

**Hearing
before the
United States
Commission on Civil Rights**

Enforcement of the Indian Civil Rights Act

Hearing Held in

WASHINGTON, D.C.

January 28, 1988

U.S. COMMISSION ON CIVIL RIGHTS

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
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CONTENTS

Statements

Opening Statement, Chairman Clarence M. Pendleton, Jr.	1
Closing Statement, Chairman Clarence M. Pendleton, Jr.	129

Sessions

Morning Session	1
Afternoon Session	41

Witnesses

Ross O. Swimmer, Assistant Secretary for Indian Affairs; Scott Keep, Assistant Solicitor for Tribal Government; Department of the Interior; Roland Johnson, Chief, Division of Tribal Government Operations; Joe Little, Chief, Judicial Services Branch and Acting Chief, Tribal Relations Branch; and James J. Thomas, Acting Chief, Division of Self-Determination; Bureau of Indian Affairs, Department of the Interior	7
R. Dennis Ickes, Former Deputy Under Secretary, Department of the Interior	41
William L. Lutz, United States Attorney, New Mexico, and Jerome G. Arnold, United States Attorney, Minnesota	54
Robert Laurence, Professor, University of Arkansas School of Law ...	68
Robert N. Clinton, Professor, University of Iowa College of Law	77
Stephen L. Pevar, Regional Counsel, Mountain States, American Civil Liberties Union	82
Jane Smith, President, National American Indian Court Clerks Association	103
Elbridge Coochise, Vice President, Northwest Tribal Court Judges Association	106
Thomas Maulson, Chief Judge, Lac du Flambeau Tribal Court, Wisconsin	118
Suzan Shown Harjo, Executive Director, National Congress of American Indians	121
Roy Sampson, Portland, Oregon	127

Exhibits

1. Letter and Questionnaire from Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, to Donald P. Hodel, Secretary of the Interior, Dec. 9, 1987; letter in response of Ross O. Swimmer, Assistant Secretary of the Interior for Indian Affairs, Jan. 27, 1987 131
2. Memorandum from Acting Assistant Secretary of the Interior for Indian Affairs to Commissioner of Indian Affairs, June 12, 1980, re: Interior Department/Bureau of Indian Affairs Policy Regarding Relationship with Tribal Governments 150
3. Memorandum from Assistant Secretary of the Interior for Indian Affairs to All Area Directors, Jan. 16, 1981, re: Interior Department/Bureau of Indian Affairs Policy Regarding Relationship with Tribal Government 155
4. "Indian Courts—Islands of Injustice," series from the *Minneapolis Star and Tribune*, Jan. 5-7, 1986 156
5. Memorandum and Order, *Cook v. Moran*, Civ. No. 6-85-1513, U.S. District Court for District of Minnesota, Sixth Division, Feb. 13, 1986 197
6. Statement of Ross O. Swimmer, Assistant Secretary of the Interior for Indian Affairs, Jan. 28, 1988 209
7. Statement of R. Dennis Ickes, Jan. 28, 1988 213
8. Statement of William L. Lutz, Jan. 28, 1988 230
9. Letter from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Senator Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, Jan. 26, 1988, re: S. 1703 and the Indian Civil Rights Act 237
10. Statement of Robert Laurence, Jan. 28, 1988 249
11. Statement of Robert N. Clinton, Jan. 28, 1988 266
12. Listing of Federal Cases Alleging Tribal Abuse, 1971-1978, submitted by Stephen L. Pevar 297
13. Listing of Allegations of Tribal Abuse, Rapid City Testimony, submitted by Stephen L. Pevar 299
14. Allegations of Tribal Abuse, Oglala Sioux Tribe; and Resolution No. 87-86, Oglala Sioux Tribe; submitted by Stephen L. Pevar 300
15. Documents Concerning the Colville Tribal Court, submitted by Jane Smith (on file at the U.S. Commission on Civil Rights) 309
16. Roster of Judges, Northwest Tribal Courts, submitted by Elbridge Coochise 310
- Exhibits Submitted After the Hearing
17. Letter from Stephen L. Pevar, Feb. 1, 1988 314

18. Resolution No. 53-88, Red Lake Band of Chippewa Indians; Statement of the Red Lake Band of Chippewa Indians; Petition to the U.S. Court of Appeals, Eighth Circuit, *Red Lake Band of Chippewa Indians v. United States*; Notice of Results of Special Referendum Election, Mar. 26, 1980; "Red Lake's Chief," *Red Lake Times*, June 17, 1987; and Memorandum re Resolution No. 1-87, Red Lake Band of Chippewa Indians 316

19. Letter from Floyd Williams, Chairman, Upper Skagit Indian Tribe 460

20. Statement of the Fort Mojave Tribe 466

21. Statement of George Aubid, Sr., Chief Judge, Mille Lacs Band of Chippewa Indians 473

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Proceedings

Morning Session

CHAIRMAN PENDLETON. I have an opening statement to read, and I would just indicate that my colleagues may have opening statements they would like to make. We will allow time for that, and then we will move to our first panel.

Good morning. This hearing is now convened. I am Clarence M. Pendleton, Jr., Chairman of the United States Commission on Civil Rights.

With me today are Commissioners Robert Destro and William Allen, Acting Staff Director Susan Prado, General Counsel William Howard, Deputy General Counsel Brian Miller, and Attorney Susan Muskett.

The purpose of this hearing is to examine the enforcement of the Indian Civil Rights Act [ICRA] of 1968 in the wake of the Supreme Court's 1978 decision in *Santa Clara Pueblo v. Martinez*. The Court there held that, with the exception of the writ of habeas corpus, provisions of the ICRA were enforceable only in tribal forums and no longer enforceable, as had been the case since the ICRA's enactment, in Federal courts.

This subcommittee has held field hearings in South Dakota and Arizona. The South Dakota hearing, which took place in the summer of 1986,

focused on ICRA enforcement by the Cheyenne River, Rosebud, and Pine Ridge Sioux Tribes. The Arizona hearing, which took place last August, focused on ICRA enforcement by the Zuni Pueblo and Navajo.

The Commission's emphasis in these hearings has been to find facts. This is our emphasis again today.

We have previously heard testimony from tribal judges, council members, Indian law scholars, private attorneys, lay advocates, Legal Services attorneys, and most importantly, from individual Indians whose ICRA rights had been violated by tribal governments. The testimony from these individuals was especially important to us because their rights, the civil rights of the individual American Indians vis-a-vis their tribal governments, are what the ICRA is all about.

Although the Commission has not examined every tribe in the Nation, we are in the midst of gathering information from them and will then be in a better position to speak generally of ICRA enforcement subsequent to *Martinez*. In the South Dakota and Arizona hearings, however, it is fair to say that we heard testimony about some ICRA enforcement problems. Those problems may be divided into two groups. For want of better language, I will refer to them as particular problems and systemic problems.

By particular problems, I refer to testimony that a tribal prosecutor had been fired or suspended eight times by the council over disagreements with her actions at Cheyenne River; inadequate recordkeeping by tribal courts at Cheyenne River, Rosebud, Pine Ridge, and Zuni Pueblo; inadequate funding of tribal courts—a problem augmented by virtue of the fact that BIA [Bureau of Indian Affairs] funding of tribal courts is not direct but rather passes through tribal councils.

I am also referring to particular problems like verbal search warrants at Cheyenne River, inability to afford counsel in criminal prosecutions, and judges without law degrees. Of the 300 or so tribal judges in the country, according to recent testimony by the Tribal Judges Association, about 20 have law degrees. In addition, by particular problems I refer to a lack of public defenders and *ex parte* hearings, about which we heard a great deal in South Dakota.

But we also found systemic problems. Systemic problems are more serious than particular problems because particular problems can be resolved by providing tribal courts with more money and more training on ICRA enforcement. If the systemic problems are not resolved, however, no amount of money or training is going to help.

What do I mean by systemic problems? Two things: first, a lack of a separation of powers between tribal councils and courts such that tribal judges cannot render their decisions without fear of retaliation by the council. This has to be resolved. Tribal judges simply cannot properly enforce the ICRA if tribal councils choose to stand in their way.

The second systemic problem concerns sovereign immunity. In many cases, I found that tribal councils were raising the defense of sovereign immunity to ICRA actions even where those actions were for injunctive or declaratory relief.

Let me be clear. I favor strong and independent tribal judiciaries. Anyone who claims that I do not is flat wrong. Read our hearing transcripts. You will see that a major focus of our hearings has been interference with tribal courts by tribal councils and the havoc that it creates in properly enforcing the ICRA.

The governmental structures that tribes are operating under today are not cultural or traditional governments. Rather, most tribes are operating with tribal constitutions adopted following enactment of the Indian Reorganization Act of 1934. These constitutions are based upon a model constitution that placed the governing power in the tribal councils. Unlike our Federal and State systems, tribal governments typically have not three branches of government, but one. And unlike our Federal courts, tribal courts do not have their origin in a constitution but in their tribal councils. As such, they sometimes operate without the necessary independence to enforce the Indian Civil Rights Act.

Turning to sovereign immunity, let me quote excerpts from our South Dakota transcript, specifically from the testimony of Cheyenne River Chairman Morgan Garreau:

COMMISSION ATTORNEY. Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe?

MR. GARREAU. Yes, I do. It has come to the tribal council with regard to waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administrative officer. At no time during those years, I believe from 1979 to the present, has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.

COMMISSION ATTORNEY. So what that means is you are saying that the Indian Civil Rights Act is unenforceable as against the tribe?

MR. GARREAU. Unless the council waives sovereign immunity.

COMMISSION ATTORNEY. Which it hasn't done.

MR. GARREAU. No, they have not, for anyone.

COMMISSION ATTORNEY. And you don't believe they should?

MR. GARREAU. As it has been stated in tribal council, sovereign immunity is something that should zealously be protected by the tribal government, and that's been the case, that the tribal council has protected that and has not waived sovereign immunity.

COMMISSION ATTORNEY. It is possible, Mr. Garreau, if I could add, that you could waive your sovereign immunity with respect to equitable relief.

MR. GARREAU. I realize that.

COMMISSION ATTORNEY. Have you considered doing that?

MR. GARREAU. I realize that, and it's been stated to the tribal council, but the council will not waive sovereign immunity.

COMMISSION ATTORNEY. Even though their greater fear is money damages?

MR. GARREAU. Basically, what has been discussed is if the tribal council should waive sovereign immunity for any instance, that other people, other members of the tribe, could come to the council requesting that sovereign immunity be waived at that time. And apparently council feels that by waiving it once, they would probably feel obligated to waive it again.

The concern expressed during our hearings was that were tribal councils to waive their sovereign immunity to ICRA claims by individual Indians, they would risk depletion of tribal treasuries. I am sensitive to that reasoning, but it simply does not apply to situations where plaintiffs seek injunctive or declaratory relief.

President Reagan's Indian policy of January 1983 roundly endorses Indian self-determination. So do I. However, the question is one of balancing the right of tribal governments to conduct their internal affairs and the rights of their individual members, vis-a-vis their governments, set forth in the Indian Civil Rights Act. If those rights are not being observed by tribal courts, then I think it entirely appropriate that another forum be available to tribal members to seek redress. I refer, of course, to Federal court review following exhaustion of tribal remedies.

The Supreme Court's assumption in *Martinez* was that, and I quote, "Tribal forums are available to vindicate rights created by the ICRA," which law, the Court further stated, "has the substantial and intended effect of changing the law which these forums are obligated to apply."

Very simply, the question before the Commission is whether, 10 years after *Martinez*, the Court's assumption is true. Are, in fact, tribal forums available for enforcement of the ICRA? If not, as the Court in *Martinez* also stated, and I quote: "Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA] in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." All governments must recognize the civil rights of their people. Tribal governments are no exception.

One last point about *Martinez* concerns footnote 22. That footnote states basically that persons aggrieved by tribal laws may be able to seek relief from the Department of the Interior, if the tribe's constitution requires Secretarial approval of tribal ordinances. In those cases, the Secretary could withhold approval pending resolution of the ICRA claim.

The Court's recognition that the Department of Interior has this discretion is part of the reason we have invited you here today. We want to

find out how you exercise that discretion. But we have also requested testimony from the BIA because it serves as the Federal liaison to Indian tribes, providing to Indians, under the United States trust responsibility, everything from education and housing to health care, judicial services, and law enforcement. It is, therefore, appropriate that we elicit your testimony about ICRA enforcement and the condition of tribal courts.

Finally, let me speak about some recent developments on Capitol Hill.

Last Friday the Senate Select Committee on Indian Affairs held a 1-day hearing on tribal court enforcement of the ICRA. I can say that the hearing took me by surprise. It took a lot of people by surprise. And I was a bit chagrined that this Commission was not invited to testify.

A few months ago I told the Chairman of the Select Committee that in 20 years Congress had never held an oversight hearing on ICRA enforcement—20 years—and yet the hearing that was held last Friday was thrown together, we are led to believe, in less than 10 days.

Was it a good hearing? The accounts I have received indicate that only one point of view was represented, namely, that tribal courts are doing about as well as State and Federal courts but could use a lot more money for training and facilities.

Was testimony received from Indians claiming their ICRA rights had been abridged? No. And that, I say, is very unfortunate. *Martinez*, again, states that if tribal forums are not enforcing the ICRA, Congress has the power to fashion additional remedies. Surely, that determination requires that Congress hear from Indians who claim that their rights are not being protected.

That is not to say that we will not take the point of view expressed on Capitol Hill last Friday and make it a part of our deliberations. We will do so, and I look forward to the receipt of the committee's hearing transcript.

Before receiving Mr. Swimmer's testimony, let me make one announcement. At the conclusion of this session, there will be an open session. The purpose of that session is to receive testimony from individual witnesses wishing to make statements relevant to the subject matter of this hearing. If anyone in this room wishes to speak during the open session, please give your name to our clerk. The record of this hearing will be held open for at least 30 days, perhaps longer, to allow us to go through the material we have received at a later date.

Let me also say that our procedure here is that, following your testimony, the initial round of questions will come from Commission staff, and then Commissioners will join in.

Do my colleagues have any statements?

COMMISSIONER ALLEN. I'll reserve my time for the close, Mr. Chairman.

COMMISSIONER DESTRO. I do, Mr. Chairman.

CHAIRMAN PENDLETON. Mr. Destro.

COMMISSIONER DESTRO. I want to take this opportunity to thank all the witnesses who are going to come today and testify before us, and I want to set out a slightly different position, as we start, from that of the Chairman.

To my mind, these hearings or the continuation of this hearing, first from South Dakota and then Arizona and now here to Washington, brings this issue back to where it really started. It seems to me we are dealing with a civil rights issue of the highest magnitude, and it is relevant that we wind up this hearing here in Washington because Washington has been integrally involved in the making and enforcement of policy regarding the American Indian from the very beginning. United States policy has ranged from overt racism to overt neglect to overt paternalism.

It's no accident that there are problems on reservations and that those problems are well documented. It is also no surprise that American society is in many respects still prejudiced against individual Indians. And the responsibility for that, I think, rests in part with the Federal Government. It began with Indian policy in the West from Kit Carson's relocation marches and extends in unbroken fashion to today's unclear policies with respect to American Indians.

So it seems to me that there are several issues that we are dealing with in this hearing. One is the rights of individual Indians, as individuals first and as citizens of the United States second. The second issue is the duty of tribes as sovereigns to individual Indians who live on the reservation and off. And, thirdly, the duties of Congress to both the tribes and to individual members of those tribes.

The focus today is on the Bureau of Indian Affairs as Congress' chief instrumentality for carrying out Federal policy in Indian country.

To my mind, the issue is not *Martinez* at all, for I am not prepared to conclude that the Court's ruling is the problem itself, but rather I see *Martinez* as perhaps a symptom of the Federal Government's unclear policy regarding law in Indian country.

It seems to me, once again, to repeat, that the problems are multifaceted: the need of Indians to be treated as full citizens of this nation, both by their tribes and by the Federal Government; second, the value of Indian culture as an ancient and wonderful thing in and of its own right, which is inherently related to the issue of Indian self-government; the duty of tribal government to tribal members under both customary law and Federal law; and the duty of Congress with respect to all these issues.

Martinez clearly recognized that the Congress has plenary powers to make law in Indian country, and it seems to me that when this hearing is over and the Commission is finally ready to debate its recommendations, the focus ought not to be so much on the foibles of Indian tribal courts as it is on Congress' responsibility to take steps to exercise its plenary power and be sensitive not only to the rights of individual Indians but also to tribal autonomy.

That may or may not necessitate making recommendations with respect to *Martinez*. It seems to me that that is an issue that the Commission needs to discuss. Nevertheless, it would be premature to say that Federal court review is the answer. It seems to me there are many possible answers, and we would appreciate and do appreciate hearing from the witnesses today with respect to what some of those answers might be.

Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. Thank you, Commissioner Destro, for those timely remarks to let the public know we want to discuss this matter. Though we are constrained in some respects, we have to consider all aspects of how Indians are treated in this country.

I will now turn to Mr. Swimmer, the Assistant Secretary for Indian Affairs, and his colleagues Mr. Thomas, Mr. Little, and Mr. Johnson. I would ask you all to stand and be sworn.

[Ross O. Swimmer, Roland Johnson, Joe Little, and James J. Thomas were sworn.]

CHAIRMAN PENDLETON. Mr. Swimmer, it's your turn.

TESTIMONY OF ROSS O. SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS; SCOTT KEEP, ASSISTANT SOLICITOR FOR TRIBAL GOVERNMENT; DEPARTMENT OF THE INTERIOR; ROLAND JOHNSON, CHIEF, DIVISION OF TRIBAL GOVERNMENT OPERATIONS; JOE LITTLE, CHIEF, JUDICIAL SERVICES BRANCH AND ACTING CHIEF, TRIBAL RELATIONS BRANCH; AND JAMES J. THOMAS, ACTING CHIEF, DIVISION OF SELF-DETERMINATION; BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

MR. SWIMMER. Thank you, Mr. Chairman. And let me add that Mr. Keep from the Solicitor's Office has been delayed a little bit this morning but is due in a few minutes and he will join us at the table at that time.

I appreciate this opportunity of appearing before the Commission. I have heard of the Commission's activities from both Indians, from tribal government, and assorted folks around Indian country, and I believe that it is timely that the question be taken up and that we decide what is to be done, needs to be done, and can be done regarding the issue of civil rights in Indian country, particularly regarding the Indian Civil Rights Act.

I agree with the Chairman's concerns, those of the Commission, and in my brief conversations with the staff I agree that we have some problems, that there are problems on the reservations; there are problems with the way in which the Indian Civil Rights Act is being interpreted, in some cases enforced, and with the mechanisms available to both Indian people and tribal people and to the Federal Government.

I would like to say, however, that this perhaps is a symptom of some other problems throughout Indian country, and a symptom of problems

that the Federal Government and, you've mentioned it so eloquently, Congress has in dealing with Indian tribes and tribal governments.

We have a long and varied history. The Bureau of Indian Affairs began its work in the War Department, and its job was to settle Indians on the reservation, avoid integration with the general population, secure their property and their person away from the general population of this country, and to secure the non-Indian population away from the Indian population. We have come a long way since those days in some respects.

We have had policies that at the turn of the century suggested that simply turning over the resources of Indian tribes to individual Indian people would eliminate the need for tribal government, would put all Indian people on a par with non-Indian people, and that the allotment of land would basically solve whatever was perceived to be the Indian problem of the 19th century. Various commissions studied that 20 or 25 years after that was the policy and found that what had happened was there was an enormous loss of property by the Indian people. The reservations had shrunk. Non-Indians had moved onto the reservations taking over the surplus land, and Indian people were generally living in conditions that were not tolerable.

So what to do about it?

In 1934 an act of Congress was passed that suggested Indian people needed some kind of protection, once again, from their non-Indian neighbors and from the systems of the Federal Government and State governments. The idea was brought forth that we should retribalize, and a provision called the Indian Reorganization Act was adopted throughout Indian country. And later in a couple of States, like Oklahoma in 1936, the Oklahoma Indian Welfare Act was passed which permitted tribes to reorganize under the same conditions as other tribes in the '34 act.

That was going to solve all of the problems of Indian people because now they would have a representative government that would take care of their needs and be an interface between State government and the Federal Government. Once again the policy was revisited in the fifties, and it was found to be a failure. It was found that, in fact, many of the tribes did not adopt this new form of government readily, that many of them put it on paper but didn't institute it as far as the actual operations out there in Indian country, and they continued a form of cultural and custom-type governments that are varied across the board, and that while they had legal governments under the '34 act, many of them operated a dual system of government, and in fact today some still do.

They found that those governments were not particularly effective at that interface between State and Federal Government and many of them didn't feel they had the authority that they needed to make things happen on the reservation. And due to the enormous loss of land and the non-Indian population that had moved in close by, taking most of the resources

that were available on those reservations for their use and leaving the Indian folks very little in terms of valuable resources, there wasn't a great deal that could be expected, at least at that time.

And again the thinking turned toward the concept of termination, or if we eliminate tribal governments, if we again turn over the assets that had been accumulated to nonprofit organizations or quasi-public corporations, the Indian people would rise to the occasion and most would survive and do much better in what had become a very non-Indian world around them, and things would be all right.

We pursued that policy in this government through the mid-sixties, and another commission went out and studied that policy and found that it had failed. They found conditions similar to those prior to 1934. They found that those tribes that voluntarily terminated themselves once again came up short on resources. They were being denied the opportunity to apply for Federal funding that had come into being through the Johnson and Kennedy administrations; they were cut off more or less from the Federal Government; and they were finding themselves in what they perceived to be a much worse condition than those tribes that had not been terminated. So the policy once again changed.

The policy of self-determination, as it grew to be known in the sixties and early eighties, is essentially the policy that we are following today, and history will prove whether or not that is going to work.

I believe that the Congress of the United States and this administration and the previous two or three administrations have pinned their hopes on tribal government. I also believe that there is little understanding from the Congress as to what tribal government is really all about. I am not sure that they really know what tribal self-determination, tribal sovereignty, tribal government really implies, and that they, as well as we, are hopeful that by saying those words something good will happen.

On the other hand, I can assure you that this administration has taken those words literally. I, for one, believe that we must pursue a policy of strong tribal government and give it a chance to work, and see if another level of government besides the State and Federal and local is appropriate and will work if given the chance, and can survive in this world as we know it today and be an effective means of not only representing the rights of the people, protecting the resources that are left on the reservations or that form parts of Indian country, but also grow and develop to be a competitive government within the system of government as we know it today.

If we do not give tribal government the chance, we must admit to ourselves that the alternative is no tribal government, or at least not recognition of tribal government as sovereign, and secure the rights, the property of the Indian people through some other means. I don't think it gives us much choice, and I'm banking on tribal government, although I

will admit to you there are days when I wonder if that is the right policy. We have our share of 310 Indian tribes in the lower 48 and over 200 in Alaska, all with varying degrees of sovereignty, because the United States Government through Congress does have plenary power and has, in fact, taken away some sovereignty of some tribes in different degrees.

But we have all of these tribes operating at different levels of sovereignty, different levels of responsibility, and different levels of governmental competence, quite frankly. And they are not all at the same level of competency any more than they are at the same level of sovereignty. That is something that must be understood by Congress—and they don't. There are tribes that can do some things such as tribal courts. Yet, there are tribes that have no authority to bring any Indian person into a court. Yet, how do we adjudicate election disputes if a tribe has no court? There is some belief that that then becomes the responsibility of the Federal Government.

Well, at what point do we go in, then, and adjudicate a tribal election dispute where there is no tribal court? Or, suppose there is no tribal court on a temporary basis and yet they have the authority for a tribal court. What is our position? Do we go in and make up the failure of the tribal court?

Those are questions that come up every day.

[Mr. Scott Keep entered the hearing room.]

MR. SWIMMER. My colleague, Mr. Keep, from the Solicitor's Office has joined us.

CHAIRMAN PENDLETON. Welcome, sir.

MR. KEEP. I apologize for being late, Mr. Chairman.

MR. SWIMMER. Let me say on a few points the Chairman mentioned, not to digress too much from the statement—first of all, to repeat myself, yes, this administration believes that tribal government must be given a chance.

Tribal government, in enforcing the Indian Civil Rights Act, has been told both in the *Martinez* case, in the act itself, and in various publications that we have put out, that the enforcement of the Indian Civil Rights Act is between the Indian tribe and the Indian people.

We recognize that if that enforcement is going to be fair and understandable, there must be a mechanism on that reservation or within that tribal government to do that enforcement.

I wholeheartedly endorse the concept of separation of power. I do not believe that sovereign immunity is applicable to a civil rights action against a tribal government. I do agree that Congress can make a decision here and do something, if it is needed, to address those two issues.

I believe that strong tribal government can only happen with a strong court system, with strong tribal councils that are educated, that have the capability of keeping their books and administering justice.

We in the Bureau of Indian Affairs have provided the monies to do that. Under our system, however—and again deferring to the tribal sovereign concept—we believe that it is very important that tribal government make those basic funding decisions. The court monies that go out to reservations that are using Federal monies to have tribal courts have a choice about that money, and some of them choose to spend the money in other places instead of on their tribal courts. That is a tribal governmental action, and we believe that they must make that decision.

I believe that, yes, if you don't have a separation of power, you must have some kind of appellate review so that an independent judiciary can hear the case.

Three years ago I served on President Reagan's Commission on Reservation Economies. We held hearings almost in the same places you did and I suspect heard many of the same things. We determined at that time that if there was not a mechanism to an enforcement of Indian civil rights, there would not be economic development on the reservation. We considered that to be fundamental.

We made a recommendation then that appellate review—and we suggested, for lack of anything better, that Federal appellate review should be available to tribal courts so that Indian individuals could go beyond a court system on the reservation and seek redress, particularly in those cases where the tribes have not taken the extra step of separating their governmental powers or providing an independent appellate review.

Now, I think, after having been on the firing line for a couple of years and seeing how that could be worked out, that I would perhaps modify that recommendation and say that I would accept a tribal appellate review that could be structured, perhaps, from several tribal courts forming an appellate court, or even a reservation appellate court, as long as that tribal appellate court had some independence from a particular tribal government. Without it, I see that we would continue to have problems.

I also would suggest that if Federal appellate review is available, it be as from a lower Federal court to a higher court, and that we recognize those courts that are courts of record on Indian reservations and not go to a trial *de novo* but that we go to an appeal to a circuit court or perhaps a magistrate system or something that could be set up. I think we should defer, in the first instance, to tribal court decisions and allow those to stand and appeal on the record where possible.

I think these kinds of things could perhaps move us and motivate Indian tribes that don't have effective court systems to develop those systems. And if they don't develop them, at least it would provide a forum that would be independent with enforcement of civil rights.

So with those comments, I simply would like to say once again that I appreciate being here. We will answer questions that you might have. Our

program people are here that deal directly with the funding of courts and with operations to the extent that we can.

But I cannot emphasize enough that as long as Congress recognizes that tribal government is the governing body on those reservations, and as long as we accept that and are going to deal with tribal government as a sovereign government within our governmental system, the primary emphasis must be at that point for the enforcement of civil rights on those reservations.

Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. Thank you, Mr. Swimmer.

I want to thank you for your candid and cogent testimony. I think my colleagues and the staff appreciate that, and it will allow us to engage in some questions without having to search through for answers or search through for questions. I also want to thank you for bringing your staff with you.

I would also like to say at this point we want to thank Secretary Hodel for his cooperation in all of this. That should not go unnoticed.

I will turn now to Deputy General Counsel Mr. Miller, and we can begin the questioning there.

MR. MILLER. Mr. Swimmer, I'd like to begin by asking you a few questions about the present policy of the BIA toward the enforcement of the Indian Civil Rights Act.

I think I understand you correctly to say that you would prefer a hands-off policy and let the tribal governments take primary responsibility for the Indian Civil Rights Act; is that correct?

MR. SWIMMER. That is essentially correct, yes. We consider ourselves to be in the position of offering resources, which may be money, technical assistance, some expertise in those areas, and review of constitutions, and with the Solicitor's Office, helping tribes understand the legal intricacies of tribal courts; but beyond that, once we have delivered those resources, it is a tribal government decision.

MR. MILLER. There have been some recommendations that the BIA take a greater role in the enforcement of the Indian Civil Rights Act. How do you feel about those?

MR. SWIMMER. My personal opinion is that we should not become involved. First of all, we don't believe we have the mechanism to become involved. We would not recommend the Bureau of Indian Affairs be—and I may be stretching your question—any kind of policeman directly for civil rights violations. I think that is an appropriate area for Congress to look at. If they chose for us to play such a role, I would expect them to give us that direction. We don't believe we have that role.

MR. MILLER. I take it from those comments that you would prefer not to have that role, too; is that correct?

MR. SWIMMER. Yes. If I could just elaborate on that for a second because in a recent hearing with the Secretary and myself, we suggested that, in fact, the role of the Bureau of Indian Affairs has outlived its usefulness on the reservation. We feel that it is time that, if tribal government is really going to be the force out there, we have to get out of the way. Our policy of self-determination means more and more responsibility and more and more authority being given to tribes with less oversight, if you will, and less structuring from the Bureau of Indian Affairs, and that we should pull back rather than become more involved in day-to-day decisionmaking and let the other processes, whether they be Congress or tribal government or the Federal courts, come in and set up the mechanism; that we would not be an effective force, especially as we are trying to implement a policy of reducing the impact of the BIA on tribal decisionmaking.

MR. MILLER. Chairman Pendleton mentioned the famous footnote 22 of the *Martinez* decision that alluded to an avenue of relief through the Department of the Interior. What is your construction of that footnote, and what has the BIA done to act upon that comment?

MR. SWIMMER. As I understand the implication of that footnote, it is that in certain cases where tribal government has been organized, and given certain responsibility to the Federal Government to approve decisions, that that extends to the ability of the Bureau of Indian Affairs, for instance, to enforce sanctions against tribal government as well.

Again, our thinking on that is that if we could use that footnote, we probably could. There are instances where, if civil rights violations have occurred, we have them adjudicated, we know they are occurring out there, we could perhaps go in and pull a grant back from that tribe or enforce some other sanction on the tribe.

However, again we are faced with the proposition that it is our opinion that those kinds of interferences, if you will, by the BIA should be eliminated. We are working to remove that ability of the BIA to go in and do that. We prefer now that constitutions be adopted that do not require approval of the Bureau of Indian Affairs to take certain actions, because it again implicates the colonialist-type policy—that we are going to oversee, we are going to continue running those tribes indirectly. And as long as they believe we are doing that, we are giving both the people on the reservation and the tribal governments the wrong impression, if that is our policy.

And that is what our policy has been, that we want to remove ourselves from day-to-day tribal decisionmaking. And it is not really appropriate that they put into their constitutions that the Bureau of Indian Affairs is going to approve this contract or that contract or whatever they're going to do, because that really shifts the burden of governance back to the BIA.

My point is that even if we accept the footnote and were to attempt some kind of vigorous enforcement, first of all, it would only apply to tribes that have that provision in their constitutions and, second, since we are trying to pull out of that anyway, it would be a short term kind of stopgap measure. And I think you and others are looking for long term fixes, if possible, and maybe not just what we could do tomorrow.

So we have not been in the position of being an enforcement agency using that footnote.

What we have done in regard to our role, as I mentioned earlier, is to provide resources, to try to bring some training to court personnel, to try to support tribes in their efforts to improve the court processes on the reservation, the same way with grants on 638 contracts where they are performing functions that we formerly performed. If they are having trouble doing that, we provide them technical assistance and help in doing that rather than reassume that operation. We think it's important they continue that operation, but we will provide as many resources as we can to help with getting it done as effectively as possible.

MR. MILLER. Would it be fair to say that that footnote was misdirected or at least out of place today?

MR. SWIMMER. I think so, and I think perhaps the Court was looking at some temporary relief—maybe not trying to justify their decision, but obviously they've come out with a decision that says the Federal Government has no role in this, and then they put a footnote in that says, "But there might be a few cases where they do, so our opinion is okay." I don't know what their thinking was when they wrote that footnote, but I believe it's out of place today.

MR. HOWARD. Secretary Swimmer, if I could ask a quick question here, could you tell us how many constitutions have the provision permitting Secretarial review of tribal ordinances?

MR. SWIMMER. I cannot do that, but I can furnish it to the committee.

MR. HOWARD. Could you tell us in round numbers how many times since 1978, since *Martinez*, the Secretary has exercised that discretion?

MR. SWIMMER. I don't know of any particular cases where we have had a request to exercise the discretion that would be in that footnote, so we wouldn't have done any enforcement or withholding of funds or anything. I would check the record on that also to see if we have had any actions brought asking us to take specific action. I am not aware of any. Staff might have that available today, but I don't know of any.

Mr. Keep tells me that approximately half of our constitutions are IRA [Indian Reorganization Act], and within those there is usually some reference back to approval authority at some level. They may not all be the same, but within the IRA oftentimes there is the expression that such action is subject to the approval of the Department of the Interior. In tribes

without constitutions under IRA—that's the '34 act—I don't think it's that common, but we will provide you that for the record.

MR. HOWARD. We received your response to Chairman Pendleton's letter of December 9 late yesterday.

[Chairman Pendleton's letter of December 9 and Assistant Secretary Swimmer's response have been entered into the record as exhibit no. 1.]

MR. HOWARD. We have looked at it very quickly. One of the questions we had posed to you was whether the Department of the Interior had a mechanism for monitoring ICRA compliance. Do you have an office or do you have staff that receives complaints at the Department of the Interior?

MR. SWIMMER. No, we don't. I don't know what we said in our response, but I'm not aware that we have any agency of the Department or activity within the BIA to specifically monitor civil rights violations.

MR. MILLER. Mr. Swimmer, the Indian Civil Rights Act, Title III of the act, section 1311, states that the Bureau was to develop a model penal code. And I'll read part of the act. Section 1311 says:

Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in Federal court for any similar offense.

And it goes on in the same vein.

Has a final model code been developed?

MR. SWIMMER. Let me defer that to Mr. Little. He would be the one who would probably be responsible for that.

MR. LITTLE. To the best of our knowledge, we have had the same quandary as you have. We did provide you with a *Federal Register* publication—I don't have the particular cite right off—that was an enumeration of a number of these areas. It is unclear whether that was an actual code or not. It is also unclear whether that was actually provided to Congress as called for under the bill.

There is some reference to codes dealing with the courts of Indian offenses, is what that reference is, that model code. Now, courts of Indian offenses are CFR [Code of Federal Regulations] courts; they are not tribal courts. These are actually administrative courts that were set up by the Federal Government in the 1800s, ostensibly to do two things. One is to keep law and order where they didn't think there was any—they were military tribunals, really—and the other was to educate Indians in this area of Anglo-Saxon law. The CFR courts have been reduced over the years, and we have less than 20 at this point.

If I look at the statute correctly, it was referencing the development of a model code for the CFR courts. The CFR currently operates under Title XI, I think, of the Code of Federal Regulations, which has a series—a law

and order code, if you will. It is not very precise, doesn't cover a lot of areas. It is more a jurisdictional-type code saying what cases the CFR will and will not hold.

There are provisions in there that also say that those tribes that want to adopt codes more extensively under the CFR can then, in turn, adopt as well as supersede that. Some tribes have done this.

There is another code being developed for the CFR courts currently. We are in final stages of review. It has been published in the *Federal Register* for comment, and as far as I know is expected to be published in final form sometime in March or April of this year.

That may answer the question. To be quite frank and not trying to get around it, I couldn't tell you whether that model code was ever presented to Congress as specified and, as I understand it, that refers to the CFR courts and not to tribal courts per se.

I might also point out that over the years codes have developed in different manners. Some the Bureau put together from contracts, and some the tribes did themselves. So many court systems have their own codes, and they range everywhere from very simple ones to some relatively complicated ones, looking like they are operating under a State code.

So if you break all that up, even implementing a model code, if you would, at this time, I think would be—I don't know how that would operate because you've got so many other codes that would probably even supersede any model code we could come up with at this point.

MR. MILLER. I asked simply because it is a part of the Indian Civil Rights Act, and the statute says: "The Secretary of the Interior is authorized and directed to recommend to the Congress on or before July 1, 1968, a model code governing administration of justice by the courts of Indian offenses."

MR. HOWARD. There was a decision in 1986—you are probably aware of it—*Cook v. Moran*, in which the U.S. district court found that the Secretary of the Interior had not issued a model code.

MR. LITTLE. That is possible. I've been here since May of 1986.

CHAIRMAN PENDLETON. You have absolution.

MR. LITTLE. That's not to absolve me, but quite frankly, I haven't really looked at it.

CHAIRMAN PENDLETON. I was trying to confer that. Whether I have your authority to do that or not is another question.

[Laughter.]

MR. MILLER. I just wanted to mention for the record, Cohen's *Handbook on Indian Law*, page 333, footnote 17, makes the same point, that the model code had not been promulgated.

Mr. Swimmer, getting back to policy issues, you alluded to the fact that the current policy is not necessarily the same as past policy; is that correct?

MR. SWIMMER. Oh, Indian policy has changed as many times as they've had Assistant Secretaries and Commissioners.

MR. MILLER. Are you familiar with the policy statement of June 12, 1980, produced by the *Martinez* Policy Review Committee?

MR. SWIMMER. Not specifically.

MR. MILLER. For the record, I'd like to enter that policy statement into the record.

CHAIRMAN PENDLETON. It is so ordered without objection.

[The document was entered into the record as exhibit no. 2.]

MR. MILLER. Thank you, Mr. Chairman.

Maybe I should address my questions to Mr. Keep, who was on that Policy Review Committee and has been with the Department for a number of years. Mr. Keep, how long have you been with the Department of the Interior?

MR. KEEP. I started with the Solicitor's Office at the end of November 1972.

MR. MILLER. And you were on that *Martinez* Policy Review Committee?

MR. KEEP. I was on one of the committees that looked that up; that is correct.

MR. MILLER. Could you very briefly summarize that policy statement, or are you in a position to do that?

MR. KEEP. I'd rather not try and summarize it. I'd rather have the document speak for itself since you have entered it in the record.

MR. MILLER. Does it attempt to set out some guidelines to evaluate whether tribal actions have violated rights secured by Title II of the Indian Civil Rights Act, along with possible sanctions if they do find a violation?

MR. KEEP. It does purport to be some guidelines; that is correct.

MR. MILLER. Was that policy statement withdrawn?

MR. KEEP. Yes, it was.

MR. MILLER. Approximately 6 months later.

MR. KEEP. Well, January 17, 1981.

MR. MILLER. Mr. Chairman, for the record, I'd like to introduce that statement withdrawing the *Martinez* policy review statement of June 12. This withdrawal is dated—well, there are two dates on it, January 16, 1981, and January 17, 1981.

CHAIRMAN PENDLETON. So ordered, without objection.

[The document was entered into the record as exhibit no. 3.]

MR. MILLER. Mr. Keep, why was that policy statement withdrawn?

MR. KEEP. I'm not sure I know all of the reasons. The withdrawal was not set as a policy decision for the Assistant Secretary.

MR. MILLER. Did you make a statement to the *Minneapolis Star and Tribune* that it was withdrawn because of resistance from tribal governments?

MR. KEEP. I don't recall ever making a statement to the *Minneapolis Star and Tribune*. The practice in the Solicitor's Office is to refer press inquiries to our Public Relations Office, the Bureau's Public Relations Office.

MR. MILLER. Mr. Chairman, for the record, I'd like to submit an article in the *Minneapolis Star and Tribune* dated January 7, 1986. In that article Mr. Keep is quoted as saying—and I'll read the whole sentence: "But the guidelines were withdrawn, said Scott Keep, an Interior Department lawyer, 'because the Indian community raised such an uproar.'"

CHAIRMAN PENDLETON. So ordered, without objection.

[The document was entered into the record as exhibit no. 4.]

MR. KEEP. Mr. Chairman, if I may clarify—

CHAIRMAN PENDLETON. Sure.

MR. KEEP. When I said I didn't recall making a statement, it is that I don't recall. I'm not denying that I made such a statement, and I'm not denying that that was my recollection at that time. But if you are asking for actual facts, I want to make it clear that that was my impression personally as an individual who had been involved in it, but I was not consulted by Mr. Krenzke or Mr. Fredericks at the time that withdrawal was issued.

So if the question is as to my personal knowledge, my personal knowledge is simply that that was my impression. Whether that was the actual reason, I don't know.

CHAIRMAN PENDLETON. Mr. Keep, let me in a sense comfort you. I understand how the press uses quotation marks. I understand how they make reference to things that one says that can be put in such a way that they become policy or fact. For any of the witnesses who are here, if you want to make some clarifying statements about that for the record, we'd appreciate it. It is not to accuse you of not saying the right thing. As you know, Mr. Keep, as a solicitor, it's a matter of establishing a record, and we want to be as clear as we can and give the witnesses a chance to say what they said when they said it or to say why they said what they said.

So I want to assure you this is not a situation where one draws you up to the bar to ask, "Did you say this?" This is not that kind of situation at all.

Thank you very much.

MR. KEEP. Mr. Chairman, I appreciate that. I just wanted to make sure that no one was misled that I knew more than I actually did.

[Laughter and simultaneous discussion.]

MR. HOWARD. You'd better quit while you're ahead.

MR. KEEP. I thought I had another appointment.

[Laughter.]

CHAIRMAN PENDLETON. Mr. Keep, sometimes the courtesy of levity is left to the Chairman, but I defer to you.

[Laughter.]

MR. MILLER. I think I'll move on to a different area.

MR. KEEP. Thank you.

MR. MILLER. Mr. Swimmer—well, I'll address it to anyone. In general, are the tribal courts enforcing the Indian Civil Rights Act?

Let me rephrase that. Are the tribes enforcing the Indian Civil Rights Act?

MR. SWIMMER. Well, I mentioned earlier that we don't have a specific P.O. box number to receive complaints. We do have the Division of Tribal Government Services, the Division of Social Services, and various other avenues for people to let us know what is going on out there.

I will furnish for the record the number of specific complaints we have received, but to my knowledge now it has been very few in number. I would say fewer than—50?

MR. LITTLE. Probably.

MR. SWIMMER. Something like that. But I will try to give you that for the record. We would make a note of that and know it if a civil rights issue had come in.

So I would have to infer from that that, to our knowledge, it appears that tribal governments are respecting civil rights and that the courts, except in a few instances which this Commission is well aware of, are also very good about trying to enforce that law.

MR. MILLER. Would it be fair to say that you are not in a position to really know?

MR. SWIMMER. I would not be—only from the information we would receive. We have not gone to the reservation to research this subject. So it is very possible that people feel they have been deprived of civil rights but are not letting anyone else know because they don't know their forum. If they get a hearing in court or feel like they could get a hearing, they'll bring it up.

MR. MILLER. Mr. Little, I take it that you concur with Mr. Swimmer on that?

MR. LITTLE. Yes. To the best of the information we get up here, that would be the case. That is not to say there aren't some other things going on, but through our mechanism we haven't had a tremendous outpouring of these kinds of allegations.

MR. MILLER. And you would not be in a position to really know whether the act is being enforced?

MR. LITTLE. No.

MR. MILLER. If I could move to a different area quickly, I'd like to bring up a situation that is occurring on a reservation simply because it brings up concrete facts that we could ask questions about, and we could look at how the BIA has performed in a particular situation. I don't choose this situation in an attempt to make it the norm or model or typical of tribal courts in general. But we would like to ask you a few questions about the situation at the Red Lake Reservation.

We have a brief chronology, and in the interests of time I would like to go through some significant events that have occurred on the Red Lake Reservation or have been alleged to have occurred there. We have learned of these events through a number of sources.

The chronology goes back to 1972 when a law review article was published in the *North Dakota Law Review*. Chairman Pendleton has just handed you a copy of that chronology. I'll briefly go through it.

In 1972 a law review article appeared criticizing the tribal courts at Red Lake.

In 1977 the Department of Justice prepared to sue the Red Lake Tribe regarding the tribal law requiring attorneys to be members of the tribe. The suit was dropped when the *Martinez* decision came down.

In 1979 the council removed the tribal treasurer. I believe her name was Hansen. This sparked an uprising which resulted in the burning of Red Lake Chairman Roger Jourdain's house along with other property. I believe about 13 buildings were burned and, unfortunately, two deaths occurred.

In 1980 the Red Lake Council passed a resolution barring the news media from the reservation.

In 1982 another resolution barring the news media was passed. Also in 1982, a BIA consultant reported, "The Red Lake court has never had a jury trial and juries were not being provided even when requested by parties."

Around that time, an Interior Department attorney advised BIA officials that the court's practice of not providing a jury trial violated rights secured by the Indian Civil Rights Act.

In 1985 Senator Boschwitz and Representative Stangeland requested the U.S. Comptroller General to investigate the Red Lake system, which they never did, as I understand it.

In May 1985, two prisoners were released by a Federal district judge on the grounds that they had been denied counsel, bail, and the right to a trial by jury.

In August 1985, the Red Lake Council began requiring that attorneys be members of the Red Lake Tribe, understand Chippewa, and be a resident of the reservation.

In 1985 also, the *Minneapolis Star and Tribune* brought a Freedom of Information action against the Department of the Interior seeking the Red Lake court records.

In August 1985, the court records were seized by the Red Lake Tribe. Suit had been brought by the U.S. Government to recover those records on the grounds that the records are "Agency records" of the BIA. The U.S. District Court for Minnesota and the Eighth Circuit have ruled in favor of the U.S. Government. The tribe has petitioned the U.S. Supreme Court for *certiorari* review.

September 1985. Suit was filed in the Federal district court against the Department of the Interior on behalf of three Indians seeking termination of Federal funds to the Red Lake court until court reforms are achieved. The suit was dismissed on the grounds that the Federal court does not have the authority under the Indian Civil Rights Act in light of the *Martinez* decision.

November 1985. The BIA issued a directive requiring the court to allow retained counsel into court.

November 1987. The Red Lake CFR court was changed from being a CFR court to a tribal court which would be under a contract for judicial services.

That is a brief chronology offered in the interest of time. If there are any errors in that, please advise me if I am incorrect on any of those points.

MR. SWIMMER. I'm not aware of any. I'm not familiar with the chronology, so I couldn't do a critique for you, but I think it speaks for itself.

MR. HOWARD. I would like to read from *Cook v. Moran*, the district court decision that Brian [Miller] made reference to, some language from the court's opinion.

Plaintiffs' claim—no matter where one focuses on the problem or how one conceptualizes the issue—is an indictment of the Court of Indian Offenses on the Red Lake Indian Reservation. It is a claim which charges that the Red Lake Court of Indian Offenses denies the fundamental rights provided under the act to its own people more often and with greater fervor than it protects them. It is a claim which charges that the Red Lake Court of Indian Offenses has established de facto the denial of fundamental rights as the norm rather than the exception in the administration of justice on the reservation. It is a claim which, based on this court's limited but eye-opening experience with the Red Lake Court of Indian Offenses, is not without substance. The claim raises great concern in this court and should raise even greater concern in the Court of Indian Offenses on the Red Lake Indian Reservation.

MR. MILLER. Mr. Swimmer, is it fair to say that you have heard some general things about the situation at the Red Lake CFR court?

MR. SWIMMER. Yes.

MR. MILLER. Maybe some background would be helpful. Is it true that a CFR court is a BIA court, under your control, and the employees of the court are Federal employees?

MR. SWIMMER. I think that is, generally speaking, true.

MR. MILLER. And that is true of the Red Lake CFR court?

MR. SWIMMER. It was when CFR was in effect.

MR. MILLER. Prior to November 1987.

MR. SWIMMER. But again, the court was put there to provide the judicial system for that tribal government, and we would defer very much to the tribal government's operation of the court.

COMMISSIONER DESTRO. May I ask a question? Let me just make sure I understand, although I think I understand what you said. Basically, it is the Federal Government's court, but the Indians run it?

MR. SWIMMER. That's a good characterization.

COMMISSIONER ALLEN. What's the "it"?

COMMISSIONER DESTRO. The court.

COMMISSIONER ALLEN. Well, there were two courts.

COMMISSIONER DESTRO. The CFR is the CFR court.

COMMISSIONER ALLEN. Were you referring to the CFR court or the tribal court?

MR. SWIMMER. The CFR court. If there is no court system on a reservation where we or the Federal Government has responsibility for law enforcement—or the tribe does, or anyone but the State—as an interim measure to provide the court system out there, we would provide what is called a CFR court to handle misdemeanors. That is primarily their jurisdiction. Once we have put that CFR court there, it is then to operate pretty much under the direction of the tribal government. And we encourage the tribes to organize their own court as soon as possible. When they organize the court, they similarly generally use our Federal funds to do that.

COMMISSIONER DESTRO. Now, let me just go one step further in my question, then. So, assuming you have a CFR court, and it is a Federal creation with the BIA having responsibility for it, the way you administer it is you say, "Well, really the responsibility is the tribe's and we'll let them take care of it." Right?

MR. SWIMMER. Not entirely. I think I will defer to Joe [Little] to let him explain how the CFR court is funded and staffed, and that relationship.

MR. LITTLE. It's a strange setup.

CHAIRMAN PENDLETON. The reason for a lot of questioning is that we find that strange.

MR. LITTLE. Yes. I think when I came into the office I found it strange, too. The CFR, as I pointed out before, is kind of an administrative creation. There is no statutory language for it or anything else. It just kind of grew out of the War Department and continued to function for many years.

As I understand part of the situation at Red Lake, which is not necessarily unusual in some areas, is there was a confusion as to exactly where that delineation was. I think in some ways the tribe thought it was a tribal court, even though the Federal Government kept saying, "No, it's a Federal court."

I had some discussion with the superintendents down there, and they were even confused as to what the situation was.

Basically, the way a CFR operates is that it's set up and it operates under the direction of the area director, similar to the way we do our police force

situation. There are some restrictions. Generally speaking, the judges are to be selected as part-time Federal employees, and they are under what we call a 950 series, I believe, which is generally paralegal, so they tend to have more paralegal background.

I'm not saying in every instance that occurs. It may be that at Red Lake they hired somebody without this background, and partly because they were confused with the situation.

We have since, I think in the directive sent out on November 25, prior to my coming on board, indicated this is really the way a CFR court should operate. There is a specific delineation. I'm not saying we still continue to have some of those with the CFRs because it is a confusing area. The bulk of our CFRs are in the State of Oklahoma for various jurisdictional reasons. And I might point out that the bulk of those have law degrees, are practicing attorneys, and do part-time work with the CFRs, and we have very few problems with them.

The ones such as at Red Lake and others, we are trying to sit down and work those out. But part of the problem comes because the operation is really through the area directors and the superintendents.

I think what Mr. Swimmer alluded to in terms of the tribe controlling is that there are provisions in the regulations that say that tribes can pass resolutions incorporating law and order codes into the operation of the CFR. So again you have strange hybrids in which you may have a CFR operating just under CFR guidelines found in section 11, CFR; or you may find a court operating under tribally adopted law and order codes, if you will, even though it's not a tribal forum—it's a Federal forum, but it's using tribal law. Now, that varies.

COMMISSIONER DESTRO. That I understand. It is confusing. But the question I have is really more a basic one which is: where does the buck stop for responsibility for protecting the rights of the people who appear before those courts? What I thought I heard, and the reason I launched into the line of questioning, was that once the CFR court was established, the Department implicitly, basically, recognized that the buck stopped with the tribe as opposed with themselves.

MR. LITTLE. I don't think that's the case. As far as I can see—I will hedge, because this is a confusing area—as far as I can see, the buck does stop with the Bureau on the CFRs. What I'm saying is the way it had been administered in the past, there may be some confusion, and you may have—and I'm not positive—some of those tribes out there that have maybe operated more authority in this area than is really laid out in the regulations.

COMMISSIONER DESTRO. Isn't that the real underlying issue in this case, who has the final authority over the CFR court?

MR. LITTLE. I'm going to defer because I don't know all the facts in the case. That could possibly be.

CHAIRMAN PENDLETON. Could I ask this question: is it possible—maybe it's not possible, but I'll ask it anyway—that you could review this and let us know what you really think about it?

MR. LITTLE. Yes, I would promise to look into it and try to review it.

CHAIRMAN PENDLETON. The reason why I ask is because I am trying to find out what is the difference between a CFR court and a tribal court. What we are confused about is that if CFR courts are controlled by the tribes, what is the difference between a CFR court and a tribal court when we are unclear about what CFR really means? Maybe that's typical Washington policy, but it seems to me the rights of individual Indians can be better protected if there is some clarity about what we're talking about, and we can maybe transmit it to them.

MR. LITTLE. As I understand it—and you're probably right; you're not going to get that much clarity—these are temporary courts, or at least that's what they were initially set up to be. Under policy of the Bureau, as far as we can review it, they were just to come in for interim periods of time when there was what they called lawlessness running rampant until the tribe itself would set up a forum. Now, some took on a bigger nature. As I pointed out, the ones in Oklahoma—there are some real questions about jurisdiction, so they are somewhat the only court system.

In terms of whether they've got control or not—and I'm losing my line of thought here; that's how confusing it's getting. As I pointed out, because they are interim courts, they are limited jurisdiction under 25 CFR 11. There are only certain types of cases they can hear. For instance, they don't have the jurisdiction to hear tribal election disputes, if you will.

That doesn't say that the tribe itself, because of other provisions within that code, can't adopt regulations that are in turn adopted by the CFR court and, if you will, are delegated authority from the tribe as a forum to operate. So you do have some CFR courts that do have the authority to overhear election disputes, if you will, and you have others that have not been given that by the tribe. So it is a strange hybrid.

MR. HOWARD. But it's fair to say that, generally speaking about CFR courts, the Secretary of the Interior has greater control over CFR courts than tribal courts; is that right?

MR. LITTLE. I think that's fair to say, yes.

MR. HOWARD. Do you think it's also fair to say with respect to the Red Lake situation, that when the tribe took your records, you gave them your court as well?

MR. LITTLE. My understanding on that is that's still up in the air. As far as I know, the case is still pending.

CHAIRMAN PENDLETON. Mr. Keep wants to say something about this one. Careful, now.

[Laughter.]

MR. KEEP. I'll try to be very careful on this one.

As I think Mr. Little has pointed out, at Red Lake there was a long history of confusion as to whether that court was characterized as a tribal court or a CFR court. It was in fact a CFR court. And when the judge thought that it was a tribal court and took the records, we sued them to get them back. That is the case that is now pending. The tribe has lost that through the circuit court and has filed a petition for *certiorari* with the Supreme Court. And unless they prevail, we will in fact get those Federal records back. If they prevail, we will find out what the law on that is.

COMMISSIONER DESTRO. Has BIA maintained its position all the way through the petition for *certiorari*? Have they opposed the grant of a petition, and on what grounds?

MR. KEEP. I don't know whether we have filed our brief in opposition to it, but we can certainly make a copy of that available to you.

CHAIRMAN PENDLETON. We'd like that.

MR. KEEP. Obviously, whatever we filed with the Supreme Court, we think the circuit court was correct. We brought the suit because we wanted the records and pursued it through the Eighth Circuit, and we still want the records.

COMMISSIONER DESTRO. Assuming that that's true, that the court of appeals was correct, why was there such a big problem in the administration of the CFR court that the district judge confessed to being appalled. He said, "This is really an appalling situation. Why was it not remedied?"

If you thought it was your court—and this really goes back to the very first question: if it was your court, why weren't you responsible for the administration? Or did you in effect cede control of the court a long time ago to the tribe and implicitly treat it as a tribal court, even though now you come back and argue inconsistently with your actions? One could conclude that.

I'm not accusing you of it, but it seems like this may be another example of a mixed message. When they say, "Look, we're going to take you at your word and take the records because you've treated us as if it's our court, and now you want the records back. Now it's not our court anymore." And then you go back and say, "Look at all these things the district judge found were wrong."

Whose responsibility was it? Yours or theirs? If it was your court, wasn't it your responsibility?

MR. SWIMMER. It could be characterized that way. And I think over the history of this, having gone through several administrations, that in fact the status of that court was very confused, and there were people, certainly my predecessors, who apparently believed it was as much a tribal court as it was our court and took a hands-off attitude.

After the court seized the records, when the Bureau realized what had happened there, and that in effect it was our court, even though we had tried to defer to the tribe and their law and order code and their system of

justice, we drew the line and said, "You can't do this. This is our court, and we are going to have some basic operating guidelines." And we put those out and we said, "This is the way it's going to be treated from now on."

And that was a couple of years ago. But the message all along was that it was our intent to pull out of that CFR court as soon as the tribe was able to develop its own court system.

CHAIRMAN PENDLETON. Ms. Prado, and then I want to get back to counsel.

MS. PRADO. In view of the foregoing, why was the decision made to change that court to a tribal court?

MR. SWIMMER. It is the intent of the Bureau to withdraw from all CFR courts as soon as practicable. Again, we don't view ourselves as a policeman, and one could argue that maybe this tribe isn't going to operate an effective court system. One could also argue that they are just as confused as we had been in the operation of this court, and that if they move forward in developing their own court system with whatever additional resources we can provide, they will have a good court system. We cannot speculate that they would have a bad court system simply because of the trouble that has been exhibited with this court.

MS. PRADO. Isn't that, like Commissioner Destro said, a mixed message? On the one hand you say that the end result of all this fight over the records is you issued guidelines, but then you turn around and, it seems to me, concede and turn the court over to the tribal court.

MR. SWIMMER. Well, I think you would have to say that we believe this is going to be the standard practice regardless of what court is out there; therefore, it is the BIA's job to continue administering justice on that reservation until a new tribal leader is elected, until a new government is restructured, or something like that. And I don't think we can accept that.

Our position is that we wish to get the tribe in a position of operating its court system as quickly as possible and begin working with the tribe to try to have a quality court system as soon as possible out there. And certainly as long as they have an alien court on their reservation, if they believe that that court is under our control, I think the chances of continued poor relations are as good if not better than they will be if the tribe has its own court and we are working again from a resource base to try to improve it.

CLARENCE PENDLETON. Mr. Swimmer, I think what we are going to have here are some specific questions about ICRA. I want to go to Mr. Destro first, and then go back to Mr. Miller, because I think we are getting down to where we want to ask some very specific questions about this whole process.

COMMISSIONER DESTRO. My question, before going back to Mr. Miller, is—I'm going to give you a hypothetical question that gets at the notion of control, and I will recognize the difficulty of it at the outset. But let's just hypothetically say that an individual who appeared before that CFR court,

before you transferred over into a tribal court system, say, a year ago—let's just posit that no statute of limitations has run on anything—would the Bureau concede that an individual Indian might have an ICRA claim against the Bureau—not against the tribe but against the Bureau—for alleged violation of his or her rights under the ICRA because it was a Bureau court?

MR. SWIMMER. I hesitate to offer that as a legal opinion. My reaction is no.

COMMISSIONER DESTRO. They would not concede that?

MR. SWIMMER. I don't believe there would be an action against the Bureau of Indian Affairs for a violation of ICRA.

COMMISSIONER DESTRO. Would not?

MR. SWIMMER. Would not be. But that is a layman's off-the-cuff opinion, and I'll defer to my attorney on that. He might have a very different opinion.

COMMISSIONER DESTRO. What do you think?

MR. KEEP. I think that's a policy question and I'll defer to him.

[Laughter.]

CHAIRMAN PENDLETON. I hope the press heard that one.

COMMISSIONER DESTRO. What do you all think as far as that question goes, because it seems to me that if you are waffling on that one, then Indians don't have a remedy against their tribes and they don't have a remedy against the Federal Government. So, unlike anybody else who lives in this country, they don't have a right against anybody; right?

MR. KEEP. First of all, I understood you were talking about the Indian Civil Rights Act.

COMMISSIONER DESTRO. Right.

MR. KEEP. Obviously, there are Federal courts. If they are our court, those people are acting as Federal employees. There are other civil rights statutes and other doctrines of constitutional torts and such that would provide them a claim against the Federal Government if their individual rights are violated. If we have done it, I mean, that's where their remedy is.

The question is, it seems to me: what did Congress do with the Indian Civil Rights Act? And I think, as the Supreme Court indicated, in noting that Congress had considered and expressly rejected substitute legislation which would have given the Department of the Interior a broader role in these matters, we have taken that as being instructive to take a hands-off approach until such time as Congress tells us to do something else.

MR. HOWARD. Mr. Keep, a quick followup question. As I read that legislative history and the letters from the Secretary of the Interior that are referred to, it seems to me that the Secretary of the Interior opposed the amendment that was under consideration because he said the Department of the Interior was already undertaking those kinds of actions under the Indian Civil Rights Act. Are you familiar with the legislative history?

MR. KEEP. I'm not familiar with the part that you're referring to. I don't have any present recollection of it.

MR. HOWARD. Could you tell us what the policy of the Department of the Interior was at the time of *Martinez* or pre-*Martinez*?

MR. KEEP. No, I couldn't because I wasn't there then. But the legislative history of the Indian Civil Rights Act and whatever official reports the Department filed at that time are a matter of record.

CHAIRMAN PENDLETON. I think we've gone a little bit astray here, and I'd like to get back to counsel so we don't break too much the train of continuity.

MR. MILLER. Mr. Chairman, I'd like to submit for the record the case of *Cook v. Moran*. It does contain a claim that the failure to provide a model code for the CFR courts contributed to the problem at Red Lake.

CHAIRMAN PENDLETON. So ordered, without objection.

[The document was entered into the record as exhibit no. 5.]

MR. MILLER. If I could ask a few brief questions. Mr. Swimmer, isn't it true that many in the Department believed that the Indian Civil Rights Act was being violated by the CFR court at Red Lake?

MR. SWIMMER. I don't know. I certainly did not condone the actions when I heard about them 2 years ago, but I can't really tell you who those many might be or what their thinking was at that time. The people I talked to subsequent to the actions that you have mentioned here have pretty much agreed with me that, no, that's not the way to operate a judicial system out there.

MR. MILLER. Would it be fair to say that some in the Department believed that the ICRA was being violated, particularly the right to counsel and the right to a jury trial?

MR. SWIMMER. Sure.

MR. MILLER. Nevertheless, you entered into a contract for judicial services with the Red Lake Tribe in November, to provide judicial services for that tribe, correct?

MR. SWIMMER. That's right.

MR. MILLER. In that contract there was no reference to the Indian Civil Rights Act; is that correct?

MR. SWIMMER. That is correct. Indirectly, of course, there is, and that is that the tribe must comply with all Federal statutes. I did not feel personally that it was necessary to point that out to a tribal chairman, either there or anyplace else. And I believe that that tribal chairman, as well as many others, knows that he has to follow Federal law and that the Indian Civil Rights Act is among those.

My concern was that if we put in the contract, "By the way, you must comply with ICRA," I might as well go ahead and list the whole U.S. Code. And maybe I should in that case.

MR. MILLER. Isn't it true that at least some people in the Interior Department proposed additional language to that contract stating specifically that the tribe would comply with the Indian Civil Rights Act in that attorneys licensed before the State of Minnesota would be allowed into that court?

MR. SWIMMER. I don't know about the latter, but we did have a recommendation that we specifically include language that the Indian Civil Rights Act be a part of this contract, which, again, I found unnecessary and felt like it would be a bad precedent.

MR. MILLER. Wasn't the argument of that person that, given the 10 years or the history of alleged violations and, in some people's opinion, violations of the Indian Civil Rights Act, that that language was necessary?

MR. SWIMMER. I don't know why they recommended it. I suspect that they felt it might be important to point it out in addition to the general language about complying with Federal statutes. But, again, I don't see this as a method of operation for us in all of our contracts, that we should put that in there.

MR. HOWARD. The crux of the problem, as I see it, is that there are some tribal officials who maintain that the Indian Civil Rights Act is not applicable Federal law, and we've heard testimony to that effect. My recollection—tell me if I'm wrong, Brian [Miller]—is that the Navajo Nation maintains the ICRA was rendered inapplicable by *Martinez*, and the Navajo do have a Navajo Bill of Rights, but they do take that position on the ICRA.

It is also my understanding—and I could be wrong—that Chairman Roger Jourdain believes that the ICRA is inapplicable. If that's the case, then that language in the contract wouldn't apply.

MR. SWIMMER. I suppose that's correct, so it would make no difference if the language was in there or not in there. He's going to disregard it if he's going to disregard it. We believe that it does apply. If any of the Chairmen has stated they believe it doesn't apply, then I guess it wouldn't make a lot of difference.

MR. MILLER. Bill [Howard], I think the jury may still be out on the Navajo position, but there are indications that that is their position.

Mr. Swimmer, isn't it true that under 25 U.S. Code section 450(m), it grants the Bureau power to rescind a contract for the violation of rights generally? The Secretary, if he determines that the performance of the tribal organization under the contract involves a violation of rights, can rescind the contract.

Isn't it also true that the Department of the Interior has been sued before on that theory? And isn't it true, given the knowledge of the Department of the violations in that court, that it would make it much more likely that such an action would succeed? That the language is mandatory? That you

must rescind the contract if there are violations of rights as mentioned in that statute?

MR. SWIMMER. I'm as anxious as I suppose you are to see how Red Lake operates their own tribal court. And if there are the problems that we have experienced in the past that were exhibited there in the CFR court, we will take that under consideration and use whatever legal means we have, whether it's that statute or some other, that might give us access to doing something.

But my reluctance has been voiced already at this hearing that I will not get involved in tribal decisions except in the extreme case. And as I mentioned, we believe the CFR court operation became extreme, and we issued guidelines stating, "You must comply with the Civil Rights Act, provide the right of counsel, provide quite a few things." And if the new court that they are organizing there is operated in such a way that we acquire knowledge that they are not operating in compliance with Federal law, we will take whatever actions we can to try to get them into compliance.

MR. MILLER. Given the fact that you've been advised that the Red Lake court had been routinely violating civil rights, would you say that it was likely that the court would continue to violate at least some of the rights secured by the Indian Civil Rights Act?

MR. SWIMMER. I apologize. I missed the first part of your question.

MR. MILLER. The first part is: given the fact that you had been advised that the Red Lake court had been routinely violating civil rights, would you say that it was likely that the Red Lake court, under the contract for judicial services, would also violate the Indian Civil Rights Act?

MR. SWIMMER. I can't draw that conclusion, because we believe that all of the court systems, as all of the tribal governments, are in the state of emerging, and most of them keep moving forward even though it's sometimes very slow. And I would hope that there have been some lessons learned, and I hope that if *certiorari* is denied on this one case, for instance, that that will be an additional lesson for the Chairman there, that in fact the Civil Rights Act applies, they've got to follow it, and they'll come around to doing that.

But I, again, hesitate to substitute my judgment for that of the tribal elected official there. I think the electorate has that opportunity and should exercise it. I don't personally like the way they operate that court or that we have operated it in the past.

Now, we don't have any evidence yet; we don't have a violation that has been cited to us. We have—I believe I'm correct in this—the same information that you do that people are alleging that they're not going to get justice, that they're not going to be able to go in that court with an attorney, that they're not going to be able to have a jury, and those kinds of things.

Maybe it's wishful thinking, but I hope and believe that if we can continue working with that tribal government, they will have a better court system. I can't simply say that I would agree with you entirely that we have to assume it's going to be another situation like we've had before.

MR. MILLER. Of course, I share your hope, but I think there have been habeas corpus cases where the Federal court has found that there was a denial of the right to counsel. You have been advised that there were violations of the Indian Civil Rights Act.

MR. SWIMMER. In the recent court, since it's been a tribal court?

MR. MILLER. No, not since it's been a tribal court. This was a CFR court.

MR. SWIMMER. Let me add one more thing, if I could quickly. We do not have, I believe, a declination issue here, either. We are in the situation that when a tribe asks for a 638 contract to operate a tribal court, we have to let them do it. So the remedial statutes would occur afterward and after the violation. But we acknowledge that those problems have existed before, and we are working with that tribal government to try and help them develop. But if they do have problems, then some of the statutes you mentioned, as well as others, if there's violation of Federal law, may give us the opportunity to go in and do something else. I'm not sure what. That again throws us into a quandary, if there is no court up there, as to where we go.

MR. MILLER. It seems to me you would have been in a better position had you included that extra language in the contract.

MR. SWIMMER. I don't see why. It either applies or it doesn't apply. Our opinion is that the Indian Civil Rights Act applies. If the Chairman's opinion is it doesn't, he will ignore it anyway, and ultimately we will have to go into another forum to decide that issue. If I put it in the contract and it is not applicable, it is not enforceable. If I don't have it in the contract and it's enforceable, it's just as enforceable under the general 638 contracting guidelines that all Federal laws apply.

My concern is that if I start with this tribal Chairman and I include it, then pretty soon I'm going to have to look at other contracts of a similar nature and I begin citing Federal laws that do apply in these cases. And I believe that I have to give the tribal government deference in that they will follow Federal law—at least give them that opportunity to follow Federal law. If they don't, then we can take the action that we can that's appropriate.

MR. MILLER. I have one last question. Is it still true that the Red Lake Tribe has a resolution on the books that effectively denies counsel to the accused in criminal trials?

MR. SWIMMER. I don't know. I don't know if they still have one.

MR. MILLER. Thank you very much.

I have no further questions.

CHAIRMAN PENDLETON. We're going to take a short break, and we'll have a few more questions from Commissioners when we return. We have to give our reporter a break. When we come back we'll begin the questioning with Commissioner Allen.

Let's take about a 10-minute break.

[Recess.]

CHAIRMAN PENDLETON. As we convene, if you will notice, Mr. Swimmer, you have shared light and sort of brightened the room up a bit, you and your colleagues.

[Laughter.]

CHAIRMAN PENDLETON. And we will suppose before the end of the day is over that the rest of the light will be shining in through the other windows. Sometimes we are in anticipation of television people being around. Mr. Swimmer grimaces, and I understand how you feel about that.

Commissioner Allen, why don't you begin the questioning.

If we could have another half hour or 25 minutes to try to tie this up, we would appreciate it, because we don't want to occupy your entire day, although we'd like to, but we don't think that would be right to do.

Commissioner Allen.

COMMISSIONER ALLEN. Thank you, Mr. Chairman.

Just a technical question, Mr. Swimmer. You did submit a written statement for the record that I enjoyed reading, but you didn't refer to it. I very much appreciated, by the way, your oral statement, which I think was fine, but the written statement—

MR. SWIMMER. I would like to have it made a part of the record, yes, sir.

CHAIRMAN PENDLETON. It is so ordered, without objection.

[The document was entered into the record as exhibit no. 6.]

COMMISSIONER ALLEN. I was somewhat taken with the general history that you gave at the outset of your testimony, invoking the various attempts on the part of the United States Government to deal with the Indian problem, which I believe is the expression you used. But I notice, however, that you came through from the early 19th century through 1934 to the fifties and up through the '68 act without mentioning the grant of citizenship in 1924. And I was curious to know why you skipped over it. I'm sure you only did it inadvertently, but I now ask you to reflect whether, had you paused to think about the grant of citizenship in 1924, you might not have found that relevant to the powers and aims of Congress with respect to Indians.

MR. SWIMMER. I suppose it would be. I don't have a recollection of the history of those particular years, but I know that following the allotment days, it would have been a natural, normal thing to do to grant citizenship. In fact, one of the reasons I tend, I think, not to remember that particular

date is that there was a grant of citizenship to my tribe and others in 1901. So we came on board a little sooner than some of the other tribes.

But I believe it was also because of the allotment of lands and the belief that Indians no longer needed to be wards of the government, and that as the land was allotted and they became sort of full citizens, they also received citizenship. And if I'm not mistaken, in fact, most Indians were citizens before the 1924 act, but it was sort of a cleanup act. It was simply to grant them citizenship if there were any that had not been. And it followed along with the idea of no tribal government, individual allotments, individual Indians competing, taking the resources and living as anyone else would in that area.

And that's why I say following that allotment, it appeared that, for one reason or another, much of the land that was allotted then was lost to the Indian people. And I think that became partly responsible for the '34 act which, of course, was developed from about '31 through '34, but the ultimate act of Congress to reorganize tribal government, and that was an attempt to stop the allotment or to hold fast the rest of the land that was still available for the fear that—

COMMISSIONER ALLEN. That was the point of my question. Was it also an attempt *de facto* and not *de jure* to withdraw citizenship?

MR. SWIMMER. To withdraw? I would not characterize it that way. I would say it was an attempt then to provide some additional forum for Indian people to continue their culture, lifestyles, and have some protection of that. Because there was no other government as we knew it then—State, local, or Federal—that could identify as any kind of a protector, so to speak, of those resources. So by providing the tribes a mechanism to come together and organize themselves—and it also provided a way of providing money, some funding mechanism. The act of 1934 allowed tribes to form reeling organizations. But it was a structure they could take advantage of and organize tribal organizations and governments if they followed a certain pattern. And as I say, even in doing that, some of the tribes did not buy into that system. They also in some cases did continue other systems.

But what it did tend to do was refocus on the reservation system, and it stopped the policy of assimilation, changed that to a policy of continued reservation development and reservation living and providing Indians with the opportunity to have organizations through which they could exercise cultural customs and historical differences.

COMMISSIONER ALLEN. That's one of the things that's concerned me, because you spoke in your oral testimony about a level of government different from Federal, State, and local. And I suppose the most vexing question we face in this entire inquiry is essentially what kind of creature this level of government is called tribal government; that is, where does it fit juridically or logically or politically or morally?

I have considerable difficulty placing it myself. If I understand your testimony, I am not alone with having that difficulty.

MR. SWIMMER. You're right up there with Congress and the various administrations that have been in effect for the last 100 years.

COMMISSIONER ALLEN. I see. But I'm curious, however, because although I have difficulty placing what we now are trying to do, I have a little less difficulty understanding some of the things that have happened over the years. And I notice in most of the court opinions and general testimony in writing, we refer to the existence of Indian sovereignty prior to the arrival of the European in North America, for example, almost as a justification for the insistence today on self-determination and on the courts' reasoning that there are somehow legal principles that arise out of that.

Now, I know it's a familiar state of repose for the human mind to fasten on something old so as not to have to think about how to justify what you want to do. But apart from that convenient excuse for accepting something, I wonder whether there is, in fact, any substance to this. After all, every human being dates from something that antedates the American Constitution. Every human experience is based on some sort of government, some form of morality or mores or policies that antedate the American Constitution.

So it is entirely unclear to me what one means when one refers to the traditional or the customary or the from-time-immemorial form of government of the Indian. What in your mind does one refer to with that?

MR. SWIMMER. The basic difference, I would say, is that while everyone does date from some historical precedent, the Indian communities are the only ones that are original on this particular continent, and were treated as independent nations as this continent was developed. The difference that has been described in various times is that, yes, that is true, but they are a conquered people. That may be, and certainly they are part of—in my opinion, anyway, and I might add there is some disagreement on this—the Federal system in that Indian tribal government today, or Indian tribes, if you will, exist by virtue of their historical existence from the past and forevermore, and that they carry with them an inherent sovereignty.

The Congress has generally chosen not to deal with that, and so the courts have dealt with it. And what the courts have said is that Indian tribes are as they were before this continent was settled, and that they retain their inherent sovereign rights as independent nations, except for those areas in which Congress has taken away from them.

The Congress has the right to exercise plenary power for whatever reason, I suppose—I think most of us will agree to that; some don't, but I believe Congress can exercise plenary power or total power over Indians to the extent of not even recognizing that a tribal government exists, in other words, termination. They could do that and in fact did in a few cases.

They cut that governmental relationship off in total. But the courts have come back and said if Congress had not done that, that you're dealing with a sovereign nation.

COMMISSIONER ALLEN. You put your finger, then, on the thing that did trouble me most of all, so let me try a conclusion, and then you and my colleagues can tell me what you think about it.

James Monroe, 1787-88, in discussing the proposed Constitution, described what happened to the States as a consequence of that proposal as the emergence of a qualified sovereignty. The States that had preexisted the Constitution were changed by the mere fact of the adoption of the Constitution, according to Monroe—who was opposing the Constitution at that point, by the way, although he was eventually President—and I have always taken him to mean that there wasn't room for any other sovereignty after the Constitution was adopted in 1788.

Now, the question that that leads to is precisely the question of the conquered people justification for the status of the Indian tribes to which you alluded in your remarks. So far as I can see, on the grounds that have been presented, there is no other place in which to locate this inherent sovereignty in association with the plenary power of Congress, which is to say the Government of the United States, than in the justification that you're dealing with a conquered people. So that as long as you retain the argument that the Indians are to be treated as conquered peoples in a permanent state of occupation, if you will, then you can still talk about their preexisting sovereignty and the relationship that that preexisting sovereignty has to subjection.

But the question is—I shouldn't say question; I'd even draw the conclusion that seems to be totally incompatible with the guarantees and rights of American citizenship. It seems that it's not just a tension, as has been said with respect to *Martinez* and other decisions, but it's an incompatibility, utterly and completely, that there is no room for a form of government other than Federal, State, or local. There may be room for statehood. And after all, you were put in the position at the BIA of making decisions of forms of government and constitutions which are extremely political decisions, and, as we know, the Constitution entrusts those decisions to Congress with respect to the organization of territories in general.

So the strain seems to come from taking this highly charged political decision and placing it in the hands of a bureaucracy rather than at the level that it was contemplated from the beginning of the republic in the hands of Congress, allow people to present our constitution, to organize themselves into a State, and having done so, then to allow Congress to debate whether they should be admitted on those terms, which means you would still have the opportunity for self-determination within reason, and

at the same time would stand on the same footing as all other elements of American life.

That's the conclusion that comes to my mind listening to and thinking about these things, and I wanted to share that with you because it might be totally consistent with your idea that the Bureau of Indian Affairs shouldn't exist at all.

MR. SWIMMER. Well, we reach the same conclusion, although I'm not sure it's for the same reason.

The relationship pre-Constitution was treating Indian tribes as nations and actually having treaties with the then-occupying European countries.

Following the Constitution, I would say that the analogy between an Indian tribal government and a State government became very similar, that the courts generally have determined that the powers of Indian tribes as they relate to the Federal Government come out of the commerce clause, which is also the one that vests certain powers of the Federal Government over States in regulating commerce, Article I, section 8, and that the actual analogy is that once the Constitution was adopted by the citizens of those various States, even though Indian people at the time were not voting, they were included in that Constitution to be recognized as a government within this Federal system, subject to the ultimate power of the Constitution, just as States would be, and in fact—well, States gave up certain powers to the Federal Government but only what they agreed to give up. Indian tribes, on the other hand, had certain powers taken away from them by the conquering effect, I suppose, of the government. But they were included in the Constitution and continued to have independent treaties made between these tribal governments and the United States Government until the late 1800s.

So there had to be some recognition of a certain sovereign aspect of those Indian tribes. Those treaties eventually changed to acts of Congress, not to have any less effect but primarily because once the treaty-making power required the approval of both houses because of the appropriations requirement on the House side, it got to be an exercise that was no longer needed, and so they could change the acts of Congress, which they did in the late 1800s.

But the courts then have come back and generally said that those Indian tribes' sovereignty stops at the U.S. Constitution. It stops there. And it is subject to the Constitution of the United States and the plenary power of Congress. But other than that, we recognize Indian tribal government as a system of government within this country, within a State. And the closest analogy would be a State government. And the courts have more and more in the last 5 or 10 years, in fact, come to regard tribal government on a par with State government—taxation, enforcement of State regulatory laws or nonenforcement of them on reservations. The trappings, if you will, of government have been afforded tribal government.

COMMISSIONER ALLEN. Without the 14th amendment, a very critical dimension.

MR. SWIMMER. Without the 14th amendment.

CHAIRMAN PENDLETON. It does seem like, in my colleague's education of me in some of these matters, that if we go back to Federalist 10, written by Madison who warned us about factions, we might want to understand that factions are the order of the day, and do we not consider Indian tribes as a part of the faction? And without the protections of the 14th amendment, it seems to me that what we are doing is a kind of a selective inclusion of people where due process is absent.

I cannot tell you, Mr. Swimmer, how much I heard from people in Flagstaff and in Rapid City, which you probably heard—and I would remind you that I had a dialogue with Mr. Garreau who said to me very clearly that in the sense of Madison, that's a faction within a faction, in saying that the Indian Civil Rights Act really only applies to the tribal council. I mean this is an admission on the record. And that bothers me.

My colleague very eloquently pointed out in Arizona that what we really have here in terms of factions is the people who have power, not including those who don't have any power. So is Congress really dealing with a powerful faction with the tribal council, or are we dealing with Indian nations as a whole?

I contend that where we are right now is that we are really dealing with tribal councils and perhaps the special interest groups in and out of that that deal with tribal councils. And as Sam Irvin said way back in 1968 when he had a discussion about the ICRA, what we are having now is really a response to a politically powerful minority in this country, and we are doing things that perhaps exceed, if you will, and as my colleague, Mr. Destro says, maybe narrowing the 14th amendment, but we are not really making the 14th amendment applicable to this situation. And that troubles me. I'm not looking for an answer, but my colleague's comments spur on these kinds of thoughts.

And if we continue to have this faction, I don't know where to put the blame for all this except at the foot of Congress. I certainly cannot put it at the foot of the BIA.

MR. SWIMMER. Thank you.

CHAIRMAN PENDLETON. Although you have your problems, somehow I have to put this there. And it does seem to me that anything the Congress wants to know, as I said in my opening remarks, about the 20 years of nonoversight, that if there is any wisdom left among many of us who are not Members of Congress, then Congress would do well to heed the testimony we have heard from top to bottom and look very seriously at how it is going to treat, if you will, its citizens. Because if not, frankly, I see no difference between sovereignty and servitude in a sense. And this is a very, very serious matter, and I think it needs to be considered in that light.

And with that, I will turn to my colleague, Mr. Destro, unless you have some response.

MR. SWIMMER. I hesitate to engage in too lengthy a response. I think sometimes we have to relate to what we see and hear and then attempt to fit that into a frame of reference. I believe what you have seen and heard does form those impressions and would in anybody's mind.

The problems we face in Indian country, however, have been the attempts by Congress and the later attempts by the courts to recognize tribal government for the purpose of doing just the opposite, of giving Indian people a forum which they have been denied in the past by State government. And where the State governments have generally failed to afford those same civil rights and those same treaty rights that had been afforded by Congresses before, the tribal governments have been a voice in that arena to state that they are, on behalf of the whole of the Indian community, representing those rights.

I think there are two levels that we operate, and that's why in my opening statement I mentioned to you that we can take any facet of the Indian community, be it the enforcement of civil rights or the enforcement of fishing treaty rights, or the development of energy resources from the reservation or the education of Indian people, and find things that need to be fixed or changed or whatever, which applies, quite frankly, to the 50 States and the Federal Government.

The question you ask, I guess, is: is there an inherent right to tribal government? Is there an inherent right to the people of a particular location to come together and form a government within this Federal system and State system of governments? And I believe that question gets answered by the courts.

The Congress has deferred on this and said—well, they haven't said anything, but the courts have indicated that there is the right of those people to come together and have a tribal government for the purpose of protecting their rights and being an advocate—in fact, some tribal governments we have today were even recognized for the purpose only of bringing a suit against the Federal Government to enforce a treaty right. In other words, they came together as an organizing group for that purpose alone, and then it later evolved by various actions of court into a full-fledged tribal government.

So I say to you that these areas are difficult to understand, and at different levels tribal government may operate for different reasons—not all make sense.

CHAIRMAN PENDLETON. I guess a part of my continuing concern is that it is very clear to me that there is a big difference in language results and performance results. And I think the language of the Congress and the language of self-determinism becomes one part. But when one looks at the performance as a result of that language, we do have a tremendous

difference. If we recognize that as a difference, I'm hoping that at some point in reviewing the record the Congress will clearly come to the conclusion that something needs to be done to protect the rights of all Indians.

Bob.

COMMISSIONER DESTRO. I only have one question, because our role is limited to looking at the ICRA. It seems to me that all the talk about self-determination is certainly relevant in the sense—that's why I pointed out at the beginning that my own view is that I don't think *Martinez* is the problem. I think *Martinez* is a symptom of Congress' unwillingness to come to grips with what precisely ought to be the role of Indian tribal government. I for one am a very strong supporter of the notion that they ought to have self-determination with respect to how they run their own affairs, subject to the overall rights that all Americans have as citizens. Now, how those are to be translated on the reservation is another question.

I suppose my question would be: as this administration ends and we go into a new one, what would you suggest that a new administration do or that the Congress do to assure some consideration of the more fundamental question of what role Indian tribal government should play, and what rights individual Indians have in it? Are there any concrete proposals that you would make with respect to it?

Congress thought they had spoken on the issue when they passed the ICRA, and they thought they had imposed the rules. The Federal courts say the tribes enforce the rules. The BIA says they can't enforce the rules or shouldn't enforce the rules. And what we are left with is those who are supposed to enforce the rules not being quite sure what they are supposed to do. What would you suggest Congress do or a new administration do to make things a little clearer?

CHAIRMAN PENDLETON. Since Washington policy is never settled but always in flux.

MR. SWIMMER. I'm not sure that I feel comfortable in recommending Congress do anything. I would suggest, though, that they could do a couple of things that I mentioned earlier—ensure an appellate system of some kind is out there, give ultimate access to a Federal court on appeal if that person just feels that they have not been given their civil rights.

My concern, however, about piecemeal action—and I say "piecemeal" if you're dealing with the Civil Rights Act—is that it does go much deeper than that. If you have people on a reservation that cannot read and write, they do not know what their civil rights are. They don't even know where to go to say they have been violated.

The mention was made earlier about why don't you put this provision in a contract. Who is going to read that contract? Frankly, nobody on the reservation will, and probably not most of the tribal council. Whoever happens to be charged with administering the contract probably will.

The purpose is to get notice, to get education, to get Indian people in a position where they are protecting their civil rights. I cannot do that for them. If a person's civil rights are being violated, they must know that and that they have a remedy. And then if we talk about remedies, that can be at various levels.

To address the problem, however, with ICRA solely, it means improvement of the court systems on the reservation. It means opportunities to get into another forum, to be assured of independence of the forum. And I just would not have much more in the way of offering solutions than that.

I might add that there is no one living on a reservation today that has to live there. There is no law that says anyone must live under the constraints of the Red Lake Tribal Council. They are free to move about anywhere in this country. And once they leave the jurisdiction of that tribe, they have no more responsibility to it nor the tribe to them, in most cases.

So you're dealing with issues of jurisdiction over where people live and that have subjected themselves to a particular tribal government, and the laws that only apply to a tribal government. They are not denied, of course, the forums for their general civil rights, non-Indian civil rights. That law was passed to help ensure that Indian tribes, which are governing a particular piece of land and over Indians, would have to give Indians access to some justice from that tribe.

But that is not the only protection. As Mr. Keep mentioned earlier, once you get out of that forum, there are some opportunities to get into the larger Bill of Rights/civil rights type of operations of the Federal Government.

So this act was passed because the Congress perceived a void in this particular instance of where there is a jurisdictional vacuum.

I guess I would suggest one other thing that has come up in various hearings. That is, there is not a clear understanding in Indian country of who has jurisdiction. And this has been particularly grievous in Oklahoma as a result of some court decisions just recently that absolutely have confused the issue so much that we have a sheriff who virtually has to, first of all, identify if the piece of land is somehow in trust or restricted; who has committed the crime beforehand, whether they were white, Indian, or otherwise; whether the crime was committed against Indian or non-Indian; and the range of crime—it could be a misdemeanor or a felony—and then whether or not he has to call the marshal to go out to investigate the crime. So the whole thing has to be tried and prosecuted before he ever makes an arrest, or he might find himself sued for violating his oath of office.

This is ludicrous, and this is an area that I think Congress must deal with, and they must make it clear on reservations and in Indian country that the law is going to be either tribal law, State law, or Federal law for

everybody, and not say, "If you're part Indian"—and we don't know which part, but if it's less than this or more than that, and that kind of thing—

CHAIRMAN PENDLETON. Try 1/32nd for us in Louisiana.

MR. SWIMMER. Or 1/1024th Cherokee.

That is an area that should be cleared up. Instead, Congress has simply deferred to the courts, and the courts are trying these cases issue by issue, and they come up with law that is across the board. We absolutely cannot tell you for sure what the jurisdiction is out there on the reservations.

So in addition to the civil rights, I throw that in gratuitously, that that is an area that the Congress could deal with, and I think deal effectively with, and they have simply deferred to the courts and refused to deal with it, primarily because tribal leadership doesn't want them to, in my opinion.

CHAIRMAN PENDLETON. I'm not so sure that we're going to find relief from that situation because occasionally Congress decides to do things and needs an interpretation of the courts, which almost makes the courts a secondary legislative body in many respects.

Mr. Swimmer, I really want to thank you and your staff for coming over this morning and spending this time with us. If you have anything else that you'd like to send us, it would be fine. We will probably have one or two questions that we might submit to you in writing later on, but because of your budget problems and our budget problems, it might take a little bit more time than we imagine to finalize the record.

Again, thank you very much, and we appreciate your time.

MR. SWIMMER. Thank you.

CHAIRMAN PENDLETON. We'll take a break and convene at 1:15 rather than 1 o'clock, and we will move on in the afternoon with R. Dennis Ickes.

[Recess.]

* * *

Afternoon Session

CHAIRMAN PENDLETON. Mr. Ickes, why don't you have a seat and we'll begin with you. Before you sit down, let me swear you in.

[R. Dennis Ickes was sworn.]

CHAIRMAN PENDLETON. I forgot one thing for the record earlier, and I cannot make the assumption, Counsel, that Mr. Keep was here under oath. We did not swear him in because he came in late, and I'm not so sure I know how to handle that. But I need to mention that for the record, because if something comes up later, we need to know that is the case.

Mr. Ickes, the floor is yours.

TESTIMONY OF R. DENNIS ICKES, FORMER DEPUTY UNDER SECRETARY, DEPARTMENT OF THE INTERIOR

MR. ICKES. Thank you.

Members of the Commission, my name is Dennis Ickes. I'm appearing here today at your invitation. I have submitted to you a written statement, but rather than read that into the record, I will submit it for the record and ask that you receive it, and then comment with respect to some of the highlights and to offer you an opportunity to ask any questions relative to the subject today.

CHAIRMAN PENDLETON. It is so ordered, sir, without objection.

[The document was entered into the record as exhibit no. 7.]

CHAIRMAN PENDLETON. By the way, Mr. Destro will be late so we are not missing anyone. He mentioned he would be late coming back.

MR. ICKES. I was present this morning when testimony was provided by Mr. Swimmer and other members of the Department of the Interior, Bureau of Indian Affairs, and I believe what Mr. Swimmer has stated has been the consistent policy in the Department of the Interior from the time that I've had any familiarity whatsoever with that Department.

I served in the Department of Justice from 1971 to 1976 and had a lot of dealings with the Department of the Interior, and then in 1976 to 1977 I was the Deputy Under Secretary of the Interior and responsible for many of the matters to which Mr. Swimmer was addressing. I can say in the last 10 years there has been no change in that the primary mission of the Department of the Interior, the primary mission of the Bureau of Indian Affairs, has been to strengthen tribal governments.

Since 1934 that has been the principal objective, and they have done that very well. The powers of tribal government have been returned in varying degrees of strength, and the BIA can be applauded for trying not to abrogate their mission. The BIA, of course, is a creature of Congress, and the ultimate problem and the ultimate solution, I think, lies at the door of Congress.

For that reason, I'd like to cover a couple of points here about the BIA and its role as you have asked, and note that the BIA is really tribe oriented; it is not individual oriented. That is not its mission. And as I perceive this Commission's responsibility, it is to be individual oriented.

I think one of the interesting features about our Constitution that was discussed to some degree this morning, about the powers of tribal governments—I think Mr. Swimmer described that accurately, but I'd like to point out one additional thing. That is, the 10th amendment to the Constitution reserves to the people of the United States sovereign powers. Those powers not specifically delegated to the Congress or to the national government or reserved to States are reserved for the people. So each of us as citizens of the United States has sovereignty. We have a level of sovereignty.

However, in the context of an Indian reservation or Indian tribe, there is no individual sovereignty, so to speak, with respect to an Indian tribe, as a member of that tribe. So an Indian person on a reservation has retained

sovereignty with respect to the United States Government, with respect to the State government in which they reside, but with respect to the tribe, they have no retained sovereignty. All power of sovereignty resides in the tribe. It's a little different than the Constitution.

CHAIRMAN PENDLETON. Excuse me, just to be clear. All power resides in the tribe?

MR. ICKES. That's correct, subject to the plenary power of Congress, of course.

CHAIRMAN PENDLETON. But who are you describing as the tribe if there are no individual rights?

MR. ICKES. I think that's the point.

CHAIRMAN PENDLETON. You mean the tribal council as such?

MR. ICKES. As a practical matter, it resides with tribal council by virtue of the fact that there is no separation of powers, that all power emanates from the tribal council or tribal business committee or whatever the legislative body is. There may be some exceptions to that, but as a general rule that would be true. All power resides in the tribal council, and you can conclude from that that no power resides in the individual except to the extent that Congress does that.

Congress attempted to do that in 1968 by its enactment of the Indian Civil Rights Act. However, through a defect which the U.S. Supreme Court discovered 10 years after the act had been implemented through every circuit court in the country, they detected that Congress failed to do some of the technicalities to, in fact, give these rights and powers to the individual persons coming within the jurisdiction of the tribe.

So for the last 10 years we have the situation where it has been at the total discretion of the tribes as to whether or not meaningful civil rights will be acknowledged on the reservation. Some tribes have done an excellent job in doing that. I can cite you some tribes, and I saw some of them here today. But there are many other instances which I think are reflected by the testimony you uncovered in Rapid City, South Dakota, and in Flagstaff, and there are many that you don't have the stories of that I could recite for you that demonstrate that tribes have not uniformly done this.

So it has to go back to Congress, and the Congress has to do that which it unsuccessfully attempted to do in 1968.

However, what happens in the interim period of time? As we know, history shows that Congress does not act real rapidly, and quite frankly, there is not a real what you'd call hue and cry in this country for civil rights for persons residing on a reservation. There have been no demonstrations on the streets of Washington. There have not been any petitions submitted to the Congress. There has not been any great outcry. It's only been by the fact that this Commission has had the wisdom to

acknowledge that there is something out there we ought to look at that anything has been uncovered.

For that reason, I think it's going to be this Commission that is going to initiate and prod Congress into doing anything at all. For that reason, I would urge this Commission in its report to the Congress to point out that there are no meaningful rights except at the discretion of tribal councils, and there is an inconsistent record among tribal governments in the implementation of that act. And there are numerous situations where there is a total disavowal of any waiver of sovereign immunity for the implementation of that act. And some people will rely upon the *Martinez* case as being the support that they have that, and there are some very good lawyers in this country who advise their clients to that effect.

So I think it's only Congress who can resolve it, but then there is a space of time here before it ever gets to Congress, before your report is ever written, and before recommendations are made, so somebody has to do something. The Bureau's testimony, as I heard it this morning, was, "That's not our job, either."

So there's a real, real void here that is not being addressed by the Congress or by the executive branch or by the Indian tribes themselves.

COMMISSIONER ALLEN. Let me interrupt for a second and have you explain this a little more clearly to me. You have invoked the 10th amendment, and you could have mentioned the 9th, too, reserved rights and powers.

MR. ICKES. Right.

COMMISSIONER ALLEN. And you indicate that those do not operate on reservations.

MR. ICKES. That's correct.

COMMISSIONER ALLEN. What I want to know then is: in what way is it possible to call people who live on reservations American citizens?

I'll give you a specific example. Take a case like *Roe v. Wade*. It is conceivable that an Indian tribe would make the decision that it forbids all abortions, for any reason whatever. You are saying, then, that that decision could be enforced against these people on the reservations in spite of *Roe v. Wade*, and I'm asking you in that case in what way would you call those people American citizens?

MR. ICKES. You ask a good question.

CHAIRMAN PENDLETON. We kind of beat around the bush around here. [Laughter.]

MR. ICKES. American Indians are citizens by virtue of various acts of Congress. I think Mr. Swimmer referred to the 1901 act that made Indians in Oklahoma citizens. The 1924 act made Indians citizens in the event they got passed over in any other previous act. So there is no question whatsoever—and the case law is very clear. In fact, I argued the very first case in this country relative to the Voting Rights Act on Indian

reservations relative to Apache County, Arizona, and the point I made was that Indian people are citizens of the United States, citizens of the States in which they reside, and they have all the rights, duties, and responsibilities relative to that when they are within the jurisdiction of the United States and the jurisdiction of those particular States.

However, on the reservation, then it becomes a unique set of laws relative to the Federal law and Indian law that starts breaking down Federal statutes into those of general application, which are intended to apply to every person in the United States, and those which perhaps could be construed as being uniquely including Indians or uniquely excluding Indians.

So any time that the Federal statute—let's take, for example, the wildlife statutes, the preservation of endangered species and things of this nature. That is a common controversy as to were those statutes of general application and therefore Indians who observe certain religious ceremonies using parts of those protected birds or whatever—and so in the reservation context, some of these Federal statutes aren't necessarily clear.

I hate to use *Roe v. Wade* as the best example of the situation, but I can probably sufficiently dance around your question to say that there are a number of Federal statutes that may have special exceptions to them or may be construed as to not apply because of certain treaties of the United States with Indian tribes and so on. I don't know of any treaty of the United States that would carve out an exception for the *Roe v. Wade* type of situation. However, you might be able to say that for certain tribal religious reasons there might be some kind of exception found. So who knows what it would be?

COMMISSIONER ALLEN. Historically, the United States has refused to accept the notion of dual citizenship. Only recently have some changes in that been made. And the presumption is that in doing so they were also refuting the notion of dual sovereignty, for all practical purposes, so that you couldn't be a British citizen and an American citizen at the same time. You could not have two nations who were sovereign over the same individual.

What you are saying, then, if I understand you correctly, is that the historical claims of the United States are refuted by the historical practice with the Indians. So the Indian is an American citizen off the reservation; on the reservation the Indian is not an American citizen, except they are allowed to vote by some quirk; right?

MR. ICKES. Well, not exactly. I wouldn't call it "by some quirk." There is a Gaza strip, so to speak, in Indian affairs, Indian policy, relative to the national citizenship issue. It is not a clear area of law, which I think you are finding as you have dealt with this area.

I would not say that Indians are not citizens of the United States by virtue of being born on the reservation. I would say they very much are.

Judicial interpretations make it very clear that Federal laws do apply on the reservation even with respect to those endangered species kinds of issues that I referred to earlier.

So it is not correct to say they are not a citizen while they are on the reservation. It's just that there is a special set of laws that come into play by virtue of their membership in an Indian tribe or by virtue of their location within an enclave, if you want to call it that, a special type of Federal enclave that is given recognition as having special sets of laws apply. And it may not necessarily please everybody that that is the case, but it certainly has been the interpretation of the Supreme Court of the United States, and it has certainly been the policy of the Congress, and it has certainly been the policy of numerous administrations for as long as I can remember in my relatively young life.

So it makes a good point to discuss and debate, but I think as a fact of law today, citizenship is very much recognized, but there are a special set of laws that apply to it.

CHAIRMAN PENDLETON. I am a little fascinated by some parts of your written statement.

Commissioner Allen and I were talking the other day by phone, and the more I listen to the discussion of BIA, I am intrigued by the notion that there is great similarity between the BIA, if you will, and the Freedmen's Bureau, and the need for predominantly Anglo government to protect the rights of its citizens.

In *U.S. v. Kagama* in 1886, there was some discussion that the reason why we did a lot of these things was the Indian tribes needed the protection of the United States Government to protect them from hostile non-Indians. There was some need to have this intervention with the Freedmen's Bureau to counteract the black codes that we had after the Civil War. There is great difference as these things begin to operate.

But I guess what I'm getting at is there seems to be this great language that we are going to protect the rights of all our people, but in many cases we do not protect the people's right to freedom. And in some cases what we have here in this situation with the ICRA is a body of language put together, but the way it operates it inhibits people's freedom even on the reservation. Today they have more freedom off the reservation than they have on. That could be a question mark.

How do you feel about that? Are these things really protecting or are they inhibiting the rights of people?

MR. ICKES. They are doing nothing at all. They are doing nothing at all because there is no enforcement mechanism as a part of the statute. Personally, I thought it was there. The Supreme Court interpreted it to that effect, and therefore I accepted the Supreme Court's ruling. My suggestion to you is that that must be overcome by a meaningful enforcement mechanism.

And I would say, in addition to that, that I would hope that would be done in the context of recognizing tribal sovereignty, of strengthening and enhancing tribal sovereignty and tribal government to be able to do that; but that they be compelled to do that, that is no longer left to their absolute discretion as to whether or not they are going to do that. And I can cite example after example where the discretion is emphasized in favor of the tribe.

CHAIRMAN PENDLETON. My only comment before turning to counsel is I find great dissimilarity in the rush, Commissioner Allen, for Congress to overturn the Supreme Court's decision in *Grove City*, and the nonrush to overturn *Martinez* as it begins to protect the rights of people and institutions. I think in the case of *Grove City*, institutional rights were to be protected, and the right to be able to decide that institution's future devoid of Federal funds.

Here we have this tremendous influx of Federal dollars going to reservations, if you will, but there is no rush to make those dollars work. But in *Grove City* legislation there is a rush to say, "If you take our money, you need to take all these Federal regulations along with it."

In this case the money just pours, and there is nothing on which you have to sign off assurances or do anything. And I find that, if you will, for lack of some other term, a great congressional inconsistency but not the only congressional inconsistency this country faces.

MR. ICKES. And there are explanations for that. They are not good ones, but there are explanations. Part of it can be attributed to the fact that there is a general level of poverty on many reservations and there is no ability to organize and to fight against that kind of situation.

There is also a general perception that you can't beat city hall, that all power resides in the tribal council, and if you go up against the tribal council, you have no power except that which was given to you by city hall.

There has been no general encouragement by tribes to do that, and there is no recourse outside the tribal system. There has been a diminishment of public funding of public legal defender type services which in the past had done that kind of thing, and also a general reluctance on their part to do that.

There is a lack of understanding by our Congress, by the Senators and Congressmen from the large States, where political power does reside. And they don't relate to it. We might relate to it out here in Utah; we might relate to it in South Dakota and Montana and Arizona and New Mexico and so on, but we can't relate to it in New York or California so much or to Florida or Texas where there are no issues affecting those particular persons.

And I think there is a perception by Congress that tribes represent the people, and therefore when the tribes come in to interact with the

Congress, they represent the people. And they do. But when there is no reserved sovereignty in individuals in the same way—and I refer again to the 10th amendment where U.S. citizens—Indian, non-Indian, or whatever—have retained sovereignty vis-a-vis the Federal Government and vis-a-vis the States, then you have power. But in the reservation context, the people have not retained power except for the power to vote for the tribal council, and that has not resulted in a reciprocal flow of rights back to the individuals.

CHAIRMAN PENDLETON. As I move to counsel, I just want to thank you, Mr. Ickes, for that outstanding testimony you gave us in Flagstaff. Do not think because there were not a lot of questions that that was not very powerful testimony. I think you should be resigned to the fact that what you presented was voluminous and complete enough that there weren't a lot of questions one needed to ask. So I want to thank you now for that testimony. It opened up a lot of avenues of interest to us.

MR. ICKES. Thank you.

MR. MILLER. Mr. Ickes, how did the *Martinez* decision change the role of the Department of the Interior?

MR. ICKES. Well, let me give you a little history here. From 1973 to approximately 1978, there was an Office of Indian Rights in the Department of Justice of which I was a Deputy Director and later the Director. It was perceived in the executive branch that that particular office in Justice would be responsible for enforcing the Indian Civil Rights Act, and I think there was a recognition on the other side of town, over there at the Department of the Interior, that they would be responsible for strengthening tribal governments and so on, and through the government-to-government relationships, etc.

However, since the *Martinez* decision, the enforcement arm of the executive branch has been in essence wiped out. The continued tribal advocacy and the strengthening process continued to go on. Tribes continued to be strengthened, supported, and maintained, but the rights of individuals lost a voice, and as a result there has not been any meaningful activity.

As I heard the testimony this morning, I would comment that there really hasn't been any contracts negated as a result of the lack of enforcement of the Indian Civil Rights Act. I was very curious to hear, on the one hand, testimony that the Red Lake contract was renewed but in the context of knowing that there had been a long history of violations.

I've had a long history as well in the civil rights area where I was involved in civil rights outside of the Indian context in the various States of this nation, and that certainly wouldn't have worked outside the Indian context anyway.

But there has not been any enforcement activity. There have been no contracts negated as a result of it, and in the review process for the IRA

tribes of ordinances and constitutional amendments and so on, there have been none that have been rejected because they violated any bill of rights. There has not been an effective means of doing it.

And I think probably Mr. Swimmer is correct to say that there has been no mechanism. This government has no mechanism and this people of individuals has no mechanism to protect those rights.

MR. HOWARD. Mr. Ickes, you mentioned you were Director of the Office of Indian Rights at the Department of Justice. When was that? In 1978?

MR. ICKES. No, 1973 through 1976.

MR. HOWARD. So you weren't at the Department of Justice at the time of *Martinez*?

MR. ICKES. I was not. I'll tell you where I was. I was in the Ninth Circuit Court of Appeals in San Francisco arguing a case of that circuit about Patrick Stands Over the Bull out of Montana who was Chairman of the Crow Tribe, dragged before the entire membership of the Crow Tribe and stripped of his position as tribal Chairman without notice, without due process in our opinion. And I was down arguing the violation of the Indian Bill of Rights when the *Martinez* case came down. So I remember very vividly where I was in 1978.

CHAIRMAN PENDLETON. Will you tell us more about that? I'm interested. I think we have all read about that case. What did that do to your case when it came down in the middle of your—

MR. ICKES. That terminated any potential for redress in the Federal courts.

MR. HOWARD. How many cases were terminated?

MR. ICKES. It would be a wild guess on my part. I assume there were a large number in the system. I think if you'd review *Federal Reporters* for the courts of appeal, you'll find many of them dismissed as a result of immediately moving to dismiss for lack of jurisdiction. Obviously, a large number of those in process—well, all of those in process were terminated.

I had a case in Arizona with the Hualapai Tribe in which the tribal Chairman and vice chairman had been stripped of their powers by the tribal council right after *Martinez*, and I thought I had a unique theory that perhaps would have distinguished *Martinez*, but the court held as a flat edict that there was no jurisdiction under any circumstance in Federal courts to hear matters involving the Indian Bill of Rights. And that was after I exhausted tribal remedies and had gone through the entire tribal system.

There is no predictable method for preserving the rights of anybody.

I'd like to add one more point, and that is we are not just talking here about members of tribes. We are talking about all persons who come within the jurisdiction of Indian tribes. The Indian Bill of Rights specifies any person who comes within the jurisdiction of a tribe, of having any

assurance whatsoever of receiving the benefits of Federal statutes because it's left to the total discretion of the tribal council whether there are any rights.

MR. HOWARD. An argument sometimes made is that the Federal courts pre-*Martinez* were not sensitive to tribal traditions and culture? Could you tell us a little bit about some of the decisions rendered while you were at the Office of Civil Rights at DOJ [Department of Justice]?

MR. ICKES. Well, it's a little hard to be very specific. I think that is a legitimate concern by tribes of that, that there is not a sensitivity to it. It's been my experience—and I have probably the unique situation here of having looked at this problem from every angle, from the individual's side, from the tribe's side, from the Federal Government's side, from the State's side. Whichever way you look at it, it comes down to whether it's fair. And I would say there were situations where the Federal courts just did not have an appreciation or understanding of the reservation situation, for tribal governments or relationships between tribes and their members and so on.

So I would think any solution needs to be sensitive to the unique nature of tribes and of their people, but I sure am unable to really specify any circumstance that I recall with any particularity to be of help to you in your question.

MR. MILLER. Mr. Ickes, a minute ago you mentioned that there is no predictable enforcement of Indian civil rights on the reservations. But before that you said that many tribes had a very good system. Isn't it unfair to categorize all the tribes?

MR. ICKES. Absolutely. I think it's very unfair to categorize all the tribes in the same lump. I think there has to be a distinction made. But I think the point is that as a general circumstance, even those tribes that have an excellent record in civil rights, there is still total discretion. I don't think any other system in the United States would stand for the proposition that if the state in its discretion wants to extend the right to vote or equal protection or due process and they have a long history of doing so, but they nonetheless retain the right to withdraw it at any time, you have much comfort in that. I think it requires Congress to extend it and to provide a meaningful means for enforcing it. And for those tribes who have done an excellent job of doing it, they will go on doing it. Those who don't will have to do it.

I don't think there is any way for Congress to legislate that Tribes A, B, and C have a special piece of legislation that enforces the statutes but that Tribes X, Y, and Z don't because they're doing all right, and next year there's a new tribal election and X, Y, and Z may not be doing so well. That's just not the way to approach the problem. The solution is to make it a uniform application and require it to be enforced and to provide a meaningful means for doing so.

MR. MILLER. A minute ago we were talking about the role of the BIA and how *Martinez* affected that role by adding another aspect, that is, enforcement of individual rights. Do you think it was really fair of the Supreme Court to put in that footnote 22 and to add that extra responsibility?

MR. ICKES. Well, I don't think there was an added responsibility. The responsibility was there. I think what the Supreme Court was doing was to acknowledge that responsibility existed and was pointing out that there exists a method for enforcement, and as a practical matter the Bureau has not done so.

Again, I think it is perceived by the Bureau that their mission is to further the tribe's powers, and that it has not made any kind of priority for seriously enforcing the individual rights that are intended to be protected by the Indian Bill of Rights.

MR. MILLER. I guess what I'm asking is: does it make sense that the Bureau has both responsibilities?

MR. ICKES. Both responsibilities? Yes. When I say "yes," I want to qualify it by saying that the Bureau has limited ability to do that, but under statute or under regulation. The testimony is that approximately half the tribes are IRA tribes, and the other half are not. So non-IRA tribes don't even subject themselves to review by the Secretary, and therefore their acts can't even be reviewed. That leaves only the contract situation, whether 638 or otherwise, in which they may review some act of the tribal council. But even in that situation they have not done anything of a significant nature to further civil rights, in my opinion.

MR. MILLER. If you could draft new legislation, would you keep both of those responsibilities in the Bureau?

MR. ICKES. Well, I think new legislation should focus on a couple of things, one of them being to strengthen tribal governments through the strengthening of the justice system, whether it's the courts or law enforcement or whatever, and it's by financing.

Unfortunately, civil rights on reservations is a luxury, and it's a luxury because there has not been Congress backing up the '68 act with any meaningful appropriations to extend it. And so I think any legislation has to include that. It is not reasonable for anyone to expect a tribe to divert its energies and its financial resources from survival, in many cases housing and the essential need for keeping a roof over your head and food in your mouth, to a civil rights issue. If I were given that choice, I would go with the food and the housing and so on and so forth. And that is basically what the tribes have done. They do not have the luxury of extending civil rights to their members even if they want to in those instances, because there has not been the appropriation available to do the job and do it right.

In our Federal system, we have that so-called luxury in the sense that Congress has been very generous in whatever the courts need to operate,

to give right of counsel, and whatever else is afforded to them. In the State context, it is mandated as well. It is almost an entitlement. However, in the reservation context, there is no entitlement from the tribe, and there is no entitlement given in essence by the Congress. So it's a luxury that cannot be afforded unless Congress does it for them.

MR. MILLER. I have no further questions.

MR. HOWARD. Just one question. You mentioned that some tribal governments have excellent support systems, yet you are concerned about those systems as well because there are potential systemic problems mentioned by Chairman Pendleton in his opening remarks.

Could you describe those excellent systems? What tribes are we talking about, and do they have the systemic problems Chairman Pendleton was referring to?

MR. ICKES. I hesitate to give an exclusive list. I'd like to refer to the Colorado River for two reasons. One is that I am familiar with it; secondly, they are here in this room—or were this morning, at least. But I think they have taken it seriously, and I think they are an example of where they have used their own resources to try and do that.

Also bear in mind that they have been endowed, so to speak, with resources by which they could do that. But you take a small tribe, like Cocopah, or you take a small tribe, rancheria in California or a small tribe in the State of Washington or a small tribe anywhere, or even a large tribe that might be quite poor in their abilities to provide these kinds of—call it luxury. Through no fault of their own in some instances—they may want to do it, but where is the money?

So I'm not here to condemn tribes as institutions. I'm here to say that there is not the means to keep them in a proper balanced relationship with their own tribal members or in balance with persons who are there as their guests or who live there. I refer, for example, to my own State of Utah on the Ute Reservation where the ratio of nonmembers to members is eight to one. And we have a situation where many non-Indians don't have the protection of the United States Constitution or the State constitution and are dependent totally, or for the most part at least, upon tribal councils' willingness to extend those rights to them.

CHAIRMAN PENDLETON. That gets back to Commissioner Allen's point earlier.

MR. HOWARD. You had testified about that at Flagstaff, and you are here today wearing your hat as a former BIA or Department of Interior official. But I wonder if there had been any developments with respect to that issue.

MR. ICKES. Well, the only development in that regard has been that it's still status quo. The tribal boundaries still incorporate a very large area, a ratio of eight-to-one nonmembers, a lot of uncertainty. I think there is a desire by both parties to try to get something worked out, but it's still

going to take an act of Congress in order to make it effective for any period of time at all.

So that condition exists. That condition exists in other parts of the Nation. So I think it is important for this Commission to be aware that we're not just talking about Indian persons or tribal members; we're talking about all persons who come within the boundaries of the reservation.

It is in the tribes' best interest, and it's not politically popular among the tribes, but I think when it is analyzed and it is seen as Federal dollars diminish to support tribal governments and to support their programs, there is going to be a greater dependence on outside help through private enterprise or whatever. One of the critical preconditions for outside persons to come in with enterprise is whether or not there is a fair set of laws in place. And I think this will enhance tribal ability to attract economic development by having the Indian Bill of Rights be effective to assure people who do business there that they do have a remedy.

I can speak to you from personal experience from another thing I have done. I was representing a business in relations with tribes, and that is a concern to business, to subject themselves to some of these things without there being rights attached to them.

COMMISSIONER ALLEN. Mr. Chairman, I'd like to make a brief observation and then ask a question to which there can be only a formal response. I realize time is very precious now.

My observation is that I conclude from much of what Mr. Ickes has said that in his opinion there is a conflict of interest, at least metaphorically if not actually, at the BIA which goes a long way to explain some of the difficulties in our expecting the BIA to be an enforcement agency for the ICRA. That is, as I interpret both his written and oral testimony, that question has been raised.

The question I have, after that observation but not related to it, stems from the fact that I have heard many people talk about the ICRA in terms of some prospective change by Congress. And also I have heard them talk about the status of the law as a result of *Martinez* and other decisions and practices turning around that, including Indian tribes, referring to the decision as having somehow invested them with a certain kind of authority with respect to civil rights.

Everyone has asked so far for a reformulation of the law or new laws. I want to ask the question, to which a formal answer will suffice for the moment, whether Mr. Ickes has given any thought at all to, simply, the repeal of the ICRA, that is, insofar as the Court's opinion seems to turn ICRA into a rather positive statement about the relationship between the Indian tribes and constitutional rights, would it possibly be effective to get the law back on ground one and give us a chance to start over simply to advocate the repeal of ICRA?

MR. ICKES. Well, I don't know about a repeal. You might want to start from the ground and then build a whole new law.

COMMISSIONER ALLEN. I wanted to ask if you had ever thought about that as a possibility. That's why I only wanted a formal response.

MR. ICKES. Okay.

COMMISSIONER ALLEN. Have you ever thought about merely repealing ICRA?

MR. ICKES. Not if it would not be replaced by something that extended rights. If you were saying to repeal it and replace it with nothing, I think it would be a terrible mistake.

CHAIRMAN PENDLETON. What's the difference?

MR. ICKES. I know what you're saying. It's not enforced or there is no means to enforce it, but at least it makes a statement.

COMMISSIONER ALLEN. I believe, Mr. Ickes, you have made some arguments in voting rights in other cases which stand on the grounds of the Constitution. And I believe the present interpretation of ICRA closes the door to some of those constitutional interpretations you have used before, and presumably, therefore, repeal of ICRA will open those doors, theoretically if not actually.

MR. ICKES. I do not think so. I think because of the unique nature of Indian tribes, courts will continue to interpret the absence of that act as being that Congress has withdrawn totally from interfering with tribal relationships with their own members. It will not take the 13th or the 14th or the 15th amendments or the United States Constitution and supplant it for it.

COMMISSIONER ALLEN. Mr. Chairman, I think that describes our problem very well.

CHAIRMAN PENDLETON. Commissioner Allen, without any elucidation, you are absolutely right, in my opinion.

Mr. Ickes, thank you very much for your testimony.

MR. ICKES. Thank you.

CHAIRMAN PENDLETON. We will now have Mr. Lutz and Mr. Arnold. [William L. Lutz and Jerome G. Arnold were sworn.]

TESTIMONY OF WILLIAM L. LUTZ, UNITED STATES ATTORNEY, NEW MEXICO, AND JEROME G. ARNOLD, UNITED STATES ATTORNEY, MINNESOTA

CHAIRMAN PENDLETON. Do you gentlemen have statements you'd like to make to us before we begin to have some discussion?

MR. LUTZ. Mr. Chairman, I submitted a written statement.

CHAIRMAN PENDLETON. Would you like to summarize it?

MR. LUTZ. With the time limitations, if it's agreeable with you, I'd be agreeable to submitting that without summarizing it as such. I would state

that those are my personal opinions and positions. They are not formal positions of the Department of Justice.

CHAIRMAN PENDLETON. I understand.

Your statement will be included in the record.

[The document was entered into the record as exhibit no. 8.]

CHAIRMAN PENDLETON. And you, Mr. Arnold, do you want to make an opening statement?

MR. ARNOLD. Perhaps I can just make a few comments. Because I was just contacted yesterday with reference to appearing before the Commission, I have not had an opportunity to prepare something in writing. I did send to your counsel numerous documents as backup material on the Red Lake situation in Minnesota. To the extent that those documents would be available on a Freedom of Information Act request, perhaps I and counsel can go over those and you can put those in the record later. There are some documents that weren't well screened, and they were really provided for counsel as background information.

CHAIRMAN PENDLETON. This Commission takes those as you have described them, and until you and counsel can have some discussion they are considered to be, if you will, attorney-client privileged documents.

MR. ARNOLD. Thank you.

In reference to the situation on Red Lake in Minnesota, and for that matter the reservations as a whole in Minnesota, the right-to-counsel issue, which is well documented, or the denial of such on the Red Lake Tribes, in my opinion is not really the most egregious conduct that occurs on the Indian reservations, even though fundamentally the denial of the right to counsel is very important.

You have heard here today, just in the short period of time I've been here, different statements made by different individuals in this area. Everyone has a varying opinion as to what the law is, the status of it, what might be accomplished. And let me say, as Mr. Lutz did, that my opinions are my own, and to the extent they vary from Department of Justice policy, they are mine.

Much has been said by Commissioner Allen about the right of citizenship, and I think the last speaker here really hit down to it, that really what we are talking about is not citizenship rights; we are really talking about geography.

There are certain areas in this country, most of them remote, where there are no constitutional rights for people, whether they be white, black, Indian. They are geographically located. They are called Indian reservations. In all of the rest of the country we have documents or we have constitutions; we have protection of minorities against the majority.

On Indian reservations the majority—and I will assume that in most cases the tribal government is the majority—have, in the areas where I have watched, very little respect even for very fundamental rights of the

people who traverse that geographical area. Most of these areas are impoverished. They are high unemployment areas. So if you are on what I call the insiders, you have employment, you have friends, you are treated well. You have food on the table; you have housing. If you are what I call the outsiders or the minority, things vary. They vary drastically. There is a double standard—and it varies. It may be the basic tenet of being free from harassment by law enforcement officers.

The suggestion this morning by someone that if you didn't like the Indian reservation you could leave, to me that is horrendous. It is the type of thing wherein if in Minnesota we decided to deny everyone constitutional rights, they could move over to Wisconsin. And I suppose that I, as a lawyer, could do such, but most of these people have grown up in that area. They are impoverished. They have no ability to move, nor should they have to.

Now, in terms of what is available, you have been furnished with information to the effect that the U.S. attorney's office pushed the Department of the Interior or the Bureau of Indian Affairs and the local Bureau of Indian Affairs office very hard to have included in the contract that was let for tribal court services on the Red Lake Indian Reservation, that is now going to the tribe, language appropriate to the enforcement of the Indian Civil Rights Act.

We were prepared, and still are prepared, to litigate that in the Federal courts if the tribe doesn't agree to it and somehow says, "We are entitled to those funds, and you must give them to us without that language." I, my staff, and certain Department of the Interior lawyers are of the opinion that we would win in the district court and the circuit court.

I do not accept that there aren't means available right now to enforce some of these basic tenets, especially wherein the tribe wants to have the money to carry out these contracts. I don't know why we expect any less of tribal governments than we would of State governments.

Just last year, how many States did not like it when the Federal Government passed a statute—I guess it's 2 years now—that said if you want highway funds, you must raise your drinking age to 21. There were a number of challenges in the courts, and they might still be there. But it was a precondition of funds.

There is nothing in the Indian legislation as we have researched it—and we are prepared to litigate it—that suggests that these conditions, especially given a track record of violations of civil rights, that we would not win, I don't think.

Now, the BIA—what is its relationship? I think everyone here knows that in fact they are there; they are responsive to tribal governments or attempt to be responsive to tribal governments. But that is not the end of their responsibility. To me that's like if you have a corrupt labor union, the corrupt labor union comes to the Secretary of Labor and says, "You must

keep us in office because we are the labor union officials." Certainly, the responsibility goes above that.

The Bureau of Indian Affairs has attempted to strengthen tribal government. Certainly, that is a great goal. But those who have been strengthened—and there's been some mention of some people from the Colorado River Tribe being here—those people have no difficulty in giving basic civil rights to their people.

Talk about funding here or about the right of counsel. Well, the right of counsel, even to many non-Indians, is not available in all courts. Sure, it is if you're going to be incarcerated, but that is of relatively recent vintage. First of all you had a right to counsel in a capital case, and then a felony, and it kind of got down to a misdemeanor. It's not too far away from having the right to counsel now if they're going to take your driver's license away and you can't afford it.

But that is of relatively recent vintage. These aren't the rights we're talking about. And we're going to be seeing in the contract areas the contracting out of law enforcement services.

Put yourself on an Indian reservation with high unemployment. The person who gets that job is directly responsive to the tribal council or the Chairman. If he does not do what that tribal council wants him to do, he is inflicted with what I call economic capital punishment. He loses his livelihood and everything. I can't think of a greater control that you can have over someone. Even the CFR courts, as they are administered by the BIA, the CFR employees, must get along with local tribal governments because what happens if they don't? You don't get economic capital punishment, but you do get some economic punishment. You are transferred.

What kind of system is that? What kind of system is it where the United States Government transfers an employee because it won't go along with trampling some citizen's rights?

And I have got to say that in our State the Red Lake tribal Chairman, Chairman Jourdain, is a very vocal leader, very aggressive leader. And that's not all bad, you know, and I don't think, as I sit here today, that I see any evil purpose in where he is headed. He is strong on tribal autonomy. And because of the strength of tribal autonomy, he resists any attempts from the outside, by the Federal Government or elsewhere, to infringe on that sovereignty. He feels that any attempt to put conditions, as other bands and tribes do, or waive tribal sovereignty, somehow they lose autonomy. But it is indeed necessary; it can be done.

I am prepared to answer any questions that you might have, but before you ask me questions, you might go to Mr. Lutz in Arizona, and maybe he can follow up on some of the contract things. I would venture to say that the State of Minnesota is not alone where we are. We have only one large closed reservation.

South Dakota, for example, has several—Pine Ridge, Rosebud, Yankton. I spent a year out there as a law clerk immediately after law school and was first exposed to the system in South Dakota. Minnesota's is a lot less complicated. Basically, our tribes with the reservations, with the exception of Red Lake and Boys Fork, are all 280 reservations. We don't have all of the problems that are mentioned in Utah, etc. We are without a lot of those problems. But we still have the basic problem of the fact that the people who control the employees really have them at risk as to their entire livelihood.

CHAIRMAN PENDLETON. Do you want to discuss the golden rule, Mr. Lutz, he who has the gold makes the rules?

MR. LUTZ. You know, I think one of the things—I think it's been brought out here—is that in dealing with tribal governments, you are dealing with very diverse groups of individuals, sometimes diverse cultures. In New Mexico we have two Apache Tribes. We have part of the Navajo Tribe. We have a number of pueblos. Even among the pueblos there is great diversity.

You also deal with large differences in sizes. I think the most serious problems that you see really come into play when there is a dispute between an individual citizen of the tribe versus tribal government. I think that is where there are problems in securing redress in the system right now, when you run into those types of things, or when the tribe determines it will not give a service or a right as a matter of course. And right now I think the individual Indian is in a situation, although he has been declared by Congress to be a citizen of this country—there are many rights that are due any other citizen in this country that, frankly, are not given to Indian citizens.

You have many tribes that very carefully observe those rights, but you have others that don't. And I think that's where the serious concern comes in, that it's left to the discretion of the tribe at this point.

My feeling is: why should these people be treated as a separate class from any other citizen? I think any citizen of this country ought to have certain basic rights, and when you talk about what's in the Indian Civil Rights Act, those are the rights you're talking about—fairly basic procedural rights, fairly basic rights of association, rights of freedom of religion and speech, and those kinds of things.

I think this is a serious problem, and I think there ought to be remedies. I do think in looking at remedies you should first give the local community and the local Indian tribe the opportunity to arrive at the remedy. I think if they are given the opportunity to arrive at the remedy, it will be more effective, because sometimes when you have remedies crammed down people's throats, you may have it on paper but in practicality it may not be put into effect as you'd like it. You almost need a two-step procedure.

First, allow the tribes to implement the Indian Civil Rights Act, and if they don't, then have some other means in which these rights can be given.

CHAIRMAN PENDLETON. Counsel.

MR. MILLER. Mr. Lutz, we'll begin with you.

In your opening statement you mentioned a number of particular cases. You didn't mention, I think, two cases that I happen to know about. One was the [name deleted] case, and the other was the recent incident up at [name deleted] pueblo?

MR. LUTZ. Probably [name deleted], I think. I'm thinking of the case of [name deleted].

Basically when we were looking at this, we realized the time would be limited, and we were kind of picking and choosing examples, and we knew we'd given you other examples.

The recent one at [name deleted] which, frankly, was just within the last couple of months, actually involves actions by the Bureau of Indian Affairs Social Services in tribal court. A question arose as to whether a small child was being molested, and Social Services made a determination that they should seek to remove the child from its present location to protect him from sexual molestations. They proceeded in tribal court, which was the only place that action could be brought.

Near the commencement of the hearing, the tribal judge inquired of Bureau of Indian Affairs personnel if the Governor or Lieutenant Governor of the pueblo had been notified. They were informed that they didn't feel that was necessary. It was a court proceeding that was recognized by law, and they felt it was a matter to be determined in court.

The tribal judge indicated that there was basic disagreement on that issue, adjourned the hearing, and got the Governor and Lieutenant Governor notified. They came in and said at that point in time they didn't need a hearing. The hearing was cancelled. No action was taken.

CHAIRMAN PENDLETON. You mean summarily the hearing was cancelled?

MR. LUTZ. Yes. They were in the middle of the hearing, and all of a sudden they said, "We aren't going to have it."

CHAIRMAN PENDLETON. There was no council action? This was done almost by fiat?

MR. LUTZ. Yes. Subsequent to that time, we have, through negotiation, gotten them to agree to hold a hearing on the issue. What the outcome is, whether we're successful or not, that's not the issue. We just felt there ought to be a hearing, a fair determination of it.

I think that just points out the problem, that there is great power in the tribal council, the tribal Governor in many pueblos of New Mexico, and the judge is not independent of them. I think that is a serious problem. Now, whether the Bureau of Indian Affairs was entitled to win on the merits is, of course, another matter.

But in looking at it, we felt that we might possibly have a remedy in Federal court, but it was very tenuous under the *Martinez* case. That's how the Bureau of Indian Affairs contacted our office initially. Certainly, it would have been a very hard case. So that's why we sat down and talked to them and said, "Look, all we're arguing about here is the right to a hearing. Just give us a hearing, and you can make a decision on what you feel the correct facts are."

MR. MILLER. The Bureau went to you and asked you to bring suit in Federal court?

MR. LUTZ. Yes. Of course, we talked to the Department, talked about many of these issues that I think you have been exploring in these hearings, the problems of enforcement of the Civil Rights Act with due process with the tribal court, even where the United States Government is involved in some cases.

MR. MILLER. I believe there was another complaint filed in your office regarding [name deleted].

MR. LUTZ. Which pueblo is that? I have a blank on the name here right now.

MR. MILLER. It was the one involving the whipping.

MR. LUTZ. Oh, that's in [name deleted].

Basically, he was brought before a tribal body acting as a semicourt, traditional council-type operation, charged with criminal violation. With little or no notice or hearing, he was summarily punished, ordered to be whipped, and ordered to be imprisoned for 30 days. The pueblo in question had no formal jail facility, so in effect his imprisonment was in a room with an adobe floor.

The interesting thing about [name deleted] was he was more concerned about the imprisonment than the whipping, while we probably had more concern about the whipping, and also the conditions of the prison.

Again, there was a situation where basically there was no redress for any claimed violation of his civil rights in the manner his violation was adjudicated and in the manner of punishment.

MR. MILLER. Do you remember what the underlying event was that caused the charge to be brought?

MR. LUTZ. I'm trying to remember. Frankly, I have a mental blank on it right now. It's been about 8 or 9 years ago that this occurred.

MR. MILLER. Wasn't it the way he talked to a religious leader?

MR. LUTZ. I honestly can't remember. That is not an uncommon thread in many of our problems of civil rights, that it starts with what they perceive as inappropriate conduct or speech.

MR. MILLER. I was going to ask you some more questions on that particular case, but I think that's all I need to ask you now since time is short.

MR. HOWARD. Mr. Arnold, you were here this morning for the testimony, were you?

MR. ARNOLD. For about the last half hour and then about 15 minutes before that.

MR. HOWARD. We raised the issue of the ICRA language that could have been included in the contract for judicial services.

MR. ARNOLD. I think I came in right after you had raised that issue.

MR. HOWARD. Secretary Swimmer's response was that the contract already included boilerplate language which stated basically that the tribe must comply with applicable Federal law; that would be sufficient; there is no need to add the ICRA language. How would you respond to that?

MR. ARNOLD. Assuming he's accurate, legalese has never bothered anybody in adding something additional. It's kind of like when we charge someone, "he knowingly, willfully, and wantonly." Assuming he is correct, there was nothing wrong with adding the language that we asked for. I suspect that that is just reasoning to not add the language as opposed to the fact that it is sufficient. We don't feel it's sufficient. Frankly, neither did the Department of the Interior Solicitor's Office.

This was a joint request for inserting this language so that we had something to enforce it with, and I believe the failure to do so has seriously shortened any possibility of using that as an enforcement tool, assuming ongoing violations.

MR. HOWARD. But it's clear in *Martinez* that the ICRA is applicable Federal law. I agree that the ICRA language should have been added to that contractual provision, but given it wasn't, you could still pursue an action in the Federal district court. You were contemplating doing that with the ICRA language.

MR. ARNOLD. The question is—we are really not talking about an enforcement provision per se. We're talking about a cancellation provision. In other words, we're going at it where it hurts, with money.

MR. HOWARD. I understand.

MR. ARNOLD. I can get a lot of things accomplished by not giving people money. In other words, if I've got \$308 million, which is what I think the Federal Government will give to Indian allotments this year under the Entitlement Act, believe me, I can do a lot with that in terms of contractual language, language that would be agreeable both to the tribal governments and to the Federal attorneys.

CHAIRMAN PENDLETON. Mr. Arnold, I have had some experience with Federal programs going to communities, and I can recall when an Assistant Secretary at HUD, and I think at the time Mr. Carlucci when he ran OEO, decided on an airplane one day what citizen participation would be in terms of control for the OEO in the Model Cities program. There was this big cry for community control of the dollars. And they got right

to the door and wrote some shaky language, and there was always a protest over the use of those dollars.

But I can tell you, if one dollar was spent wrong, Federal auditors and local auditors and local government auditors would descend on whatever that activity was, close up doors, take back money, institute judicial proceedings, and so forth. That has not happened in this case, as you indicate.

MR. ARNOLD. That policy hasn't changed, either. We still do that.

CHAIRMAN PENDLETON. So we have two kinds of policies. We have one where American citizens, if you will, in a sense to differentiate, are descended upon for the use of these dollars. Yet, in another way we're saying for some other people, who also have American citizenship, "Let them take this money and do what they please with it."

And in those contracts with third-party contractors, if you will, even with local government under block grant programs, there is always the proviso you have to sign off on certain kinds of assurances, and those assurances are listed, at least by name and by title. In the block grant program you can sign up on assurances for civil rights, and assurances for this and assurances for that, affidavits that you're going to do all these good things, and you can be held liable for them if you don't.

It seems we haven't got those kinds of provisions in what we're talking about in the 638 payments to tribal governments. I share your outrage and wish there was something that could be done about it. But we can only hope that as Congress begins to work through whatever it wants to do to amend self-determination, we might be able to have some impact. I doubt if we will, but at least the record will be there for others to use.

I guess what I want to ask you: if the situation at Red Lake continues the way it is right now, what would you propose to BIA? You have already made a petition to have certain things done. It seems like your hands are tied. What would you further suggest for remedy?

MR. ARNOLD. First of all, since October of '86, there has been some improvement on Red Lake.

CHAIRMAN PENDLETON. Good.

MR. ARNOLD. I'm talking about the right to counsel. As a result of some discussions between myself and Chairman Jourdain, in fact, the tribal council amended its ordinance in terms of representation and allowed that on an ad hoc basis lawyers admitted to practice before the Supreme Court of Minnesota could practice in the tribal courts by the payment of a fee, and I think that was about it, and you wouldn't have to speak through an Ojibwa or reside on the reservation, which are the requirements of their bar.

Things seemed to be proceeding fairly well, but about that same time there was a lawsuit moving through the Federal courts dealing with whose records the CFR court's records were. And just about that time, after the

tribal council had passed it and Chairman Jourdain had received it and it was awaiting his signature, the court held that these tribal court records were Federal property, and it went into a drawer and hasn't been seen since.

But as a result of that discussion and some other discussions with the superintendent, Earl Barlow, there has been an improvement in the court system. We have offered training to their prosecutors, to their judges. They are now holding jury trials.

The question of right to counsel within the sense of those habeases hasn't come up since that time. And Mr. Barlow in the superintendent's office states that they will be allowed to practice in the CFR court. I think that's one of the things that has moved the tribe now to say that they are taking over the court system.

But there has been some improvement. In the sense, if we step back away from the rule of law, the improvements that have been made over the last year and a half or so, then if we step back to where it was—and when I say improvements in the rule of law, you have to have in mind that I think in the first 6 or 8 months of '86 we had about one homicide a month on that reservation. Since about October of '86, we have had some increase in law enforcement. There has been a little more evenhandedness. There's been a crackdown on the illegal use of alcohol and marijuana. And, frankly, we've gone, since July of '86, without a homicide on the reservation.

Have in mind that our homicides on that reservation are somewhat classical in the sense that you have an individual, an Indian, who absorbs too much or is under the influence of a mood-altering drug, usually alcohol or marijuana, who picks up the nearest available weapon, whether it be a pitchfork, a rifle, a knife, 2 by 4, and nails the nearest available person, usually a relative, girlfriend, boyfriend, associate, for no apparent reason.

But in answer, if things flow back and if it gets worse, I guess we will be in the situation of instituting a criminal civil rights investigation. That's about the only lever we have left.

MR. MILLER. Mr. Arnold, I have a quick followup question. You mentioned the change in the right to counsel. Do you know of any criminal proceeding at Red Lake where counsel has been allowed in to represent that defendant since that time?

MR. ARNOLD. No, I know of no one who has gone up to Mr. Barlow, the superintendent, and said, "Look, I want to go into the Red Lake Tribal Court and you said that we would be allowed there." I know of no one who has made that request.

I can say that the tribal court does have an advocate available for defendants charged. It's what we call lay advocate. But that advocate is available in the proceedings in tribal court.

MR. MILLER. Mr. Chairman, I hate to interrupt, but when I said we had no further questions, I was only referring to Mr. Lutz. May we proceed?

CHAIRMAN PENDLETON. I am advised, counsel.

MR. MILLER. Thank you, Mr. Chairman. Susan Muskett has some questions.

MS. MUSKETT. Mr. Arnold, at this time is the legal counsel that is available to the average Indian such that the average Indian is aware of his rights under the ICRA, including his right to Federal court review in habeas corpus actions?

MR. ARNOLD. Well, when you say a right to review of Federal habeas corpus, about the only people who are aware of that in the entire system are those who are in prison. I'm talking about both in the State system and outside the State system, unless you've got counsel there. I mean, that doesn't arise until after you are incarcerated.

But to the extent that are people aware that they have a right to counsel, I think, generally speaking, that inside the tribal courts the people would probably say no. Attempts have been made to get counsel, and they don't think about it. I don't think they think one way or the other. I think they know that there are no people on the reservation who speak fluent Ojibwa who are lawyers who are permitted to practice in the courts of Minnesota.

MS. MUSKETT. Do you think the lay advocates have enough expertise to point out to the defendant the different rights that may be violated in the court proceeding?

MR. ARNOLD. I haven't seen them in action. Obviously, they would not do the job that a person trained in the law would do, but they aren't that many years removed from the fact of having judges in the State system that weren't trained in the law, either, and some of them did a very good job. I am just not familiar with that. I would guess that most of the defendants that appear in that tribal court would very much welcome a lawyer alongside them.

I am not trying to be evasive. I just don't know.

CHAIRMAN PENDLETON. I think we heard in Rapid City that there were serious problems with that process. I can appreciate the process of lay advocates and the like to attempt to do things. I guess what it really comes down to is that, although you have access to tribal courts, the separation of powers question gets to be whether or not they could have some relief provided by the court. Whether that relief is available, it seems to us, from what we have heard and read, it is in many cases but not universally [available], so anything could happen. For the most part you don't get the kind of relief you want because there is not that separation of powers.

MS. MUSKETT. How frequently does your office receive complaints regarding the Red Lake court?

MR. ARNOLD. I think most all of the complaints we receive are received in terms of habeas corpus petitions, and I think I have furnished those since

'85. You have to have in mind—and once again I speak for Minnesota where our tribes are Chippewa, and I think we have four small bands of Sioux. These are not complaining people. They learn to live with their system.

Frankly, I think with the exception of these habeas corpus proceedings, these are people, for the most part, that were very much criminal elements moving in and off the reservations. And it's because of their exposure to the State courts of Minnesota or Federal courts in criminal process that they realized they had the rights they did, and they are the ones who would be able to hire lawyers from the outside and bring habeas corpus petitions. The Red Lake Indian Reservation—it's a 5-hour drive from the State capital or the major metropolitan area, the Twin Cities. So to that extent I wouldn't expect a whole lot. I really wouldn't.

I think you see more of them coming through law enforcement. That is, they might complain to the Bureau of Indian Affairs, superintendent of police, or the FBI.

MR. MILLER. Mr. Arnold, I was a bit intrigued about the point you made about going into Federal court to, I guess, withhold funding from the tribe. Would that be under 25 U.S.C 450(m)?

CHAIRMAN PENDLETON. I'm sure you have these numbers in your head. [Laughter.]

MR. ARNOLD. You bet. What I was reviewing was the Solicitor's Office premises. I went through that and I checked some of the case laws they cited, and I believe it to be on sound ground as to—like the Chairman says, run those statutes by you young guys. When you get a little older, you forget some of the numbers.

[Laughter.]

MR. MILLER. What I was asking was: there were other cases trying that, and the Federal court rejected that claim, particularly the Montana case, the *Weatherwax* case.

MR. ARNOLD. I understand that. But having said that, in those cases there wasn't a track record to start with. I'm not disagreeing with those cases, but I'm saying where you have a clear track record, I think you are entitled to put it in, and I think we'd win.

CHAIRMAN PENDLETON. Thank you very much, gentlemen, for appearing before us today. We appreciate the time you took to come to Washington.

MR. LUTZ. One thing I would correct. I had the pueblo wrong in the [name deleted] case. It's [name deleted].

CHAIRMAN PENDLETON. Do you need that [indicating]?

MR. LUTZ. No, sir. We sent off to GSA [General Services Administration] for our file, and they didn't send it back.

CHAIRMAN PENDLETON. Do you want to have that one? We have copies.

MR. LUTZ. Yes, because we don't have it anymore, so that's why I was a little bit rusty on the facts—

MR. MILLER. Would you like to address that particular case again, given that refreshment of your recollection?

MR. LUTZ. Yes. It's obviously been a while since we looked at it, and it does appear that basically the major thing they were concerned about was his actions toward the officials. Alcohol was involved, and there was a public whipping in it, which was his concern.

MR. MILLER. Basically, he was drunk at the time when he made the comment to a religious leader?

MR. LUTZ. Yes, to the tribal officials, and he was dragged before a tribal meeting or meeting of the council.

MR. MILLER. When you say "dragged," is that metaphoric?

MR. LUTZ. Semimetaphorical, but he was given very short notice, which is common in some of these cases where they run afoul.

MR. MILLER. I'm serious when I ask that. When we talked about the whipping, it was a physical whipping, too, wasn't it?

MR. LUTZ. Yes. There he was required to kneel, and they took his shirt off. It was a rather summary-type punishment.

CHAIRMAN PENDLETON. Before you go, Commissioner Destro has a question he would like to ask.

COMMISSIONER DESTRO. I apologize for coming in late, but Mr. Arnold made a comment that I can't resist asking a question about. That is, if you had control over the \$308 million you could really do a lot. I would not quarrel with that for a minute.

The question I have is: how likely do you think, even if you had the authority, you'd be allowed to get away with it? I know the Chairman raised the issue with respect to enforcement of the Civil Rights Act in *Grove City* earlier, but I guess in looking at the record—and it's come up in Commission meetings—you can search the record high and low and find very few instances where the Federal Government ever cut off the change. Do you think even if you had the authority the political powers that be would let you get away with it?

MR. ARNOLD. I think those tribal governments who have no track record of denying civil rights, that their entitlement programs would go forward; that if there were violations of civil rights, they would either be corrected or some action would be taken; and if you document the track record, I think you'd be successful.

CHAIRMAN PENDLETON. Mr. Arnold, just let me say to you that in my 20 years' experience with these kinds of things, I have yet to know where the Federal Government has ever cut off a dime in any program in any area, not just in the area of Indian activities or Indian programs. There is always that threat of language and always the threat of review, and suddenly, because of Mr. Destro's carefully inserted word "political," the

political process says, "No, we're not going to cut this off because of so many problems with it."

MR. ARNOLD. But as you perhaps know from your experience, it is simply the threat and working back through it that improvements can be made. I'm not saying there ought not be amendments to the current Indian statutes. I think there ought to be. I think you have a copy of the Department of Justice letter from John Bolton to Senator Inouye that sets forth some amendments to give redress into the Federal court. I think that's a very important first step, but I think more can be done elsewhere.

CHAIRMAN PENDLETON. We intend to insert that letter of January 26 to Senator Inouye into the record.

[The document was entered into the record as exhibit no. 9.]

CHAIRMAN PENDLETON. Mr. Lutz, do you want to make a comment about that?

MR. LUTZ. I think the problem of withholding funds is that those funds are usually most beneficial to the very people that are the victims.

CHAIRMAN PENDLETON. Right.

MR. LUTZ. And you make them a victim a second time over. My personal opinion would be that there needs to be some other remedy than withholding funds because many of these Indians do suffer from extreme poverty. While maybe not all the money trickles down as it should to them, certainly some of it does.

COMMISSIONER DESTRO. That was actually the reason for my question because if you look at it in the civil rights context, in States like—well, I won't say which States, but certain States have been accused of violating civil rights, for example, in their university, and the alternative to cutting off the money has always been Federal court or departmental intervention in the internal affairs of the university.

It seems to me when you're talking about tribal sovereignty, which may be more sacrosanct in some respects than State sovereignty—at least that's the way it appears at this point—if you don't have the remedy of cutting off the money, you are certainly not going to have the remedy of more direct intervention into the way the tribe actually does things. So don't you wind up with exactly the problem that you mentioned, of holding the people who most need the help hostage to whomever is not abiding by the rules?

COMMISSIONER ALLEN. Permit me to interrupt you just long enough to say I find it a peculiar, indeed bizarre way, to fight poverty, to train lawyers.

[Laughter.]

CHAIRMAN PENDLETON. After all, it does create a job.

[Laughter.]

CHAIRMAN PENDLETON. Thank you very much, gentlemen.

We won't take a break here. We'll move on to Mr. Laurence. Is he here?

The Chair is going to try to have a firm hand and stick to our half hour time frame for the next three witnesses.

[Robert Laurence was sworn.]

**TESTIMONY OF ROBERT LAURENCE, PROFESSOR,
UNIVERSITY OF ARKANSAS SCHOOL OF LAW**

MR. LAURENCE. My name is Robert Laurence. I train lawyers for a living.

[Laughter.]

CHAIRMAN PENDLETON. So does my colleague over here, sir. I don't know whether that helps you a lot at this table, but we can try.

Go right ahead, sir.

MR. LAURENCE. I submitted a written statement to the Commission, and because time is short I think mostly I'll answer questions on that, with just what I hope is a short introduction because I know from the discussion I've heard that the Commission is very interested in the *Martinez* decision, and I will talk about the *Martinez* decision.

CHAIRMAN PENDLETON. Your statement will be made part of the record.

[The document was entered into the record as exhibit no. 10.]

MR. LAURENCE. I understand why you-all are—I should say why the Commission—you'll have to excuse me for phrases like "you-all." I teach in Arkansas.

CHAIRMAN PENDLETON. I must say to you we had great testimony from one of your colleagues, sir, Mr. Smoller, in housing, so feel free to address us as you'd like to. Other people do that, so it's okay with us.

MR. LAURENCE. Am I allowed to take my shoes off?

[Laughter.]

COMMISSIONER ALLEN. You-all do whatever you-all want.

[Laughter.]

MR. LAURENCE. I understand the *Martinez* decision sticks in the craw of the Commission. Your natural inclinations are to look askance at a decision that does as it does and closes the doors of Federal courthouses to people complaining of civil rights violations.

I will answer questions about the *Martinez* decision. I would like, though, to make an attempt to tie it together with the famous *Oliphant* decision. I suppose that you are as familiar with that.

Mark Oliphant was a white man. He was arrested on the Suquamish Reservation by Suquamish police for resisting arrest and assaulting an officer. Eventually, the United States Supreme Court released him, finding the Suquamish were without jurisdiction over him.

The connection may not be obvious to the Commission, between the *Oliphant* case and the *Martinez* case, but in my view there is an important connection between the two.

Mark Oliphant had, in my view, an Indian Civil Rights Act case. He was in detention so habeas corpus was available to him. He certainly, in my view, had the right to ask the Federal court to inspect his allegations that he was denied equal protection of rights because he was white, about to be tried by an all-Indian jury. Perhaps he had some more general due process complaint, a trial by jury, right to counsel—I'm not sure. The point is the Supreme Court in its decision did not make him enumerate those precise equal rights violations but rather allowed him to attack in a broad-based way the power of the Suquamish Tribe over him.

In my view, that case should have been an Indian Civil Rights Act case. Let me put it this way. If the Indian Civil Rights Act is good enough for Julia Martinez—and I think it is; you're going to be able to get me to say that here in a couple of minutes—if it's good enough for Julia Martinez, I think it should be good enough for Mark Oliphant too.

It should be recommended to Congress that the Suquamish trial of Mark Oliphant under the Indian Civil Rights Act, while observing the Indian Civil Rights Act, is exactly the manner acceptable to Congress. And that very loose, very broad-based attack has had tremendous spinoff into other areas of the law. The Suquamish Tribe have given up, by implication, those aspects of their sovereignty that are somehow "inconsistent with their dependent status," in the Supreme Court's words, and it's unclear, I think, to all of us exactly what those mean. That imprecise test should be taken away from the Federal courts; they should be put back into the Indian Civil Rights Act.

Now, what about *Martinez*? I think you all appreciate this tension that has been described between tribal sovereignty and individual rights. Commissioner Allen this morning, I think, questioned that tension model. I'll even give him and the Commission a contradiction, not just tension, between those two concerns. Even with that contradiction, my metaphor is that it's like the contradiction between the sounding board in the piano and the contradictory tension that is put on by the tuning pin. The Chairman can perhaps say whether piano tuning comes within the jurisdiction of the Commission; I'm not sure. But it is exactly those contradictory forces that keep Indian law strong.

Still, at some point you've got to decide. You've got to say: are the Federal courts going to be open to Julia Martinez or not? I will say I think the answer to that should be yes, fully recognizing that my colleague, Bob Clinton, from the University of Iowa, to whom I defer in almost all respects, is about to tell you the opposite.

CHAIRMAN PENDLETON. Counsel.

MS. MUSKETT. Professor Laurence, I have a couple of questions regarding your recommendation in your written statement for Federal court review under restricted circumstances. You have indicated that money damages should not be recoverable against the tribe itself. Without

this measure, do you feel that declaratory and injunctive relief against the tribes will be adequate to bring about tribal reform?

MR. LAURENCE. Yes.

MS. MUSKETT. Would you be open to the imposition of monetary relief against the tribes if there were a cap or limit on the amount recoverable?

MR. LAURENCE. No. I don't mean to be too short with these answers, but time is short.

[Laughter.]

COMMISSIONER ALLEN. It's pleasant.

CHAIRMAN PENDLETON. Please don't apologize.

MR. LAURENCE. In that case, next?

[Laughter.]

MS. MUSKETT. In your article on service of process and execution of judgment on Indian reservations, you discuss some of the difficulties with enforcement of the judgment on Indian reservations. If a Federal court were given authority to render declaratory and injunctive relief for ICRA violations, do you foresee any problems with enforcement of the Federal judgment?

MR. LAURENCE. Well, in that article, I was talking about the enforcement of money judgments by private litigants against Indian defendants whose property lay on the reservation. Here we're talking about enforcement of the Indian Civil Rights Act by declaratory relief or injunctive power against what is by definition going to be tribal activity. So, in my view, declaratory judgments ought in most cases to be enough because I expect tribal councils to follow the holdings of Federal judges like the rest of us. Injunctions might occasionally be necessary.

When a Federal judge issues an injunction, I think we all ought not to forget that in a very real way the United States Army, United States marshals certainly, are standing behind that judgment ready to enforce it. And that is an enormously powerful tool that might be used against a very fragile government. I think it ought to be used reluctantly.

But the kinds of problems that come from enforcing money judgments against private individual defendants whose property is on the reservation, I think, are very different from the kinds of enforcement problems involved in tribal governmental activities under the ICRA.

By the way, I should also say I am pleased that you read that article. Other than my mother, there is no indication that anyone other than you has read it.

[Laughter.]

MS. MUSKETT. You have indicated that Federal court review should be restricted to cases which meet a minimum amount in controversy. What would you recommend as a minimum amount in controversy?

MR. LAURENCE. That's a tough question for a law professor to answer, I must say. If I were a Congressman, I'd have lots of legislative hearings to

find out exactly what kinds of claims might arise and what the amounts of controversy would be, and where should we have to set the level in order to make it effective.

I will say, in case this bothers you or the Commission in terms of that requirement, I recognize that violations, like perhaps Julia Martinez' or a right to counsel violation that is alleged—I wouldn't require an amount in controversy to be alleged for those sorts of fundamental freedoms.

As I mentioned in the statement, I am concerned here about a case like the *Dry Creek Lodge* case, where plaintiffs were alleging a deprivation of property by the tribe because the tribe had closed down a road preventing access to their business. I would make them allege some sufficient amount in controversy to make sure that we're weeding out not only the harassing suits but also the minor ones.

We used to have one in Federal courts. I think it's even more appropriate where you're dealing with the ICRA than it used to be with respect to general Federal question jurisdiction. But I don't know what the amount should be.

MS. MUSKETT. I have no further questions.

MR. MILLER. Professor Laurence, if the Congress were to overturn both *Oliphant* and *Martinez*, would there be a diminution of tribal court jurisdiction?

MR. LAURENCE. Would there be a diminution of tribal court jurisdiction if *Oliphant* and *Martinez* were both reversed? So now we'd have criminal power back over non-Indians, and challenges to the exercise of that power would be in Federal courts. Your question was whether that would diminish tribal power?

MR. MILLER. Yes.

MR. LAURENCE. No, I don't think so. To me the good thing about reversing *Oliphant* legislatively—or the combination that you suggest, reversing both—would allow the exercise of tribal power to be attacked and get rid of this broad-based attack on the existence of tribal power. I much prefer the scalpel, if you will, of challenges to the exercise of power than the blunderbuss attack to the existence of tribal power.

CHAIRMAN PENDLETON. Would you repeat that again?

MR. LAURENCE. You like that scalpel/blunderbuss?

CHAIRMAN PENDLETON. Yes. It's probably personally instructive.

MR. LAURENCE. The Indian Civil Rights Act lists some precise restrictions on tribal power. I'm sure it has often been pointed out to the Commission about how Congress picked and chose amongst the various protections in the Bill of Rights. For example, the 19th amendment isn't there, nor is the right to free counsel—a very precise list. Still, of course, it's not as precise as, say, the bankruptcy code. It uses terms like “due process.” So there is still some room for common law judges to work, and

I admire that about this statute. But compared to the *Oliphant* standard which attacks the power of tribes, it's much more precise.

The other thing about the *Oliphant* test that I think this Commission especially should find repugnant is that it has become, and probably was all along, a "white plaintiffs only" rule. Indians don't get to use the *Oliphant* attack, but only—I should say non-Indians, not just whites, but it is something that is not available generally, the *Oliphant*—

COMMISSIONER ALLEN. Are you saying the distinction is non-Indian rather than nonmember?

MR. LAURENCE. I consider that still to be an open question. The Supreme Court within about 6 weeks—*Oliphant* says non-Indian, and *Oliphant* seems to make the distinction—or the words of *Oliphant* are drawn on a racial line between Indians and non-Indians. Six weeks later in the *Wheeler* case, the Supreme Court paraphrases *Oliphant* and uses the word "nonmember." I don't know exactly what they have in mind. I don't like distinctions drawn upon race. I also don't like to step *Oliphant* forward by saying that the test should be member or nonmember. I'd just throw the whole thing out. It's not a sensible test in my view. It has racial implications, I think. And the Indian Civil Rights Act is there to protect Mark Oliphant.

MR. MILLER. Would you characterize the pre-*Martinez* Federal case law as generally sensitive to tribal customs and traditions?

MR. LAURENCE. Some cases were and some weren't. The word "generally"—I find cases to admire in the pre-*Martinez* cases. Perhaps my favorite one is the district court case in the *Martinez* case itself where the district judge, fairly carefully in my view, looked at Julia Martinez' rights and the old, old tribal tradition that was involved that was now infringing upon her rights, and balanced those two concerns with what I thought was a good measure of common law sensibility, and arrived at the conclusion that the tribe should win; the tribe should be permitted to do that.

That, to me, was a well-written opinion. I think the Tenth Circuit, by the way, that reversed that is almost as well-written an opinion, although it reached the opposite conclusion. I give those two cases to my students sometimes to show that well-written opinions can reach opposite conclusions, and I prefer the first one.

There were some decisions that were not thoughtful at all. A case comes to mind called *United States v. Albert* in which the court just tossed off, I think in a one-sentence footnote, that the Indian Civil Rights Act incorporates the Constitution and applies it to Indian tribes. Well, that's not what it does, and no one thinks that's what it does, and if the court had thought about it, it would have realized that.

So the only reason I don't say yes to your answer is because of the word "generally." There is, from my view, room for optimism. My guess is that Bob Clinton is about to be less optimistic about those very same cases.

MR. MILLER. The reason why I asked is that you recommended Federal court review again, and that indicated to me that you trusted Federal judges to be sensitive to tribal customs and traditions, and I'm asking you why you feel that way.

MR. LAURENCE. I have to, of course, because I want Mark Oliphant to be back in Federal court arguing that he didn't get his Indian civil rights. And I do trust the Federal court to look into what happened to him. Federal courts do it.

I guess the whole principle here—and the principle gets in trouble when you start tinkering with the statute and looking at small parts of it. In my view, that underlying tension has to stay in the Indian Civil Rights Act. And as I finish up my statement, as long as the Commission goes about its business with the respect for individual rights and for tribal sovereignty, then I am optimistic as to the way this will come out.

I think the couple of mentions of the *Grove City* case are instructive in this regard. The point is that there is a substantial difference between the Turtle Mountain Chippewa Tribe and Grove City Community College—a substantial difference—in my view a difference that makes all the difference in the world. And, of course, that difference is that the Turtle Mountain Chippewa are recognized as being a sovereign entity, and Grove City Community College is not.

Now, it is that underlying tension of American Indian law that keeps us from saying that the Turtle Mountain Chippewa is as fully sovereign as Bolivia. It is not. I agree that it is not. It is somewhere in between.

COMMISSIONER ALLEN. Almost crushed in between, isn't it, because there's hardly any room in between there for something to be.

MR. LAURENCE. There's enormous room in terms of sovereignty between the Grove City Community College and the country of Bolivia, an enormous room for the recognition—

COMMISSIONER ALLEN. States.

MR. LAURENCE. States are in there as well, I agree.

MR. MILLER. I don't have any further questions. I did want to comment that, Professor, you mentioned *Martinez* stuck in the craw of the Commission. Commissioner Destro in his opening statement says that it didn't stick in his craw, and I just wanted to point that out.

COMMISSIONER DESTRO. I'll go ahead and point it out myself. As I said, I think *Martinez* is the symptom and not necessarily the problem. I'm not so sure—I'll wait for Professor Clinton to talk about his paper—but as I mentioned at the Flagstaff hearing, maybe it's because one of the courses I teach is conflict of laws, which most law students perceive as being a course in how many angels can dance on the head of a pin.

But the problem that I see there is convincing people that there is a reality to overlapping jurisdictions, and that multiple jurisdictions can exist in the same space with a lot of room for maneuver, and that the degree to

which I would oppose a *de novo* review of the trial court judgment in the Federal court would be the same reason that I would oppose the Supreme Court being allowed to federalize conflict of law rules because they would be applying substantive standards, not questions that take into account the sovereignties of the various entities involved. That's a very jargonistic way of—

CHAIRMAN PENDLETON. —creating space.

COMMISSIONER DESTRO. No, it's not a question of creating space. I firmly believe that that space is there. The reason that I mentioned *Grove City* is that it is not a connection between Grove City College, which can be forced to comply under pain of losing its funding. It would be more: is the tribe as sovereign subject to all the rulemaking, just like a State would be? Because, really, the analogy I would draw is State to tribe, rather than private party to tribe. The tribes don't have a 14th amendment, so they are not governed by that. But it seems to me the real crux is the degree to which Congress has the responsibility not to let the tribes get away with violating other people's civil rights. Because you can't claim a trust responsibility and then say, "Well, we're just going to leave it all up to you." Either Congress has the responsibility to enforce civil rights or it doesn't, and they just can't say, "Well, we're going to hear no evil, speak no evil, and see no evil" once it's been waved under their nose under a platter. And the question to my mind is: what do you do with that consistent with both tribal sovereignty and individual rights?

That's why I said I found these articles that the Commission is upset about *Martinez* to be troublesome because I haven't quite figured out how you can do that, but I am convinced that there's room there. And your paper isn't that far away, as far as reading it as someone who had never thought I would be immersed up to my ears in Indian law. I don't see that there's that big of a difference between some of the things that you're saying, especially this whole question about Indian versus non-Indian, and non-Indians have certain rights that Indians don't.

You talk about inverting the laws. Once again, the Indians come out, like a movie I saw a long time ago, at the fuzzy end of the lollipop. You do them a favor by passing the Indian Civil Rights Act and then take it all away. Whether you did it by *Oliphant* or whether you do it by *Martinez*, they still come out with the short end of the stick.

I think that if this Commission, if we step back and don't get embroiled—and some of this is *Martinez*—what ought the rules to be? It seems to me your suggestions are very good ones and not that far from Professor Clinton.

MR. LAURENCE. I think you're right. I think Bob and I are in the same ball park, if perhaps not in the same section. One of my colleagues kept telling me, "At some point you have to decide—will Julia Martinez get into court or not?" And my position is yes, she does, very carefully. She

gets into court to make the complaint that her children have been denied membership because of her sex, Julia's sex.

COMMISSIONER ALLEN. There's one problem with all that. If it's true, in fact, that Julia Martinez or anyone else has rights determined on the basis of her membership in the tribe, by definition there are some whom are nonmembers—call them non-Indians or anything else—who have different rights. And they might include Mark Oliphant.

I believe this is very much a process of trying to have your cake after you've eaten it, and sooner or later you have to face up to the fact you can only have one or the other, not both. The 14th amendment language does not exclude Indians, as I understand and read it. And I'm not talking about the division of interpretation at the moment; I'm only talking about the language because I have a liberty that those of you who are bound to the limits of the law don't have. I can think whatever is true. I don't have to think what has been said before.

[Laughter.]

COMMISSIONER ALLEN. And it strikes me, thinking that way, that the attempt to create this notion of the tribe as, in fact, a Federal entity is simply false. It's false historically. We had that presented to us this morning, the idea that the tribes were part of the Federal system. They were not. And it's false today, in spite of the fact that we are trying mightily hard to carve out a space for them. And what do we run up against? We run up against the geographical reality of the States.

Now, unless someone is going to bite the bullet and say where you have substantial tribes or substantial territory, and making them States will not affect the existing States in a way as to render them noncontiguous, and so the only way to give them the status you want is to make them States, I think we're just barking up the wrong tree.

CHAIRMAN PENDLETON. I have to call this to a halt at some point. It's an interesting discussion, but we have other witnesses we have to get to before the witching hour.

If you have a final comment, go right ahead.

MR. LAURENCE. Only in reaction to one thing. The 14th amendment protects against certain actions by the States. The 5th amendment protects against certain actions by the Federal Government. Those two amendments to the Constitution do not protect against certain actions by tribal governments.

Now, it appears that the Chief Justice of the Supreme Court thinks that's because the tribes aren't sovereign enough, that the tribes are more like Grove City College or the PTA, so naturally those two amendments don't apply to them. Most of us think—and Chief Justice Rehnquist has never actually held that though he appears to think that—most of the rest of us think the reason for the nonapplication of those two amendments is because the tribes are a special kind of sovereignty and never ratified those

two amendments. They are not as sovereign as anything. No analogy works very well, but they are different. So those two amendments don't apply.

That is not to say that Indians don't have 14th amendment rights. And I just have to be absolutely clear about that. Any Indian standing before the State of Arkansas or before the Federal Government has all the rights that I do. What we are talking about is whether the tribe is restricted by the 14th amendment. And the answer is very well established that the answer is no.

COMMISSIONER ALLEN. Whether the tribe is subject to the plenary power, as you all like to say, of Congress.

MR. LAURENCE. That's right. So Congress passes a statute, and it's the statute that we're talking about.

CHAIRMAN PENDLETON. This reminds me of a discussion I read a long time ago that two things can't occupy the same space at the same time; that is, two light rays superimposed upon one another. It sounds like what we're trying to do here is superimpose tribal sovereignty upon the Federal Constitution and make it all work. If that's the case, there is no space. What you're doing now is trying to fit it into a space that doesn't exist.

MR. LAURENCE. That's Commissioner Destro's comment about overlapping—

CHAIRMAN PENDLETON. I'll tell you what we're going to do. Mr. Laurence, don't go away. We think this is a healthy discussion. So why don't we ask Professor Clinton and Mr. Pevar to come and sit at the table, and perhaps since you all want a piece of each other—Mr. Laurence has said, Mr. Clinton, that you both happen to be in the same ball park but one happens to be in section A and one in section Z.

Let's take a short recess.

[Recess.]

[Robert N. Clinton and Stephen L. Pevar were sworn.]

CHAIRMAN PENDLETON. Professor Clinton, I noticed that you were shaking your head in the rear and salivating a bit.

[Laughter.]

CHAIRMAN PENDLETON. Is the Iowa College of Law associated with the university?

MR. CLINTON. It's the University of Iowa College of Law.

CHAIRMAN PENDLETON. I'm a member of the committee for the Holiday Bowl, and I want to say to you that I have never seen a team that had more decorum, politeness, and good demeanor about them as the Iowa team when they came to San Diego, and have been for the past couple of years. It was good to have them in San Diego, and they win, you know, a little bit, and Mr. Eliot and his crew do a fine job.

MR. CLINTON. Thank you very much, Commissioner Pendleton. At Iowa we are very proud of our Hawkeyes and we have been delighted to

be at the Holiday Bowl for 2 years running, and we hope we put on a good show and had some loyal crowd support with it.

CHAIRMAN PENDLETON. And it's good to be out of the zero temperature to sunny San Diego.

MR. CLINTON. Absolutely.

CHAIRMAN PENDLETON. Why don't you guys do what you want to do in the beginning, you and Mr. Pevar, and then we will hold our questions until both of you get through, whatever you want to say to us.

We want to thank you for your voluminous and complete testimony that will be part of the record. Go right ahead.

TESTIMONY OF ROBERT N. CLINTON, PROFESSOR, UNIVERSITY OF IOWA COLLEGE OF LAW

MR. CLINTON. I have submitted a slightly revised statement correcting some typographical errors, my statement having been prepared in the 2½ working days since I was invited to testify, and I would like to request that it be submitted for the record.

CHAIRMAN PENDLETON. So ordered, without objection.

[The document was entered into the record as exhibit no. 11.]

MR. CLINTON. Additionally, I'd like to briefly summarize my comments and react generally to the testimony I have heard so far by putting the question that I think is before this Commission in some perspective.

In my view, what I have heard at least today ignores a fundamental point, and that fundamental point is the single most fundamental right that Indian tribes and their members have is the right of sovereignty. It is in fact a very hard-fought-for and hard-bargained-for right.

If you look at the Treaty of New Echota—that is the removal treaty that Assistant Secretary Swimmer's tribe signed in 1835 with the United States—it bargains carefully for that right of sovereignty, and in fact guarantees that the Cherokee will never be included within the boundaries of any State or subjected to State law because the Cherokees insisted on that right of sovereignty, and that was viewed as a fundamental right.

Additionally, most of the removal treaties, indeed most treaties setting aside Indian land for reservations, were doing so to protect the self-governing autonomy of Indian tribes. And I think that's a critical point. It is a treaty right. Nobody is suggesting we're going to give back to the Cherokees the Southeastern United States that they ceded in exchange for our promise to protect that right. Certainly, we abrogated or at least modified and to some extent hurt the Cherokee right of self-government when we broke the treaty and included them in the State of Oklahoma.

Having said that, that didn't take away their right of self-government. Their right of self-government remained.

The second point I want to make by way of perspective, aside from indicating that right of self-government was bargained for and is a basic

right of Indian tribes and their members, is to note the tribes are different than States in the allocation of power.

Why? The States and their people, or at least some of their people, were in fact part of the bargain that created the United States. They were part of the delegation of authority in "We the people of the United States" to the Federal Government in the Constitution. The tribes at the time were not. They didn't participate in that authority delegation. They never delegated any authority that they maintained as an original right to the Federal Government. Instead, that's the reason for the theory that the Indian tribes retained only that which they have not given away by treaty or otherwise.

As a consequence, the Indian tribes have, in my judgment, even a greater claim to legitimate sovereign authority than do the States. It is a basic right. It is a right that they bargained for. It's a right which we promised them. And to enlarge the scope of Federal authority, as I have heard discussed today, to impose on nonconsenting tribes and often nonconsenting tribal members, because nobody has proposed putting what we have discussed today up to a vote of the tribal membership—to impose that on tribes is, in fact, a diminution, a taking away of that which we promised the tribes in exchange for their land.

That is my overall comment.

Now, I want to be a little more specific about a couple of very quick points. First, the Indian Civil Rights Act is not, in my judgment or on its face, a jot-for-jot incorporation of every item—

CHAIRMAN PENDLETON. What does that mean, "jot for jot"?

MR. CLINTON. Jot for jot, meaning exactly what the constitutional item means in the Constitution. It's been used by the Supreme Court to discuss the incorporation doctrine. It is not a jot-for-jot incorporation. My statement indicates a couple of differences. I want to highlight one critically important difference, and that is in the area of the right to counsel.

While I think there are exceptional abuses—they are not systematic; they are episodic—of certain civil rights in Indian country, and it may be the overall situation at Red Lake is in fact one of those. I heard discussed today the denial of "the right to counsel" at Red Lake because people who were admitted to State bars could not become members of the bar of the Red Lake Tribe. The Red Lake Tribe as a sovereign tribe has a right to set its own bar requirements, and those bar requirements do not need to include formal legal education.

States and the Federal Government did not have formal legal education in their bar requirements for 150 years. I don't think that means that for that period they denied the sixth amendment right to counsel. Likewise, I don't think the bar requirements for the Red Lake Tribe deny the right to counsel. That doesn't mean there aren't other abuses at Red Lake. There very well might be.

That is but an illustration of the fact that the ICRA does not mean exactly in applications to tribes which, for example, may have lay judges and lay prosecutors, where an attorney representing the defense is likely to be more disruptive of the system than a lay advocate. That does not mean that in fact there aren't rights. There are, but they are balanced rights that must be accommodated to the realities of the Indian country, and in fact that's what Congress did.

Furthermore, the discussion I heard today seems to suggest that there aren't remedies for violation of rights. The thrust of my statement, I think, is to suggest that under current existing law, without any changes, legally remedies exist. Whether they are being used well, whether they are being fully implemented, whether the BIA is fully implementing the authority it has—those may be different questions. But those remedies exist, and I want to summarize them.

One, clearly the *Martinez* decision recognizes the tribal courts and other tribal institutions are appropriate law-applying institutions to, in fact, apply and enforce the Indian Civil Rights Act. I'd be the first to concede that some tribal decisions, like some State decisions, for that matter some U.S. Supreme Court decisions with which I disagree, might be read as possibly not enforcing civil rights.

But as I sit down and read the reported cases, many of those cases represent remarkable efforts of tribal judges to, in fact, enforce the civil rights provided under the Indian Civil Rights Act. In fact, some of them are very courageous decisions. I cited the *Chapoose* case in my statement in which a tribal judge went out of his way to hold something the U.S. Supreme Court is not prepared to hold with respect to a Federal court, and that is that the council couldn't take away his jurisdiction to enforce due process.

The prevailing law in the Federal courts, though I happen to disagree with it and think it's wrong—I've written two articles on the subject—is, under *Ex parte McCardle*, Congress can take away the Federal court's jurisdiction to enforce civil rights. I think that decision is wrong. But notice in essence an Indian tribal judge was prepared to say that he had more authority than even our Federal judges have to enforce the requirements of the Indian Civil Rights Act.

Now, why have Indian judges assumed that responsibility? I think they have assumed it, and assumed it recently quite well, because they have the primary responsibility, because *Martinez* gave it to them. In short, *Martinez* is responsible for the development on many reservations of a very healthy attitude with respect to civil liberties.

The Winnebago Tribe, for example, just set up a tribal court after a retrocession of Public Law 280 jurisdiction. They also simultaneously revised their constitution to incorporate a Winnebago Bill of Rights paralleling the ICRA in order to assure that their tribal institutions did in

fact honor ICRA rights. It simply is not true that on most reservations in this country tribes and tribal institutions are ignoring rights. On many, maybe most, they are doing an honest, serious job of trying to enforce them. Abuses exist. They also exist in the Federal and State system. Any solution should not be systemic. It should, in fact, address the abuses, which are not, in my judgment, systemic.

A second remedy. I pointed out that *Martinez* does not mean that Federal and State courts in the civil realm have no role whatsoever to play in the enforcement of the Indian Civil Rights Act. Where extraterritorial force must be given to a tribal judgment under comity or full faith and credit, and where that judgment is taken in to a State or Federal court for enforcement, as Commissioner Destro knows because I know he teaches full faith and credit, that court will be required to look at whether the judgment comports with due process, which means whether it comports with the ICRA as far as I'm concerned.

In short, there already is a remedy in Federal and State courts for abuse of Indian Civil Rights Act rights after the tribe has rendered its judgment and extraterritorial force is sought.

Furthermore, I think there are existing remedies in the BIA. I would not necessarily say that the BIA has an active policy. Maybe they should do more, but let me outline legally that which exists.

First, the BIA approves tribal constitutions adopted under the IRA. Surely it can choose to disapprove them when they do not comply with ICRA guarantees.

Second, under those constitutions the tradition has been, though the policy is changing, to, in fact, require some or all ordinances—it depends on the tribal constitution—to be approved by the Bureau. Certainly, in exercising that approval requirement, the ICRA and the rights thereunder are relevant.

Third, control of funds. We have already heard about section 450(m), and we have heard a debate about including language in contracts or not including language in contracts. The statute, 450(m) of the Indian Self-Determination Act found in Title 25, authorizes the rescission of contracts where rights are violated. And I assume that includes rights under the Indian Civil Rights Act.

You don't need language in a contract to do that. It's in the statute. It doesn't make any difference what the contract said or whether it even included the boilerplate language that apparently is found, though I have never read the contract, in the Red Lake contract. The statute authorizes the BIA to do that, and judicious use of that can oversee the enforcement of civil rights.

But there is a big difference between asking for a direct remedy, saying a litigant can go into court and get an order, and asking the Federal Government to provide basic oversight. This is not a direct remedy. It's a

vehicle for oversight, and that oversight exists under existing law and should be used.

Furthermore, the BIA has taken the position—I have cited the cases—that it chooses what government it's going to recognize for purposes of the government-to-government relationship between the tribes. Just as the United States, when it recognizes the Government of Chile, makes a decision—what is the lawful Government of Chile with whom the United States as a sovereign is going to deal? The United States Government decides who is the lawful sovereign that it's going to deal with.

Now, that doesn't mean it can displace a tribal government. It can't, any more than it can or should—maybe it's that it should—displace the Government of Chile.

On the other hand, it does make an independent decision as a sovereign, and therefore election dispute issues—I know the Commission has heard a number of them—can be remedied through that BIA oversight.

My final point is that even if it's not an election dispute issue, insofar as the United States maintains a government-to-government relationship with a sovereign who we believe is flagrantly disregarding civil rights or persistently grossly abusing them, we would in an international arena ask: should we continue our government-to-government relationship? With terrorist nations, Libya, we break diplomatic relations.

Ultimately, I think that power exists with respect to Indian tribes, although I think it requires congressional approval. Therefore, the BIA can and should receive information on ICRA compliance. It should not, however, try to remedy the individual case but should use the power that it has with respect to contracts, with respect to the government-to-government relationship, to provide negotiation room so that we have a negotiated arrangement between two sovereigns, like the early treaty arrangement we had with tribes, not an imposed arrangement of that arrangement which violates potential rights which this Commission or the Congress may deem appropriate.

My last point is about Federal judicial review. We have had a number of proposals about Federal judicial review here. I would say if one believes, as I do not, that there is systematic and widespread violation of the ICRA, a return to pre-*Martinez* law is not in order. Professor Laurence and I may be playing in the same ball park, but on this issue we are not on the same team. In fact, I would submit that if we are going to take tribal sovereignty seriously, the basic right of tribes to make their own laws and be governed by them, promised in treaties, in returning to pre-*Martinez* law treats them as less than States.

Why? In a civil rights situation where a State court adjudicates rights, you cannot, with the exception of habeas, which already exists for tribes, go into Federal court and say, "Oh, no, the State court was wrong; the right is otherwise." That decision is, to use a lawyer's term, *res judicata*. It

is final. There is only one review mechanism available in Federal law for State court decisions which deny civil rights. What is that one review mechanism? It is review in the United States Supreme Court.

I would submit that if one believes—and I do not—that in fact there are systematic widespread violations of the ICRA, that the only means which accommodates the promise of Indian tribal sovereignty, which we solemnly made to tribes, and the concerns about civil liberties, which I share and have heard voiced here, would be to provide the same kind of review mechanism in the U.S. Supreme Court from the decisions of tribal courts. In short, at most the Article III review should be in the U.S. Supreme Court, and I don't fully subscribe to that solution because today I have been shown no widespread systematic violations of the ICRA, and instead believe that on most reservations most tribes are making a diligent serious effort within the limits of their budget and shrinking Federal funds to, in fact, accommodate civil liberties.

Thank you.

CHAIRMAN PENDLETON. Mr. Pevar. I think we want to get this all out on the table, and then we can have some spirited or nonspirited discussion.

**TESTIMONY OF STEPHEN L. PEVAR, REGIONAL COUNSEL,
MOUNTAIN STATES, AMERICAN CIVIL LIBERTIES UNION**

MR. PEVAR. Thank you, Chairman Pendleton. Since you began by discussing sports with Professor Clinton, at some risk I will point out I'm from Denver.

[Laughter.]

CHAIRMAN PENDLETON. You mention that in this room at great peril.

MR. PEVAR. I do appreciate, though, that the chairs are orange and blue, Denver's colors.

[Laughter.]

CHAIRMAN PENDLETON. You know, I'm from San Diego, but I still have four Redskin season tickets. I find no comfort in my being from San Diego.

COMMISSIONER DESTRO. While we're talking about this, I grew up 30 miles from Cleveland, and that doesn't make me very happy, either.

MR. PEVAR. I'll try to make my points and leave this town pretty quickly.

[Laughter.]

MR. PEVAR. First, a moment on my background. For the last 11 years I have been regional counsel with the American Civil Liberties Union, and in that capacity I supervise ACLU cases in 11 States. For over 3 years, from 1971 through 1974, I worked for South Dakota Legal Services on the Rosebud Indian Reservation. For the past 5 years I've taught Indian law at the University of Denver Law School. I'm the author of *The Rights of Indians and Tribes* by Bantam.

And I have litigated quite a few Indian rights cases, including the first ICRA case that went to a U.S. court of appeals, *Luxon v. Rosebud Sioux Tribe*. The decision in that case was that the ICRA did provide a private right of action. That was the position we took. That case eventually was overruled by *Martinez*.

The discussion of enforcement of the ICRA should be divided into three parts, and that's how I will divide my comments.

The first is whether the ICRA is being violated. If it's not, then we can close our books and go home.

The second is: if it is being violated, where is it being violated, and how is it being violated? What is the nature of the problem?

And the third question, once we have handled the first two, is: how do we stop it? What's missing? What do we have to do to correct the problem?

The first question: is the ICRA being violated? That question is no longer open to serious debate. You now know what people in Indian country have known for a long time, and that is there are massive and pervasive violations of basic fundamental liberties, liberties that are guaranteed in the Indian Civil Rights Act, and that people are suffering as a result. The situation is shocking and it's sickening.

I want to read a statement that one of the Senators of the subcommittee that eventually proposed what became the Indian Civil Rights Act said in December of 1967, a few months before the act was passed. This statement by Senator Hruska of Nebraska was in support of the passage of the act. And as I read it, see how it applies today, two decades later:

Mr. President, as the hearings developed and as the evidence and testimony were taken, I believe all of us who are students of the law were jarred and shocked by the conditions as far as constitutional rights for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian rights. There was a failure to conform to many of the elemental and traditional constitutional safeguards. The Constitution simply was not applicable.

The ICRA was passed two decades ago, and on many reservations today it might as well never have been enacted.

Commissioner Pendleton, you read from the testimony of the Rapid City hearings. When I read the same testimony, I came across another discourse that I believe warrants repeating. You asked the Chairman of the Cheyenne River Tribe this question:

"Question: In other words, there is no such thing as free speech or freedom of the press or any of those activities on the reservation?"

"Answer: No."

The answer to the first question is resoundingly, "Yes." The ICRA is being violated. Indeed, I don't know of a single Federal civil rights law that is being violated so pervasively as this one, without recourse.

So we move, then, to the second question: what is the nature of the problem? How widespread is it?

The nature of the problem is that it is pervasive, and it exists on every level of tribal government, from the tribal council to the police officer.

I did not prepare a written statement. However, I do have, for the Commission's benefit, several documents.

The first document is a list of 24 Federal cases that were decided in the years 1972 to 1978, in other words, pre-*Martinez*. These are limited to the non-habeas corpus cases, the ones that today do not have a voice, and that is broken into 17 different categories. And listed in there, in the abuses that were alleged, and many of which were found by the Federal courts, are abuses that go to the core of government, that go to the very foundations of any governmental system, including the tribal government. They dealt with election fraud; they dealt with keeping people off the tribal rolls; they dealt with an interference or a refusal to obey the tribe's own laws—not the ICRA but a deliberate ignoring of the tribe's own written laws; banishment from the reservation; the taking of private property without compensation.

The second document that I would like to submit is a list of 19 subject areas that I have taken from the Rapid City hearings that, once again, illustrate that the same problems that initiated the passage of the Indian Civil Rights Act, that initiated the lawsuits that were filed right after the passage of the Indian Civil Rights Act, still go on today. And in the hundreds of pages of testimony that this Commission has already transcribed, you will find dozens—dozens—of shocking and horrible violations of rights that 200 years ago this country decided were fundamental civil liberties, that no one within the borders of this country should ever endure.

The third document is something that I received earlier this week. As it happens, I receive in my office, on a fairly regular basis, telephone calls and letters from Indian people in the 11 States that I supervise, telling me of allegations of denials of their basic civil liberties. And in every instance, unless they are being incarcerated, in which case they could use the habeas corpus provisions of the Indian Civil Rights Act, I must tell them that they are screwed without any recourse, that there is nothing I can do for them and there is nothing anyone can do for them outside of their own tribal government. And in 99 percent of those cases their response is, "But that's the very people who are causing me this problem."

And I say, "Then you have no recourse."

This third document—in fact, there are three documents attached to that—is a letter written from a member of the Oglala Sioux Tribe who lists four different ICRA violations, and three of those were found by agencies within the tribal government to be in fact ICRA violations, and those agencies, such as the personnel board, ordered some kind of relief.

That prompted the tribal council to pass a resolution 87.66 that essentially negated and overruled those tribal court or tribal agency decisions—ex post facto, after the case—and it establishes sovereign immunity of the tribe. So that no one, to this day, can sue the Oglala Sioux Tribe for violations of the same fundamental rights that would drive you and me to a Federal court in a heartbeat.

MR. HOWARD. What is the name of that case—the case on the Pine Ridge Reservation that you're referring to?

MR. PEVAR. Well, there are four of them. Margaret Moore.

MR. HOWARD. I ask because we did receive that resolution recently, and it was quite a surprise to us because we had held a hearing in Rapid City focusing on Cheyenne River, Rosebud, and Pine Ridge, and we thought we had raised a great many questions about sovereign immunity, and the one exception we found in that hearing was the Oglala Sioux. Chief Judge Robert Fast Horse was fairly successful in administering his court and seeing that sovereign immunity was waived. He has since departed, I understand, and now they have reasserted sovereign immunity.

MR. PEVAR. And it wouldn't matter if he were still there because the council has now passed this, and his hands would be tied. If he were a responsible jurist, he would have to obey this tribal law.

Anyway, I would like to submit those documents.

CHAIRMAN PENDLETON. Without objection, so ordered.

[The documents were entered into the record as exhibits nos. 12, 13, and 14.]

MR. PEVAR. Then we move to the second half of the second question, which is: where is this happening? How widespread is the problem?

Professor Clinton has simply stated he doesn't think it is widespread. I can state with the same surety it is widespread. None of us has researched that, and I, with honesty, cannot say that it is widespread or not widespread. I do feel the Commission can find out and that the evidence is out there.

We know for certain that South Dakota is a legal no-man's land. There is not even free speech on some reservations. But how widespread this is—what I would recommend is that on many reservations there are legal aid offices; there's an Indian Bar Association; there are U.S. attorneys. I would recommend that inquiries be made to see exactly how widespread this is.

We know from the court cases that are contained in my first list that many tribes throughout the United States have been guilty of ICRA violations. Whether that same number exists today or whether it is more or less, we don't know, but that is something very important to find out.

The final question is: what should we do? What should this Commission recommend?

This is a difficult and challenging question. It is difficult and challenging for two reasons.

First of all, there are two legitimate and competing interests at stake. On the one hand is tribal sovereignty, which has been recognized, as Professor Clinton has eloquently stated, for as long as our country has been in existence. On the second hand, and a competing legitimate interest, is the right of individuals to basic human values, the values upon which our country was founded, and the values upon which we even judge other countries.

What would we think of a country that does not guarantee free speech? What did we think when a court in the Philippines decided that the killing of Aquino should not be punished, that there was no recourse there? What do we say to ourselves about the government of that country that would permit that? And yet, those are the kinds of things that go on within our own borders on Indian reservations.

Another reason why this is challenging and difficult is that the possible remedies are enormous. On the one hand, you could adopt something like Professor Clinton has stated, which still leaves the remedies with the tribe. For example, you could order, or Congress could somehow enforce or pass legislation if this was necessary, that would fund the BIA to fund tribes for better law enforcement, but still leave it within tribal forums to enforce the ICRA; to the other extreme, and that is a law that essentially overrules the *Martinez* case, that would create a private right of action for Indians.

One thing is certain. Something must be done. Not only are people suffering, but tribes are suffering. As several of the witnesses pointed out, this type of injustice, especially where a tribe is ignoring its own laws and creating protections in which individuals cannot even sue their tribes, creates a disrespect and a contempt for the tribe itself.

History has shown—and I'm fearful of tribes for their sake if we allow this to go on—that any government that ignores the essential rights of its citizens will not exist. And I think part of the reason why tribes are in such disarray today is because in 1934 we imposed upon them a new form of government without also providing restrictions on governmental power, without providing the limitations that every society has to control governmental abuse.

Now, where I leave off from Professor Clinton is that I do not see a viable alternative other than a private right of action. However, I must say this. You would be doing a disservice to Indians and to this country if you have a knee-jerk reaction to the problems on Indian reservations and say that just because there is not free speech there must be access to the Federal courts.

What I feel is the only proper analysis is that we should enact a remedy that is the least drastic remedy possible that will accomplish the goal of enforcing civil rights. I am open, and I feel the Commission should be

open, to the possibility that something short of a private right of action will accomplish our goals. However, thus far I am not convinced that there is.

So what I will do is state my case for the extreme remedy, and that is a private right of action. However, even in offering it, I wish to advise the Commission that I am not saying by this that something short of this cannot work. I have not seen any evidence, however, that it would.

The reason why I propose a private right of action; a legislative overruling of *Martinez*, is for at least the following five reasons—and this comes from my human personal reaction to having lived on an Indian reservation and having had streams of people come into my office, and still today as an ACLU attorney having people call me and say, “I’ve just lost my job without a hearing”; “they just took away my land assignment”; “they just evicted me from my house because I supported the last candidate.” And knowing that those people have nowhere to turn, I support a private right of action.

Number one, a private right of action guarantees that the remedy lies with the victim. The victim does not have to appeal on bended knee to the Bureau of Indian Affairs or to anyone else. That victim can go into Federal court and seek redress. I would not want my free speech to be dependent on a BIA official, and whether that BIA official thinks that maybe I should move someplace else or not, which I agree was a horrible suggestion or comment—

CHAIRMAN PENDLETON. That was made by the BIA.

MR. PEVAR. Yes.

CHAIRMAN PENDLETON. Someone referred to that earlier. I just want to point it out at this point since you’ve made it now, and so there’ll be some continuity in the record, but it was made by Mr. Swimmer himself that if you want to move, you can get some other rights.

MR. PEVAR. Yes, that’s an embarrassment. Since you’re a man of color, that’s like telling a black man that if they don’t like the busing situation in Alabama, they can move to Massachusetts.

I found that offensive.

The second reason is that the alternative of leaving rights with the tribe hasn’t worked. Even the electoral process, as some people within the BIA have suggested as being the remedy—well, if this government is not giving you your rights, wait 2 years or 4 years and vote them out of office.

Civil rights are not subject to majority rule. In fact, that is the nature of civil rights. They are antisovereignty. They are antigovernment control. Everyone in the United States can vote to take away my free speech and the Bill of Rights guarantees it. It is not an answer to tell someone who calls me up that, “Well, wait 2 years and vote that person out of office.” Our governmental values are antagonistic to that very concept.

The third reason why I support a private right of action is that the alternative of leaving it with government agencies hasn’t worked. We had

testimony today that the BIA doesn't want the responsibility, hasn't exercised the responsibility that it does have. Indeed, as Professor Clinton pointed out, the BIA could already do a lot more than it is doing, and I feel it is irresponsible for not doing. They have the responsibility to oversee 120 tribes and their constitutions and their laws, and to my knowledge they haven't ever done anything to disapprove a tribal law or a tribal constitution based on the ICRA.

Even under the 638 contracts, once again—and I haven't read that law in a little while, but as I recall it says that the tribe can be permitted to take over a Federal program, an otherwise Federal program, and operate it itself, if it proves that it will do so consistent with Federal law.

So the enforcement opportunities are there. And the BIA is ignoring those responsibilities.

Moreover, as the Commission has already pointed out, the sanctions that the BIA would have are unconscionable anyway. Because what would the BIA do? Simply increase the harm to the very victims that are already suffering from it. And history has shown that where you have such drastic penalties, they aren't used; it is too drastic.

The fourth reason is that several rules were created by the courts during 1972 to 1978 that ameliorate the harshness of the ICRA.

Number one is the courts require an exhaustion requirement. That can either be part of the legislative history of an amendment, or I'm certain that the courts are going to require it anyway. So essentially, only those tribes that are violating the law will find themselves faced with an ICRA challenge in Federal court because litigants must first use all available tribal remedies.

The second thing is that the courts required that the ICRA be interpreted consistent with tribal values, that, in other words, the ICRA is not necessarily coextensive; it is not necessarily parallel with the Bill of Rights. And several people—I think you, counsel—asked for citations to cases on that. Three that come off the top of my head—and two of them are listed there, the *White Eagle* case and the *Howlett* case, and then one that's not on there, the *Wounded Head* case.

To give you an example, as I recall, the Eighth Circuit ruled that the 25th amendment—I believe it's the 25th amendment—which lowered the voting age from 21 to 18, even though that is part of our Constitution, it wouldn't necessarily be applied; and indeed the Eighth Circuit ruled that it wouldn't be applied to an Indian tribe, which showed that its tribal value and its tribal customs were so important in requiring a voting age of 21 that in that instance the due process and equal protection clauses of the U.S. Constitution would not be knee-jerkedly applied to an Indian reservation.

So there already is that kind of safety net for tribes in the ICRA.

Finally, a private right of action can include that the remedy be limited to declaratory and injunctive relief. I feel that this should be something left

up to the tribes, just as it is left up to the States. However, we at least will know that when basic fundamental rights are being violated, Indians can go to a Federal court and knock on the door and say, "At least get them to stop."

The fifth and final reason why I support a private right of action is essentially this, that in the final analysis only those tribes that are violating the law have anything to worry about. Someone may say, "Well, what about the frivolous suits, that they may eventually have to go into Federal court even in those situations in which they are going to wind up winning?" The only response I have to that is that it is a small price to pay for human decency. That is a situation that State and Federal governments face today too. Sometimes you win and sometimes you lose. But the problem is not closing the courthouse door.

I want to close with just a personal note. There probably is no place in the free world today in which someone does not have free speech, and where someone who is denied free speech has no recourse than within an Indian reservation, within the United States of America. I am ashamed by this.

I appreciate Professor Clinton's point that sovereign immunity is something they bargained for, and that all other things being equal we should let them have it. There comes a point in time—and this country made this decision over 200 years ago, and every country in the free world has followed suit—there comes a point in time when you say, "I have to make a choice. There are certain human values that our system of government acknowledges and respects and judges others by. We cannot permit this to go on."

CHAIRMAN PENDLETON. Thank you, gentlemen.

Before we go to questions, let me make a comment. This Commission's mind is really open, and I think the fact that we have had balanced testimony throughout all this process is an indication of that. We realize this is an extremely difficult situation, as you have indicated, Mr. Pevar, to make some recommendations to Congress and to the administration. When we make one, or make several if that's the case, we want to make certain that we are doing what is in the best interests of the people who are to be the recipients of the kinds of recommendations we would make if our recommendations were considered for public policy.

I think the three of you have outlined some extremely important parameters of that recommendation development. And I think, speaking for my colleagues, we need you to be aware of that. That is why I said in the beginning that there is absolutely no way we could close off this record today. We have too much material to look at. We haven't had a chance to see it all. And I'm certain that my colleagues in carrying out their responsibility want to be able to review every piece of paper that we have.

COMMISSIONER ALLEN. We'll tell you when it begins to be repetitive, Mr. Chairman.

CHAIRMAN PENDLETON. When I used to teach school, Dr. Allen, I used to say to my students, "If you don't hit me in the first paragraph of your test paper, you don't have me at all. After that point I begin to stop reading."

But I think you need to know and the other witnesses need to know that there is no rush to judgment; there is no rush to judgment. If anything, we need to make certain that we know exactly what we are doing. And there is one person I know that will not let us rush to judgment, and that is Commissioner Destro, who has slowed us down on more than one occasion so that we don't make this mistake. I think, in all respect to him, there's been one instance where he has slowed us down where we have been able to do some things that we think could make a difference in how what we recommend is accepted, and I must applaud him for that.

So don't look to tomorrow morning's paper to see that three Commissioners have decided, "This is what we do with ICRA, and this is what we do to Congress." That will not be the case, and there will be many moons passed, if you will, before we come to the point of saying, "Here's what we recommend," and I'm certain that a lot of you will know about that at the time we feel comfortable with doing it.

I'm being extensive with those remarks so you will understand what I'm saying. I appreciate your testimony.

Counsel.

MR. HOWARD. Just very briefly. Mr. Pevar, you are right to say that ICRA complaints can no longer be sent to the Department of Justice, or at least the Department of Justice can no longer do anything about them, so you seem to be getting a great many of these complaints. The Commission can receive those complaints. We have received a great number of complaints since we started this project 2 years ago, and if you would like to forward those complaints that you've received to us, we'd be very happy to have them.

MR. PEVAR. What can you do with them?

MR. HOWARD. What can the Commission do about anything? We can make findings and recommendations and report to Congress and the President. The crux of the matter of ICRA enforcement is to gather the facts, to base any recommendations we may make on data that is nationwide.

MR. PEVAR. Well, part of the documents I submitted you can consider as four separate complaints. They were presented to me that way. And my response was, "I would like to present them to the U.S. Commission, but unfortunately there is nothing you can do outside of tribal remedies, and you have exhausted those already, so you're out of luck."

MR. HOWARD. I understand, but we can use them in writing our report. We need to digest these things. We are continuing to gather information from the tribes, as Chairman Pendleton said in his opening statement. We submitted a letter to the Department of the Interior—you may have seen it, dated December 9—which enclosed a nine-page questionnaire. And a great many of those questions had to be sent directly to the tribes because the Bureau did not have that information. I'm talking about the number of ICRA complaints brought, the numbers of instances in which sovereign immunity is raised as a defense. We are still receiving that information. It's coming in slowly but hopefully surely.

COMMISSIONER DESTRO. One of the suggestions you made strikes me as being useful, and we might want to—

MR. PEVAR. I hope after all that—

[Laughter.]

COMMISSIONER DESTRO. In terms of information gathering. There are a lot of useful suggestions in there. But our focus in sending out that questionnaire was on BIA and obviously, since they didn't collect the information, to the tribes. It seems to me if you could help us and if others could help us in terms of who else we ought to send a copy of that questionnaire to—we know with respect to the reservations how to find the legal aid office on the reservations that we've dealt with, but you obviously have more access like who should we send it to? Who is the network?

MR. PEVAR. Here's an important name and telephone number for you. The Legal Services has an Indian law backup center, and that Indian law backup center gives backup work to all the Indian Legal Services in the country. The fellow in charge of that now is Steve Moore. His telephone number is (303) 447-8760. And I believe he has the name and address of the director of every Indian Legal Services program in the United States.

CHAIRMAN PENDLETON. Commissioner Destro is making that request because we only visited two locations. It is impossible, under the constraints that this Congress has placed upon us, the budgetary constraints and the muzzle constraints about what we can say, maybe, for us to go much farther with this. We might be able to make some other arrangements. But the thing is we want to be able to use as many resources as are there to be able to collect what we think is important information.

And I understand that my letter to Secretary Hodel is all over this country, so if you don't have a copy, we'd be glad to give you a copy of the letter to Secretary Hodel so you can see what kinds of questions we are asking of the tribes.

COMMISSIONER DESTRO. Do you know whether or not they collected data? Do they collect that kind of data in some kind of a tabular form? Because when I did volunteer work at Legal Aid in Cleveland, we had to fill out a little form that I assume went into a computer bank somewhere

that justified the funding levels that they were going to be asking for the next year. Now, whether or not that is easily retrievable from whatever data banks—but does somebody mark on a Legal Services intake sheet that this might be an ICRA claim?

MR. PEVAR. We used to do that also when I worked for Legal Aid. Again, I don't know if it's still done.

MR. CLINTON. Could I say something about the information access problem for a second?

COMMISSIONER DESTRO. Yes.

MR. CLINTON. There is a footnote in my statement which suggests that there is a problem, but it's a problem of collection of the cases and publication. I know if I want to find out whether States are honoring the constitutional amendments, I can trot into my law library and take a look at the reported decisions. While the *Indian Law Reporter* has episodically collected those decisions which are sent in, there is no systematic reporter that collects all the tribal decisions.

I happen to think that education is an important answer in the questions here, and if in fact there were such a reporter system, hopefully funded with some dollars that would subsidize it so the tribes that are poor can afford it, it might come as a surprise to some tribes that, yes, there are other tribes that realize that there is an exception to sovereign immunity called *Ex parte Young*, and yes, you can sue a tribal official without involving sovereign immunity, and yes, that's a classic part of some tribe's jurisdiction.

I think that such a reporter system that is systematic, instead of sort of voluntary in a way the privately funded *Indian Law Reporter* system is, might be very, very helpful both to give government and this Commission the information which it is seeking but also to help elevate and educate the level of legal discourse among both law-trained and paralegal judges on these kinds of questions.

Now, it is quite true that a judge at Oglala is not going to have to follow the decision of a judge on the different sovereign immunity statutes from, say, Colville. But I think that knowing other tribal judges are doing certain things to enforce the Indian Civil Rights Act—and they are—would be very, very helpful and would basically solve two problems at once.

CHAIRMAN PENDLETON. You bring to mind that I had a chance to speak to the Indian Tribal Court Clerks in Reno last year—Counsel Howard and I went out together—and found them extremely interested in the kind of thing that we are doing. But what I found even more important is that they had never seen what we have put out called the *Indian Civil Rights Handbook*. And the request for that handbook from people was just outstanding. We came back and had to mail out copies to people.

I think what you are saying is that if we can pass out more information, people can begin to make some of their own decisions with respect to this,

but how far we can go with that jurisdictionally or budgetarily I don't know, but your comments bring to mind that session.

COMMISSIONER DESTRO. Let me just add while we're on the subject that one of the recommendations we might consider would be that we know, I think it's fair to say, that the tribes don't have enough money to consider anything like access to LEXIS. And I do know that a lot of the deal Mead has cut with a lot of the State judges is, "You send us your opinions and we'll give you a free terminal." That's the way to get the stuff. But the Federal Government does, in fact, have its own system called JURIS, which might be expanded to have an Indian law database in it so you could just search it as part of the Federal Government's trust responsibilities.

But that's on the law side. What I was asking about, although I think it is certainly relevant but we need the fact side, too, and we talked about around this table, and Commissioner Berry made the comment two meetings ago, I believe it was, that there really are no new ideas. But it is really impossible to find out exactly how many Federal civil rights claims there are and under which statutes because everybody has incompatible databases, and wouldn't it be nice to have a nice consistent database, that we could pop into the database any time we wanted to and find out what's going on.

And that's why I asked the question, do you know whether they still fill out those sheets, and is there some way, even to recommend that Congress fund some money, to pull that information out, because they shouldn't be making laws based on no information, although they do it all the time.

CHAIRMAN PENDLETON. Can we move to some questions? I think we are almost catching up with ourselves here, and I think the record speaks for itself, but there are probably some questions we need to ask you and you need to respond in a way that makes it an even better record. Brian.

MR. MILLER. I was going to say for the sake of time I will limit myself to one comment and one question.

The comment is we spoke of balance a minute ago, and I just wanted to comment for the record that we did invite other witnesses that would have considered themselves unfriendly witnesses, but they have either declined or have not been able to make it after accepting.

The question is addressed to Mr. Pevar, and that is, I wanted his thoughts on how a study of the Indian Civil Rights Act compares to other studies of civil rights. I thought, since you were with the ACLU, it would be most properly addressed to you.

MR. PEVAR. Let me make sure I understand the question. How, for example, does the enforcement of the ICRA compare with the enforcement of the Civil Rights Act of 1964? Have there been more or less violations?

MR. MILLER. Well, I guess what I was asking was: we have heard a lot about tribal sovereignty and a lot about difficulties in obtaining evidence of

violations of civil rights. I was wondering if you have any thoughts on whether the difficulties in ascertaining those violations and I guess conflicting rights of governmental units—if those problems come up in other civil rights investigations. I don't know if I made it clear, but I think you understand where I'm going.

MR. PEVAR. I think I understand where you're going, but I think the two things that are most critical—and if this answers your question, good—are, number one, you are having violations of this Federal law; and secondly, I don't know of any other civil rights laws in which the courthouse doors are closed to enforce them.

Whether there are more ICRA violations than more violations of the 1964 Civil Rights Act, I don't know and I don't think anyone knows. But, without hesitation, I will say there are pervasive and massive violations of the ICRA for which there is no recourse. And that is something that is intolerable under our system of government, or should be.

CHAIRMAN PENDLETON. Mr. Clinton, I saw you shake your head, and Mr. Laurence, are you just being an innocent—if you're being a sponge and taking this all in, it's okay, but if you want to contribute, please feel free to do so.

MR. LAURENCE. I had you to myself. I thought it was only fair to let those two—

CHAIRMAN PENDLETON. No, I don't think it's fair for you to cop out with that.

[Laughter.]

MR. LAURENCE. I'll remain the calm voice of moderation, and when you get done with them, I'll sort of wrap things up.

[Laughter.]

CHAIRMAN PENDLETON. Touche.

MR. CLINTON. I'm really troubled by the statement that the courthouse door is closed. On many Indian reservations the courthouse door is quite open. And notice it is not just the back courthouse door is open, but as I suggested in my statement, if the judgment requires extraterritorial effect, the Federal and State courthouse doors are open to hear the violation. Furthermore, in certain situations, certain limited situations, there are other remedies that could be sought. I would be the first to confess that they might be more aggressively pursued by the Bureau and the Bureau ought to be doing something, but the law already provides for them.

Painting a picture that suggests that there are either no direct remedies or there are no indirect remedies for these violations of civil rights does not, in my judgment, accurately reflect the present state of the law. In short, one of the problems we may have may be paying more careful attention to that law which we have, instead of trying to advance a systemwide remedy for isolated problems—and there are problems; I

would be the first to concede it—but they tend not to be systematic, in my judgment.

And it seems to me the remedy which has been proposed here by my colleague next to me, which is a return to pre-*Martinez* law, not only does disservice to another right of Indians, the right of sovereignty, but treats the sovereignty as less than that of States, in contradistinction to my proposal which, if I thought there was a systematic problem, would be the first thing I think we ought to try because it represents the most limited intrusion on sovereignty that we can have and still accommodate an external review of the tribal forums. And there are forums.

CHAIRMAN PENDLETON. Mr. Laurence, how do you feel about the dialogue between these two with respect to there may be some ground that we don't have to go to pre-*Martinez*? There's a difference of opinion here about how to do this, about what we should recommend—might be something in between a legislative repeal of ICRA—and I risk to say a word that you don't like, which is tinkering with the principle of it. But how do you feel about the sense of what it is that I'm saying, if not the substance?

MR. LAURENCE. The substance of what you say is that you'd like me to referee these two?

A good part of what each of them said, they passed in the night. The first half of Mr. Pevar's testimony had to do with what is going on on the reservations, and I am certainly in no position to say that. And Bob Clinton didn't say anything, I think, that really contradicted anything that was in that first half. That all depends upon other witnesses who are coming before you.

Likewise, the first half of Bob's comments with his respect for sovereignty, Mr. Pevar called eloquent or something like that. I got the impression that Mr. Pevar does not object to Bob's recitation of the history of tribal sovereignty, so I don't feel as though there is any dispute to be settled there.

As I recall, Mr. Pevar was very careful before he listed his five reasons to overrule *Martinez*; he was careful to say, "Maybe there is something less intrusive and we ought to do the least intrusive thing." Bob's suggestion is that there is a less intrusive alternative, and that is *certiorari* to the Supreme Court of the United States.

I'll referee that dispute by saying people more savvy than I would suggest that that is not a politically available alternative, to convince Congress to allow petitions for *certiorari* to the U.S. Supreme Court. If it were, I think I would prefer that to overruling *Martinez*. I'll let Mr. Pevar say whether he would prefer that if it is a viable option.

COMMISSIONER ALLEN. Let me ask you before you do that, to follow up a bit on that—because when the statement was made by Mr. Clinton—I was mindful of the fact that the analogy wasn't exactly complete. It is true

that *res judicata* leads to the Supreme Court, but it is also true that citizens of States have the option of filing allegations of violations of their Federal rights in Federal district court. They can file in State court or in Federal district court.

Do you mean by accepting his formula to limit it to an appeal to the Supreme Court, or would you give the option also, tribal court or Federal district court?

MR. LAURENCE. You're talking about 1983 actions that will allow an injunction. Really, Bob has to respond to this because Federal jurisdiction—

CHAIRMAN PENDLETON. Excuse me. For the sake of the record, you mean section 1983?

MR. LAURENCE. Yes.

CHAIRMAN PENDLETON. For the sake of the record, it's section 1983, not 1983 as a year, because those who will read the transcript will wonder what happened in 1983—people like me who are nonlawyers.

MR. LAURENCE. I certainly don't remember where I was in 1983 or what I was doing, but I'm sure it wasn't in any way illegal.

[Laughter.]

MR. LAURENCE. Bob Clinton will want to respond to what section 1983 means. He teaches the course and I don't, and there is an exhaustion requirement. I'll let him speak to that.

I had Commissioner Allen's reaction when I read Bob's written remarks over lunch. I was sort of persuaded by Mr. Pevar, though, just now saying, "Let's try the least intrusive thing we can," and certainly *certiorari* to the Supreme Court is less intrusive than *de novo* review in district court.

So if I thought that were a politically viable option, then based upon the Pevar less-intrusive remedy argument, I'd follow Bob's suggestion. I'm just afraid I don't think anybody in this town is going to convince Congress to open up the U.S. Supreme Court to writs of *certiorari* from—what would it be?—125 tribal courts.

CHAIRMAN PENDLETON. What you're really saying is there is a legal way of looking at this, and then there is the political reality of what you do with the law.

MR. LAURENCE. So I'm told.

CHAIRMAN PENDLETON. There's a political way of looking at this whole thing, I think, that is different from what Mr. Clinton is saying, that the law makes these things available to you. I guess we could say we would doubt very much if Congress would tinker, even in the smallest amount, with the Civil Rights Act of 1964 for the same kind of reason.

MR. CLINTON. If I could address the 42 U.S.C. section 1983 problem, because I do teach in that area.

COMMISSIONER DESTRO. Could I interrupt before you do? There is an aspect of this that it would be useful for you to address at the same time.

Commissioner Allen addressed a plaintiff-initiated complaint, and if you might wrap into your comments the civil rights removal statute, which is a defendant-oriented Federal remedy that may be legally available, but I defy most people to find a case where it has succeeded since the 1860s.

MR. CLINTON. Actually, that question wrapped into it would have been my answer to it, which is while that is, at least in theory, available with respect to 28 U.S.C. section 1343, if I recall correctly, civil rights removal, the reality of that kind of removal in Federal court is virtually nil. But let's talk briefly about [section] 1983.

One looks very carefully at 1983 actions that are brought successfully today in Federal court. They are not about abuses which occur in State courts. Why are they not about abuses which occur in State courts? Because those abuses for the most part are adjudicated in those courts. The decision of the court is final.

COMMISSIONER ALLEN. Let me interrupt, because that is not the reference we're making. We're only talking about civil rights claims, whether they are against tribal councils, tribal police officers, courts, whatever. It is not a question of abuses within the court being reviewed on writs of error that we are discussing here.

MR. CLINTON. Precisely, I understand that. But let me take that one step further. Since many tribes—unfortunately not as many as both the Commission and I might like—do in fact provide remedies of those ICRA violations in their tribal court structure, and since all the panelists conceded that going to those tribal court structures should be the first thing that anybody should be required to do, that is noticed different than 1983. The entire panel here is saying that there should not be concurring jurisdiction in the first instance, and without exhaustion—there is no exhaustion doctrine in 1983 law. Then no one is suggesting really that there ought to be a concurrent original action. Why? Again, it's because of the accommodation of that important Indian right of sovereignty, which in many ways is stronger, as I suggested at the beginning of my statement, than the claim to separate governmental status of the States.

Now, the second thing I'd say about that, which I think is very important, is that if you look at the Supreme Court's recent line of decisions over the last 15 years with respect to 1983 cases, the increasing trend among those cases in doctrines like Younger abstention, and in doctrines like the Antitax Injunction Act requirements, has been to return to the States the front line, often exclusive handling of such constitutional claims, leaving the remedy to 1257 Supreme Court review.

In short, the U.S. Supreme Court has come to the realization that an overly broad enforcement of 1983, without reference to State sovereignty, could in fact impinge on State sovereignty in a serious way and has relegated those claims back to State courts and the Supreme Court review.

Their concern about State sovereignty is precisely my concern about tribal sovereignty. But, in fact, I go one step further.

COMMISSIONER ALLEN. Before you do—let's try to get them step by step, and in that way we won't get lost. What I missed in your response about the *certiorari* with respect to the tribes is that same symbiotic relationship that allows systems to grow together. What you just described for States and the Supreme Court or the Federal court, there's a symbiotic relationship. Are you suggesting that same degree of symbiosis for the tribes and the Federal system?

MR. CLINTON. No, I am actually suggesting something slightly different, and that something slightly different is that the United States honor its treaty promises to tribes, which it never made to States, to treat them as sovereign and to respect that sovereignty. Therefore, the extra mile of exhaustion, which was contained in Mr. Pevar's statement and, for that matter, Bob Laurence's statement, which suggests that you can't initiate in Federal court without going to tribal forums first.

COMMISSIONER ALLEN. There are some promises of sovereignty to States, but we won't get into that. And it's not viewed as governmental; it's constitutional.

MR. CLINTON. I also write in the area of constitutional history and we can discuss the history but not in this hearing.

I happen to believe, frankly, that the promises of the Constitution in the Indian commerce clause, but also in the treaties, the tribes are stronger, and that there's a difference. The fundamental difference is the States and most of their people were in fact part of the Federal bargain; they were part of the "we the people." It is not true that the tribes were.

COMMISSIONER ALLEN. Just one last word. That is not entirely so. When you say "the tribes," of course, you imply every Indian and every Indian tribe. That is not entirely true. There were some Indians who were included. And, indeed, the language of the Constitution excludes Indians not taxed expressly in order to include Indians taxed, meaning those who could be part of the union that was formed.

MR. CLINTON. I have researched that clause, and my conclusion with respect to that research is that the "Indians not taxed" reference had reference to Indians who were still living in tribal communities. In short, it had reference to tribes. What was involved were, in fact, those Indians who had, for various reasons, including, I might add, slavery, been taken out of tribal communities and were living in what were then white communities, and that's a very different statement.

COMMISSIONER ALLEN. Except historically, but we'll talk about it afterwards.

CHAIRMAN PENDLETON. I'm liking this, but we have to bring this to a close soon because we have some other testimony.

Mr. Pevar, do you have a comment about that?

MR. PEVAR. Very quickly.

Again, I feel the test should be the least intrusive means that works, in other words, affords meaningful redress for the violations of civil liberties, the civil liberties that are guaranteed in the ICRA. And I have reluctantly come to the conclusion, for the reasons I have stated, that a private right of action is that least drastic means.

CHAIRMAN PENDLETON. That works.

MR. PEVAR. That works; right. And the reason why I rejected that is one my colleague on my right has stated, that politically I don't see either, when Congress is presented with opening up the Federal district courts to these problems or opening up the U.S. Supreme Court to hear appeals from the 120 IRA tribes and all the other Indian tribes, the 500-some tribes.

Secondly, it is ineffective because the Supreme Court takes so few cases. Their rules even tell you, "We don't take cases just because there's been a violation. We only take those cases that will establish important principles."

That means for my clients, and for the dozens of people who are suffering ICRA violations, they won't have any more redress in practice than they have today. They will never be heard. And even if they could afford to hire a counsel to present a petition for *certiorari* to the United States Supreme Court as to why they lost their tribal job—even if they could do all that, the chances that the Supreme Court is going to accept their case is so minimal that I don't find that to be a meaningful opportunity.

MR. CLINTON. If I could just add, if reality is a matter of concern—and I think it should be—I think one has to also compare the speed of remedy of direct review in the Supreme Court, which is a one-step process, with the speed and cost of remedy of first going to a Federal district court, then having it appealed to the United States court of appeals, and then finally the potentiality ultimately of Supreme Court review after that; it's a three-step process on top of tribal review. To the extent that it is more costly—and I think it is far more costly—it also is far more disruptive of tribal government if, in fact, it turns out that the claim was without merit. It's costly, even for injunctive and declaratory relief. The other remedy is far less costly and more speedy.

CHAIRMAN PENDLETON. The last word is yours, Bob.

COMMISSIONER DESTRO. I would agree with your last comment in the sense that I have been told on other occasions, once by the Attorney General of Missouri and once by the former Governor of Rhode Island, that civil rights attorneys' fees are the single highest line-item budget in either of their State law enforcement budgets. And he said, "And that only includes our costs, not the ones we have to shell out because we lost the case." So in terms of cost you may well be correct, and I suspect that you are.

This is a hard question to pose—and I have done it in constitutional law classes that I've taught, and as a result have been accused by a couple of my students of being a critical legal studies aficionado. It seems to me that everybody agrees on the goal here, so it seems to me what we really need to do is go back to the initial assumption. And it seems to me that what we have here is some differences of opinion among this panel. The BIA people profess no opinion on it. They are just merely the vessel into which Congress pours its intent.

But here we have Professor Clinton taking the position that the tribes are not like States; tribes are independent sovereigns who weren't part of the deal; and that the result is that we should look at them under the treaties. If I hear you correctly—and I'd like to have you expand on it a little bit—the limitations, if any, of Congress' power under the Indian commerce clause.

Then what I hear Mr. Pevar saying is that, "Wait a minute, that may all be true, but this is the United States, and it is too late to make those kinds of arguments, that these people have been incorporated into the United States, they are United States citizens, and there are certain modes of behavior that we expect out of all civilized people, and it makes us look rather hypocritical for us to say, 'Well, they have sovereignty'—to violate their people's rights." That is why at the very first hearing we had in Rapid City, South Dakota, one of the only TV networks that was there was South African television because they see the reservations as our homelands.

And not to characterize Professor Laurence's testimony too much, it is a somewhat mediate position that no matter what you do, there ought to be kind of a middle ground. I think everybody agrees on that, that there ought to be some way we can do it. But it seems to me, isn't it going to be incumbent upon this Commission as a first step to say that you have got to address the notion of what is an Indian tribe, and what is its relationship to the Congress—not how does it compare to a State, but what is a tribe?

I think everybody would agree it is valuable, whatever it is. It seems to me that Congress did make a deal back in the early days, and we don't get rid of the word "reservation"; it was all given to them; they reserved it, just like the States reserved something in the 10th amendment. What it is, the Supreme Court is not sure, and I don't think we're any more sure about what the tribes reserved.

But isn't that really the question? What is a tribe and what is their relationship to this polity we call the United States of America?

MR. CLINTON. I think ultimately that is the critical issue, and I also think in addressing that issue you hit the nail on the head in suggesting that the question of congressional power is, in fact, a critical question. I have long been researching the issue of the scope of congressional power under the Indian commerce clause, and I am familiar with the excellent work of your

colleague, Nell Jessup Newton at Catholic, who has done some very similar and excellent work. And I come to the following conclusions with respect to it.

History suggests that it is about regulating governmental affairs of a United States sovereign with another sovereign. The Indian tribe isn't included among other sovereigns like foreign nations for nothing. That is bilateral relations. It involves negotiation. It involves government-to-government contact.

The idea of plenary power historically never developed under the Indian commerce clause. It instead developed in at least three critically important cases in the late 19th and early 20th century: the *Kagama* decision, the *Lone Wolf* decision, and the *Sandoval* decision, under something called the trusteeship power, which I don't find anywhere in the Constitution and I don't think is legitimate.

The Court in *McClanahan* rejected, rejected, any idea of a trusteeship power but never went back and fundamentally considered the question of what is the scope of commerce with the Indian tribes. That is the fundamental question.

What I think that means is government-to-government dealings and negotiations.

Now, notice in those government-to-government dealings and negotiations, sometimes the sovereign has cards to play, whether that is Federal monies for the judiciary, whether that is recognition of a tribe, whether that is programs. And we do that with foreign nations. We do it and can do it with tribes. But there is a vast difference, Commissioners, between negotiating with the tribe and making a recommendation, which is what you heard from my colleague to my right today, to impose something on the tribe. I have some problems with solutions that are impositions and not the product of negotiations about that fundamental right that we guaranteed to the tribes in the treaties.

CHAIRMAN PENDLETON. Mr. Pevar, I thought Congress already decided that.

MR. PEVAR. Congress did. I have a problem with imposing something on tribes, too. I have a greater problem with denying free speech. And I simply come down on the side that there are basic values that this country prides itself on, and we cannot deny some of our citizens those same rights.

So in other words, you ask your first question: what is the nature of an Indian tribe? But then you must ask the second question: will we permit that Indian tribe to deny free speech?

COMMISSIONER DESTRO. Isn't the subsidiary question, before you get to that, that there is no other sovereign on the face of the earth whose citizens are also citizens of the United States? And we granted every single one of them citizenship. If you're going to draw an analogy—and it's not mine; I wish I'd come up with it—but it's a lot closer to what are the citizens of

Puerto Rico than it is to what are the citizens of Louisiana. That's why I say that I'm not so sure. I mean, it strikes me there has got to be a mediate position between negotiating about our own citizens' rights, which we usually do at the barrel of a gun with a foreign power, and as I recall from the BIA affairs they were looking at it like this was a part of the War Department. We had the troops, and Kit Carson moved them from one place to another. These were subject people, and now we made them all citizens so now they're different from Bolivia or the Philippines or Chile. And that may well be the genesis of Mr. Laurence's comment.

CHAIRMAN PENDLETON. Mr. Laurence, do you want to say something?

MR. LAURENCE. With all respect, I think you are a crit—[laughter]—and as an anticrit I think such discussions have almost nothing to do with getting bread on Indian tables or free speech into their mouths. And the whole idea of Congress taking on a debate as to where in the world the plenary power comes just scares the bejabbers out of me, and I'd never suggest they ought to do that.

COMMISSIONER DESTRO. That is important, but politically speaking, it seems to me that is implicit in everything I've read. And one of the things I find most amazing about people who say I'm a crit is I'm probably one of the first conservative crits that most people have come across. It just seems to me implicit in all of this are those kinds of arguments that you're never going to be able to get down to brass tacks to find those mediate things unless you say, "Look, let's be honest about what it is we can expect for American citizens out of Indian tribes."

CHAIRMAN PENDLETON. I'm not so sure we can decide what a tribe is. If we have to ask that question, that's good discussion at some point. But the question is, as Mr. Pevar said, there are people who are suffering now, and what is it that we can do to recommend relief? There's a bill sitting up there now about self-determination of education. If we can influence that, it's fine, because I don't know when we might have a chance to influence something again, and probably we won't have a chance to do that. But the record that is here certainly could impact and should impact upon the kinds of decisions the Senate makes in the bill now before it.

COMMISSIONER ALLEN. Mr. Chairman, if I remember correctly, Mr. Ickes said earlier that those make nice discussions, but they don't solve problems. But I'd like to remind you and everyone else that usually problems come precisely from those kinds of discussions having taken place earlier, at least implicitly, and decisions being founded on them. And to resolve problems sometimes means being fundamental. It means unlearning history we think we know when in fact we don't. It means changing concepts. That's often what these things lead to.

CHAIRMAN PENDLETON. Gentlemen, thank you very much.

We'll take all three people next—Ms. Smith, Mr. Colosimo, and Judge Coochise.

Mr. Colosimo is not here, so we will take Ms. Smith and Judge Coochise.

[Jane Smith and Elbridge Coochise were sworn.]

CHAIRMAN PENDLETON. I might add that those persons who wish to make your 5-minute statements during the public section, we will ask you to sign up with the clerk right off my right shoulder, and we'll be glad to take your testimony for the record. Those who want to write us, feel free to do so.

Ms. Smith, go right ahead.

TESTIMONY OF JANE SMITH, PRESIDENT, NATIONAL AMERICAN INDIAN COURT CLERKS ASSOCIATION

MS. SMITH. I am Jane Smith, president of the National American Indian Court Clerks Association. To give you a slight background, I have been with the Colville Tribal Court as a court administrator from Washington State for the past 7 years. I have been president of this organization for about the last year and a half.

I am somewhat representing our 287 members across the United States which comprise 146 major tribes. So I feel that I kind of know what's going on. But I would like to clarify that, that what I have been hearing today is a lot of substantive law, that type of thing. I'm from the trenches. I'm the one that has to do the actual workings and do all of the paper shuffling that goes along with affording people these tribal rights, so I hope you guys will keep that in mind when you're asking me questions.

One thing that I thought was kind of interesting, at least in the discussion today, was about using money as a form of making sure that we do afford people their rights. I'm not sure of some of the other tribes in the other areas, but I know at least as far as we are concerned we do get 638 money from the Bureau, and we have to do a lot of paper shuffling to make sure that we are doing our jobs. We do quarterly reports; we do final reports. We are evaluated quarterly by the Bureau to make sure that we are affording people their rights.

I do have the documentation that I brought to give to the committee. If I had a little bit more time, I would have had copies for everybody. But in it I kind of wanted to give you a general idea of at least what we are doing in the Colville court, and I would like to say generally what most of the clerks in Washington and the Pacific Northwest area are doing.

I have included scripts of our arraignment procedures where we explain to the defendants what their rights are as far as under the Indian Civil Rights Act and under our code.

I have included five sections of our tribal Law and Order Code so you can see the duties of our judges, court clerks, court administrators, and what rights the defendants have.

I have included one copy of a criminal file which is a random file I picked up to show you exactly what a file looks like so you will know we are a court of record. We do record all of our proceedings.

I have a Federal court decision where one of our cases was sent up as far as the Ninth Circuit, and it was held that we were doing our job, that there were no civil rights violations. It was brought up on a writ of habeas corpus.

I have brought copies of several of our criminal dispositions so you will know what type of cases we are doing and the type of sentencings we are providing to those defendants.

We do have a court reporter that we keep for the Colville tribal court, and I have included about six or seven decisions that have been heard in the tribal court.

I've got job descriptions for the chief judge, of which one of the requirements for our court is that the chief judge be a law-trained attorney. We have two associate judges on staff. One is law trained. Those two are members of the Washington State Bar in addition to our tribal court bar. And we do have one lay associate judge.

I have also included the judicial oath of conduct and our spokesman's oath. To become a spokesman in our tribal court there is a \$25 fee, and they do have to pass an oral examination on their knowledge of our tribal Law and Order Code. It doesn't matter whether they live on the reservation or off, and we do have a bar membership of about 25 members with attorneys from as far as Seattle and Bellingham, which is on the coast. We are farther inland.

The tribe—in fact today, possibly by now—is going to be taking the issue of the Civil Rights Act and including it in our Law and Order Code. When I left Tuesday they had given me a copy where 9 of our 14 councilmen had signed it and approved it, so that today it was kind of just the formality of passing it in full council session.

I have included a copy of our quarterly reports and a profile, at least the back page that was completed of what you had requested.

And I would kind of like to say that a feeling I am really getting from this is that we the people, the ones that are really the ones that should be concerned about it, really haven't been asked or included to find out what we feel about this whole thing. I can probably say I don't think any of you are tribal members or probably even lived on a reservation.

My concern is, number one, I think this Commission should have, first of all, asked the people living on the reservation if they feel their civil rights have been violated. It kind of comes down to the fact that traditionally the United States Government has always told Indian tribes, "This is what we are going to do for you, and this is what you are going to do." They haven't really asked us. I don't want to alienate you, but I kind of feel that that's what's going on here.

We have had some really good testimony for us and some good testimony against us, but basically you haven't gone out and asked us how do we feel about it. There are some civil rights violations, but I'm sure you'll find there may be a lot more other people out there that feel that the Indian tribes are doing a good job for what they've got to work with. I feel that should be your number one priority, a general mailing, if nothing else, of a questionnaire to the people. This profile we got was not sent directly to us. It was sent through BIA. I didn't even receive a copy of it until last week after I got back from being here. To me that is not going right to the problem and finding out what's going on.

I have also included a copy of our constitution too that has been passed, and I would like to submit that for your review.

CHAIRMAN PENDLETON. Thank you. Without objection, the documents will be entered in the record.

[The documents were entered into the record as exhibit no. 15. The length of this exhibit prohibited its inclusion here; it is on file at the Commission.]

CHAIRMAN PENDLETON. In all fairness, I think it is important to say that we have been to the field—only a small portion of that, but we have been to the field, and we do have some documentation. As a matter of fact, in going to the field we heard from more than just one tribe, certainly in South Dakota. Other tribes decided to come over and spend time with us and discuss with us.

I share your concern that people who have to do the work need to be considered in all this. I think probably, in comparison to some other hearings, that we have included the people. Certainly, you are here today as a representative. We have gone to people—I mentioned I did spend time with the Tribal Court Clerks Association in Reno and answered questions. Certainly, we'd like to do more of that.

It is also fair to say that the Congress itself has become an impediment to that process. By "impediment" I mean—one of the factors, not the only factor—if we had not had our budget cut as much as we have, we would probably be able to do an awful lot more of what it is you're talking about. And I also need to say I think this is clear indication to you and to others that perhaps this Congress doesn't want us to ask the questions that we're asking, restricting the universe in which we can operate to begin to get at the facts we need to have to make a recommendation.

Your chastising us is not chastising at all. I think it is a reality that you should be concerned about, and I can appreciate that. I think I am also right in saying that we are concerned in this total hearing about what happens to the rights of individuals on reservations. And a lot of what we are hearing is that it is not good.

I think you have also heard the other side, where in some cases it is good. And again, if Congress has decided in 20 years not to have

oversight, and then they tell us we cannot have oversight, I think one has to question the wisdom of Congress in dealing with people, like Mr. Clinton says, in a sovereign-to-sovereign way. And is this any way to treat a sovereign? I don't happen to think so.

But your comments—I'm not trying to respond in a negative way. I hope you will take what I'm saying in a positive way. We want to do even more, but there are certain constraints, and whatever we recommend would take into consideration those constraints.

Thank you.

COMMISSIONER ALLEN. May I add a word, Mr. Chairman. I think Ms. Smith needs to know that we do have a statutory mandate. And, of course, it does make us responsible to hear the complaints of individual citizens, some of whom have played an instrumental role in generating this series of hearings.

But our much more serious mandate imposed upon us by Congress is to monitor enforcement of Federal civil rights laws by Federal agencies, and this particular hearing today and the series of hearings we have had has been focused on the BIA primarily because of its singular responsibility with respect to the tribes. Our job is to say to Congress and the President whether the BIA does its job or not. And so we have been involved in this in the way we have today in order to carry out our statutory responsibility.

Beyond that, I must add, too, as the Chairman said, that we have heard from many individuals; we have sought them out. We wish we could go everywhere, but of course we can't. But I suppose what is at least worth as much is the fact that our individual interest in the matter is most certainly with the question of what the persons who live on the reservations think about their own experience. And as the scholars just before you conceded in their exchange, they are not going to establish for this Commission whether violations of civil rights or successes in the guarantees of civil rights are frequent or rare through their testimony. They can testify about the law to us. Those who will establish the facts of the matter will be the people who live on the reservations.

CHAIRMAN PENDLETON. Judge Coochise, we are glad to have you here. Do you have a statement you want to make to us, or should we just ask questions? How do you want to go about it?

TESTIMONY OF ELBRIDGE COOCHISE, VICE PRESIDENT, NORTHWEST TRIBAL COURT JUDGES ASSOCIATION

JUDGE COOCHISE. Well, basically an introduction and a viewpoint. My name is Elbridge Coochise. I'm a member of the Hopi Tribe in Arizona. I was a judge at the Hopi Tribal Court for 5 years before moving to the Northwest where I have been a judge for 6½ years now.

I am also the administrator for the Northwest Intertribal Court System, which encompasses 14 tribes, a consortium. They are small tribes in

western Washington, with two additional tribes under contract. So I work with 16 tribes.

And one of the concerns that I have with the Commission is the branding, you might say, or the remarks that I have read following the start of your investigation that because of several tribal court problems, Red Lake or Rapid City, all of us as tribal courts are denying civil rights. I take exception to that very strongly. Because that same kind of connotation is not made even in Seattle where they had last year problems with the court in Pierce County. No one said all State courts are denying process to their people or employees.

And that is the main focus I wanted to bring, that granted there are problems. You have problems everywhere, and most of us are working at it. I took the job because I thought I could sit and fairly dish out justice to my people whether it was at home or elsewhere. And I sat for 11 years, and I know there have been problems and that's what we've been working on at the national judges association, a constant turnover of judges because of either decisions, or mostly I think they were because of a lack of sufficient or adequate pay. Most of us in our society can't live on \$10,000 to \$15,000 a year and expect to not be enticed to go to other agencies to work. The biggest focus of the National American Indian Court Judges Association since I became a judge was training to upgrade those judges within the tribal courts, as well as to assist in seeing if we can get our pay scale up to where we could live and work comfortably, as well as stabilize our tribal courts. So with that I—

CHAIRMAN PENDLETON. Judge, we respect and accept your admonition. I would hope that you would not assume that we draw conclusions based on the kinds of questions we asked, and I think Commissioner Allen's comments go well to how is this law being enforced. And we have heard some good things. I would hope that you could rest assured that when a report is written, recommendations will be balanced and give credit to those tribes that are doing exactly what it is that's supposed to be done.

I think what we are looking at, as I mentioned in my opening statement, were those things that are particular and those things that are systemic, and we are looking at all of that.

If this Congress passes a law as a civil rights law and they charge this Commission with appraising those laws and seeing how they are working, I think we have an obligation to do that. I can say to you that similar kinds of criticism of this Commission did arise with respect to school desegregation matters, and this Commission had a range of positions with respect to school desegregation.

What I feel comfortable about in my tenure here is that in spite of all of the criticism and the politicization of this Commission and the negative comments by the press and by the special interest groups and by certain Members of Congress, this Commission's work is now being cited in court

opinions, in op-ed pieces, in scholarly journals, and the like. And I think that's where the battle of ideas is perhaps won.

If anything, what we want to do is make sure that the record is clear and complete. All we are doing is gathering facts. We do not leave here today with any assessment, with any recommendations in our head. As I mentioned earlier, there will be no report from this Commission in tomorrow morning's paper that this is the status of the ICRA enforcement on Indian reservations in this country. That will not take place. It will be some time before that is all put together, and those might not be the recommendations at all. I have no idea what the recommendations will be.

JUDGE COOCHISE. Well, if that's the case, it's fine, but from the time the proceedings started with inquiries, my understanding was part of the role the Commission was to play was to look at the violations within the border towns from those areas in handling Indian people, their rights, and then somehow in the middle it turned around to the tribal courts' violations.

CHAIRMAN PENDLETON. That is not what I understand at all. That is not a part of the proposal as we put it all together. We were only concerned with studying the enforcement of the ICRA. This question came up earlier.

JUDGE COOCHISE. That's fine. Because my big concern is I have more complaints coming in by non-Indians with State courts violating tribal people of their rights than I do in our tribal courts in the 11 years I've sat on the bench.

COMMISSIONER ALLEN. We'd like to receive those.

CHAIRMAN PENDLETON. We'd like to receive that. Nobody has yet decided to give us any of that.

JUDGE COOCHISE. Unless people know I'm a judge, I get totally different treatment. That is so flagrant once you go off the reservation. You go in a restaurant where there is no service until they find out you're a judge, and pretty soon three or four people come around.

CHAIRMAN PENDLETON. I understand that because I can walk past the Lyndon LaRouche people in the airports these days and they would never ask me if I supported something in terms of AIDS or Star Wars or anything else, assuming that all blacks do not take these ideas into consideration. So I understand what you're saying.

COMMISSIONER DESTRO. If you can give us some help—this is why I asked the previous witnesses. Sometimes we just don't even know exactly which questions to ask.

JUDGE COOCHISE. Okay. With that, why are you waiting until now to say that?

CHAIRMAN PENDLETON. We have always said that.

JUDGE COOCHISE. We haven't heard anything from you.

CHAIRMAN PENDLETON. Well, I don't know how to answer that question.

JUDGE COOCHISE. We work in the courts and you're talking about have these problems come up. Now you're saying give us that information. You could have given us that questionnaire 2 years ago.

CHAIRMAN PENDLETON. I think what you're doing now is you're taking this hearing as the hearing. We have had two other hearings. And as Commissioner Allen very carefully pointed out, this section of the hearing was really focusing in on the BIA. Why did we focus in on the BIA? Because of the voluminous complaints on reservations by Indians of the treatment of them by the BIA. So what we decided to do was to have the BIA come and other people come and tell us what that situation really is.

So it is not a matter that we believe the BIA. I think you have seen today where we have not said, "We believe." A lot of us are a bit astonished by that. But it was Commissioner Destro's idea, as I can recall, saying, "Wait a minute, of all we heard at Rapid City and all that we heard at Flagstaff, we have to get the BIA at the table and get some things on the record with respect to how they are enforcing the Indian Civil Rights Act."

Now, in terms of how extensive this becomes, we have always been open to factfinding. I must say very frankly to you, sir, that there are those Indians and non-Indians who don't want us to find facts.

JUDGE COOCHISE. That's true.

CHAIRMAN PENDLETON. And what I think I'm saying to you—and my colleagues may speak for themselves, and so may staff—but the universal feeling is whatever you've got, give it to us. We need to be able to look at that and assess that in such a way that we do have the most extensive record we can have before going into some kind of deliberations about a report and recommendations to the administration and to Congress as is provided and required in our statute.

So this door is not closed. This door is wide open.

COMMISSIONER DESTRO. If I can add to that, I think that I can honestly say that we have asked at every hearing, "Would you please share whatever you have with us." I have gone to the Association of American Law Schools, Native Indian Section, and said, "Would you send us whatever information you have."

I'm sure you know this is true from reading reports of what you do sometimes in the newspapers—you say, "Gee, I'm not sure that was the same case we were involved with." And what I've read about these hearings, I wasn't completely sure they were exactly the same hearings that I sat through.

But suffice it to say that we do need help and we don't live on the reservation. We are not experts in this. I know more about this subject now than I ever thought I would ever know in my whole life, and I'm sure I'm going to learn a lot more about it.

But I kept looking at the document that you put together, and this is the first that I knew that you did quarterly reports, and that in point of fact the

BIA does have the information. And unless you had come here and told us—because we sent a questionnaire to the BIA, and like any other bureaucracy you have to fight like crazy. You have to tell them exactly what you're looking for before they'll admit whether or not they have it.

So any kind of smoking gun memo or anything else, if you think or if you go home and talk to whoever and say, "If there is anything that you know of that might be relevant, send it in." We talked this morning about keeping the record open longer than 30 days. This record is open a lot longer than anybody ever dreamed it would be because, as the Chairman quite accurately pointed out, I left Rapid City, South Dakota, seeing that the hot little hands of the BIA are all over this thing. I mean you can't turn around without running—you cannot say anything without running into the BIA somewhere. And our primary responsibility, as other Commissioners have pointed out, is that if we don't have authority over the tribes, which has been the big issue in the media, we certainly have oversight responsibility over the BIA.

I don't know whether they're the source of the problem or the problem or what, but we certainly need everybody's help in trying to figure it out. We don't have any preconceived notions. If we started with them, we certainly don't have them now.

CHAIRMAN PENDLETON. I think you can rest assured—and we are being exhaustive and extensive about this—it does none of us any good, this Commission, collectively or as individuals, or the BIA, or the tribes or nations themselves, to not put all this up on the table and to sift through it in an appropriate manner where we can make those recommendations.

Again, I want to reinforce that the reason the BIA was here—this very transcript of Rapid City, when you go through this, as Commissioner Destro says, BIA's hands are all over this document. We needed to know some more about that.

Right over here [indicating]—I'm not trying to play state of the Union—[laughter] is the transcript from Flagstaff; and when you go through this transcript you see an awful lot of things in it.

These aren't the only things we are concerned about or going to deal with, but certainly these are matters on the record and under oath in both of these documents. And whatever we take is going to be, for that matter, under oath. We need to have everything we possibly can.

But I'm going to tell you, when Mr. Pevar read from part of my dialogue with Chairman Morgan Garreau in Rapid City, that was frightening testimony. And we have to continue to raise the question—as my colleague has raised—this is the issue about those who have power and those who don't have power. And there is a big question about how those who don't have the power are treated by those who do.

I am going to say, frankly, that maybe those that do have the power in some cases do treat people well. But the record that we got at this point

indicates, while we're here today, that we need to look even further. Even in Rapid City, when we left there—the intimidation of witnesses is a cause for concern. We even had the U.S. attorney look into some matters at Rapid City.

So if there is something really good about this, it is important that that be up on the record.

JUDGE COOCHISE. If you can get a U.S. attorney to act, you're doing better than we have in the past years.

CHAIRMAN PENDLETON. It was not easy to get the U.S. attorney to act.

JUDGE COOCHISE. In the questionnaire that you sent out, a lot of the questions were geared towards the courts, and I'd really like to respond to that. Especially in the Northwest area where we have 41 tribes in the Portland area, we do have both trial and appellate courts, and we do have jury trials. Most of the appellate panels are three-judge panels. There is one tribe that has more than three judges. I think they sit five or seven on the panels. And most of our judges have been through training, even though they were not legally trained by your terms as far as a lawyer, with our own association and also the American Indian Lawyer Training Program, and now the National Indian Justice Program. And many of us tribal judges attended—at least I know in the first 4 years I was on the bench, three times a year I went to the National Judicial College in Reno.

Your questions—a lot were dealing with training. Yes, we do receive it when we can, and it has been slowing down lately because of the funding aspects.

CHAIRMAN PENDLETON. Would you be amenable to allowing some of our staff people to come out and observe?

JUDGE COOCHISE. Yes. In fact, we made that request. I think you have it in your records. We sent a resolution to Flagstaff with one of our board of directors from the Northwest Judges Association.

CHAIRMAN PENDLETON. Yes, you did.

COMMISSIONER ALLEN. I remember it very well.

CHAIRMAN PENDLETON. And I'll say again that this record is not closed. Again, we have the same constraints you have, and the constraints are with respect to where the dollar is going to come from to do that. We might be able to find a way to do it, but I think to help with that is to say to us exactly what goes on. We are not basing this on all that we heard at Flagstaff or all that we heard at Rapid City. There's got to be a little bit more to this, and we want to work it all out. That's all I can really say.

COMMISSIONER DESTRO. If you can help us with other questions—we don't know what it's like in the trenches. You know what the questions are; we really don't. It is really true in government, as in anything else, that if you ask the wrong questions, you're going to get the wrong answers. So if you can help our staff with other questions that might be asked of people

that you think there ought to be answers to, we'd certainly love to have your assistance.

COMMISSIONER ALLEN. Let me just say a word before we leave this subject. Twice now I've heard a mistake that I would like to correct. There seems to be an impression among some that this entire hearing is devoted to an inspection of tribal court systems. I want you to understand that that is not what this series of hearings or this study is about. It is, of course, true that once you begin to look into the Indian Civil Rights Act, its enforcement, its guarantees, you will necessarily run into the court system, and you will deal with the question of the court system as the likeliest avenue for recourse for persons with complaints. And you will ask questions about how it does its job, and you will note the cases where it does so well and the cases where it does not do so well.

But denials of civil rights are hardly to be confined to persons operating judicial systems. Indeed, I think it is commonly the case that they originate outside the judicial systems, and the problems subsequently emerge that the judicial system may have difficulty dealing with them. They may not even be allowed to.

So, of course, we have to look at courts. But this is not a review of tribal court systems simply put.

The questionnaire to the BIA raises that because of the BIA's intimate connections with 638 contracts and otherwise with tribal court systems. We are here because we are interested in knowing what the status of civil rights happens to be for American Indians, each and every one of them, as American citizens. That is our mandate. That is what we shall carry out.

CHAIRMAN PENDLETON. Bill, do you have a question?

MR. HOWARD. No.

CHAIRMAN PENDLETON. Let me say I think Commissioner Allen has put that well. We turned down other kinds of testimony that dealt outside of our realm, that dealt with other matters than 638 contracts. And we confined ourselves pretty much to where we are right here. I think it is clear that it is not just the court system but other things that we have to be concerned about at the same time.

COMMISSIONER ALLEN. Could I ask them one question before they leave?

CHAIRMAN PENDLETON. Sure.

COMMISSIONER ALLEN. I would like to hear what they have to say about the question we put, above all, to the BIA today, and whether they think the Indian Civil Rights Act, ICRA, requires some modification in order to bring its fruits to the reservation. Or do you think the BIA ought to be subject to some modification?

CHAIRMAN PENDLETON. Or should there be an ICRA?

COMMISSIONER ALLEN. Yes. Remember I spoke of repeal earlier. What about that?

JUDGE COOCHISE. I can only speak for the tribes I work with. Every tribe that I work with, the 16, is abiding by the Indian Civil Rights Act as a Federal mandate they have to comply with. So whether I think it or not, the tribal governments have already accepted it, and my role as a judicial officer has to go with those that are mandated by the tribe.

I think if the Constitution doesn't apply, yes, I think it needs to be there for the rights of the individual members of the tribes—if that's what you're asking.

COMMISSIONER ALLEN. That's it, yes, and also the question of what the BIA's role in that whole process is.

CHAIRMAN PENDLETON. Excuse me, before you answer. Are you satisfied with the BIA's role in this process? And if you can't tell us today, you might want to recommend to us in writing what you think that role should be with respect to ICRA.

JUDGE COOCHISE. As far as the role of the BIA, I don't think any of the tribes are ever satisfied with their role. Because like you heard today, they really don't take a stand one way or another most of the time. They are supposed to be advocates for the tribes, but when they are here on the Hill, I've been here the last 2 months at different hearings, and they pointblank asked the Bureau, especially on funding, and they won't give a response.

We need the services out in Indian country. We need funding for it, but they won't take a role, or they won't advocate for the tribes what's going to improve the system, whether it's social service or the judiciary or whatever.

MR. HOWARD. Could you explain that a bit more, Judge? You said the BIA has not taken a position on funding.

JUDGE COOCHISE. Dealing with alcohol training—in fact, last week when they were pointblank asked, "You asked for \$9 million for judicial services. Is that sufficient, or should you be asking for more?" There was no response to the positive or the negative. It's just like they didn't take a stand on it either way.

COMMISSIONER DESTRO. Do you think they'd take a stand—because I remember reading the articles in the paper—if it were suggested that rather than passing the money through the BIA, the money just be put in the line and given directly to the tribal court systems?

JUDGE COOCHISE. Oh, I'm sure they would then, because any bureaucracy, whether it's BIA or otherwise, always looks out for itself first.

MR. HOWARD. With regard to the testimony last week, I was there also. Are you referring to the testimony before the Select Committee?

JUDGE COOCHISE. Right.

MR. HOWARD. I suspect the reason Mr. Little did not respond to that question—the question was diverted to Joe Myers—was because Mr. Little didn't have the authority to offer an opinion on that. I suspect he was

limited to the four corners of his written testimony and couldn't speak outside of that.

Mr. Myers had responded to Senator Inouye that BIA was developing a formula to provide direct funding to tribal courts. And we didn't get to that today, but we do want to explore that with the BIA.

JUDGE COOCHISE. Yes, that is an area that the judges association, since I've been on the bench, has been pushing with the Bureau, is to set aside funds specifically for tribal courts where they don't have to compete with programs like social services or education.

CHAIRMAN PENDLETON. You mean a line item appropriation for tribal courts?

JUDGE COOCHISE. Yes. Anytime you have to be put in that light, how do you expect the government to look at the judiciary as a separate component of the government other than the program? We have been pushing, and Mr. Little is probably one of the first ones—

COMMISSIONER ALLEN. May I ask you to clarify who the "we" are who has been pushing?

JUDGE COOCHISE. Tribal court judges.

COMMISSIONER ALLEN. The association?

JUDGE COOCHISE. Right. But most of our judges don't feel like they should be in a political role, so it is hard to get them other than at our meetings, and they don't want to take that role because they don't want to start being politicians.

COMMISSIONER ALLEN. I understood. I wanted to know if you meant by that that the association was pushing in an avenue to free the courts from relationships with their respective councils. Is that why the interest in the funding?

JUDGE COOCHISE. Right, so we are not competing for the same dollars that social service is applying for in the priority system.

CHAIRMAN PENDLETON. Let me ask you this question. If you're pushing for—I think that's your word—independent funding, an independent line item—let me try this one and see what happens to it. Does your Association of Northwest Tribal Court Judges or any other association you know of—is there some kind of a petition for separation of powers?

JUDGE COOCHISE. No, not in a document form. We have discussed it. It has been discussed quite a bit as far as whether it's a separation, actual black and white, or whether it's a real separation in reality. But there is no per se document itself saying we're pushing for separation of power.

CHAIRMAN PENDLETON. Let me ask another question, then. Have you ever discussed the question among fellow judges about the summary dismissal of judges because councils have decided that they have rendered the wrong decision?

We have testimony on record that in the middle of the night judges have been summoned and dismissed and decisions have been reversed. Trudell

Guerue at Rapid City, who was a former chief judge at Rosebud, raised this question. He said the ICRA is not worth the paper it's written on. We heard that from several other people in that area.

I would take it that we need to address this question of whether or not judges have discussed the matter of summary dismissal and summary overturn by the council of their decisions.

I read carefully the development of the Supreme Judicial Council of the Navajo Nation and found that a fascinating way to have but not have a supreme court or supreme sense of review, not only from its makeup in terms of the language of that council, but also from the composition of the members on it, and most of whom were tribal council members.

But it does seem to me that in this connection we'd like to know how tribal judges feel about their tenuous relationship with tribal councils. The literature and the material has extensive recollection or notations of these kinds of things. But how do you feel about that? Maybe my colleagues might want to do something else with my question. I hope I'm asking the right one. I think that I am.

COMMISSIONER ALLEN. Do they talk about it?

CHAIRMAN PENDLETON. Do you talk about it?

JUDGE COOCHISE. Yes, we do. And I think in reality it is happening places. I wouldn't be sitting here 11 years on the bench if that weren't the case.

CHAIRMAN PENDLETON. How did you survive?

JUDGE COOCHISE. The councils, after any decision we made, would come in and sometimes talk to us, but they won't summarily dismiss us. As I say, I haven't been approached too many times because the way I make my judgments is spelled out, why I rule the way I do.

MR. HOWARD. Excuse me. You haven't been what too many times?

JUDGE COOCHISE. I haven't been asked too many times or even considered for removal that I can recall at all. I think in our system in the Northwest it's better that way because they have someone outside sitting in their courts, and in practicality they basically did the separation in reality because there are no family ties or immediate ties to that reservation.

But we do talk about it in the association, the pros and the cons with it.

CHAIRMAN PENDLETON. We're going to stop just a minute. We need to take a break. But I think we need to pursue this line of questioning a little bit more, but we need to give our reporter a break. We'll take a break until 6 o'clock.

[Recess.]

CHAIRMAN PENDLETON. We want to reconvene.

Judge Coochise and Ms. Smith, the questions you raise are extremely important to us in developing a comprehensive record with respect to

ICRA enforcement. So what we are going to do is this. We are going to have an onsite visitation, and you and counsel can work that out.

More importantly, we want to know the names of other tribal judges, irrespective of their level of experience or their education, and their levels within the court hierarchy. And what we want to do is keep this record open and reconvene some of you at a subsequent session, maybe the day before a Commission meeting, and take testimony on the record based upon the things you have mentioned to us and based upon the things we have heard in other visitations.

This will certainly begin to complete a record, Ms. Smith, if you will, at the grassroots level. I think certainly we would not exclude members from the court clerks association in these proceedings, however we can design that. This is not going to have to be so extensive.

Let me put one other thing on the record. You mentioned the questionnaire. There was no way we could have developed this questionnaire had we not had previous testimony. So the questionnaire, whereas it might appear later in the game, would never have been designed. Now, if that elicits some other attention, we want to deal with that.

So with that, we will not take a lot more of your time today, but I think what you can feel comfortable about, maybe comfortable about, is the kind of thing I said we are going to do, and we need that kind of response.

JUDGE COOCHISE. A clarification on your question of the list of judges. Irregardless of the position, education—

CHAIRMAN PENDLETON. I'm saying irrespective of their training. If there are tribal court judges and associations, we need to know who the associations are, and maybe we can have some representatives come, if they will come and testify under oath before this Commission and be able to respond to some of the kinds of questions we might put in advance.

There are no tricks to this. I think you can see in the record here from Rapid City the kinds of questions we asked there, and we need to ask those questions of other court judges. I think that begins to not only expand the record but allow us what Ms. Smith has talked about, about the people who actually have to do the work. That is a lot better than what we know has happened in other places with respect to taking testimony.

JUDGE COOCHISE. I have a list of our Northwest Judgesmembers if you'd like that.

CHAIRMAN PENDLETON. We'd like to have it, no question about it.

JUDGE COOCHISE. It includes not only appellate judges but trial judges.

CHAIRMAN PENDLETON. Thank you. That will be part of the record, without objection.

[The document referred to was entered into the record as exhibit no. 16.]

JUDGE COOCHISE. Also the judicial officers who are limited orally, once or the few times they sit in.

CHAIRMAN PENDLETON. Thank you very much for spending some time with us. I hope you can help us with the next part of this.

JUDGE COOCHISE. One other question with regard to the visitation. How long—

CHAIRMAN PENDLETON. You can get together with counsel and work that all out.

JUDGE COOCHISE. Because I have a meeting tomorrow with our association.

CHAIRMAN PENDLETON. We won't be out there tomorrow.

JUDGE COOCHISE. I know the first question asked will be when it is.

CHAIRMAN PENDLETON. We don't know when. We've got to get together with counsel to decide within our framework what we have to do. We have some other hearings coming up and a whole plateful of things, and we're going to work this in in such a way that we can do what we have to do to get the material we need to have.

MR. HOWARD. I will give you a call.

JUDGE COOCHISE. Are you going to be submitting a questionnaire, then, for us?

MR. HOWARD. I need to talk to the subcommittee a bit more about this, and you and I need to talk; I will talk to you no later than sometime next week.

JUDGE COOCHISE. Fine.

CHAIRMAN PENDLETON. Really, the questionnaire has to do with BIA more than anything else, but we understand where you are.

COMMISSIONER DESTRO. If I can just add, we don't know yet. If you think it would be a good idea, we'd certainly like to hear. Because you're going to know what questions more than we will.

JUDGE COOCHISE. I think at least from our association we wanted you to come out there and talk about some of these problems because we were being branded without even having any input. And I think that's what we wanted.

CHAIRMAN PENDLETON. I can assure you that subcommittee members will take under consideration the fact that they should also come and make those observations and ask some of those questions.

JUDGE COOCHISE. In our resolution we did ask if you would.

CHAIRMAN PENDLETON. Right. We have been so reminded again, and your request before this tribunal, for lack of some other word, is granted. We will now move to the open session.

MS. SMITH. I just need to make one quick comment. Before we broke you talked about separation of powers, and I would like to let you know that our tribe, the council, has been considering separating the tribal court from the tribal government, putting it on as a constitutional amendment. They have done that probably because of things like this that have been coming up, problems that they don't want to have to deal with because it

looks bad. So we'd like you to know that at least we are cognizant of the problems inherent with having a tribal court directly under them, and they are seriously considering doing something about it.

CHAIRMAN PENDLETON. Okay. Thank you very much.

We will now move to one of our prospective witnesses. We will call this the free speech section.

We will first take Chief Judge Thomas Maulson from Lac du Flambeau Tribal Court in Wisconsin.

[Thomas Maulson was sworn.]

TESTIMONY OF THOMAS MAULSON, CHIEF JUDGE, LAC DU FLAMBÉAU TRIBAL COURT, WISCONSIN

JUDGE MAULSON. First of all, I'd like to make one comment that I am one of the Chippewas that do speak up in northern Wisconsin within the Chippewa Nation.

CHAIRMAN PENDLETON. Thank you. We need more people to speak up.

JUDGE MAULSON. I want to thank Mr. Miller for offering an invitation for me to come out here. I was out here not too long ago, and I received the *Federal Register* indicating, "You are invited to listen." Well, as funding is short all over, I made an effort to make sure I was out here for this particular meeting here today.

CHAIRMAN PENDLETON. Thank you.

JUDGE MAULSON. And it did bother me, first of all, just being an observer as the letter indicated. It bothered me as a tribal judge on my reservation, and my court and my system being a very infant court; and how we have a lot of non-Indian people putting us, once again, under the microscope and picking us apart and saying that we are not following rules and regulations under the Indian Civil Rights Act; and people not understanding that our court system, an Indian court, is very new, even though the CFR courts have been in existence for some time, and not have that opportunity for some courts to fail; and organizations like this, instead of what I call witch-hunting out there or looking for problems, maybe make solutions and try to pick these people up. Because like I say, my court is very new. I've been a judge going on 5 years now. I'm a nonlawyer judge, and I probably don't have the ability to talk like our eloquent Robert Clinton who I applaud on his pro-Indian speech that he made here.

And I have to deal in northern Wisconsin and Wisconsin where I come from, with all the tribes that we have, and dealing with racism, civil rights. As an Indian person, as an Indian judge, we are being scrutinized by the whites because they say that Indian courts are not adequate. Because of the fact of educating the non-Indian out there—or the white, as people call us Indians—to the fact that our courts are just as good as the white courts.

We are starting to mend some of our problems, but yet our treaty rights are being violated. Our people are being discriminated against as Indian people. Civil rights are being violated by those people, and our people are saying, "What is happening to the court system? Why are the white people doing that to us?"

And they come to people like myself, judges, prosecutors, governmental officials, saying, "What's happening?" And, once again, I have to deal with them by saying that we have laws that affect them.

My court has to deal with Public Law 280. We work on a very limited budget. We don't get a lot of dollars from the Bureau of Indian Affairs. We have to almost beg for these dollars. And tribes shouldn't have to beg for those dollars. If white courts and organizations like yourselves want us to be, as you call it, equal, there shouldn't be that space. But you have to be an Indian to understand that.

You know, you people ask for—you don't know the answers, and maybe there should be a couple of Indians on this board, and you will definitely get that.

I was a police officer once. It took an Indian to deal with an Indian. Then you got those answers. It takes a black to deal with a black in the ghetto areas to get those things that you people want. And maybe we should have Indians on this Commission also. That bothers me because we don't have them.

You've had a big education in the last couple of years, and we, too, have got an education from it because of the Commission, because people think that the Indian courts are doing something wrong, that Indian people are not given due process. And it appalls me to hear about some of these, and I think you people should jump on these Indian courts that are not having free speech on their reservations. We do have freedom of speech on our reservation.

But like I say, it's very hard as a tribal judge to try to fill the shoes of a court that has been in existence for years and years and to try to have our people, when they come before me, and white non-Indian people out there saying, "Well, they're fine. If they kill that deer off the reservation, that deer would cost \$2,000 for that violation," because he was a sportsman not understanding Indian ways, and Indian people are not sportsmen; they have to exist on what they get out there. And if they did it out of the context of an agreement, which the tribes in Wisconsin are doing with the State of Wisconsin in their treaty rights, then that particular fine isn't so big.

I have to look at all that stuff as a judge.

So, yes, we are different. You can't be an Indian. I can't be a black or a white or whatever race that we have out there. I can't be them and you can't be what I am. But yet we have to educate our people, and that's the tune to what's happening here. People don't understand what's going on in

Indian country. You people are just digging and trying to find out. And when you get in on a really gory one, boy, you really dig in on that one.

But let's dig in on some of those good ones because we're trying. Hey, we're in the Pampers stage, and we've got to keep changing those Pampers all the time for us. Because we do follow the Indian Civil Rights Act. I make sure that our people, even though we don't have dollars for a defendant that comes before my court—I'll postpone a particular initial hearing until he gets an attorney someplace, or gets a lay advocate to represent him. But yet, the first guy that runs to Judicare it's called in Wisconsin, where they give dollars to represent a client—the first person that goes there gets represented there, but the other guy is left out in the cold. And we run into those situations in my court.

I guess they say there's a pro bono or there's supposed to be a law that deals with lawyers saying you should give so many hours free. Hell, I haven't seen a lawyer do that yet, you know.

[Laughter.]

CHAIRMAN PENDLETON. Thank you. I didn't meant to cut you off, but we have to cut you off because we have to try to get two other people in between now and what we hope is our 6:30 deadline. Do you want to wrap up for us?

JUDGE MAULSON. I'd just like to say everybody is sort of sighing in relief. This is a big question, and I hope you people leave this open a long time, because there are a lot of other people out there. I represent the Great Lakes Judges Association also with all our other judges that are very new because of the void in the treaty issue that played that part in northern Wisconsin.

So, yes, some courts are going to make mistakes, but I don't think we should be beat up for them, either. I think this organization should try and implement and put a law in there that's going to help us, too.

CHAIRMAN PENDLETON. Thank you very much.

JUDGE MAULSON. Thank you.

COMMISSIONER DESTRO. If I can add for the record—well, why don't you call the other people.

CHAIRMAN PENDLETON. Susan Harjo, who is the executive director for the National Congress of American Indians, has asked us to give her 5 minutes of free speech time.

COMMISSIONER DESTRO. If I can just add with reference to northern Wisconsin, having lived in Milwaukee for a number of years, the degree to which I think people who don't live anywhere close to Indian country are not appreciative of the issues. I went up to northern Wisconsin to Wausau for the release of the State Advisory Committee's report on treaty violations, and I was appalled at the comments of the Mayor of Wausau who, if he had made the same comments about blacks, would have been run out of town on a rail.

The notion that why don't we just marry an Indian and get ourselves a slice of these nice treaty rights? The notion of what a reservation is—it doesn't belong to the State of Wisconsin; it was kept by the Indians, has not even entered the consciousness of the people who run that State. And Wisconsin is considered one of the more progressive States in the country.

And when you get here. Not all of my colleagues felt the same way, but when I said, "I'm going to go up to Wisconsin," they said, "Well, you came from there; why don't you go ahead and go." Hate crimes and bumper stickers that say, "Save a deer; shoot an Indian" are so appalling, but they never made the national news. It was a local story.

And why? Because I think in Washington people don't give a damn about Indians.

JUDGE MAULSON. That's why I'm trying to identify it. It's very confusing for Indians when you have to deal with a whole group of laws, not only State law, tribal ordinances, but cultural. So like I say, it does confuse the issue, and we as judges and people that work within the judiciary try to educate our people the best we can. Like I say, granted there are problems out there in Indian country, but we should deal with those particular problems.

CHAIRMAN PENDLETON. Thank you very much, sir.

Ms. Harjo, you have been here a long time today.

TESTIMONY OF SUZAN SHOWN HARJO, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS

MS. HARJO. Yes, I hadn't planned to stay as long as this, but it was so fascinating I had to stay until this point to find out that no one knows—

CHAIRMAN PENDLETON. I'm sorry, let me swear you in.

MS. HARJO. One of our Cheyenne Nation laws and the tenet of our religion is that we do not lie. I don't swear, but I would certainly agree with your premise that I not tell a lie here, either.

CHAIRMAN PENDLETON. I'm going to respect your rights.

MS. HARJO. Thank you.

I have communicated with the Commission on the scope and vagaries of what many of us in Indian country feel is a fishing expedition and not in the interests of the Indian people. I won't reiterate those problems. I would just like to continue in the tone that was begun a short while ago and look at this as a dialogue for a few more minutes.

It is not just in Wisconsin where we see this problem. We first saw the "Spear an Indian; save a salmon" bumper stickers in the State of Washington. We have seen the spread of an increasingly vigorous anti-Indian organized hate group network that is in virtually every State in this country where there are Indian people. We know that these hate groups are tied to the Aryan Nation, to the Order, to the Klan. We suspect that

these hate groups have the same kind of organized crime underpinnings and financing.

We suggest you look into this. This is a problem for us. This is a problem that is creating more scars for Indian country. Even as we speak, the spearing season is going to begin very soon in Wisconsin, and we are going to have even greater problems.

Some of the people who are organized under the name of PARR, Protect America's Rights and Resources—fine-sounding names these hate groups have—are excluding the Indian children from Little League games and not letting the white kids play ball against the Indian kids because they are Indians, and because their parents are fishing and hunting in their traditional ways as their treaty says they can, as the United States agrees, as the courts have said they can.

We have emotional scarring that is taking place. As we sit here, there have been numerous jokes about the upcoming Super Bowl, and certainly I support the Washington Redskins. I love them. I'm going to root for them. I don't think it would be tolerated if there were in the Nation's capital or in any city in America a team called the Blackskins, if I got out on a football field and dressed up in an Aunt Jemima outfit, and this good gentleman got out in blackface in a Steppin Fetchit outfit for the Blackskins.

There would be a race riot in this city and in this country if we had a team called the Jew Boys, if we had a team called the Black Chicks. If we had anything that was derogatory to women or any other racial or religious minority in this country, it would not be tolerated. It is tolerated.

Why is it tolerated? Because that is the era we are in. Everyone has that same old movie running through their heads, and Indians are identified as an era, not as a people. We are not an era like cowboys. We are a people. We are many people. We are diverse. We have a richness of cultural underpinnings without which we would not be able to survive today's conditions of outrageously high unemployment, staggering alcoholism, the highest rate of teenage suicide of any population in this country, which comes from low self-esteem, which comes from having those kids' elders—myself, this good gentleman, our elders, too—mocked, dehumanized, cartooned, stereotyped. That is what is causing the deaths of many of our children.

We can't be polite about these problems anymore. The only way that this Commission could have made itself look any better would have been to do exactly what you did, to drag the BIA up here, the worst agency in the Federal Government, and say, "Hit on tribal courts," one thing that many people don't understand about Indian country, to raise the specter of a lack of democracy in Indian country, which I daresay is the only place where you will find true living democracy in this day and age.

By saying that we have to have separation of powers, you do arrogantly try to interject yourselves between ourselves and our history, ourselves and our tradition, ourselves and what we are passing on to our children.

We are guaranteed the right to be Indian people in perpetuity. There are certain things that we allow. I allow you to refer to me as Cheyenne. I allow you to refer to me as Indian when my name is Jista, the people, or my father, Widulgee Muskogee, the first people of the Wind clan, so we can communicate with each other.

And as you have heard here, many tribes are willing to adopt foreign influences and to allow themselves to make accommodations to the kinds of models for governance that other peoples have. Sometimes they do that if only to be able to survive. Some of us do not wish to do that, and I think you will see that many of us will not oftentimes in the future.

We take ourselves very seriously, so seriously that we laugh at almost everything. That is our way of reacting to these kinds of situations. And by "these kinds of situations" I mean where the Commission has put together a hearing somewhat on tribal courts, somewhat on separation of powers, somewhat on tribal sovereignty—what is it; what is the nature of it?—somewhat on the power of the councils. And to talk about the power of the haves and the have-nots in a situation where Indian country is in a survival mode is really stretching a point, to talk about power of tribal councils. I think that is a really odd thing to think about.

You sat here this morning with a BIA that you could see didn't even know how to tell you what a CFR court was, reported on by reporters who had to say, "What is CFR?" and an editorial writer who will write some opinion based on total lack of knowledge. And we have a hearing record, I think, that is of no use to anyone.

Now, I don't know if you didn't send the questionnaire to the tribal courts because it wasn't cleared by OMB and you have to have all questionnaires cleared by OMB, or if you didn't respect the tribes enough and the tribal courts to not send it to them directly and you just wanted to find out information about them from the BIA, which would sort of be in keeping if the BIA is the overall Federal Government's agent for Indians, or if there is another explanation.

Both those explanations are the ones that we object to, because you have taken an easy way out and you've seen what's happened. You haven't gotten any information. You didn't get it from the hearing this morning because these folks from the BIA don't even know what a CFR court is. So you don't know now.

Now, when you go out and talk with the good judges from the Pacific Northwest, you will get a better idea. I think it was stunning that you didn't realize certain things like quarterly reports. I am so glad you admitted that, sir, for the record, that you had no idea that they made reports, that they had any sort of communication.

I think there is a lot for this body to look into that it hasn't, and it is trying to focus, or at least there is the perception in Indian country that you are trying to focus on the problems that we have. We are under a colonized system. We are not, as Mr. Swimmer said earlier, a conquered people. One of the last battles my relatives were in was the Battle of the Little Big Horn, and as I recall we did not lose.

CHAIRMAN PENDLETON. Ms. Harjo, could you wrap up for us. I know you are emotional about this, and I can understand it, and we need to hear this. But I think we have to bring this to a close when we can.

MS. HARJO. I think because of the years of colonial overseeing of the development of business council governance forms and not the people—most of our tribes and nations are general council tribes and nations; that means all the people participate—and if you'd been in Indian country and gone to some of those meetings, you'd see that it is democracy plus. It is the thing that Franklin and others fell in love with when they visited the Iroquois Confederacy because they had never seen that kind of piece of work in governance. There was no model in their experience. That's why they adopted it for the United States.

Our tribes still carry that out, for the most part. And that is something that this Commission needs to understand, needs to understand the history and the development, and why it is you hear some inconsistencies. It is because we have had to do certain things to survive, and because we have had to bend to the BIA.

You hear Indian people, BIA people, talk about us as members of Indian tribes. That's one of the evidences of the job that colonialism has done on us. We are citizens of our Indian nations first. We have dual citizenry, if we wish it, because of an act of June 2, 1924. Saying that Indians could also be citizens doesn't make me a citizen of the United States unless I so choose. I have so chosen. There are entire nations of Indian peoples that have not chosen that and who, in fact, travel on their own passports in and out of the borders of the United States.

This is the kind of testimony I think would be valuable here. I wonder what the purpose of this forum is, and I will certainly try to submit something for your record once we can determine as an organization what it is you are trying to do. If there is a way we can help you focus, we would be happy to do so.

I don't know where the free speech closures are. I have never had my civil rights violated in any part of Indian country, ever. I have had them violated in almost every part of non-Indian country where I have been.

CHAIRMAN PENDLETON. Me, too.

MS. HARJO. I think that's what you need to look at. And with the background that some of the people on this Commission obviously have and the love for the law and the love for civil rights, I think you ought to

join with us and take care of some of the rascals who are trying to do us in and not try to do us in yourselves.

CHAIRMAN PENDLETON. Mr. Allen. We usually don't make comments about this.

COMMISSIONER ALLEN. I just wanted to make a request. I would really like to have from whatever her resources are a list of those Indian nations that live on their own passports and have not accepted American citizenship, if she has access to it.

MS. HARJO. Onondaga Nation is the most notable example, and you can read about them in the most recent *National Geographic*. There's a whole spread on them and about their passports and which countries have accepted them and which ones haven't.

CHAIRMAN PENDLETON. New York?

MS. HARJO. Their territory borders New York.

COMMISSIONER ALLEN. I'd like some background on that, if I may, as to what the U.S. Government considers their status and what the relationship is. I'm unfamiliar with that.

CHAIRMAN PENDLETON. You and I are familiar with one another, and I have accepted your wrath on more than one occasion—you as well as the organization—and I will continue to accept that wrath. What I do reject out of hand is that this Commission is sitting to do anybody in. We have no mandate to do anyone in, and we don't intend to do anyone in.

And you made some comment about us having to have clearance from OMB and elsewhere. Let me just reassure you that OMB has cleared nothing and clears nothing that we do in terms of how we respond.

And the matter about BIA, I get from your testimony the implication that we are in bed with BIA. Far be it. If we were in bed with the BIA, we wouldn't have hauled them up here today. I think for you to make some assumptions about our process without knowing that process—and I've heard you criticize us on other occasions without knowing what it is we are trying to do, and you raised a question about what we were doing. I think to raise that question is legitimate, but at some point down the line I think we are doing what we are statutorily mandated to do.

Had the Congress not passed an ICRA, we wouldn't be sitting here today talking about it. And it falls clearly within our mandate, and we see some problems with it on both sides of the ledger. So the point is: how do you get at those issues?

And to prejudge us is just not fair to us. We are going to do the best we can in groping to find out. True, none of us will ever be Indians.

MS. HARJO. Mr. Chairman, I am well rebuked. I would like to say, though, that you can well understand how we feel when we feel we are equally prejudged by this body because we have statutory mandates that predate the existence of the United States.

CHAIRMAN PENDLETON. We have prejudged no one.

COMMISSIONER ALLEN. Mr. Chairman, I just wanted to say with regard to your remarks that any number of people now have raised the question about the various forms of discrimination and possibly violence against Indians, which one would think would be well within our mandate. But it would not, I'm quite certain, come into our mandate from the ICRA.

CHAIRMAN PENDLETON. No.

COMMISSIONER ALLEN. If it were within our mandate, it would come through the other existing civil rights laws, and that raises a paradox, of course, whether indeed we are to consider the other civil rights laws as extending to Indians as individuals, and if extending to them as individuals, how far, whether into the reservations or not.

I would very much like to see that question also on our agenda before we are done. I think we have been well admonished not to overlook the possibility that all the other civil rights laws of the United States apply to the Indians not only outside but on the reservation.

CHAIRMAN PENDLETON. Let me be clear, just to set the record straight. This Commission is going to grapple with something that might be of interest to all of you. At last count there are 130 Federal civil rights statutes on the books—statutes, Executive Orders, and regulations—130. And what started out as four groups to be protected by the act of '64, we find out there are many, many more groups. And the allocation for that is over a half-billion dollars, and 15,000 Federal employees. And we are trying to identify that and find out why is there still a problem. I mean the resource base is there. The public policy base is there, and we still have problems.

But finally, this Commission has spoken out on violence, before my time here, before anybody's time at this table. This Commission has the largest body of material it has put out on hate crimes and hate violence.

I can only say to you that whatever laws we have on these books are not going to change probably the most destructive force in this world, and that's man's inhumanity to man or woman's inhumanity to woman, if you want to take it to that, and I think that is a serious problem we have to look at, and no law is going to change that. I do think laws cannot tolerate that.

COMMISSIONER ALLEN. Mr. Chairman, I have to tell you when you phrase it that way, you raise the question of whether men are ever inhumane to women and vice versa.

[Laughter.]

JUDGE MAULSON. Mr. Chairman, I'd just like to ask one thing. You seem to ask all the professors and all these other bigwigs that were sitting up here that had papers sitting in front of them if they wanted to change the Indian Civil Rights Act, and I haven't had that opportunity to show the judge's perspective, for the simple reason I think it should stay the way it is. But if any mandate is going to be made, if they want Indian courts to fulfill the obligations out there in Indian country and meet the needs of the

problems on some reservations, then we need those green dollars to do that. And that's through the Bureau of Indian Affairs, which they are not doing today.

CHAIRMAN PENDLETON. I don't know if you have followed our process, but we have been in dialogue in open session which we don't normally do. We usually hear people and then we say nothing. But I think this matter is of such importance that we have felt free, as they say in some churches, to testify.

Ms. Harjo, I want to say to you that I would hope that your initial comments about dialogue would not end with this exchange here. I think we need to move on and find out how we continue the dialogue so that we don't tell lies and we aren't perceived as telling lies.

But if I can borrow from Commissioner Destro, if we don't open up this process, which we have been able to do and other Federal agencies have not been able to do, then we have no process at all. I still contend we are that independent body through which this debate has to take place.

Mr. Sampson.

[Roy Sampson was sworn.]

TESTIMONY OF ROY SAMPSON, PORTLAND, OREGON

MR. SAMPSON. I appreciate the opportunity to be here, and I also appreciate the lateness of the day and the time and attention you have spent in this hearing process.

A brief background. I have been active in Indian affairs for the last 20 years or so, primarily in the Northwest, and had a lot of activity associated with the Indian fishing cases that you may now be familiar with, the Indian fishing rights cases that were developed in Oregon and Washington.

I also had the opportunity to serve in the Department of the Interior. Rogers Morton was Secretary. I was the special assistant to him for about 5 years. I have spent a brief tenure in the BIA, and came back as a Deputy Assistant Secretary for Indian Policy in the first part of this administration in 1981.

I flew in this morning, red-eying it in last night after hearing of this hearing, because what you are doing here is something that I am particularly interested in. You can't work in the resource fields and you can't be associated with tribes as I have been, you can't be an Indian transplant from Oklahoma living in Oregon, which I am, without being deeply concerned about the types of issues that are being raised, as it relates to individual Indians, as it relates to what is happening within the systems that are in place in reservations, and some concern about what happens to those rights of Indians which do not reside on the reservation but which have a continuing relationship with those independent and sovereign nations. Roughly half of the Indian population of this nation resides in urban centers and not on reservations.

I don't want to get into a lot of dialogue except to suggest to you that my interest, having been sparked and realizing that the hearing was here, and hearing the testimony of the Bureau of Indian Affairs this morning, prompted me to stay and offer some assistance to the Commission.

I don't think as of today you're getting the type of record that you need in terms of process about what the Bureau has been doing. I would suggest that there is a whole sequence of documents associated with what has been happening that are not necessarily directly related to the testimony that you got on the Indian Civil Rights Act.

CHAIRMAN PENDLETON. Let me say to you that we have reams of documents, so do not take what we heard at the table as the record. There are other documents that support what it is you say. It all didn't come out on the record today. I just want you to know that.

MR. SAMPSON. I appreciate that. Particularly the process that has taken place at individual reservations with the development of individual courts and court systems. I am particularly sensitive to the fact that you have testimony from certain places. I have had a chance to look at and read today and the testimony that was made from the Northwest judges association.

I think the process that went through for the development of those individual court systems is one that I would hope this Commission would spend some time analyzing. They are not the same. They do differ. The funding was not adequate, nor was it balanced and fair. Has it been distributed in a way that you can track? Perhaps not something that you will like to see, but I think you're going to see 20 years of very sporadic funding activity which leads you to a whole series of implementation of policy decisions which were on the record but never followed through on.

I share what Suzan [Harjo] was saying—a lot of us were sitting in the back of the room this morning shaking our heads, seeing five of our friends sitting up at the front table who we've known off and on for a number of years unable to answer some very basic questions of this committee. That disturbs me.

I would like to offer to prepare for the committee my recollection of what I have observed over the last few years in this subject area, and will do so as now I understand the record will be open.

One other closing comment. There is a general mistrust of these types of activities, not just of this Commission, in Indian country and for perhaps good reason. The studies and the reviews of those things that have impacted individual Indian tribes and individual Indian people—there are a lot of them.

What has happened with those studies has not necessarily benefited Indian people. There is a lot of distrust of studies and reviews. That is not a critique of this Commission, as least as far as I am concerned, but I think it

does explain some of the things you are hearing and the feedback that you're getting.

It would be most constructive, I think, for both myself and for others that want to see the work of the Commission end up with a product that both you and the Indian people will be proud of, to have some idea of agenda, time frame, and process that you will go through so that we know the amount of time and effort we might have and the opportunity to continue to suggest additional information.

I haven't seen that. I am out of the mainstream now. I'm working with the Yakima Tribe building a wonderful fish hatchery, which we are very proud of, and that doesn't keep you close to this type of politics. But there are a lot of us who have been around who want the opportunity to help you in your deliberations to solve these types of issues.

Thank you for the opportunity to say that today, and I hope to be able to carry on a continuing dialogue with this committee as you move forward.

CHAIRMAN PENDLETON. I think you should feel comfortable that you can maintain dialogue with counsel's office and others you see appropriate. We don't have a time frame. What you are hearing from us today is that there is more to get, and there is no specific time frame.

Let me share with you or support your observation that we, too, want a record established of which Indians and this Commission can be proud. And we understand the suspicion of committees that are politically constituted, if you will, through the public policy process. We are not persuaded that we don't fit that mold. We are probably persuaded that we do fit that mold and are anxious to prove where we are in this process.

In the end, I think the chips have to fall where they are going to fall. As Ms. Harjo said, we have to tell the truth. And the truth might not always be comfortable, but we want to be able to tell the truth as best we can formulate it from the facts that we obtain.

This is not a policymaking body in that respect. It is a research and, if you will, recommending body to the administration and to the Congress. And we will conduct ourselves just that way, and we might have other things to do in the process of putting this full record together. If we see fit to do that and it has to be done, we will do it. It does us no good to be on a fishing expedition and not catch the right kind of fish that everybody can feed on. We want to be able to catch something that everybody can eat, rather than to say, "I don't want that kind of fish."

So feel free to share with us what you want to share with us.

And with that, I can say that this session has recessed.

[At 6:45 p.m. the hearing was recessed.]

Exhibits Submitted During the Hearing

Exhibit No. 1



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

December 9, 1987

HAND-DELIVERED

Honorable Donald P. Hodel
Secretary of the Interior
United States Department of the Interior
18th & C Street, N.W., Room 6117
Washington, D.C. 20240

Dear Secretary Hodel:

Don

The U.S. Commission on Civil Rights, pursuant to its responsibility to monitor enforcement of Federal civil rights laws, is examining enforcement of the Indian Civil Rights Act of 1968 (ICRA). As part of this evaluation, a Commission Subcommittee has held hearings in South Dakota and Arizona on ICRA enforcement by several tribes, focusing primarily on the Navajo Tribe, the Zuni Pueblo Tribe, and the Cheyenne River, Rosebud, and Pine Ridge Sioux Tribes. When its examination is complete, the Commission will report its findings and make recommendations to the President and the Congress.

The Subcommittee's monitoring of ICRA enforcement would be incomplete were it not to include consideration of the role of the Bureau of Indian Affairs. While this matter received attention at the Subcommittee's field hearings, that attention was necessarily incomplete. For this reason, the Subcommittee will convene a hearing here in Washington to give thorough consideration to the Department's ICRA policy. We invite your Department to testify at the hearing, which will take place at the Commission's offices on January 28, 1988, at 10:00 a.m.

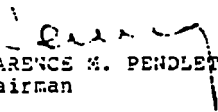
We have enclosed a list of questions which we would like answered by your Department. Certain of the questions pertain to your policy with regard to ICRA enforcement. Others ask for data on ICRA enforcement, 638 contracts with tribes, tribal constitutions, and training provided for tribal judges and personnel. We would be grateful if you would forward these questions to the appropriate offices for response and, in addition, if you would designate officials to represent the Department of Interior at the Commission's hearing.

Exhibit No. 1 (cont.)

Page 2

In order to expedite the collection of the information we are requesting as well as other information Commission staff may want to obtain prior to the hearing, I have asked that Commission staff visit your Department on or before December 18 and speak with persons who are familiar with the availability of the data we have requested. Commission staff will therefore contact your office later this week to identify with whom they should meet.

Sincerely,


CLARENCE M. PENDLETON, JR.
Chairman

Enclosure

Exhibit No. 1 (cont.)

Page 1

QUESTIONS

PART I: GENERAL OVERSIGHT

In April 1986, Associate Solicitor for Indian Affairs Tim Vollmann described the role of the Department with respect to the ICRA in an outline prepared and distributed to a meeting of the Indian Law Section of the Federal Bar Association. The outline points out that in Martinez the Supreme Court rejected the idea that the Secretary of Interior had enforcement or review authority over tribal actions, except when a tribal constitution or Federal statute requires Secretarial approval of tribal ordinances. When that exception applies, the outlines further states, the Department must "be cognizant of a tribe's compliance with the Indian Civil Rights Act and other federal laws before it acts to recognize certain governmental actions."

His outline also states:

A. The policy of tribal self-determination and practical considerations create an institutional reluctance to become routinely involved in allegations of ICRA violations.

1. BIA has programs to enhance tribal institutions and encourage ICRA compliance.

2. Even the most peripheral involvement in tribal processes makes the Department a target of lawsuits by dissident challengers of tribal action.

B. Violations of ICRA may be a basis for BIA declination to contract programs with a tribe under P.L. 93-638.

C. Violations of ICRA may affect how the Secretary exercises his trust responsibility with regard to tribal trust assets, both funds and natural resources.

D. A gross violation of the ICRA (e.g., violation of due process through disregard of the tribal constitution or laws governing tribal elections) may affect the federal government's recognition of tribal representatives.

Exhibit No. 1 (cont.)

Page 2

1. Do the statements cited above represent the current policy of the Department of Interior with respect to ICRA enforcement? If not, what is the current policy? Is issuance of a new policy under consideration? If so, in what office? When will it be issued?
2. What are the "practical considerations" cited in Mr. Vollmann's outline that contribute to "an institutional reluctance to become routinely involved in allegations of ICRA violations?" Please give examples.
3. Quoting from the Vollmann outline, what programs does BIA have in place "to enhance tribal institutions and encourage ICRA compliance?"
4. Does BIA monitor ICRA violations? If so, please describe how and provide the Commission with information on the ICRA violations that have taken place since 1978.
5. Vollmann's outline asserts that ICRA violations may be a oasis for BIA declination to contract programs with a tribe under P.L. 93-638. Is this current policy? Since Martinez, has BIA ever declined to contract such programs because of ICRA violations? If so, when and on what basis?
6. Since Martinez, again citing the outline, how often has the Department's exercise of its trust responsibility been affected by ICRA violations? In how many cases was ICRA noncompliance the stated reason for agency action or inaction?
7. Since Martinez, again citing the outline, how often has the Department refused recognition of tribal representatives because of "gross ICRA violations?" What is a gross ICRA violation and where is it defined? How many gross ICRA violations have taken place since 1978? Does the Department have information in its files on these violations?
8. What offices of the Department of the Interior have responsibilities or collect data in relation to the Indian Civil Rights Act?
9. A letter of August 3, 1987, from the Judicial Services Branch to the Commission states that "The mission of the Branch of Judicial Services within the Bureau of Indian Affairs is to help tribal governments establish and maintain a strong and viable Indian Judicial System capable of dispensing equal justice." What are the stated criteria of the Judicial Services Branch for determining whether

Exhibit No. 1 (cont.)

Page 3

tribal governments have "strong and viable Indian Judicial System[s]; capable of dispensing equal justice?" Are the criteria published? If the Judicial Services Branch does not have stated criteria, how does the BIA measure the progress of tribal judicial systems? Is ICRA enforcement one of the measurements used? What other factors are relevant? Please provide the Commission with a directory of the Judicial Services Branch.

10. What are some of the recent accomplishments of the BIA in assisting tribal judicial systems?
11. What are weaknesses of the BIA in administering tribal judicial systems under 638 contracts?
12. What duties or responsibilities does the Bureau have with respect to violations of a tribal code or constitution? In carrying out these responsibilities, what procedure is followed and what offices carry out the responsibilities?
12. 25 C.F.R. Section 81.5(a) authorizes a Secretarial election only "upon a request from the tribal government." In light of the Zuni Pueblo succession election dispute about which the recently Commission received testimony, will the regulations be changed to allow direct petitions to the Secretary from a substantial percentage of enrolled eligible voters? Are any other regulatory changes contemplated as a result of the Zuni experience? How many other such instances have there been since 1978?
13. Please list the types of contracts between the BIA and a tribal government under P.L. 93-638 and provide a printout of all 638 contracts currently in force. How many are for tribal courts? Tribal police? Appeals courts? Tribal councils? Public Defender services? Judicial training?
14. Under 25 U.S.C. §450f(c), which, if any, of the Pub. L. No. 93-638 contract categories are routinely required to contain insurance clauses requiring liability insurance coverage and waiver of sovereign immunity by tribal governments?
15. Please state the reason why some of the Pub. L. No. 93-638 contract categories are not routinely required to contain liability insurance coverage clauses.
16. Please state what BIA personnel, by job classification, are responsible for negotiating, reviewing, approving, and signing the Pub. L. No. 93-638 contracts in each category.

Exhibit No. 1 (cont.)

Page 4

17. In 1973, the BIA proposed a task force to study enforcement of the ICRA and to prepare interpretative guidelines and a model code of criminal procedure. Was this in response to section 301 of Title III of the Civil Rights Act of 1968? Was the proposal adopted and the task force assembled? Were the guidelines prepared? If so, please provide the Commission with a copy. Was the model code drafted? If so, please provide the Commission with a copy. If neither was prepared, please explain why not.
13. In an October 27, 1987, statement to the Subcommittee on Interior and Related Agencies of the Committee on Appropriations for the House of Representatives, the Assistant Secretary for Indian Affairs proposed to give tribes greater control over self-determination funds. He stated that among other things, "this would be necessary to establish . . . certain minimum standards with respect to protection of individual rights and public safety."
- (a) Please describe what the "minimum standards" would be. Would these standards be compliance with the ICRA and/or other rules or regulations? Which ones?
- (b) Would tribes have to demonstrate compliance with minimum standards before being eligible to exercise greater control over Federal funds? What would constitute satisfactory evidence of compliance?
- (c) Would there be a procedure for terminating funds if it were determined that a tribe did not meet these standards? Please describe what process. Would a tribe not in compliance be allowed to receive funds under a contract?
- (d) Who would make the determinations of compliance, an administrative law judge? A Federal judge? A contract compliance officer?
- (e) Does the BIA currently have the capability to enforce minimum standards for the protection of individual rights? If it does not, what additional resources would be required?

Exhibit No. 1 (cont.)

Page 5

PART TWO: DATA ON TRIBAL COURTS AND ICRA CASES

The following questions ask for data to be broken down by tribe and area office, and are accordingly phrased as if directed to each BIA area office. Please provide as much information as is currently available in Washington, D.C., and ask area directors to respond to those questions which cannot be answered by Washington personnel.

Training

1. Please indicate what training is provided to judges and court personnel for the tribes in your area. What specific training is given with respect to implementation of the safeguards contained in the ICRA?
2. What is the total number of tribal judges in your area? Of this total, how many have law degrees? How many have received special training on the ICRA?
3. Do you believe those subject to tribal law need to be better informed of their rights under the ICRA? What steps has your office taken to inform those subject to tribal law in your area of their rights under the ICRA?
4. What is the total number of tribes in your area? Of this total, how many have written constitutions? Please provide the Commission with copies of these constitutions.
5. Please indicate which of the tribes in your area have, and do not have, each of the following ICRA rights included in their constitutions or laws:

CIVIL * ~

- a. Freedom to practice religion
- b. Freedom of speech
- c. Freedom of the press
- d. Freedom of assembly and/or redress of grievances
- e. Eminent domain (taking of land for public purpose with just compensation)
- f. Freedom from bills of attainder and/or ex post facto laws
- g. Equal protection of the laws
- h. Due process

Exhibit No. 1 (cont.)

Page 6

CRIMINAL

- a. Unreasonable searches and seizures
 - b. Double jeopardy
 - c. Self-incrimination
 - d. Right to speedy trial
 - e. Right to public trial
 - f. Right to be informed of nature and cause of accusation
 - g. Right to confront and compel witnesses
 - h. Right to counsel
 - i. Limit on excessive bail
 - j. Prohibition of cruel and unusual punishment
 - k. Sentencing limitation
 - l. Equal protection of the laws
 - m. Due process
 - n. Bills of attainder and/or ex post facto laws
 - o. Trial by jury
6. Please describe the method by which judges for the tribal courts in your area are selected.
 7. Do all the tribal courts in your area have law clerks? File clerks? If not, how many do and how many do not?
 8. Please list each tribe in your area and state whether it has a prosecutor or public defender system or both or neither.
 9. Are attorneys permitted to appear before the tribal courts in your area? If not, please identify which tribal courts do not permit them to appear. If so,
 - a. are they permitted in civil cases?
 - b. are they permitted in criminal cases?
 - c. please indicate the criteria for permitting their appearance.
 - d. If tribal court bar admission is required, please indicate the criteria for admission.

Exhibit No. 1 (cont.)

Page 7

10. Which tribes in your area have courts of record, i.e., in which the proceedings are transcribed or taped? Please list each tribe indicating whether they have courts of record and how the record is kept for each court. Of those tribes with courts of record,
- are court reporters used in proceedings in the tribal courts in your area? If not, please identify which courts do not use court reporters.
 - are tape recordings made and kept but not transcribed? Please indicate what the practice is in each of the tribal courts in your area.
 - are tribal court opinions published and how may they be obtained?
 - are tribal ordinances published and how may they be obtained?
11. To whom may an appeal from the tribal courts in your area be taken, i.e., whether to appellate courts, Tribal councils, or no appellate mechanism. If the system differs among the tribes in your area, please identify the differences, by tribe.
12. Please list the tribes in your area that have judicial appellate tribunals. In your list, please state:
- how many judges sit on each
 - the exact name of the judicial appellate tribunal.
 - the standard for appellate review: de novo or on the record.
13. How many judges who sit on the tribal courts in your area also hear appellate cases? Please list the judges by tribe.
14. Since Martinez, have the tribal appellate courts in your area ever formally invoked the ICRA in reviewing cases from the lower courts? Please identify which appellate courts in responding to this question.

INDIAN CIVIL RIGHTS ACT

15. Do you keep records of the number of cases in the tribal courts in your area in which the pleadings allege a

Exhibit No. 1 (cont.)

Page 8

violation of the ICRA? If not, please identify who does. If so, please state by year the number of cases tried in the tribal courts in your area, post-Martinez, in which the pleadings allege a violation of the guarantees of the ICRA.

_____ 1978	_____ 1979	_____ 1980
_____ 1981	_____ 1982	_____ 1983
_____ 1984	_____ 1985	_____ 1986

16. In the cases identified in the preceding question, please state the number of cases in which nontribal members have invoked the ICRA.
17. Please state by year the number of cases for the period 1978-1985 in which the ICRA or a similar tribal ordinance or constitution was formally found to have been violated.

_____ 1978	_____ 1979	_____ 1980
_____ 1981	_____ 1982	_____ 1983
_____ 1984	_____ 1985	_____ 1986

18. Please briefly describe the types of problems affecting ICRA enforcement in the tribal courts in your area. In your view, are any of these problems serious? How should they be addressed?
19. In your opinion, does Congress need to amend the ICRA? If so, please briefly outline what changes you think are needed in the ICRA. If not, why not?
20. In your opinion, how much do tribal politics affect the independence of the tribal courts in your area?
21. In your opinion, should there be any kind of limited Federal judicial review of tribal court ICRA decisions, other than in habeas corpus cases? Please explain the reasons for your answer.
22. Have the tribal councils ever overruled tribal courts in your area since 1978? Please list by tribe the instances of such overruling, identifying the case name and year. Also, please state whether the pleadings in any of these

Exhibit No. 1 (cont.)

Page 9

cases alleged a violation of any the guarentees protected by the ICRA, or a similar tribal ordinance or constitutional provision.

- 23. In how many ICRA cases has sovereign immunity been raised as a defense since 1978? In how many of these cases has the defense been successful?**

Exhibit No. 1 (cont.)



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 27 1988

Clarence M. Pendleton, Jr., Chairman
United States Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Mr. Pendleton:

In response to your letter of December 9, 1987, to the Secretary of the Interior, please find enclosed responses to your questionnaire concerning the 1968 Indian Civil Rights Act. As we informed your staff, our response is incomplete at this time since some of the information had to be requested from our twelve (12) area field offices, and the time constraints in receiving and collating that information would not allow us to meet your January 28 deadline.

The responses to this questionnaire are based on information from eight (8) of the twelve (12) area offices. Further information from the remaining four (4) area offices will be provided to you upon our receipt of such materials.

Your staff was also informed that much of the information sought under Part II of your questionnaire could only be obtained directly from the tribal governments. Your questionnaire was forwarded to the tribes and their responses should be forwarded to your office directly.

Sincerely,

Assistant Secretary - Indian Affairs

Enclosure

Exhibit No. 1 (cont.)

RESPONSES

PART I: GENERAL OVERSIGHT

1. The Statements cited are found in an outline for a presentation given by a Department of the Interior Solicitor at one of the annual Federal Bar Association meetings and cannot be construed as representing the current policy of the Department of the Interior with respect to Indian Civil Rights Act (ICRA) enforcement. It has been the Bureau of Indian Affairs policy since January 16, 1981, to handle each alleged civil rights violation of provisions of tribal constitutions on a case by case basis. Other types of claimed ICRA violations have been deferred to local tribal resolution mechanisms in keeping with the U.S. Supreme Court ruling in Santa Clara Pueblo v. Martinez.

Attached is a position of the Bureau's Division of Tribal Government Services concerning tribal court compliance with the Indian Civil Rights Act of 1968. However, there is no "new" official Bureau policy with respect to ICRA enforcement.

2. Mr. Vollman is no longer working at the Central Office, and it would be presumptuous to infer what his assessment of "practical considerations" might be in restricting ongoing Bureau involvement in responding to ICRA allegations.
3. The Bureau, through a contract administered by the Branch of Judicial Services, provides training to tribal and CFR court personnel that includes sessions just on provisions of the ICRA, as well as courses that include aspects of the ICRA as embodied in court procedural actions.
4. The Bureau does not monitor ICRA violations on a regular basis. The Bureau will look into cases brought to its attention, but only as a method of clarifying the facts surrounding the allegations.
5. Apparently Mr. Vollmann's assertion alludes to 25 CFR 271.74 which directs that under the Section entitled "Reassumption" of P.L. 93-638 contracts:

(a) A contract made under this part may be terminated, and control or operation of the program or function assumed by the Commissioner or Area Director as appropriate, in whole or in part; when the Commissioner or Area Director determines that the tribal organization's performance under the contract involves: (1) the violation of the rights of any persons can be identified as a pattern or practice . . .

Since Martinez, as reported from the Bureau Area Offices, the Bureau has not reassumed a contract on the basis of ICRA violations. Technically, the regulations call for "violations of rights" to be a basis for reassumption of a contract, not for initial entry into a contract.

6. Based on Area Office reports, there were at least five (5) instances where the alleged violation of civil rights "has been an issue to the point where the Bureau of Indian Affairs has had to deviate from routine procedures in carrying out its trust responsibilities."

Exhibit No. 1 (cont.)

7. Since Martinez, in at least two instances "the Bureau did withhold recognition of tribal council actions where questioned (disputed) members voted on enactments that required Secretarial approval."

The Bureau does not utilize any official definition of "gross ICRA violations." The Bureau does not maintain specific files denoting "gross ICRA violations." Instances of alleged ICRA violations might be found with any number of Bureau departments.

8. There is no office within the Bureau with the responsibility to collect data in relation to the ICRA.
9. There are no published criteria for determining whether or not tribal governments have "strong and viable Indian Judicial Systems capable of dispensing equal justice." Assessments of tribal court systems are based on a number of administrative criteria. For instance relevant criteria would include: funding levels for the court system; extent of training received by court personnel; tribal constitutional autonomy of the court; and extent of court's subject matter jurisdiction.
10. As taken from the Branch of Judicial Services FY 87 report to the Division of Tribal Government Services:

"In FY 87 the following activities were accomplished by the Branch of Judicial Services:

- Twenty-one (21) court systems were provided additional funds for their court systems as "needy courts." The funds are used to upgrade courts by providing personnel, equipment, and training.
- Eight (8) national tribal court training sessions, attended by an average of 50 court personnel per session.
- Contracted for ten (10) training sessions on child abuse for benefit of Division of Social Services, to cover ten (10) out of the twelve (12) BIA area offices.
- Worked closely with Division of Social Services, Division of Law Enforcement, Office of Indian Education, and Indian Health Service to help produce minimum guidelines for the establishment of Child Protection Teams (CPTs) at each area level. Provided training funds to CPTs through P.L. 99-570, Anti Drug and Alcohol Abuse funds.
- Branch was part of Bureau's Alcohol and Drug Abuse Task Force and administered funds to provide anti drug and alcohol training and related activities. Helped develop policy for distribution of all funds under P.L. 99-570.
- Developed court base funding criteria for providing additional non-banded court funds.
- Developed concept for Judicial Services Training Center, and received administrative approval to develop Center in FY 88. Also, reviewed several sites and recommended final site selection.

Exhibit No. 1 (cont.)

- Reviewed three (3) tribal court systems.

11. The major weakness in administering tribal judicial systems under 638 contracts is that the funds are "banded" monies within the Bureau's Indian Priority System. This means that funds for court systems are not stable and can be subject to funding increases or decreases based on tribal priority needs for that year. Unsure funding levels make it very difficult to develop a court system that can grow steadily to meet community needs.
12. Alleged violations of tribal codes or constitutions are handled under the directives in the Martinez ruling and are deferred to local tribal forums unless raised under a habeas corpus situation, in which instance the issue is referred to the U.S. Attorney's office and the federal courts.

The Bureau, generally, becomes involved in alleged violations of tribal constitutions when the alleged violations may call into question the legitimacy of the election of a tribal governing body. In such situations the Bureau has to assess whether or not it is providing services or funds to a legitimately recognized tribal government as embodied in its tribal constitution or organic documents. The Division of Tribal Government Services would be responsible for such assessments.

12. In the Zuni Pueblo election dispute the Acting Deputy Assistant Secretary - Indian Affairs denied a petition for a secretarial-held election to vote on the temporary suspension of the Zuni Constitution. The denial was appealed to the Interior Board of Indian Appeals which held that:

"An election called by the Secretary pursuant to 25 CFR Part 61 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials."

There are no regulatory changes contemplated as a result of the Zuni experience.

13. This data is still being compiled based on the information provided from field offices, and will be provided to your office upon collation of the information.
- 14./15. Under the self-determination regulations (25 CFR 271.45) the contract officer is granted discretionary authority to determine what liability insurance may be required. This regulation provides that tribal organizations shall obtain public liability insurance under contracts entered into with the Bureau under P.L. 93-638. However, where the contracting officer determines that the risk of death, personal injury or property damage under the contract is small and that the time and cost of procuring the insurance is great in relation to the risk, the contract may be exempted from this requirement. However, any contract which requires or authorizes, either expressly or by implication, the use of motor vehicles must contain a provision requiring the tribal organization to provide liability insurance, regardless of how small the risk.

Exhibit No. 1 (cont.)

16. Negotiations

- 1) Primary responsibility - contracting officer and staff (GM-GS-1102).
- 2) Secondary responsibility - program staff which could be any of dozens of classifications depending on program requirements, i.e., law and order, finance, social services, education, etc.

Reviewing

Same as above plus Agency Superintendent (GM-340) and Area Public Law 93-636 Coordinators (GS-Various).

Approving

Area Director (ES-340) or Assistant Secretary (ES-340).

Signing

Warranted Contracting Officers within the limit of their signatory authority (GM/GS-1102).

17. We have no information concerning a 1973 BIA proposal to establish a task force to study enforcement of the ICRA and to prepare interpretative guidelines and a model code of criminal procedure. A task force was established in 1970 in the Solicitor's Office to carry out the responsibilities imposed on the Department by section 301 of Title III of the Civil Rights Act of 1968. A model code of criminal procedure was developed by that task force and published in the Federal Register on April 14, 1975, 40 Fed. Reg. 16689. In addition to the substantive provisions, the Federal Register publication also includes commentary on those provisions. Possibly that commentary is the "interpretative guidelines" to which you refer.
18. In order to avoid confusion, it should be noted that the "self-determination grants" referred to in the question are not the same as the currently authorized section 104 grants, which are also known as self-determination grants.

I was responding to a hypothetical question posed by the subcommittee chairman as to the assurances that would or should be required of tribes if they were to be given greater flexibility in the use of federal funds provided through the Bureau of Indian Affairs.

The Commission's inquiries may be premature. Current law does not allow the type of flexibility that was being discussed at the hearing. Congress provided \$1,000,000 in the FY 1988 budget for ten tribes to plan tribal budgets and included a number of directives that the tribes and the Bureau must meet before a decision to grant increased authority is made.

The first meeting with the ten tribal chairman was held on January 22, 1988. Over the next nine months the tribes and the Bureau will be working together to determine exactly what the parameters should be. These

Exhibit No. 1 (cont.)

findings will be submitted to Congress and legislative determination will be made as to the sufficiency of the safeguards and the determination of enforcement actions.

PART II: DATA ON TRIBAL COURTS AND ICRA CASES

1. The Central Office provides training through a Bureau contract with the National Indian Justice Center, Inc. Additional training has been provided by various independent contractors such as Indian Law Center, the University of Montana, and other contract groups as contracted for by the tribes, area offices and agencies.

Under the contract with the Indian Justice Center, Inc., courses in the ICRA are provided while provisions of ICRA are addressed in other courses such as criminal law, civil procedure, housing, etc.

2. As provided by Areas:

Aberdeen

- Number of Tribal Judges	40
- Number of Tribal Judges w/ Law Degree	10
- Specifically trained in ICRA	28

Sacramento

- Number of Tribal Judges	2
- Number of Tribal Judges w/ Law Degree	0
- Specifically trained in ICRA	unknown

Eastern

- Number of Tribal Judges	25
- Number of Tribal Judges w/ Law Degree	9
- Specifically trained in ICRA	25

Minneapolis

- Number of Tribal Judges	32
- Number of Tribal Judges w/ Law Degree	unknown
- Specifically trained in ICRA	32

Billings

- Number of Tribal Judges	22
- Number of Tribal Judges w/ Law Degree	3
- Specifically trained in ICRA	20

Anadarko

- Number of Tribal Judges	37
- Number of Tribal Judges w/ Law Degree	21
- Specifically trained in ICRA	37

Phoenix

- Number of Tribal Judges	31
- Number of Tribal Judges w/ Law Degree	10
- Specifically trained in ICRA	unknown

3. There is a general consensus from the area offices that those subject to tribal law need to be better informed of their rights under the ICRA.

Exhibit No. 1 (cont.)

4. As provided by Areas:

Aberdeen

- Number of Tribes 15
- Number of Tribes with Constitutions 15

Sacramento

- Number of Tribes 94
- Number of Tribes with Constitutions 33

Muskogee

- Number of Tribes 14
- Number of Tribes with Constitutions 14

Eastern

- Number of Tribes 21
- Number of Tribes with Constitutions 8

Minneapolis

- Number of Tribes 29
- Number of Tribes with Constitutions 28

Billings

- Number of Tribes 10
- Number of Tribes with Constitutions 6

Anadarko

- Number of Tribes 23
- Number of Tribes with Constitutions 20

Phoenix

- Number of Tribes 41
- Number of Tribes with Constitutions 41

Juneau

- Number of Tribes 197
- Number of Tribes with Constitutions 95

Navajo

- Number of Tribes 1
- Number of Tribes with Constitutions 0

5. thru 23. Requires response from tribes.

Exhibit No. 1 (cont.)

POSITION OF THE BUREAU OF INDIAN AFFAIRS ON TRIBAL COURT COMPLIANCE WITH THE INDIAN CIVIL RIGHTS ACT OF 1968

The Indian Civil Rights Act of 1968, P.L. 90-284, was passed by Congress as a recognition of the unique status that tribal governments have under the U.S. Constitution, and the responsibility that these governments have to their people. The civil rights that were extended onto Indian lands are similar to but not the same as those rights demanded of the federal government and state governments under the Bill of Rights. The federal courts have found that by enacting a law to require Indian tribes to provide constitutional rights to Indians on reservations:

...Congress wished to protect and preserve individual rights of Indian peoples, with realization that goal was best achieved by maintaining unique Indian culture and necessarily strengthening tribal governments. O'Neal v. Cheyenne River Sioux Tribe, C.A. S.D. 1973, 482 F 2d 1140, 1144.

To this end, the Bureau continues to work closely with tribal court systems, providing funding when necessary, technical support, and ongoing training for tribal court personnel, including how to best adhere to the provisions of the Indian Civil Rights Act of 1968. The Bureau attempts to insure that courts in Indian country operate within the spirit and the letter of law of the Indian Civil Rights Act through the contractual framework of P.L. 93-638. Any attempts by the Bureau to directly interpret tribal court actions would be counter to restrictions established by the U.S. Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed 2d 106. The Bureau recognizes tribal courts and tribal governments as evolving governmental entities. Therefore, the Bureau views its roles as supportive and instructive to tribal court systems, but not as ultimate interpreter of the unique cultural applications of equal protection and due process that are sometimes administered by such court systems. The Bureau will continue to provide its support and instructive role in promoting the application of the guarantees found within the provisions of the Indian Civil Rights Act, but will not overstep the boundaries acknowledged by the U.S. Supreme Court.

Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government, Worcester v. Georgia, 31 U.S. (6 Pet) 515, 559, 8 L. Ed 483 (1832); see United States v. Maguire, 419 U.S. 544, 557, 42 L. Ed 2d 706, 95 S. Ct. 710 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer 'possessed of full attributes of sovereignty,' they remain a 'separate people, with power of regulating their internal and social relations.' Santa Clara Pueblo v. Martinez, *supra*, 113.

Exhibit No. 2



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MEMORANDUM

JUN 12 1980

To: Commissioner of Indian Affairs

From: ~~Assistant Secretary~~ ^{Acting} Assistant Secretary - Indian Affairs

Subject: Interior Department/Bureau of Indian Affairs Policy Regarding Relationship with Tribal Governments

The purpose of this memorandum is to establish Departmental policy guidance for dealing with tribal governments in the wake of the Martinez decision.

I. BACKGROUND

The need for establishing such policy arises from the May 15, 1978, Supreme Court decision in Santa Clara Pueblo v. Martinez. While the Martinez decision does not form the entire basis for this policy, it has given impetus to the need for a policy regarding the relationship between Indian tribes and the United States.

In the Martinez decision, the Supreme Court held that, except for habeas corpus, the Indian Civil Rights Act of 1968 (ICRA) does not provide access to the Federal courts for individuals who feel their civil rights have been violated by actions of their tribal government. Rather, the Court determined that such matters are to be resolved through the use of tribal forums.

In the Martinez decision, the Court also reviewed the legislative history of the Indian Civil Rights Act to show that the Congress rejected proposals to give the Department of the Interior administrative review of alleged violations by tribal governments of the civil rights of individuals. Consequently, neither this Department nor the Federal courts constitute a forum wherein individuals who allege violations of the Indian Civil Rights Act by tribal governments may be heard.

Rather, the Martinez decision has clearly placed the responsibility and the authority for enforcement of the Indian Civil Rights Act on tribal governments. In its discussion of the decision the Court said, "In addition to its objectives 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."

Exhibit No. 2 (cont.)

2

Therefore, the Martinez decision has had the practical effect of reinforcing the authority of Indian tribes to truly self-govern. By doing so, it has provided them with both the opportunity and the responsibility to strengthen their tribal governments and create an atmosphere of respect for those tribal forums charged with protecting individual rights.

II. INDIAN CIVIL RIGHTS ACT

With that background in mind, it is essential that actions of personnel of the Bureau of Indian Affairs reflect and adhere to the following in respect to the Indian Civil Rights Act:

1. The Bureau is genuinely concerned that tribes adhere to the requirements of the Indian Civil Rights Act which places serious responsibilities on tribal governments to protect the civil rights of individuals under their jurisdiction.
2. The Bureau of Indian Affairs, however, can not and will not constitute a forum wherein individual tribal members might seek redress for alleged violation of the Indian Civil Rights Act by a tribal government.
3. Rather, recognizing the additional support for the concept of self-government that the Indian Civil Rights Act provides for tribes, the Bureau will actively work to help tribal governments develop forums which will enable them to deal fairly on issues relating to this Act. In so doing, the Bureau must respect the sovereignty and uniqueness of each tribal entity, while being prepared to encourage and assist within available resources in the following:
 - (a) The development, amendment or revision of tribal constitutions, law and order codes, judicial procedures, and other governing documents as appropriate.
 - (b) The provision of technical assistance for civil rights studies when requested by tribes.
 - (c) Assurance of appropriate training programs for judges, law enforcement personnel, and other tribal staff.
 - (d) Through the Solicitor's Office, provision of legal interpretations on civil rights matters when requested.
 - (e) Establishment and strengthening of fair and objective tribal judicial systems.
4. The Bureau expects each tribe to abide by the terms of the political relationship it has with the United States. A breach of the terms of the political relationship may result in an alleged violation of the civil rights of an individual; however, it is important to distinguish that the actions to be taken as set out in the following are not directed at the alleged violation, which will be handled in a tribal forum, but rather at the breach of the terms of the political relationship.

III. POLITICAL RELATIONSHIP WITH TRIBAL GOVERNMENTS
(Political Relationship Policy)

This part of the policy statement is made with full understanding and appreciation of the fact that hard and fast rules concerning a political relationship cannot be drawn. Political developments and realities external to this Department will be present at a particular time with regard to a particular set of circumstances that will require deviation from this general policy guidance. Any such deviation will be authorized or made by the political appointees of the United States — the Commissioner, the Assistant Secretary - Indian Affairs, or the Secretary of Interior.

This policy and implementing procedures do not apply to the day-to-day administrative decisions by Bureau officials, but are designed to apply in cases of extraordinary and deliberate breach of the terms of the political relationship between Indian tribes and the United States, which may be brought to the attention of the Superintendent in several ways.

At the Agency level, this would not affect the Superintendent's responsibility to make administrative decisions concerning actions by tribal officials. In making such decisions, it may be necessary for the Superintendent to determine whether there has been compliance with the tribe's constitution. Such administrative decisions would be subject to the administrative appeals procedures in 25 CFR 2. Those matters involving an extraordinary and deliberate breach, however, would require political considerations and decisions outside the administrative review procedures set forth in 25 CFR 2.

In most instances, many of the terms of the political relationship between a tribe and the United States are specifically set forth in the tribal constitution. Where a tribal constitution provides for representative government, we consider such document as evidence of a delegation of authority from the Indian people to their elected representatives for the purpose of governing the tribe. The governing body is, therefore, responsible to the people to serve them and conduct the tribe's affairs in the manner set forth in the tribal constitution. The tribal constitution also defines certain terms of the political relationship between the tribe and the United States. Each party to that relationship, therefore, has a right to expect the governing document to be honored.

There are a number of tribes which have forms of government that have not been embodied in written documents, or whose documents have not been formally approved by the Secretary or his representative. In those instances, the political relationship may not be defined so clearly. However, the historical terms of those specific relationships are sufficiently well understood by consistent patterns of inter-relationship between the tribe and the United States, as reflected by both Federal and tribal records, to identify the terms of the political relationship and to permit the principles of this policy to be applied in like manner.

Exhibit No. 2 (cont.)

4

As a party in this political relationship, the Secretary has the right to expect that the terms of the relationship are honored. He would be derelict in his duty as representative of the Federal Government in this relationship and negligent in his responsibility to the tribe if he had knowledge regarding clear violations of the terms of the relationship and did not advise the tribe of his concern and do what he could to bring about corrective action.

The application of this policy will occasionally require Superintendents and other line officials to make recommendations that may be opposed by tribal officials. Responsible actions taken by Bureau officials to implement this policy will receive my full support. I believe tribal leaders will understand that it is only reasonable for both parties to the political relationship to insist on compliance with its terms.

In implementing this policy, Bureau officials at all levels have key roles to fulfill. At the field level, it will be the responsibility of the Superintendent, in most instances, to identify tribal action which may constitute an extraordinary and deliberate breach of the terms of the tribal/Federal relationship. He must fully develop the factual information which will assist in the decision as to whether a breach has occurred. In so doing, discussion with tribal officials will reveal whether the action in question was deliberate and whether the tribal officials are prepared to stand by their action. He should also indicate whether there is a third party whose rights may have been affected, whether a tribal forum is available, and whether any action is on-going or anticipated by such third party.

The Superintendent shall then refer the matter of the apparent breach to the Area Office. The Area Director shall negotiate with the tribal officials in an effort to resolve the matter in controversy. If he is unsuccessful in his effort, he shall immediately refer the matter, including his comments and recommendations, and those of the Superintendent to the Central Office for any further action.

The Commissioner will make the determination whether an extraordinary and deliberate breach of the tribal constitution has occurred. He will evaluate whether the breach warrants a response on the part of the Department and the nature of that response, and develop the procedure to deal with it. If one of the techniques selected is the imposition of sanctions, the Commissioner will consider the following:

- a. Whether the breach stems from a different interpretation of ambiguous language in the constitution or is a willful disregard of clear language.
- b. What the impact of the sanction will be on the future well-being of tribal members.
- c. What the impact of the sanction will be on the Secretary's fiduciary obligation on Departmental programs.
- d. What the impact will be on future relations with the tribe or the particular tribal government or leaders in question.
- e. The impact on the policy of self-determination and recognition of tribal sovereignty.

Exhibit No. 2 (cont.)

5

- f. What impact the sanction, or failure to apply it, will have on relations with other tribes.
- g. What the impact will be on the Bureau, Department and Administration from the Congress, the media, general public and world opinion.
- h. The best interests of the United States.

Sanctions in order of increasing severity are:

- a. Refusal to recognize or approve a specific act of a tribal government or any consequence of it.
- b. Refusal to recognize any otherwise legal act of the tribal government until corrective action is taken.
- c. Withdrawal of recognition of an officer of the tribe as legitimately seated and whose actions the United States can recognize.
- d. Withdrawal of recognition of a governing body as legitimately seated and, therefore, one with whom the United States can do business.
- e. Cut-off of all Bureau funding with recommendation to other agencies that they take similar action and/or a refusal to deliver trust funds.
- f. Withdrawal of recognition of all officials. Such officials could be recognized, however, for the sole purpose of taking action to correct the breach. Once corrections are made, recognition to the proper officials could then be restored.

The Central Office will monitor the crisis and decide when and if sanctions will be withdrawn and normal working relations re-established.

This policy is intended as a means to ensure that the terms of the political relationship are honored by both parties. This policy acknowledges the existing tribal quasi-sovereign political status. But it acknowledges all the implications of such status and deals with them. This policy is consistent with that expressed by Congress in P.L. 93-638 to maintain the Federal Government's unique and continuing relationship with tribal governments.



Exhibit No. 3



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 16 1981

Memorandum

To: All Area Directors
Active Deputy

Through: Commissioner of Indian Affairs

From: Assistant Secretary - Indian Affairs

Subject: Interior Department/Bureau of Indian Affairs Policy
Regarding Relationship with Tribal Government

Rocky

JAN 17 1981

Pending further instructions from this office, no action should be taken to implement the policies set forth in the memorandum of June 12, 1980, subject: "Interior Department/Bureau of Indian Affairs Policy Regarding Relationship with Tribal Government."

In the event a situation develops where the Area Director believes that there is a clear violation of provisions of the tribal constitution, he should refer the matter to the Office of the Commissioner, with a full report on the circumstances. Each matter will be handled on a case by case basis.

T. W. Z. J. S.

Minneapolis Star and Tribune, January 5, 1986

INDIAN COURTS ISLANDS OF INJUSTICE

Indians' rights are often denied in tribal courts

First of a series.

By Sharon Schmickle
and Roger Buesen
Staff Writers

Mary Norcross was jailed in Minnesota on charges of possessing marijuana. She was denied bail and a bail hearing. Five weeks after she was jailed, her home was taken away by tribal officials because she had "abandoned" it.

Connie Chasing Hawk lost custody of her two sons to the boys' grandmother without notification or a hearing. She then was jailed for "resisting" when her children were taken.

Margo Loud, jailed in Minnesota on charges of selling marijuana, sought an attorney. She was later denied counselor-recommended drug treatment, according to a note on the

recommendation, because she had sought legal help.

These cases come from islands of injustice.

They are from American Indian reservations, where half a million Indians live under courts that often fail to hand out justice.

On many reservations with Indian courts:

■ Indians are denied their civil rights — including the rights to lawyers, bail and jury trials — and sometimes are victims of illegal police searches.

■ Tribal politicians control court functions by firing judges with whom they disagree, overturning court decisions and manipulating the legal system to benefit themselves and their relatives while punishing their enemies.

Reprinted with permission from the Star Tribune, Minneapolis-St. Paul.

Exhibit No. 4 (cont.)

■ Judges have little legal training, seldom hold their jobs long enough to become skilled and sometimes decide cases in which they have a personal interest.

■ Businesses, important to the well-being of reservation economies, are scared away by unjust and incom-

petent tribal courts.

■ Indians whose rights are abused have almost nowhere to turn for help, and federal officials who see abuses often do nothing.

It's not supposed to work that way.

Indians living on the nation's 487 reservations are granted, under federal law and their own tribal constitutions, most of the rights protecting other Americans.

But reservation judges and officials ignore the protections on many of

the 147 reservations where tribes run their own courts.

Federal judges, in most cases, lack power to hear appeals of Indians from reservation courts. Federal bureaucrats dismiss their claims.

And tribal officials retaliate. Indians who fight back sometimes lose their jobs, houses and possessions because of actions by tribal authorities.

Experts, including Ross Swimmer, who last month took charge as the Bureau of Indian Affairs' chief administrator, agree that serious problems afflict Indian courts. Those problems are stunting reservation economies, Swimmer said, and he said that strengthening courts will be a priority in his administration.

But others argue Indians should be allowed to work out solutions unfettered by non-Indian courts and U.S. government officials. They say more time and money will improve tribal courts.

In the meantime, Indian courts continue deciding about 160,000 criminal, civil and juvenile cases a year. And any of the 1.4 million Indians who enters a reservation can fall within the power of an Indian court.

Major crimes committed by Indians on reservations and crimes by non-Indians are handled in federal court. Indian courts have authority over other crimes committed by Indians and over civil matters.

One of those courts is on Minnesota's Red Lake Reservation, 564,000 acres of wooded land William Lawrence knows well.

"People go down to Nicaragua all the time and talk about people's rights being violated. Well hell, they only have to go 300 miles north (of Minneapolis) to see the same rights being violated," said Lawrence, a lawyer and member of the Red Lake tribe who has spent most of his life on or near the reservation. (He now works weekdays in Minneapolis.)

In the Red Lake court, Indians are denied rights that federal laws say they should have. At Red Lake, there are no lawyers — they have been effectively barred — and most people accused of crimes take the advice of police, the prosecutor or other court workers.

Jury trials are rare. And some criminal suspects sit in the reservation's jail for days with no right to post bail and without being told of

Exhibit No. 4 (cont.)

the charges against them. (Elsewhere in Minnesota, suspects cannot be held without formal charges for more than 36 hours. But rules governing the Red Lake court allow officials to hold Indians indefinitely if a judge has signed a temporary commitment order.)

About 4,090 Chippewa Indians live on the Red Lake Reservation, 30 miles north of Bemidji, Minn. Another 3,189 members of the tribe living off the reservation are subject to the court's authority during visits there.

The 102-year-old court, which handles about 2,000 cases a year, has three judges, none of whom are lawyers. Lawyers are not welcome at Red Lake.

The presence of lawyers is "detrimental to the very existence of the Red Lake Indian Reservation and also serves to disrupt the peace and tranquility of the Red Lake Band of Chippewa Indians," the tribal council, which governs the reservation, declared in a 1982 resolution.

Lawyers are prohibited from entering the reservation or practicing in the Red Lake court without council approval, the resolution said in affirming a longstanding practice at Red Lake.

Red Lake Chairman Roger Jourdain refused to be interviewed for this series.

No lawyer has received approval to practice there, according to a U.S. Interior Department official.

Even lawyers paid by the government have been barred. Congress grants money to a legal aid system to help Indians who can't afford lawyers in civil cases. But "none of the attorneys in our office or the paralegals have been allowed to

practice or appear as advocates in Red Lake," said Karen Sullivan, director of the legal services office in Cass Lake, Minn., that serves three reservations, including Red Lake.

Red Lake's attorney ban applies to Indian lawyers, too, as Austin Sebastian discovered. Sebastian, a Chippewa Indian and a lawyer who had an office in Bemidji until he moved to South Dakota in 1984, accompanied a client to the Red Lake court in 1982. When the proceeding began, tribal council members in the gallery objected to Sebastian's presence, saying lawyers are not allowed to appear in court.

The judge allowed Sebastian to observe the proceeding but told him to remain silent.

In June 1985 the tribal council banned Sebastian from entering the reservation after he tried to serve a federal court summons on tribal officials on behalf of his client.

The tribe came under pressure to soften its attorney rule in May 1985 when a U.S. District Court judge in St. Paul released two prisoners from the Red Lake jail because they had been denied attorneys, bail and jury trials.

The tribal council responded in August by specifying qualifications for those who want to assist defendants in the court. The requirements include being a member of the Red Lake tribe, a resident of the reservation and having an understanding of the Chippewa language.

But the new qualifications won't bring any lawyers to Red Lake. There isn't a lawyer who meets them, according to Assistant U.S. Attorney Paul Day, an Indian lawyer who has tried to find Indian attorneys in Minnesota to organize a chapter of the American Indian Bar Association.

Exhibit No. 4 (cont.)

Lawrence may come closest to meeting the qualifications, but he doesn't speak Chippewa. "You've created an impossible situation with the qualifications," Lawrence said. He said no other Red Lake members are law school graduates.

Although the tribal council doesn't allow lawyers in the Red Lake court, it uses them for its legal affairs. It paid law firms in Duluth and Washington, D.C., more than \$140,000 in fees and expenses in 1984.

Jury trials, a right for Americans living on or off reservations, are almost as rare as lawyers at Red Lake. Juries are rare on other reservations, as well.

But that isn't what the law intended. The Indian Civil Rights Act, passed by Congress in 1968, gives Indians charged with crimes that could

involve a jail sentence the right to be tried by a jury. That is often not the case.

A 1976 survey of 100 Indian courts, the most recent comprehensive survey of tribal courts, found that 42 courts didn't have a jury trial the previous year. Only 10 courts had more than five jury trials.

Red Lake's court apparently heard criminal and civil cases for almost 100 years before it had its first jury trial, which occurred in 1983. In 1982, a Bureau of Indian Affairs (BIA) consultant reported "the Red Lake court has never had a jury trial and juries were not being provided even when requested by parties."

Red Lake's court rules discourage defendants from asserting their right to jury trials. One rule, for example, requires a defendant convicted in a jury trial to pay the cost

of the trial. The requirement has been one of Red Lake's court rules for more than 30 years, and it became tougher two years ago when the tribal council specified exactly what costs defendants who lose must pay.

The council's action came shortly after the Red Lake court held its first jury trial, a case involving Donald Cook, a dissident who participated in a takeover of the reservation six years ago.

Cook was arrested in 1983 on charges of disturbing the peace when he tried to observe tribal council and court sessions which officials said were closed. Cook decided to gamble and stand trial before a jury. He was acquitted and paid nothing.

Less than a month after the trial, the tribal council set rates for pay and travel expenses for jurors and prospective jurors that would make the cost of a trial with six jurors more than \$400 for the first day and \$160 for each additional day, a sizable sum on a reservation where fewer than half the people can find a part-time or full-time job.

Mark Anderson, an Interior Department lawyer, advised BIA officials at Red Lake two years ago that the Indian court's rule on jury-trial costs violated civil rights laws "because defendants — particularly indigent ones — would be discouraged from exercising their right to a jury trial."

That advice went unheeded until May 1985 when the federal judge ordered the release of two men from the Red Lake jail in part because they were denied a jury trial. The judge said the Red Lake court's practice of requiring defendants to pay for the cost of jury trials if they are convicted effectively denies them the right.

Exhibit No. 4 (cont.)

Since the ruling, Anderson said, the Red Lake court has held three jury trials. The cost of those trials was paid with court funds and not by the defendants, although Red Lake has not formally changed its rule on court costs.

Rights violations aren't confined to the Red Lake Reservation. "There are Red Lakes in just about every state in the union," acknowledged Joseph Myers, an authority and supporter of tribal courts who is executive director of the National Indian Justice Center in Petaluma, Calif.

Widespread complaints of civil rights violations prompted the U.S. Civil Rights Commission in July 1985 to look into the problem. An investigation is set to begin later this year.

Another federal panel, the Presidential Commission on Indian Reservation Economies, held hearings on reservations in 1983-84 researching economic problems there. Although its goal was to analyze obstacles to economic development, the commission heard so many complaints about tribal courts that it decided to address the issue in its report, released in November 1984. The panel urged reforms to prevent rights abuses by tribal courts.

But these studies won't help Mike and Mary Norcross, who lived on the Red Lake Reservation until April. The Norcrosses, parents of seven children, were arrested on the reservation Feb. 14, 1985, on drug charges.

"They didn't read me any rights or anything," said Mike Norcross. "They just took me to the police station and put me into a cell. I went and talked to the criminal investigator, Gerald Hill. He said plead guilty because you'll never get out of this one. I seen (a judge)

standing there. I asked him if we could have bail. He told that other cop that was standing there, 'No bail or bond.' "

Hill denies he told Norcross to plead guilty. "I talked to him, but I don't remember any conversation like that," Hill said.

Mike Norcross said he was in jail for five days before he was charged with destroying evidence and possession of marijuana. He pleaded guilty to possession and was sentenced to 90 days and fined \$180.

Mary Norcross said police read her rights to her and that she asked for bail and an attorney. The jailer, she said, replied: "There's no bail for any of you." She said nothing happened with her request for an attorney. She, too, pleaded guilty to possessing marijuana and also was sentenced to 90 days in jail and fined \$180.

During her sentence, Mary Norcross was notified that her home purchase agreement with the Red Lake Reservation Housing Authority "has been terminated, effective immediately, due to abandonment of the home." Many of her family's belongings were never recovered.

She had lived in the house and made payments for about four years under an agreement with the Department of Housing and Urban Development and the reservation housing authority.

There was no hearing about the house until after another family had moved into it, according to George Gaasvig, executive director of the Red Lake Housing Authority. "She was incarcerated and not available," Gaasvig said. The authority has offered to help Norcross recover possessions that were left in the house.

Exhibit No. 4 (cont.)

Mary Norcross, who now lives off the reservation in Bemidji with her family, asked tribal officials to reconsider taking back the house. They turned down her appeal a few weeks ago.

Documenting the problems of Indian justice in the United States

In recent years, the problems of Indian courts have been cited by experts and documented in reports. Below are comments from experts and excerpts from the reports:

"Although many tribal courts are functioning admirably on limited resources, lack of support and vacillating policies over the years have created overall needs of staggering proportions."

**American Indian Lawyer
Training Program report in 1977**

"The tribal courts do not work well, and necessary improvements would require much time and involve many difficulties. To perpetuate them at all runs counter to the evolutionary trends in the Indians' relation to the dominant culture in this country. Therefore, it would be more realistic to abandon the system altogether and to deal with Indian civil rights and criminal problems in the regular county and state court systems."

American Bar Foundation study in 1978

"Complaints of political interference abound. There have been repeated instances of tribal leaders putting pressure upon an Indian court judge to rule a certain way, under an implied threat that the judge must comply or lose his/her job. . . .

"(A likely) reason for the disposition of virtually all cases in Indian courts by guilty pleas is the fact that they are not well equipped to conduct adversary proceedings. . . .

"Little recourse remains for one convicted by an Indian court. While most tribes have structures providing for appeals, they often are inoperative."

**National American Indian Court
Judges Association report in 1978**

Exhibit No. 4 (cont.)

"Today this minority group is in a position comparable to that of other minorities in the late 1950s or early 1960s. There is really no Indian civil rights movement comparable to that which blacks forged in the 1960s. Most Indian interest groups are primarily concerned with establishing political and economic control over reservation areas."

Statement concerning the civil rights of Indians to the U.S. Commission on Civil Rights by John E. Huerta, deputy assistant attorney general, in 1979

"In the field of criminal law, tribal justice leaves much to be desired. . . . Tribal judges possess and exercise an enormous amount of power in the criminal area with few practical institutional checks."

Vine Deloria Jr. and Clifford M. Lytle in "American Indians, American Justice" (1983)

". . . . (F)ailure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law. . . .

"Tribal government patronage systems and the politicization of tribal courts are significant obstacles to Indian reservation economic development since they discriminate unfairly against individuals and businesses. A lack of sovereign responsibility deters investment."

Presidential Commission on Indian Reservation Economies report in 1984

About the writers /

This series was reported by Sharon Schmickle and Roger Buoen, under the direction of Assistant Managing Editor/Projects John Ullmann.

Schmickle, 43, has worked at the newspaper for five years and is a general assignment reporter.

Buoen, 34, an assistant city editor, joined the newspaper in 1978. He is a lawyer.

Researcher Nita Martin contributed to the series. It was copy edited by Jim Landberg.

Minneapolis Star and Tribune, January 5, 1986

Woman flees tribal justice to keep sons

Bismarck, N.D.

Connie Chasing Hawk's sons were finishing their bedtime baths when police appeared at the door with a court order demanding that she turn over her two boys. Without notifying Chasing Hawk or hearing evidence or giving his reasons, a judge had awarded custody of the boys to a relative.

When the Sioux Indian woman refused, tribal police threatened to get a warrant to search for the boys in the house.

Chasing Hawk, 30, and her sons, ages 8 and 10, fled to the nearby home of her sister, also on the Cheyenne River Sioux Reservation in Eagle Butte, S.D. But escape seemed hopeless.

"I saw all those cop cars out there. We were really scared," Chasing Hawk recalled. "We just walked back."

Police took the children on that Jan. 9, 1985, night and arrested Chasing Hawk for resisting the court order — an order made by a judge without following tribal or federal rules that protect people's rights.

Chasing Hawk and the boys' paternal grandmother had been fighting over the children since 1979, after the boys' father was killed.

Chasing Hawk had left the children with their grandparents, who live on the reservation, because she had lost her house and couldn't provide an adequate home for the children. She tried to get them back several times over the next few years, twice through legal action. But the grandmother refused, saying Chasing Hawk was neglecting the children. Court officials told Chasing Hawk that she should get a job and a home before she resumed custody, she said, but she was unable to find permanent work.

A tribal court judge heard evidence and decided in December 1984 that the boys belonged with their mother.

But their grandmother, Pearl Hollow Horn, called Chief Tribal Judge Melvin Garreau on Jan. 9, 1985, and begged him to return the boys to her because she was worried their mother wasn't watching them that night.

Garreau, who was tribal chairman until 1980, said that on the basis of Hollow Horn's call he didn't think there was time for a hearing.

At the jail, Chasing Hawk said, she and her sons were allowed to sit together on a bench outside a cell block until around 11 p.m., when police led the boys away to drive them to the Hollow Horn home.

Exhibit No. 4 (cont.)

"I was standing at the window and they got down to the cop cars, down a long sidewalk. Michael got in, but John was crying and he ran back up toward me. When the cop came to get him back, Michael ran back up, too," Chasing Hawk said. "I didn't sleep. I was crying all night."

Overnight in her cell, a jaller gave her cigarettes and water.

The next afternoon, she appeared in tribal court without a lawyer. The Indian Civil Rights Act gives Indians on reservations the right to hire lawyers, but indigent Indians

facing criminal charges are not entitled to government-paid lawyers. People who can't afford lawyers must represent themselves in Indian court if they cannot find a volunteer to do it.

She pleaded guilty to contempt of court for refusing to give up her children when police went to her house. She was fined \$10.

Chasing Hawk was free, but she was not to see her sons for two months.

At Hollow Horn's request, Judge Garreau ordered Chasing Hawk to stay away from her children. The judge said it was not necessary to notify Chasing Hawk or hear her side of the story because he was already convinced contact with Chasing Hawk would be injurious to the boys.

The order said, however, that there would be a custody hearing in two weeks. Chasing Hawk turned to Dakota Plains Legal Service, where lawyers agreed to represent her.

The hearing was postponed until March 12 when another judge, Tyrone Takes The Knife, heard the arguments, decided that Chasing Hawk was a fit mother and ordered

that the boys be returned to her immediately.

Instead, the grandmother drove down the street to tribal council headquarters.

Chasing Hawk said she saw the car and feared that Hollow Horn had turned to the tribal council, which had reversed court decisions and fired judges who disagreed with its actions.

Chasing Hawk filled both gasoline tanks on her sister's 1978 pickup.

She picked up the boys with only the clothes they were wearing, picked up her own belongings, and after dark drove off the reservation where the tribe would be powerless to touch her. "I figured maybe they would try to do something before morning."

Her fears were well-founded. Eagle Hunter, the council member from Hollow Horn's district, helped the grandmother state her case before the council. And the council on March 12, the same day that Chasing Hawk had won in court, ordered the court to return the children to Hollow Horn. But Chasing Hawk has kept them out of the reach of reservation officials.

Since then, Hollow Horn has appealed in tribal court to reverse the March 12 decision awarding custody of the boys to Chasing Hawk. The case is pending.

Meanwhile, Chasing Hawk and her children share a modern three-bedroom apartment in a low-income complex on the outskirts of Bismarck. It is within walking distance of the boys' school and Interstate Business College, where Chasing Hawk is studying.

Chasing Hawk said she will stay away from the reservation in order to keep her children.

Minneapolis Star and Tribune, January 5, 1986

Drug arrests leave family out of home, out of work, out of luck

Ponemah, Minn.

Darrell Geshick and Margo Loud live with their four children in a 25-foot camping trailer someone abandoned two years ago. It sits in a small clearing near the northeast shore of Lower Red Lake.

Carpet remnants and sheets of plastic cover holes that once held window panes. The family hauls water from the chapel in town and chops wood for heating and cooking. They have one bunk bed, no telephone, no plumbing and — with no jobs — little hope.

Things were much different for the Chippewa Indian family before Feb. 14, 1985. On that day, Loud and Geshick were arrested after police found, among other items, a marijuana plant and a plastic bag containing marijuana seeds in their modern four-bedroom house on a wooded hill in the village of Ponemah.

The episode cost them time in jail. It also cost them their house, possessions, jobs and medical treatment.

Had they been arrested in Hennepin County — or within the jurisdiction of any other county court in Minnesota — they would

have been charged within 36 hours or released. They would have been entitled to a lawyer, bail and a jury trial. And if convicted of possessing a small amount of marijuana, they would have faced no more than a \$100 fine and some form of counseling.

But Geshick and Loud were arrested on the Red Lake Indian Reservation, where attorneys have not been allowed to practice; where defendants have been denied jury trials and bail; where federal and tribal laws allow people to be held indefinitely without charges; where

powerful tribal officials have been accused of interfering with the courts, and where a federal judge has ruled that Bureau of Indian Affairs (BIA) court officials have violated Indians' civil rights.

"The public doesn't know what's going on behind the walls of our court," Geshick said. "It's been like this for a long time, a long time And what can we do? There's nobody to defend us."

Geshick said he spent five days in jail before he was charged. Federal rules governing the Red Lake court allow a person to be locked up indefinitely if a judge signs a "temporary commitment" order

Exhibit No. 4 (cont.)

within 36 hours after the suspect is jailed. The order need not indicate the nature of the charges.

Geshick had no attorney to represent him. On the day he was charged, he pleaded guilty to possessing marijuana and was sentenced to 90 days and fined \$180.

Loud also said she was held five days before she was charged with selling marijuana as well as with resisting arrest, assaulting police officers, cultivating marijuana and child neglect. (Loud said the charge arose because her 8-year-old son had gotten off the school bus before she returned home on the day of her arrest.)

According to Loud, this is what happened when she appeared in Red Lake court:

"When I pleaded not guilty to all charges, (Judge George Sumner) said, 'Do you have anything to say before I sentence you?' I said, 'Wait a minute don't I get a chance to talk to anybody? Do I just come in here and get hung?'"

Sumner declined to be interviewed for this series.

Sumner continued Loud's case for a week. She was visited in jail by Marvin Needham, a counselor at Red Lake's drug abuse program who is not a lawyer but acts occasionally as a lay counselor in the court. Needham told her she could choose between serving 21 months on all charges or six months and a \$360 fine if she would plead guilty to selling marijuana. Loud accepted the plea bargain, although she insists she was not selling the drug.

After the sentencing, Loud began demanding to see an attorney.

Through letters and calls to her sister in Andover, Minn., she contacted Andrew Dawkins, a St. Paul attorney.

"After I had been sentenced to six months in jail, I knew that everything was wrong," Loud said. ". . . Everybody else just took their sentence and that was it. Even Darrell, he didn't want me to do it because he thought something might happen to me . . . but I was stubborn enough to keep on."

Loud and Geshick then asked to be released during workdays for their temporary jobs, which were due to start soon. A tribal official notified Judge Sumner that he planned to hire the couple and that their work hours would be from 8 a.m. to 5 p.m. Other prisoners had taken part in work-release arrangements, Loud said, but the request by Loud and Geshick was denied. They lost their jobs.

At about the same time, Dawkins began investigating Loud's case, calling the Red Lake police and BIA and court officials.

"From what they told me it was clear to me that she had not been properly informed of her right to have an attorney," Dawkins said. "She probably could have made a pretty strong case that the arrest was invalid, that the search of her

house was invalid, that the sentencing procedure was invalid, the whole thing actually."

Loud didn't have the \$500 Dawkins requested to continue working on the case, and he closed the file.

While Loud was in jail, a counselor from the Red Lake Drug Abuse Program recommended in an April 24 memo delivered to court officials that Loud have inpatient

Exhibit No. 4 (cont.)

treatment for marijuana dependency. She did not get the treatment.

A note on the bottom of Loud's copy of the memo says, "Denied Because Family Sought Legal help on the outside." Counselor Pamela J. White, who signed the memo and initialed the note, refused to discuss it except to say that questions about it should be addressed to Sumner.

While Loud and Geshick were in jail, the Red Lake Housing Authority adopted a resolution allowing housing officials to "immediately terminate" lease agreements if there is evidence the tenant committed an illegal act — such as illegal drug possession — in the unit.

And reservation officials assigned the house that Loud and Geshick had been leasing through a low-income housing program to another family. Their possessions were still inside and have never been recovered, although the housing authority has offered to help get them back.

Loud and Geshick were released from jail in late spring and say they are paying their fines in \$25 monthly instalments.

Minneapolis Star and Tribune, January 5, 1986

Tribal court workers get little or no training, no job security

Eagle Butte, S.D.

Carmelita Eagle Chasing went to the tribal court on the Cheyenne River Reservation in South Dakota looking for work. She applied for two positions, tribal prosecutor and secretary, hoping to land the secretarial job.

She was hired as the prosecutor.

Despite a lack of legal training and experience, Eagle Chasing successfully prosecuted a criminal case her first day on the job. "The trial went smoothly," she said later and laughed.

But her stint as a prosecutor didn't last long — within a month she was replaced.

Eagle Chasing is like many others who have worked in key tribal court positions on the nation's Indian reservations. They had little training and were unable to hold their jobs long enough to become competent.

A 1978 study by an Indian judges' association found tribal judges "often lack training and other basic qualifications for office. Many tribes have no fixed qualifications, and choose judges based simply upon political contacts or popularity."

Another group that provides training for Indian judges surveyed 100 tribal courts in 1976 and found that 69 percent of those responding — 54 courts — had judges with no legal training.

"A lot of due process rights (are being violated) because judges don't have training," said Brenda Dupris, court administrator and member of the Cheyenne River Reservation in central South Dakota.

"Everybody thinks they can be the judge, and they get in there and they can't do the work," said Dupris, who described the reservation's criminal court as chaotic and "just a circus."

Dupris has been court administrator since 1981, organizing the files and trying to professionalize its operations. But despite her efforts, the Cheyenne River Sioux court is still among the Indian courts struggling with untrained and inexperienced workers.

Judge True Vincent Clown Sr., for example, was assigned most of the

Exhibit No. 4 (cont.)

tribe's huge criminal caseload — 4,309 cases in 1984. Clown said his only formal legal training was in the U.S. Marine Corps, where "they trained us in interrogating prisoners. We half-way studied international law."

Like so many tribal judges, Clown didn't last long. After 2½ months on the bench, the reservation's tribal council replaced him. The tribe's newest judge also has no formal legal training. "It's just craziness," Dupris said of the council's action.

Tribal judges are hearing important lawsuits and they "don't have the faintest idea what they're doing," said Gilbert LeBeau, a former judge. "We need congressional investigations and hearings into this."

The turnover rate among judges and other court workers at many reservations makes it almost impossible for judges to gain the necessary experience to become skilled.

Thirty percent of the courts responding to the Indian lawyer survey had chief judges who had been in their jobs less than a year.

Tribal officials and Indian court studies blame high turnover among judges and court workers on low salaries, political vulnerability and, as one report put it, "the tribal court's lack of stature as an independent arm of government."

At the Cheyenne River court, which is staffed by three judges, there have been 20 judges since 1979. The tribe's police department and prosecutor's office — key law enforcement positions — are no better. The reservation has had 16 police chiefs over the same six years.

Kathy Spotted Bear has been the tribe's prosecutor for six years — but she has been fired eight times. Each time she was been rehired, most recently in October after her uncle, Keith Jewett, who is a member of the tribe's governing council, made a plea for her reinstatement.

Eagle Chasing, who served as prosecutor during Spotted Bear's absence after her latest dismissal, said she had worked as a court clerk, a jailer and a radio dispatcher. Eagle Chasing was discharged when Spotted Bear got her job back.

Minneapolis Star and Tribune, January 5, 1986

Though powers often unclear, number of tribal courts grows

On a June night in 1984, Phillip Brown was riding his bicycle on the Salt River Pima-Maricopa Indian Reservation in Arizona.

As he pedaled, two gunshots were fired nearby. One bullet hit the 14-year-old boy in the chest and mortally wounded him. Within days, Albert Duro was arrested and later indicted for the killing.

But Duro has never gone to trial. Instead, in the 18 months since the slaying, prosecution of the case has gone from federal officials to tribal officials, and three courts have debated whether the tribe has the power to try Duro.

The case, now before the Ninth Circuit Court of Appeals, illustrates the complex, confusing and changing body of law that defines the legal powers of the nation's Indian courts.

Indian courts have been on reservations for more than 100 years. They were created and have operated independently of state and federal courts because Indian tribes are in some respects sovereign entities — nations within a nation — that govern themselves within limits set by Congress.

On reservations without Indian courts, state and county police and

courts handle criminal and civil disputes. But many tribes have been unhappy with that arrangement.

The result has been an increase in the number of tribes with their own courts. In 1976, there were 98 tribes with Indian courts, including one at the Red Lake Reservation in Minnesota. Today, there are another 49, including an additional Indian court in Minnesota, on the Nett Lake Reservation.

Twenty reservation courts are administered by the federal government and are called Courts of Indian Offenses. They are staffed mostly by tribal members.

There is little practical difference between Courts of Indian Offenses and the other Indian courts, except workers with Courts of Indian Offenses are federal employees and the other courts' personnel are employed by tribes.

Both types of Indian courts receive funding from the federal government, last year at a cost of almost \$8.3 million.

But as the number of tribes with their own courts grows, so does confusion over the legal powers of tribal courts.

Exhibit No. 4 (cont.)

When a crime is committed on a reservation, for example, three different courts — each applying different laws — potentially have authority over the case. Determining which court is the proper body involves several factors, including the race of the person charged, race of the victim and type of crime involved.

If it is a major crime — such as murder or rape — the case is heard in federal court. And crimes committed by non-Indians are prosecuted in federal or state courts.

Indian courts are limited to lesser crimes and tribal judges cannot impose a fine of more than \$500 or a jail term longer than six months, although they can convict a defendant of multiple charges for a single incident and add up the penalties.

Tribal and federal courts sometimes can hear the same case. When that happens, an Indian can be legally punished twice for the same incident.

Figuring out an Indian court's power in civil cases also can be complicated, especially in cases in which tribes assert authority over non-Indians. And there are important questions still up in the air regarding tribal court powers — all of which make law enforcement on reservations a difficult task.

For instance, can a tribal court force an Indian who is not a member of the court's tribe to stand trial in a criminal case? That is the issue in the case of Duro, who was indicted by a federal grand jury for killing Phillip Brown. Duro was accused of firing a rifle during an argument with another man and hitting the boy, who happened to be bicycling nearby.

But the indictment was later dismissed, according to Assistant U.S. Attorney Roger Dokken, after it was learned that at least one witness had lied to the grand jury.

The murder case is still open and new indictments are possible, said Dokken.

The dismissal prompted tribal officials on the Salt River Reservation to bring Duro to trial in their court.

"I felt an obligation to the parents of the boy that a judicial system work," said Faithe Seota, the tribe's prosecutor.

Since tribal courts have no authority over major crimes such as murder, Seota decided to charge Duro with unlawful discharge of a firearm, a crime the Indian court has power to decide.

In tribal court, Duro's lawyers argued the Indian court had no authority to try him because Duro, a Mission Indian, was not a member of the Salt River tribe. The tribal judge disagreed, so Duro's lawyers went to a federal judge and made the same argument.

The federal judge ordered Duro freed, ruling the tribal court lacked legal power to force Duro to stand trial. That decision has been appealed to the Ninth Circuit Court of Appeals, which is expected to make its decision soon.

Minneapolis Star and Tribune, January 5, 1986

Well-run courts have troubles, too

The tribal and juvenile courts on the San Carlos Apache Reservation in Arizona "operate smoothly" and are "managed by diligent, dedicated staffs," consultants hired by the BIA concluded in a 1983 report.

Yet the consultants found problems that illustrate the staggering needs of the Indian court system. Some two dozen problems cited by the American Indian Lawyer Training Program include:

- The tribe's prosecutor "has the potential of being politically entangled" and his office should be investigated to determine if cases are being handled fairly and regular office hours are maintained. (At the time the report was issued, Brazie Goseyun was both a prosecutor and a member of the governing tribal council.)
- The tribe's criminal and civil code, which includes laws of the reservation and court procedures, is outdated and needs to be redrafted.
- The tribe has no public defender system and should establish one.
- The tribe's law library lacks basic materials.
- Court records are poorly organized and inadequately labeled.
- The courts have no formal written schedule providing the public with notice of court proceedings.
- Court workers need more training.
- There is "much misinformation and friction" between the courts, police and prosecutor's office.

Still, the consultants reported to the Bureau of Indian Affairs, the San Carlos courts "appear to be effectively operated court systems."

Minneapolis Star and Tribune, January 6, 1986

INDIAN COURTS
ISLANDS OF INJUSTICE

Tribal politicians often meddle in courts

Second of a series.

By Sharon Schmickle
and Roger Buoen
Staff Writers

Joan LeBeau convinced a judge to rule that reservation officials were tampering with elections.

But it didn't matter.

The officials she challenged fired the judge, rescinded the ruling and appointed the father of one of the accused as judge. The new judge ruled against LeBeau.

LeBeau's case was decided in a court on the Cheyenne River Reservation in South Dakota where, as in many other Indian courts, disputes often are settled by politics, not rules of law.

Political meddling in courts is a critical problem on many of the 147 reservations that have Indian courts. This problem prevents reservation Indians from asserting their basic rights.

Many tribal constitutions grant politicians control over reservation courts and allow them to fire judges and reverse court decisions. Some tribal officials use that power to manipulate courts and avoid election challenges.

When that happens, Indian voters are powerless, as LeBeau learned.

After her victory vanished, LeBeau and other critics of the tribal council ran for office, trying to win seats

on the council that had overruled the court. LeBeau and three others won primary elections.

But the council barred the challengers from the general election ballot. The Bureau of Indian Affairs (BIA) said that the tribe's action violated its constitution, but the BIA's finding had no effect.

For four years LeBeau and other Indians at the Cheyenne River Reservation have sought outside help — from federal judges, the BIA, U.S. Commission on Civil Rights and U.S. senators and representatives. In every case, their appeals have failed.

The LeBeau story is not unique:

■ On the Fallon Reservation and

Exhibit No. 4 (cont.)

Colony in Fallon, Nev., the Paiute Shoshone Tribal Council ended a feud in 1983 with the reservation housing authority by firing housing authority members and locking them out of their offices. Federal officials told the council it was violating its own ordinances and one week later suspended support for reservation housing programs. The council had also dismissed court workers, so there was no court where tribal members could appeal the council's action. As a result, Indians on the reservation, where unemployment exceeds 40 percent, lost a \$2-million low-income housing project.

■ On the Red Lake Reservation in Minnesota, tribal politicians seized court records in August 1985. Despite repeated demands by the federal government, which is responsible for the Red Lake court, the tribe has refused to return the records.

■ On the Rosebud Indian Reservation in South Dakota, a tribal judge was suspended and later jailed in 1981 because he granted a petition to postpone an election. The 233 petitioners claimed candidates tried to buy votes with liquor and food. Council members found another judge who reversed the decision, and held the election.

■ On the Navajo Reservation in Arizona, the tribal council, faced with unfavorable court rulings in 1978, ducked the decisions by creating a special judicial panel of eight members, five from the council, to consider lawsuits against the council. The arrangement stayed in place until December 1985 on a reservation considered by many Indian court experts to have the best Indian justice system in the nation.

These and other cases affect more than the rights of Indians at the polls — they also threaten economic and social order on reservations.

Economic development is desperately needed on many Indian reservations, but investors and lenders shy away because they fear regulation by politics rather than by reliable legal principles.

The U.S. government contributed to the underlying problem of the tribal court system when in 1934 it developed a model for tribal governments that put courts under control of politicians. Most tribes used this model in adopting constitutions.

Although some reservations have begun electing judges or establishing independent appellate courts, most judges and other court workers hold office at the pleasure of the tribal councils. Many councils routinely shield themselves from reservation courts and overturn court decisions.

"There is no separation of power; there is no check and balance," said Alex Skibine, an Osage Indian who is deputy counsel for the Interior and Insular Affairs Committee in the U.S. House of Representatives. "If federal courts found there were legal problems with the MX missile, President Reagan might not like the decision, but he couldn't fire the judge." In many tribal courts, however, "The judge can be summarily dismissed by the tribal council because it doesn't like his decisions."

The most recent major study of Indian courts, completed in 1978 for the BIA by the National American Indian Court Judges Association, said the problem is pervasive:

Exhibit No. 4 (cont.)

"Complaints of political interference abound. There have been repeated instances of tribal leaders putting pressure upon an Indian court judge to rule a certain way, under an implied threat that the judge must comply or lose his/her job. Impeachments and recalls of judges are frequent."

The rapid turnover thwarts attempts to improve Indian courts. Those trying to train judges and other court personnel admit that much of their work is undone when judges are fired for trying to follow judicial rules.

"As long as you have a judicial system that is subject to the whims of whoever is in office, then you have no guarantees that training will cure a problem that centers around being fired for unpopular decisions," said Lawrence Baca, a Pawnee Indian and immediate past president of the American Indian Bar Association.

The Cheyenne River Reservation illustrates what happens when politicians twist courts to serve their own purposes.

"It's a kangaroo court, is what it is," said Sam Eagle Staff, a member of the tribe who helped found a committee in 1981 to clean up government on the reservation. "The judges are controlled by the council, the elected officials. Everybody's doing a favor for each other. They've forgotten the main purpose they are there for, which is for law and order."

The tribe's chief judge, Melvin Garreau, has held office for four years since he replaced the judge who was fired in the election dispute. He acknowledges that politicians reach into the reservation's court system to fire judges for their decisions,

overturn decisions and award jobs to relatives.

Garreau blames a tribal constitution that was patterned after documents designed by the BIA: "That document that has been given to us was specifically designed to tear us apart."

Criminal court judges on the reservation have resigned or been fired at the rate of about one every four months in recent years.

Before he was fired last fall, former Judge True Vincent Clown Sr. said politics should have no place in reservation courts. But he also said he plans to run for tribal council in the next election. The day after he said he would be a candidate, Clown presided over a dispute about filling a vacant seat in the district where he would run.

The details of Joan LeBeau's case show how difficult it can be to separate politics from the Cheyenne River courts.

LeBeau, a soft-spoken woman with 12 grandchildren, said she hoped for reform in 1981 when she organized a petition drive to redistrict the Cheyenne River Reservation.

The reservation, 1.4 million acres of South Dakota's butte country west of the Missouri River, is divided into six tribal council districts. Indians in isolated villages must drive as far as 100 miles round-trip to attend district meetings. Many, including LeBeau, think that's too far. So a majority voted to create 13 election districts in 1981.

Facing elections, tribal council members refused to redistrict the reservation.

Exhibit No. 4 (cont.)

Led by LeBeau, voters sued the tribal council and the election board in tribal court, and Chief Judge Gilbert LeBeau (no relation to Joan LeBeau) ruled in June 1982 that the council must honor the referendum.

The next day Judge LeBeau was at home eating lunch when the phone rang. He answered it to learn that the council had fired him because of his decision.

A week later, the council rescinded Judge LeBeau's order and replaced him with Melvin Garreau, father of Morgan Garreau, a council member and vice chairman of the tribal election board. Morgan Garreau said he abstained from the vote that made his father judge. Melvin Garreau said he saw no problem with deciding the case in which his son was a defendant because "I was only ruling as to the constitutional provisions at law."

Meanwhile, Joan LeBeau complained to the BIA and several congressmen that upcoming elections would be illegal unless the council changed its mind.

A BIA official replied in July 1982 that the BIA agreed with her that the redistricting referendum was valid, but said the agency would not get involved in internal tribal disputes.

The council had its way; elections were held with six districts, and Judge Melvin Garreau's son was elected tribal chairman.

In February 1983, Joan LeBeau and a group of voters sued the BIA in federal court, claiming that the elections were illegal and that the BIA should not recognize the council. A year later, a federal judge ruled against LeBeau and the vot-

ers, saying that the election had followed tribal court rulings, which were issued by Judge Melvin Garreau.

Out of money to continue legal challenges, LeBeau decided to pursue the fight politically. She and four other candidates, including two judges who had been fired because of decisions favoring her position, began campaigning for the 1984 tribal council election.

In July 1984, the tribal council barred all five from the ballot. It said that LeBeau and the judges, who they barred "forever," had committed past misconduct by initiating "frivolous legal action for their own personal gain against the tribe to further their own political interests and not the interests of the

tribe or its members." It said that the other two candidates didn't live in their districts, although they had been certified by tribal election boards as qualified candidates in their districts.

BIA officials warned the council that it was violating its own constitution by banning the candidates and that it might not be recognized by the U.S. government should it hold illegal elections.

Again, LeBeau and other voters filed suit in federal court trying to stop the election. A judge refused in August 1984, ruling that the dispute should be decided by the tribal court.

LeBeau and four other candidates remained off the ballot.

The BIA said the tribe had acted "wholly outside the constitution," but said it would recognize council actions when there was a quorum present at council meetings, excluding members from the two affected districts.

Exhibit No. 4 (cont.)

In December 1984, LeBeau and eight other voters appealed in federal court, asking that the BIA require new elections. The court dismissed the case in June 1985, saying the matter should be decided by the BIA and the tribal courts.

"The decision is a disgrace, in my opinion," said Terry Pechota, a Sioux Indian attorney who practices law in Rapid City and who helped represent LeBeau and the others without a fee. "Basically it means that Indian people who see a conspiracy committed against them by their tribal council have no right to pursue that action in United States District Court."

LeBeau raised \$7,000 to pay costs of the lawsuits, largely by "banging on doors" on the reservation, where 55 percent of the adults were unemployed in 1984. The money came from 102 different people, she said, three-fourths of whom asked not to be identified.

"The fear of the council ever finding out who donated it was unbelievable, fear of losing jobs. . ." LeBeau said.

Shut out of federal courts, LeBeau and the others have turned again to tribal courts and the BIA.

In October 1985, Chief Tribal Judge Melvin Garreau ruled that the resolutions barring the five candidates from the ballot were valid. An appeal of that decision, filed Nov. 4, 1985, is pending in tribal court.

On Oct. 25, 1985, the BIA denied a formal appeal in which LeBeau and others asked the agency to require new tribal elections, to withdraw recognition of the seated council, and to withhold funding from the tribe until the problems are resolved.

Minneapolis Star and Tribune, January 6, 1986

Studies say courts make investors, lenders wary

Inadequate tribal courts threaten more than the civil liberties of people accused of crimes — they also sap reservation economies.

A presidential commission that studied Indian reservations in 1983-84 found that weak and ineffective tribal courts are stunting economic development on reservations across the United States.

A study conducted last year concluded that Indians on some reservations are getting neither credit nor loans because merchants and lenders lack confidence in Indian courts.

The Cheyenne River Sioux tribe of South Dakota, for instance, faced an economic crisis because of complaints about the reservation's tribal court.

Last June officials with the Farm Credit Banks of Omaha, Neb., threatened to cut off credit unless the tribe reformed its courts and laws. Their association sets policies for farm-credit cooperatives that lend money to ranchers on the reservation.

The tribe has an unemployment rate lingering around 55 percent and critically needs credit. Ranching is the reservation's biggest industry, and ranchers are big borrowers.

The lenders wanted sweeping changes in the tribe's legal system, including the appointment of a lawyer to act as a judge in credit disputes. (Tribal judges, who are not lawyers and often have no formal legal education, usually decide such cases.) A lawyer was needed "because of the unfamiliarity that tribal judges have with consumer credit law," said Frank Hutfless, vice president and general counsel for the Farm Credit Banks of Omaha.

The farm credit banks also demanded the tribe guarantee that the tribal council, the reservation's governing body, would not overturn the credit judge's decisions. The tribe's constitution does not make judges independent from the tribal council, and the council has overruled court decisions.

"Tribal judges are political appointees," Hutfless said. "That's another reason why we wanted a separate judge — just to eliminate political favoritism and the 'popular' type of decision."

Tribal Chairman Morgan Garreau acknowledged creditors' wariness of the reservation's tribal court. "They are reluctant to get involved in tribal politics," he explained.

Finally, lenders wanted to change tribal law to allow them to come on the reservation and seize collateral — cattle and farm machinery, mostly — if a borrower fails to repay a loan. Tribal law didn't give creditors that right. And in the past when creditors have tried to recover collateral on the reservation after a loan default, they have run into trouble.

"We have had some problems with armed people" who refused to give

Exhibit No. 4 (cont.)

up the collateral, Hutfless said. "We also had trouble with gaining support of the tribal police. Frankly, we were trying to do something we didn't have any legal tribal basis to do."

Faced with a crippling loss of credit, tribal leaders agreed to everything the lenders wanted. In October, the tribal council adopted legislation — drafted by Hutfless — establishing a credit court with a lawyer as a judge and changing reservation laws governing credit disputes.

Now credit is flowing back onto the reservation.

The Cheyenne River Reservation is not the only reservation faced with the loss of credit because of its court.

Last year, 186 North Dakota lawyers with offices within 50 miles of Indian reservations in that state responded to a University of North Dakota survey about credit cases in tribal courts. Most lawyers with tribal court experience said they would not recommend non-Indian creditors use Indian courts. Among the other lawyers surveyed, only 16 percent said tribal courts were fair.

If business people distrust tribal courts, they "are not going to freely extend credit if default will necessitate looking to a tribal legal system for collection," according to a report about the survey by Jesse Trentadue of the University of North Dakota. The Presidential Commission on Indian Reservation Economies also blamed tribal courts for much of the problem. Commissioners recommended that tribes amend their constitutions so the courts are protected from interference from tribal politicians.

Minneapolis Star and Tribune, January 6, 1986

S.D. case shows how tribal leaders can interfere

Eagle Butte, S.D.

At 3 a.m. on Christmas Eve in 1978, police stopped a maroon-and-white car weaving along a village street on the Cheyenne River Reservation.

The driver couldn't pass finger-counting or balancing tests, and a Breathalyzer test registered a blood alcohol content of .14 percent, above the legal limit for sober driving. Police arrested the driver and put him in jail.

That arrest triggered a governmental crisis on the South Dakota reservation because the driver was the son of the tribal chairman and because politicians control courts and police here, as they do on many of the nation's Indian reservations.

The son and the chairman say there was no evidence to support a conviction. The current tribal prosecutor refuses to release records of the incident, although she confirms a record exists.

But the reservation's former attorney general and a former prosecutor kept copies of police and court documents about the case. Details from the documents have been corroborated by minutes of a Cheyenne River Tribal Council meeting, as well as by police and a judge who were involved in the case.

The documents show how reservation politicians can manipulate the courts to protect friends and relatives.

Here is what happened:

Dec. 24:

Within 15 minutes after the jail door closed on the tribal chairman's son, the chairman and his cousin, the tribe's police chief, were at the jail. The son was released and allowed to drive away. The chairman says he was merely there to bond his son out.

Dec. 26:

The reservation's attorney general — who supervised criminal prosecution, advised police on legal issues, and acted as attorney for the tribe — heard of the case and began an investigation into the legality of the son's release.

Dec. 27:

The chairman orally fired the attorney general for "trying to make a case" against the chairman. The attorney general maintained that he had a right to appeal his dismissal to the tribal council.

Dec. 28:

The chairman, by letter, fired the attorney general for insubordination.

Dec. 29:

In a letter to the council, the attorney general resigned without specifying when he would leave the job. "I no longer enjoy the confidence and support of the

Exhibit No. 4 (cont.)

Tribal Chairman which at present is needed for me to effectively accomplish the tasks of this office . . ." he told the tribal council in his letter. Meanwhile, the investigation into the arrest of the chairman's son continued.

Jan. 15:

Acting on criminal complaints filed by the tribe's prosecutor, police arrested the chairman and police chief on charges of illegally releasing the chairman's son from jail. The charges included official misconduct, obstructing justice and obstructing governmental functions. The men were held three hours and released on bail.

Jan. 17:

The tribal council, in special session, accepted the attorney general's resignation. The council also scheduled a hearing to consider firing the prosecutor who had signed the criminal complaints against the chairman and police chief.

"We do ourselves no credit when we drag our tribal executives off like common criminals," the chairman said at the meeting.

Chairmen from other reservations in South Dakota attended the meeting and denounced the arrests. The Pine Ridge Reservation chairman suggested the arrests were part of a conspiracy to force separation of powers in tribal governments. The Sisseton-Wahpeton chairman called it a "sorrowful occasion" when a tribal judicial system would go to the extent of arresting a chairman. The former attorney general, a non-Indian, was told to leave the reservation immediately.

Jan. 20:

The chairman fired the police officer who had arrested him, according to the police officer.

Jan. 25:

The prosecutor was fired. Charges against the police chief and the chairman were dismissed.

Today — Here is what happened to the key people in the case:

Former tribal attorney general Kenneth E. Jasper has a private law practice in Rapid City, S.D.

Raylene Marshall, the prosecutor who was fired, works as a para-legal at Dakota Plains Legal Service on the reservation.

Kenneth Blackbird, the police officer who was fired after he arrested the chairman, is a police officer for the Bureau of Indian Affairs on the Yankton Sioux Reservation in South Dakota.

Paddy Aungie, the police officer who arrested the police chief, said she resigned about eight months later because "there wasn't any impartiality there." Since December 1979 she has been chief of police for the city of Eagle Butte, a non-tribal office on the reservation. She said she observes daily operations of the tribe's criminal justice system and said that things haven't improved. "It's kind of a farce, really," she said.

David Roberts, the police officer who arrested the son, left the police department in 1984. He works for the reservation's sanitary landfill.

Former Judge Walter Woods, who signed documents ordering the arrest of the police chief and chairman as well as the dismissal of

Exhibit No. 4 (cont.)

charges against the two officials, said he was fired by the tribal council in 1983 over other matters and is still unemployed.

The former tribal chairman, Melvin Garreau, is chief judge of the reservation.

The son, Morgan Garreau, is tribal chairman. The drunken driving charge against him was dismissed, he said.

"I'm well aware our system isn't exactly foolproof or the best system," he said. "Separation of powers should be implemented, and the judges should be elected at large by the people because it is very political now with the council appointing the judges The way our system is set up, it was set up in 1934 under the Indian Reorganization Act, and that constitution wasn't written by Indians I realize people don't think it's a system they can live with."

Minneapolis Star and Tribune, January 7, 1986

INDIAN COURTS ISLANDS OF INJUSTICE

U.S. reluctant to curb tribal court abuses

Last of a series.

**By Sharon Schmickle
and Roger Buoen
Staff Writers**

Indians on reservations have almost nowhere to turn when their rights are abused by tribal officials and Indian courts.

Federal judges refuse to hear most of these cases.

Congress has failed to pass laws curbing abuses.

U.S. Justice Department lawyers routinely reply that their hands are tied.

And the Bureau of Indian Affairs (BIA) has been ineffective, according to the agency's new chief administrator.

The BIA lacks procedures for investigating civil rights complaints, usually declines to get involved and sometimes looks the other way when abuses are occurring.

Congress has authority over Indian tribes, and the BIA has powerful leverage in the \$1.4 billion it dispenses annually for tribal governments.

Yet civil rights abuses are occurring virtually unchecked on many of the nation's reservations with Indian courts. A half-million Indians live on those reservations and could find themselves in courts without rights to bail, jury trials, lawyers and decisions untainted by politics.

Why isn't the federal government, which spends more than \$8 million a year to finance courts for about 150 reservations, doing something to curb the abuses?

The answer lies partly in the long history of white men's exploitation of Indians. Because of this past, government officials are reluctant to demand changes in the way tribes operate their courts.

Congress gave Indians most of the protections of the Bill of Rights in the 1968 Indian Civil Rights Act. But 10 years later the U.S. Supreme Court sharply limited the impact of this legislation.

Exhibit No. 4 (cont.)

In its decision — Santa Clara Pueblo vs. Julia Martinez, written by Justice Thurgood Marshall — the court ruled Indians usually cannot assert those rights in federal court.

Julia Martinez had turned to federal courts in 1975 when her tribe, the Santa Clara Pueblo in New Mexico, refused to enroll the children of her marriage with a man from another tribe. Men who married non-members were allowed to bring children into the tribe, but not women. Enrollment in a tribe entitles an Indian to basic citizenship, including the right to vote in tribal elections.

After the tribe refused to change its membership rules, Martinez turned to the federal courts. She claimed the tribe violated her civil rights by not giving equal treatment to all members.

The problem with limiting appeals to reservation courts is that Indian courts are often the source of the abuses.

This means, as one justice put it in his dissent in the Martinez decision, that enforcement of Indians' civil rights has been "left up to the very tribal authorities alleged to have violated them."

"It's unfortunate that Justice Marshall can't come out here to see the effects of that decision," said Krista Clark, a lawyer with Dakota Plains Legal Services on the Cheyenne River Reservation in South Dakota.

What he would see, according to Clark, is "chaos and anarchy" on many reservations.

"They all know that Martinez says you can do whatever you want within the tribe. They can toss the constitution out the window," Clark said.

The message of Martinez was clear to the U.S. Justice Department's Civil Rights Division. In 1973, the division had opened the Office of Indian Rights to curb widespread abuses against Indians. The office surveyed Indians on reservations and investigated complaints.

Nearly 300 of the 1,640 complaints the Indian rights office received in the five years before the Martinez decision cited tribal officials as the abusers of rights. Overall, alleged violations of the Indian Civil Rights Act — which exclusively addresses reservation justice — was the No. 1 complaint.

But after the Martinez decision, the Justice Department dismantled the Indian rights office and stopped investigating complaints.

"I think the decision was clear and the position the U.S. has taken subsequent to that decision is that neither the government nor private individuals have standing to proceed in federal court based on the Indian Civil Rights Act," said James Schermerhorn, a Justice Department lawyer.

He said the department still gets about one complaint every other month and responds that it can do nothing.

Congress could change all that. It could give federal courts authority to hear cases in which Indians allege that their civil rights have been violated by tribal officials. Such legislation also would allow the Justice Department to renew its watchdog activities over the civil rights of Indians on reservations.

But there is no proposal before Congress to do that and none is in the works, according to Peter Taylor, staff director of the Senate Select Committee on Indian Affairs.

Exhibit No. 4 (cont.)

The only bill that comes close is a proposal by Sen. John Melcher, D-Mont., to put federal magistrates on reservations to hear criminal and civil cases. Melcher drafted the bill, he said, because he hears frequent complaints about tribal courts. The bill faces an uncertain future.

"There is just talk about solving the problems and nothing is done and nothing is resolved," said Melcher, a member of the Senate Select Committee on Indian Affairs. "Congress, I don't think, would ever allow that situation to exist very long if tribal courts should start applying their constitutional law and their own court system to non-Indians."

Indian civil rights problems get a low priority and are hidden because those who lobby for Indians tend to represent tribal officials, said Melcher and other observers of Indian justice.

"There is really no Indian civil rights movement comparable to that which blacks forged in the 1960s. Most Indian interest groups are primarily concerned with establishing political and economic control over reservation areas It is difficult to learn of civil rights violations involving Indians because the Indian community is not yet fully alert to these problems," U.S.

Deputy Assistant Attorney General John Huerta told the U.S. Civil Rights Commission in 1979.

With Congress unwilling to act and the federal courts and the Justice Department unable to act, Indians who feel they have been treated unfairly by tribal officials or judges often turn to the BIA.

They are usually disappointed.

The BIA has no authority to review or reverse individual decisions of

Indian courts. But it administers 20 of the courts, which have problems as serious as other Indian courts have, and it funds them all.

The BIA is responsible for contracts that dispense funds to Indian courts. Compliance with federal law, including the Indian Civil Rights Act, is a condition of most of those contracts.

To avoid being a partner in civil rights abuses, BIA officials sometimes try to pressure tribes violating civil rights laws by reminding reservation officials of the laws and threatening tribes with sanctions for unlawful actions.

The BIA counts on complaints from Indians and information from its field officers to help guard against abuses, said BIA officials. The BIA in Washington generally sends complaints to local offices, but the BIA has no established procedures or policies on what should be done with complaints.

When asked about the agency's policy, Bud Shapard, the acting chief of the BIA's tribal government division, said: "There is no set of regulations and guidelines for handling complaints of the (Indian) Civil Rights Act. If that's what you are looking for, you can forget it and write that in your paper. Every complaint is handled in an individualized fashion."

The BIA tried to come up with guidelines for dealing with tribes and the Indian Civil Rights Act after the Martinez decision. It drafted a policy in 1979 that would have helped tribes bring outdated constitutions and court systems into compliance with the law and would have imposed sanctions against tribes found breaking the law.

Exhibit No. 4 (cont.)

But the guidelines were withdrawn, said Scott Keep, an Interior Department lawyer, "because the Indian community raised such an uproar."

The BIA has not issued new guidelines. "We are still laboring, trying to define what that role is . . . All I can tell you is there isn't anybody else out there who's got the answer, either," Keep said.

Until a recent change in leadership, key officials in the BIA were saying there were no problems with Indian civil rights on reservations.

If problems existed, violations would come to the BIA's attention "through one way or the other," Shapard said in November at a meeting attended by the agency's then acting director of Indian services.

But when Ross Swimmer took over in December as the BIA's chief administrator, he told Minneapolis Star and Tribune reporters that he is concerned enough about problems in Indian courts to make the issue a priority in his administration.

"The BIA has not been very involved that I can see in moving the justice system on the reservations, and it might be that we lack the talent . . ." Swimmer said. "I don't know how often those kinds of things were brought to the attention of the bureau."

The BIA has known for more than a decade about abuses in a court it runs on Minnesota's Red Lake Reservation.

In 1977 the Justice Department sued the Red Lake tribe for civil rights violations, including a ban on lawyers, but dropped the suit after the Martinez decision, saying the Supreme Court had erased its authority to pursue the case.

The BIA recognized even earlier that there were flaws in the system at Red Lake. It instigated rewriting Red Lake's code for criminal and civil procedure in an attempt to bring the court into compliance with the Indian Civil Rights Act.

The \$28,000 project was completed in 1976 but was rejected by the tribal council.

Since then the council has asked its lawyers to undertake another revision, at a cost of \$150,000.

An Interior Department lawyer in the Twin Cities learned of Red Lake's no-attorney policy more than two years ago and warned the BIA not to recognize the policy. Despite the fact that the BIA technically runs the court, it has been unable to reverse the no-lawyer policy.

Last May, U.S. Sen. Rudy Boschwitz and Rep. Arlan Stangeland, both Minnesota Republicans, asked the U.S. Comptroller General for "an investigation and audit of the Red Lake court system and law enforcement program. Of particular concern is the allegation made by numerous tribal members that the manner of operation in many ways violate their civil rights."

According to a Boschwitz aide, the response to the request was that things are so bad on other reservations — particularly in South Dakota — that federal officials haven't had time to get to Red Lake.

Also last May, Red Lake's lawyer ban, in part, prompted a U.S. District Court judge in St. Paul to order two men released from the reservation's jail. After that ruling, BIA officials said the tribe's policy on lawyers had changed to permit attorneys to practice there.

But lawyers who have tried to represent Red Lake clients continue to

Exhibit No. 4 (cont.)

be turned away. The tribe adopted a rule in August requiring anyone who practices in the Red Lake court to be a member of the tribe and understand the Chippewa language, requirements that disqualify every lawyer.

In November — after three Red Lake Indians sued the Interior Department in an attempt to shut down the Red Lake court because of rights abuses — the BIA issued a directive from Washington to Indian court officials, including those at Red Lake, saying civil rights laws must be enforced and defendants must be allowed to have lawyers represent them.

The Red Lake tribe responded by ordering two BIA officials who said they would enforce the Washington directive off the reservation. But the BIA officials have remained there.

Meanwhile, the Red Lake court continues to operate. A lawyer has yet to appear there.

Federal policy shifts over 100 years are blamed for court chaos

Indian justice has undergone major changes in the past 100 years as non-Indians marched onto Indian lands and trampled the people's culture. More than a century ago, the U.S. government imposed on tribes a European-style court system that was foreign to most Indians. Since then, tribes have struggled with inconsistent federal policy which has contributed to much of today's confusion and chaos in Indian courts. The major federal policy shifts affecting Indian courts were:

- **1883** / Reservation courts were established by the Bureau of Indian Affairs, displacing traditional Indian methods of dispensing justice.
- **1885** / Congress gave federal courts authority over major crimes on reservations.
- **1887** / The federal government started breaking up the reservations by assigning land allotments to individual Indians and allowing the allotments to be sold. Indian governments were weakened, and states assumed jurisdiction over much reservation land.
- **1896** / The U.S. Supreme Court ruled the U.S. Constitution does not apply to Indian tribes.
- **1934** / Congress reversed itself and took steps — in the Indian Reorganization Act — toward revitalizing reservations. Most tribes reorganized under constitutions designed by the Interior Department, in nearly all cases giving elected officials authority over judges and court functions.
- **1953** / Congress again reversed itself and took steps toward integrating Indians into the larger society under a concept called termination. Public Law 280 gave five states authority over court functions on reservations and gave other states an option to assume such authority.
- **1968** / Congress passed the Indian Civil Rights Act, offering reservation Indians most of the protections in the Bill of Rights. But there was no substantial increase in funding for Indian tribes to implement the act or defend themselves in appeals that began to be filed in federal courts.
- **1975** / Congress again reversed itself and took steps toward giving tribes more voice in running their own governments, including courts, with the Indian Self-Determination and Education Assistance Act. Tribes were still required, however, to comply with federal law, including civil rights regulations.
- **1978** / The U.S. Supreme Court decided that the Indian Civil Rights Act did not give individual Indians the right to appeal civil rights violations to federal courts except when they had been jailed unfairly.

Ideas to improve tribal justice

Indian courts suffer from a long list of problems, but there also is a long line of experts offering an assortment of proposals to improve justice on the nation's reservations. Here's a sampling of the major proposals:

- **Abolish tribal courts**/Samuel Brakel, who wrote a report on tribal courts for the American Bar Foundation, favors abolishing Indian courts and allowing state and county courts to handle criminal and civil cases arising from reservations.
- **Review by federal courts**/Ross Swimmer, assistant Interior secretary for Indian affairs, and the Presidential Commission on Indian Reservation Economies urge federal court review of some Indian court decisions.
- **Separation of powers**/Swimmer and the commission also propose separating the powers of tribal courts and tribal councils.
- **Indian Supreme Court**/Larry Baca, immediate past president of the American Indian Bar Association, and Tom Tso, chief justice of the Navajo nation, have proposed a nationwide Indian Supreme Court, removed from the pressures of local reservation politics, to review tribal court decisions.
- **More training, money, time**/Joseph Myers, executive director of the National Indian Justice Center, is calling for the federal government and tribes to make stronger commitments to Indian courts, including increasing court budgets, expanding judges' training and giving the system more time to develop.
- **Expand jurisdiction to non-Indians**/Kevin Gover, a lawyer who represents tribes, and Robert Laurence, a University of Arkansas law professor, suggest giving Indian courts jurisdiction over non-Indians on reservations *and* allowing for review of Indian court decisions by federal courts.
- **Federal magistrates on reservations**/U.S. Sen. John Melcher, D-Mont., is sponsoring a bill that would set up federal magistrates on reservations to hear cases involving Indians and non-Indians. Under the bill, defendants and victims who preferred could still take their cases to tribal courts.

Minneapolis Star and Tribune, January 7, 1986

BIA's new administrator says his agency wants better courts

Courts on American Indian reservations are inadequate, and improving them will be a priority for the Bureau of Indian Affairs (BIA), according to the agency's new chief administrator.

"We definitely will be developing strategies and will be working with the tribal chairmen to see what we can do" to strengthen Indian courts, said Ross Swimmer, who was confirmed in December by the U.S. Senate as assistant interior secretary for Indian affairs.

Swimmer's criticism of Indian courts goes beyond the views of other key BIA officials. In November, two weeks before Swimmer took over, BIA officials said there were no major problems with civil rights in Indian courts.

Swimmer said last month that the problems are so serious Congress should enable federal courts to review Indian court decisions to better protect people's civil and property rights.

But as a political matter, Swimmer said, he won't propose such legislation unless "the tribes are willing to get together and back it."

"It has to be a tribal initiative," he said. "I think for me to try to propose legislation that would cause any kind of review of tribal courts, I wouldn't get anywhere unless the tribes are going to support it."

Under current law, the only appeals from tribal court a federal judge can decide are claims that Indians have been jailed unfairly.

Tribal leaders have given mixed reviews to the changes Swimmer advocates.

Swimmer, a lawyer and president of a bank in Tahlequah, Okla., was co-chairman of the Presidential Commission on Indian Reservation Economies, whose report last year criticized Indian courts and advocated more review by federal courts.

Commission members, who held hearings on reservations, found tribal courts suffering from a lack of training, interference by tribal leaders and violations of the rights of those who appear in the courts.

"Drawing a picture of it, we found in cases that they needed to have a stronger judiciary; needed to have it separated from the administration, needed more qualified judges, needed more training," said Swimmer, who was principal chief of the Cherokee Nation of Oklahoma until taking over as head of the BIA.

Concerning civil rights violations by tribal courts, he said: "I don't know how widespread it is, but I think it is common enough that we need to encourage tribes to deal with it and try to get a stronger judiciary."

Exhibit No. 4 (cont.)

He said Indian courts will improve if federal judges are allowed to review more reservation cases.

"Any time you have an appellate review of a court decision, it tends to keep the lower court a little more on their toes," he said.

Some tribal leaders, fearing erosion of tribal sovereignty, balk at that suggestion. Swimmer, though, said federal court review would not limit a tribe's political independence, noting that states remain independent even though state court cases can be appealed to federal judges.

"I don't think that has caused a great loss of state power," he said. "I don't think it will to the tribes if they have certain cases that are subject to review."

Inadequate tribal courts also hurt reservation economies, Swimmer said, because businesses refuse to go on reservations, fearing unfair treatment in tribal courts.

Business people complain there's too much interference by tribal council members in tribal courts, he said, and "they felt that they could not be assured of a fair hearing because the court seemed politicized."

Tribes must "make sure people do get a fair hearing, especially in those instances where non-Indians are coming on to the reservation and hiring Indian people," he said.

It's in a tribe's best interest to have better courts, Swimmer said. Tribes that don't "are going to fall behind in terms of economic development. I don't think there will be jobs coming on the reservation. So there's plenty of incentive for tribes to improve."

Swimmer has not developed specific proposals to improve tribal courts. "It's too early in the administration. I've been inundated

with problems that are certainly no less important than that," he said.

But, he said, "the court systems and the total economic development area are going to be priority issues."

In addition to supporting legislation allowing federal court review, the BIA also can strengthen Indian courts by encouraging tribes with effective courts to assist tribes with struggling courts.

"Other than that it's just kind of general persuasion on our part to work with the tribes that are having problems and give them technical assistance to bring their courts into line," he said.

Swimmer opposes cutting off federal funding to tribes that refuse to clean up their courts.

"That's the kind of money they need to get the technical assistance," he said. "To simply use the leverage of federal funds, I don't think it would be that effective."

He also opposes dismantling tribal courts and turning the cases over to state and federal courts. "I think there is a lack of sophistication by tribal courts in Indian country," he said. "But I don't think . . . we need to simply throw out the system and put everybody under state or federal jurisdiction.

Instead, he said, "We have to continue working with tribes to bring an enlightened judiciary to their reservations."

Minneapolis Star and Tribune, January 7, 1986

Most leaders say they want to keep separate legal system

"Lurking behind the hogan" is a rule of law unlikely to be found in any state or federal court. Yet a judge in Arizona invoked it recently to settle a dispute over life insurance benefits.

The case was in Navajo court, considered a jewel in the Indian court system, where Indian concepts of justice are often woven into modern American legal practices.

Custom says that when a Navajo couple is divorced, the wife can take what she wants from the earthen house called a hogan. But she may not return later to claim more of her ex-husband's possessions.

A woman claimed in Navajo court that she had a contractual right to life insurance benefits arising from the death of her ex-husband. Although the woman was named as beneficiary in the policy, the judge awarded the money to the dead man's mother because the ex-wife had not included the insurance in the divorce stipulation. The ex-wife could not now lurk behind the hogan.

Defenders of Indian courts point to such cases as one of many reasons for preserving their troubled court system. Within limits set by Congress, Indian courts can dispense a justice that sometimes reflects unique cultural values.

Despite problems in reservation courts, most Indian leaders strongly support their separate system of justice. There are differences, however, about the shape that system should take and what ties it should have with the federal government.

Some Indians are demanding freedom to run tribal governments, including courts, without what is viewed as paternalistic help from non-Indians.

"It is a mistake and an inappropriate notion that only white U.S. federal judges are capable of ensuring the protection of Indian rights in Indian courts and that it is necessary to establish an appeal to federal courts in order to correct injustice in Indian courts," said Robert T. Coulter, a Potawatomi Indian who is executive director of the Indian Law Resource Center in Washington, D.C. "Indian governments are perfectly capable of making and correcting their own mistakes. It is more appropriate that they should do it."

Other Indians disagree, saying that civil rights violations by Indian courts may be too high a price for a system shielded from almost all review off the reservation.

That split runs through the Indian legal community, said Lawrence Baca, who is immediate past presi-

Exhibit No. 4 (cont.)

dent of the American Indian Bar Association.

About half of Indian attorneys oppose any outside interference in tribal courts, such as review of more Indian court decisions by federal judges, said Baca, a Pawnee Indian. "Sort of a belief being that if we have problems, we'll correct them."

"The other half of the legal community is going to be saying these courts have had a long enough chance to clean up their act and haven't done it, so it's high time an outside source with the power to do it steps in and cleans it up," Baca said.

But cleaning up tribal courts won't be easy politically. On the tribal level, most reforms need the approval of elected reservation officials.

Experts have urged tribes to change their constitutions and make courts independent from tribal councils to avoid political meddling in the courts. But few tribal officials have and some fiercely resist the idea.

Federal court review of some tribal court decisions, a reform requiring Congressional action, is less popular. Tribal officials dismiss that idea as paternalistic and they say it infringes on tribal independence.

And more training for court workers, another leading suggestion to improve Indian courts, requires increased court budgets. That has not been a priority for tribal chairmen.

But few Indian lawyers advocate abolishing the courts. Instead, Baca said, they favor reforms such as review of Indian court decisions by federal judges or by a national panel of Indian judges.

A centerpiece of the argument in support of Indian courts is the desire to preserve and exercise the limited sovereignty that tribes hold under treaties and other agreements with the United States.

"You go all the way back to the discovery of the Western Hemisphere and the outreached hands and the smiles of Indian people on the Atlantic coast and on the Pacific coast," said Joseph Myers, executive director of the National Indian Justice Center in Petaluma, Calif., and a prominent advocate of Indian courts.

For Indians, what followed after the arrival of European settlers was the loss of their riches, land and liberty. Myers fears that Indians will now lose their courts at the hands of white people.

If Indians aren't allowed to control their courts, "there will be no more tribal government," said Myers, whose organization provides training for judges and other court workers under contract with the federal government.

"If you lose the enforcement arm of your government — the tribal court — there is no need to have a government because you are not regulating anyone any longer," he said.

Exhibit No. 4 (cont.)

Other Indians dismiss the sovereignty argument and say outside pressure on the courts would bring urgently needed reforms, not the demise of tribes.

Lee Cook, a Minnesota Chippewa businessman who was Deputy U.S. Commissioner of Indian affairs in 1970-71, said tribal leaders use Indian sovereignty as a defense. Those same leaders, he said, muddy the sovereignty issue by demanding massive financial assistance from state and federal governments.

"There is a misbelief and a serious misunderstanding that the tribal councils are self-governing. They are not. Most tribes are run by the federal government. Lingering notions of sovereignty are largely myths . . .," Cook said.

Another point made frequently by defenders of the system is that tribes haven't been given a real chance to correct the flaws in their courts. Even though many tribal courts are a century old, it's only within the past decade that tribes have been able to make meaningful steps toward court reforms.

They also say the federal government has been inconsistent in its policy toward Indians, keeping tribes confused about their standing with respect to self-government and, therefore, short-sighted in their planning. Furthermore, the courts have had inadequate funding and technical support.

Myers acknowledges that there are serious flaws in Indian courts. But there have been recent improvements, he said, and with more time and money, Indians can overcome these problems. "This is a building process," Myers said. "And we're not near enough to completion, in my estimation."

But the amount of time Indians should wait troubles Baca and others.

"It's difficult to look at anyone being denied fundamental rights like the right to vote and the right to run for office, the right not to be tossed in jail without due process and say that we ought to wait one more day," Baca said. "And at the same time I recognize as an Indian, as a member of the larger Indian community and Indian bar, that I don't want to see something forced universally on tribes that's not going to fit."

And there is concern that the time argument may backfire because civil rights violations are still occurring nearly two decades after Congress passed the Indian Civil Rights Act, which promised Indians on reservations most of the protections of the Bill of Rights.

"If tribes do not start granting people the rights granted under the Indian Civil Rights Act, we think the problems are serious enough that Congress is going to go back at it," Baca said.

Minneapolis Star and Tribune, January 7, 1986

Paper gets OK to see court files, but Red Lake officials withhold them

By Dan Oberdorfer
Staff Writer

Four months ago, the Red Lake Indian tribe seized the records of many reservation court cases after the federal government had agreed to allow the Minneapolis Star and Tribune to see them.

Although the court is run and paid for by the federal government, federal officials and others have been prevented access since August to the files of about 2,000 Red Lake cases, some of which government lawyers say are needed to defend three lawsuits.

The court files were removed from the Bureau of Indian Affairs (BIA) building at the reservation on order of George Sumner, who was chief judge of the Red Lake court. Basing his order on a newly passed resolution of the tribal council, Sumner, a tribal member, claimed the files were tribal property. He made his order after his superiors at the BIA informed a Star and Tribune reporter she could review the files.

Government officials have accused Sumner of insubordination for ordering the records removed. Federal officials have said they are considering criminal charges in the case. Assistant U.S. Attorney Lynn Zentner said the government will sue the tribe to get the records back.

The case of the disappearing records exemplifies problems the BIA has encountered in its unique relationship with Indian courts. The BIA administers 20 court systems on reservations across the country, including Red Lake, and gives money to about 130 others. The judges, however, are chosen by In-

Indian tribes and can have fierce loyalty to them. Sometimes the interests of the tribes and the federal government conflict and the judges issue orders that clash with the principles of government espoused by the BIA.

James Moore, an official at the National Archives, wrote to the Justice Department that the case of the Red Lake court records "appears to represent a blatant attempt to subvert public policy and the laws of the United States." He said the "removal of records . . . cannot be countenanced." Moore became involved with the case because the court records are to be turned over to the National Archives after 20 years.

The dispute began last August when Star and Tribune reporter Sharon Schmickle asked to see the court records. After initially being refused access, Schmickle filed a Freedom of Information Act request. Two weeks later, when the records were not turned over, the newspaper filed suit in U.S. District Court in Minneapolis.

Exhibit No. 4 (cont.)

The Interior Department has said throughout that the criminal files Schmickle requested appear to be public records, but the department says it is unable to turn the records over because it does not have them.

It does not have them because on the evening of Aug. 29, 1985, one day before the government was required to act on Schmickle's request, Red Lake's tribal council adopted measures declaring the records to be tribal property, ordering them moved to tribal archives and declaring the records confidential.

As Mark Anderson, a lawyer in Minnesota for the Interior Department, pointed out in a letter to the BIA at Red Lake, just a few months earlier the tribe had argued the federal government should represent court employees in defending another court case because the reservation court was federal.

After the council ordered the records removed, the Interior Department advised its employees in the BIA to "take whatever actions it deemed necessary to safeguard the court records and ensure their continued safekeeping within the agency office." But it was too late. On Sumner's order, the records had already been removed to the tribal archives, and despite several demands by the federal government to get the files back, only one file has been returned, Anderson said.

Tribal officials emphatically informed the government at a meeting in October that "under no circumstance, did the (tribal) Council intend to return the records," according to court documents.

Exhibit No. 5

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U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Edward Dean Cook, Gregory Good,
and Douglas Neadeau,

Civil File No. 6-85-1513

Plaintiffs,

v.

MEMORANDUM AND ORDER

Robert C. Moran, in his official capacity as Chief Law Enforcement Officer of the Red Lake Law Enforcement Services and custodian of all incarcerated persons in Red Lake Jail, Donald Hodel, Secretary of the Interior, and Bruce Graves, Chief Magistrate of Red Lake Court of Indian Offenses,

Defendants.

Richard Meshbesh, Esq., Meshbesh, Meshbesh & Bauer, 4601 Excelsior Boulevard, Suite 411, Minneapolis, Minnesota 55416, appeared on behalf of plaintiffs Edward Dean Cook, Gregory Good, and Douglas Neadeau.

Lynn A. Zentner, Esq., Assistant United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401, appeared on behalf of defendants Robert C. Moran, Donald Hodel, and Bruce Graves.

The matter before the court is the Motion to Dismiss of defendants Donald Hodel, Secretary of the Interior, Bruce Graves, Chief Magistrate of the Red Lake Court of Indian Offenses, and Robert C. Moran, Chief Law Enforcement Officer of the Red Lake

Filed: 2-14-85 in
FRANCIS OSEAL CLERK

Exhibit No. 5 (cont.)

Law Enforcement Services. In order to address adequately this motion, an understanding of the procedural background of this case is necessary.

On September 11, 1985, plaintiffs Edward Dean Cook, Gregory Good, and Douglas Neadeau filed their Original Complaint alleging that this case arose under the Indian Civil Rights Act (the Act), 25 U.S.C. §§ 1301-1312. In their Complaint, plaintiffs stated that they were residents of the Red Lake Indian Reservation and were within the jurisdiction of the Red Lake Court of Indian Offenses which has convicted and sentenced each of them in derogation of their rights under the Act. Plaintiffs also stated that § 1311 of the Act directed the Secretary of the Interior to recommend to Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations, but the Secretary of the Interior has yet to recommend this model code. Plaintiffs alleged that the failure of the Secretary of the Interior to recommend the model code denied them rights guaranteed under the Act. Plaintiffs sought relief in the nature of an injunction enjoining the Secretary of the Interior from providing funds for the operation and administration of the Red Lake Court of Indian Offenses, enjoining the Chief Magistrate and other officials and employees of the Red Lake Court of Indian Offenses from acting on any civil or criminal matter within the jurisdiction of that court, and enjoining the Secretary of the Interior from entering into any

Exhibit No. 5 (cont.)

contract with the Red Lake Band of Chippewa Indians for the establishment of a Tribal Court for the Red Lake Indian Reservation.

• On November 8, 1985, defendants Donald Hodel, Bruce Graves, and Robert C. Moran filed their Answer and Motion to Dismiss. Defendants contended that plaintiffs failed to state a claim upon which relief could be granted under the Act because the Act provided only one express remedy -- habeas corpus. Defendants further contended that plaintiffs had no implied right of action for declaratory or injunctive relief under the Act even if tribal officials proved deficient in enforcing the substantive provisions of the Act. Defendants concluded that the failure of the Secretary of the Interior to recommend a model code was not actionable under the Act. A hearing of this motion was postponed pending the disposition of plaintiffs' Motion to Amend Complaint which was granted on December 18, 1985.

Plaintiffs' Amended Complaint, which was filed on December 20, 1985, alleges that this case arises under the Fifth Amendment of the United States Constitution. Plaintiffs again state that they are residents of the Red Lake Indian Reservation and are within the jurisdiction of the Red Lake Court of Indian Offenses which convicted and sentenced them in derogation of their rights under the Act. Plaintiffs allege that the denial of their rights under the Act is the direct result of the failure of the Secretary of the Interior to recommend to the Congress a model code to govern the administration of justice by courts of

Exhibit No. 5 (cont.)

Indian offenses on Indian reservations pursuant to § 1311 of the Act. Plaintiffs allege that this failure of the Secretary of the Interior violates their Fifth Amendment right to due process of law. Plaintiffs, as in the Original Complaint, seek injunctive relief in the nature of enjoining the Secretary of the Interior from providing funds for the operation and administration of the Red Lake Court of Indian Offenses, enjoining the Chief Magistrate and other officials and employees of the Red Lake Court of Indian Offenses from acting on any civil or criminal matter within the jurisdiction of that court, and enjoining the Secretary of the Interior from entering into any contract with the Red Lake Band of Chippewa Indians for the establishment of a Tribal Court for the Red Lake Indian Reservation.

On January 7, 1986, defendants filed an Amended Motion to Dismiss. Defendants contend that to the extent, if any, that plaintiffs have alleged a cause of action under the Indian Civil Rights Act, they have failed to state a claim upon which relief can be granted since habeas corpus is the exclusive remedy under the Act and declaratory or injunctive relief cannot be implied. Defendants further contend that to the extent, if any, plaintiffs have stated a Fifth Amendment due process claim, the relief which they seek is improper and cannot be granted. The motion came before the court for a hearing on January 24, 1986.

In their Amended Complaint, as amplified in their oral argument, plaintiffs allege only that the Secretary of the Interior, in failing to recommend a model code to the Congress

Exhibit No. 5 (cont.)

pursuant to § 1311 of the Act,¹ violated their Fifth Amendment right to due process of law.² At the outset, the court notes its difficulty in conceptualizing a due process claim as plaintiffs have presented it in this case. How plaintiffs' due process rights were violated and what specific injuries plaintiffs suffered as a result of the failure of the Secretary of the Interior to recommend to Congress a model code -- a code which

¹ Section 1311 of the Indian Civil Rights Act provides that:

The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual, (3) establish proper qualifications for the office of judge of the court of Indian offenses, and (4) provide for the establishing of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this subchapter, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

25 U.S.C. § 1311.

² Apparently, plaintiffs have abandoned any claim arising under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1312, and, in so doing, have implicitly acknowledged that the exclusive remedy for violations of the Act is habeas corpus. See 25 U.S.C. § 1303; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Exhibit No. 5 (cont.)

the Congress was required neither to adopt nor implement -- pursuant to § 1311 remains unclear upon review of the Amended Complaint. Section 1311 merely directs the Secretary of the Interior to recommend a model code to the Congress. The model code, if Congress saw fit to adopt and implement it, would be intended to assure any individuals being tried for offenses before a court of Indian offenses have and be aware of their rights under the United States Constitution and any tribal constitution applicable to such individuals. That is, the model code would create or guarantee no rights beyond those provided in the Act, but would provide Congress, if it so desired, with a vehicle to facilitate the protection of the rights which the Act conferred. But Congress was not required to adopt or implement the model code which the Secretary of the Interior was directed to recommend. The court, therefore, has difficulty conceptualizing a violation of plaintiffs' right to due process of law in the failure of the Secretary of the Interior to recommend a model code. The court doubts seriously whether plaintiffs have stated a claim upon which relief can be granted in their Amended Complaint.

The court's difficulty in conceptualizing plaintiffs' claim is due in no small part to plaintiffs' own difficulty in conceptualizing their claim. Clearly, plaintiffs' claim is directed to the abuse and denial of their rights guaranteed them under the Act at the hands of the court of Indian Offenses on the Red Lake Indian Reservation. To this end, plaintiffs filed their Original

Exhibit No. 5 (cont.)

Complaint alleging a violation of and seeking relief under the Act. When defendants filed their Motion to Dismiss, however, plaintiffs scrambled to amend their complaint. Plaintiffs apparently feared the potential bar to their case that the Act, read in light of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978),³ presented. Plaintiffs, faced with the possibility of dismissal and the prospect of the violation of their rights under the Act going unremedied, could not stand idly by. They filed an Amended Complaint virtually identical to the Original Complaint with the single notable difference being that they now alleged that their claim arose under the Fifth Amendment of the United States Constitution as a result of the failure of the Secretary

³ In Santa Clara Pueblo, which involved a challenge under the Indian Civil Rights Act to an Indian tribe's ordinance denying membership to the children of a female tribal member who married outside the tribe, the United States Supreme Court held that the Act may not be interpreted to authorize impliedly civil actions for declaratory or injunctive relief against a tribe or its officers in federal court to enforce its substantive provisions. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51-52 (1978). In so deciding, the Court was sensitive to the two distinct and competing purposes manifest in the Act: the purpose of "securing for the American Indian the broad constitutional rights afforded to other Americans" thereby "strengthening the position of individual tribal members vis-a-vis the tribe" and the purpose of promoting the well-established federal policy of furthering tribal sovereignty, autonomy, self-government, and self-determination. Id. at 61-62 (citations omitted). The Court was "reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief" as the express remedy under the Act. Id. at 66. Given the rather involved legislative history and unique considerations surrounding the Act, the Court found it "highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302" of the Act. Id. at 68-69.

Exhibit No. 5 (cont.)

of the Interior to recommend a model code. In so doing, plaintiffs significantly, if not unfortunately, changed the focus of their case and their conceptualization of the case. Plaintiffs no longer could focus on the abuse and denial of their rights in the court of Indian offenses on the Red Lake Indian Reservation. Plaintiffs now focused on the failure of the Secretary of the Interior to recommend a model code. This change in focus necessitated a change in conceptualization. Plaintiffs could no longer conceptualize their claim as one against the court of Indian offenses for the abuse and denial of their rights under the Act. Plaintiffs now conceptualized their claim as one against the Secretary of the Interior for failing to recommend a model code.

Plaintiffs' claim -- no matter where one focuses on the problem or how one conceptualizes the issue -- is an indictment of the Court of Indian Offenses on the Red Lake Indian Reservation. It is a claim which charges that the Red Lake Court of Indian Offenses denies the fundamental rights provided under the Act to its own people more often and with greater fervor than it protects them. It is a claim which charges that the Red Lake Court of Indian Offenses has established de facto the denial of fundamental rights as the norm rather than the exception in the administration of justice on the Reservation. It is a claim which, based on this court's limited but eye-opening experience with the Red Lake Court of Indian Offenses, is not without substance. See Greg Good and Douglas Neadeau v. Gary Graves and

Exhibit No. 5 (cont.)

Wanda Lyons, Civil No. 6-85-508 (D. Minn. May 20, 1985) (Order).
The claim raises great concern in this court and should raise even greater concern in the court of Indian offenses on the Red Lake Indian Reservation.

Plaintiffs' indictment of the court of Indian offenses for the Red Lake Indian Reservation, however, is not presently before the court in a form upon which the court can act. Plaintiffs' indictment of the Red Lake Court of Indian Offenses is before the court in the form of a due process claim against the Secretary of the Interior for failing to recommend a model code to the Congress pursuant to § 1311. The court does not believe the plaintiffs state a due process claim as presently stated. Even if plaintiffs did state a due process claim, however, it would not remedy the true wrong of which they complain. The true wrong of which plaintiffs complain is the denial of their rights at the hands of their own people in the form of the Red Lake Court of Indian Offenses, not the failure of the Secretary of the Interior to recommend a model code which the Congress may or may not have adopted and implemented. Perhaps telling in this regard is the relief which plaintiffs seek. The relief which plaintiffs seek is to enjoin the Secretary of the Interior from funding and contracting with the Red Lake Band of Chippewa Indians in connection with a tribal court or court of Indian offenses on the Red Lake Indian Reservation and to enjoin the Red Lake Court of Indian Offenses from acting on any civil or criminal matter within its jurisdiction. Clearly, the relief plaintiffs seek is

Exhibit No. 5 (cont.)

directed not at remedying a wrong of the Secretary of the Interior, but rather at remedying the wrongs of the Red Lake Court of Indian Offenses. Plaintiffs are not really complaining of the failure of the Secretary of the Interior to recommend a model code, but rather are complaining of the failure of the Red Lake Court of Indian Offenses to protect and accord them their rights. To the extent that plaintiffs seek to correct the injustices of the Red Lake Court of Indian Offenses through a due process claim against the Secretary of the Interior, they have unfortunately selected the wrong means to accomplish their end.

The court, however, cannot fault plaintiffs for selecting the means they have selected in this case because they have all but been forced to attack the injustices of the Red Lake Court of Indian Offenses indirectly through the Secretary of the Interior due to the structure and interpretation of the Indian Civil Rights Act, as seen in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), which precludes a direct attack on the court of Indian offenses and its tribal officers and administrators other than a petition for a writ of habeas corpus. The injustices which plaintiffs allege occur in the Red Lake Court of Indian Offenses are likely real and distressingly so. But, given the unique and complex character of Indian tribes as quasi-sovereign nations and the extraordinarily broad authority of Congress over Indian matters, the role of the courts in matters between tribes and their members, even where redress of violations of rights under § 1302 of the Act is sought, is quite restrained. Id. at 71-72

Exhibit No. 5 (cont.)

(citations omitted). Claims for redress of the injustices of the Red Lake Court of Indian Offenses which plaintiffs allege are today best directed to Congress. Unless and until Congress states otherwise, this court is constrained to offer only the remedy of habeas corpus for injustices in the Red Lake Court of Indian Offenses and is forced to stand as an idle observer of those injustices which habeas corpus will not remedy.

Plaintiffs have sought in this lawsuit to remedy the injustices of the Red Lake Court of Indian Offenses under the guise of a due process claim against the Secretary of the Interior for failing to recommend to Congress a model code pursuant to § 1311. Plaintiffs, however, have failed to state a claim upon which relief can be granted with respect to a due process claim against the Secretary of the Interior in the context of § 1311. Although the court can envision a potential due process claim against the Secretary of the Interior in connection with the courts of Indian offenses, that claim is not presented to the court today. The court, consequently, must dismiss the lawsuit before it for failure to state a claim upon which relief can be granted.

Exhibit No. 5 (cont.)

Accordingly, IT IS ORDERED that:

The Motion to Dismiss of defendants Donald Hodel, Secretary of the Interior, Bruce Graves, Chief Magistrate of the Red Lake Court of Indian Offenses, and Robert C. Moran, Chief Law Enforcement Officer of the Red Lake Law Enforcement Services, be granted and this case be dismissed.

Dated: February 13, 1986.



Paul A. Magnuson
United States District Judge

Exhibit No. 6

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY - INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE U.S. COMMISSION ON CIVIL RIGHTS.

January 28, 1988

Good morning Mr. Chairman and members of the Commission. I am pleased to be here today to present the views of the Department of the Interior on the Indian Civil Rights Act of 1968.

The Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.) was passed by Congress as a recognition of the unique status that tribal governments have under the United States Constitution, and the responsibility that these governments have to their people. The rights that were extended to Indian living on Indian lands are similar to but not exactly the same as those rights demanded of the Federal and state governments under the Bill of Rights. The Federal courts have found that by enacting a law to require Indian tribes to provide constitutional rights to Indians in Indian country:

"...Congress wished to protect and preserve individual rights of Indian peoples, with realization that goal was best achieved by maintaining unique Indian culture and necessarily strengthening tribal governments, O'Neal v Cheyenne River Sioux Tribe (C.A. S.D. 1973).

Exhibit No. 6 (cont.)

The Department recognizes tribal governments and their judicial systems as evolving governmental entities. Our role is supportive and instructive to these self-governing systems, and not as ultimate interpreter of the unique cultural applications of equal protection and due process that we administered by both systems. Our position is one that has been clearly dictated by Congress and the United States Supreme Court.

In 1978 the landmark decision in Santa Clara Pueblo v Martinez, the United States Supreme Court held that, except for habeas corpus, the Indian Civil Rights Act of 1968 does not provide access to the Federal Courts for individuals who feel their civil rights have been violated by actions of their tribal government. Rather, the court determined that such matters are to be resolved through the use of tribal forums.

In the Martinez decision, the court also reviewed the legislative history of the Indian Civil Rights Act to show that the Congress rejected proposals to give the Department of the Interior administrative review of alleged violations by tribal governments of the civil rights of individuals. Consequently, neither this Department nor the Federal courts constitute ready forums wherein individuals who allege violations of the Indian Civil Rights Act by tribal government may be heard.

Exhibit No. 6 (cont.)

Rather, the Martinez decision has clearly placed the responsibility and the authority for enforcement of the Indian Civil Rights Act in tribal governments. The Court in Martinez indicated that "In addition to its objectives 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."

Therefore, the Martinez decision has the effect of reenforcing the authority of Indian Tribes to self-govern, while limiting our direct involvement in internal tribal governmental decisions. The decision has provided tribal governments with both the opportunity and responsibility to strengthen their tribal governments and create an atmosphere of respect for those tribal forums charged with protecting tribal member's individual rights.

We then have a responsibility to encourage and assist tribes, within available resources, in maintaining adequate forums, yet in so doing, we must also respect the self-governing and individualness of each tribal entity. This is not an easy role for us to carry out.

Exhibit No. 6 (cont.)

We have attempted to carry out this difficult role by aiding in:

- (a) the development, amendment or revision of Tribal constitutions, law and order codes, judicial procedures, and other governing documents as appropriate;
- (b) Technical assistance for civil rights studies when requested by Tribes;
- (c) Appropriate training programs for judges and law enforcement personnel.

The Department does not view itself as a forum for interpreting alleged civil rights violations and will continue to view its role as restricted under the interpretations of Santa Clara Pueblo v Martinez, and apparent congressional intent.

I will be pleased to respond to any questions the Commission may have.

Exhibit No. 7

**STATEMENT OF
R. DENNIS ICKES
TO
THE UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C.
January 28, 1988**

Exhibit No. 7 (cont.)

THE MISSING LINKS IN MEANINGFUL CIVIL RIGHTS ENFORCEMENT

Mr. Chairman and members of the Civil Rights Commission, my name is R. Dennis Ickes. I am appearing today in response to your invitation to provide testimony concerning the Bureau of Indian Affairs' role in the enforcement of the Indian Bill of Rights.

My experience with the topic of this hearing has stretched over the period 1973 through the present. In 1973, I was the Deputy Director of the Office of Indian Rights in the Department of Justice. From 1974 to 1976 I was the Director of that office. From 1976 to 1977 I was the Deputy Undersecretary of the Interior. From 1977 to the present I have been in the private practice of the law. Since 1973, some circumstances have placed me in an advocacy position on behalf of individual Indians to protect their civil rights vis-a-vis the states (i.e., Shirley v. Apache County, Arizona) and vis-a-vis tribes (i.e., Stands Over Bull v. Crow Tribe; United States v. Boni). Some circumstances have made me an advocate for the tribe vis-a-vis the states (i.e., Lower Brule Sioux Tribe v. State of South Dakota) and vis-a-vis the United States (i.e., Lower Brule Sioux Tribe v. Corp. of Engineers). Yet other circumstances have made me an advocate for non-Indian individuals and local governments' rights vis-a-vis a tribe (i.e., Uintah and Duchesne Counties, Utah). Regardless of the situation as it pertained to individual Indians or tribes, I

Exhibit No. 7 (cont.)

have advocated support for a tribal government that respected its members and non-members enough to assure them of the protection of fundamental fairness. I believe that the IBOR provides minimum elements of fairness that are critical to win the respect of members and non-members and are necessary to establish tribal legitimacy. No tribal relationships exist without the Bureau of Indian Affairs being directly or indirectly involved.

Congress has plenary power over Indian tribes. Congress has delegated to the Bureau of Indian Affairs the principal responsibility for formulating and executing national Indian policy even though Congress has also delegated fragments of national Indian policy to other department within the executive branch. Because of the Bureau of Indian Affairs' high profile in Indian affairs, it is often the lightning rod for every perceived wrong that has occurred in Indian country.

My purpose today is not to judge the acts of individuals who now work or have worked in the BIA. After all the BIA is a creature of Congress from whom it has received its authority, money, and much of its policy. Instead, I intend to comment concerning what is, what should be, how it can and should be done, and what should be done in the interim. It is my view that only Congress can prescribe the cure for the absence of meaningful enforcement of the Indian Bill of Rights. It is also my view that until Congress acts, the BIA

Exhibit No. 7 (cont.)

is the only non-tribal agency that can influence better and more meaningful enforcement of the ICRA.

THE BIA AND NATIONAL INDIAN POLICY

Congress has placed the BIA in the forefront of executing national Indian policy. National Indian policy has been primarily tribe oriented. National policy toward Indian individuals has been subordinate to tribal interests. Even though there are numerous federal programs to assist Indian individuals, those same programs have as a part of their goal the strengthening of tribal governments. It is fair to say that Congressional policy since 1934 has been designed to encourage economic development, self-determination, cultural plurality, and tribalism. In furtherance of the congressionally determined goals numerous tribal constitutions and ordinances have been enacted by Indian tribes and approved by the Department of Interior. Each of the aforementioned congressional goals was intended to focus power in the tribe, even though the nominal beneficiaries were individuals. In more recent years tribal power has been enhanced by tribal administration of more and more federal programs on a government-to-government basis, as opposed to a previous policy of administering federal programs directly to beneficiaries through federal agencies.

During these past 54 years, the BIA has nurtured the restoration of meaningful economic and political power to the tribes. Although tribal powers were being strengthened, the

Exhibit No. 7 (cont.)

rights of individuals languished. It was not until the 1960s that any attempt was made to balance the powers of the tribe with the rights of individuals. The 10th Amendment to the United States Constitution reserved sovereign powers not specifically granted to the national government to the states and to the people. However, federal judicial interpretations of tribal powers have not found that tribal members reserved any powers. Sovereignty within an Indian reservation is totally held by the legislative branch. The tribes' legislative branches' power vis-a-vis tribal members is as plenary as Congress' power is vis-a-vis the tribes. In essence, unless tribal powers have been limited by Congress, a tribe's power is absolute. While many tribal constitutions and ordinances have incorporated the United States Constitution, or the Indian Bill of Rights, or a special bill of rights, the record shows that meaningful enforcement cannot be attained without reasonable judicial oversight.

THE BIA AND THE ICRA

The enactment of the Indian Bill of Rights in 1968 was Congress' statement that tribal powers had limits in their relationships with persons within their jurisdictions. The ICRA was Congress' sensitive attempt to extend United States Constitutional principles into tribal jurisdictions while taking into account certain unique tribal circumstances. From 1968 to 1978 it was accepted by nearly every federal circuit court of appeals, if not every circuit, that the federal courts

Exhibit No. 7 (cont.)

had jurisdiction to review allegations that a tribe violated certain individual rights. During this same 10-year period, the executive branch of the federal government received appropriations from Congress to implement and enforce the Act.

While the BIA advocated the strengthening of tribal powers there was no concurrent governmental advocacy for individuals who came within the jurisdiction of tribal powers. The exception to this statement was the brief period from 1973 through 1978 when the Nixon-Ford Administrations created and supported the Office of Indian Rights within the Department of Justice. The Santa Clara Pueblo v. Martinez decision in 1978 effectively terminated one of the significant bases for that office.

Even though the Office of Indian Rights operated for a brief period, some valuable lessons can be learned from its performance. During its 5-6 year period, the Office of Indian Rights was an advocate for individuals whom were allegedly victimized by tribal governments exceeding the limitations imposed by the Indian Bill of Rights. Its activities were somewhat analogous to what the Department of Justice did in advocating the rights of black citizens whom were victimized by state and local governments exceeding the limitations imposed upon the states by the 13th, 14th, and 15th Amendments. The IBOR and the availability of federal forums motivated many individual Indians to organize to assert their rights. Between the activities of the Office of Indian Rights and numerous

Exhibit No. 7 (cont.)

individuals, significant case law was developed which defined the limits of tribal power and the breadth of individual liberties. While the Act was strictly directed to tribal-individual relations within the jurisdiction of an Indian tribe, the enforcement of the Indian Bill of Rights heightened the awareness of civil liberties of many Indians, both in tribal government and individuals. The results achieved by increased civil rights awareness included not only better balance between tribal governments and individuals, but it also encouraged the assertion of civil rights of Indians vis-a-vis the state and local governments. By 1978 the tribal governments evidenced a special sensitivity to the rights of individuals. States and local governments likewise evidenced a similar degree of sensitivity to the rights of their Indian residents and customers.

The role of the BIA in this period remained the same - encourage economic development, self-determination, cultural plurality, and tribalism. The relationship between the BIA and the Office of Indian Rights was generally ^{*} good. Each had a balancing role to play. The BIA sought to maintain and strengthen tribal powers and the Office of Indian Rights sought to keep those powers in check. As tribal power was strengthened by presidential policy and was increased by government-to-government relationships, so were individual protections from abuse strengthened. The most dramatic illustration of this concurrent strengthening was the 1973

Exhibit No. 7 (cont.)

Wounded Knee incident on the Pine Ridge Reservation in South Dakota. The Oglala Sioux Tribal administration had allegedly interfered with the rights of individuals on that reservation. The BIA and other law enforcement agencies generally supported the tribal government's responsibility to restore order to the reservation and the Office of Indian Rights (then not officially organized) generally reviewed law enforcement's and tribal actions to prevent abuses and excesses. Together they protected tribal prerogatives and individual liberties during very challenging times.

Notwithstanding these generally complementary roles, the Department of Interior and the Bureau of Indian Affairs failed to be more assertive in motivating tribes to implement the provisions of the Indian Bill of Rights, both through moral leadership and through consistent, uniform enforcement activities that were available to it. The Bureau of Indian Affairs had several points in its trust responsibility relationships with tribes to do this. Those points included the resolution, ordinance, and constitution approval process and the contracting process.

As to the approval process, many of the Indian Reorganization Act tribes (IRA tribes) had constitutional provisions which empowered the Secretary of the Interior or his designee to review certain tribal enactments, such as resolutions, ordinances and Constitutional provisions. During the review process the BIA had the opportunity to evaluate

Exhibit No. 7 (cont.)

tribal actions in the context of the Indian Bill of Rights and to comment upon or negate those actions. As a practical matter there was no consistent and uniform effort to do an Indian Bill of Rights review.

As to the contracting process, the BIA and all federal agencies contracting with tribes or through tribes had the opportunity to compel tribes and their agencies to implement Indian Bill of Rights' provisions. As a general rule federal agencies routinely incorporated other civil rights laws into their contracts with tribes, but did not specify the Indian Bill of Rights. In practice there was no effective contract oversight relative to Indian Bill of Rights enforcement. I am unaware of a single instance where a federal contract with a tribe was terminated or where any contract sanction was imposed or where even any investigation of alleged violations was conducted. In light of the numerous complaints about tribal-individual relationships, it is difficult to believe that tribal contracts could have been free of similar complaints.

As a practical matter, the federal policy of promoting tribal self-determination and internal BIA politics strongly influenced the BIA and the Department of Interior to refuse any routine involvement in IBOR enforcement activities even though the Bureau had some meaningful tools available to encourage IBOR compliance.

Exhibit No. 7 (cont.)

The BIA'S limited IBOR involvement can be largely explained. Due in large measure to Morton v. Mancari, 417 U.S. 535 (1974), BIA personnel charged with executing its mission were generally tribally affiliated Indian persons who had been in positions of power in tribal governments or were related to tribal political leaders or were affiliated in some manner with tribal politics and politicians.

BIA non-enforcement or limited enforcement activities can also be traced in part to the collective influence of tribal leaders who demanded that the BIA stay out of tribal politics, and the lack of any significant demand by individual Indians that the BIA involve itself in IBOR matters. As a general rule, reservation politics was divided between those who were in power and those who were out of power. Nonetheless, both those in and out of power possessed a common desire to preserve the powers of the tribe in its dealings with outsiders. Further, the Bureau was comprised of mostly Indian personnel, some of whom were tribal members. Thus, BIA involvement was feared as being potentially partisan.

The Indian Bill of Rights was commonly perceived by Indian politicians of nearly every faction as a threat to sovereignty and their political power. Even those whom used the IBOR to secure their political power saw that it could be later used against them. Thus, it was natural for BIA personnel to lean heavily in favor of strong tribal governments and to suspiciously view the Indian Bill of Rights. As a

Exhibit No. 7 (cont.)

result, the Indian Bill of Rights was not a priority with the BIA. Further, the Office of Indian Rights was viewed as the responsible agency for its enforcement. With the Martinez decision and the termination of the Office of Indian Rights, the principal impetus for any government agency enforcing the Indian Bill of Rights within reservations was lost.

THE BIA'S ROLE AFTER MARTINEZ

After Martinez and after the demise of the Office of Indian Rights, there has been no apparent and visible federal government enforcement of the Indian Bill of Rights. Tribal councils have controlled access to their courts and in many instances have influenced judicial decisions either before or after the tribal judiciary has acted. Each tribe has been left to its own devices as to if and how it will enforce the Act. There is no obvious involvement by the BIA in causing tribes to enforce the Act and there has been no visible organized effort by individuals to lobby tribes, the BIA, or the Congress to compel tribal or Bureau enforcement.

Does this condition suggest that there are no problems? The answer is clearly no! Your hearings in Rapid City and Flagstaff and various news articles reveal that there are many reasons to believe that there are substantial bases for Congress to reassess the Act and the lack of oversight.

The principal reasons that there is not a greater outcry against the current situation include the fact that general reservation poverty limits the financing of organized

Exhibit No. 7 (cont.)

activities by individuals, there is a perception by individuals that they cannot beat "city hall", there is a perception by individuals that tribal council power is supreme over tribal judicial remedies, there is no recourse outside of the tribal system, there has been a diminishment of publicly funded legal services, there is a general reluctance by publicly funded legal services to attack tribal actions, and there is a concern that challenges to tribal power will weaken the ability of tribes to deal with their outside adversaries, i.e., state and local governments.

Many tribes are not per se opposed to the enforcement of civil rights within their reservations but, instead, they view civil rights as a luxury which they cannot afford. Tribal budgets are principally devoted to badly needed support services with minor portions available to defend civil rights claims. Other tribal concerns arise out of the Indian Bill of Rights' enforcement history from 1968-1978. Many Indian Bill of Rights' contests pertained to the conduct of tribal elections where tribal power was often placed at the mercy of activists who could paralyze and intimidate tribal government by the filing of an action in federal court, often using publicly financed lawyers. Memories of those years have been partially responsible for chilling any support for any new laws which would again place tribal government on the defensive and where they may be placed in financial jeopardy.

Exhibit No. 7 (cont.)

WHAT ULTIMATELY MUST BE DONE

The long term solution to meaningful civil rights protection resides with Congress. It has the plenary power to define the rights of individuals and to define the limits of tribal powers. In addition, it must provide a meaningful enforcement mechanism. Tribal government advocates will initially be uniformly against the idea in much the same way as the states were opposed to the 13th, 14th, and 15th Amendments and the implementing of federal legislation which states perceived diminished their powers vis-a-vis the federal government.

Legitimate tribal concerns can be dealt with by new legislation which strengthens, or at least maintains, tribal powers while enhancing the rights of individuals. It is not necessarily true that anything which strengthens individuals in their relationships with tribal government results in weakening tribal government. Congress could strengthen the rights of individuals and simultaneously strengthen tribal justice systems' courts, and its law enforcement administration.

Any revised Indian Bill of Rights should include a Congressional commitment to finance a reservation justice system that meets defined minimum standards. Those minimum standards should include a judiciary that is independent of political interference during a reasonable term and whose members are law trained (not necessarily a lawyer), and a police force that is trained in law, techniques for

Exhibit No. 7 (cont.)

enforcement, and knowledge of the Indian Bill of Rights. Pay standards should be established for the justice system that are attractive within the geographical area served.

For tribes to be truly capable of surviving in times of shrinking federal funds for tribal programs, a case must also be made for conforming the Indian Bill of Rights more closely to the United States Constitution. All tribal members are citizens of the United States and are considered residents of the states within which they reside. With few exceptions, tribal members generally have extensive contact with non-reservation situations, i.e., they attend school with non-Indians, they shop off-reservation for many items, they often work off-reservation, they frequently marry non-tribal members, their reservations are often checker-boarded or have significant areas of non-tribal lands, and otherwise have substantial interaction with off-reservation persons, governments and private enterprise.

It is not practical for private investment to seriously consider a reservation as a place to locate or to do business if the tribal justice system is significantly different than non-reservation situations with which private investment is familiar. It is not practical for tribal members who have the means to develop their potential within the reservation if the tribal justice system is subject to dramatic political change. It is not practical for tribes to impede their own development by adhering to a government system that

Exhibit No. 7 (cont.)

offends the majority society's or members' sense of fairness. It is not practical for Congress to permit tribes to operate without guidance as to what is and is not acceptable concerning governmental power and individual rights.

It is not fair for citizens of the United States to have enclaves within the United States' boundaries where Constitutional principles are not in effect. It is not fair that non-tribal members residing within reservation boundaries are without the protection of the United States Constitution and federal courts. It is not fair that tribal members are not assured that they will have recourse to a judicial system that is not subordinate to the tribe's political body.

The current situation with the IBOR is neither practical nor fair to any of those who live, work, invest, or govern within Indian country. I implore you to report this situation to the Congress and request that Congress begin the process for simultaneously strengthening individual rights and the tribal governments' ability to assure those rights.

Not only should Congress be concerned with the rights of tribal members within a reservation, but it should also take into account numerous non-member Indians and non-Indians whom are not participants in the tribal political process and yet are subject to many tribal powers. In some reservation areas, the numbers of non-Indians substantially exceed the numbers of tribal members. In my own State of Utah, the Ute Reservation has a non-Indian population that outnumberes the Indian

Exhibit No. 7 (cont.)

population eight to one. The Ute Reservation includes incorporated towns and substantial business activities. Nonetheless, the non-Indian and non-member Indian population have no political voice in the tribal government that governs. Not only are the non-members subject to litigating certain of their disputes with tribal members in tribal courts which are in turn subject to the political power of the tribe's governing business committee, but such non-members have no political voice in the election of the business committee even though the non-member resides in the same political territory as the tribal members. This anomaly must be confronted and an equitable solution found.

CONCLUSION

Indian people and Indian governments are striving not only to survive but to survive with dignity and respect. Tribal governments want respect from those they govern and from those whom are their neighbors outside the reservation. Tribal governments want their legitimacy to be accepted by others. Tribal governments want to safeguard the uniqueness of their race and political institutions. Tribal governments want to control their land, resources, members, and activities within the reservation that affect their interests. Tribal governments want to influence state and national policy as those policies impact them. However, tribal governments' wants require monetary resources to finance their operations. In a time when tribal financial resources seem to be outstripped by

Exhibit No. 7 (cont.)

tribal wants, tribes must acknowledge that an important ingredient to solving their financial needs lies in the support of off-reservation people, communities, governments, and private enterprise. Any significant off-reservation financial investment on reservations will be contingent in part upon how seriously tribes take their responsibility to provide a fair and equitable justice system which implements laws that are compatible with the United States Constitution.

Until Congress acts upon this Commission's findings and recommendations, there are only the tribes themselves whom can effectuate Congress' intent in the enactment of the IBOR. In the interim, the BIA must use the authority and powers available to it to provide all individuals within tribal jurisdictions the assurance that they are not second and third class citizens.

Exhibit No. 8



U.S. Department of Justice

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STATEMENT CONCERNING INDIAN TRIBAL COURTS

BY

WILLIAM L. LUTZ

UNITED STATES ATTORNEY

DISTRICT OF NEW MEXICO

BEFORE

THE

UNITED STATES COMMISSION ON CIVIL RIGHTS

JANUARY 28, 1988

Exhibit No. 8 (cont.)

Mr. Chairman, members of the Commission, I appreciate the opportunity to appear today to discuss problems that have arisen in Tribal Courts in New Mexico. Tribal Courts in New Mexico vary widely as to the procedures employed and independence of the judiciary. There are many Tribal Courts that carefully observe the provisions of the Indian Civil Rights Act of 1968. These courts insure the fairness of the proceedings to all parties appearing before the court. Unfortunately, there have been some instances where Tribal Courts have not met these standards.

Problems arise in three areas: (1) lack of separation of powers, (2) lack of independent review and (3) lack of adequate training of tribal judges. Several cases from New Mexico illustrate these problems.

1. First is the case of Faye Viarrial. Mrs. Viarrial was an enrolled member of Pojoaque Pueblo by reason of her marriage to a pueblo member. Mrs. Viarrial challenged some of the ways in which the Pueblo conducted its affairs. She claimed retaliation because of her challenges. She had been unable to obtain employment with the Pueblo, and other benefits were claimed to be denied as a means of punishment. Mrs. Viarrial made her concerns known to the media, the New Mexico congressional delegation and our office. On several occasions she was brought before the Pueblo Council and asked to apologize publicly to obtain forgiveness. She refused. She was disenrolled

Exhibit No. 8 (cont.)

and evicted from the Pueblo, although her family was allowed to remain in Pueblo housing. She had no opportunity to contest the procedure or to present her side. The Santa Clara Pueblo v. Martinez case prevented review by U.S. District Court.

2. Several years ago we received a complaint from a member of Santo Domingo Pueblo. The complainant had been charged with a criminal offense. In Tribal Court, there was no real opportunity to defend the charges. Yet the defendant was sentenced to a whipping and term of incarceration.

3. At Acoma Pueblo several years ago, two members of Acoma Pueblo were experiencing marital difficulties. The husband sought and obtained a divorce in state court. Their property was divided equally by state court. The wife obtained a divorce in Tribal Court and was given all property, when Tribal Court concluded that this property had been earlier placed in the names of family members of the husband for the purpose of keeping the property from the wife. It would appear the adverse ruling was precipitated by the husband securing a divorce in state court. When the husband was unable to make the payments ordered by Tribal Court, he was arrested repeatedly. Through negotiations the arrests ended, but the property issue was never resolved. Since this incident, Acoma Pueblo has been making a sincere effort to improve its Tribal Court.

Exhibit No. 8 (cont.)

4. Several years ago at Santa Clara Pueblo a dispute arose between the Tribal Governor and the Council. The Council locked the Tribal Governor out of his office and summarily removed him from office. It appeared that the procedure used to remove the Governor was contrary to the Pueblo's constitution which included a specific procedure to remove the Governor. By reason of the case of Santa Clara Pueblo v. Martinez, the only remedy the Governor had was to file a complaint in Tribal Court. The Tribal Council controlled Tribal Court, and the only appeal from Tribal Court was to the Tribal Council. Therefore, there was no effective procedure for the Governor to contest his removal.

5. At another pueblo, the Tribal Governor was assaulted by a Tribal Council member. The assault was a simple assault within the Tribal Court's jurisdiction. The Governor requested prosecution in federal court since the Council controlled the appointment of tribal judges. The Governor felt he could not get a fair hearing in Tribal Court concerning the assault. Further, any appeal would have been to the Tribal Council.

These examples point out some problems in certain areas in the justice system in Indian Country. Even in the best court systems some litigants become dissatisfied with the outcome with no real legal basis for such dissatisfaction; however, there are far too many complaints on procedural matters in Tribal Courts.

Exhibit No. 8 (cont.)

In formulating recommendations, I would suggest to the Commission several problems which must be considered.

1. Separation of powers. In many Tribal Courts the judges have no independence from the Tribal Council. The judges can be removed at the whim of the Council, and the Council controls most action in Tribal Court. The judge must have independence from the Tribal Council.

2. Independent review. In many Tribal Court systems, there is no opportunity for an independent review of the decision. Appeal is only to the Tribal Council. While many Pueblos are small and could not support an appellate court by themselves, some mechanism must be present to allow for an independent review of the initial decision.

3. Qualifications and training of judges. There must a provision for minimum standards of knowledge and experience of judges. The judges must have some continuity in office. Many times in New Mexico the Tribal Court appointments are made every year. A judicial system does not need to have lifetime appointments, but a term of appointment should be defined and should be longer than one year. An untrained judge is more likely to reach an unjust decision. It is essential that training be made available to the judges.

Exhibit No. 8 (cont.)

4. Enforcement of the Indian Civil Rights Act. In the event there is a breakdown in Tribal Court procedure, there must be some method to insure that the members of the tribe have the minimum protection found in the Indian Civil Rights Act. All citizens of this country are entitled to certain basic rights within a judicial process. Some of these are outlined in 25 U.S.C. 1302. At present there is no forum other than Tribal Court to seek enforcement of these rights. When Tribal Court is the cause or source of the problem, the remedy is hollow at best. The Native American should have access to federal court to enforce the Indian Civil Rights Act. Every other citizen of the country has such a right; why should that right be denied only Native Americans? The remedy, however, should not be a trial de novo of the factual determination: it should provide the federal court the authority to compel the Tribal Court system to adhere to the rights granted in the Indian Civil Rights Act.

5. Provision for fundamental fairness, including notice and hearing. In formulating remedies, one must be sensitive to traditions of the various tribes. Tribal Courts do not have to be patterned after state or federal courts, but they should provide notice of hearing, the right to a hearing and, most important, a hearing before an unbiased tribunal.

The Commission should also recognize that we are in a society that loves to litigate. The tribes and tribal officers should be protected from unfounded, frivolous suits. Many tribes

Exhibit No. 8 (cont.)

and tribal governors do not have great resources to hire attorneys to represent them in court. The remedy should be limited so as to prevent an abuse of the system. Bankrupting tribal governments defending frivolous suits would be no better than the present system.

In conclusion, any remedy must give Tribal Courts and tribal governments the opportunity to correct within their own government the problems which exist. Changes must include: first, a separation of powers in tribal court systems; second, review independent from Tribal Council guaranteed in the appeal process; third, minimum standards of education and experience of judges and adequate training available to judges; fourth, a right to proceed in Federal court to compel Tribal Courts to honor guarantees of the Indian Civil Rights Act. And above all, there must be fairness to litigants in Tribal Court, including notice, hearing and unbiased determination.

I would be glad to answer any questions the members of the Commission may have.

Exhibit No. 9



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D C 20530

26 JAN 1988

Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: S. 1703 and the Indian Civil Rights Act

Dear Mr. Chairman:

This supplements our letter of October 27, 1987 concerning S. 1703, a bill to amend the Indian Self-Determination and Education Assistance Act. We said then, and remained convinced now, that tribal programs funded by this Act may fail to comply fully with the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 et seq. (P.L. 90-284, Title II of the Act of April 11, 1968, 88 Stat. 77). We propose to grant federal courts, following the exhaustion of tribal remedies, limited authority to enforce the ICRA. Specifically, we suggest adding the following new section to S. 1703:

"Sec. ____ Compliance with the
Indian Civil Rights Act.

"Title I of the Indian Self-Determination and Education Assistant Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended by adding the following new section 112:

"Sec. 112. (a) Any program or activity receiving federal financial assistance from the Secretary of the Interior or from the Secretary of Health and Human Services pursuant to this Title shall be administered in compliance with the Indian Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968, 82 Stat. 77).

Exhibit No. 9 (cont.)

"(b) Federal district courts shall have jurisdiction of civil actions alleging the failure of programs or activities funded by this Act to comply with § 202 of Title II of the Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968, 82 Stat. 77).

"(c) Any aggrieved person, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in the appropriate federal district court for equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with subparagraphs (a) and (b) above. Tribal sovereign immunity shall not constitute a defense to such an action."

The language we suggest grants federal district courts jurisdiction, following the exhaustion of tribal remedies, of complaints that federally funded tribal programs violate the ICRA. The proposed amendment is limited to federally funded tribal programs; tribal activities which do not receive federal dollars remain unaffected. For the reasons spelled out below, we urge the Select Committee to adopt the proposed amendment to S. 1703.

1. The Need To Condition S. 1703 On Compliance With The ICRA

S. 1703 amends the current law to aid Indian tribes in providing important government services to their members. Under the Act, Indian tribes may choose to provide services such as health care, education, social welfare benefits, law enforcement, judicial services, employment assistance and other government services to many of the nation's nearly one million eligible Indians. Funding is provided by the United States pursuant to contracts between tribes and various federal agencies. The program is substantial; the Bureau of Indian Affairs alone estimates that in fiscal 1988 its self-determination contracts with Indian tribes will total 308 million dollars. Absent the language we propose, or an equally effective remedy, we believe the beneficiaries of programs funded by this Act may be denied the protection of federal law.

Exhibit No. 9 (cont.)

Beneficiaries of federal programs generally are protected by broad, well-defined constitutional rights and the full range of federal civil rights legislation. Furthermore, federal courts are routinely available to enforce rights secured by federal civil rights statutes or the Constitution. Beneficiaries of programs funded under this Act, however, are limited to the protections contained in the ICRA. Constitutional safeguards are largely unavailable. Talton v. Mayes, 163 U.S. 376 (1896). While the ICRA contains many of the protections found in the Constitution, except for habeas corpus it is unenforceable in federal courts. Tribal forums enjoy exclusive jurisdiction of civil actions brought to enforce the ICRA. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Although some post Santa Clara litigants indirectly sought to redress tribal grievances by suing federal officials in district court, few such suits have achieved their objective in a timely manner. See, e. g., Runs After v. United States, 766 F.2d 347 (8th Cir. 1985) and Wheeler v. United States Department of Interior, 811 F.2d 549 (10th Cir. 1987).

While tribal measures to enforce the ICRA may be available in theory, such remedies are often unavailable in practice. Since the Supreme Court's decision in Santa Clara Pueblo, several federal court opinions, two major news articles and the Report of the Presidential Commission on Indian Reservation Economies have all questioned the fairness or availability of ICRA enforcement in tribal court. In addition, serious allegations of ICRA violations surfaced recently in hearings held by the United States Commission on Civil Rights. In testimony taken in Washington, D.C., Rapid City, South Dakota, and Flagstaff, Arizona, a number of Indians shared important evidence of tribal non-compliance with the ICRA.

This Department's substantial interest in ICRA compliance, see, e.g., 28 CFR § 0.50(a) -- indeed, our conviction that all federal civil rights statutes must be aggressively enforced -- compels us to add our voice to those who find a failure to fully enforce the ICRA post Santa Clara Pueblo.

2. Tribal Failure to Enforce The ICRA Post Santa Clara Pueblo

For 10 years prior to Santa Clara Pueblo, the ICRA was routinely enforced in both tribal and federal courts, with little if any adverse effect on tribal government. Federal court review ended, however, with the Supreme Court's 1978 decision in Santa Clara Pueblo that federal courts lack non-habeas corpus jurisdiction over ICRA cases. Although the Court found that the ICRA "has the substantial and intended

Exhibit No. 9 (cont.)

effect of changing the law which [tribal] forums are obliged to apply", Id. at 65, enforcement was limited to tribal forums and remedies.

Substantial evidence now exists that tribal forums may not, as the Supreme Court assumed in Santa Clara Pueblo, "vindicate rights created by the ICRA". Id. Tribal remedies under the ICRA are often inadequate; they fail to fully protect individuals from the arbitrary and unfair action of tribal government, including tribal programs and activities funded by the Self-Determination and Education Assistance Act. According to the Presidential Commission On Reservations Economies, "the politicization of tribal courts [by tribal governments] ... discriminate[s] unfairly against individuals and businesses." Report and Recommendation To The President Of The United States, Presidential Commission On Indian Reservation Economies, November 1984, Part Two at 36. Three factors contribute to this result: first, judicial review may be unavailable; second, tribal sovereign immunity and other jurisdictional impediments may bar or limit ICRA relief; and, third, tribal governing bodies interfere with tribal courts.

A. The Lack Of Judicial Review

Tribal courts lack clear authority to review tribal government action. In some tribes, judicial review may be unavailable. See e. g., Santa Clara Pueblo, supra. In other tribes judicial review may be limited. The Cheyenne River Sioux Tribe, for example, is one of several tribes which explicitly reserve final authority over tribal action to tribal councils and not tribal courts. A recent Cheyenne River resolution states in part:

BE IT FINALLY RESOLVED, that the Council shall retain the power to review the decision of the Tribal Court of Appeals on issues of law under such conditions and procedures as are found by the Council to be appropriate.

Cheyenne River Sioux Tribal Resolution No. 213-85-CR. Similarly, Oglala Sioux Tribal Resolution No. 87-76 provides in part:

WHEREAS, the Oglala Sioux Tribe has reviewed the actions of the Tribal Court and Tribal Court of Appeals in the Moore case and find that the said courts have exceeded their authority under Ordinance No. 86-09, now

Exhibit No. 9 (cont.)

THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council hereby declares that all court orders in the case of Margaret Moore v. Oglala Sioux Tribal Personnel Board, et al. are hereby declared null and void

Although the rule may not be as clear elsewhere, "[i]n at least 27 tribes the council hears appeals from tribal court judgments . . ." American Indian Lawyer Training Program, Indian Self-Determination And The Role Of Tribal Courts, 1977, at 59. In fact, tribal courts are available in only about one half of the nation's nearly 300 federally recognized Indian tribes.

As a result, the same tribal body which takes action is often called upon to determine its propriety. The Eighth Circuit in Runs After v. United States, *supra*, citing Justice White's dissent in Santa Clara Pueblo, notes parenthetically that "... given congressional concern about deprivations of individual Indians' rights by tribal authorities, [it is] improbable that Congress desired enforcement of rights to be left to the very tribal authorities alleged to have violated them." *Id.* at 353.

B. Sovereign Immunity And Other Jurisdictional Impediments To ICRA Enforcement In Tribal Court

In Santa Clara Pueblo, the Court found that "[t]ribal forums are available to vindicate rights created by the ICRA, and [the Act] has the substantial and intended effect of changing the law these forums are obliged to apply". Santa Clara Pueblo, *supra*, at 65. The clear implication is that tribal courts, where they exist, are available to enforce the ICRA. However, in addition to those tribes which have no court or refuse to permit full judicial review, other tribes rely on the doctrine of sovereign immunity or jurisdictional limitations to bar judicial enforcement of rights secured by the ICRA. For example, Cheyenne River Chairman Morgan Garreau provided the following testimony to the Civil Rights Commission:

MS. MILLER: Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe [in tribal court]?

MR. GARREAU: Yes, I do. [The question] has come to the tribal council with regard to [a] waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administra-

Exhibit No. 9 (cont.)

tive officer. At no time during those years, I believe from 1979 to the present [i.e., 1986], has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.

MS. MILLER: So what that means is you are saying that the Indian Civil Rights Act really is unenforceable as against the tribe?

MR. GARREAU: Unless the council waives sovereign immunity.

MS. MILLER: Which it hasn't done.

MR. GARREAU: No, they have not, for anyone.

Hearings, supra, at p. 377.

Cheyenne River is not an isolated case. Tribal court decisions which dismiss ICRA cases by invoking sovereign immunity have occurred in a number of jurisdictions. For example, in Satiacum v. Sterud et al., No. 82-1157 (Puy. Tr. Ct., April 23, 1983), 10 Indian L. Rep. 6013, the Puyallup Tribal Court rejects the argument that Santa Clara Pueblo "represents an explicit waiver of the tribe's immunity" in an ICRA action in tribal court. Id. at 6015. In Dubray v. Rosebud Housing Authority, No. CIV83-01 (Rosebud Sioux Tr. Ct., Feb 1, 1985), 12 Indian L. Rep. 6015 (app. pdng., Inter-tribal Ct. of App.), the tribal court found "no provision in the tribal code which would waive the tribe's immunity to suits based on claims under the [ICRA]". Id. Therefore, the tribal court continued, "because the tribe's immunity has not been waived, the plaintiff's [ICRA] complaint ... must be dismissed." Id. See also, Whatoname v. Hualapai Tribe et al., Civil No. 003-80 (Hualapai Ct. of App., May 11, 1981) (The tribal court dismissed an ICRA case commenting that "[i]t is difficult for this Court to fathom how the Indian Civil Rights Act can be said to waive the immunity of the Tribe in its own Courts by implication while such waiver by implication was expressly rejected by the federal courts ...". Slip op. at 8.); Garman v. Fort Belknap Community Council, et al., No. CV83-238, (Ft. Blkp Tr. Ct., Jan. 20, 1984), 11 Indian L. Rep. 6017 (ICRA case dismissed against tribal defendants with the observation that the tribe has "not chosen to expressly waive tribal sovereign immunity to allow enforcement of the Indian Civil Rights Act in tribal courts ..."); and the cases cited by Johnson and Madden, Sovereign Immunity In Indian Tribal Law, 12 Am. Indian L. Rev. at 167, n. 59 (1984).

Exhibit No. 9 (cont.)

In those cases where sovereign immunity presents no bar to ICRA enforcement, other jurisdictional considerations may intervene. For example, tribal court civil jurisdiction may be limited to cases in which both parties are members of the tribe or each consent to tribal court jurisdiction. See, S. G., 25 CFR §11.22C (The Interior Department's Court of Indian Offenses, which is similar to tribal courts, has "jurisdiction of all suits wherein the parties to the action are members of the tribe ... and of all other suits between members and non-members which are brought before the court by stipulation of both parties.").

C. Separation Of Powers -- The Lack Of Tribal Court Independence

Tribal governing bodies may interfere with the process of tribal courts. The 1984 Report of the Presidential Commission on Indian Reservation Economies found that

failure [of tribal governments] to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on [tribal] governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law.

Report And Recommendations To The President Of The United States, supra, Part One, at 29. The Presidential Commission, co-chaired by Ross O. Swimmer, further finds that

[b]oth Indians and non-Indians complain of political discrimination against them by tribal governments and by tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.

Id., Part Two at 36.

Exhibit No. 9 (cont.)

Recent hearings before the United States Commission on Civil Rights provide further evidence that tribal courts may be incapable of enforcing rights secured by the ICRA. Former Chief Judge Trudell Guerne of the Rosebud Sioux Tribal Court wrote that there is an "absence of any forum in which the Indian Civil Rights Act is enforceable." Guerne, The Indian Civil Rights Act -- How it is Used As License And Not As Protection, 1986, at 3 (unpublished paper in the files of the United States Commission On Civil Rights). This is true, according to Guerne, because tribal councils control tribal courts; "removal from office or the bench is not an uncommon tribal council tool." Id. at 4. This lack of judicial independence or separation of tribal powers was echoed by a number of other Indian judges. For example, former Tribal Judge Walter Woods of the Cheyenne River Sioux Tribe testified before the Civil Rights Commission that tribal

judges are politically appointed so they can be controlled by the council. If they make decisions that are not favorable with the council, then they will be removed without a hearing -- because I know; I was one of the individuals that was removed.

Hearings before the United States Commission on Civil Rights, Rapid City, S.D., 1986, at 392. Former Cheyenne River Sioux Tribal Chairman Garreau confirmed that "[a]ll it takes is just an action of the tribal council to remove a judge." Id. at 383.

A number of federal court decisions further underscore the lack of an independent tribal judiciary. In Shortbull v. Looking Elk, 677 F.2d 645 (8th Cir. 1982), a panel of the Eighth Circuit noted that "because of [a tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the tribal Executive Committee, who quashed Judge Red Shirt's orders." Id. at 650. As a result, "[w]e are thus presented with a situation in which [the plaintiff] has no remedy within the tribal machinery ..."
Id. Similarly, in Runs After v. United States, *supra*, the Eighth Circuit found that after the tribal court upheld a contested voting redistricting plan

the Tribal Council terminated the tribal court judge, allegedly because of the decision enforcing the reapportionment, rescinded the tribal court order directing elections to be held in thirteen election districts, and appointed a new tribal court judge.

Exhibit No. 9 (cont.)

Id. at 348. In addition, the tribe "forever barred" the judge who was removed in Runs After from tribal political office. Resolution No. 190-84-CR, Cheyenne River Sioux Tribe, July 12, 1984. "Abuse of power by tribal governments is widespread", according to former Tribal Judge Guerue. Guerue, supra, at 3.

3. The Need To Expand The Federal Court's ICRA Jurisdiction

With the exception of habeas corpus authority found in §1303 of the ICRA, 25 U.S.C. §1303, federal courts lack jurisdiction of ICRA complaints. Enforcement is left exclusively to tribal forums. However, the Supreme Court's finding that these tribal forums are "available to vindicate rights created by the ICRA" has not proved accurate. Santa Clara Pueblo, supra, at 65. The lack of judicial review, sovereign immunity, jurisdictional barriers and tribal council interference with tribal courts are some of the factors which impede full tribal enforcement of rights secured by the ICRA.

Several federal court decisions recognize the anomaly of creating statutory rights without an adequate enforcement mechanism or remedy. In Garreaux v. Andrus, 676 F.2d 1206 (8th Cir. 1982), for example, the Eight Circuit acknowledged "that the plaintiffs are being treated unfairly by the tribal council" but, citing Santa Clara Pueblo, went on to hold that federal courts lack statutory authority to consider ICRA claims. Id. at 1210, n. 2. See also, Shortbull v. Looking Elk, supra; and R.J. Williams Co. v. Fort Belknap Housing Authority, 509 F. Supp. 933 (D.C. Mont. 1981), Rev'd and remanded on other grounds, 719 F.2d 979 (9th Cir. 1983) ("This case illustrates the absurd results that the broad rule of [Santa Clara Pueblo] can cause." 509 F. Supp. at 939).

Courts, however, properly defer to congressional action. In Kickapoo Tribe v. Thomas, No. 83-4177 (D. Kan., June 24, 1983), 10 Indian L. Rep. 3093, the court found that it is beyond the power of the judiciary "to determine whether [] congressional Indian policy fosters self-government or a vacuum with the potential for chaos." Id. at 3096. In Wells v. Philbrick, 486 F. Supp. 807 (1980), the court went one step further adding

[i]t certainly may be argued that the effect, after Santa Clara Pueblo, of the ICRA is to create rights while withholding any meaningful remedies to enforce them, [citation omitted], but it is for Congress, not the Courts, to resolve this state of affairs [citing Santa Clara Pueblo, supra, at 72].

Exhibit No. 9 (cont.)

Id. at 809.

• Evidence of the tribal failure to fully enforce the ICRA is important because, as the Court noted in Santa Clara Pueblo,

Congress' authority over Indian matters is extraordinarily broad ... Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.

Santa Clara Pueblo, supra, at 72. In fact, the Presidential Commission on Indian Reservation Economies has made such a recommendation. The Commission, in its November 1984 report, recommends

that legislation be provided for appellate review of tribal court decisions to the federal court system where constitutional or statutory rights are involved.

Report And Recommendations To The President, supra, Part One at 30. Professor Wilkinson adds support for such a view when he argues "that federal judicial review of tribal action is often appropriate and perhaps should be expanded". Wilkinson, American Indians, Time, and the Law, Yale Univ. Press, 1987, at p. 113 (1987). A similar view was voiced by Gover and Laurence. In discussing the need to modify both Santa Clara Pueblo and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), they suggest that:

[t]he legislative branch seems well-suited to judge the sophistication of Indian judicial systems [A legislative] modification of [Santa Clara] to grant a careful and not overly disruptive federal oversight of [tribal] jurisdiction might be acceptable. We leave the details of such legislation in the capable hands of Congress It would place a scalpel back in the federal judge's hand ...

Avoiding Santa Clara Pueblo v. Martinez: The Litigation In Federal Court Of Civil Actions Under The Indian Civil Rights

Exhibit No. 9 (cont.)

Act, 8 Hamlin L. Rev. 497, 523 (1985). See also, Final Report Of Task Force Number 2, American Indian Policy Review Commission, September, 1976, at p. 35 (The standards set by Congress in the ICRA permit federal courts to be "sensitive" to tribal concerns and such a process has a "salutary" effect on federal court construction of the Act).

A number of tribal judges also recognize the need for federal court ICRA jurisdiction. Judge Sambroak of the Rosebud Sioux Tribal Court provided the following testimony to the Civil Rights Commission:

MR. MCDONALD: Do you believe the ICRA should be amended to allow [a] private right of action in federal court?

JUDGE SAMBROAK: Yes.

Hearings, Supra, at 250. Chief Judge Lorraine Rousseau of the Sisseton Wahpeton Sioux Tribal Court echoed the same theme when she told the Civil Rights Commission:

I guess what I'm saying is there may be a need for limited jurisdiction by the federal courts in certain cases.

Testimony Before the United States Commission on Civil Rights, Washington, D.C., February, 1986 at 196.

4. Conclusion

Santa Clara Pueblo, which held that federal courts lack jurisdiction after 10 years of effective ICRA enforcement, was premised on the assumption that "[t]ribal forums are available to vindicate rights created by the ICRA." Santa Clara Pueblo, supra, at 65. Since the record now shows serious tribal "deficien[cies] in applying and enforcing" the ICRA, we look to Congress, as did the Court in Santa Clara Pueblo, to permit "civil actions for injunctive or other relief to redress violations of [the ICRA]." Id. at 72. Systemic, institutional factors, including sovereign immunity and the lack of judicial independence, often limit the ability of tribal forums, as a practical matter, to remedy violations of the ICRA. Further, many tribes, not just a few, suffer from these systemic impediments to effective tribal enforcement of the ICRA. Accordingly, we urge the Select Committee to include language in S. 1703, along the lines set out above, which grants federal courts limited jurisdiction of complaints that federally funded tribal programs violate the ICRA.

Exhibit No. 9 (cont.)

The Office of Management and Budget has advised this Department that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in cursive script, reading "John R. Bolton". The signature is written in dark ink and is positioned above the typed name.

JOHN R. BOLTON
Assistant Attorney General
Office of Legislative Affairs

Exhibit No. 10



**The Florida State University
Tallahassee, Florida 32306-1034**

College of Law

**BEFORE THE
UNITED STATES COMMISSION ON CIVIL RIGHTS**

HEARINGS ON THE CIVIL RIGHTS OF INDIANS

TESTIMONY

by

Robert Laurence

**Professor of Law, University of Arkansas
Visiting Professor of Law, Florida State University**

January 28, 1988

Washington, D.C.

Exhibit No. 10 (cont.)

I.

Biographical Information

I am a Professor of Law, permanently at the University of Arkansas, Fayetteville, presently on leave and in residence at the Florida State University in Tallahassee. One of the subjects that I teach regularly is American Indian law, and that is also one of the areas in which I engage in scholarly research and writing. (I have attached as an appendix to this statement a list of my publications in the field of American Indian law.) I graduated from the University of New Mexico School of Law in 1977, and did graduate work at the University of Illinois College of Law. My undergraduate training was in mathematics. I taught at the University of North Dakota before moving to Arkansas, and have had a continuing relationship with the summer session of the Special Scholarship Program in Law for American Indians, administered by the American Indian Law Center at the University of New Mexico. I am not an Indian.

II.

Preliminary Observations

1. I imagine that I will not be the first participant at these hearings to comment on the irony surrounding the Commission's project to study civil rights violations committed by Indian tribal governments. When one thinks of civil rights and of American Indians, one's mind turns first to the harms perpetrated against Indians: discrimination in housing and in

Exhibit No. 10 (cont.)

the obtaining of credit, interferences with Indian religious freedoms, denials of health care and welfare benefits, the state of Indian education, the plight of urban Indians, to name a few. One does not have to deny that Indian governments, like all governments, occasionally tread on individual rights in order to observe that this treading is not at the top of the list of American Indian civil grievances. I will leave to other witnesses to question the Commission's motives, if they will; for myself, I begin by expressing puzzlement over the Commission's choice, and will be pleased to hear that the Commission is pursuing with equal vigor its investigations of the civil rights of American Indians vis a vis the federal and state governments.

2. As I emphasized to Mr. Miller of the Commission's staff, I have no particular expertise concerning what, in fact, is happening on Indian reservations. I assume that tribal governments occasionally overstep the bounds of what would be considered proper governmental activity in Anglo-American society. I assume that this is especially likely with respect to what non-Indian Americans consider to be the norms of procedural due process. In my experience, tribal governments and tribal officers and judges work more informally than the non-Indian institutions to which most of us are accustomed. From reading the cases decided under the Indian Civil Rights Act (ICRA), I do know that both Indians and non-Indians alike have raised non-trivial complaints against tribal action. Nevertheless, to the extent that the Commission is engaged in a fact-finding mission

Exhibit No. 10 (cont.)

regarding tribal governmental activity and the grievances, if any, of those who deal with tribes, I am unable to provide any meaningful insight.

3. Perhaps it goes without saying, but the views represented here are mine alone and are not those of the Universities or the faculties with which I am associated.

III.

Statement

I am a "tribal advocate." That is to say, I approach most Indian law questions from this perspective: The recognition of tribal sovereignty is, and ought to be, the mainstay of domestic American Indian law. I follow the venerable Felix Cohen's pronouncement that:

Perhaps the most basic principle of all Indian Law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. . . . What is not expressly limited remains within the domain of tribal sovereignty.¹

¹ F. Cohen, Handbook of Federal Indian Law 122 (1942). The last sentence of this quotation was brought into question in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and

Exhibit No. 10 (cont.)

This initial perspective makes me, to some extent at least, an unfriendly witness before the Commission, for, while my view of any individual case is not predetermined, my inclinations are to support tribal governments rather than the individuals who deal with them. This may seem an odd stance for one who would otherwise describe himself as a "liberal," but Indian tribes are old governments, whose claims to sovereignty, in fact, far predate our own. Indian governments have been made fragile through dealings with the United States government and these dealings have not always met modern standards of humanity and fairness. Given this historical background, we non-Indians must be very careful that our later dealings with the Indians do not result in further degradation or destruction of these important governments. I begin, then, as a tribal advocate.

I am not, however, as unfriendly to intrusions into tribal sovereignty as some witnesses before the Commission. I have spoken and written, for example, approvingly of the ICRA and have even urged, in the very restrictive context that I shall explain below, the legislative reversal of Santa Clara Pueblo v. Martinez.² But the understanding of this position, and others, requires that the Commission appreciate that I begin with a profound respect for tribal sovereignty and an admiration of our American legal system that recognizes it.

later cases discussed below.

² 439 U.S. 49 (1978).

Exhibit No. 10 (cont.)

From this vantage point, Oliphant v. Suquamish Tribe³ is anathema. Oliphant, of course, is the case holding that there are implied limits on the reach of Indian tribal sovereignty. In particular, and of direct relevance to the deliberations of the Commission, is the relation between the holding of Oliphant, the persistence of tribal sovereignty and the scope of the Indian Civil Rights Act.

Mark Oliphant is one of the persons with whom the Commission is presently concerned in its project. He was arrested by the Suquamish police for assaulting a tribal officer and resisting arrest. He was about to face Suquamish justice. He could anticipate a fine or a short jail sentence. And he was concerned with the workings of the Suquamish criminal justice system. While it is true, as I observed earlier, that there are other, more-pervasive civil rights concerns on the Suquamish Reservation, it is certainly fitting that the Commission study Mark Oliphant's civil rights before the Suquamish Tribe.

Given that Congress has passed the ICRA, given that the Act contains a habeas corpus provision and given further that Mark Oliphant was in custody, it would have been, in my view, perfectly appropriate, under the ICRA as it exists today, for a federal court to examine his treatment by the tribe. The court should have listened to his arguments that his prosecution threatened to deprive him of due process, equal protection or the like. The court should have listened to his arguments that he

³ 435 U.S. 191 (1978).

Exhibit No. 10 (cont.)

was being treated differently because he was a non-Indian, that an all-Indian jury to try a non-Indian was inconsistent with the ICRA, that the tribe's procedures were inadequate, or whatever his ICRA arguments were. But Oliphant was not written this way; Mark Oliphant was not released because of ICRA violations.

Instead the Supreme Court permitted a broad-based attack on Suquamish sovereignty, and found that the tribe had impliedly surrendered the power to try Mark Oliphant for resisting arrest and assaulting a police officer. That Indian tribes no longer possess those incidents of sovereignty that they have voluntarily surrendered is self-evident. I can also accept that Congress may, within limits not relevant here, unilaterally remove those aspects of sovereignty that it finds inconsistent with other national goals. But for a court to determine, based on undesignated criteria, that certain aspects of tribal sovereignty are somehow "inconsistent with their dependent status" raises difficult problems.

Perhaps the most serious effect of Oliphant is that the case invited later plaintiffs -- almost exclusively non-Indian plaintiffs -- to make similar attacks on the existence of tribal power, though now usually in a civil, not criminal context. In the wake of Oliphant, for example, tribal taxes were challenged, not on the grounds that they were discriminatory or unfairly imposed, but because they were said to be "inconsistent with the tribe's dependent status."⁴ The entry of a default judgment in

⁴ Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

Exhibit No. 10 (cont.)

tribal court was challenged, not because of lack of notice to the defendant, but because tribal court jurisdiction was said to be "inconsistent with the tribe's dependent status."⁵ Tribal hunting and fishing rules were attacked, not because of any short-comings in their promulgation or application, but because they were said to be "inconsistent with the tribe's dependent status."⁶

As a result of Oliphant, then, the ICRA, which Congress carefully crafted to limit tribal powers, has been replaced, in the hands of non-Indian plaintiffs, with a judge-made assault on tribal sovereignty. This misguided approach does not give due deference to the relevant Act of Congress. Worse, it prefers the imprecise test of "inconsistent with their dependent status" to the ICRA's precise list of limitations.

It is possible that the rule of Santa Clara Pueblo v. Martinez is connected to the Oliphant holding. Martinez took away from federal judges the authority to inspect tribal activity under the ICRA, in the civil context. And only non-Indian plaintiffs have the Oliphant ploy available to them, because of the tribe's acknowledged plenary power over its own members. Indians, then, can rarely attack the existence of their tribe's power, but only its exercise, under the ICRA or tribal law. When

⁵ National Farmers Union Ins. Co. v. Crow Tribe of Indians, 105 S.Ct. 2447 (1985).

⁶ Montana v. U.S., 450 U.S. 544 (1981).

Exhibit No. 10 (cont.)

an Indian is the civil plaintiff, like Julia Martinez, there is no recourse but to tribal authorities.

But non-Indian plaintiffs may finesse the ICRA question and Martinez's barrier, because of Oliphant. When the plaintiff is white, the complaint against tribal authority can often be rephrased out of ICRA terms attacking the exercise of tribal power and turned into an attack on the very existence of tribal power over the non-Indian.⁷ So again, now in the civil context and only for white plaintiffs, the precise terms of the ICRA take a back seat to the imprecise "inconsistent with their dependent status" test from Oliphant.

My recommendation to the Commission is that it recommend to the President and the Congress that the mischievous Oliphant be legislatively overruled and the "inconsistent with their dependent status" test be taken away from the federal courts. Tribal sovereignty ought to remain in place unless the tribe surrenders it or Congress expressly takes it away.⁸ Especially since Oliphant appears destined to evolve into a "White Plaintiffs Only" rule, its departure from the Indian law jurisprudential scene will be unlamented.

It is consistent with the Oliphant decision itself that Congress do away with it, since the decision is based on the

⁷ See Gover & Laurence, Avoiding Santa Clara Pueblo v. Martinez, 8 Hamline L. Rev. 497 (1985).

⁸ I would hope, of course, for some congressional disquietude toward doing the latter. These old, resilient, yet fragile sovereignties need nurturing, not pruning.

Exhibit No. 10 (cont.)

Court's view that Congress intended the result. The Court searched for and found an "unspoken assumption" of Congress that tribes had no criminal jurisdiction over non-Indians.⁹ I suggest that Congress now speak the opposite assumption. The Court wrote that ". . . Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."¹⁰ Congress should now state very clearly that the ICRA, with its habeas corpus entry into federal court, is exactly the manner acceptable to it.

The congressional vehicle for overruling Oliphant should thus be the Indian Civil Rights Act, which is why this proposal is being made to the Commission. In Oliphant, the Supreme Court recognized that the statute might have worked the kind of direct congressional recognition of tribal power over non-Indians that would have settled the question without any inquiry into what was "inconsistent with their dependent status."¹¹ In spite of some rather instructive legislative history of the ICRA, the Court found that the statute was not sufficiently unequivocal regarding the legitimacy of tribal exercise of criminal jurisdiction over non-Indians to settle the matter. Congress now need only amend the ICRA to make clear to the Court what was unclear to it in Oliphant.

⁹ Oliphant, 435 U.S. at 197-206.

¹⁰ Id. at 210 (emphasis added).

¹¹ Oliphant, 435 U.S. at 195, n. 6.

Exhibit No. 10 (cont.)

Should Congress at the same time overrule Martinez? Strong tribal advocates would say "No." People whose opinions I very much respect point to the vulnerability of poor tribes to harassing civil rights litigation in federal court, to the possibility of the smallest tribe being held to the most formal procedural due process requirements, to the unseemliness of airing before federal judges the most political of intra-tribal disputes, to the irony of exacting from old, old non-European governments compliance with latter-day tidbits of American constitutional law.

There is much to be said for this position. On balance, however, I come out in favor of a very careful overruling of Martinez. Civil rights are important, and only those whose notion of "Indian-ness" is more romantic than real think that Indian tribes are too pure to violate these important rights. The easiest case for federal court intrusion into tribal decision making is the one that is in place now: when tribes choose to incarcerate someone, federal habeas corpus is available to test the validity of the incarceration.

Julia Martinez and others, however, need injunctive relief, not habeas corpus. And my position is that, within the guidelines set out below, the federal courthouse ought to be open to her, under the ICRA. The Martinez case, then, might be legislatively overruled, under these guidelines, briefly sketched:

Exhibit No. 10 (cont.)

1. An ICRA plaintiff must first exhaust her tribal remedies. This was the law as it was developing under the pre-Martinez ICRA.¹² Which remedies? All of them. I am suspicious of any exception for so-called "fruitless" remedies. Often, under tribal procedures, the final appeal will be to the tribal council, a political body. I would require the plaintiff to take this step before suing under the ICRA, so as to avoid the federal court's having to determine whether internal tribal politics make such an appeal "fruitless."

2. There should be a meaningful "amount-in-controversy" requirement. Tribal governments are smaller, poorer and more fragile than state governments. They are very vulnerable to the threat posed by frequent and extended litigation. They should be protected from all but the most important challenges to their actions. This requirement would be the civil analog of the habeas corpus remedy in criminal matters. Just as habeas corpus requires that tribal action amount to detention before it is actionable, the

¹² See, e.g., O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973).

Exhibit No. 10 (cont.)

"amount-in-controversy" requirement would mean only major tribal actions would be reviewable.¹³

3. Money damages should not be recoverable against the tribe. The doctrine of tribal sovereign immunity should not be abolished. Declaratory judgment should be the preferred remedy for prevailing plaintiffs, with injunctions available when necessary to effectuate the federal court's decision. An Ex parte Young¹⁴ exception, to allow injunctions against tribal officers, but not against the tribe, seems appropriate.

4. The "political question" doctrine should be applied liberally. The pre-Martinez history of ICRA litigation teaches that, if the case is overruled, many of the plaintiffs will be Indians suing their own tribes over election-related controversies. For example, in White Eagle v. One Feather,¹⁵ the Eighth Circuit was called upon to determine whether the "one person, one vote"

¹³ I accept that the claims made in suits for injunctive or declaratory relief based on free speech, right to counsel or other important civil rights are often not reducible to monetary amounts. Such suits should not be inhibited by the amount-in-controversy requirement. I am thinking, instead, of suits such as Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), where the plaintiffs were seeking an injunction against tribal action that allegedly deprived them of the value of their property.

¹⁴ 209 U.S. 123 (1908).

¹⁵ 478 F.2d 1311 (8th Cir. 1973).

Exhibit No. 10 (cont.)

constitutional requirement of Baker v. Carr¹⁶ applied, under the ICRA, to tribal elections. It is easy to forget just how close the Supreme Court came, in Baker, to deciding that federal courts had no jurisdiction over matters of apportionment. Under the ICRA, federal courts ought to rediscover that reluctance to intrude into political matters, and should dismiss what are essentially political controversies. Furthermore, the doctrine ought to be applied more liberally under the ICRA than it is under the Constitution; the statute, after all, is being imposed by the United States unilaterally on governments that have not ratified it.

5. Federal court review should be on the tribal court record, if possible. This will have the laudable effect of encouraging litigants to undertake full and good faith advantage of the tribal judicial system. Of course, some tribal courts operate rather informally, and the "record" will be not what a federal court is used to. The ICRA should not be written or read to tax tribal judicial systems beyond their ability to bear. Tribal court records may be in a native tongue, and that should be the federal court's problem, not the tribal court's. Much of the record might be tape recorded oral presentations. Sometimes, perhaps, the

¹⁶ 369 U.S. 186 (1962).

Exhibit No. 10 (cont.)

federal court will have no choice but to take supplementary evidence. But the requirement that the federal court look first to the record of the tribal court will help to keep the ICRA from being destructively intrusive.

6. The substantive provisions of the ICRA should be read with respect for both traditional tribal ways and for valid, modern innovation. The federal courts were, on the whole, rather respectful of tribal tradition in the pre-Martinez ICRA cases.¹⁷ This respect should continue, and the federal courts should be reluctant to strike down tribal tradition in the name of Anglo-American legal philosophy. But, too, tribes should not be required under the ICRA to remain frozen in pre-Colombian days, in the name of deference to tribal tradition. Indian tribes, like all governments, have a desire to evolve to meet modern problems, and new tribal solutions are also entitled to federal court deference. On the other hand, the "take the tail with the hide" theory of cases like White Eagle v. One Feather,¹⁸ which holds that Anglo-American standards

¹⁷ Many cases might be cited here; perhaps the most instructive case in this regard was the federal district court opinion in Martinez itself, 402 F. Supp. 5 (D.N.M. 1975).

¹⁸ 478 F.2d 1311 (8th Cir. 1973).

Exhibit No. 10 (cont.)

may be applied when the tribe adopts an Anglo-American institution, seems unobjectionable.

I do not have the time here, nor would I ask the Commission's patience, to explore these guidelines in the detail they deserve. Furthermore, it is folly to propose any ICRA revision in detail until the Commission completes its investigation of exactly who needs civil rights protection before tribal courts and why. In answering those questions, it is important not to conclude, based on Oliphant, that non-Indians are not in need of any protection. Oliphant is a case whose time has passed and which ought to be legislatively reversed. Most important for a happy outcome of these deliberations is that they be undertaken with an appreciation of the importance of tribal sovereignty as a basic tenet of American Indian law. If the Commission, the President and the Congress go about their deliberations with a respect both for the rights of individual American citizens and for the old, old governments that were here first, then I trust that the details will work themselves out. Federal law in general, and the ICRA in particular, must remain flexible enough to advance the interests of tribal sovereignty and individual rights.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert Laurence", written in dark ink on a white background. The signature is positioned above a horizontal line.

Robert Laurence

Exhibit No. 10 (cont.)

APPENDIX

Publications on Indian Law by Robert Laurence

On the "Quiet" Abrogation of Indian Treaties and the Proper Reading of United States v. Dion, 4 J. Land Use & Env'tl. L. ____ (1988).

Learning to Live with the Plenary Power of Congress over the Indian Nations, 30 Ariz. L. Rev. ____ (1988).

Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation (with Hanna), 40 Ark. L. Rev. 797 (1987).

Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions under the Indian Civil Rights Act (with Gover), 8 Hamline L. Rev. 497 (1985).

Service of Process and Execution of Judgment on Indian Reservations, 10 Am. Indian L. Rev. 257 (1984).

Thurgood Marshall's Indian Law Opinions, 27 How. L.J. 3 (1983).

The Indian Commerce Clause, 23 Ariz. L. Rev. 203 (1981).

Exhibit No. 11

**STATEMENT OF
ROBERT N. CLINTON
IN HEARINGS BEFORE
THE UNITED STATES COMMISSION ON CIVIL RIGHTS
ON
BUREAU OF INDIAN AFFAIRS RESPONSIBILITY FOR
ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT**

Washington D.C.
January 28, 1988

Copr. 1988 Robert N. Clinton

Exhibit No. 11 (cont.)

My name is Robert N. Clinton. I am a Professor of Law at the University of Iowa College of Law. I regularly teach and write in the fields of Native American law, constitutional law, and federal courts. I want to thank the United States Commission on Civil Rights and its staff, including particularly Brian Miller, for the kind invitation to testify today on questions of enforcement of the Indian Civil Rights Act in Indian country that have been the subject of these hearings. I am here at the invitation of the Committee and propose only to express my own personal views and opinions as a teacher and scholar active in the field of Indian affairs. I am not here representing any tribe or group. The views I offer will be purely my own and do not represent the perspectives of my employer.

My practice and academic experience in Indian law involves review of many of the federal, state, and, to a lesser extent, tribal judicial decisions and academic literature interpreting and enforcing the provisions of the Indian Civil Rights Act. Since I neither live nor work on a daily basis in Indian country, my knowledge of the routine functioning of tribal governments is more anecdotal and episodic, lacking the systematic breadth that I ~~has~~ presume has been supplied to this Commission by tribal governmental officials and other Indian leaders in the tribal community who have daily experience with the issues raised by the Act. It is to such tribal and Indian community leaders that the Commission should primarily look for guidance in the state of enforcement of the Indian Civil Rights Act and any proposals for changes in institutional arrangements for enforcing the Act certainly should be coordinated with such affected tribal governments. Since Indian tribes have their own experienced political leaders, I certainly would not presume to speak for any Indian peoples. Thus, my comments today will focus primarily on the law governing the enforcement of the Indian Civil Rights Act, rather than on the experience of tribal members and non-members with their tribal governments.

While the focus of today's hearings centers on the role of the Bureau of Indian Affairs (BIA) in the enforcement of the civil rights portions of the Indian Civil

Exhibit No. 11 (cont.)

Rights Act, 28 U.S.C. §§ 1301-03 (ICRA), this issue cannot be understood without taking into account the larger context in the which the BIA performs that role. Thus, my statement today will focus on a number of interrelated issues, including (1) the scope, policy, and enforcement of the ICRA; (2) the development of tribal enforcement mechanisms for the ICRA; (3) the enforcement of the ICRA in state and federal courts, including proposals for reform; and, finally, (4) the appropriate role of the BIA, if any, in the enforcement of the ICRA.

Scope, Policy, and Enforcement of the Indian Civil Rights Act

In order to understand the complex legal problems confronting the enforcement of the Indian Civil Rights Act, one must recognize that the ICRA is an awkward and controversial statute that Congress enacted in 1968 as a result of a very confused set of hearings. These hearings reflected a lack of agreement on the basic problem Congress sought to remedy through the legislation and a seeming lack of full understand of the nature of Indian tribal government. In his public pronouncements on the ICRA, Senator Sam Ervin of North Carolina, the Chairman of the Senate Judiciary Committee, and others seemed genuinely confused as to whether the goal of their legislation was to extend constitutional rights to Indians, whom Senator Ervin at various points seemed to wrongly perceive did not have such rights,^{1/} or, rather, to

1. Since at least the Act of June 2, 1924, ch. 233, 43 Stat. 253, Indians born in the United States have been citizens of the United States and of the states in which they reside. As such, they have the full rights of any citizen against federal and state government. The Congressional confusion arose because federal court decisions correctly had noted that most of the civil rights limitations available in the original Constitution, the Bill of Rights, and most of the other amendments by their terms apply only to federal or state governments. There were no federal *constitutional* limitations on tribal governments beyond those, such as the Thirteenth Amendment limitation on slavery and involuntary servitude, that apply to all persons within the United States. See e.g., *In re Sah Quah*, 31 F. 327 (D. Alask. 1886) (thirteenth amendment is absolute ban on slavery everywhere in the United States and barred Tlingit Indians from holding slaves). Consequently, prior to the enactment of the ICRA, courts generally held that various constitutional civil provisions did not apply to tribal governments because such governments were separate domestic dependent nations and were not arms of either federal or state governments covered by the

Exhibit No. 11 (cont.)

apply and enforce against tribal governments some or all of the rights guaranteed by the constitutional against state or federal government. This lack of clarity of purpose produced a statute that seems to misperceive the basic nature of tribal government and one which, quite properly, did not make rights held against tribal governments identical to the civil rights the Constitution guarantees against federal or state governments.

The confusion evident in Congress' approach to ICRA is most evident in the inclusion of certain guarantees in the 25 U.S.C. § 1302 that at best could only be awkwardly accommodated within the structures of then existing tribal governments and at worst were inconsistent with many tribal governing traditions. For example, 25 U.S.C. § 1302(9) prohibits Indian tribes from "pass[ing] any bill of attainder." The aversion to legislative imposition of punishment that surrounds the bill of attainder clause derives from Anglo-American notions of separation of powers in which legislatures formulate and enact criminal law and courts enforce it. In federal and state constitutional jurisprudence, this idea of separation of powers is constitutionally enshrined in the structure of our fundamental governing documents. At the time of the enactment of the ICRA, however, no tribe of which I am aware had any constitutional structure that facilitated, let alone protected, separation of powers and the idea was inconsistent with both tribal traditions and formal tribal constitutions which generally only created a relatively omnipotent tribal council, as a legislative branch,

terms of the constitution. In *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), for example, the Tenth Circuit said "No provision in the Constitution makes the First Amendment applicable to Indian nations * * * ." See also, *Barta v. Ogallala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (1957); *Toledo v. Pueblo de Jemez*, 119 F.Supp. 429 (D.N.M. 1954). The pre-ICRA case law therefore did not indicate, as Senator Ervin's statements sometimes suggested, that Indians lacked constitutional rights. Rather, the prior case law, recognizing the separate sovereignty of Indian tribes, held that provisions of the *federal* constitution that limited the operations of federal and state governments did not apply to tribal governments in their dealings either with Indians or non-Indians. Tribes, like states, of course were free to establish bill of rights guarantees in their own tribal constitutions.

Exhibit No. 11 (cont.)

to exercise the sovereignty vested in the tribe. Then and now, most tribal constitutions are structured more like the government of the United States under the Articles of Confederation, which incidentally did *not* contain any bill of attainder limitation, than like the three-headed constitutional governments of the United States and the states. When, after passage of the ICRA, lawyers ultimately carefully analyzed application of the separation of powers theory of the bill of attainder restraint to tribal government they were forced to conclude that the clause could not be enforced with respect to tribal governments in the same fashion it was with respect to federal or state governments. The result was compelled because tribal governments lacked the constitutionally derived concept of separation of powers and the courts properly concluded that Congress had not meant to impose such a doctrine on them in enacting the ICRA. Such efforts to enforce the bill of attainder provisions produced at best an awkward accommodation of the realities of tribal government to the artificially derived theory of the ICRA.^{2/}

Similarly, insofar as certain provisions of the ICRA imposed on Indian tribes certain aspects of the Bill of Rights derived from Anglo-American notions of the adversary process, such as the right of confrontation, the right to retained counsel, and the right to criminal jury trial, they ignored the fact that traditionally many Indian tribes, like many European judiciaries, had been organized around a more inquisitorial model of adjudication. Accommodating such newly imposed procedural requirements meant more than merely affording new rights, it meant adapting, changing, and partially rethinking the basic notions of the tribal governing process, accommodating it to an externally derived standard of conduct, not always fully supported by tribal governmental leaders or members.

Where these inconsistencies between Indian cultural traditions and the dictates of the proposed ICRA were made clear, Congress responded during the hearings on the

2. See *e.g.*, *Dodge v. Nakal*, 298 F. Supp. 26 (D. Ariz. 1969).

Exhibit No. 11 (cont.)

ICRA by preferring the preservation of the tribal tradition. For example, Congress removed a proposal to include a guarantee against the establishment of religion when it was pointed out that a number of traditional tribal governments, such as those of the New Mexico Pueblos, were in essence theocracies and that adoption of such a provision would destroy or alter the basic nature of the affected tribal government. Similarly, the ICRA contains no provision guaranteeing any jury trial right in civil cases. Thus, Congress recognized that jot-for-jot incorporation and application of Bill of Rights guarantees to tribal governments with fundamentally different structures than federal and state governments did not make sense. Where, as in the case of the establishment clause, such inconsistencies were brought to its attention, Congress remedied them in favor of preservation, rather than destruction, of the tribal traditions. Unfortunately, as noted above, not all such inconsistencies were cured before the legislation was enacted into law.

Further indication that the Indian Civil Rights Act does *not* require jot-for-jot incorporation and application of Bill of Rights guarantees, with interpretation identical to that applied when the clauses are enforced against federal or state governments, is found in the very language of the ICRA. The ICRA, for example, guarantees a right to the *criminally* accused "*at his own expense* to have the assistance of counsel for his defense," while the Constitution also guarantees a right to *appointed* counsel in federal and state courts. *Contrast*, 25 U.S.C. § 1302(6) with *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Perhaps the most interesting discontinuity between the ICRA and federal Bill of Rights limitations involves the right to jury trial. Under 25 U.S.C. § 1302(10), the right to criminal jury trial of not less than six persons is guaranteed to for any offense punishable by imprisonment, even though the criminal sentences imposed by tribal courts are expressly limited by § 1302(7) to a six month incarceration or a fine of \$500 or both. By contrast, the United States Constitution guarantees no right to jury trial in state court for crimes punishable at the same level as

Exhibit No. 11 (cont.)

the maximum punishment authorized for tribal courts. *Duncan v. Louisiana*, 391 U.S. 145 (1968). In short, in this instance the guarantees of the ICRA not only mean something different than similar guarantees of the Bill of Rights and the fourteenth amendment, they also provide *more* constitutional protections in tribal forums than the United States Supreme Court has deemed necessary for state tribunals.

It therefore is evident that the question of whether the ICRA is being adequately enforced in Indian country involves a complex issue that cannot be answered in simple terms, or with simple solutions. With respect to tribal governments, the ICRA demonstrably cannot, has not, and should not involve jot-for-jot incorporation of constitutional guarantees of the Bill of Rights and the fourteenth amendment. Congress and the tribal governments that have primary responsibility for enforcing the ICRA both recognize that some process of interpretation and construction of the provisions of the ICRA in light of tribal traditions and the circumstances of tribal government is necessary and appropriate. This Commission therefore should recognize that mere noncompliance of a tribal government with analogous constitutional limitations that might be imposed on federal or state government does not necessarily indicate a violation of the ICRA if valid policy reasons exist for adapting the ICRA protection to the exigencies and circumstances of tribal government.

An illustration of this problem is found in the guarantee of the right to retained counsel found in § 1302(6). In the American legal system the guarantee of the right to appointed and retained counsel in criminal cases protected by the sixth and fourteenth amendments operates in contexts where both judge and prosecutor are almost invariably law trained attorneys. In some tribes, particularly smaller tribes, the judge and the prosecutor may be non-lawyers specially trained for their jobs in training schools established for Indian judges and for tribal legal representatives by the American Indian Court Judges Association and other organizations. In this context affording, or even requiring, a lay counsel who has no formal law degree or

Exhibit No. 11 (cont.)

admission to a state bar should satisfy the requirements of § 1302(6), even though it might not be acceptable in federal or state courts with different institutional arrangements. Indeed, smaller tribes that employ few, if any, persons with formal legal training in their judiciaries or their prosecutorial staffs quite reasonably fear that allowing members of the state bar to represent the defense will unfairly balance their tribal criminal processes in favor of the defendant. Such tribes therefore may restrict tribal bar membership to members of the tribe or to all persons who are separately admitted to the tribal bar. Accommodation of such variance in the institutional settings of tribal government within the ICRA must be recognized if tribal governments are to grow and develop into more sophisticated institutions for the governance of Indian country. It should be recalled that most state bars functioned for well over a century after the adoption of the Constitution and the Bill of Rights with bar admission requirements that did *not* necessitate formal legal education.

The fundamental question therefore that should be asked by this Commission and by Congress is whether tribal governments are providing, as required by the ICRA, the rudimentary aspects of due process, free speech, equal protection and related rights that are required for a fair, free, and democratic government. The question is *not* whether the tribal governments are providing jot-for-jot protection of rights that would be guaranteed against state or federal governments in their courts.

Growth of Tribal Remedies for Indian Civil Rights Act Violations

The process of growth and development of a governmental and judicial systems and evolutions in the sophistication of mechanisms for the enforcement of civil rights guarantees were gradual historical developments in the United States, focused primarily on the post-World War II era. Similarly, that development in Indian country, while remarkably rapid in the twenty years since the adoption of the ICRA, also will take some time and evolution. As Nathan Margold wrote in 1942 in the

Exhibit No. 11 (cont.)

introduction to the first luminary treatise in this field, F. Cohen, **Handbook of Federal Indian Law**:

[T]he groups of human beings with whom Federal Indian law is immediately concerned have undergone, in the century and a half of our national existence, changes in living habits, institutions, needs and aspirations far greater than the changes that separate from our own age the ages for which Hammurabi, Moses, Lycurgus, or Justinian legislated. Telescoped into a century and a half, one may find changes in social, political, and property relations which stretch over more than 30 centuries of European civilization. The toughness of law which keeps it from changing as rapidly as social conditions change in our national life is, of course, much more serious where the rate of social change is 20 times as rapid.

What is most remarkable about the twenty year history of the enforcement of the Indian Civil Rights Act is *not* how far tribal governments are in the enforcement of the ICRA from federal or state courts, but, rather, how close they have come in a very short twenty year span of time to reaching a level of development in the enforcement of civil liberties that took almost a century and half of development in federal and state courts. While the over 127 tribal courts and the over 200 organized tribal governments recognized today may not always uniformly enforce civil liberties guarantees of the ICRA with the same judicial independence and aggressive style that in recent years sometimes made federal courts so unpopular with federal and state governments, it is truly remarkable that they have progressed rapidly quite far. In a span of twenty years most of them have probably progressed, in my judgement, at least to the point that federal and states courts reached in their enforcement federal constitutional guarantees other than those protecting racial equality prior to World War II after a century and half of national experience with a Bill of Rights. On the other hand, judicial decisions from other tribes suggest that many have far surpassed this minimal floor and rival some contemporary state governments in the rigor with which they enforce the civil liberties represented in the ICRA.

In short, I basically agree with the excellent analysis of tribal enforcement of the ICRA offered by Alvin Ziontz, one of the foremost practicing attorneys with wide

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Exhibit No. 11 (cont.)

background and experience in Indian country, in his excellent article on the ICRA, *After Martinez: Civil Rights Under Tribal Government*, 12 U. Cal. Davis L. Rev. 1 (1979). Mr. Ziontz argued that the institutional setting of federal courts differed greatly from tribal courts because tribal judges, like state courts, lacked any concept of judicial independence and tribal constitutions also lacked a constitutionally based concept of separation powers. He further argued that the American system of judicial review is "most attributable to the system of checks and balances created by the United States Constitution," a system obviously lacking in most tribal constitutions and which Congress had not meant to impose on tribes in enacting the ICRA. Mr. Ziontz properly indicated that the development of judicial review in tribal forums would be a gradual, rather than an instantaneous, development in the aftermath of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that no federal remedy exists for civil violations of the ICRA and that Congress intended the primary remedy to rest with tribal governments). That development in the sophistication of tribal governments in enforcing civil liberties protections currently is being propelled by the fact that these governments have the *primary* responsibility for the enforcement of the ICRA. Any effort by this Commission to recommend a shift in primary responsibility for enforcing the ICRA away from tribal governments and to others, such as the federal courts or the Bureau of Indian Affairs (BIA), in my judgement, ultimately will retard further progress in encouraging Indian tribal governments and courts to shoulder the political responsibility for the enforcement of the ICRA guarantees. From my anecdotal experience and reading of the few reported tribal cases, remarkable progress has been made in tribal governments on this question in a brief period of time. While, as with federal or state governmental protections of civil liberties, isolated examples of even gross abuse still can be cited, they should not detract from the overall evidence of progress in tribal enforcement of sometimes alien and often

Exhibit No. 11 (cont.)

confusing ICRA protections. The published tribal court decisions^{3/} strongly suggest an increased receptivity of tribal judges to ICRA claims and careful, dispassionate, and sometimes courageous efforts of tribal judges and other governmental leaders to resolve such claims notwithstanding the restricted institutional setting of their lack of judicial independence and the lack of a clear constitutional concept of separation of powers in most tribes.^{4/} Indeed, some of these cases, such as the *Chapoose* case, reflect tremendous tribal judicial heroism in holding that a tribal government that controls the judicial appointments and tribal court had no authority to curtail that court's power to entertain such ICRA issues. It truly would be ironic in the face of such herculean recent developments in tribal governments if any recommendations to

3. One problem faced by this Commission or others seeking systematic information about the behavior of tribal courts and governments relative to the enforcement of the ICRA is the lack of any systematized system of reporting of tribal court decisions. While the Indian Law Reporter recently has undertaken to report such decisions there is not systematized system by which tribal courts routinely send all their decisions to that source or some other private or public publisher for collection and publication. One recommendation this Commission could make that indirectly would assist tribal judges, lawyers, and others interested in the decision of tribal governments on ICRA and other matters would be to request or require tribal courts receiving federal program support funds for their judicial systems to send their written orders and decisions to the Indian Law Reporter or some other private or public source for collection and publication. The great increase in the number of such opinions being submitted for publication may require federal funding to support the systematic collection of such materials since the commercial market for such materials may be comparatively narrow, thereby making unsupported publication economically impracticable. The objective of any such effort, whether through federal program support or otherwise, should be to assure that these decisions are published at price that many financially strapped tribal governments can afford.

4. See e.g., *In the Matter of the Colville Tribal Jail*, 13 Indian Law Rptr. 6021 (Colv. Tr. Ct. 1986) (protecting rights against cruel and unusual punishment); *Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation*, 13 Indian Law Rptr. 6023 (Ute Tr. Ct. 1986) (finding denial of due process by vesting power to enforce tribal enrollment ordinance in tribal business committee and withdrawing jurisdiction from tribal courts); *United States v. Myers*, 12 Indian Law Rptr. 6003 (Hoopa Valley Ct. App. 1984) (protection of accused's speedy trial right); *Miller v. Crow Creek Sioux Tribe*, 12 Indian Law Rptr. 6008 (Intertribal Ct. App. 1984) (same); *United States v. Brooks*, 12 Indian Law Rptr. 6021 (Hoopa Valley Ct. App. 1984) (protection of accused's rights against unlawful search and seizure); *Turtle Mountain Band of Chippewa Indian v. Parisien*, 1 Tribal Court Reporter § A 95 (1979) (protection of due process right to hearing in dismissal of tribal employee).

Exhibit No. 11 (cont.)

shift the burden of ICRA enforcement elsewhere, including the BIA, that might emerge from these hearings retards future progress in tribal governments in the area of civil liberties enforcement by removing primary tribal governmental responsibility for such questions.

Enforcement of the Indian Civil Rights Act in Federal and State Courts

In *Pueblo v. Martinez*, 436 U.S. 49 (1978), the United States Supreme Court held that no federal cause of action could be implied in the Indian Civil Rights Act that would permit federal district courts to entertain civil claims brought under the ICRA. This decision was based primarily on the Court's view that Congress had not meant to infringe on the fundamental principle of Indian tribal self-government when it enacted the ICRA, a point that the Court derived from a careful analysis of the legislative history of the ICRA. The Court recognized that in 25 U.S.C. § 1303 Congress provided an institutional federal habeas corpus remedy for the violation of the ICRA in criminal cases that was substantially equivalent to, and possibly more intrusive than,^{5/} that afforded against state governments in 28 U.S.C. §§ 2241, 2254. The Supreme Court treated this remedy as the exclusive federal cause of action created under the ICRA to enforce its provisions in nontribal judicial forums. This decision therefore left the *primary* responsibility for enforcing the civil provisions of the ICRA with tribal governments, often through tribal courts. The Court also recognized that in tribes, such as the Santa Clara Pueblo, which lacked a separate court structure and handled resolution of disputes through other tribal governance

5. The decisions construing "custody" for purposes of the remedy available to state prisoners under 28 U.S.C. §§ 2241 and 2254 construe that term more narrowly than the federal courts have construed the term "detention" in 25 U.S.C. § 1303. In particular, monetary fines, a not uncommon form of tribal criminal sentence, are treated as a form of detention authorizing federal habeas under 25 U.S.C. § 1303, e.g., e.g., *Settler v. Lameer*, 419 F.2d 1311 (9th Cir. 1969), while the cases interpreting the custody requirement of 28 U.S.C. §§ 2241, 2254 afford no remedy to state prisoners whose only criminal sentence involves a monetary fine. E.g. *Edmunds v. Won Bae Chung*, 509 F.2d 39 (9th Cir.), cert. denied 423 U.S. 825 (1975) .

Exhibit No. 11 (cont.)

processes, that "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies."

Since the decision in *Martinez*, litigants, occasionally with the cooperation of federal courts, have been adept at advancing creative vehicles to evade the result of that case. In a number of decisions, courts or litigants either have distinguished *Martinez* or sought to find other vehicles for bringing ICRA claims into the federal courts, such as 42 U.S.C. § 1985(3).^{6/} Such efforts are, in my judgment, misguided and I regard the *Dry Creek Lodge* case^{7/}, the most obvious case of this type, to be wrongly decided since these approaches undermine the central thrust of the Congressional mandate to protect Indian tribal sovereignty over such matters that the United States Supreme Court recognized in the *Martinez* case.

There is one area, however, in which federal and state courts already have a legitimate role to play in the enforcement of the ICRA. When the judgments or orders of tribal courts or governments are brought into federal or state courts for enforcement under the full faith or credit statute, 28 U.S.C. § 1738, or under doctrines of intergovernmental comity,^{8/} such federal or state courts rightly can and

6. See e.g., *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985) (§ 1985(3) claim rejected); *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982) (same); *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983) (same); see generally, Gover & Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation In Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 Hamline L. Rev. 497 (1985).

7. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980.)

8. The cases are badly split on whether federal or state deference to and enforcement of tribal laws and judgments is compelled by doctrines of intergovernmental comity applied to the judgments of foreign governments under the rule of *Hilton v. Guyot*, 159 U.S. 113 (1895) or whether such intergovernmental cooperation is required by federal law under dictates 28 U.S.C. § 1738. While the full faith and credit clause of article VI of the Constitution applies only to judgments and laws of "every other State," the language of section 1738 is intentionally broader and requires "courts within the United States" to accord full, faith, and credit to acts, records, and judicial proceedings of "any State, Territory, or Possession of the United

Exhibit No. 11 (cont.)

have examined the questions of whether the judgment complies with the due process requirements of the ICRA or whether it was "rendered under a system of law reasonably assuring the requisites of an impartial administration of justice." *E.g.*, *Red Fox v. Red Fox*, 23 Or. App. 393, 542 P.2d 918 (1975)^{9/} Thus, in cases where tribal laws or judicial proceedings require extraterritorial enforcement by federal or state courts, review by the enforcing court of tribal compliance with the due process elements of the ICRA is already a legitimate part of existing law.

States." Over 130 years ago, the Supreme Court interpreted a similarly phrased statute involving recognition of administrators of estates appointed in the territories to cover Indian tribal governments. *Mackey v. Cox*, 59 U.S. (18 How.) 100.(1855). Other early cases extended the same principle to tribal judgments in other types of cases. *E.g.*, *Hayes v. Barringer*, 168 F. 221 (8th Cir. 1909); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905); *Raymond v. Raymond*, 83 F. 721 (8th Cir. 1897); *Standley v. Roberts*, 59 F. 836 (8th Cir. 1894), *appeal dismissed* 166 U.S. 1177 (1896). These venerable cases suggest that section 1738 should be interpreted to require federal and state courts to accord full faith and credit to tribal court proceedings as judgments of a "Territory," and some modern decisions have accepted that approach. *E.g.*, *Jim v. CIT Financial Services Corporation*, 87 N.M. 362, 553 P.2d 751 (1975); *see also, In re Lynch's Estate*, 92 Ariz. 354, 377 P.2d 199 (1962). Other courts have ignored or rejected this interpretation of section 1738, but still afford deference to tribal court judgments under principles of judicial comity. *E.g.*, *Red Fox v. Red Fox*, 23 Or. App. 393, 542 F.2d 918 (1975); *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950). For purposes of the point at issue in these hearings, the question of whether enforcement of tribal court laws and judicial proceedings is required by section 1738 or inter-governmental comity is irrelevant since a requisite of affording full faith and credit involves assuring that the judgment complied with due process of law, *Pennyroy v. Neff*, 95 U.S. (5 Otto) 714 (1877), and the principle of intergovernmental comity applied in the United States requires the enforcing court, in this instance federal or state courts, to examine, as the court put it in the *Red Fox* case, citing *Hilton v. Guyot*, whether the judgment was rendered "under a system of law reasonably assuring the requisites of an impartial administration of justice."

9. In *Red Fox*, the state court afforded comity to a tribal court divorce decree after assuring itself that the procedures used in the tribal court, including in particular the exclusion of one party's retained attorney who was not a member of the tribal bar from representing the party in the proceeding while affording the party the right to representation through a tribal "spokesman" authorized to practice before the tribal courts, comported with the rudiments of fair procedure. The opinion is a little confused because the court stopped short of directly addressing the ICRA claims since the question was then pending in federal district court in pre-*Martinez* litigation which could not be brought today into federal court. I do not regard the *Martinez* decision as precluding this type of review by federal or state enforcing courts in full faith and credit or comity cases. I further believe that the state court in *Red Fox* could and should have fully disposed of the ICRA issues had they not already been pending in a federal forum.

Exhibit No. 11 (cont.)

The present institutional role of federal and state courts in the enforcement of the ICRA seems to establish the appropriate allocation of power. It has placed the primary responsibility with tribal governments and has caused tribal institutions to assume greater responsibility for the enforcement of these civil liberties guarantees, thereby accounting for much of the recent progress in tribal courts and other forums in developing more sophisticated mechanisms and approaches for dealing with such questions. Undermining the allocation of authority established in *Martinez*, in my judgment, would demoralize tribal governments and retard or even set back these productive developments. In short, while I recognize that isolated abuses of the ICRA by tribal governments can be cited, just as I believe that one can cite violations of the United States Constitution by federal and state governments, I remain unconvinced that there is a *systematic* problem with tribal court remedial structures that requires a general remedy.

Were I convinced, however, that some federal judicial oversight of tribal governmental compliance with the ICRA is needed, the remedy I would support would be far different from wide-spread and often unsophisticated federal district court intrusion into tribal governmental processes that existed before the Supreme Court's decision in *Martinez*. The specter of federal judges interfering with tribal governmental decisionmaking or otherwise serving as an quasi-appellate court for tribal judges, was demoralizing to the development of tribal self-governing institutions. Furthermore, outside of the writ of habeas corpus, state court judgments generally are not subjected to the such destabilizing and demoralizing review by federal district judges where some constitutional violation is alleged. Rather, the exclusive remedy in such civil cases usually requires the disaffected party to seek review from the United States Supreme Court under 28 U.S.C. §§ 1257 or 1258 . If the Commission were to conclude, quite contrary to my own tentative views on this question, that a federal judicial remedy is required for tribal judicial noncompliance with the requirements of

Exhibit No. 11 (cont.)

the ICRA, I would suggest that it model its recommendation on the provisions of sections 1257 and 1258.

Over the past decade, Congress has amended a number of laws to afford tribal governments the same status as state or municipal governments for various federal policy purposes. In the Indian Tribal Tax Status Act, Pub. L. 97-473, Title II, 96 Stat. 2607-11 (amending various sections of Title 26), Congress amended the Internal Revenue Code to give tribal governments the tax exempt status and bonding authority enjoyed by state and municipal government. Congress also has amended a number of environmental protection statutes to authorize tribes to submit enforcement plans to assume a role in the planning, management, and enforcement of such environmental regulations in a manner equivalent to that afforded to the states under the legislation.^{10/} Indeed, in affording the federal habeas corpus remedy provided for in 28 U.S.C. § 1303, Congress afforded those detained under tribal authority a remedy substantially equivalent to that provided to those detained under state authority in 28 U.S.C. §§ 2241 and 2254. Assuming one believed, as I do not, that serious systematic problems in the enforcement of the ICRA existed in tribal governments throughout Indian country and that leaving final resolution of civil ICRA questions with tribal forums therefore inadequately protected ICRA rights on most or all of the nation's Indian reservations, I would submit that the next logical incremental step which would facilitate federal oversight, would be to afford a vehicle for United States Supreme Court review of the final decisions of tribal forums in cases or controversies under a model that is substantially equivalent to that provided for review of state court decisions or the decisions of the courts of Puerto Rico under 28 U.S.C. §§ 1257 and 1258. While I neither currently support such a change in federal law nor believe that

10. Pub. L. 99-499, 100 Stat 1615, amending 42 U.S.C. § 9601(36) (authorizing Indian tribe to apply, like a state, to carry out enforcement actions under the Superfund legislation); Pub. L. 99-339, §302(b)(1), 100 Stat. 666, amending 42 U.S.C. § 300f(10) (Safe Drinking Water Act); *see also*, 33 U.S.C. § 1362(4) (Federal Water Pollution Control Act).

Exhibit No. 11 (cont.)

it is needed, I have drafted the following provision for the benefit of the Commission to illustrate how such a provision could be structured:

§ 1260 Tribal Forums; appeal; certiorari

Final judgments or decrees rendered in cases or controversies by the courts or other forums of Indian tribes with a governing body duly recognized by the Secretary of the Interior may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question to validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the facial validity of a statute, ordinance, resolution or other legislative act of an Indian tribe with a governing body duly recognized by the Secretary of the Interior on the ground of its being repugnant to the Constitution or the provisions of the Indian Civil Rights, 25 U.S.C. § 1301-03, protecting the rights of persons against tribal governments and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute, ordinance, resolution or other legislative act of an Indian tribe with a governing body duly recognized by the Secretary of the Interior is drawn in question on the ground of its being repugnant to the to the Constitution or the provisions of the Indian Civil Rights, 25 U.S.C. § 1301-03, protecting the rights of persons against tribal governments; where is drawn in question the validity of the applications of a statute, ordinance, resolution or other legislative act of an Indian tribe with a governing body duly recognized by the Secretary of the Interior on the ground of its being repugnant to the Constitution or the provisions of the Indian Civil Rights, 25 U.S.C. § 1301-03, protecting the rights of persons against tribal governments and the decision is in favor of its validity; or where any right, title, privilege, or immunity is specifically set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

Under this draft provision, the Court's discretionary writ of certiorari jurisdiction, rather than an appeal of right, would constitute the primary method ^{FOR} ~~by which~~ review of the decisions of tribal forums adjudicating civil ICRA questions. The provision therefore would accord tribal decisions the same presumptive correctness and respect accorded to the final decisions of state courts on federal constitutional and other civil liberties questions. As with the states, adoption of this provision also would provide an alternative method to the writ of habeas corpus for review of tribal

Exhibit No. 11 (cont.)

compliance with ICRA guarantees to those convicted of crimes in tribal court. This provision has the advantage of retaining tribal forums as the front line of defense of ICRA protections against the actions of tribal officials, thereby respecting the dignity of Indian tribal sovereignty, protected in *Martinez*. Furthermore, since this provision would apply only to the *final* judgments and orders of tribal forums, it would ameliorate the demoralizing and destabilizing interlocutory interference with on-going operations of developing tribal governments and forums. While I remain unconvinced of the need for such a statutory change, this proposal, in my judgment, represents the *most* that should be done at the present time to afford a federal judicial remedy for civil violations of the ICRA if any such remedy is thought to be needed.

The Role of the Bureau of Indian Affairs in Enforcing the Indian Civil Rights Act

In the *Martinez* decision, the United States Supreme Court specifically noted that the Bureau of Indian Affairs had some ill-defined role to play in the resolution of ICRA issues. In footnote 22 of its opinion, the Court noted that 25 U.S.C. § 476 requires tribal constitutions to be approved by the Secretary of the Interior and that some, but not all, of these constitutions also require approval of the Secretary for certain tribal actions. Thus, with reference to these provisions, the Court noted that "*In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.*" (emphasis supplied). The focus of this hearing therefore should be on precisely what role the Court envisioned the BIA and the Department of the Interior to play in connection with the above-quoted language.

In the context of the Court's statement, it is evident that the Court had in mind that the Bureau should consider the conformity to the ICRA of a certain limited class of tribal actions "in those instances" where it had the power to approve those actions. In such situations, the Court properly envisioned that Department of the

Exhibit No. 11 (cont.)

Interior and the BIA could perform a direct remedial role for persons disaffected by the tribal decision who claim that their rights under the ICRA were violated. By a direct remedial role, I mean that a disaffected party can file and have heard a formal or informal complaint seeking a direct remedy of the particular tribal decision in question. The Secretary of the Interior, for example, must approve tribal constitutions and amendments thereto adopted pursuant to the Indian Reorganization Act (IRA) under the provisions of 28 U.S.C. § 476. Should a tribe hypothetically seek to adopt a tribal constitution excluding female adult members of the tribe from voting in the tribal election, I would presume that the Secretary could and should justifiably use the power committed under section 476 to decline to approve the amendment based on noncompliance with the equal protection guarantees of 25 U.S.C. § 1302(8). Not all tribes have written constitutions, however, and not all tribal constitutions are recognized by the Secretary under the authority of section 476 since a number of tribal constitutions had been adopted prior to the adoption of section 476. Where federal law imposes no express requirement of Secretarial approval, as in section 476, the Secretary, in my judgment, has no valid legal authority to require approval or specific conformity with the ICRA beyond questions of recognition of the tribe, which I shall discuss below. Similarly, the boilerplate constitutions of several tribes, drafted by agents and employees of the Department of the Interior during the 1930's, contain many specific provisions requiring some or all tribal ordinances to be approved by the Secretary.^{11/} For tribal constitutions containing such provisions, I would presume that the Court's statement in *Martínez* authorized the Secretary or his designee to

11. For any excellent review and critique of the history and scope of such approval requirements, see, American Indian Policy Review Commission, *Final Report* 187-89 (1979). See also, *Moapa Band of Palute Indians v. U.S. Dept. of Interior*, 747 F.2d 563, 564-66 (9th Cir. 1984); *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962). Where such review provisions exists, the courts generally construe them to vest a rather limited authority in the Secretary to review the merits of Indian decision. Cf. *Tooahnippah v. Hlckel*, 397 U.S. 598 (1970) (authority to approve Indian wills vested only a narrow discretion to decline to approval an irrational testamentary disposition).

Exhibit No. 11 (cont.)

consider conformity with the ICRA as one factor in deciding whether to approve any proffered tribal ordinance or resolution requiring secretarial approval. The remedy in such review, however, is limited to the action authorized by law, that is disapproving the tribal constitution, amendment, or ordinance subject to Secretarial review. Not all tribes, however, have written constitutions and not all tribal constitutions contain such approval requirements. Where neither federal law nor the tribal constitution *expressly* requires approval of the Secretary for implementation of tribal governmental action, the Supreme Court already has held in *Kerr McGee Corp. v. Navajo Tribe*, ___ U.S. ___, 105 S.Ct. 2447 (1985), that tribal actions are perfectly valid without any intervention by the Secretary. I read the *Kerr McGee* case to preclude any direct remedial role for the BIA in reviewing tribal constitutions or ordinances that do not by express federal or tribal law require Secretarial approval. *Kerr McGee*, therefore, *sub silentio* rejected a very old and very paternalistic line of lower court cases, stretching back at least to *Rainbow v. Young*, 161 F. 835 (8th Cir. 1908), suggesting that the Department of the Interior or the BIA derived general oversight or remedial powers with respect to tribal government from either the commitment of management of Indian relations to the Commissioner of Indian Affairs (now the Assistant Secretary for Indian Affairs in the Department of the Interior), contained in 25 U.S.C. § 2, or from the authorization to the President to make regulations for carrying "any act relating to Indian affairs," contained in 25 U.S.C. § 9. In this connection, I should also note that on many reservations the Department of the Interior and the BIA sometimes in fact perform many tasks not directly assigned them by federal law or tribal constitutions, such as conducting tribal elections. Since neither federal nor tribal law generally require such activities to be conducted and approved by the Department of the Interior, rather than the tribe, the mere fact that BIA provides such assistance to the tribe, legally or otherwise, does *not* mean that it has any power to approve such actions or to enforce their conformity with the ICRA.

Exhibit No. 11 (cont.)

Neither federal law nor tribal constitutions generally require approval of the Secretary for the actions of tribal executive or judicial officers outside of the approval of disposition of trust property through sale, lease, or contract. Thus, the Secretary of the Interior and the BIA should play no direct remedial role whatsoever in the actions of such tribal governmental officials. In short, since neither federal law nor tribal law have ever provided a direct appeal from the decisions of tribal courts to the Department of the Interior or the BIA, those agency should exercise no direct remedial oversight of tribal compliance with the ICRA in such individual cases. Indeed, federal law does not even provide an appeal to the Department of the Interior or the BIA from the twenty-one federally-created Courts of Indian Offenses operating in Indian country by virtue of the federal regulations contained in 25 C.F.R. Pt. 11. Rather, the appeal provided for in the regulations is *within* the tribal court structure.

25 C.F.R. §§ 11.6, 11.6C.

In *Wheeler v. United States Dept. of Interior*, 811 F.2d 849 (10th Cir. 1987), the Tenth Circuit recently adopted exactly the same view of the role of the Department of the Interior and the BIA in enforcing the ICRA as the one advanced here. The case involved a challenge to elections in the Cherokee Nation based on claimed voting irregularities. After exhausting tribal remedies an unsuccessful candidate for Principal Chief, petitioned the BIA to conduct an investigation, to stay certification of the election results, and to freeze all federal funding to the Cherokee Nation pending the outcome of the investigation. After the BIA rejected his requests, he sought judicial review in federal courts. In an excellent and thoughtful opinion, Judge McKay, speaking for a unanimous panel of the United States Court of Appeals, ruled that the BIA had no authority to enter the relief requested by the plaintiff. The court recognized that there were limited "special situations [that] require Department action" where the Department by law is expressly authorized "to take an active role in lawmaking, [and where] the Department may refuse to recognize laws that tribal

Exhibit No. 11 (cont.)

authorities have passed." Nothing in federal or tribal law, however, expressly authorized the BIA to conduct or overturn tribal elections or to exercise any other remedies of the type sought by the plaintiff in *Wilson*. Consequently, the Tenth Circuit held that "when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere."^{12/} See also, *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985); *Garreaux v. Andrus*, 676 F.2d 1206 (8th Cir. 1982).

The lack of any such appeal to or other form of direct remedial role for the BIA in a wide variety of situations is not an oversight of federal law, but the result of a proper, correct, and deliberate Congressional policy to rectify the past paternalism of federal Indian policy by avoiding making the tribal governments accountable to a paternalistic federal trustee in individual cases. Alvin Ziontz, in the excellent article I noted above, properly pointed out that main thrust of the Indian Reorganization Act was to remove the prior paternalistic impediments to tribal self-government imposed by federal policy and, in the language of the originally proposed bill "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise."^{13/} The Congressional hearings on the IRA are clear that the point of the Act was eliminate the broad discretion that the Department of the Interior and the Office of Indian Affairs theretofore had exercised over tribal affairs. Senator Wheeler called the local Indian agent "a czar" whose oversight of tribal actions he sought to eliminate to promote tribal self-govern-

12. The Tenth Circuit, relying on its much criticized decision in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), reserved, but not resolve, the question of whether the BIA may have some role to play where no tribal forum existed at all for the presentation of the dispute. In light of the recognition in *Martinez* that nonjudicial tribal forums were adequate law enforcing instrumentalities, I presume the Court's reference to lack of any available forum meant a lack of any tribal judicial or nonjudicial for the resolution of the dispute.

13. H. R. 7902, 73d Cong., 2d Sess. (1934) and S. 2755, 73d Cong., 2d Sess. (1934).

Exhibit No. 11 (cont.)

ment.^{14/} As the sponsor of the legislation, he pointed out that "[t]his bill * * * seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs * * * *^{15/} Commissioner John Collier, perhaps our greatest Commissioner of Indian Affairs, urged that the point of the legislation was to eliminate the heavy hand of the federal government in the governance of Indian country and to limit the role of the Office of Indian Affairs (now the BIA) to supplying "guardianship services." As Collier put it, he hoped the IRA would contribute to a situation in which the Indian department would "ultimately exist as a purely advisory and special service body [like] the Department of Agriculture [in relationship to] American farmers."^{16/}

Any effort by the BIA today to play any larger role in the oversight of enforcement of the Indian Civil Rights Act than that expressly authorized by federal or tribal law, therefore, would contravene the express intent of Congress and the executive in enacting the Indian Reorganization Act, that great piece of legislation that resulted in rejuvenation of tribal self-government and which was intended to remove, but has not fully eliminated, the heavy-handed, paternalistic, and final control of Indian tribal affairs ~~from~~ by the federal government, and in particular, the Indian bureau. Any effort to enlarge the BIA role in tribal oversight of individual tribal governmental action by affording that agency a direct remedial role would be grossly inconsistent with the policies and purposes of the Indian Reorganization Act, under which most tribal governments operate, and would set back over 50 years the federal policy of promoting, protecting, and facilitating the tribal self-government

14. 78 Cong. Rec. 11125 (1934).

15. 78 Cong. Rec. 11125 (1934).

16. *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. 22 (1934).*

Exhibit No. 11 (cont.)

that was promised to Indian tribes in treatise the United States solemnly entered into with them in exchange for their land. Consistent with long-standing federal laws and policy, the Bureau of Indian Affairs' direct remedial role in enforcement of the ICRA properly is limited *at most* to those situations in which federal or tribal law *expressly* require approval of the tribal action and, in those situations, the federal remedy available is limited solely to disapproving the action in question for noncompliance with the ICRA.^{17/}

Where a violation of the rights of any person under the ICRA is found by the BIA or other federal contracting agencies in federally funded programs operated by tribal governments under the authority of the Indian Self-Determination Act of 1975, 25 U.S.C. § 450m, does vest the Secretary of the contracting department with the authority, after notice and hearing, to rescind the contract and reassume federal governmental management of the affected program after a determination that the "tribal organization's performance under such contract or grant agreement involves . . . the violation of the rights . . . of any persons" In such cases the Secretary "may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights . . . which necessitated the rescission has been corrected." The authority to suspend federal contract and grant funding by the terms of the statute is limited, however, to violations of rights in connection with "performance under such contract or grant agreement." It does not authorize the Secretary or the BIA to suspend general program or other funds to any tribe not governed by the contract and grant provisions of the Indian Self-Determination Act or to otherwise provide appeals to disaffected parties from the decisions of tribal courts or other governmen-

17. E.g., *Totenhagen v. Area Director, Minneapolis Area Office, BIA*, 15 IBIA 105, 14 Ind. L. Rptr. 7016 (1987); *LeBeau v. Acting Assistant Secretary of Indian Affairs*, 14 IBIA 84, 13 Ind. L. Rptr. 7016 (1986); *Crooks v. Director, Minneapolis Area Office, BIA*, 14 IBIA 181, 13 Ind. L. Rptr. 7038 (1986).

Exhibit No. 11 (cont.)

tal institutions.^{18/} Furthermore, the Act contemplates only a *temporary* suspension of the contract or grant relationship until the problems with respecting civil rights have been corrected. Secretarial decisions to decline to suspend a grant under the authority of section 450m involve a matter "committed to the discretion of the Secretary," and therefore are not reviewable in formal administrative proceedings or by the courts.^{19/}

Another role that the BIA can and should play involves education and training relative to enforcement of the ICRA. Since federal program funds have long supported many tribal courts and other tribal governmental programs, the Department of the Interior can and should play an active role in training tribal governmental officials about the requirements of the ICRA and the adaptation of the institution of judicial review to tribal governmental environments. The federal government cannot reasonably cut back federal program funds supporting many non-self-sustaining tribal courts and governments and simultaneously demand that newly selected tribal officials and judges adhere without any formal training to the legally complex requirements of the ICRA.

While the direct remedial role of the Bureau of Indian Affairs in enforcing the provisions of the ICRA is legally quite narrow, the Bureau does have one other more general part to play in cooperation with the Assistant Secretary for Indian Affairs in managing the government-to-government relationship with the tribe. The BIA properly has taken the position that "for purposes of carrying out the government-to-govern-

18. *E.g.*, *Gillette v. Area Director, Navajo Area Office, BIA*, 14 IBIA 71, 13 Ind. L. Rptr. 7017 (1986).

19. *Weatherwax on Behalf of Carlson v. Fairbanks*, 619 F. Supp. 294 (D. Mont. 1985) (no judicial review of decisions by the Secretary not to suspend or rescind contracts under section 450m); *Gillette v. Area Director, Navajo Area Office, BIA*, 14 IBIA 71, 13 Ind. L. Rptr. 7017 (1986) (the Indian Self-Determination Act does *not* make parties who benefit from program grants or contracts third party beneficiaries entitled to enforce duties under the contract or grant with respect to enforcement of rights).

Exhibit No. 11 (cont.)

ment relationship between the United States and Indian tribes, it is necessary for the Bureau to determine the identity, composition and authority of the tribe's governing body."^{20/} While this power is generally limited to ascertaining the results of tribal political decisions, in rare instances it provides the BIA a role in correcting due process and related violations in connection with tribal election disputes.^{21/} A power to refuse to recognize tribal action is not the equivalent, however, of BIA power to displace the tribal political process or conduct tribal elections itself where not provided for by federal or tribal law. Similarly, the BIA can play a role in enforcing the ICRA by cooperating with the Assistant Secretary of Indian Affairs in exercising the power committed to that office by 25 U.S.C. § 2 to manage "all matters arising out of Indian relations." As indicated above, this provision should be interpreted strictly as vesting a very narrow power, not authorizing any type of general oversight of Indian governmental behavior that would be inconsistent with the purposes and policies of the Indian Reorganization Act. The one role relevant to enforcement of the ICRA that is subsumed within this authority is the power to recognize, or conversely to recommend that Congress break relations with and derecognize, an Indian tribe. Like any sovereign government, the United States government may choose and select the governments with which it will establish or continue to maintain government-to-government relations. Treatise, statutes, executive orders and the like, of course, recognize the governments of the tribal parties and protect many

20. *E.g., Crooks v. Area Director, Minneapolis Area Office, BIA*, 14 IBIA 181 (1986); *LeBeau v. Acting Assistant Secretary of Indian Affairs*, 14 IBIA 84, 13 Ind. L. Rptr. 7016 (1986).

21. *E.g., Totenhagen v. Area Director, Minneapolis Director, BIA*, 15 IBIA 105, 14 Ind. L. Rptr. 7016 (1987) (reversal of administrative decision to recognize the removal of Chairman of Shakopee Mdewakanton Sioux Community for failure to give proper notice required by due process and tribal law). In exercising such authority, however, the BIA and the Department of the Interior cannot ignore or displace other federal or tribal laws relative to the structure and functioning of tribal government. *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); *see also, Morris v. Watt*, 640 F.2d 404 (1981).

Exhibit No. 11 (cont.)

property, hunting and fishing, water, and political rights of such tribes. In addition, under the authority of 25 U.S.C. § 2, the Secretary of Interior has created regulatory procedures for the recognition of Indian tribes. 25 C.F.R. Pt. 83. Just as the federal government monitors the human rights record of foreign governments for compliance with fundamental norms of human decency, the Department of the Interior and the BIA can and should monitor the records of compliance of federally recognized Indian tribes with the provisions of the ICRA. This role does *not*, however, authorize the BIA to intervene in any particular case to rectify what it perceives to be a violation of the ICRA. Rather, the power of the BIA in this instance is limited to recommending to Congress such derecognition or in limited cases derecognizing the offending tribe itself, a devastating decision that, like the breach of diplomatic relations with foreign governments, can only be used sparingly and thoughtfully if it is to have any effect. Thus, while the BIA should be prepared to receive complaints of violation of the ICRA from those disaffected by the decisions of tribal government, just as the Department of State receives complaints of human rights abuses from persons disaffected or abused by foreign nations with which the United States maintains diplomatic relations, such complaints should be received pursuant to the Bureau's general information gathering role and do not themselves initiate a remedial process in the individual case. Derecognition of tribal governments that fail to comply with the ICRA or other appropriate forms of governmental conduct should be treated as a temporary diplomatic solution to a troublesome problem so that it is not converted into a *de facto* form of tribal termination. The federal government therefore should be prepared to promptly recognize any new government of a derecognized tribal government that shows willingness to comply with the requirements of the ICRA. In short, derecognition of tribal governments should be a rare and *temporary* solution to the problems of government-to-government relations with Indian tribes.

Exhibit No. 11 (cont.)

While 25 U.S.C. § 2 delegates authority to the Assistant Secretary for Indian Affairs to manage relations with Indian tribes, and therefore provides adequate authority for the BIA recognition of theretofore unrecognized tribes of the type contemplated by 25 C.F.R. Pt. 83, that authority does *not* in most instances authorize the Department of the Interior to unilaterally cease government-to-government relations with an Indian tribe the government of which is already recognized by the federal government. In most instances, Indian tribes with governing bodies duly recognized by the Secretary of the Interior have treaties and statutes that protect their entitlement to certain federal programs and benefits and which recognize the tribal government in question. The law is quite clear that the executive branch cannot unilaterally abrogate such Indian treaty or statutory rights without a clear and specific authorizing act of Congress evidencing an intent to abrogate or modify the Indian rights in question.^{22/} Thus, while the BIA can unilaterally recognize tribal governments utilizing the authorization delegated in 25 U.S.C. § 9, in most instances its derecognition recommendations would require specific Congressional action. Where, however, Congress has never recognized a tribe through treaty or statutes, including appropriations legislation, and the tribe's recognition rests exclusively on BIA action, the BIA properly may be able to withdraw the recognition for noncompliance with the ICRA. Where derecognition of a tribal government by Congress or the BIA operates to interfere with or abrogate any property rights, rights to benefit programs, or other water or hunting and fishing rights, the United States may be liable to pay just compensation to the tribe under the fifth amendment taking clause.

Since any recommendation that the federal government cease its recognition of a tribal government for noncompliance with the ICRA can have momentous consequences

22. E.g., *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976).

Exhibit No. 11 (cont.)

for the federal government, the tribe, and its members,^{23/} such a political remedy for violation of the ICRA should be invoked by the BIA very carefully and only as a last resort to handle a difficult problem of intergovernmental relations. I would suggest that the BIA should not recommend such action unless it finds that the record of the affected tribal government evidences a persistent and flagrant disregard for the necessity of complying with the ICRA or a persistent and gross pattern of abuse of rights granted under the ICRA. Even then, before exercising its discretion to recommend to Congress *temporary* cessation of the government-to-government relations with an offending tribe, the BIA should consider whether the remedy is likely to produce a change in tribal government that will improve the tribe's record of ICRA compliance and it must weigh what monetary obligations such a recommendation may impose on the federal government for abrogation of Indian rights protected under the fifth amendment protections against the taking of property without just compensation. When the BIA recommends disruption of the government-to-government relations with a tribe, it ought to offer the tribe or its members remedial services necessary to overcome the deficiencies it has found in enforcement by tribal institutions of the mandates of the ICRA.^{24/}

23. The unhappy history of Indian experience with the devastating policy of termination promoted during the 1950's indicates the problems with the cessation of federal relations with an Indian tribe, including the withdrawal of federal services and benefit programs for Indians. See generally, F. Cohen, *Handbook of Federal Indian Law* 152-80 (1982 ed.); M. Price & R. Clinton, *Law and the American Indian: Readings, Notes and Cases* 83-86 (1983); Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 *Amer. Ind. L. Rev.* 139 (1977); Herzberg, *The Menominee Indians: Termination to Restoration*, 5 *Amer. Ind. L. Rev.* 143 (1978); Felsenthal & Preloznic, *The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Property Rights Following Termination*, 51 *N.D. L. Rev.* 53 (1974).

24. Under the Indian Self-Determination Act of 1975, for example, where a Secretary declines to enter into a program contract or grant relationship with a tribe on the ground that the tribe is incapable of properly executing the program within the criteria specified in the Act, the Secretary is required by law to "provide to the extent practicable assistance to the tribe or tribal organization to overcome his state objections." 25 U.S.C. § 450f(b). Since derecognition of a tribal government would have even more momentous consequences for the tribe and its members, should the

Exhibit No. 11 (cont.)

Obviously, the BIA also can use its ultimate power to recommend derecognition of tribal governments to *negotiate* interim solutions of ICRA problems with tribal governments perceived to be persistently offending ICRA rights. There is a considerable difference, however, between negotiating a resolution of a pattern of abuse of ICRA rights by a tribal government and ordering a remedy in an individual case. Short of exercising its power to recommend derecognition, the role of the BIA primarily should be one of diplomacy with Indian tribes, just as the Department of State utilizes diplomacy to attempt to remedy perceived human rights abuses in foreign nations.

Conclusion

Judicious use by the Department of the Interior of the powers of disapproval, rescission of program contracts and grants, negotiation, recognition of tribal governments, and, ultimately but sparingly, the power to recommend the *temporary* cessation of government-to-government relations with tribal governments that have demonstrated a persistent pattern of abuse of ICRA rights has the advantage of affording a tribally-specific cure for patterns of persistent ICRA abuse.^{25/} By contrast any effort to shift such cases to federal courts by creating a federal civil cause of action for violation of the ICRA, thereby returning to the *pre-Martinez* case law, would be more disruptive of than helpful to the enforcement of Indian rights. It would severely penalize those tribal governments that have made great progress in enforcing the ICRA. It would disruptively shift the primary burden of enforcing the ICRA from tribal institutions to federal courts, thereby potentially retarding the willingness of

Department of the Interior decide to recommend cessation of the government-to-government relationship with a tribe due to noncompliance with the provisions of the ICRA, it should be obligated to provide at least as much assistance.

25. For a more general discussion of the importance of tribally-specific problems, see, Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 Hamline L. Rev. 543 (1985).

Exhibit No. 11 (cont.)

some tribal institutions to seriously enforce the ICRA when they know they always will be "second-guessed" by federal courts and creating great disrespect for tribal governmental institutions among the governed. Finally, creating such a federal cause enforceable in federal district courts *unnecessarily* would interfere with and impede Indian treaty-guaranteed rights of tribal self-government and autonomy. Due respect for the self-determination rights of Indian tribes, protected by treaty and statute, *at most* suggests the creation of a review power in the United States Supreme Court, akin to the writ of certiorari jurisdiction exercised over state courts to assure the supremacy of federal law, to enforce tribal conformity to the ICRA. While not endorsing such a statutory change, I have drafted such a provision for consideration by the Commission.

The BIA also quite definitely has a role, albeit a quite limited role, to play in the enforcement of the Indian Civil Rights Act. That role, however, is primarily one of education, funding, support, and diplomacy, backed ultimately by the power to recommend *temporary* cessation of the government-to-government relations with offending tribal governments until civil rights abuses have been corrected. The power vested in the BIA should not and does provide legal remedies in individual cases other than those involving the exercise of approval powers expressly delegated to the Secretary of the Interior by federal statutory law or tribal constitutions. Any effort to enlarge the role of the BIA in enforcing the ICRA beyond that described here would clearly run afoul of treaty protected promises of tribal self-government, the well established principle of tribal sovereignty, Congressional policy and mandate contained in the Indian Reorganization Act and related statutes, and general thrust announced in federal Indian policy of fostering and supporting Indian tribal self-government by respecting the government-to-government relations between federal and tribal institutions.

Exhibit No. 12

Stephen L. Pevar
Appendix to Testimony

<u>Allegation of Tribal Abuse</u>	<u>Case</u>
1. Prohibiting certain tribal members from holding tribal office	<u>Luxon v. Rosebud Sioux Tribe</u> , 455 F.2d 689 (8th Cir. 1972); <u>Howlett v. Salish and Kootenai Tribes</u> , 529 F.2d 233 (9th Cir. 1976)
2. Failure to abide by tribal regulations regarding eligibility for enrollment	<u>Williams v. Chippewa-Cree Tribe</u> , 4 ILR F-107 (D. Mont. 1977)
3. Failure to abide by tribe's own laws	<u>Williams v. Sisseton-Walpelton Sioux Tribal Council</u> , 387 F. Supp. 1194 (D.S.D. 1975)
4. Discrimination in enrollment criteria	<u>Santa Clara Pueblo v. Martinez</u> , U.S. (1978)
5. Attempted removal of chairperson by tribal council	<u>Rank v. Crow Creek Tribe</u> , 4 ILR F-111 (D.S.D. 1977)
6. Residence requirement for tribal office	<u>St. Marks v. Chippewa-Cree Tribe</u> , 4 ILR D-11 (9th Cir. 1976); <u>Howlett v. Salish and Kootenai Tribes</u> , 529 F.2d 233 (9th Cir. 1976)
7. Intentional interference with right to vote	<u>Means v. Wilson</u> , 522 F.2d 833 (8th Cir. 1975)
8. Reapportionment	<u>White Eagle v. One Feather</u> , 478 F.2d 1311 (8th Cir. 1973); <u>Pomani v. Crow Creek Tribe</u> , 418 F. Supp. 166 (D.S.D. 1976); <u>Brown v. U.S.</u> , 486 F.2d 658 (8th Cir. 1973);
9. Conspiracy in tribal election	<u>Indian Pol. Act. Comm. v. Tribal Exec. Comm.</u> , 3 ILR G-118 (D. Minn. 1976)
10. Qualifications for tribal office	<u>Mousseaux v. Rosebud Sioux Tribe</u> , 5 ILR C-34 (8th Cir. 1978)

Exhibit No. 12 (cont.)

11. Irregularities in tribal elections (bribery, fraud, etc.) Crowe v. Eastern Band of Cherokee Indians, 5 ILR B-26 (4th Cir. 1978); Burnette v. Rosebud Sioux Tribe, 5 ILR F-68 (D.S.D. 1977); Rosebud Sioux Tribe v. Driving Hawk, 534 F.2d 98 (8th Cir. 1975); White v. Tribal Council, 383 F. Supp. 810 (D. Minn. 1974)
12. Dismissal from tribal employment Takes Gun v. Crow Tribe, 5 ILR F-92 (D. Mont. 1978)
13. Banishment from reservation; taking of private property Hennessey v. Dimmler, 5 ILR G-15 (N.Y. County Ct. 1977)
14. Cancellation of land assignment without notice or hearing Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200 (9th Cir. 1973)
15. Wrongful termination of tribal employment Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975)
16. Wrongful foreclosure of tribal loan O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973)
17. Taking one member's land and giving it to another member Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231 (4th Cir. 1974)

Exhibit No. 13

Allegation of Abuse: Rapid City Testimony

1. Police brutality (no recourse).
2. Banishment from the reservation.
3. Violation of privilege against self-incrimination.
4. Arrest and incarceration without charges being filed (Judge Guerue estimates 300+ in 5 months).
5. Dismissal of tribal judges and prosecutors by tribal council in retaliation (Pine Ridge prosecutor fired 8 times).
6. Overruling court decision by tribal council or by council member (court decrees are "essentially a sham"--Remerowski).
7. Lack of standards and training for police.
8. Nepotism; unfair hiring practices.
9. Undue influence by tribal council members on police dept.
10. Removal of police officers for political reasons.
11. Election irregularities ("very, very serious problems"--Krista Clark).
12. Lack of independence of tribal court.
13. 40% of Legal Aid cases were ICRA violations--Remerowski.
14. "There are widespread violations of people's rights to due process of law under the ICRA."--Krista Clark.
15. Unnecessary ex parte orders.
16. Barring members from holding tribal office.
17. Having one judge reverse decision of companion judge.
18. Lower courts ignoring decision of appellate court ("I don't think that precedent means anything."--Krista Clark).
19. Tribal law protecting sovereign immunity prevents ICRA suits.

Exhibit No. 14

Oglala Sioux Tribe

OFFICE OF PERSONNEL

P. O. Box 439

Pine Ridge, South Dakota 57770

(605) 867-5821, Extension 218

January 8, 1987

MEMORANDUM

TO: Charmaine Wisecarver, Director
Transportation Department

FROM: Personnel Director/ *EK*

SUBJ: PERSONNEL BOARD DETERMINATIONS

Attached is a copy of the findings made by the Personnel Board on January 4, 1988 concerning your termination of employment. A letter to this effect has been given to President American Horse and the Executive Committee. Based upon consideration of all available information presented, the Personnel Board took the following action through formal motion and vote:

Motion #1. Motion by Anita Ecoffey, Wounded Knee Board Member, to reaffirm the previous actions of the Personnel Board to reinstate Charmaine Wisecarver, Transportation Director and Dennis King, JTPA Director, to their respective positions and that both employees be paid immediately according to timesheets submitted, and that both Directors be given keys to their offices; motion seconded by Irma Bear Stops, Wanblee Board Member. Vote: 6 for, 0 against. Motion carried.

Motion #3. Motion by Irma Bear Stops, Wanblee Board Member, to request that the Personnel Board be placed on the agenda of the upcoming Tribal Council meeting (date to be determined); motion seconded by Anita Ecoffey, Wounded Knee Board Member. Vote: 6 for, 0 against. Motion carried.

Please call if you have any questions.

brs

Attachment

Exhibit No. 14 (cont.)

Joe American Horse, January 7, 1988
Page Two

COPY

Further, the Personnel Board has made the following findings:

1. There was no evidence of due process opportunity afforded either employee prior to termination as required by federal regulations and cited in the Equal Employment Opportunity Law, The Indian Civil Rights Act of 1968 and the Oglala Sioux Tribal Merit System Ordinance of 1950, No. 80-06. In both instances, specific charges, allegations, dates, documentation or reference to prior disciplinary actions were absent or non-existent. The specific procedure governing termination actions is defined in ARTICLE XVI, TERMINATION, TENURE AND STATEMENT, Section 3, Types of Disciplinary Action, No. 3. Termination through the Personnel Director, the appointing authority, 15 days after notice in writing to an employee stating specific reasons, may dismiss any employee who is negligent or inefficient in his duties or is unfit to perform his duties, who is found guilty of gross misconduct, or who is convicted of any crime involving moral turpitude. When such conviction is final, the employee may have recourse to the Personnel Board.

The Personnel Board unanimously found that the insubordination allegations upon which Ms. Wisecarver and Mr. King were terminated, were unfounded. Accordingly, the Personnel Board sustains the validity of the legal appointments of Charmaine Wisecarver and Dennis King.

2. That, the Tribal Treasurer is not legally empowered to implement, manage or monitor the centralized tribal personnel system, nor is she authorized to undertake personnel actions relevant to hiring and firing employees. In this particular action, Tribal Treasurer, Anita Janis, acted beyond and outside her authority as stated within the Oglala Sioux Tribal Constitution. The Personnel Board views this action as a violation of the Tribal Personnel Ordinance, as well as the previously named federal employment laws and of civil rights guarantees enacted to protect tribal members.

The Personnel Board will appeal this action to the Tribal Council to cease further inconsistent applications of personnel management regulations.

3. That, withholding salary checks for Ms. Wisecarver and Mr. King is an illegal action due to the initial action taken on December 15, 1987 in which the two employees were reinstated and directed to continue in their respective positions. Any compensation legally entitled to any employee for hours worked or expenses incurred is to be paid without discrimination. Withholding payment of compensation to employees is a violation of federal employment and compensation laws governing organizations who hold federal contracts, i.e., Fair Labor Standards Act, Equal Employment Opportunity, Title VII of the Civil Rights Act and the Tribal Employment Rights Ordinance (TERO). Continued illegal salary compensation procedures may subject the Oglala Sioux Tribe to outside federal agency(ies) investigation and intervention.

The Personnel Board has determined that Ms. Wisecarver and Mr. King are to be paid immediately in terms of salary or expenses.

4. That, the communications to the public from Ms. Wisecarver and Mr. King regarding their respective programs' activities or budgets via radio broadcasts

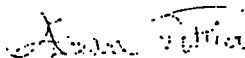
Exhibit No. 14 (cont.)

Joe American Horse, January 7, 1988
Page Three

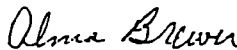
or other media does not "jeopardize" continued credibility of our tribal government. The Personnel Board has determined that Ms. Wisecarver and Mr. King have maintained open communication with their particular Advisory Boards, the OST Transportation Board and the Crazy Horse Planning Commission, respectively, in reviewing program activities, objectives, proposals and problem areas. The Personnel Board has concluded that the Freedom of Information Act and the right to freedom of speech must be maintained and upheld in order to provide accurate information to the general tribal membership.

Based on the above findings, the Personnel Board will continue to recognize Charmaine Wisecarver and Dennis King as the OST Transportation Director and JTPA Director, respectively, as legal appointments within the Oglala Sioux Tribe's Merit System. Any outstanding salary payments should be immediately released and keys to the new locks to their offices be given both Directors.

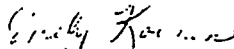
Sincerely,



Pearl Cottier, Chairperson
OGLALA SIOUX TRIBE PERSONNEL BOARD



Alma Brewer, Vice-Chairperson
OGLALA SIOUX TRIBE PERSONNEL BOARD



Emily Koenen, Personnel Director
OGLALA SIOUX TRIBE

brs

COPY

Exhibit No. 14 (cont.)

P. O. Box 194
Manderson, S. D.
57756
January 20, 1988

JAN 25 1988

Stephen Pevar
American Civil Liberties Union
2160 S. Holly
Room 201
Denver, Co. 80222

Dear Mr. Pevar:

The following is the information we discussed on Jan. 11, 1988, via telephone. Within the past two (2) years these are some of the violations of Tribal law that have occurred on our reservation, the Pine Ridge reservation, for which the victims have no recourse.

1. King and Wisecarver

Dennis King, Director of the Oglala Sioux Tribe (OST) Job/Training Partnership Act program, and Charmaine Wisecarver, OST Transportation Director, were asked questions about their federally funded programs at a public meeting. The information was published in a local newspaper. Two days later they were given one (1) hour's notice of termination from their jobs by the Tribal Treasurer. No hearing or appeal process was given.

As the two directors were hired according to Tribal Ordinance No. 80-06, OST Personnel Merit System, certain procedures were to be followed. The OST Personnel Board, after conducting two hearings which the Treasurer refused to attend, did support the program directors and told them to return to work. However, the Tribal Treasurer refuses to release their pay checks. The two directors have been working without pay for almost five weeks. There is no procedure to force the Tribal Treasurer to release their pay checks. (See note)

2. Margaret Moore

Margaret Moore was the Director of the Higher Education Program for the Oglala Sioux Tribe. Based on false allegations, she was suspended from her position without prior notice.

Note: On Jan. 21, the Oglala Sioux Tribal Council voted 5 to 5 in support of the Treasurer's termination, and set a hearing date for sometime in February. This is the complete opposite of their process. King & Wisecarver have yet to present their views.

Exhibit No. 14 (cont.)

After completing the administrative procedures, Ms. Moore was reinstated by the Personnel Board without back pay for three months, and told to reapply for the position as the qualifications had been changed during her absence. However, the OST Contracts Compliance Officer found the changes to be unapproved by the funding agency and told the Personnel Board to readvertise the position. The Personnel Board refused and terminated Ms. Moore.

The issue was then taken to Tribal Court and the original allegations were found to be false. The Court reinstated Ms. Moore with back pay. The decision was appealed and the Appellate Court affirmed the original decision in favor of Ms. Moore.

The Tribal Council then enacted Resolution No. 87-76, granting the Tribal Council, and all tribal employees and programs immunity from suit. They also overruled the two previous court decisions and created a new panel of judges to again hear the case. Ms. Moore was originally suspended Nov. 25, 1985.

3. Carrie Twiss

Carrie Twiss was the Director of the Tribal Employment Rights Office. Mrs. Twiss was asked to give a meeting report on the local radio station. After the broadcast, she received a written reprimand based on false charges by the Tribal President. She was further never given a hearing on the reprimand. When she was physically threatened by a Tribal Council member, she was told by the Tribal Court that a restraining order could not be issued because of the Immunity Resolution No. 87-76. She was then verbally assaulted during a Tribal Council session by a Tribal Council Representative and suspended without pay. She is unable to receive a hearing on this matter. She was suspended on Oct. 16, 1987.

4. Hay Contract

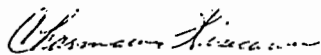
In 1985 the reservation experienced a severe drought. An emergency Hay Program was contracted with the BIA to purchase additional hay for the local ranchers for winter feed. A verbal agreement was given to a local rancher who could purchase enough hay in the eastern part of the state. However, when the rancher, Joe Merrival asked about the contract, he was informed that the bidding process was waived and the hay was being purchased from a local banker. Indian preference was not waived but the Tribal Council would not change the agreement. Mr. Merrival has no recourse as Resolution No. 87-76 does not allow the Tribe to be sued.

Exhibit No. 14 (cont.)

I hope this information is helpful and can be used to establish some individual rights on reservations. There are a number of other incidents that could be reported but this letter would become a volume.

Thank you for any help you can give.

Sincerely,



Charmaine Wisecarver

cc: Margaret Moore
Dennis King
Carrie Twiss
Joe Merrival

Exhibit No. 14 (cont.)

RESOLUTION NO. 87-76

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL
OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION OF THE LEGALITY OF COURT ORDERS OF THE OGLALA SIOUX TRIBAL COURT AND TRIBAL COURT OF APPEALS IN THE CASE OF MARGARET MOORE V. OGLALA SIOUX TRIBAL PERSONNEL BOARD, ET AL.

WHEREAS, Article IV, Section a (k) of the Oglala Sioux Tribal Constitution provides that the Tribal Council shall have the authority "(k) to promulgate and enforce ordinances. . . governing the conduct of members of the Oglala Sioux Tribe and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers, and

WHEREAS, Article V of the Tribal Constitution further provides that the judicial power of the Oglala Sioux Tribe shall be vested in court or courts which the tribal council may establish, and

WHEREAS, pursuant to its constitutional authority, the Oglala Sioux Tribal Council has established a tribal court and tribal court of appeals and has defined the "duties and powers" of said courts, and

WHEREAS, the Oglala Sioux Tribe, its departments and programs and tribal officials acting in their official capacities provided in the Supreme Court case of Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978) and like cases, and

WHEREAS, the Oglala Sioux Tribe granted a partial waiver of its immunity from suit by the passage of ordinance No. 76-03, as amended by Ordinance No. 77-11, which prohibited the tribal courts from entertaining any action against the Oglala Sioux Tribe, a tribal government agency, or any tribal official, or employee complaining of official conduct thereof" unless the plaintiff first exhaust tribal administrative remedies as provided in said ordinances, and

WHEREAS, because the tribal courts were rendering monetary judgments against the Oglala Sioux Tribe without regard to the tribal finances, the Tribal Council passed Ordinance No. 86-09 on October 8, 1986, which repealed Ordinance No. 76-03, as amended, and prohibited any further lawsuits against the Oglala Sioux Tribe in tribal court by providing that:

Unless specifically waived by the Oglala Sioux Tribal Council Resolution or Ordinance, which resolution or ordinance makes specific reference to a waiver of sovereign immunity, the Oglala Sioux Tribe, the Oglala Sioux Tribal Council and all Oglala Sioux Tribal Officers, and employees, including all tribally chartered entities

Exhibit No. 14 (cont.)

RESOLUTION NO. 87-76

Page Two

performing governmental services, provided these tribally chartered entities have not in their charters consented to sue or to be sued, shall be immune from suit in any civil action for any liability arising from the performance of their official duties, based upon the doctrine of sovereign immunity,

and

WHEREAS, it was the intent of the tribal council that in suits in which the Tribe, tribal departments and programs, tribally chartered organizations and tribal officials and employees acting in their official capacities shall no longer be subject to suit in any tribal court, unless "specifically" authorized by the Tribal Council, and that the tribal council shall directly hear and determine such suits, and

WHEREAS, the Oglala Sioux Tribal Court and Oglala Sioux Tribal Court of Appeals have ignored the Tribal Council's mandate in Ordinance 86-09 and have assumed jurisdiction over the case of Margaret Moore v. Oglala Sioux Tribal Personnel Board, et al. which has resulted in a judgment of \$20,740.00 against the Oglala Sioux Tribe, plus reinstatement to a position within the Tribe (i.e., Higher Education Grants Director) for which she is not qualified, and

WHEREAS, the Oglala Sioux Tribe has reviewed the actions of the Tribal Court and Tribal Court of Appeals in the Moore case and find that said courts have exceeded their authority under Ordinance No. 86-09, now

THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council hereby declares that all court orders and final judgments entered in the case of Margaret Moore v. Oglala Sioux Tribal Personnel Board, et al. are hereby declared null and void for the reason that said court orders and judgments were entered contrary to the prohibitions contained in Ordinance 86-09, and

BE IT FURTHER RESOLVED, that all judges of the Oglala Sioux Tribal Court and Tribal Court of Appeals are hereby directed and ordered not to entertain any lawsuit or other proceeding filed against "the Oglala Sioux Tribe, the Oglala Sioux Tribal Council and all Oglala Sioux Tribal officers, and employees, including all tribally chartered entities performing governmental services (unless the charters contain a consent to suit)" except where the tribal council by resolution or motion allows the plaintiff to file suit against such tribal parties in tribal court, and

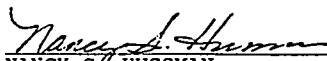
BE IT FURTHER RESOLVED, that Margaret Moore shall be given a full hearing on her claim before the Tribal Council on July 23, 1987, or as soon thereafter as her claims can be heard and the decision of the Tribal Council shall be final.

Exhibit No. 14 (cont.)

RESOLUTION NO. 87-76
Page Three

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned, Secretary of the Oglala Sioux Tribal Council, hereby certify that this resolution was adopted by the vote of: 13 for; 0 against; 2 not voting, during a REGULAR Session held on the 14th day of JULY, 1987.


NANCY S. HUSSMAN
Secretary
Oglala Sioux Tribe

A-I-I-E-S-T:



JOE AMERICAN HORSE
President
Oglala Sioux Tribe



Exhibit No. 15

This exhibit is on file at the U.S. Commission on Civil Rights.

Exhibit No. 16**JUDGES ROSTER**

1/88

<u>NAME</u>	<u>TITLE</u>	<u>COURT</u>
1. Bill, Esther	Associate Judge	Yakima
2. Booth, Ira	Associate Judge	Metlakatla
3. Bostrom, Marguerite	Judge	NICS/Puyallup
4. Boyd, Willie	Associate Judge	Spokane
5. Brady,, William	Judge	Sitka
6. Burke, Louise	Associate Judge	Flathead
8. Chenois, Edith	Chief Judge	Quinault
9. Clements, George	Appellate Judge	Warm Springs
10. Coochise, Elbridge	Chief Judge	NICS
11. Duggan, Grace	Chief Judge	Suquamish
12. Dulik, Emma	Chief Judge	Makah
13. Dundas, Lena	Chief Judge	Metlakatla
14. Dupris, Anita*	Chief Judge	Colville
15. Dupuis, Don	Judge	Flathead
16.	Chief Judge	Warm Springs
17. Finkbonner, Charles	Chief Judge	Lumi
18. Fry, Betty*	Associate Judge	Colville
19. Gabori, Fred*	Judge	
20. Gonzales, Robert	Judge	Shoshone-Bannock
21. Greeley, Hamilton	Appellate Judge	Warm Springs
22. Greene, Verbena	Appellate Judge	Warm Springs
23. Guthrie, Milne	Associate Judge	Metlakatla
24. Harding, David	Chief Judge	Burns-Paiute
25. Hawk, Cecelia	Associate Judge	Suquamish
26. Hevessey, Iva	Associate Judge	Spokane
27. Hostnik, Charles*	Judge	NICS
28. Hutchinston, Douglas*	Judge	NICS
29. Ike, Daisy	Appellate Judge	Warm Springs
30. Irvin, Rosemary*	Chief Judge	Puyallup/NICS
31. Jackson, Anita	Associate Judge	Warm Springs
32. Jackson, Nesha	Associate Judge	Yakima
33. Johnson, Buford, Jr.	Appellate Judge	Warm Springs
34. Johnson, William*	Associate Judge	Umatilla
35. Kalama, George	Judicial Officer	Nisqually
36. Lane, Cheryl	Associate Judge	Siletz
37. LaSarte, Bernard	Associate Judge	Coeur d'Alene
38. Littlefield, Ted	Associate Judge	Metlakatla
39. Lohah, Charles	Judge	Shoshone-Bannock
40. Lozar, S.A. "Bud"	Judge	Flathead
41. Lynn, Clyde	Judge	Spokane
42. Maloney, Doreen	Judge	Upper Skagit
43. Mankiller, Kermit	Judge	Nez Perce
44. Martinez, Daniel	Appellate Judge	Warm Springs
45. Miles, Wanda	Judge	Nez Perce
46. Newman, Josephine	Associate Judge	Flathead
47. Ortloff, Lauretta	Associate Judge	Yakima

JUDGES ROSTER - 1
1000/J.ROSTER1

Exhibit No. 16 (cont.)

JUDGES ROSTER

CONTINUED

<u>NAME</u>	<u>TITLE</u>	<u>COURT</u>
48. Ough, Oscar	Chief Judge	Kalispel
49. Pascal, Conrad	Judge	Spokane
50. Peters, Mike	Judicial Officer	Squaxin Island
51. Pinkham, Julian	Associate Judge	Yakima
52. Purser, Rose	Associate Judge	Pt. Gamble Klallam
53. Quinones, Carol Anne	Youth Court Judge	Kalispel
54. Robertson, Diane M.	Judge	Siletz
55. Roe, John*	Judge	Siletz
56. Rosander, Francis	Judge	Quinault
57. Rosario, Patricia	Associate Judge	Lummi
58. Rowe, Nina	Appellate Judge	Warm Springs
59. Settler, Alvin	Judge	Yakima
60. Shelton, Lawrence	Magistrate	Tulalip
61. Smith, Carrie	Judicial Officer	Squaxin
62. Smith, Claude	Cf. Appellate Jdg.	Warm Springs
63. Smith, Woodrow, Sr.	Appellate Judge	Warm Springs
64. Sohapp, Lola	Associate Judge	Warm Springs
65. Stewart, Howard	Associate Judge	Colville
66. Unger, Betty	Judge	Siletz
67. Viles, Cynthia	Judge	Siletz
68. Viles, Mary s.	Acting Chief Judge	Siletz
69. Vitalis, Jean	Juvenile Judge	Makah
70. Wallulatum, Vincent	Appellate Judge	Warm Springs
71. Ward, David*	Chief Judge	Yakima
72. Whitford, Jeannette	Chief Judge	Kootenai
73. Wohali, Sam	Chief Judge	Coeur d'Alene
74. Williams, Marilyn	Judge	Upper Skagit
75. Wynecoop, Richard	Chief Judge	Spokane,

*Attorneys

JUDGES ROSTER - 2
1000/J.ROSTER1

Exhibits Submitted After the Hearing

Exhibit No. 17



MOUNTAIN STATES REGIONAL OFFICE

2160 So. Holly Suite 201
Denver, CO 80222
(303) 753-1214

Dorothy Davidson
DIRECTOR

Stephen L. Pevar
STAFF COUNSEL

February 1, 1988

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944-3800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

Chairman Clarence M. Pendleton
U. S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, DC 20425

Dear Chairman Pendleton:

It was a pleasure to testify before the U.S. Commission last week, and I appreciated the opportunity to do so.

On my way back to Denver, I thought of one additional point that I should have made. During my testimony, I listed the reasons why a private right of action must be permitted to tribal members so that they can challenge civil rights abuses. Included in that list should have been the following.

It has long been recognized that in order to perform its high function in the best way, "justice must satisfy the appearance of justice." In re Murcheson, 349 U.S. 133, 136 (1955). The lack of an avenue of recourse for civil rights abuse fails to satisfy the appearance of justice.

Violations of civil rights, of course, should not go without redress. However, perhaps even more destructive to the individual and to the tribe is the lack of an avenue by which to complain.

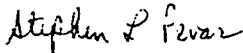
Even when someone loses a civil rights action, the satisfaction of knowing that he or she had a day in court is not only important to the individual but also to the system. Like an escape valve on a steam pot, access to the judiciary allows the release of pressure that otherwise would cause an explosion. Unfortunately, this type of pressure is now building within Indian country because there is no avenue for redress of civil rights problems.

Exhibit No. 17 (cont.)

Chairman Clarence M. Pendleton
February 1, 1988
Page Two

Thus, many Indians today carry with them a fear of a civil rights abuse even if they have not suffered an abuse. They carry this fear because they know that, if they are abused, they have no place to turn for meaningful relief. This lack of recourse has produced a noticeable level of fear, and also a frustration, that would be eliminated by the passage of remedial legislation.

Sincerely yours,



Stephen L. Pevar

SLP:cmd

315

Exhibit No. 18

TRIBAL COUNCIL
Organized April 18 1918
(Revised Constitution and By-Laws, January 6, 1959)

RED LAKE BAND of CHIPPEWA INDIANS

Phone 218/679-3341
RED LAKE, MINNESOTA 56671



RESOLUTION NO. 53-88

RE: Response to January 28, 1988 hearing of the
Sub-Committee of the Civil Rights Commission
on enforcement of the ICRA

WHEREAS, a Sub-Committee of the U.S. Commission on Civil Rights, chaired by Clarence Pendleton, conducted a one-sided hearing on January 28, 1988 at Washington, D.C. on enforcement of the Indian Civil Rights Act, which amounted to a vicious attack on Tribal Sovereignty and autonomy of the Red Lake Band of Chippewa Indians; and,

WHEREAS, none of the January 28th testimony referred to the established nation to nation or Government to Government relationship which the U.S. Government has recognized with the Red Lake Band of Chippewa Indians which must take precedence over recommendations made to congress by Federal Agencies; and,

WHEREAS, at the January 28, 1988 hearing, a 1972 law review article was entered into the record but the foreword in the same law review by a prominent official and recognized authority on Indian Affairs, commenting on the article, was ignored and not entered into the record. In this foreword, it was stated that "Whether tribal sovereignty is still available to Indian tribes as a defense against seeming violations of Indian Civil Rights in view of the Indian Civil Rights Act of 1968 is the main issue of the note entitled "Tribal Injustice-The Red Lake Court of Indian Offenses". This article serves to bring out the perennial demand that Indian tribal governments, including their courts, meet ethical standards in all of their operations while this goal has not been met by other units of local government. Incidents like those pointed out in relation to the Red Lake Court are plentiful in other courts of the land, and all courts are facing the tasks of judicial

— RED LAKE ENTERPRISES —

Red Lake Indian Sawmills (73 Years)	Red Lake Cedar Fence Plant	Chippewa Arts
Red Lake Housing Industry	Red Lake Fishing Industry (60 Years)	Home of the Famous, Red L...

Exhibit No. 18 (cont.)

TRIBAL COUNCIL
Organized April 18, 1918
(Revised Constitution and By-Laws, January 6, 1959)
RED LAKE BAND of CHIPPEWA INDIANS

Phone 218/679-3341
RED LAKE, MINNESOTA 56671



UPPER RED LAKE

● PONEMAH

LOWER RED LAKE

LITTLE ROCK ●

RED LAKE ●

● REDBY

Res. No. 53-88
Page two

review and upgrading of their functions. The Red Lake Indian Reservation, having been considered a "closed" reservation has yielded less to the intrusion of "outsiders" than any other in the upper Midwest. There is therefore greater concern by the tribe about its prerogatives in the exercise of tribal sovereignty and the effect of any imposed standards for the operation of tribal government. This is not to say there is no room for improvement but it does mean that the process of improvement must be self-engendered. This is one of the situations where impatience to set things right may be self-defeating since political control remains with the Red Lake Band officials"; and,

WHEREAS, the Red Lake Tribal Council, acting for and on behalf of the Red Lake Band of Chippewa Indians, looks upon the Act of April 11, 1968, title 11 as another in a long line of travesties, affording no discretion whatsoever to the Red Lake Band, in the matter of accepting or rejecting terms; and,

WHEREAS, Congressmen Aspinall, Haley, Morris, Rhodes and Kyle introduced a bill on May 2, 1968, less than a month after enactment of the Act of April 11, 1968, to Amend the ICRA and keep it from the possibility of being forced on the Indians and instead, provided that the Indian Tribes be urged to include certain of the provisions in their organizational documents; and,

WHEREAS, the Sub-Committee is obviously unaware that Congress transformed an Agreement with the Red Lake Band into Federal Law guaranteeing our Red Lake Independence and that nothing in the Agreement shall be construed to deprive the Red Lake Indians of any benefits to which we are entitled to under existing Treaties and Agreements; and,

— RED LAKE ENTERPRISES —

Red Lake Indian Sawmills (73 Years) / Red Lake Cedar Fence Plant / Chippewa Arts & Craft Shop
Red Lake Housing Industry / Red Lake Fishing Industry (60 Years) . . . Home of the Famous Red Lake . . .

Exhibit No. 18 (cont.)

TRIBAL COUNCIL
Organized April 18, 1918
(Revised Constitution and By-Laws, January 6, 1959)

RED LAKE BAND of CHIPPEWA INDIANS

Phone 218/679-3341
RED LAKE, MINNESOTA 56671



UPPER RED LAKE

● PONEMAH

REDLAKE ●

● REDBY

Res. No. 53-88
Page three

WHEREAS, it was general knowledge then as it is now that one of the "any benefits" referred to was the right to govern ourselves, free from outside interference; and,

WHEREAS, it is the firm position of the Red Lake Tribal Council that Red Lake Indian customs, culture and Tribal organization should not be forced into an anglo-saxon mold; that the right of the Red Lake Band to control its own internal organization and form of tribal government has long been recognized by the Executive, Legislative and Judicial branches of the United States Government; that any modification of Tribal customs, culture and Tribal Organization should not be imposed by the United States without the consent of the Indians; that we the Red Lake Tribal Council, Red Lake Band of Chippewa Indians, have our own written basic organization document - the Constitution of the Red Lake Band, which was approved by the U.S. Government, with which to govern ourselves, free from outside interference; and,

WHEREAS, the inherent sovereign power of the Red Lake Band of Chippewa Indians, though being recognized by the Federal Government, was not created by the Federal Government; the Red Lake Indians were found here, we were not placed here by the U.S. Government and cannot be classified as a conquered people where the laws of the Conqueror might prevail; now,

THEREFORE, BE IT RESOLVED, that the Red Lake Tribal Council does hereby go on record as opposing and objecting to any attempt to enforce application of the ICRA on the Red Lake Band of Chippewa Indians which would be in direct contradiction to and violation of prior agreement, policies and treaties between the Red Lake Band of Chippewa Indians

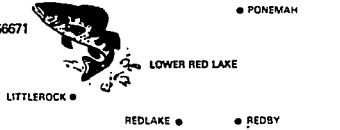
— RED LAKE ENTERPRISES —

Red Lake Indian Sawmills (73 Years) / Red Lake Cedar Fence Plant / Chippewa Arts & Craft Shop
Red Lake Housing Industry / Red Lake Fishing Industry (60 Years) . . Home of the Famous Red Lake Villages

Exhibit No. 18 (cont.)

TRIBAL COUNCIL
Organized April 18, 1918
(Revised Constitution and By-Laws, January 6, 1959)
RED LAKE BAND of CHIPPEWA INDIANS

Phone 218/679-3341
RED LAKE, MINNESOTA 56671



Res. No. 53-88
Page four

and the United States Government; and as such agreements, policies and agreements were considered and recognized when the Red Lake Band was excepted from P.L. 280; and it is hereby requested that the Red Lake Band of Chippewa Indians be excepted from any proposal which it deems detrimental to the best interests of the Red Lake Band of Chippewa Indians; and,

RESOLVED FURTHER, that the Red Lake Tribal Council hereby asserts the CLOSED RESERVATION status of the Red Lake Indian Reservation and will oppose and object to any and all attempts to change our legal and land status which was the legacy left by our forefathers to enjoy without outside interference.

RESOLVED FURTHER, that Fran Ayer, Red Lake Legal Counsel, is hereby authorized and directed to submit this Resolution as response to the Sub-Committee of the Civil Rights Commission Hearing on January 18, 1988 and to register the Red Lake Band's position, objection and opposition.

RESOLVED FURTHER, that copies of this Resolution be sent to: Clarence Pendleton, Chairman; Sub-Committee of CCR: Daniel Inouye, Chairman, Senate Select Committee on Indian Affairs; Morris Udall, Chairman, Committee & Interior and Insular Affairs and the Minnesota Congressional Delegation.

FOR: 9
AGAINST: 0

We do hereby certify that the foregoing resolution was duly presented and enacted upon at the Special Meeting of the Tribal Council held on Saturday, February 20, 1988 at the Holiday Inn, Bemidji, Minnesota.

Roger A. Jourdain Roger A. Jourdain, Chairman
Royce Graves Sr. Royce Graves, Sr., Secretary

- RED LAKE ENTERPRISES -

Red Lake Indian Sawmills (73 Years) / Red Lake Cedar Fence Plant / Chippewa Arts & Craft Shop
Red Lake Housing Industry / Red Lake Fishing Industry (60 Years) . . . Home of the Famous Red Lake . . .

Exhibit No. 18 (cont.)

LAW OFFICES
PIRTLE, MORISSET, SCHLOSSER & AYER
A PROFESSIONAL SERVICE CORPORATION

M. FRANCES AYER*
KENNETH W. DEHN
FRANK R. JOZWIAK
PATRICIA A. MARKS**
MASON D. MORISSET
ROBERT L. PIRTLE
THOMAS P. SCHLOSSER
TERENCE L. THATCHER

PHILIP BAKER-SHENK*
OF COUNSEL

*DISTRICT OF COLUMBIA BAR
**PENNSYLVANIA STATE BAR
ALL OTHERS WASHINGTON STATE BAR

GLENN W. RADISH
INVESTIGATOR RESEARCHER
ILLINOIS AND TEXAS STATE BARS

PATRICIA A. MARKS**
LEGISLATIVE SPECIALIST

WILLIAM E. SIMONS
BUSINESS MANAGER
OREGON AND MAINE STATE BARS

THE FEDERAL BAR BUILDING
1815 "H" STREET N.W. SUITE 750
WASHINGTON, D.C. 20006-3604
FACSIMILE (202) 331-8738
(202) 331-8690

SEATTLE OFFICE
1500 KEY TOWER
1500 SECOND AVENUE
SEATTLE, WASHINGTON 98104-1046
FACSIMILE (206) 386-7322
(206) 386-5200

PLEASE REPLY TO WASHINGTON, D.C. OFFICE

March 11, 1988

Chairman Clarence M. Pendleton, Jr.
U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W.
Washington, D.C.

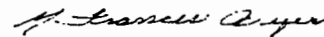
Dear Mr. Pendleton:

Enclosed are Resolution No. 53-88 and testimony of the Red Lake Band of Chippewa Indians. The Band requests that they be made a part of the record of the Commission's January 28, 1988 hearing on Enforcement of the Indian Civil Rights Act. This material is submitted within the 2 week extension of which I was apprised on January 29, 1988 by Deputy General Counsel Miller. The additional time is greatly appreciated.

As counsel to the Red Lake Band of Chippewa Indians, I would be pleased to meet with you or Commission staff to discuss any questions you have about the Band's testimony or to discuss allegations about the Band made to the Commission. The Band may provide the Commission with additional information at a later time.

Sincerely yours,

PIRTLE, MORISSET, SCHLOSSER & AYER



M. Frances Ayer

MFA:k1b

Enclosures

cc: Chairman Jourdain
Deputy General Counsel Miller

k1b/031188
MFA1.0/RED-PEND.L1

Exhibit No. 18 (cont.)

TESTIMONY OF THE RED LAKE BAND OF CHIPPEWA INDIANS
FOR THE RECORD OF THE HEARING ON ENFORCEMENT OF THE
INDIAN CIVIL RIGHTS ACT CONDUCTED BY THE
CIVIL RIGHTS COMMISSION IN WASHINGTON, D.C. ON JANUARY 28, 1988

INTRODUCTION

In the January 28, 1988 hearing of the Commission on Civil Rights (CCR), the Deputy General Counsel listed for the record a number of "significant events" alleged to have occurred on the Red Lake Reservation from 1972 to the present. One allegation was that the firing of the tribal treasurer in 1979 led to the burning of the Chairman's house. Another was that the press was barred from the Reservation in 1981; and in 1982 criminal defendants were denied jury trials. Mr. Miller noted that many alleged civil rights violations were listed in a 1972 law review article which was made a part of the record.

RELIANCE ON LAW REVIEW ARTICLE INAPPROPRIATE

A 16 year old essay in the North Dakota Law Review should not be relied upon to demonstrate the condition of the Red Lake Court today. The article itself is a rancorous tirade of unsupported allegations and blatant inaccuracies, both legal and factual. It also demonstrates that its author is lost somewhere between his tribal heritage and the non-Indian world. His contempt for tribal culture and history is obvious; yet, the poor legal scholarship demonstrates that he is not at home in the non-Indian legal world. The author left the reservation when he was a small boy and has never since lived there. It is notable that he was never able to pass a bar examination.

The author begins his 1972 essay with an incomplete recitation of the significant facts of Exparte Crow Dog, 109 U.S. 556 (1983). The case concerns the murder by Crow Dog of Spotted Tail, both Sioux Indians. The author does not note that Tribal law required the murderer to care for the victim's family. Incensed, the United States sought and received the death penalty for Crow Dog in a federal territorial court. The United States Supreme Court overruled, holding that Crow Dog was subject exclusively to tribal law. In so holding, the Supreme Court states as follows:

The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government . . . necessarily implies . . . that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation

Exhibit No. 18 (cont.)

by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

109 U.S. at 568.

The author reports that following the murder by Crow Dog a "judicial vacuum" or "void" necessitated the passage in 1885 of the Major Crimes Act, 18 U.S.C. § 1153, making murder by one Indian of another Indian within Indian country a federal crime.

The tragedy of the Congress' assessment seems patently clear. Indians killing Indians could now be killed rather than care for the dependent family of the victims.

That the tragedy of the Congress' assessment escapes the author is perhaps at the heart of what is wrong with the 1972 essay. He misses the point of what the United States Supreme Court saw clearly, that the United States pledged to the Indian tribes the right to govern themselves by their own laws and customs. As a then law student, it is surprising that he missed this fundamental legal principle. As a tribal member, it is sad that he equated the tribal punishment with a judicial vacuum.

The author notes that 3 generally accepted arguments for tribal courts are that the effective application of a different law may require a specialized judge, that only Indian courts render justice equitably to Indians, and that "Indian justice" is different from "white justice" since it represents a special concern for the individual before the court. The author labels these generally accepted arguments as "anachronistic notion[s] of fairness".

The author laments the fact that even the most basic of the Federal Government's objectives in establishing Courts of Indian Offenses have not been met, citing as examples of that failure that there are still practicing medicine men on the Reservation, and that traditional mannerisms such as the native language, dances and beadwork have been revived.

One has to pause and wonder about the author, to consider the possibility that if there is a problem it is not with the Red Lake Band, but in the troubled mind of the author.

The author concludes his essay by declaring that the Red Lake Court cannot be saved and should be replaced. He observes that the federal government's policy vacillates from administration to administration and predicts that the fate of the "vanishing American" has been decided, that the final chapter will conclude when the dominant society tires of its "current infatuation with the noble savage".

Exhibit No. 18 (cont.)

CURRENT FEDERAL POLICY

Fortunately, the author's depressed assessments of the state of federal - Indian relations and tribal affairs are far from reality.

Recognition and support of tribal self-government has been the consistent policy of the federal government since 1970, and thanks to the tireless efforts of many tribal advocates such as the Red Lake Band of Chippewa Indians that policy is holding firm.

In 1970, President Richard M. Nixon issued his Indian policy statement, formally enunciating the policy of self-determination. This policy has been implemented through many congressional acts, notably the Indian Financing Act of 1974, the Indian Self-Determination Act of 1975, and the Indian Health Care Improvement Act of 1976. In 1983, President Ronald Reagan reaffirmed the policy of self-determination and the government-to-government relationship between the United States and Indian tribes. The Congress continues to reinforce these policies today. One foundation example is S. Con. Res. 76, which reaffirms this Nation's government-to-government relationship with Indian tribes, and reaffirms its trust responsibility and obligation to Indian tribes. Notable also are S. 1703, proposed amendments to the Indian Self-Determination Act, and S. 721, the Indian Development Finance Corporation Act.

TRIBAL POLICY

General

It would be a mistake to assume, as does the 1972 author, that the Red Lake Band is not in many significant ways distinct from the non-Indian way of life. The leaders of the Red Lake Band understand that the way to provide a well-ordered tribal society with justice for all lies deep within the Red Lake people, in their history and culture. They provide the foundation and the moral fiber which hold the people together.

Red Lake Has Remained Separate And Culturally Intact

Despite old federal policies designed to tear tribes apart and incredible economic hardship, the Red Lake Band has managed throughout its history to remain a politically and geographically separate, culturally intact entity.

Many of the Chippewa Indians in the old Northwest Territory of the United States signed treaties with the federal government as early as the 1840's, relinquishing land in return for reservations and certain other rights. Even in those early years, however, the Red Lake Band held itself apart from the bulk of the Chippewa Indians. It did not sign a treaty with the United States until 1863. Thereafter, while some government officials may have anticipated the ultimate general consolidation of all the Chippewa bands, the Red

Exhibit No. 18 (cont.)

Lake Band had no such expectation. It vigorously protected its separate tribal sovereignty and today remains politically separate from the consortium of 6 Chippewa bands who organized under the Indian Reorganization Act as the "Minnesota Chippewa Tribe".

During the period of allotment, in the late 19th and early 20th Century, most reservations in the country were cut up into allotments and distributed among individual Indians, only too often to be lost to non-Indian ownership. In 1889 Congress directed that the Red Lake Reservation be allotted. But the Red Lake Band resisted allotment on its reservation and preserved the tribal integrity of its aboriginal lands. Today, the Red Lake Reservation is unique among reservations in the country. Having never been allotted, it retains today its cohesive communal nature.

In 1954 the Congress specifically exempted the Red Lake Reservation from operation of P.L. 280. That law gave the State of Minnesota jurisdiction over all Indian country within its boundaries, except the Red Lake Reservation.

Preserving And Sharing Red Lake's Identity As A "People"

The Red Lake Band is nearing the accomplishment of its dream to create an educational entity to preserve, enhance and to share their identity as a "people". They will soon begin construction of a tribal archives, a public library, and an interpretive center.

Tribal Archives

In each society that sees itself as a "people" that sense of identity is maintained and preserved by a shared remembrance of the past. Today, the Red Lake Band of Chippewa seek to preserve and share their own historical records of the past.

Self-esteem as a critical component of the education process has been well established by research on education issues. For American Indian children, the research identifies a low self-esteem as the primary cause of lack of educational achievement. In part, the low self-esteem is attributed to the public view and understanding of tribal societies that has been created and perpetuated by the non-Indian historians, linguists, and anthropologists who create the cultural stereotypes of a given community. Personal access to the historical record of the evolution of the Red Lake Band of Chippewa will immeasurably contribute to the enhancement of tribal members' pride and understanding of their status in the world community.

Included in the tribal archives will be photographs, music, oral histories, maps, audio and visual recordings, and the vast array of written documentary information of the Red Lake people: Treaties, ratified and unratified; tribal government proceedings; personal correspondence; and many other similar materials -- all of them important as the record of specific historical and general cultural

Exhibit No. 18 (cont.)

development. This material will be the utilization for historical and cultural references for education in curriculum development, teacher training and text materials, references for cultural programs in language, arts, and traditional crafts. Ultimately, the archival materials will become the source of intelligence and insight upon which the Red Lake Band of Chippewa's community and culture will be perceived and interpreted by others.

Tribal Library

Libraries are all about the storage and transmission of knowledge. The 5,000 people who live on the Red Lake Reservation, an area comparable in size to the State of Rhode Island, have been served by a half-hour visit every two weeks by a bookmobile from the Kitchigami Regional Library. Consequently, the immense resources of information so familiar to the upper income and highly educated members of society are not available to those who need them the most. Computer terminals, library networks, and reference collections are unknown or mysterious concepts to most tribal people living on reservations.

The Red Lake Tribal Council has recognized the crucial need for library and information services and of the serious negative results of the lack of them and has made consistent efforts to meet the need.

Tribal Interpretive Center

The Red Lake Band of Chippewa is undergoing a continuing challenge in terms of relationships with other communities, states, and foreign nations. Some of these issues involve the maintenance of traditional ways while attempting to meet the demands of a technological society. The unique status of common land ownership and exemption from certain state and federal statutes require a different response to surrounding communities and visitors from domestic and foreign lands.

Over the past years, the Red Lake Band of Chippewa, has hosted visitors ranging from tourists and college students to television crews and foreign dignitaries. Students from France, Germany, and Malaysia have been guests of Red Lake in 1987. TV crews from Japan have filmed at Red Lake during the past summer, more international exposure is planned in 1988 in a TV documentary filed by a commercial station from England. The Japanese Ambassador to the United Nations was a guest of Red Lake in 1987 with the possibility of a broader exchange in the future. Recently, the Red Lake Band has joined with a community group from Red Lake Falls, the Association of the French of the North, in a cooperative effort to develop and improve community relations in a sustained manner. The exciting opportunity to present an accurate chronology of the evolution of the Red Lake Band of Chippewa from pre-white settlement to the complex challenges of the 20th century, through the use of a facility designed for

Exhibit No. 18 (cont.)

flexibility in presentations, will greatly enhance community and cultural understanding on a local, regional and international scope.

An accurate depiction of cultural change and continuity of a most unique American Indian Tribe will provide unparalleled potential for community understanding.

THE RED LAKE COURT

In FY 1988 the Red Lake Court has for the first time an almost adequate budget of \$253,000, double that of FY 1988, and probably 10 times the budget of the Court in 1972.

The court is now well staffed with reasonably well paid personnel. There are four judges, one of whom has a college degree. In the years 1986 and 1987 the judges received training from the National Indian Justice Center in probate law, Indian housing law, juvenile justice systems, civil rights, evidence and objections, tribal court probation, advanced criminal law, and appellate law and procedure. There are a chief judge, 2 associate judges and 1 appellate judge. One judge has served 6 years, 2 have served 3 years, and 1 has served two years. The appellate judge hears only appeals and no trial judges participate in appeals. There are presently 12 cases on appeal before the Red Lake Court. The chief judge's salary is \$32,000; the 2 associate judges' salaries are \$24,000; the appellant judge is paid \$100 per day while deciding an appeal. The court has 3 full-time clerks. Attorneys and lay defenders who meet tribal admission requirements may practice before the court. The court provides a lay public defender to represent anyone charged with a criminal defense upon request, whether that person can afford counsel or not. In this respect, the Tribe goes above and beyond the requirements of the Indian Civil Rights Act that defendants be afforded counsel only at their own expense. There are 7 lay advocates in addition to the public defender who are licensed to practice before the court. They have attended training at the National Indian Justice Center and the United States Police Academy.

The Court has a financial accounting system which handles all fines, a case docket listing sufficient particulars to track repeating offenders, and records of cases are kept by category, both civil and criminal.

All proceedings are recorded both by a stenographer and a tape recorder.

Tribal elders are frequently used as expert witnesses in trial proceedings, and upon request, a traditional forum is provided for resolution of disputes. In a traditional forum all proceedings are oral and the remedy obtained is a compromise between the disputing parties.

Exhibit No. 18 (cont.)

Although alcohol offenses are treated as criminal offenses, the Court frequently provides for alternative sentencing including in-patient treatment, out-patient treatment, halfway houses, short-term detoxification, and home arrest.

Under a grant from the Administration for Native Americans the Tribe has developed a comprehensive civil and criminal code which provides the full range of civil and criminal due process. This code is now being reviewed by the Tribal Council prior to its adoption.

The Red Lake jail is a modern, air conditioned facility with a capacity for holding 32 individuals. It contains separate departments for male and female and for adult and juvenile detainees. Juveniles are kept in jail for only a brief period of time, after which they are transferred either to a girls' or to a boys' home in Poenema on the Reservation.

1979 VIOLENCE

The statement in the hearing that the tribal treasurer was fired in 1979, resulting in the burning of the Chairman's house is an amazing leap of logic. It would be more accurate to say that the Council exercised its legitimate tribal constitutional authority to dismiss the treasurer because of neglect of her duties, and that rather than exercising their political remedies pursuant to the tribal constitution, the supporters of the former treasurer rioted, looted, burned and kidnapped. Although the homes of several innocent victims were burned, truly the entire Tribe was a victim because the burning and looting resulted in the loss of the tribal jail, the tribal shopping center, several gas stations, an AA rehabilitation center, a youth group home, and massive amounts of tribal records. Only in 1985 was the Council able to replace the shopping center which provides essential services to the remote communities of the Reservation.

It should be noted that in a special popular election held following the dismissal of the treasurer, the Red Lake people ratified the Council's action. A copy of the result of that election is attached as a part of this testimony and the Tribe requests that it be made a part of the record.

It requires a large leap in logic to conclude that it was the Council's fault that the lawless acts of violence occurred. If Alexander Haig's supporters had burned the White House when he was fired, would it have been said, "Alexander Haig was fired, resulting in the burning of the White House."

THE RED LAKE POLITICAL PROCESS

A lot of derogatory things have been said by those who perpetuated the lawless acts about the strength of the Red Lake Chairman. Attached as a part of this testimony is an article

Exhibit No. 18 (cont.)

reprinted from the Duluth News Tribune and Herald which sheds more light on this complex man. The Tribe requests that it be made a part of the record.

The Chairman is seventy-five years old and has held office since 1958. He is the first elected Chairman of the Red Lake Tribe. To have held office for 30 years, he of necessity has the support of his people.

After the 1979 lawless violence on the Reservation the perpetrators of the violence criticized the Red Lake political process to their congressmen and the BIA. The Red Lake Council took the responsible action of requesting federal monitors of the 1982 election, the first following the violence. Those monitors were the following:

1. M. Frances Ayer, Esq.
Office of the Assistant Secretary - Indian Affairs
2. Anne Crichton
Office of the Solicitor
U.S. Department of the Interior
3. Mark Anderson
Office of Twin Cities
Field Solicitor
U.S. Department of the Interior
4. Betty Bell
Anadarko Agency
Bureau of Indian Affairs
5. John Weddel
Portland Area Office
Bureau of Indian Affairs
6. Art Staples
Red Lake Agency
Bureau of Indian Affairs

These federal monitors certified the election as being honest and fair.

THE PRESS

Much, too, has been said, about the Council's action in temporarily barring the press from the Reservation following their irresponsible 1979 reporting and their covert liaisons with the perpetrators of the violence. It is never reported that in 1982 the Council modified its previous law to allow the press on the Reservation. In fact, during the 1982 election a federal information officer, William L. Engles, Portland Area Office, Bureau of Indian

Exhibit No. 18 (cont.)

Affairs (currently Commissioner of the Administration for Native Americans), was on the Reservation at the request of the Council to be sure that the press was notified and that reporters were courteously treated and assisted.

JURY TRIALS

Lastly, Mr. Miller commented on the so-called 1982 denial of jury trials to criminal defendants. In fact, in 1982 the budget of the Red Lake Court, funded solely by the BIA, was grossly inadequate, and included no funds for jury trials. It is unreasonable to expect people who have low paying jobs by the day to refrain from working and serve on a jury without pay, especially to participate in a system which in many ways is not a part of their cultural understanding. Today jury trials are held upon request.

ATTORNEYS

The Red Lake Band has done its best to preserve the tribal quality of its court. On August 29, 1985, the Band passed a resolution requiring that to be approved and licensed to represent individuals before the Red Lake Court, an applicant must meet the following criteria:

1. be at least 21 years of age,
2. be a person of good moral character,
3. never have been convicted of a felony and is a law abiding citizen,
4. is schooled in tribal law and has knowledge of the laws, customs, and court rules and procedures of the Red Lake Band,
5. has an understanding of the Chippewa language,
6. is a member of the Red Lake Band of Chippewa Indians, and
7. is a resident of the Red Lake Indian Reservation and has been such for a period of one year prior to applying to the Tribal Council for a license.

This resolution has been cited as in effect prohibiting outside, non-Indian professional attorneys from practicing before the Red Lake Court. The resolution does, in fact, prohibit non-members of the Red Lake Band from practicing before the court. It does not prohibit a tribal member who is knowledgeable in tribal law and custom, who has an understanding of the Chippewa language, and who is also a professional attorney from practicing before the court. Note that the applicant is not required to speak the Chippewa language, but rather, to understand it.

How reasonable are the requirements for membership and an understanding of the Chippewa language, both of which when applied do prevent non-Indian attorneys from practicing before the Red Lake Court? Much of this testimony has been devoted to explaining the importance to the Red Lake people of their history, culture, customs,

Exhibit No. 18 (cont.)

land and language. A member of the Tribe who has lived on the reservation has an understanding of these important and unique qualities.

The Chippewa language, spoken and understood on the reservation, is the language of Red Lake ancestors. It is today, except for classroom teaching, an oral language. The Red Lake people who learned Chippewa as a first language think in Chippewa. For them to converse in English requires translation of something spoken in English to Chippewa for understanding and then translation of a response from Chippewa to English. Non-Indians sometimes mistake people's length of time for response as lack of intelligence. Members of the Red Lake Band understand.

There are so many examples of differences which non-Indians do not understand. The attitude of the Red Lake people about their land is just one. It is no doubt difficult for non-Indian people to comprehend the significance of the land to people whose ancestors have always lived on that very same land. Always is a long time; yet, the lands of the Red Lake people are their aboriginal homeland. That homeland is today as it has always been held communally by the Tribe, not individually. "Tribal" is a concept not easily comprehended by non-Indians.

The focus of the Red Lake law is on qualities that go to a person's knowledge and understanding of tribal life and law, not on whether a person also happens to be a professional attorney. Yet, that there are today no Red Lake members who are professional attorneys does mean that defendants must be represented by lay counsel. Examining this from a policy and legal standpoint is instructive.

It is a fact that outside, non-Indian, professional attorneys frequently disrupt tribal court proceedings and attempt to bamboozle lay Indian judges, prosecutors, clerks, jurors, and witnesses.

Would Solomon have been a better judge if he had gone to Princeton or Yale? That ancient jurist, held up as a paragon, the greatest judge in history, never received a law degree. He knew his people, knew their values, knew what was in their hearts. Solomon had what schools cannot teach. Solomon had wisdom.

A very respectable legal argument can be made that "counsel" as used in the Indian Civil Rights Act of 1968 does not mean that Tribes must admit professional attorneys to practice before their courts.

Prior to the Indian Civil Rights Act, 25 U.S.C. § 1302(6), Indians had no right to counsel in tribal court since the Sixth and Fourteenth Amendments to the United States Constitution do not apply to Indian tribes. Settler v. Lameer, F.2d 231 (8th Cir. 1974). The Act, passed in 1968, forbids an Indian Tribe in exercising powers of self-government to deny any person in a criminal proceeding, at his

Exhibit No. 18 (cont.)

own expense, assistance of counsel. Neither the Act nor its legislative history gives particular qualifications for counsel. It only requires a tribal court to recognize that the parties before it have a right to counsel. It has been left to the courts to interpret the meaning of the word "counsel" as used in the Act. They have interpreted "counsel" in a due process context.

The purpose of the Act is to guarantee to Indians "due process" and "equal protection" and to protect them from arbitrary action by tribal governments, state governments and the federal government. 2 U.S. Code Cong. and Adm. News 1837, 1864 (1968). But along with strengthening rights of an individual within a Tribe, Congress wanted the Act to demonstrate its commitment to the goal of tribal self-determination. Its intent was to promote the federal "policy of furthering Indian self-government." Santa Clara Pueblo v. Martinez, 437 U.S. 49, 62 (1977). Courts have been careful in their interpretation of "due process" and "equal protection" as used in the Act, to consider the historical, governmental and cultural values of an Indian tribe. They have concluded that the terms do not always have the same meaning that the U.S. Constitution has given them. Tom v. Sutton, 533 F.2d 1101, 1104 (9th Cir. 1976). "Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural and economic needs of the tribal government." Santa Clara Pueblo v. Martinez, at 62.

The Oregon Court of Appeals decided that a party had not been denied due process by a tribal court's decision to deny the party the right to be represented by counsel of his choice. Red Fox v. Red Fox, 23 Or. App. 393, 542 P.2d 918. (1975). The case involved a divorce action, in which the tribal court would not allow the husband's retained attorney, a member of the Oregon and federal bars, to appear, but did tell the husband he could be represented by a "spokesman" certified to appear before it. The husband argued it was unconstitutional for a court not to allow a party to appear through a retained attorney. The Oregon Court of Appeals concluded that the husband had not been deprived by the tribal court of any "fundamental due process."

The obvious response here is that one is not deprived of a "right" to representation because a court will not permit a specific individual to appear before it. No constitutional claim arises from the limitation of representation to those satisfying specific qualifications where those so qualified are, in fact, available to a litigant.

Id. at 401, 542, P.2d at 922. The court ruled that due process under the Constitution is not denied by allowing representation by lay counsel in tribal court. A tribal court's decision to limit

Exhibit No. 18 (cont.)

representation to qualified lay counsel does not deprive a party of the right to counsel.

The Court of Appeals, Ninth Circuit, specifically examined due process under the Indian Civil Rights Act in the same fact situation. Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977). The husband brought suit in federal district court, alleging his rights under the Indian Civil Rights Act had been violated. He argued the Oregon court only dealt with his Constitutional due process claims, not his claims based on the Indian Civil Rights Act. The district court granted the wife's motion for summary judgment because the same issues in the federal court action had been resolved by the Oregon court.

On appeal, the Court of Appeals ruled that the resolution of the due process claims under the United States Constitution also reached the merits of the claims under the Indian Civil Rights Act. The Court reasoned that in spite of the variance of protection under the Bill of Rights and the Indian Civil Rights Act due to the regard given to tribal values, if due process under the Constitution is not denied because of representation only by lay counsel, neither is due process denied under the Indian Civil Rights Act. Id. at 364.

In United States v. E.K., 471 F. Supp. 924 (D. Or. 1979), involving a motion to transfer a juvenile to adult status, counsel objected to the admission of the defendant's tribal juvenile record, in part because of absence of counsel in the tribal court. The district court found that under the Tribe's civil code a person is allowed to be represented before a tribal court by a certified advocate or spokesman, but there was no right to be represented by professionally licensed counsel. There was no evidence the defendant had not been able to get or was denied the opportunity to be represented by a certified spokesperson or advocate. The court concluded that the hearing record did not show a lack of fairness which would have denied defendant due process. Id. at 933. It ruled that the tribal scheme was fundamentally and adequately fair under the circumstances. "[T]here is nothing constitutionally repugnant in the tribal court scheme of representation . . . , although that scheme differs from that practiced in this or other courts of the United States." Id. at 934:

In each of the cases cited, "counsel" for a party in tribal court was certified to appear before that court. The Tribe in governing itself had decided these persons were qualified to serve as "counsel" in its court. It is the words "qualified" and "certified" that makes lay counsel meet the demands of due process. Even in American jurisprudence, "counsel", as used in the Sixth Amendment, has been defined as "a person who is legally trained and qualified", not just those "persons licensed by some state to practice law". United States v. Stockheimer, 385 F. Supp. 979, 983 (W.D. Wis. 1974), aff'd 534 F.2d 331 (7th Cir. 1976) cert. denied, 429 U.S. 966 (1976).

Exhibit No. 18 (cont.)

Some case law does exist that goes the other way on this issue. In the article, An Historical Analysis of the 1968 "Indian Civil Rights" Act, the author examined Towersap v. Fort Hall Indian Tribal Court, Civ. No. 4-70-37 (D. Id. 12/28/71), in which the court rejected a Tribe's argument that "assistance of counsel" should mean only the aid of a friend, as traditionally permitted by the tribal court. The court ordered the tribal court to permit non-Indian lawyers to represent Indian defendants. The author concluded, "[w]hile the policy of allowing professional counsel in tribal courts at defendant's expense may be subject to criticism, there is little doubt that in adhering to the plain language of the [Indian Civil Rights Act] the court implemented the intent of the drafter of the provision." Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv. J. On Legis. 557, 620 (1972).

Robert N. Clinton, in his statement before the United States Commission on Civil Rights On Bureau of Indian Affairs Responsibility For Enforcement of the Indian Civil Rights Act on January 28, 1988, concluded,

With respect to tribal governments, the [Indian Civil Rights Act] demonstrably cannot, has not, and should not involve jot-for-jot incorporation of constitutional guarantees of the Bill of Rights and the Fourteenth Amendment. Congress and the tribal governments that have primary responsibility for enforcing the [Indian Civil Rights Act] both recognize that some process of interpretation and construction of the provisions of the [Indian Civil Rights Act] in light of tribal traditions and the circumstances of tribal government is necessary and appropriate."

United States Commission on Civil Rights On Bureau of Indian Affairs Responsibility For Enforcement of the Indian Civil Rights Act on January 28, 1988, p. 6. He pointed especially to the problem of the meaning of "counsel" found in § 1302(6). He reasoned that if "counsel" is interpreted to mean professionally licensed attorneys, then an imbalance could arise within the tribal court system, since many judges and prosecutors may be non-lawyers who only attended training schools established by the American Indian Court Judges Association and other organizations. "Indeed, smaller tribes that employ few, if any, persons with formal legal training in their judiciaries or their prosecutorial staffs quite reasonably fear that allowing members of the state bar to represent the defense will unfairly balance their tribal criminal processes in favor of the defendant." Id. at 7.

In Wounded Knee v. Andera, 416 F. Supp. 1236 (D.S.D. 1976) the issue was whether a tribal judge's dual role as judge and prosecutor violated due process. The district court concluded it did. One of the Tribe's arguments was that it was unable financially to hire a

Exhibit No. 18 (cont.)

prosecutor. The court concluded that financial obstacles could not be a reason to deny due process. "The tribe need not hire a professional attorney; a lay person hired part-time may be sufficient." *Id.* at 1241. If the courts are sanctioning the hiring of lay prosecutors and finding that lay prosecutors do meet the requirements of due process, then it would appear unequal and unfair to hold that restricting counsel to lay counsel violates due process.

In 1977, the United States Supreme Court decided that the Indian Civil Rights Act did not authorize civil actions against Indian tribes or officers in federal court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977). Although parties, in cases cited in this memorandum, could no longer bring their claims based on the Indian Civil Rights Act into federal court, the cases are still instructive on how the Act has been construed. The courts have found that being represented by lay counsel in tribal court does meet the demands of due process and the right to counsel, thus fulfilling the purpose of the Indian Civil Rights Act, to be treated fairly by governments.

United States v. Red Lake

In their testimony, both the Assistant Secretary for Indian Affairs and the United States Attorney for Minnesota mentioned United States v. Red Lake. The petition of the Tribe for certiorari is submitted as a part of this testimony, and the Tribe requests that it be made a part of the record. A reading of the Tribe's petition will demonstrate that the Tribe's contention that the records are tribal not federal records is meritorious. There has been too much of a tendency on the part of others simply to dismiss the Tribe's position as frivolous. Knowing the Tribe's plans for the Red Lake Archives should help the CRC to understand how deeply the Red Lake people feel about protecting tribal records, especially in view of their massive records loss during the 1979 lawless violence.

CONCLUSION

It must be remembered that the Red Lake Band is a separate, dependent sovereign, that its history, customs, language, and beliefs are different. One has only to spend time with the people to know that. Red Lake people are not like other people.

As the Assistant Secretary for Indian Affairs noted in his testimony, he has received few complaints from Red Lake members about violation of their civil rights. The people themselves believe in their Tribe and its laws, except for perpetrators of the 1979 violence who are unwilling to accept the political will of the Red Lake people, and who would rather riot and complain than vote.

The Tribe deeply resents the intrusion by the United States Civil rights Commission and the Congress into Red Lake affairs through the passage of the 1968 Civil Rights Act. It is not that the Tribe does not provide fair government. Rather, it does so because

Exhibit No. 18 (cont.)

the Tribe has the governmental authority and responsibility to do so, not because of federal law. The Tribe believes so deeply that the Congress lacks the power to pass laws intruding upon its governmental authority that it commissioned a legal opinion analyzing the legality of the exercise by Congress of its so-called "plenary power". The opinion concludes that the exercise of that power is without Constitutional basis. A copy of the opinion is attached, and the Tribe requests that it be made a part of the record.

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No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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QUESTIONS PRESENTED

1) Whether federal courts should have referred to tribal court for resolution a suit by the United States against an Indian tribe seeking to enforce a federal records law?

2) Whether an Indian reservation court, organized and funded pursuant to 25 C.F.R. Part 11, but enforcing a tribal law and order code, is an arm of the tribe, making its records tribal records, or an arm of the federal government, making its records federal records?

3) Whether an Indian tribe enjoys sovereign immunity from suit brought by the United States government?

**PARTIES TO THE PROCEEDING SOUGHT TO BE
REVIEWED**

United States of America

Red Lake Band of Chippewa Indians

Red Lake Tribal Council and its members:

Roger Jourdin, Chairman

Royce Graves, Secretary

James Strong, Treasurer

Allen English, District Representative

Lawrence Bedeau, District Representative

George Jones, District Representative

Adolph Barrett, District Representative

Roman Stately, Jr., District Representative

Gerald Brun, District Representative

Dan Raincloud, Jr., District Representative

Tom Stillday, District Representative

Exhibit No. 18 (cont.)

iii

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	1
JURISDICTION.....	2
STATUTES AND REGULATIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
THE COURT OF APPEALS DECISION.....	6
REASONS FOR GRANTING THE WRIT.....	7
1. The District Court and Court Of Appeals Should Have Referred This Controversy To Tribal Court.....	9
2. The Court of Appeals Applied An Improper Standard In Determining That The Red Lake Court Records Were BIA Records Rather Than Records Of The Tribe.....	11
3. The Red Lake Band Of Chippewa Indians Is Immune From Suit.....	15
CONCLUSION.....	20

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Barta v. Oglala Sioux Tribe of Pine Ridge Reservation</i> , 259 F.2d 553 (8th Cir. 1958) <i>cert. denied</i> 358 U.S. 932 (1959)	18
<i>Bellotti v. Baird</i> , 428 U.S. 132 (1976)	11
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	3, 8
<i>Cherokee Nation v. Georgia</i> , 30 U.S. 1 (1831)	18
<i>Chisholm v. Georgia</i> , 2 U.S. 419 (1793)	19
<i>Federal Land Bank of Omaha v. Reeves</i> , F. Supp. _____, 14 ILR 3071 (D.S.D. 1987)	10

Exhibit No. 18 (cont.)

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 19

Iowa Mutual Insurance Co. v.
LaPlante, ___ U.S. ___,
107 S. Ct. 971 (1987) 8, 9, 10, 11

Jones v. Meehan,
175 U.S. 1 (1899) 18

Kessler v. Strecker,
307 U.S. 22 (1939) 11

Leiter Minerals v. United States,
352 U.S. 220 (1957) 11

Menominee Tribe v. United States,
391 U.S. 404 (1968)..... 18

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 18

Exhibit No. 18 (cont.)

v

<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	15
<i>National Farmer's Union Ins. Cos. v.</i> <i>Crow Tribe</i> , 471 U.S. 845 (1985)	9, 10, 11
<i>Native American Church v. Navajo Tribal</i> <i>Council</i> , 272 F.2d 131 (10th Cir. 1959)	18
<i>New Mexico v. Mescalero Apache Tribe</i> 462 U.S. 324 (1983)	8
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	17
<i>Organized Village of Kake v. Egan</i> 369 U.S. 60 (1962)	14
<i>R.J. Williams v. Fort Belknap Housing</i> <i>Authority</i> , 719 F.2d 979 (9th Cir. 1983)	10
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	8, 16, 19

Exhibit No. 18 (cont.)

<i>Sibbach v. Wilson & Co.</i> , 312 U.S. 1 (1941)	11
<i>Talton v. Mayes</i> , 163 U.S. 376 (1896)	13
<i>United States v. Clapox</i> , 35 F. 575 (D. Or. 1888)	14
<i>United States v. Kagama</i> , 118 U.S. 375 (1886)	13, 18
<i>United States v. King</i> , 395 U.S. 1 (1969)	16
<i>United States v. Ohio</i> , 614 F.2d 101 (6th Cir. 1979)	11
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975)	8, 16
<i>United States v. Mississippi</i> , 380 U.S. 128 (1965)	6, 19

Exhibit No. 18 (cont.)

vi

<i>United States v. Testan</i> , 424 U.S. 392 (1976)	16
<i>United States v. Texas</i> , 143 U.S. 621 (1892)	19
<i>United States v. United States Fidelity Guarantee Company</i> , 309 U.S. 506 (1940)	16, 17, 18
<i>United States ex rel. Kishell v. Turtle Mountain Housing Authority</i> , 816 F.2d 1273 (8th Cir. 1987)	10
<i>United States v. Yakima Tribal Court</i> , 806 F.2d 853 (9th Cir. 1986) <i>cert. denied</i> ___ U.S. ___, 107 S. Ct. 2461 (1987)	6,16
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	<i>passim</i>

Exhibit No. 18 (cont.)

United States v. White Mountain Apache Tribe, 784 F.2d 917 (9th Cir. 1986) 6, 16

Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980) 6, 17

Washington v. Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) 18

Wellman v. Chevron, U.S.A., 815 F.2d 577 (9th Cir. 1987) 10

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 7, 16

Williams v. Lee, 358 U.S. 217 (1959) 8

Worcester v. Georgia, 31 U.S. 515 (1832) 15, 17, 19

Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975) 18

Exhibit No. 18 (cont.)

vii

<i>Treaties and Statutes</i>	Pa
Treaty of Old Crossing, 13 Stat. 667.....	-
Supplement to Treaty of Old Crossing, 13 Stat. 689	2
Federal Records Act, 44 U.S.C. §§ 3106, 3301	2, 5, 15
Indian Reorganization Act, 25 U.S.C. § 461, <i>et seq.</i>	7, 12
5 U.S.C. § 551(h)	4
5 U.S.C. § 552	4
25 U.S.C. § 2	14
5 U.S.C. § 9.....	14
25 U.S.C. § 200	14
25 U.S.C. § 1302(7)	14
28 U.S.C. § 1152(a), P.L. 83-280	3
28 U.S.C. § 1254(1)	2
41 U.S.C. § 252(c)	4
<i>Regulations</i>	
25 C.F.R. Part 11	2, 3, 7
25 C.F.R. § 11.1(a)(6)	12
25 C.F.R. § 11.3	3
25 C.F.R. § 11.4(d)	12
25 C.F.R. § 11.11	14
25 C.F.R. § 11.22	10
25 C.F.R. §§ 11.38-11.98 ME	4

Exhibit No. 18 (cont.)

viii

<i>Other</i>	Page
Felix S. Cohen's <i>Handbook of Federal Indian Law</i> (1982 Edition, R. Strickland, ed.) at 332-335	3
II Kappler, <i>Indian Affairs, Laws and Treaties</i> (1904) at 853-855, 861-862)	2
Op. Sol. Int., October 25, 1934 (Powers of Indian Tribes), 55 I.D. 14.....	13
Tribe, "Intergovernmental Immunities In Litigation, Taxation, and Regulation: Separation of Powers Issues In Controversies About Federalism," 89 Harv. L.R. 682 (1976)	19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87 -

RED LAKE BAND OF CHIPPEWA INDIANS, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Red Lake Band of the Chippewa Indians hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the appeal court's decision in the case of *United States of America v. Red Lake Band of Chippewa Indians*, No. 86-5453 MN.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit of which review is sought is reported at 827 F.2d 380 (1987). The Opinion is reproduced in

the Appendix at App. 2. The district court opinion affirmed by the Eighth Circuit is reproduced at App. 10.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit is dated August 31, 1987. A timely petition for rehearing was filed by the Red Lake Band of Chippewa Indians. That petition was denied on September 28, 1987. App. 1. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves a consideration of the primary jurisdiction of tribal courts, the doctrine of sovereign immunity, and the rights of self-government enjoyed by Indian tribes of the United States. The case also requires consideration of the Federal Records Act, 44 U.S.C. § 3106, 3301, and certain regulations of the Bureau of Indian Affairs, 25 C.F.R. Part 11. See App. 24 and App. 26.

STATEMENT OF THE CASE

The Red Lake Band of Chippewa Indians (hereinafter either the Red Lakes or the Tribe) is a federally-recognized Indian tribe. The Tribe signed treaties of peace with the United States in 1863, 13 Stat. 667, and 1864, 13 Stat. 689; (compiled in II Kappler, *Indian Affairs, Laws and Treaties*, (1904) at 853-855, 861-862). The Red Lakes live on the Red Lake Reservation which covers approximately 637,000 acres of Northern Minnesota.

The Tribe operates as a sovereign government pursuant to a Constitution ratified by the Tribe's members and approved by the Secretary of the Interior on November 10, 1958. That Constitution, among other things, grants the Tribal Council authority "to enact ordinances . . . provid-

ing for the maintenance of law and order and the administration of justice by establishing a police force and a tribal court and defining their powers and duties" Revised Constitution and By-Laws of the Red Lake Band of Chippewa Indians, Art. VI, 5.

As early as February 15, 1952, the Secretary of the Interior approved a tribal law and order code establishing the criminal rules of conduct for the Red Lake Reservation. See, Exhibit F, Supplemental Court of Appeals Record. In subsequent amendments through the years, the Tribe established rules of criminal procedure for the reservation court that enforces that law and order code and continued to update the code's definition of offenses, as necessary. In light of the successful operation of a justice system on the Red Lake Reservation, Congress explicitly exempted that Reservation from operation of P.L. 83-280 when it granted the State of Minnesota criminal jurisdiction over all other Indian reservations in that state. 28 U.S.C. § 1152(a). See, *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976).

In the 19th Century the Bureau of Indian Affairs began to establish courts on certain Indian reservations, typically called Courts of Indian Offenses, to handle prosecutions against on-reservation criminal activity by Indians. See generally, Felix S. Cohen's *Handbook of Federal Indian Law*, (1982 Edition, R. Strickland, ed.) at 332-335. These courts are often known as CFR courts, for the rules establishing them are now codified in 25 C.F.R. Part 11. Those rules set up the procedures whereby judges of the courts are appointed and by which court proceedings are conducted. Judges, for instance, are appointed by the Bureau of Indian Affairs, and paid by the Bureau of Indian Affairs (BIA), but are subject to the approval or veto of the Reservation Tribal Council. 25 CFR § 11.3. The rules also define the elements of the

criminal offenses alleged violations of which are prosecuted before the courts. 25 CFR §§ 11.38-11.98ME.

At the time the controversy involved in this case arose, the court on the Red Lake Reservation was funded and organized through the CFR mechanism. On the other hand, the Red Lake Court did not enforce the CFR list of offenses. Instead, it enforced -- and still enforces -- criminal ordinances enacted by the Tribe itself.¹

On August 29, 1985, the Red Lake Tribal Council passed an ordinance declaring that "all Red Lake Court of Indian Offenses case records shall be kept confidential by the Court and the information contained in the case records shall be withheld from public disclosure." Red Lake Tribal Council Ordinance #1-85. On the same date, through Resolution No. 234-85, the Tribal Council ordered that the case records of all closed cases of the Red Lake Court be transferred to the Tribal archives and kept confidential. The records were accordingly transferred on August 30, 1985.²

On September 17, 1985 the BIA demanded by letter to the Tribal Council that it relinquish the records of all closed cases of the Red Lake Court. When the records were not released, the United States brought an action in

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- 1 The Red Lake court is now funded through a grant under P.L. 93-638, 41 U.S.C. § 252(c), rather than through the CFR mechanism.
 - 2 The Tribal Council action was taken in response to a concern that the records would be made available by the BIA to a non-Indian, non-reservation newspaper that had filed an FOIA request with the BIA for the records. The FOIA, of course, does not apply to Indian Tribes. As self-governing societies they reserve the right to handle their governmental documents as they themselves determine. *See*, 5 U.S.C. §§ 551(h), 552.

the United States district court for the district of Minnesota for recovery of the records pursuant to 44 U.S.C. §§ 3106 and 3301, the Federal Records Act.

On cross motions for summary judgment, the district court ruled in favor of the government and ordered release of the records. The district court rejected the Tribe's assertion that its sovereign immunity protected it from suit by the federal government absent an explicit Congressional authorization. The district court also held that the records at issue were records of the United States and that their deposit into Red Lake archives and the Tribe's refusal to reveal them constituted a violation of 44 U.S.C. § 3106. The court then directed that the records be turned over to the BIA, but stayed its own order pending appeal to the Eighth Circuit court of appeals. On appeal, the court of appeals generally affirmed the district court's ruling.

The Tribe also argued before the district court that summary judgment should not be granted because there remained a genuine dispute of fact as to the nature of the Red Lake Band's organizational structure and thus, the nature of the Red Lake Court. The district court determined that there was no genuine dispute and ruled on the motions for summary judgment.³ The Tribe before this Court does not reassert the existence of a genuine dispute. The nature of the Red Lake Court is at issue, but the resolution of that issue involves a legal determination that can be made on the facts in the record.

³ The Tribe's cross-motion for summary judgment was filed in an effort to protect its interests if the district court determined, as it ultimately did, that there was no genuine factual dispute.

THE COURT OF APPEALS DECISION

In ruling on the Red Lake's appeal from the district court's judgment, the court of appeals considered the Tribe's two primary arguments. Those were: (1) the Tribe is exempt from suit under the doctrine of sovereign immunity and (2) the Red Lake Court is, in substance, a tribal court, functioning as an exercise of tribal sovereignty and its records, therefore, are tribal, not BIA, records.

With respect to the Tribe's assertion of sovereign immunity, the court of appeals acknowledged the general rule that tribes are protected from suit unless there is an explicit waiver of that immunity by Congress. But the court went on to hold, relying on two Ninth Circuit cases, *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) and *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), cert. denied ___ U.S. ___, 107 S. Ct. 2461 (1987), that the Tribe's sovereign immunity does not foreclose lawsuits brought by the United States. The court so ruled on essentially two grounds. First, it said that "it is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States." 827 F.2d at 382. It concluded this loss of sovereign immunity was a "necessary implication of [the Indians'] . . . dependant status," citing *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152 (1980), and arose even without Congressional action. Second, the court announced that for purposes of this case, tribes were analogous to states. Having so concluded, the court then relied on the case of *United States v. Mississippi*, 380 U.S. 128 (1965), to hold that "just as a state may not assert sovereign immunity as against the federal

government . . . neither may an Indian tribe . . ." 827 F.2d at 383.

With respect to the Red Lake's second main argument (that the records of the Red Lake Court were tribal records) the Eighth Circuit held, without analysis, that as the records were those of a "CFR court," the documents were, *ipso facto*, BIA records. In so holding, the court relied upon its interpretation of Department of the Interior regulations, 25 C.F.R. Part 11, but did not look past those regulations to the Red Lake Court's "ultimate source of . . . power." *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The court went on to consider whether, pursuant to the regulations, a tribe utilizing the CFR-funding mechanism could nevertheless exempt itself from certain of the regulations, including those related to record-keeping. On this point, the court decided that a tribe "organized" under the Indian Reorganization Act, 25 U.S.C. § 461 et seq., which uses "CFR courts", can exempt the court from the bulk of the CFR regulations and make it an "independent tribal court" by enacting a tribal law and order code. 827 F.2d at 382. On the other hand, the court said, if a federally-recognized tribe that has not "organized" itself under the IRA uses a CFR court, it cannot similarly exempt itself from the CFR rules by enacting a law-and-order code. The court of appeals then held that the Red Lake Band had not presented evidence that it met the criteria for "exemption," for it had not shown it was "organized" under the IRA.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly noted that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142

(1980) quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The Court has also consistently interpreted federal law in a manner most likely to aid in achieving the federal government's "goal of promoting tribal self-government, a goal embodied in numerous federal statutes [fn. omitted]." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). The Court has reiterated that any restrictions on that right should generally be found only where there is a clear and unequivocal announcement by Congress of the intent to do so. See e.g. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Bryan v. Itasca County*, *supra* 426 U.S. at 392-393.

In this case, the Eighth Circuit has ignored these basic tenets of federal Indian law. On the question of sovereign immunity, the court of appeals found a loss of this fundamental component of Indian sovereignty in the absence of explicit Congressional action. Such an implied divestiture of right is neither justified as a matter of law nor necessary as a matter of policy. The net effect is to permit a central element of tribal sovereignty to be lost at the whim of executive branch officers simply by their decision to file a lawsuit. Next, judging the nature of the Red Lake Court and its records, the Eighth Circuit focused on form rather than the substance, contrary to this Court's direction in *United States v. Wheeler*, *supra*. In so doing, and in declaring, against all logic, that a court enforcing tribal law is not a tribal court, the Eighth Circuit cut deeply into the Red Lake Band's sovereign authority "to make . . . [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). And finally, the court of appeals overlooked this Court's recent affirmations of the primary importance of tribal courts in protecting tribal self-government. *Iowa Mutual Insurance Co. v. LaPlante*, ___ U.S. ___, 107 S. Ct. 971 (1987), *National Farmer's Union Ins. Cos. v.*

Crow Tribe, 471 U.S. 845 (1985). It thus permitted the exercise of federal court jurisdiction over a controversy that should first have been referred to the tribal court itself.

In *United States v. Wheeler*, *supra*, this Court reserved the question of "[w]hether . . . a [CFR] court is an arm of the federal government or, like the Navajo Tribal Court, derives its powers from the inherent sovereignty of the Tribe." 435 U.S. at 427 n. 26. That question, and the implications of its answer, are squarely presented here. The Eighth Circuit answered it in a way contrary to the clear direction of this Court's rulings on tribal sovereignty and self-government. Though this case involves but one court on one reservation, it necessarily implicates all CFR courts throughout the country and raises decidedly important questions of federal Indian law which should be settled by this court. See Rule 17.1(c), S. Ct. Rules.

**1. The District Court and Court Of Appeals
Should Have Referred This Controversy To
Tribal Court**

The district court and court of appeals committed a fundamental error when they heard this case. They should, instead, have referred the controversy to tribal court for resolution. In two recent cases, this Court has made clear that controversies between Indians and non-Indians involving reservation affairs should be resolved, in the first instance at least, in the reservation court. See, *National Farmers Union Ins. Cos. v. Crow Tribe*, *supra*, and *Iowa Mutual Insurance Co. v. La Plante*, *supra*. In each case, the Court directed that the federal court stay its review of tribal court jurisdictional issues until the tribal court had determined to accept or reject its own jurisdiction over the matter. Here, although the issues

to be decided are not jurisdictional in the same sense, the same deference to tribal court decisions should nevertheless prevail. Otherwise, the "exercise of jurisdiction [by a federal court] over matters relating to reservation affairs can . . . impair the authority of tribal courts," *Iowa Mutual, supra*, 107 S. Ct. at 976. If the Red Lake Band is subject to suit at all, a matter discussed below, it should, at least, only be so in its own tribal court.

The lower courts -- including the Eighth Circuit -- have so understood the broad teaching of *National Farmers Union* and *Iowa Mutual*: tribal courts, not federal courts, should resolve controversies arising on a reservation. See, *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987) (suit by Indian against non-Indian corporation should be brought in tribal court, not U.S. District Court); *Wellman v. Chevron, U.S.A.*, 815 F.2d 577 (9th Cir. 1987) (same). When a non-Indian sues an Indian for activities occurring on the reservation, the cause of action should be heard in tribal court. *Federal Land Bank of Omaha, v. Reeves*, ___ F. Supp. ___, 14 ILR 3071 (D.S.D. 1987). See also, *R.J. Williams v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983) ("the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation.")⁴ It makes no difference that the plaintiff is the United

⁴ Interestingly, the rules that the United States says govern the Red Lake Court expressly grant the court jurisdiction over "all suits wherein the defendant is a member of the tribe . . . within [its] jurisdiction . . ." 25 C.F.R. § 11.22. Here, individual tribal council members were named as additional defendants. Thus, the federal government's own regulations lead to the conclusion the Tribe urges here.

States itself. Suits by the United States are typically subject to the federal doctrine of abstention, to which the Court has analogized deference to tribal courts. *See, Leiter Minerals v. United States*, 352 U.S. 220 (1957); *United States v. Ohio*, 614 F.2d 101 (6th Cir. 1979). It is, moreover, United States policy to encourage the development of tribal self-government in which "tribal courts play a vital role" *Iowa Mutual, supra*, 107 S. Ct. at 976.

The federal courts in this case should have dismissed the case or stayed action on the complaint so that the issues could be presented first for tribal court review.⁵

2. The Court of Appeals Applied An Improper Standard In Determining That The Red Lake Court Records Were BIA Records Rather Than Records Of The Tribe

The court of appeals had before it the question whether the records of the Red Lake Court are records of a federal agency or of a separate sovereign, that is, the Red Lake Band of Chippewa Indians. To answer that question, the court should necessarily have grappled with the question left open in *United States v. Wheeler, supra*: Whether a court funded and generally organized

⁵ This quasi-jurisdictional issue was not raised below. That does not deny this Court the power to consider it. This Court may review "fundamental errors" by lower courts, even if not previously asserted by a party. *See, Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). As well, this Court has drawn an analogy between the deference to tribal courts announced in *National Farmers Union, supra*, and *Iowa Mutual, supra*, and the more traditional abstention doctrine. *See, Iowa Mutual Insurance Co. v. LaPlante, supra*, 107 S. Ct. at 976 n. 8. This Court may, *sua sponte*, raise and resolve abstention issues not raised below. *Bellotti v. Baird*, 428 U.S. 132, 143, n. 10 (1976).

under the Code of Federal Regulations, but which enforces tribal law, acts as an arm of the federal government or as an arm of the separate tribal sovereignty.

But, in answering this question, the Eighth Circuit simply announced, without analysis, that "the records of C.F.R. courts are agency records and belong to the United States." 827 F.2d at 383. The court noted that the Red Lake Band is listed in the regulations as one of those tribes to whom the regulations generally apply, 25 C.F.R. § 11.1(a)(6), and concluded that "designated tribal courts are presumptively CFR courts". 827 F.2d at 383.⁶

The teaching of this Court in *United States v. Wheeler, supra*, however, makes it clear that such a superficial analysis cannot satisfactorily fix the underlying status of a tribal court. In that case, too, the question of double jeopardy turned on whether a tribal court, there a court organized by the Navajo Tribe, was an "arm of the federal government." 435 U.S. at 319. In making that judgment, the Court noted that the critical issue is "not the extent of control exercised by one prosecuting authority over the other, but rather the *ultimate source of the power* under which the respective prosecutions were undertaken." 435 U.S. at 320. (emphasis added) "That Congress has in certain ways regulated the manner and

6 Having so quickly decided the nature of the records at issue, the only question the court analyzed at all was whether the Redlake Band had exempted itself from the full reach of the regulations (including record keeping) by showing that (1) it was organized under the Indian Reorganization Act, 25 U.S.C. §. 461 et seq. and (2) it had adopted a tribal law and order code. See 25 C.F.R. §. 11.4(d). A regulatory exemption is beside the point, however, if the records are not the BIA's to regulate. In any case, the Redlake Band has clearly followed the record keeping requirements of the regulations themselves. See n.9, *infra*.

extent of the tribal power of self-government does not mean that Congress is the source of that power." *Id.* See also, *Talton v. Mayes*, 163 U.S. 376, 384 (1896).⁷

The Red Lake Court, even though its judges are paid by the BIA, nevertheless does not enforce *federal law*. It enforces a criminal code adopted by the Tribe itself. The "ultimate source" of the Red Lake Court's power is the sovereign power of the Red Lake Band of Chippewa Indians, "a separate people . . . regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886), quoted in *United States v. Wheeler*, *supra*, 435 U.S. at 322, and the Red Lake court acts as an arm of the Red Lake Band.⁸ Were it otherwise, then

7 The Eighth Circuit in this case had before it several pronouncements and letters from the Tribe itself asserting that the Red Lake Court was a "CFR Court," not a tribal court. Those declarations came in the context of a struggle over BIA funding of court operations. What the Tribe or its representative may have said about the nature of the Red Lake Court, in any case, is not determinative of the legal issue involved here. For purposes of funding, the Red Lake Court was a CFR court. That does not mean that when it enforces tribal law it is not an "arm of the Tribe."

8 In this case, the Red Lake's do not urge, and this Court need not reach if it accepts certiorari, the question of whether a *CFR court* enforcing *CFR offenses* is operating as an arm of the federal government or of the Tribe itself. It is worth noting, however, that if the CFR Courts do not represent an exercise of tribal sovereignty, then not only are subsequent federal prosecutions barred, but the legality of the CFR courts may be in question. The Interior Department Solicitor has suggested, for instance, that the "more satisfactory defense" of the legality of the CFR courts "is a doctrine . . . that the courts of Indian offenses derived their authority from the Tribe rather than from Washington." Op. Sol. Int. October 25, 1934 (Powers of Indian Tribes) 55 I.D. 14, reprinted in, 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, (Cont.)

prosecution in a CFR court enforcing tribal law, where punishments cannot exceed one year in jail, 25 U.S.C. § 1302(7), as amended by § 4217, P.L. 99-570, would foreclose later federal prosecutions where more severe sentences can be meted out, with predictable "undesirable consequences." *United States v. Wheeler*, supra 435 U.S. at 330.⁹

(n. 8 cont.)

at 445, 476. This more "satisfactory defense" is necessary because the Secretary has relied on 25 U.S.C. § 2 to provide authority to establish CFR courts to try persons for the violation of criminal offenses defined in the administrative regulations. There is reason to question the breadth of that authority. *E.g.*, *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962) (declaring that 25 U.S.C. § 2 and § 9 do not provide "general power to make rules governing Indian conduct.") *But see United States v. Clapox*, 35 F. 575 (D. Or. 1888) (upholding legality of BIA courts).

- 9 The regulations themselves do not require the full records of the tribal court be made agency records or that they be turned over to the agency. If the records are not federal agency records, therefore, the regulations themselves do not compel a result favorable to the government. 25 C.F.R. § 11.11 requires, first, that a case record be kept available "for inspection by duly qualified officials" But the record need simply summarize the case and need not be released, simply available for review. 25 C.F.R. § 11.11 also requires that "a record of all proceedings shall be kept at the BIA agency office as required by 25 U.S.C. § 200." That law provides that "whenever an Indian shall be incarcerated in an Indian jail, or any other place of confinement, on an Indian reservation or in an Indian school, a report or record of the offense or case shall be immediately submitted to the superintendent of the reservation or such official or officials as he may designate and such reports shall be made part of the records of the agency office." The Red Lake Court does submit such a summary report whenever an Indian is incarcerated. *See* Page 24a of Addendum to Court of Appeals Opening Brief for (cont.)

Subjected to the *Wheeler* analysis, the inapplicability of the Federal Records Act to this case becomes manifest. 44 U.S.C. § 3301 defines federal records to include materials "made or received by an agency of the United States under federal law or in connection with a transaction of public business" When it is enforcing the tribal law and order code, the Red Lake Court is not making or receiving documents "under federal law". It is making or receiving those documents under tribal law. Nor can it be said that it is transacting the "public business" of the United States government. It is, rather, conducting the business of a separate sovereign, the Red Lake Band of Chippewa Indians. Thus, the records of the Red Lake Court are tribal records, not subject to the control of the BIA, irrespective of the BIA's funding or administrative regulation of the Red Lake Court.

3. The Red Lake Band Of Chippewa Indians Is Immune From Suit

The separate and sovereign nature of American Indian tribes was first enunciated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832). Although the Supreme Court has departed from the "conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), the Court still hews to the determination that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v.*

(n. 9 cont.)

Appellants (December 31, 1986). What the Tribe seeks to protect are the detailed and complete court records -- such as hearing transcripts, etc.

Bracker, *supra*, 448 U.S. at 142, quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). "[U]ntil Congress acts the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their independent status." *United States v. Wheeler, supra*, 435 U.S. at 323.

A fundamental element of tribal sovereignty is immunity from lawsuits absent Congressional authorization. *United States v. United States Fidelity Guarantee Company*, 309 U.S. 506, 513 (1940). That "immunity cannot be waived by [government] officials." *Id.* "[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed [by Congress].'" *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 58 quoting *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. King*, 395 U.S. 1, 4 (1969).

The court of appeals acknowledged the clear statements by this Court upholding the sovereign immunity of American Indian tribes from suit. Relying, however, on two Ninth Circuit cases, *United States v. White Mountain Apache Tribe*, 794 F.2d 917, 920 (9th Cir. 1986) and *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) *cert. denied* ___ U.S. ___, 107 S. Ct. 2461 (1987), the court held nonetheless that a tribe's sovereign immunity did not protect it from suits by the United States, even without an explicit Congressional authorization. In so doing, the court of appeals misread this Court's precedents on tribal sovereignty and imported into federal Indian law inapplicable principles involving the sovereign powers of states of the Union.

The Eighth Circuit suggests that tribes have lost their sovereign immunity vis-a-vis the United States as "an inherent implication of the superior power exercised by the United States over the Indian tribes" 827 F.2d

at 381. In doing so the Court relied on this court's declaration in *Washington v. Confederated Tribes of Colville, supra*, that Indian tribes retain attributes of sovereignty unless they are divested by treaty, federal law, or "by necessary implication of their dependent status." *Id.*, 447 U.S. at 152 (citation omitted).

The Eighth Circuit has misunderstood this Court's analysis of the "necessary" restrictions on tribal sovereignty. As the Court explained it in *United States v. Wheeler, supra*, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the Tribe." 435 U.S. at 326. Significantly, however, whatever other attributes of sovereignty are restricted when tribes deal with non-members, immunity from suit is not one of them. In fact, it is typically suits by non-members from which tribes are immune. *United States v. United States Fidelity Guarantee, supra*.

In any case, this lawsuit does not involve relations of the sort between a tribe and non-members explained by *Wheeler* and involved in, for instance, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Rather, the issue here involves the nature of the relationship between the Tribe and the United States government itself. That relationship is defined by the treaties between the two sovereigns and by the inherent trust relationship arising as a consequence. In that context, the words of Chief Justice Marshall still hold meaning: "A weak state [such as an Indian tribe] . . . may place itself under the protection of one more powerful without stripping itself of the right of government and *ceasing to be a state.*" *Worcester v. Georgia, supra* 31 U.S. at 557 (emphasis added). Nothing in the treaties between the Red Lake Band and the United States evinces an intent by the

Tribe to relinquish its sovereign immunity. Ambiguities in an Indian treaty should be resolved in favor of the tribe. See e.g., *Washington v. Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675-76 (1979); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Jones v. Meehan*, 175 U.S. 1 (1899). *A fortiori*, "the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n. 14 (1982).

Nor need a waiver of sovereign immunity against suits by the United States be implied to protect the government's interest. Congress can provide for such suits if it sees fit to do so. But under the Eighth Circuit's rule, Congress need never act. Under the Eighth Circuit's rule, the sovereign immunity of an Indian tribe can be waived by any officer of the United States government who has authority to file suit. This Court has acted in the past to protect Indian tribes from the exercise of that kind of administrative power, see, *United States v. United States Fidelity Guarantee*, *supra*, and should do so again.

The Eighth Circuit also erred in relying on cases from this Court permitting suits by the United States against individual states of the Union. From the very first, this Court has rejected the analogy between Indian tribes and individual states. See e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 16, (1831); *United States v. Kagama*, *supra*, 118 U.S. at 381. Lower courts, including the Eighth Circuit itself, have also rejected attempts to compare Indian tribes to the states. See *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1081 (8th Cir. 1975); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553, 556 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

In the context of a waiver of sovereign immunity the difference between the Indian tribes and the states is particularly compelling. This Court has held that by entering the Union, the states consented to suit by the sovereign thus created. *See United States v. Texas*, 143 U.S. 621, 12 S. Ct. 488, 494 (1892); cf. *Chisholm v. Georgia*, 2 U.S. 419 (1793). *See generally*, Tribe, "Intergovernmental Immunities In Litigation, Taxation, and Regulation: Separation of Powers Issues In Controversies About Federalism," 89 Harv. L.R. 682 (1976). Tribes did not, in the same way, consent to become part of the larger Union. Neither they nor their members ratified a constitution which subjected them to suit by the federal sovereign. Instead, they signed treaties with the United States, retaining their status as "distinct independent political communities . . . [and] their original natural rights," except as they ceded them to the United States in treaty or as the United States Congress explicitly acts to limit them. *Worcester v. Georgia*, *supra*, 31 U.S. at 560.

The Eighth Circuit's reliance on *United States v. Mississippi*, 380 U.S. 128 (1965), a case involving explicit Congressional statutes intended to enforce the Fifteenth Amendment, is particularly inapposite in this context. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress may, in enforcing the Fourteenth Amendment, override state's Eleventh Amendment immunity from suit.) Here, the Tribe does not argue that its sovereign immunity cannot be waived by an explicit statement of the Congress. All the Tribe asks is that the Court again make it clear that the Tribe's sovereign immunity is not waived by implication, cannot be waived by executive branch officials, and can only be removed by an "unequivocally expressed" statement of Congress. *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 58.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners
Red Lake Band of Chippewa Indians, et al.

December, 1987.

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

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Exhibit No. 18 (cont.)

**APPENDIX
TABLE OF CONTENTS**

	<u>Page</u>
United States Court of Appeals, for the Eighth Circuit, No. 86-5453, Order Denying Petition for Rehearing (September 28, 1987)	App. 1
United States Court of Appeals for the Eighth Circuit, No. 86-5453 Opinion of August 31, 1987	App. 2
United States District Court for the District of Minnesota, Memorandum and Order of October 24, 1986.....	App. 10
Federal Records Act	App. 24
Bureau of Indian Affairs Regulations	App. 26

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 86-5453MN**

United States of America	*
Appellee,	*
	*
vs.	* Appeal from the United
	* States District Court for
Red Lake Band of	* the District of Minnesota
Chippewa Indians, et al.,	*
Appellants.	*

Appellants' petition for rehearing has been considered by the Court and is denied.

September 28, 1987

Order entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

APP. 1

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 86-5453

United States of America, *
Appellee, *
v. * Appeal from the United
* States District Court for
Red Lake Band of * the District of Minnesota
Chippewa Indians, Red *
Lake Tribal Council; Roger*
Jourdain; Royce Graves; *
James Strong; Allen *
English; Lawrence *
Bedeau; George Jones; *
Adolph Barrett; Roman *
Stately, Jr.; Gerald Brun; *
Dan Raincloud, Jr; *
Tom Stillday, *
Appellants. *

Submitted: June 11, 1987
Filed: August 31, 1987

Before McMILLAN, Circuit Judge, FAIRCHILD,*
Senior Circuit Judge, and JOHN R. GIBSON, Circuit
Judge.

McMILLAN, Circuit Judge.

* The Honorable Thomas E. Fairchild, Senior Circuit Judge for the
United States Court of Appeals for the Seventh Circuit, sitting by
designation.

Exhibit No. 18 (cont.)

The Red Lake Band of Chippewa Indians, the Red Lake Tribal Council and Red Lake Band officials (collectively Red Lake) appeal from a final judgment entered in the District Court¹ for the District of Minnesota granting custody to the United States of certain records of the Red Lake Court of Indian Offenses (the tribal court). For reversal, Red Lake contends (1) tribal sovereign immunity bars the district court's assertion of jurisdiction over this action, and (2) the district court erred in granting summary judgment because there existed a genuine issue of material fact about whether the tribal court records were agency records belonging to the United States. For the reasons discussed below, we affirm the judgment of the district court.

In August 1985, Red Lake removed case records from its tribal court and stored them in the tribal archives. The Bureau of Indian Affairs (BIA) demanded that Red Lake return the records and Red Lake refused. The United States then filed this action under the Federal Records Act, 44 U.S.C. § 3106,² seeking recovery of the

1 The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

2 44 U.S.C. § 3106 provides:

Unlawful removal, destruction of records. The head of each Federal agency shall notify the [Federal Records] Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he [or she] is the head that shall come to his [or her] attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he [or she] knows or has reason to believe have been unlawfully removed from his [or her] agency, or from another Federal Agency whose records have been transferred to his [or her] legal custody. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist

Exhibit No. 18 (cont.)

The district court granted summary judgment for the United States. *United States v. Red Lake Band of Chippewa Indians*, Civ. No. 6-86-34 (D. Minn. Oct. 31, 1986) (memorandum opinion). The district court held first that it had jurisdiction over the case because sovereign immunity may not be asserted by an Indian tribe against the United States. *Id.* at 5. The district court relied on *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 153-54 (1980) (*Colville*), where the Supreme Court held that "tribal sovereignty is dependent on, and subordinate to, . . . the Federal Government," and that "tribes retain . . . their historical sovereignty not inconsistent with the overriding interests of the National Government."

Red Lake acknowledges on appeal that tribal sovereign immunity is not absolute as against the federal government. Red Lake contends, however, that the Supreme Court has held that only Congress may override tribal sovereign immunity and only by express waiver, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (*Santa Clara Pueblo*). There, the Court stated: "[T]ribal sovereign immunity . . . is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit. It is well settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* at 58 (citations omitted). Red Lake argues that the district court's jurisdictional ruling in this case contradicts *Santa Clara Pueblo* and means that any federal agency may waive tribal sovereign immunity merely by suing the tribe, whether or not Congress has waived the tribe's sovereign immunity. Congress has not

(n. 2 cont.)

shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

APP. 4

Exhibit No. 18 (cont.)

expressly waived tribal sovereign immunity under the Federal Records Act.

Whether tribal sovereign immunity may bar an action by the United States against an Indian tribe is a question of first impression in this circuit. In *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986), the Ninth Circuit held that "the Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers." This principle was later cited by the same court in *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) (*Yakima*), cert. denied, 107 S. Ct. 2461 (1987), in support of its holding that the United States could sue and override a tribe's sovereign immunity just as it could sue and override a state's sovereign immunity, citing *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (*Mississippi*) (federal sovereignty overrides state sovereignty).

Red Lake seeks to distinguish the *Yakima* and *White Mountain* cases. In both cases, the tribe obtained an injunction in tribal court preventing federal officials from carrying out official duties on the reservation. The United States challenged the injunctions in federal district court and the tribe resisted, arguing the district court had no jurisdiction. Because the tribes initiated the proceedings in tribal court, Red Lake argues that the tribes had waived their sovereign immunity with respect to the orders and decisions of the tribal court, which orders and decisions were in turn the subject of the litigation in federal district court. Red Lake also argues that the analogy drawn in *Yakima* between the relationship of the federal government and Indian tribes and that between the federal government and the individual states is not apt because Indian tribes exist in a trust relationship with the federal government and the states do not.

APP. 5

Exhibit No. 18 (cont.)

See F. Cohen, Handbook of Federal Indian law 220-21 (1982 ed.). Red Lake asserts it would not be a proper exercise of the federal government's fiduciary duty to permit an implicit waiver of tribal sovereign immunity whenever a federal agency wanted to sue an Indian tribe.

We conclude it is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States. In general, Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358 (1919). The status of Indian tribes in relation to the United States, however, is paradoxical. "[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). The tribes have been described as "domestic dependent nations," *id.* at 17, exercising many of the sovereign powers of an independent nation, yet existing in a ward-guardian relationship with the federal government and thus subject to its superior and plenary powers. In sum, the Indian tribes are distinct, independent political communities, retaining the right of self-government, yet subject to the protecting power of the United States. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

This status has been interpreted to mean that Indian tribes retain all fundamental attributes of sovereignty unless divested of them by federal law or by the "necessary implication of their dependent status." *Colville*, 447 U.S. at 152 (citation omitted).³ Tribal immunity from suit

³ The Supreme Court has found such a divestiture in cases where: "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to

without their consent is among those fundamental attributes of sovereignty that may be divested as an implicit result of their dependent status. *Cf. United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) ("[I]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."). We conclude that just as a state may not assert sovereign immunity as against the federal government, *Mississippi*, 380 U.S. at 140-41; neither may an Indian tribe, as a dependent nation, do so. Tribal sovereign immunity may not be asserted against the United States and we hold therefore that the district court had jurisdiction over this case.

Red Lake next contends the district court erred in ruling that the tribal court records are agency records and thus the property of the United States. The question of ownership of the tribal court records depends on the status of the Red Lake Court of Indian Offenses. The United States argues that the tribal court is a "C.F.R. court" organized under the BIA and governed by 25 C.F.R. Pt. 11. Part 11 establishes "Courts of Indian Offenses" on designated reservations for the purpose of providing "adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law." 25 C.F.R. § 11.1(b). The Red Lake Reservation is among those reservations specifically designated in the regulation. *Id.* § 11.1(a)(6). The records of C.F.R. courts are agency records and

(n. 3 cont.)

non-Indians without federal consent or prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights." *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 153-54 (citations omitted).

APP. 7

Exhibit No. 18 (cont.)

(federal records are "all books, papers . . . or other documentary materials . . . made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved as appropriate for preservation by that agency"); 25 C.F.R. § 11.11 (C.F.R. courts must keep records of all court proceedings and these records are to be kept at a BIA office).

Red Lake contends that because its tribal court is an independent tribal court and therefore not subject to the recordkeeping provisions of 25 C.F.R. § 11.1, its tribal court records are not agency records belonging to the United States. Designated tribal courts are presumptively C.F.R. courts. A C.F.R. court may, however, exempt itself from BIA regulation and be reclassified as an independent tribal court if the tribe establishes that it was organized under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479, and that it has adopted its own law and order code in accordance with its constitution and bylaws. 25 C.F.R. § 11.1(d).

The district court entered summary judgment in this case because Red Lake failed to offer any evidence that the tribe had met the requirements of § 11.1(d). Memorandum opinion at 10, 13. Red Lake contends on appeal that the district court should not have ordered summary judgment, but should instead have permitted further discovery on these issues.

Red Lake did not offer evidence establishing the necessary elements for exemption under § 11.1(d) at the summary judgment stage. Red Lake merely stated then, as it does now, that it does not know whether the tribe is organized under the IRA or whether the tribe has adopted a law and order code that effectively supplants agency regulation. Red Lake thus failed to produce any evidence that would lead the district court to conclude

Exhibit No. 18 (cont.)

that there existed any genuine factual dispute about whether the tribal court was still a C.F.R. court, as the Red Lake tribal court is specifically designated in the Part 11 regulations. The structure of the regulations requires Red Lake to affirmatively establish that it has met the exemption requirements of § 11.1(d). Absent evidence that the exemption applies, the Part 11 regulations would indicate that the United States was entitled to judgment as a matter of law. Red Lake's unsupported assertions that additional discovery is necessary on these issues are not sufficient to create a factual issue that would make summary judgment inappropriate in this case. *See* Fed. R. Civ. P. 56(e) (party resisting motion for summary judgment may not rest on mere allegations or denials, but must set forth in his or her response specific facts showing that there is a genuine issue for trial). We hold the district court did not err in entering summary judgment in this case.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH
CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,	*	
Plaintiff,	*	
v.	*	CIVIL 6-86-34
	*	
Red Lake Band of	*	MEMORANDUM AND
Chippewa Indians, Red	*	ORDER
Lake Tribal Council;	*	
Roger Jourdain, Chairman;	*	October 24, 1986
Royce Graves, Secretary;	*	
James Strong, Treasurer;	*	
Allen English,	*	
Lawrence Bedeau,	*	
George Jones,	*	
Adolph Barrett,	*	
Roman Stately, Jr.,	*	
Gerald Brun,	*	
Dan Raincloud, Jr.	*	
and Tom Stilday,	*	
District Representatives,	*	
Defendants.	*	

McLaughlin, J.

This matter is before the Court on plaintiff's motion for summary judgment and defendants' motion to dismiss. Plaintiff's motion will be granted and defendants' motion will be denied.

Facts

This is an action by the United States against the Red Lake Band of Chippewa Indians and the Red Lake Tribunal [sic] Council of Minnesota. Jurisdiction lies under 28 U.S.C. § 1345. The United States seeks to

Exhibit No. 18 (cont.)

recover documents from the Red Lake Court of Indian Offenses, which were removed from the court pursuant to an August 29, 1985 Tribunal [sic] Council Ordinance which states:

All Red Lake Court of Indian Offenses cases records shall be kept confidential by the Court and information contained in the case records shall be withheld from public disclosure.

Red Lake Tribal Council Ordinance No. 1-85. The tribal council, through Resolution No. 234-85 (passed the same date as the ordinance), ordered the case records of all closed cases of the Red Lake Court to be transferred to the tribal archives. The resolution further provides that these records shall be kept confidential and not made available for public inspection. The transfer to the tribal archives occurred on August 30, 1985. On September 17, 1985 the Bureau of Indian Affairs (BIA) made a formal demand upon the defendant for the return of the records. Defendant has refused to return the records. The BIA and the Department of the Interior claim that these court records are agency records belonging to the federal government, and that defendants' removal and continued possession of these records is in violation of the Federal Records Act, 44 U.S.C. § 3106. Defendants contend that the records are the property of the tribe, because the Red Lake Court is an independent tribal court and not subject to BIA regulations. Defendants further contend that the Court is without jurisdiction to hear this case because of Indian sovereign immunity from suit.

Jurisdiction

Defendant Red Lake Band of Chippewa Indians disputes the Court's jurisdiction over this action. Defendant asserts that Indian sovereign immunity prevents the

Exhibit No. 18 (cont.)

United States government from suing an Indian tribe without express congressional authorization.

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 47, 60 (1978); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-73 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 612-13 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). This tribal sovereign immunity is subject to the superior and plenary control of Congress, and Congress may, through an unequivocal expression of legislative intent, waive the sovereign immunity of an Indian tribe. *Santa Clara Pueblo*, 436 U.S. at 60; *United States Fidelity & Guaranty Co.*, 309 U.S. at 512. See also *United States v. Testar*, 424 U.S. 392, 399 (1976) quoting *United States v. King*, 395 U.S. 1, 4 (1969) (discussing standards for a waiver of sovereign immunity). Tribal sovereign immunity does not, however, bar actions by the United States against Indian tribes. As the Supreme Court has stated, "[t]ribal sovereignty is dependent on, and subordinate to, only the *Federal Government*," *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 154 (1980), and "tribes retain . . . their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'" *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) quoting *Confederate Tribes*, 447 U.S. at 153. (Both of these cases involve suits by states, not the federal government.) While there is no Eighth Circuit law on point, two recent Ninth Circuit cases have addressed the issue of Indian tribal sovereign immunity and suits by the federal government. In *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986), an Indian tribal court had attempted to enjoin federal officials from conducting official business on the reservation, specifically from prepar-

ing and filing a water rights claim in state court on behalf of the tribe. The United States sued in federal court seeking declaratory relief. The tribe argued that the suit in federal court was barred by the tribe's sovereign immunity, but this argument was rejected by the court. The court held that a "[t]ribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers." *White Mountain Apache Tribe*, 784 F.2d at 920. In *United States v. Yakima Tribal Court of the Yakima Indian Nation*, 794 F.2d 1402 (9th Cir. 1986), a tribal court order attempted to prevent federal officials from relocating an irrigation canal on Indian land. The United States sued, and the Ninth Circuit held that Indian sovereign immunity did not extend to preventing the federal government from exercising its superior sovereign power to seek a declaration in federal district court that the tribal court order was void. The *Yakima* court held that the United States could sue and override an Indian tribe's immunity just as it could sue and override a state's sovereign immunity. *Yakima Tribal Court*, 794 F.2d at 1408, discussing *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (state sovereign immunity overridden by United States suit).

The reasoning of the *White Mountain Apache Tribe* and *Yakima Tribal Court* cases is persuasive and consistent with Supreme Court pronouncements in *Confederated Tribes* and *San Carlos Apache Tribe*. The Court's assertion of jurisdiction over this case does not repudiate the right of Indian tribes to sovereign immunity, but simply recognizes that such sovereign immunity does not work as against the United States. Therefore, defendant's motion to dismiss this action for lack of jurisdiction will be denied.

Summary Judgment

A defendant is not entitled to summary judgment unless the defendant can show that no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). Summary judgment is an extreme remedy that should not be granted unless the moving party has established a right to judgment with such clarity as to leave no room for doubt and unless the non-moving party is not entitled to recover under any discernible circumstances. *E.g., Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). In considering a summary judgment motion, a court must view the facts most favorably to the non-moving party and give that party a benefit of all reasonable inferences that can be drawn from the facts. *E.g., Hartford Accident & Indemnity Co. v. Stauffer Chemical Co.*, 741 F.2d 1142, 1144-45 (8th Cir. 1984). The non-moving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Salinas v. School District of Kansas City*, 751 F.2d 288, 289 (8th Cir. 1984).

Possession of the Red Lake Court Records

On August 29, 1985 the Red Lake Tribal Council passed Ordinance No. 1-85 which states:

All Red Lake Court of Indian Offenses case records shall be kept confidential by the Court and information contained in the case records shall be withheld from public disclosure.

Also on that day the tribal council passed Resolution No. 234-85, ordering the Red Lake court to transfer the case records of all closed cases of the court to the tribal archives and providing that the records shall be kept confidential and not made available for public inspection.

On August 30, 1985, all closed case records of the Red Lake Court of Indian Offenses were transferred to the tribal archives. On September 17, 1985, the BIA made a formal demand upon the defendants for the return of the agency records. Defendants have not returned the documents but admit that they are in possession of the records at issue. Defendants claim the records belong to the tribe; plaintiff claims the records belong to the federal government.

The primary issue in dispute in this case is the status of the Red Lake Court of Indian Offenses. Plaintiff argues that the Red Lake court is organized pursuant to Title 25 of the Code of Federal Regulations, Part 11, that it is a creation of the BIA and the Department of the Interior, and that therefore its records are agency records belonging to the federal government. Defendants argue that the Red Lake Court is an independent tribal court pursuant to Title 25 C.F.R. § 11.1(d) and that its records belong to the tribe.

The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, is authorized to manage all Indian affairs and all matters arising out of Indian relations. 25 U.S.C. § 2. Pursuant to this authority, the commissioner has promulgated regulations establishing and governing courts of Indian offenses. 25 C.F.R. Part 11. 25 C.F.R. Part 11 states:

It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitution has been provided under Federal or State law.

Exhibit No. 18 (cont.)

25 C.F.R. § 11.1(b). The regulations list the Indian reservations subject to Part 11, and this list includes the Red Lake, Minnesota reservation. 25 C.F.R. § 11.1(a)(6). The regulations in 25 C.F.R. Part 11 govern the practice and procedure of courts of Indian offenses. For example, judges of the courts are appointed and removed by the BIA. 25 C.F.R. §§ 11.3(b), 11.4. The offenses adjudicated in the courts of Indian offenses are codified at 25 C.F.R. §§ 11.30 *et seq.*, and this Code of Indian Tribal Offenses controls on the Indian reservations. Indian tribal councils may adopt ordinances applicable to their own tribes, and after an ordinance has been approved by the Secretary of the Interior it becomes controlling; any inconsistent regulations in Part 11 will no longer be applicable to that tribe. 25 C.F.R. § 11.1(e). In addition, 25 C.F.R. § 11.11 states:

Each Court of Indian Offenses shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the agency [BIA] office, as required by 25 U.S.C. 200.¹

¹ 25 U.S.C. § 200 provides that whenever an Indian is incarcerated in an agency jail or other place of confinement on an Indian reservation, a report or record of the offense or case must be made a part of the records of the agency [BIA] office.

Exhibit No. 18 (cont.)

Records kept pursuant to 25 C.F.R. § 11.11 are kept at the BIA agency office. The BIA is part of the Department of the Interior, and is therefore a federal agency. Records of a federal agency are subject to the Federal Records Act, 44 U.S.C. § 101, *et seq.* Federal records are "all books, papers . . . or other documentary materials . . . made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . ." 44 U.S.C. § 3301. Thus the records of courts of Indian offenses, kept pursuant to 25 C.F.R. § 11.11, are the property of the federal government, and unauthorized possession or removal of these records is unlawful. *See* 44 U.S.C. § 3106 (authorizing the Attorney General to sue on behalf of the agency administrator to recover unlawfully removed records). Moreover, the Department of the Interior and the BIA have promulgated internal agency rules for the disposition of the records of courts of Indian offenses. Under the agency rules of the Department of the Interior, "[a]ll official records, regardless of their form, belong to the Department rather than to the officer who has custody of them and are to remain in the custody of the Department until there is official authorization for disposal." 384 Department of the Interior Departmental Manual 3.4A 2/2085 # 2625. The BIA rules state that records of the courts of Indian offenses are to remain in the BIA's custody for twenty years, and are then to be transferred to the National Archives. *See* Bureau of Indian Affairs Manual, Record Disposal Schedule 172, Supp. 3, Release 1, 2/11/77.

Title 25 C.F.R. § 11.11(d) limits the application of Part 11 regulations with regard to certain non-C.F.R. governed, independent tribal courts. Section 11.1(d) states:

APP. 17

Exhibit No. 18 (cont.)

The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 . . . until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

Thus the tribal courts of tribes coming under the provisions of section 11.1(d) are not subject to the record-keeping provisions of 25 C.F.R. § 11.11, and the records of such independent tribal courts are not federal agency records. Defendants contend that the Red Lake Tribe and the Red Lake Court of Indian Offenses comes under the provisions of 11.11(d). Defendants must establish two factors before the Red Lake Court of Indian Offenses can be classified as an independent tribal court under section 11.1(d). First, the tribe must be organized under the Indian Reorganization Act. Second, the tribe must have adopted its own law and order code in accordance with its constitution and bylaws.

A. The Indian Reorganization Act

The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, states in relevant part:

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate consituation [sic] and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reserva-

Exhibit No. 18 (cont.)

tion, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

25 U.S.C. § 476. Defendants have failed to offer any evidence to establish that the tribe is organized in this manner. Moreover, plaintiff has submitted documents from the defendants which clearly indicate that the defendants themselves believe the Red Lake court is a court of Indian offenses under the C.F.R. and the BIA and therefore not a tribal court of a tribe organized under the Act. For example, when the BIA began listing the specific Indian reservations to which 25 C.F.R. § 11.1 *et seq.* applied in section 11.1(a), the Red Lake reservation was not on the list. Consequently the Red Lake Tribal Council passed Resolutions No. 70-81, specifically directing their tribal attorneys "to investigate the misunderstanding existing within the [BIA] as to the status of the Red Lake Court of Indian Offenses and to take such steps as are deemed necessary to correct the . . . arbitrary reclassification of the Red Lake Court of Indian Offenses." Plaintiff's Memorandum Exh. A. The resolution further states that "the Red Lake Court of Indian Offenses was first established by the [BIA] in 1884 and has operated as such since then under provisions of the Code of Federal Regulations." *Id.* Pursuant to this resolution, defendant's counsel sent a letter to then-Secretary of the Interior James Watt, dated August 10,

APP. 19

Exhibit No. 18 (cont.)

1981. The letter states that the Red Lake Court was "originally and ever since has operated under the provisions of Title 25 Code of Federal regulations or *in other words as a Bureau of Indian Affairs Court.*" Plaintiff's Memorandum Exh. F (emphasis added). The August 10, 1981 letter also states that "the Red Lake Reservation Court of Indian Offenses . . . certainly comes under the application of . . . [section] 11.1(b)." *Id.* Section 11.1(b) is the purpose section for the establishment and maintenance of C.F.R. courts of Indian Offenses; it states that Part 11 regulations only apply where there is no "traditional agency] for the enforcement of tribal law," such as an independent tribal court. In response to defendant's request that it be officially included on the list of reservations governed by Part 11, the BIA published an amendment to the Part 11 regulations including the Red Lake Reservation on the list. 47 Fed. Reg. 22093 (May 21, 1982).

Another letter from the Red Lake's tribal attorney to the tribal chairman, dated April 12, 1985, states that:

The Red Lake Court of Indian Offenses is a Federal Government Court system set up pursuant to title 25 of the Code of Federal Regulations. The Red Lake Court system *is under the control, direction and supervision of the United States Department of Interior* and administered by the Bureau of Indian Affairs. The staff of the Red Lake Court of Indian Offenses are employees of the United States Department of Interior, Bureau of Indian Affairs. The Red Lake Court of Indian Offenses *is not a tribally operated court system.*

Plaintiff's Memorandum Exh. G (emphasis added). And in a memorandum from the Red Lake tribal chairman to the Red Lake council members, dated April 13.

1985, the chairman states that, "[t]he Court personnel are Federal employees and the Red Lake Court System is a Federal Government Court System under the control of the United States Department of Interior." Plaintiff's Memorandum Ex. H. These documents show that the defendants believe that the Red Lake court is a C.F.R. court of Indian offenses subject to the regulations in Part 11. If defendants believed that the tribe was organized under the Indian Reorganization Act, they would not have classified the Red Lake Court of Indian Offenses as a "Bureau of Indian Affairs Court," but as an independent tribal court.

B. The Tribe's Law and Order Code

The second factor that defendants must establish to be classified as an independent tribal court under section 11.1(d) is that the tribe adopted its own law and order code in accordance with its constitution and bylaws. Defendants have failed to establish this factor. Defendants assert that the tribe has adopted a law and order code, and plaintiff does not dispute this. However, this is not sufficient by itself to establish that defendants are subject to section 11.1(d). Defendants may have adopted ordinances that replaced the law and order code of the C.F.R. and still be subject to the remaining parts of the C.F.R. governing the administration of courts of Indian offenses. This is possible given the provisions of 25 C.F.R. § 11.1(e), which states:

Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsis-

Exhibit No. 18 (cont.)

tent therewith shall no longer be applicable to that tribe.

Thus the tribal court could be adjudicating offenses wholly different from the C.F.R. law and order code and still be a court of tribal offenses governed by the C.F.R. Defendants have not offered any evidence to establish that the tribe's law and order code was in fact adopted pursuant to section 11.1(d) and not section 11.1(e). In fact, in the August 10, 1981 letter from defendants' counsel to then-Secretary of the Interior James Watt, counsel states that the adoption of the law and order code by the tribal counsel and its approval by the Secretary of the Interior on February 15, 1952 "was performed under what is now Section 11.1e, 25 C.F.R. (1980)." Plaintiff's Memorandum Exh. F. If defendants believed section 11.1(d) applied to the tribe, they would not have stated that the tribe's law and order code was enacted under section 11.1(e).

Defendants have not offered any evidence to support their contention that the Red Lake court is a tribal court pursuant to section 11.1(d). Moreover, plaintiff has produced substantial evidence of defendants' assertions that the Red Lake court is in fact a C.F.R.-created court, subject to all of the Part 11 regulations. Since it is undisputed that the records of a C.F.R. court of Indian offenses are records of a federal agency, specifically, the BIA/Department of the Interior, defendants' removal and continued possession of the Red Lake court records is unlawful. *See* 44 U.S.C. § 3106. Therefore, plaintiff's motion for summary judgment will be granted.

Based on the foregoing, and upon all the files, records, and proceedings in this matter,

IT IS ORDERED that defendant's motion to dismiss for lack of jurisdiction is denied.

Exhibit No. 18 (cont.)

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is granted.

APP. 23

FEDERAL RECORDS ACT

44 U.S.C. § 3106

Unlawful removal, destruction of records.

The head of each Federal agency shall notify the [Federal Records] Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he [or she] is the head that shall come to his [or her] attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he [or she] knows or has reason to believe have been unlawfully removed from his [or her] agency, or from another Federal Agency whose records have been transferred to his [or her] legal custody. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

FEDERAL RECORDS ACT

33 U.S.C. § 3301

Definition of Records.

As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications and of processed documents are not included.

Exhibit No. 18 (cont.)

**BUREAU OF INDIAN AFFAIRS
REGULATIONS**

25 C.F.R. Part 11

Law and Order on Indian Reservations

APP. 26

SUBCHAPTER B—LAW AND ORDER

PART 11—LAW AND ORDER ON INDIAN RESERVATIONS

APPLICATION; JURISDICTION

- Sec.
11.1 Application of regulations.
11.2 Jurisdiction.

COURTS OF INDIAN OFFENSES

- 11.3 Judges.
11.4 Removal of judges.
11.5 Court procedure.
11.6 Appellate proceedings.
11.6C Appellate proceedings.
11.7 Juries.
11.7C Juries.
11.8 Witnesses.
11.10 Clerks.
11.11 Records.
11.12 Copies of laws.
11.13 Complaints.
11.14 Warrants to apprehend.
11.15 Arrests.
11.16 Search warrants.
11.17 Commitments.
11.16 Ball or bond.
11.19 Definition of signature.
11.20 Definition of tribal council.
11.20C Definition of tribal council.
11.21 Cooperation by Federal employees.

CIVIL ACTIONS

- 11.22 Jurisdiction.
11.22C Jurisdiction.
11.23 Law applicable to civil actions.
11.24 Judgments in civil actions.
11.24C Judgments in civil actions.
11.25 Costs in civil actions.
11.26 Payment of judgments from individual Indian moneys.
11.26C Payment of judgments from individual Indian moneys.

DOMESTIC RELATIONS

- 11.27 Recording of marriages and divorces.
11.28 Tribal custom marriage and divorce.
11.29 Tribal custom adoption.
11.29C Adoption.
11.30 Determination of paternity and support.
11.31 Determination of heirs.
11.31C Determination of heirs.
11.32 Approval of wills.
11.32C Approval of wills.

SENTENCES

- 11.33 Nature of sentences.
11.34 Probation.
11.34C Probation.

Sec.

- 11.35 Parole.
11.38 Juvenile delinquency.
11.38C Juvenile delinquency.
11.37 Disposition of fines.

CODE OF INDIAN TRIBAL OFFENSES

- 11.38 Assault.
11.39 Assault and battery.
11.40 Carrying concealed weapons.
11.41 Abduction.
11.42 Theft.
11.43 Embezzlement.
11.44 Fraud.
11.45 Forgery.
11.46 Misbranding.
11.47 Receiving stolen property.
11.48 Extortion.
11.49 Disorderly conduct.
11.50 Reckless driving.
11.50C Reckless driving.
11.50ME Traffic violations.
11.51 Malicious mischief.
11.52 Trespass.
11.53 Injury to public property.
11.54 Maintaining a public nuisance.
11.55 Liquor violations.
11.55ME Liquor violations.
11.56 Cruelty to animals.
11.57 Game violations.
11.58 Gambling.
11.59 Adultery.
11.60C Fornication.
11.61 Illicit cohabitation.
11.62 Prostitution.
11.63 Giving venereal disease to another.
11.63C Giving venereal disease to another.
11.64 Failure to support dependent persons.
11.64C Failure to support dependent persons.
11.65 Failure to send children to school.
11.66 Contributing to the delinquency of a minor.
11.67 Bribery.
11.68 Perjury.
11.69 False arrest.
11.70 Resisting lawful arrest.
11.70ME Resisting or obstructing officers.
11.71 Refusing to aid officer.
11.72 Escape.
11.73 Disobedience to lawful orders of court.
11.74 Violation of an approved tribal ordinance.
11.75C Limitation on filing of complaints.
11.76H Failure to sell or remove from tribal range infectious or cull animals.
11.77H Introduction of livestock without permit.
11.78H Stock trespass in form of unauthorized use of range.
11.79H Failure to dip sheep.

Exhibit No. 18 (cont.)

§ 11.1

- Sec.
 11.80H Making false reports of stock owned.
 11.81H Unauthorized fencing of tribal land.
 11.82H Inter-district trespass.
 11.83H Grazing stock without permit.
 11.84H Refusing to brand or mark livestock.
 11.85H Obstructing or interfering with livestock roundups.
 11.86H Trespass on areas reserved for demonstration purposes.
 11.87H Peyote violations.
 11.88ME Curfew.
 11.89ME Firearms.
 11.90ME Keeping of livestock.
 11.91ME Control of dogs.
 11.92ME Forest fire protection.
 11.93ME Possession of controlled substances.
 11.94ME Garbage and rubbish.
 11.95ME Extradition.
 11.96ME Breaking and entering.
 11.97ME Juvenile services.
 11.98ME Date of incorporated statutes.

THE INDIAN POLICE

- 11.301 Superintendent in command.
 11.302 Police commissioners.
 11.303 Police training.
 11.304 Minimum standards for police programs.
 11.305 Minimum standards for detention programs.
 11.306 Return of equipment.

AUTHORITY: R.S. 463; 25 U.S.C. 2. Interpret or apply sec. 1, 38 Stat. 588; 25 U.S.C. 200, unless otherwise noted.

SOURCE: 23 FR 10515, Dec. 24, 1957, unless otherwise noted.

NOTE: The regulations in this part are applicable on Indian reservations subject to the provisions of § 11.1, and the following exceptions:

Sections 11.6, 11.7, 11.30, 11.32, 11.34, 11.36, 11.38, 11.39, 11.31, 11.32, 11.34, 11.34, 11.50, 11.63, and 11.64, not applicable to Crow Indians.

Sections 11.6C, 11.7C, 11.30C, 11.32C, 11.34C, 11.36C, 11.39C, 11.31C, 11.32C, 11.34C, 11.36C, 11.50C, 11.60C, 11.63C, 11.64C, and 11.78C, applicable only to Crow Indians.

Sections 11.76H to 11.87H, inclusive, applicable only to Hopi Indians.

Sections 11.1, 11.2, 11.3, 11.5, 11.6, 11.6C, 11.7, 11.7C, 11.8, 11.30C, 11.32, 11.32C, 11.34, 11.34C, 11.35, 11.36C, 11.38, 11.39, 11.39C, 11.30, 11.31, 11.31C, 11.32, 11.32C, 11.33, 11.34C, 11.36C, 11.37, 11.49, 11.50C, 11.52, 11.53, 11.57, 11.58, 11.60C, 11.63, 11.63C, 11.64C, 11.74, 11.78C, and 11.76H-11.87H, inclusive, are not applicable to Coeur d'Alene Indians.

25 CFR Ch. I (4-1-87 Edition)

All sections in Part 11 not heretofore mentioned in this note are applicable to the Coeur d'Alene Indians.

EDITORIAL NOTE: Nomenclature changes appear at 38 FR 10927; May 3, 1973.

APPLICATION; JURISDICTION

§ 11.1 Application of regulations.

(a) Except as otherwise provided in this part, §§ 11.1 through 11.87 of this part apply to the following Indian reservations:

- (1) Omaha (Nebraska).
 - (2) Flandreau (South Dakota).
 - (3) Yankton (South Dakota).
 - (4) Wind River (Wyoming).
 - (5) Bois Forte (Minnesota).
 - (6) Red Lake (Minnesota).
 - (7) Cocopah (Arizona).
 - (8) Kaibab (Arizona).
 - (9) Hopi (Arizona) (Tribal court enforcement of special grazing regulations).
 - (10) Fallon (Nevada).
 - (11) Goshute (Nevada).
 - (12) Lovelock (Nevada).
 - (13) Te-Moak (Nevada).
 - (14) Yomba (Nevada).
 - (15) Duckwater Shoshone (Nevada).
 - (16) Kootenai (Idaho).
 - (17) Shoalwater Bay (Washington).
 - (18) Hoopa (California) (Jurisdiction limited to special fishing regulations).
 - (19) Anadarko Area Tribes (Western Oklahoma).
 - (20) Choctaw (Mississippi).
 - (21) Eastern Cherokee (North Carolina).
 - (22) Louisiana Area (Louisiana) (Includes Coushatta and other tribes in the State of Louisiana which occupy Indian country and which accept the application of this part; provided that this part shall not apply to any Louisiana tribe other than the Coushatta Tribe until notice of such application has been published in the FEDERAL REGISTER.)
- (b) It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law.

Bureau of Indian Affairs, Interior

§ 11.3

(c) No court of Indian Offenses will be established on reservations where justice is effectively administered under State laws and by State law enforcement agencies.

(d) The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian Judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957, as amended at 49 FR 7366, Feb. 29, 1984; 49 FR 12244, Mar. 29, 1984; 50 FR 12242, Mar. 28, 1985]

§ 11.2 Jurisdiction.

(a) A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§ 11.38 through 11.87H, when committed by any Indian, within the reservation or reservations for which the court is established, provided that such court on the Hopi Reservation shall also have jurisdiction to enforce against members of the tribe within the Hopi Reservation the ordinances passed by the Hopi tribal council which prohibit offenses against the peace and welfare of the tribe committed by such members off the reservation.

(b) With respect to any of the offenses enumerated in §§ 11.38 through 11.87H, over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the duty of the said Court of Indian Offenses to order delivery to the proper authorities of

the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.

(c) For the purpose of the enforcement of the regulations in this part, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction and a "reservation" shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

(d) All Indians employed in the Indian Service shall be subject to the jurisdiction of the Court of Indian Offenses but any such employee appointed by the Secretary of the Interior shall not be subject to any sentence of such court, unless such sentence shall have been approved by the Secretary of the Interior.

COURTS OF INDIAN OFFENSES

§ 11.3 Judges.

(a) A Court of Indian Offenses established for any reservation or group of reservations shall consist of one or more chief judges, whose duties shall be regular and permanent, and two or more associate judges, who may be called to service when occasion requires, and who shall be compensated on a per diem basis.

(b) Each judge shall be appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the tribal council.

(c) Each judge shall hold office for a period of 4 years, unless sooner removed for cause or by reason of the abolition of the said office, but shall be eligible for reappointment.

(d) A person shall be eligible to serve as judge of a Court of Indian Offenses only if he (1) is a member of a tribe under the jurisdiction of the said court; and (2) has never been convicted of a felony, or, within 1 year then last past, of a misdemeanor.

(e) No judge shall be qualified to act as such in any case wherein he has

APP. 29

§ 11.4

any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.

(f) On any reservation where no permanent Court of Indian Offenses has been established under this section, a provisional court may be established, with powers equal to those of a permanent court. Such court shall be established by detailing a judge from another reservation, upon request of the tribal council of the reservation desiring his services. Such detail shall be made by the superintendent of the reservation where the judge regularly presides. *Provided*, That where the judge to be detailed is paid from tribal funds the consent of the tribal council of such tribe shall be obtained for the detail. No detail shall extend beyond 1 year, but any detail may be renewed for additional periods unless such renewal is disapproved by the tribal council which requested or approved the detail.

§ 11.4 Removal of judges.

Any judge of the Court of Indian Offenses may be suspended, dismissed or removed, by the Commissioner of Indian Affairs, for cause, upon the recommendation of the tribal council.

§ 11.5 Court procedure.

(a) Sessions of the Court of Indian Offenses for the trial of cases shall be held by the chief judge, or, in case of his disability, by one of the associate judges selected for the occasion by all of the judges.

(b) The time and place of court sessions, and all other details of judicial procedure not prescribed by the regulations in this part, shall be laid down in rules of court approved by the tribal council and by the superintendent of the reservation.

(c) It shall be the duty of the judges of each Court of Indian Offenses to make recommendations to the tribal council for the enactment or amendment of such rules of court in the interests of improved judicial procedure.

§ 11.6 Appellate proceedings.

All the judges of the reservation shall sit together, at such times and at such places as they may find proper and necessary for the dispatch of busi-

25 CFR Ch. I (4-1-87 Edition)

ness, to hear appeals from judgments made by any judge at the trial sessions. There shall be established by rule of court the limitations, if any, to be placed upon the right of appeal both as to the types of cases which may be appealed and as to the manner in which appeals may be granted according to the needs of their jurisdiction. In the absence of such rule of court any party aggrieved by a judgment may appeal to the full court upon giving notice of such appeal at the time of judgment and upon giving proper assurance to the trial judge, through the posting of a bond or in any other manner, that he will satisfy the judgment if it is affirmed. In any case where a party has perfected his right to appeal as established herein or by rule of court, the judgment of the trial judge shall not be executed until after final disposition of the case by the full court. The full court may render judgment upon the case by majority vote.

§ 11.6C Appellate proceedings.

All the judges of the reservation, except the trial judge, shall sit together, at such times and at such places as they may find proper and necessary for the dispatch of business, to hear appeals from judgments made by any judge at the trial sessions, and such tribunal shall be known as the Crow Tribal Court of Appeals. There shall be established by rule of court the limitations, if any, to be placed upon the right of appeal both as to the types of cases which may be appealed and as to the manner in which appeals may be granted, according to the needs of their jurisdiction. In the absence of such rule of court any party aggrieved by a judgment may appeal to the full court upon giving notice of such appeal at the time of judgment and upon giving proper assurance to the trial judge, through the posting of a bond or in any other manner, that he will satisfy the judgment if it is affirmed. In any case where a party has perfected his right to appeal as established in this section or by rule of court, the judgment of the trial judge shall not be executed until after final disposition of the case by the full

Bureau of Indian Affairs, Interior

§ 11.10

court. The full court may render judgment upon the case by majority vote.

§ 11.7 Juries.

(a) In any case where, upon preliminary hearing by the court, a substantial question of fact is raised, the defendant may demand a jury trial.

(b) A list of eligible jurors shall be prepared by the tribal council each year.

(c) In any case, a jury shall consist of six residents of the vicinity in which the trial is held, selected from the list of eligible jurors by the judge. Any party to the case may challenge not more than three members of the jury panel so chosen.

(d) The judge shall instruct the jury in the law governing the case and the jury shall bring a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing law. If the jury is unable to reach a unanimous verdict, verdict may be rendered by a majority vote.

(e) Each juror who serves upon a jury shall be entitled to a fee not less than the hourly minimum wage scale established by 29 U.S.C. 206(a)(1), and any of its subsequent revisions, plus fifteen cents per mile travel costs. Each juror shall receive pay for a full day (8 hours) for any portion of a day served, plus travel allowance.

[22 FR 10515, Dec. 24, 1957, as amended at 41 FR 5280, Feb. 5, 1976]

§ 11.7C Juries.

(a) In any case where, upon preliminary hearing by the court, a substantial question of fact is raised, the defendant may demand a jury trial.

(b) A list of eligible jurors shall be prepared by the tribal council each year.

(c) In any case, a jury shall be drawn from the list of eligible jurors by the judge. Any party to the case may challenge not more than three members of the jury panel so chosen.

(d) The judge shall instruct the jury in the law governing the case and the jury shall bring a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing law. If the jury is unable to reach a unani-

mous verdict, the verdict may be rendered by a two-thirds majority vote.

(e) Each juror who serves upon a jury shall be entitled to a fee not less than the hourly minimum wage scale established by 29 U.S.C. 206(a)(1), and any of its subsequent revisions, plus fifteen cents per mile travel costs. Each juror shall receive pay for a full day (8 hours) for any portion of a day served, plus travel allowance.

[22 FR 10515, Dec. 24, 1957, as amended at 41 FR 5280, Feb. 5, 1976]

§ 11.8 Witnesses.

(a) The several judges of the Courts of Indian Offenses shall have the power to issue subpoenas for the attendance of witnesses either on their own motion or on the request of the police commissioner or superintendent or any of the parties to the case, which subpoena shall bear the signature of the judge issuing it. Each witness answering such subpoena shall be entitled to a fee not less than the hourly minimum wage scale established by 29 U.S.C. 206(a)(1) and any of its subsequent revisions, plus actual cost of travel. Each witness testifying at a hearing shall receive pay for a full day (8 hours), plus travel allowance. Failure to obey such subpoena shall be deemed an offense as provided in § 11.73. Service of such subpoenas shall be by a regularly acting member of the Indian police or by an Indian appointed by the court for that purpose.

(b) Witnesses who testify voluntarily shall be paid by the party calling them if the court so directs, their actual traveling and living expenses incurred in the performance of their function.

[22 FR 10515, Dec. 24, 1957, as amended at 41 FR 5280, Feb. 5, 1976]

§ 11.10 Clerks.

The superintendent shall detail a clerk of court for each Court of Indian Offenses. The clerk of the Court of Indian Offenses shall render assistance to the court, to the police force of the reservation and to individual members of the tribe in the drafting of complaints, subpoenas, warrants and commitments and any other documents incidental to the lawful functions of the court. It shall be the fur-

§ 11.11

ther duty of said clerk to attend and to keep a written record of all proceedings of the court, to administer oaths to witnesses, to collect all fines paid and to pay out all fees authorized by the regulations in this part, and to make an accounting thereof to the disbursing agent of the reservation and to the tribal council.

§ 11.11 Records.

Each Court of Indian Offenses shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the agency office, as required by 25 U.S.C. 200.

§ 11.12 Copies of laws.

(a) Each Court of Indian Offenses shall be provided with copies of all Federal and State laws and regulations of the Bureau of Indian Affairs applicable to the conduct of Indians within the reservation.

(b) Whenever the court is in doubt as to the meaning of any law, treaty or regulation it may request the superintendent to furnish an opinion on the point in question.

§ 11.13 Complaints.

No complaint filed in any Court of Indian Offenses shall be valid unless it shall bear the signature of the complainant or complaining witness, witnessed by a duly qualified judge of the Court of Indian Offenses or by the superintendent or by any other qualified employee of such reservation.

§ 11.14 Warrants to apprehend.

Every judge of a Court of Indian Offenses shall have the authority to issue warrants to apprehend, said warrants to issue in the discretion of the court only after a written complaint shall have been filed, bearing the signature of the complaining witness.

25 CFR Ch. I (4-1-87 Edition)

Service of such warrants shall be made by a duly qualified member of the Indian police or other police officer of the United States Indian Service. No warrant to apprehend shall be valid unless it shall bear the signature of a duly qualified judge of the Court of Indian Offenses.

§ 11.15 Arrests.

No member of the Indian police shall arrest any person for any offense defined by §§ 11.38 through 11.87H or by Federal law, except when such offense shall occur in the presence of the arresting officer or he shall have reasonable evidence that the person arrested has committed an offense or the officer shall have a warrant commanding him to apprehend such person.

§ 11.16 Search warrants.

(a) Every judge of the Court of Indian Offenses of any Indian reservation shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of said court. However, no warrant of search and seizure shall issue except upon a duly signed and written complaint based upon reliable information or belief and charging the commission of some offense against the tribe. No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and describes the articles or property to be seized and bears the signature of a duly qualified judge of the Court of Indian Offenses. Service of warrants of search and seizure shall be made only by members of the Indian police or police officers of the Bureau of Indian Affairs.

(b) No policeman shall search or seize any property without a warrant unless he shall know, or have reasonable cause to believe, that the person in possession of such property is engaged in the commission of an offense under the regulations in this part. Unlawful search or seizure will be deemed trespass and punished in accordance with § 11.52.

Bureau of Indian Affairs, Interior**§ 11.22C****§ 11.17 Commitments.**

No Indian shall be detained, jailed or imprisoned under the regulations in this part for a longer period than 36 hours unless there be issued a commitment bearing the signature of a duly qualified judge of the Court of Indian Offenses. There shall be issued, for each Indian held for trial, a temporary commitment and for each Indian held after sentence a final commitment on the prescribed forms.¹

§ 11.18 Bail or bond.

Every Indian charged with an offense before any Court of Indian Offenses may be admitted to bail. Bail shall be by two reliable members of any Indian tribe who shall appear before a judge of the Court of Indian Offenses where complaint has been filed and there execute an agreement in compliance with the form provided therefor and made a part of the regulations in this part. In no case shall the penalty specified in the agreement exceed twice the maximum penalty set by §§ 11.38 through 11.87H for violation of the offense with which the accused is charged.

§ 11.19 Definition of signature.

The term "signature" as used in the regulations in this part shall be defined as the written signature, official seal, or the witnessed thumb print or mark of any individual.

§ 11.20 Definition of tribal council.

The term "tribal council," as used in the regulations in this part, shall be construed to refer to the council, business committee or other organization recognized by the Department of the Interior as representing the tribe, or where no such body is recognized, to the adult members of the tribe in council assembled.

§ 11.20C Definition of tribal council.

The term "tribal council," as used in the regulations in this part, shall be construed to refer to the Crow tribal council.

¹Forms may be obtained from the Commissioner of Indian Affairs, Washington, D.C.

§ 11.21 Cooperation by Federal employees.

(a) No field employee of the Indian Service shall obstruct, interfere with or control the functions of any Court of Indian Offenses, or influence such functions in any manner except as permitted by the regulations in this part or in response to a request for advice or information from the court.

(b) Employees of the Bureau of Indian Affairs, particularly those who are engaged in social service, health and educational work, shall assist the court, upon its request, in the preparation and presentation of the facts in the case and in the proper treatment of individual offenders.

CIVIL ACTIONS**§ 11.22 Jurisdiction.**

The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the clerk of the court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

§ 11.22C Jurisdiction.

The Court of Indian Offenses shall have jurisdiction of all suits wherein the parties to the action are members of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the

§ 11.23

clerk of the court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

§ 11.23 Law applicable to civil actions.

(a) In all civil cases the Court of Indian Offenses shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe, not prohibited by such Federal laws.

(b) Where any doubt arises as to the customs and usages of the tribe the court may request the advice of counsellors familiar with these customs and usages.

(c) Any matters that are not covered by the traditional customs and usages of the tribe, or by applicable Federal laws and regulations, shall be decided by the Court of Indian Offenses according to the laws of the State in which the matter in dispute may lie.

§ 11.24 Judgments in civil actions.

(a) In all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party.

(b) Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered.

(c) Where the injury was deliberately inflicted, the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe.

(d) Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment shall compensate the injured party for a reasonable part of the loss he has suffered.

§ 11.24C Judgments in civil actions.

(a) In all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some

25 CFR Ch. I (4-1-87 Edition)

other act for the benefit of the injured party.

(b) Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered.

(c) Where the injury was deliberately inflicted, the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe.

(d) Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment may compensate the injured party for a reasonable part of the loss he has suffered.

§ 11.25 Costs in civil actions.

The court may assess the accruing costs of the case against the party or parties against whom judgment is given. Such costs shall consist of the expenses of voluntary witnesses for which either party may be responsible under § 11.8 and the fees of jurors in those cases where a jury trial is had, and any further incidental expenses connected with the procedure before the court as the court may direct.

§ 11.26 Payment of judgments from individual Indian moneys.

(a) Whenever the Court of Indian Offenses shall have ordered payment of money damages to an injured party and the losing party refuses to make such payment within the time set for payment by the court, and when the losing party has sufficient funds to his credit at the agency office to pay all or part of such judgment, the superintendent shall certify to the Secretary of the Interior the record of the case and the amount of the available funds. If the Secretary shall so direct, the disbursing agent shall pay over to the injured party the amount of the judgment, or such lesser amount as may be specified by the Secretary, from the account of the delinquent party.

(b) A judgment shall be considered a lawful debt in all proceedings held by the Department of the Interior or by the Court of Indian Offenses to distribute decedents' estates.

Bureau of Indian Affairs, Interior

§ 11.30

Cross Reference: For individual Indian money regulations, see Part 115 of this chapter.

§ 11.26C Payment of judgments from individual Indian moneys.

(a) Whenever the Court of Indian Offenses shall have ordered payment of money damages to an injured party and the losing party refuses to make such payment within the time set for payment by the court, and when the losing party has sufficient funds to his credit at the agency office to pay all or part of such judgment, the superintendent shall certify to the Secretary of the Interior the record of the case and the amount of the available funds. If the Secretary shall so direct, the disbursing agent shall pay over to the injured party the amount of the judgment, or such lesser amount as may be specified by the Secretary, from the account of the delinquent party.

(b) A judgment shall be considered a lawful debt in all proceedings held by the Department of the Interior or by the Court of Indian Offenses to distribute decedents' estates.

(c) No recovery may be had after 5 years from date of final judgment in any suit unless such judgment shall have been renewed before date of expiration.

Cross Reference: For individual Indian money regulations, see Part 115 of this chapter.

DOMESTIC RELATIONS

§ 11.27 Recording of marriages and divorces.

All Indian marriages and divorces, whether consummated in accordance with the State law or in accordance with tribal custom, shall be recorded within 3 months at the agency of the jurisdiction in which either or both of the parties reside.

§ 11.28 Tribal custom marriage and divorce.

(a) The Tribal council shall have authority to determine whether Indian custom marriage and Indian custom divorce for members of the tribe shall be recognized in the future as lawful marriage and divorce upon the reservation, and if it shall be so recognized, to determine what shall constitute

such marriage and divorce and whether action by the Court of Indian Offenses shall be required. When so determined in writing, one copy shall be filed with the Court of Indian Offenses, one copy with the superintendent in charge of the reservation, and one copy with the Commissioner of Indian Affairs. Thereafter Indians who desire to become married or divorced by the custom of the tribe shall conform to the custom of the tribe as determined. Indians who assume or claim a divorce by Indian custom shall not be entitled to remarry until they have complied with the determined custom of their tribe nor until they have recorded such divorce at the agency office.

(b) Pending any determination by the tribal council on these matters, the validity of Indian custom marriage and divorce shall continue to be recognized as heretofore.

§ 11.29 Tribal custom adoption.

The tribal council shall likewise have authority to determine whether Indian custom adoption shall be permitted upon the reservation among members of the tribe, and if permitted, to determine what shall constitute such adoption and whether action by the Court of Indian Offenses shall be required. The determination of the tribal council shall be filed with the Court of Indian Offenses, with the superintendent of the reservation and with the Commissioner of Indian Affairs. Thereafter all members of the tribe desiring to adopt any person shall conform to the procedure fixed by the tribal council.

§ 11.29C Adoption.

No future adoptions among or by the Crow Indians shall be recognized except those made in accordance with the act of March 3, 1931 (46 Stat. 1494).

§ 11.30 Determination of paternity and support.

The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. A judgment of the

§ 11.31

court establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses.

§ 11.31 Determination of heirs.

(a) When any member of the tribe dies leaving property other than an allotment or other trust property subject to the jurisdiction of the United States, any member claiming to be an heir of the decedent may bring a suit in the Court of Indian Offenses to have the court determine the heirs of the decedent and to divide among the heirs such property of the decedent. No determination of heirs shall be made unless all the possible heirs known to the court, to the superintendent, and to the claimant have been notified of the suit and given full opportunity to come before the court and defend their interests. Possible heirs who are not residents of the reservation under the jurisdiction of the court must be notified by mail and a copy of the notice must be preserved in the record of the case.

(b) In the determination of heirs the court shall apply the custom of the tribe as to inheritance if such custom is proved. Otherwise the court shall apply State law in deciding what relatives of the decedent are entitled to be his heirs.

(c) Where the estate of the decedent includes any interest in restricted allotted lands or other property held in trust by the United States, over which the administrative law judge would have jurisdiction, the Court of Indian Offenses may distribute only such property as does not come under the jurisdiction of the administrative law judge, and the determination of heirs by the court may be reviewed, on appeal, and the judgment of the court modified or set aside by the said administrative law judge, with the approval of the Secretary of the Interior, if law and justice so require.

Cross Reference: For regulations governing the jurisdiction of the administrative law judge concerning the determination of heirs, see Part 15 of this chapter.

25 CFR Ch. I (4-1-87 Edition)

§ 11.31C Determination of heirs.

The superintendent of the Crow Reservation shall have authority to protect, impound or convert into cash, for the benefit of the estate, any personal property which may be left by any decedent who is an enrolled member of the Crow Tribe, pending final determination of the heirs of said decedent by the Secretary of the Interior, and in accordance with existing law and regulations.

§ 11.32 Approval of wills.

When any member of the tribe dies, leaving a will disposing only of property other than an allotment or other trust property subject to the jurisdiction of the United States, the Court of Indian Offenses shall, at the request of any member of the tribe named in the will or any other interested party, determine the validity of the will after giving notice and full opportunity to appear in court to all persons who might be heirs of the decedent, as under § 11.31. A will shall be deemed to be valid if the decedent had a sane mind and understood what he was doing when he made the will and was not subject to any undue influence of any kind from another person, and if the will was made in accordance with a proved tribal custom or made in writing and signed by the decedent in the presence of two witnesses who also sign the will. If the court determines the will to be validly executed, it shall order the property described in the will to be given to the persons named in the will or to their heirs; but no distribution of property shall be made in violation of a proved tribal custom which restricts the privilege of tribal members to distribute property by will.

Cross Reference: For regulations governing the jurisdiction of the administrative law judge concerning the approval of wills, heirs, see Part 15 of this chapter.

§ 11.32C Approval of wills.

The determination of the validity of wills shall be made by the Secretary of the Interior as provided in Part 15 of this chapter.

Exhibit No. 18 (cont.)

Bureau of Indian Affairs, Interior

§ 11.36

SENTENCES

§ 11.33 Nature of sentences.

(a) Any Indian who has been convicted by the Court of Indian Offenses of violation of a provision of §§ 11.38 through 11.84H shall be sentenced by the court to work for the benefit of the tribe for any period found by the court to be appropriate; but the period fixed shall not exceed the maximum period set for the offense in the code, and shall begin to run from the day of the sentence. During the period of sentence the convicted Indian may be confined in the agency jail if so directed by the court. The work shall be done under the supervision of the superintendent or an authorized agent or committee of the tribal council as the court may provide.

(b) Whenever any convicted Indian shall be unable or unwilling to work, the court shall, in its discretion, sentence him to imprisonment for the period of the sentence or to pay a fine equal to \$2 a day for the same period. Such fine shall be paid in cash, or in commodities or other personal property of the required value as may be directed by the court. Upon the request of the convicted Indian, the disbursing agent may approve a disbursement voucher chargeable to the Indian's account to cover payment of the fine imposed by the court.

(c) In addition to any other sentence, the court may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured, through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party.

(d) In determining the character and duration of the sentence which shall be imposed, the court shall take into consideration the previous conduct of the defendant, the circumstances under which the offense was committed, and whether the offense was malicious or willful and whether the offender has attempted to make amends, and shall give due consideration to the extent of the defendant's resources and the needs of his dependents. The penalties listed in §§ 11.38 through

11.87H are maximum penalties to be inflicted only in extreme cases.

§ 11.34 Probation.

(a) Where sentence has been imposed upon any Indian who has not previously been convicted of any offense, the Court of Indian Offenses may in its discretion suspend the sentence imposed and allow the offender his freedom on probation upon his signing a pledge of good conduct during the period of the sentence upon the form provided therefor.

(b) Any Indian who shall violate his probation pledge shall be required to serve the original sentence plus an additional half of such sentence as penalty for the violation of his pledge.

§ 11.34C Probation.

(a) Where sentence has been imposed upon any Indian, the Court of Indian Offenses may in its discretion suspend the sentence imposed and allow the offender his freedom on probation, upon his signing a pledge of good conduct during the period of the sentence.

(b) Any Indian who shall violate his probation pledge shall be required to serve the original sentence plus an additional half of such sentence as penalty for the violation of his pledge.

§ 11.35 Parole.

(a) Any Indian committed by a Court of Indian Offenses who shall have without misconduct served one-half the sentence imposed by such court shall be eligible to parole. Parole shall be granted only by a judge of the Court of Indian Offenses where the prisoner was convicted and upon the signing of the form provided therefor.

(b) Any Indian who shall violate any of the provisions of such parole shall be punished by being required to serve the whole of the original sentence.

§ 11.36 Juvenile delinquency.

Whenever any Indian who is under the age of 18 years is accused of committing one of the offenses enumerated in §§ 11.38 through 11.87H, the judge may in his discretion hear and determine the case in private and in an informal manner, and, if the ac-

§ 11.36C

cused is found to be guilty, may in lieu of sentence place such delinquent for a designated period under the supervision of a responsible person selected by him or may take such other action as he may deem advisable in the circumstances.

§ 11.36C Juvenile delinquency.

(a) Whenever any Indian who is under the age of 18 years is accused of committing one of the offenses enumerated in §§ 11.38 through 11.75C, the judge may in his discretion hear and determine the case in private and in an informal manner, and, if the accused is found to be guilty, may in lieu of sentence, place such delinquent for a designated period under the supervision of a responsible person selected by him or may take such other action as he may deem advisable in the circumstances.

(b) In the absence of either parent or guardian, the court shall appoint a suitable person to represent the delinquent child.

§ 11.37 Disposition of fines.

(a) All money fines imposed for the commission of an offense shall be in the nature of an assessment for the payment of designated court expenses. Such expenses shall include the payment of the fees provided for in the regulations in this part to jurors and to witnesses answering a subpoena. The fines assessed shall be paid over by the clerk of the court to the disbursing agent of the reservation for deposit as a "special deposit, court funds" to the disbursing agent's official credit in the Treasury of the United States. The disbursing agent shall withdraw such funds, in accordance with existing regulations, upon the order of the clerk of the court signed by a judge of the court for the payment of specified fees to specified jurors or witnesses. The disbursing agent and the clerk of the court shall keep an accounting of all such deposits and withdrawals for the inspection of any person interested. Whenever such fund shall exceed the amount necessary with a reasonable reserve for the payment of the court expenses before mentioned, the tribal council shall designate, with the approval of the superintendent, further

25 CFR Ch. I (4-1-87 Edition)

expenses of the work of the court which shall be paid by these funds, such as the writing of records, the costs of notices or the increase of fees, whether or not any such costs were previously paid from other sources.

(b) Wherever a fine is paid in commodities, the commodities shall be turned over under the supervision of the clerk of the court to the custody of the superintendent to be sold or, if the tribal council so directs, to be disposed of in other ways for the benefit of the tribe. The proceeds of any sale of such commodities shall be deposited by the disbursing agent in the special deposit for court funds and recorded upon the accounts.

CODE OF INDIAN TRIBAL OFFENSES

§ 11.38 Assault.

Any Indian who shall attempt or threaten bodily harm to another person through unlawful force or violence shall be deemed guilty of assault, and upon conviction thereof shall be sentenced to labor for a period not to exceed 5 days or shall be required to furnish a satisfactory bond to keep the peace.

§ 11.39 Assault and battery.

Any Indian who shall willfully strike another person or otherwise inflict bodily injury, or who shall by offering bodily injury, or who shall by offering violence cause another to harm himself shall be deemed guilty of assault and battery and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.40 Carrying concealed weapons.

Any Indian who shall go about in public places armed with a dangerous weapon concealed upon his person, unless he shall have a permit signed by a judge of a Court of Indian Offenses and countersigned by the superintendent of the reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days; and the weapons so carried may be confiscated.

Bureau of Indian Affairs, Interior

§ 11.50C

§ 11.41 Abduction.

Any Indian who shall willfully take away or detain another person against his will or without the consent of the parent or other person having lawful care or charge of him, shall be deemed guilty of abduction and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.42 Theft.

Any Indian who shall take the property of another person, with intent to steal, shall be deemed guilty of theft and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.43 Embezzlement.

Any Indian who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be deemed guilty of embezzlement and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.44 Fraud.

Any Indian who shall by willful misrepresentation or deceit, or by false interpreting, or by the use of false weights or measures obtain any money or other property, shall be deemed guilty of fraud and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.45 Forgery.

Any Indian who shall, with intent to defraud, falsely sign, execute or alter any written instrument, shall be deemed guilty of forgery and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.46 Misbranding.

Any Indian who shall knowingly and willfully misbrand or alter any brand or mark on any livestock of another person, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.47 Receiving stolen property.

Any Indian who shall receive or conceal or aid on concealing or receiving any property, knowing the same to be stolen, embezzled, or obtained by fraud or false pretense, robbery or burglary, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months.

§ 11.48 Extortion.

Any Indian who shall willfully, by making false charges against another person or by any other means whatsoever, extort or attempt to extort any moneys, goods, property, or anything else of any value, shall be deemed guilty of extortion and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.49 Disorderly conduct.

Any Indian who shall engage in fighting in a public place, disturb or annoy any public or religious assembly, or appear in a public or private place in an intoxicated and disorderly condition, or who shall engage in any other act of public indecency or immorality, shall be deemed guilty of disorderly conduct and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.50 Reckless driving.

Any Indian who shall drive or operate any automobile, wagon, or any other vehicle in a manner dangerous to the public safety, shall be deemed guilty of reckless driving and upon conviction thereof shall be sentenced to labor for a period not to exceed 15 days and may be deprived of the right to operate any automobile for a period not to exceed 6 months. For the commission of such offense while under the influence of liquor, the offender may be sentenced to labor for a period not to exceed 3 months.

§ 11.50C Reckless driving.

Any Indian who shall drive or operate any automobile, wagon, or any other vehicle in a manner dangerous to the public safety, shall be deemed guilty of reckless driving and upon

Exhibit No. 18 (cont.)

§ 11.50ME

conviction thereof shall be sentenced to labor for a period not to exceed 15 days and may be deprived of the right to operate any automobile for a period not to exceed 6 months. For the commission of such offense while under the influence of liquor, the offender may be sentenced for the first offense to labor for a period not to exceed 3 months and for a second or subsequent offense for a period not to exceed 6 months and may be deprived of his right to operate any motor vehicle for a period of 1 year.

§ 11.50ME Traffic violations.

Until such time as the Menominee Tribe enacts its own traffic code, the provisions of the Wisconsin State Traffic Laws (Chapter 346, Title 32 of Wisconsin Statutes) are hereby applicable to the operation of motor vehicles on the Menominee Reservation with the exception that any Indian found guilty of violating such laws shall, in lieu of the penalties provided by State law, be sentenced to labor for a period not to exceed six (6) months and may be deprived of the right to operate any motor vehicle for a period not to exceed six (6) months.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40805, Sept. 13, 1978]

§ 11.51 Malicious mischief.

Any Indian who shall maliciously disturb, injure or destroy any livestock or other domestic animal or other property, shall be deemed guilty of malicious mischief and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.52 Trespass.

Any Indian who shall go upon or pass over any cultivated or enclosed lands of another person and shall refuse to go immediately therefrom on the request of the owner or occupant thereof or who shall willfully and knowingly allow livestock to occupy or graze on the cultivated or enclosed lands, shall be deemed guilty of an offense and upon conviction shall be punished by a fine not to exceed \$5, in addition to any award of damages for the benefit of the injured party.

25 CFR Ch. I (4-1-87 Edition)

§ 11.53 Injury to public property.

Any Indian who shall, without proper authority, use or injure any public property of the tribe or the United States, shall be deemed guilty of the offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.54. Maintaining a public nuisance.

Any Indian who shall act in such a manner, or permit his property to fall into such condition as to injure or endanger the safety, health, comfort, or property of his neighbors, shall be deemed guilty of offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 5 days, and may be required to remove such nuisance when so ordered by the court.

§ 11.55 Liquor violations.

Any Indian who shall possess, sell, trade, transport or manufacture any beer, ale, wine, whisky or any article whatsoever which produces alcoholic intoxication, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 60 days.

§ 11.55ME Liquor violations.

Until such time as the Menominee Tribe enacts its own liquor control ordinance, the provisions of the Wisconsin State laws found in Wis. Ann. §§ 176.01 through 176.91 relating to liquor control, are hereby incorporated by reference and made applicable to the buying, selling, and consumption of alcoholic beverages on the Menominee Reservation, with the exception that any Indian found guilty of violating such law shall, in lieu of the penalties provided by State law, be sentenced to labor for a period not to exceed sixty (60) days.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40805, Sept. 13, 1978]

§ 11.54 Cruelty to animals.

Any Indian who shall torture or cruelly mistreat any animal, shall be deemed guilty of an offense and shall be sentenced to labor for a period not to exceed 30 days.

Exhibit No. 18 (cont.)

Bureau of Indian Affairs, Interior

§ 11.64C

§ 11.57 Game violations.

Any Indian who shall violate any law, rule or regulation adopted by the tribal council for the protection or conservation of the fish or game of the reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days; and he shall forfeit to the court for the use of any Indian institution such game as may be found in his possession.

§ 11.58 Gambling.

Any Indian who shall violate any law, rule or regulation adopted by the tribal council for the control or regulation of gambling on any reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.59 Adultery.

Any Indian who shall have sexual intercourse with another person, either of such persons being married to a third person, shall be deemed guilty of adultery and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.60C Fornication.

Any Indian who shall have sexual intercourse with another person, neither of such persons being married, shall be deemed guilty of fornication and upon conviction thereof shall be sentenced to labor for a period of not to exceed 25 days.

§ 11.61 Illicit cohabitation.

Any Indian who shall live or cohabit with another as man and wife not then and there being married shall be deemed guilty of illicit cohabitation and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.62 Prostitution.

Any Indian who shall practice prostitution or who shall knowingly keep, maintain, rent or lease, any house, room, tent, or other place for the purpose of prostitution shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to

labor for a period not to exceed 6 months.

§ 11.63 Giving venereal disease to another.

Any Indian who shall infect another person with a venereal disease shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months. The Court of Indian Offenses shall have authority to order and compel the medical examination and treatment of any person charged with violation of this section or found to be afflicted with any communicable disease of this nature.

§ 11.63C Giving venereal disease to another.

Any Indian who shall infect another person with a venereal disease shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months. The Court of Indian Offenses shall have authority to order and compel the medical examination and treatment of any person charged with violation of this section or found to be afflicted with any communicable disease.

§ 11.64 Failure to support dependent persons.

Any Indian who shall, because of habitual intemperance or gambling or for any other reason, refuse or neglect to furnish food, shelter, or care to those dependent upon him, including any dependent children born out of wedlock, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 3 months, for the benefit of such dependent.

§ 11.64C Failure to support dependent persons.

(a) Any Indian who shall, because of habitual intemperance or gambling or for any other reason, refuse or neglect to furnish food, shelter, or care to those dependent upon him, including any dependent children born out of wedlock, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a

Exhibit No. 18 (cont.)

§ 11.65

period not to exceed 3 months, for the benefit of such dependent.

(b) The Court of Indian Offenses shall also have authority to order and compel the payment of all alimony lawfully awarded in any divorce proceeding by any State court having jurisdiction, and nonpayment of such awards shall be accepted as conclusive evidence of failure to provide for dependent persons under this section: *Provided, however,* That an appeal may be taken to the Tribal Court of Appeals whose decision shall be final.

§ 11.65 Failure to send children to school.

Any Indian who shall, without good cause, neglect or refuse to send his children or any children under his care, to school shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 10 days.

CROSS REFERENCE: For regulations pertaining to the education of Indians, see Parts 27, 31 through 33, and 38 through 42 of this chapter.

§ 11.66 Contributing to the delinquency of a minor.

Any Indian who shall willfully contribute to the delinquency of any minor shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.67 Bribery.

Any Indian who shall give or offer to give any money, property or services, or anything else of value to another person with corrupt intent to influence another in the discharge of his public duties or conduct, and any Indian who shall accept, solicit or attempt to solicit any bribe, as above defined, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months; and any tribal office held by such person shall be forfeited.

§ 11.68 Perjury.

Any Indian who shall willfully and deliberately, in any judicial proceeding in any Court of Indian Offenses, falsely swear or interpret, or shall make a sworn statement or affidavit knowing

25 CFR Ch. I (4-1-87 Edition)

the same to be untrue, or shall induce or procure another person so to do, shall be deemed guilty of perjury and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.69 False arrest.

Any Indian who shall willfully and knowingly make, or cause to be made, the unlawful arrest, detention or imprisonment of another person, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.70 Resisting lawful arrest.

Any Indian who shall willfully and knowingly, by force or violence, resist or assist another person to resist a lawful arrest shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days.

§ 11.70ME Resisting or obstructing officers.

Until such time as the Menominee Tribe enacts its own ordinances dealing with resisting or obstructing an officer, the provisions of Wisconsin Statutes 946.41 are hereby incorporated by reference and made applicable with the exception that any Indian found guilty of violating the provisions of Wisconsin Statutes 946.41(1) shall, in lieu of the penalties therein provided, be sentenced to labor for a period not to exceed sixty (60) days.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40805, Sept. 13, 1978]

§ 11.71 Refusing to aid officer.

Any Indian who shall neglect or refuse, when called upon by any Indian police or other police officer of the Bureau of Indian Affairs, to assist in the arrest of any person charged with or convicted of any offense or in securing such offender when apprehended, or in conveying such offender to the nearest place of confinement shall be deemed guilty of an offense, and upon conviction, shall be sentenced to labor for a period not to exceed 10 days.

Exhibit No. 18 (cont.)

Bureau of Indian Affairs, Interior

§ 11.79H

§ 11.72 Escape.

Any Indian, who, being in lawful custody, for any offense, shall escape or attempt to escape or who shall permit or assist or attempt to permit or assist another person to escape from lawful custody shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 6 months.

§ 11.73 Disobedience to lawful orders of court.

Any Indian who shall willfully disobey any order, subpoena, warrant or command duly issued, made or given by the Court of Indian Offenses or any officer thereof, shall be deemed guilty of an offense and upon conviction thereof shall be fined in an amount not exceeding \$180 or sentenced to labor for a period not to exceed 3 months.

§ 11.74 Violation of an approved tribal ordinance.

Any Indian who violates an ordinance designed to preserve the peace and welfare of the tribe, which was promulgated by the tribal council and approved by the Secretary of the Interior, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced as provided in the ordinance.

§ 11.75C Limitation on filing of complaints.

No complaint shall be filed charging the commission of an offense, as defined under §§ 11.38 through 11.75C, unless such offense shall have been committed within 1 year prior to the date of the complaint.

§ 11.76H Failure to sell or remove from tribal range infectious or cull animals.

Any Indian who shall willfully refuse to dispose of cull or infectious animals indicated for removal in accordance with the instructions contained in § 89.8 of this chapter, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to hard labor for a period of not to exceed 90 days, or a reduction of 10 percent in his grazing permit.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978; 44 FR 18969, Mar. 30, 1979]

§ 11.77H Introduction of livestock without permit.

Any Indian who shall introduce or cause to be introduced any livestock into unallotted lands of the reservation without a permit shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to a period of not to exceed 60 days at hard labor.

CROSS REFERENCE: For Navajo grazing regulations, see Part 167 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.78H Stock trespass in form of unauthorized use of range.

Any Indian who shall willfully graze stock in excess of permitted number on tribal range, or who shall refuse to graze his livestock in accordance with range management plans which consider deferred grazing, the reservation of specific areas for seasonal use, etc., shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months, and, or, he shall be required to pay damages equal to the value of the forage consumed, salaries and expenses of employees for the time incurred in making investigation, and reports. In lieu of cash, this fine, if levied, may be collected in livestock.

CROSS REFERENCE: For Navajo grazing regulations, see Part 167 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)

[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.79H Failure to dip sheep.

Any Indian who willfully refuses to dip all of his sheep and goats according to regulations when so directed by the superintendent or his authorized representative shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months or shall be subject to a fine

Exhibit No. 18 (cont.)

§ 11.80H

not to exceed \$100 or both. In lieu of cash, this fine, if levied, may be collected in livestock.

(5 U.S.C. 301 and 25 U.S.C. 2)
[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.80H Making false reports of stock owned.

Any Indian who willfully makes a false report as to the total number of stock owned, or refuses to make a true report of stock ownership, shall be deemed guilty of an offense and upon conviction thereof, shall be fined not less than \$10 nor more than \$100. In lieu of cash this fine may be collected in livestock.

CROSS REFERENCE: For method of making out reports of stock owned, see § 167.7 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)
[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.81H Unauthorized fencing of tribal land.

Any Indian who shall willfully fence, for his own advantage, range land belonging to the tribe, without first having secured a permit from the superintendent shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months.

(5 U.S.C. 301 and 25 U.S.C. 2)
[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.82H Inter-district trespass.

Any Indian who shall allow his stock to trespass on range allocated to others under provisions of the grazing regulations, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 3 months or shall be subject to a fine equal to the damage done the range allocated to others, or both.

CROSS REFERENCE: For Navajo grazing regulations, see Part 167 of this chapter.

(5 U.S.C. 301 and 25 U.S.C. 2)
[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

25 CFR Ch. I (4-1-87 Edition)

§ 11.83H Grazing stock without permit.

Any Indian who shall allow his stock to graze on tribal land without a grazing permit shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 3 months or shall be fined not to exceed \$100 or both. In lieu of cash, this fine, if levied, may be collected in livestock.

(5 U.S.C. 301 and 25 U.S.C. 2)
[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.84H Refusing to brand or mark livestock.

Any Indian who shall willfully refuse to brand or mark his or her livestock where such branding or marking is required in the interest of ownership identification or for other purposes or who alters obliterates or removes such brands or marks shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 60 days.

(5 U.S.C. 301 and 25 U.S.C. 2)
[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.85H Obstructing or interfering with livestock roundups.

Any Indian who shall interfere with or obstruct authorized roundups which have for their purpose the removal of unowned horses or other livestock, or for the purpose of determining ownership or for other purposes designed to protect tribal land from destruction, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed 6 months.

(5 U.S.C. 301 and 25 U.S.C. 2)
[22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49982, Oct. 26, 1978]

§ 11.86H Trespass on areas reserved for demonstration purposes.

Any Indian who shall commit willful trespass on areas reserved for demonstration, administration, or agricultural purposes designed for the benefit of the tribe shall be guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period

Exhibit No. 18 (cont.)

Bureau of Indian Affairs, Interior

§ 11.92ME

not to exceed 60 days and shall be subject to a fine not exceeding \$100, or both. In lieu of cash, this fine, if levied, may be collected in livestock.

(5 U.S.C. 301 and 25 U.S.C. 2)
(22 FR 10515, Dec. 24, 1957. Redesignated at 43 FR 49962, Oct. 26, 1978)

§ 11.87H Peyote violations.

Any Indian who shall introduce into the Navajo country, sell, use or have in his possession within said Navajo country, the bean known as peyote shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 9 months or a fine not to exceed \$100, or both; *Provided*, That it shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church.

(5 U.S.C. 301 and 25 U.S.C. 2)
(38 FR 19910, July 25, 1973. Redesignated at 43 FR 49962, Oct. 26, 1978)

§ 11.88ME Curfew.

Until such time as the Menominee Tribe enacts its own curfew ordinance, the provisions of Menominee County Ordinance No. 23A relating to curfew are hereby incorporated by reference and made applicable with the exception that any Indian parent or guardian found guilty of violating such law shall in lieu of the penalties provided by Menominee County Ordinance No. 23A be sentenced to labor for a period not to exceed five (5) days.

(5 U.S.C. 301 and 25 U.S.C. 2)
(43 FR 40805, Sept. 13, 1978)

§ 11.89ME Firearms.

Until such time as the Menominee Tribe enacts its own firearms ordinance, the provisions of the town of Menominee Ordinance No. 39 relating to the use of firearms are hereby incorporated by reference and made applicable within the unincorporated villages of Keshena, Neopit, and Zoar, according to the plats thereof and additions thereto as recorded with the Register of Deeds of Menominee

APP. 45

County, Wis., with the exception that any Indian found guilty of violating such laws shall, in lieu of the penalties provided by the said ordinance, be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)
(43 FR 40805, Sept. 13, 1978)

§ 11.90ME Keeping of livestock.

Until such time as the Menominee Tribe enacts its own ordinances dealing with the keeping of livestock, the provisions of Menominee County Zoning Ordinance, Article 6, Section 41, prohibiting the keeping of livestock within 200 feet of residential property lines are hereby incorporated by reference and made applicable with the exception that any Indian found guilty of violating such law shall, in lieu of the penalties provided by the Menominee County Zoning Ordinance, be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)
(43 FR 40805, Sept. 13, 1978)

§ 11.91ME Control of dogs.

Until such time as the Menominee Tribe enacts its own ordinances regulating the keeping of dogs, the provisions of the town of Menominee Ordinance No. 1 regulating the licensing and control of dogs are hereby incorporated by reference and made applicable, with the exception that any Indian found guilty of violating such law, in lieu of the penalties provided by the said ordinance, be fined five dollars (\$5.00) for the first offense and ten dollars (\$10.00) for each succeeding offense.

(5 U.S.C. 301 and 25 U.S.C. 2)
(43 FR 40805, Sept. 13, 1978)

§ 11.92ME Forest fire protection.

Until such time as the Menominee Tribe enacts its own ordinances dealing with fire protection, detection, control and suppression, the provisions of the Wisconsin Administration Code, DNR Section 26.12(5)(a) requiring a written permit issued by Wisconsin Department of Natural Resources Fire Warden before any person sets any fire except for warming the

§ 11.93ME

person or cooking food, are hereby incorporated by reference and made applicable to the setting of fires on the Menominee Reservation. Any Indian found guilty of failing to obtain a permit shall be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40805, Sept. 13, 1978]

§ 11.93ME Possession of controlled substances.

Until such time as the Menominee Tribe enacts its own ordinances dealing with the possession of controlled substances, the provisions of Wisconsin Statutes 181.41(3) are hereby incorporated by reference and made applicable with the exception that any Indian found guilty of violating such law shall, in lieu of the penalties provided by Wisconsin Statutes 181.41(3), be sentenced to labor for a period not to exceed thirty (30) days.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40806, Sept. 13, 1978]

§ 11.94ME Garbage and rubbish.

Until such time as the Menominee Tribe enacts its own ordinances dealing with garbage, rubbish, and inflammable material, the provisions of the town of Menominee Ordinance No. 4 regulating disposal of garbage, rubbish and inflammable material are hereby incorporated by reference and made applicable with the exception that the designation of Menominee Enterprises, Inc., shall include Menominee Tribal Enterprise, that public dumps may be designated by the Menominee Tribe as well as by the town of Menominee and that any Indian found guilty of violating such law shall, in lieu of the penalties provided by town of Menominee Ordinance No. 4, be sentenced to labor for a period not to exceed five (5) days in the event of the first offense and not to exceed thirty (30) days for each succeeding violation.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40806, Sept. 13, 1978]

§ 11.95ME Extradition.

(a) Whenever the Area Director, Minneapolis Area Office, is informed

25 CFR Ch. I (4-1-87 Edition)

and believes that an Indian has committed a crime outside the Menominee Reservation and is present on the Menominee Reservation, using it as an asylum from prosecution, the Area Director may order a police officer of the Menominee Reservation to apprehend such Indian and deliver him to the authorities seeking his arrest at the exterior boundaries of the reservation.

(b) If a person, apprehended pursuant to this section, so demands, he shall be taken by the arresting police officers to the Menominee Court of Indian Offenses where a Judge shall hold a hearing. If it appears that there is no probable cause to believe the Indian is guilty of the crime with which he is charged outside the reservation, or if it appears probable that the Indian will not receive a fair trial in the state court, the Judge shall order the Indian released from custody.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40806, Sept. 13, 1978]

§ 11.96ME Breaking and entering.

Until such time as the Menominee Tribe enacts its own breaking and entering ordinance, the provisions of Wisconsin Statutes 943.14, "Criminal trespass to dwellings," are hereby incorporated by reference and made applicable, with the exception that any Indian found guilty of violating the provisions of Wisconsin Statutes 943.14 shall, in lieu of the penalties therein provided, be sentenced to labor for a period not to exceed six (6) months.

(5 U.S.C. 301 and 25 U.S.C. 2)
[43 FR 40806, Sept. 13, 1978]

§ 11.97ME Juvenile services.

Until such time as the Menominee Tribe enacts its own juvenile code the provisions of the Wisconsin State laws relating to juveniles, Wisconsin Statutes §§ 48.12-48.47, § 48.78, §§ 48.81-48.97, and Chapter 54, are hereby incorporated by reference and made applicable to juvenile cases arising on the Menominee Reservation. Provided That the following statutes are not to apply: Wis. Stat. Ann. §§ 48.31, 48.32, 48.41, 48.83, and 48.89. And provided

Bureau of Indian Affairs, Interior

§ 11.304

further. That rendering of juvenile services to the Menominee Tribe shall be in accordance with the agreement entered into on March 15, 1978, between the Wisconsin Department of Health and Social Services and the Menominee Restoration Committee.

(5 U.S.C. 201 and 25 U.S.C. 2)
[43 FR 40806, Sept. 12, 1978]

§ 11.301ME Date of incorporated statutes.

All Wisconsin statutes, Menominee County ordinances, and ordinances of the town of Menominee, incorporated in §§ 11.501ME through 11.971ME shall be those in effect on the date of publication of this rulemaking, together with any amendments hereafter adopted.

(5 U.S.C. 201 and 25 U.S.C. 2)
[43 FR 40806, Sept. 12, 1978]

THE INDIAN POLICE

§ 11.301 Superintendent in command.

The superintendent of each Indian reservation shall be recognized as commander of the Indian police force and will be held responsible for the general efficiency and conduct of the members thereof. It shall be the duty of the superintendent, or his duly qualified representative, to keep himself informed as to the efficiency of the Indian police in the discharge of their duties, to subject them to a regular inspection, to inform them as to their duties and keep a strict accounting of the equipment issued them in connection with their official duties. It shall be the duty of the superintendent to detail such Indian policemen as may be necessary to carry out the orders of the Court of Indian Offenses and to preserve order during the court sessions. The superintendent shall investigate all reports and charges of misconduct on the part of Indian policemen and shall exercise such proper disciplinary measures as may be consistent with existing regulations. No superintendent of any Indian reservation shall assign or detail any member of the Indian police force for duty as janitor or chauffeur or for any duty not connected with the administration of law and order.

§ 11.302 Police commissioners.

The superintendent of any Indian reservation may, with the approval of the Commissioner of Indian Affairs, designate as police commissioner any qualified person. Wherever any special or deputy special officer is regularly employed in any Indian jurisdiction, he shall be police commissioner for that jurisdiction. Such police commissioner shall obey the orders of the superintendent of the reservation where employed and shall see that the orders of the Court of Indian Offenses are properly carried out. The police commissioner shall be responsible to the superintendent for the conduct and efficiency of the Indian police under his direction and shall give such instruction and advice to them as may be necessary. The police commissioner shall also report to the superintendent all violations of law or regulation and any misconduct of any member of the Indian police.

§ 11.303 Police training.

It shall be the duty of the superintendent to maintain from time to time as circumstances require and permit classes of instruction for the Indian policemen. Such classes shall familiarize the policemen with the manner of making searches and arrests, the proper and humane handling of prisoners, the keeping of records of offenses and police activities, and with court orders and legal forms and the duties of the police in relation thereto, and other subjects of importance for efficient police duty. It shall further be the purpose of the classes to consider methods of preventing crime and of securing cooperation with Indian communities in establishing better social relations.

§ 11.304 Minimum standards for police programs.

The following minimum standards are required of all law enforcement programs that receive funding from the Bureau of Indian Affairs:

(a) Each law enforcement officer shall be specifically identified as such and shall be individually authorized to make arrests and carry firearms. Only employees assigned duties as law en-

§ 11.304

25 CFR Ch. I (4-1-87 Edition)

enforcement officers and qualified under paragraph (e) of this section may be authorized to carry firearms or make arrests.

(b) Uniforms, when worn, shall positively identify the wearer as a law enforcement officer. Badge, name plate and tribal or Bureau of Indian Affairs patch shall be visible at all times. Uniforms of all enforcement personnel shall be plainly distinguishable from the uniforms of any non-enforcement personnel working on the reservation. Each officer shall be issued a standard identification card bearing a photograph of the officer.

(c) A firearm may be discharged only when in the considered judgment of the officer there is imminent danger of loss of life or serious bodily injury to the officer or to another person. The weapon may be fired only for the purpose of rendering the person at whom it is fired incapable of continuing the activity prompting the officer to shoot. The firing of warning shots is prohibited. This policy does not apply to the use of firearms to participate in official marksmanship training or to kill a dangerous or seriously injured animal.

(d) Except in firearms training, each time a firearm is used for law enforcement purposes a report shall be filed with the superior of the officer who used the weapon. Whenever use of a weapon results in serious injury or death of any person, the officer firing the weapon shall be placed on administrative leave, or be assigned to strictly administrative duties pending a thorough investigation of all circumstances surrounding the incident.

(e) Each law enforcement officer must have attained a score of 70 percent or better on an approved firearms qualification course within the previous six months to be qualified to carry a firearm. Whenever an officer's firearms qualification lapses, the officer shall return all weapons issued. The following courses are approved firearms qualification courses:

- (1) The National Rifle Association National Police Course.
- (2) The National Rifle Association 25-Yard Course.
- (3) The National Rifle Association Practical Pistol Course.

(4) The Federal Bureau of Investigation Practical Pistol Course.

(f)(1) Law enforcement officers shall be issued the standard police .38 caliber revolver and ammunition. The use of other types of hand guns such as automatics, parabellums, or calibers other than the authorized .38 caliber is prohibited. The barrel length may be not more than 6 inches nor less than 4 inches for uniformed personnel, and not less than 2 inches for plainclothes personnel. Only standard load ammunition may be used. Bureau of Indian Affairs officers who carried a .357 Magnum revolver while performing law enforcement functions for the Bureau of Indian Affairs before July 17, 1972, may be authorized to carry a .357 Magnum revolver. The Commissioner of Indian Affairs may grant a written waiver to permit Bureau of Indian Affairs officers to carry hand guns not authorized by this paragraph.

(2) Each tribe shall specify the type of firearms, ammunition and auxiliary equipment to be used by the law enforcement officers of that tribe.

(g)(1) Newly employed patrol officers shall successfully complete within their first year of service the approved Basic Police Training Course conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy and approved by the Commissioner of Indian Affairs. An officer who fails to complete the training required by this paragraph shall be discharged or transferred to a position not involving law enforcement duties. Transfer may result in demotion.

(2) Prior to, or within one year after, promotion or appointment to a supervisory enforcement position, an employee shall complete the approved Supervisory Enforcement Officer Training Course conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy and approved by the Commissioner of Indian Affairs. An officer who is serving in a supervisory position and fails to complete the training required in this paragraph shall be transferred to a

Bureau of Indian Affairs, Interior

§ 11.304

nonsupervisory position. Transfer may result in demotion.

(3) Prior to, or within one year after, promotion or appointment to a criminal-investigator position, an officer shall successfully complete the Criminal-Investigator Training Course conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy and approved by the Commissioner of Indian Affairs. An officer who is serving in a criminal-investigator position and fails to complete the training required in this paragraph shall be transferred to a noncriminal-investigator position. Transfer may result in demotion.

(4) Prior to, or within one year after, promotion or appointment to a supervisory criminal-investigator position, an officer shall successfully complete the Executive Management Course of Training conducted at the Indian Police Academy or a similar course substantially meeting or exceeding the level of training provided by the Indian Police Academy approved by the Commissioner of Indian Affairs. An Officer who is serving in a supervisory criminal-investigator position and fails to complete the training required in this paragraph shall be transferred to a nonsupervisory criminal-investigator position. Transfer may result in demotion.

(h) Each law enforcement officer shall receive a minimum of forty hours of local in-service training annually to meet training needs determined by the tribe and to keep abreast with developments in the field of law enforcement.

(i) The Civil Service Commission accepted Bureau of Indian Affairs standards for skill level GS-083 are the minimum entry level qualifications for a patrol officer. The Civil Service Commission standards for skill level GS-1811 are the minimum entry level qualifications for criminal investigators. The standards are available for inspection or copying at any Bureau, Agency, Area, or Central Personnel Office.

(j) Salaries paid law enforcement officers by a tribal organization under a contract under Part 271 of this chap-

ter or by a tribal governing body under a grant under Part 272 of this chapter shall be equal to or greater than the salaries paid officers with similar responsibilities employed directly by the Bureau of Indian Affairs.

(k) Prior to taking an adverse action against any employee, the contractor under Part 271 of this chapter or grantee under Part 272 of this chapter shall take the following steps:

(1) Notify the employee of the contemplated action and give a full specification of the reasons such action is contemplated.

(2) Provide the employee with a written statement of any specific violation of rules, regulations, or statutes the contractor or grantee alleges the employee has committed and the names of all persons upon whose testimony these allegations are based.

(3) Set a hearing date not less than 15 days after the employee has been given the written statement of allegation.

(4) Provide the employee and the employee's counsel at the hearing with an opportunity to confront and cross-examine each adverse witness.

(5) Provide the employee and the employee's counsel at the hearing with an opportunity to delineate issues, to present factual contentions in an orderly manner and to generally protect the employee's interest.

(6) Reconsider the decision to take the adverse action based solely on the evidence given at the hearing and provide the employee at the time the decision is announced with a written statement of the reasons for the decision and the evidence relied upon in reaching the decision.

(7) Issue a final order based on the decision reached after the hearing.

(l) After October 1, 1977, the tribe shall require each law enforcement officer it employs to adhere to a law enforcement code of conduct prescribed by the tribe. The code shall establish specific rules concerning conflicts of interest, employee conduct both on and off duty, impartiality and thoroughness in performance of duty, and acceptance of gifts or favors.

(m) A contractor under Part 271 of this chapter shall use the same report forms and submit the same statistical

Exhibit No. 18 (cont.)

§ 11.305

25 CFR Ch. I (4-1-87 Edition)

reports to the Central Office that are required of Bureau of Indian Affairs police programs.

(n)(1) When a law enforcement officer receives an oral or written allegation that a law enforcement officer employed by a program funded by the Bureau of Indian Affairs has violated the civil rights of any person, the officer receiving the allegation shall prepare a written report of the allegation and transmit it through the chain of command to the chief law enforcement officer within seven days of receipt of the allegation.

(2) Not later than seven days after being notified of the allegation, the chief law enforcement officer shall take the following actions:

(i) Notify the Federal Bureau of Investigation, the agency superintendent or contracting officer's representative, and the tribal council. The notice to the Federal Bureau of Investigation shall state whether an investigation is being conducted to determine whether tribal law was violated and shall cite any relevant provisions of the tribal code.

(ii) If the officer against whom the allegation is made is an employee of the Bureau of Indian Affairs, prepare a memorandum to the superintendent, who shall, through the area director and the Assistant Secretary—Indian Affairs, transmit to the Director, Office of Audit and Investigation, a request that the allegation be investigated to determine whether any administrative action is warranted. The memorandum shall be transmitted through the superintendent and the area director. The tribal council shall receive a copy of any such memorandum.

(iii) If the officer against whom the allegation is made is an employee of a tribal contractor, notify both the top Bureau of Indian Affairs law enforcement officer assigned to the agency and the tribal council. If there is no Bureau of Indian Affairs law enforcement officer at the agency, the superintendent and the area special officer shall be notified.

(3) If the chief law enforcement officer is accused of a civil rights violation, the report of the allegation shall be transmitted directly to the agency

superintendent, who shall take the actions required by paragraph (n)(2) of this section. If there is no agency superintendent, the report of the allegation shall be transmitted directly to the area director, who shall take the actions required by paragraph (n)(2) of this section.

(4) As soon as all actions required by paragraphs (n) (1), (2), and (3) of this section have been completed, a copy of all documents concerning the allegation shall be transmitted to the Chief, Division of Law Enforcement Services, in the Central Office.

(5 U.S.C. 301, 25 U.S.C. 2, 450m)

[41 FR 47234, Oct. 28, 1976; 41 FR 51012, Nov. 19, 1976, as amended at 42 FR 46518, Sept. 16, 1977; 43 FR 16973, Apr. 12, 1978]

§ 11.305 Minimum standards for detention programs.

Each detention program that receives funds from the Bureau of Indian Affairs shall meet the following minimum standards:

(a) No sick or injured person may be booked or held in a detention facility unless a medical release has been obtained from a medical officer.

(b) Any inmate requiring medical attention shall be treated as soon as possible.

(c) The jailor or other responsible employee shall maintain control over the custody and issue of all medicine to prisoners under treatment for chronic ailments to insure proper use and to guard against overdose.

(d) Routine inspections of all cells shall be conducted every thirty (30) minutes to protect the safety and welfare of prisoners. A record of each inspection shall be logged in appropriate records.

(e) Only persons who have been specifically authorized by the jailor to visit a prisoner or prisoners may be allowed in the cell block areas.

(f) Special attention shall be given to cells occupied by persons jailed for intoxication to guard against the infliction of personal injury.

(g) No juvenile may be kept in the same cell with any adult.

(h) Each prisoner shall be served three nutritionally adequate meals a day.

Exhibit No. 18 (cont.)

Bureau of Indian Affairs, Interior

(i) Each foodhandler shall be given a medical examination and, if training in foodhandling is available locally from the Indian Health Service, shall complete the foodhandler training offered by the Indian Health Service prior to employment.

(j) All jail facilities including kitchens shall be subject to periodic inspections by personnel from the Indian Health Service or other appropriate agency to insure proper sanitary conditions.

(k) The number of persons in each cell may not exceed the number for which the cell was designed.

(l) A record of all visitors shall be maintained indicating date, time and identity of each visitor.

(m) Proper precautions shall be taken to insure the safekeeping of property belonging to inmates.

(n) Prior to, or within six months after, promotion or appointment to a position involving detention/jail duties, an employee shall successfully complete a Detention/Jail Operations and Management Training Course approved by the Commissioner of Indian Affairs. An employee who is serving in a position involving detention/jail duties and fails to complete the training required by this paragraph shall be transferred to a position not involving detention/jail or law enforcement duties or discharged. Transfer may result in demotion.

(5 U.S.C. 301, 28 U.S.C. 2, 450k)

[41 FR 47238, Oct. 28, 1976, as amended at 42 FR 46518, Sept. 16, 1977]

§ 11.306 Return of equipment.

Upon the resignation, death or discharge of any member of the Indian police all articles or property issued him in connection with his official duties must be returned to the superintendent or his representative.

Exhibit No. 18 (cont.)

N O T I C E

OF

RESULTS OF SPECIAL REFERENDUM ELECTION (MARCH 26, 1980) TO APPROVE (BY A YES VOTE) OR DISAPPROVE (BY A NO VOTE) THE RED LAKE TRIBAL COUNCIL RESOLUTION REMOVING STEPHANIE HANSON AS TREASURER OF THE RED LAKE BAND OF CHIPPEWA INDIANS

YES..... 584
NO..... 164

We, the undersigned member of the General Election Board, do hereby certify that the foregoing ballot count to be true and correct on this 27th day of March, 1980, at 1:45 (AM/PM)

GENERAL ELECTION BOARD

Benedict M. Lawrence
Benedict Lawrence, Chairman

Doris Carlson
Doris Carlson, Member

Albert Raincloud
Albert Raincloud, Member

Susan Hallett
Susan Hallett, Member

RED LAKE TIMES
June 17, 1987

Red Lake's chief

Roger Jourdain's friends, foes agree he puts reservation first

Courtesy of Susan Stanich, staff writer,
News-Tribune & Herald, Duluth, Minn.

He's been called an elder statesman, a dictator, a great leader, a man of the people, a man against the people.

It's been said he's part labor organizer, part Indian chief and part just plain contrary. He's known affectionately to some — even on other reservations — simply as "The Chairman." Others, less affectionately, call him an Indian Huey Long or Richard Daley.

There are two things everyone agrees about, however; Roger Jourdain is controversial. And Roger Jourdain does what he thinks is best for the Red Lake Reservation north of Bemidji.

The 74-year-old Jourdain has been chairman of the Red Lake Band of Chippewas for the last 28 years. He's the only elected chairman Red Lake has ever had.

During that time, he's hobnobbed with foreign ambassadors and top-level American leaders; he's been burned out of his reservation home; he's been kept under wraps by the FBI (protected, they say; kidnapped, he says).

He's been threatened by political opponents. He's weathered harsh criticism at home, unsympathetic media reports, a small revolution and some close elections. He's become a nationally known

voice for tribal sovereignty.

"We need about 50 Roger clones to turn loose in Indian affairs," said Vine Deloria Jr., political science professor at the University of Arizona, Sioux Indian, and author of the best-selling "Custer Died for Your Sins."

"One is too many," countered Robert Head, president of the board of Red Lake

Fisheries.

Jourdain is a short, personable man with a full head of pomaded graying hair and a paunchy middle. He puffs and mutters as he talks and appears to be preoccupied. In reality, say his associates, he misses nothing that goes on, and quickly digests and files for future reference his observations.

He's gracious, hospitable, direct, insulting. He's jovial and affectionable and peppers his conversation with ethnic and religious affronts and berates his enemies wholeheartedly. He rarely bothers to defend himself against slander. The reason, say his opponents, is because the accusations are true. His friends say it's because he can't be bothered with pettiness.

During a recent interview, he immediately veered onto a favorite subject: "I want to beat the BIA," he said, fist in the air.

Jourdain has cultivated a dislike of the BIA — the Bureau of Indian Affairs, an agency of the U.S. Department of Interior — since he was a young man. In those days, the bureau was run by non-

Exhibit No. 18 (cont.)

Indians and exerted a paternalistic control over tribes.

"Housing was in shambles," he said: "Shacks, outhouses, open wells. They'd haul water home in a barrel."

Jourdain said that the pre-BIA Red Lake Indians supported themselves and others as well, and the standard of living was good. After the loss of millions of acres of land, however, and under the administration of the BIA, people became demoralized and destitute.

"There was a breakdown in health and (standard of living). But the BIA doesn't give a damn. They never had quality people to manage the affairs of the American Indians."

It's not much better now that Indians run it, he said. "They're all misfits, malcontents, sellouts."

Ross Swimmer, assistant secretary of the Interior and top BIA official, refused to be questioned about Jourdain. Jourdain is an outspoken leader of a nationwide drive for Swimmer's resignation.

But Earl Barlow, BIA director of the five-state area with offices in Minneapolis, said he agreed with Jourdain that the old BIA didn't always have tribes' best interests at heart.

Barlow said the BIA has changed dramatically for the better — from a regulatory agency into a service-oriented, advisory agency — and the change is patly due to Jourdain's years of criticism.

"I'm a very warm admirer of the chairman," he said.

The chairman doesn't discuss his private life easily. He doesn't see himself as a separate, private person, friends say. Instead, they say, he sees himself as an extension of Red Lake and of Indian people in general.

His detractors say it's the reverse: He sees Red Lake as an extension of himself.

As a boy, Jourdain attended Red Lake boarding, mission and public schools. His father was a disciplinarian, and his mother was a matron at the military-style boarding school, which employed corporal punishment.

The kids' at school knew his father would be harder on him than anyone else, so they'd try to get him in trouble, Jourdain said. "I'd get five or 10 slaps, and those d— kids would be out there laughing. And then I'd get them and beat them up in a dark closet.

"I had a very independent personality. My father wanted me to go and finish Flandreau (a South Dakota boarding

school for Indian children) and go to Haskell (Institute. also for Indian young people, in Kansas). I was 14. I said, 'No.'

"I was tired of that bugle, saying the Pledge of Allegiance all the time."

He was raised a Roman Catholic but became disillusioned with Catholicism, partly because lighter-skinned children were treated better by mission teachers, he said. Now he considers himself a traditionalist, a follower of the ways of his ancestors.

His preference in music is a combination of backgrounds: "The drum, of course; then Indian hymns. I always love to hear them. And the Latin chants sung in the early days of the Catholics."

His dream as a boy was to find some job where he wouldn't have to hang fishing nets.

But as a young man, his future father-in-law — Paul Beaulieu — became his model, Jourdain said. "He fought against the whole bureau (BIA). He was a very compassionate, charitable guy. He'd give you his last 25 cents.

"I took (him) and others to council meetings. I kept the fires going, the water buckets filled. Unknowingly, I was absorbing all that. The traditional people were all admonishing the younger people, 'Don't forget. Pay attention to what we're saying. Don't forget what we're doing.' I didn't know I was listening."

Jourdain married his wife, Margaret, in 1933. They have a son and two grandchildren. "Fifty-four years of marriage," he said. "She's my first girlfriend, my first wife."

Then, characteristically, he jumped into the present. "I'm a rare commodity

Exhibit No. 18 (cont.)

in this world," he said, raising his voice as his face took on a glowering expression. "Look at Reagan — he couldn't live up to his marriage vows, and he's spouting off about the moral issues of this world. Oh, that makes me sick."

In the cluttered office at his Bemidji home, a worried voice from the living room brought him suddenly to his feet. "It's all right, dear, I'm right here," he called as he left the room.

When he returned, he explained that his wife had suffered a massive stroke and is bedridden much of the time. "She gets anxious," he said. "She needs reassurance that she's not alone."

The couple moved to Bemidji after their reservation home was burned during civil violence in 1979. They didn't move back at first, Jourdain said, because of threats to their lives. Now, the threats are gone, but "nobody has offered to replace my home," he said.

For much of his adult life, Jourdain carried a union card and worked as a heavy equipment operator in Minneapolis. In 1959, he was elected Red Lake's first chairman, leader of a government that superseded the old chiefs' council. The chiefs remained as advisers.

The son of one of those advisers now lives in St. Paul, where he has worked as a pipefitter for the last 17 years. As the son of a chief and therefore a chief by inheritance, Archie King sat on the chiefs' advisory council for years. But last year, after he ran against Jourdain for the chairmanship, he said, Jourdain removed him.

Jourdain beat King by 21 votes.

King and other members of the opposition claim that reservation elections are rigged and that opposition candidates have the popular support of the vast majority of voters. According to federal observers, however, the allegation is false.

"I think quite a little bit of this is sour grapes by the losers," said Mark Anderson, field solicitor for the Department of

the Interior in Minneapolis and a certified observer in the 1982 election. Art Staples, a BIA official observing the 1986 election, said that election, too, was aboveboard.

Jourdain's political opponents also charge that he and the tribal council have misused or embezzled state and federal money; that Jourdain controls the courts, which deal harshly with his opponents; and that the council mismanages programs.

But state, federal and tribal officials, as well as all the Indian people questioned — with the exception of Jourdain's political opponents — say such charges are false or grossly exaggerated.

Extensive federal and state audits have revealed no wrongdoing, officials say. They say programs are administered more capably at Red Lake than on most reservations. Most of the officials praised Jourdain and the council.

"Everyone in that administration has performed what they say they're going to do," said Minnesota Attorney General Skip Humphrey. "They get the job done."

Jourdain and tribal leaders from other reservations complain that the non-Indian public is quick to believe that tribal governments are corrupt. Non-Indians presume Indians can't handle their own affairs, they say.

Non-Indians also willingly listen to the allegations of tribal dissidents, tribal leaders say. They point out that all governments have dissidents but tribal dissidents seem to get more coverage.

The dissidents claim they turn to federal courts because Red Lake courts abuse their civil rights.

"I think there have been instances of deprivation of rights up there," Anderson said. "But at the same time, I think the judges have tried to be fair and even-handed. They are no different than judges anywhere else. They are less educated, but that doesn't mean they can't be fair."

The Red Lake Tribal Council has met in executive session for the last eight

Exhibit No. 18 (cont.)

years, which means the meetings are not open to the Red Lake public. According to the tribal constitution, council meetings must be open, but executive sessions may be closed. Jourdain said the council meets in executive session because people he describes as criminals and drug pushers come to disrupt them.

The effect is a government with little oversight by the people, opponents say.

"It keeps us in the dark what's going on," said the fisheries board's Head. "They won't even give us a copy of the tribal budget. Nothing on the agenda is ever brought up in the community. He's really keeping us under his thumb, and we can't seem to get out."

Council sessions have been closed since 1979, when violence erupted after a newly elected council treasurer was dismissed by the council after publicly questioning the way it was handling government programs.

The treasurer's husband and five other armed men broke into the jail and took hostages there. According to federal observers, the men had been drinking. By nightfall, young people were driving around drinking and shooting guns in the air.

Several buildings were burned, including Jourdain's home, and two young people were shot and killed. A federal court sent five of those who broke into the jail to prison. The shootings were determined accidental.

FBI officials took the Jourdain family from their burning home to a motel in Grand Rapids, where Jourdain said they were held hostage for six weeks after a six-hour interrogation by FBI officials. He said they tried to entrap him into admitting he had stolen \$2 million in federal money.

"Where (Roger) says that, people think he is employing hyperbole," said Suzan Shown Harjo, executive director of the National Congress of American Indians in Washington, D.C. "But he's not. I happened to be one of the few people in the Department of Interior that day, a Saturday. (I was) a special assistant. We were on the phone with the BIA

and tribal police . . . What he's saying is factually correct. It was worse than what he says."

Don Cook of Red Lake, then as now a leader of the move to oust Jourdain, says Red Lakers are chafing under the chairman's control, feeling as though they can't function unless they're part of his vision.

"There's no opportunity for our young people here," said Head, the father of five grown, unemployed sons. "If there's no hope in sight, they get frustrated. You turn to drinking; it's a way out, I suppose."

The real reason young people are frustrated, Jourdain says, is that there are few jobs. He said employment is the biggest need on the reservation, but it hasn't been easy luring business to the remote reservation, even with the tax breaks the tribe can offer.

Opponents say Jourdain is so bullheaded he scares interested business people away.

His strong leadership style is in the old tradition of tribal leadership, said William Houle, chairman of Fond du Lac Reservation near Cloquet — the idea that the head man knows what's best for the people.

"It's a little different from what we have now," he said. "Chairman Jourdain simply says, let's get it done. I believe it's right. That's the way it should be."

"I've worked with him on committees, and he's a difficult man. Robert's Rules, sometimes, don't apply," Houle said. "But I believe a lot of the things he has done certainly turned out to be the best thing for Red Lake. I can't say enough good about the man. He certainly is my idol of tribal leadership."

Houle related an anecdote told him by the late Sen. Hubert H. Humphrey, a story that he said illustrates Jourdain's style.

When Humphrey was vice president, Jourdain called him and told him Red Lake needed government money for about 60 homes. Humphrey told him to get the papers in order — bids, plans and so on.

Exhibit No. 18 (cont.)

Jourdain chuckled when reminded of the story and related the rest of it. "We had a home-building training program; we had a good nucleus of 60, 70 tradesmen. So I told (them) to go right ahead. We started excavating. I think we had 45 homes up, shells, and about six finished.

"So I called up Humphrey. He said, 'What the h—— are you doing? You're supposed to get it approved first!'"

Jourdain laughed. "He had to hustle like h—— to get authorization; they had to wire money to the bank here."

He fell silent and then got serious.

"Humphrey was a statesman and humanitarian, second to none."

A longtime financial supporter of the DFL, Jourdain has little good to say about the current crop of federal officials — from President Reagan to BIA director Swimmer, Sens. Dave Durenburger and Rudy Boschwitz, Rep. Arlan Stangeland. Republicans, Jourdain said, always backed termination of the tribes, either openly or subtly.

"An Indian Republican is a sellout to the Indian cause," he said.

During a visit to Red Lake last year, Swimmer said that tribes have to look to outside private investors for economic development. That sounds well and good, Jourdain said, but such a suggestion is actually a veiled plan to get rid of tribes.

"The pressure is on. They want us to go to the private sector to borrow money. In the bank, that means mortgaging your land. And our land is not for sale."

Another DFL friend is former Vice President Walter Mondale.

"Roger's a very practical person," Mondale said. "He's not a radical. He's trying to make things work . . . He has unbelievable stamina and energy. He's one of Minnesota's most extraordinary people."

In the early 1960s, Jourdain worked out a way for federal housing money — buried in bureaucracy — to be used on American Indian Learning and Resource reservations, Mondale said.

Jourdain went to Washington, D.C. with a memo and "carried it around until

I wore it out," he said. "I had to change clothing three times; I was wringing wet in Washington."

He couldn't get the interest of the BIA, but both the Indian Health Service and the federal housing agencies agreed to come up with 10 homes and water and sewer services, he said.

At that time, Dr. Emery Johnson, who retired in 1981 as national director of the Indian Health Service, was a doctor on the White Earth Reservation and frequently was called to practice at Red Lake.

"Anyone up in that country who saw what people were living in 30 years ago — one-room shacks, tar paper, wind would blow right through the holes in the walls, abject poverty, getting water from wherever you could get it — you know that's not healthful," he said. "The major cause of infant mortality was related to infectious diseases. (It) was 2 1/2 times greater than the general population."

The accomplishments of Jourdain and the Red Lake Tribal Council are considerable, Johnson said: the first urban Indian health program in the country, in Minneapolis, now the best among 37 nationwide; the first hospital ever built by an Indian tribe; the first tribal community health program, now "a class act, as good a health system as anybody, and probably better than most."

The Indian infant mortality rate is the same as that of the general population now, he said.

Red Lake's community health program has never been a political issue there, not even during the 1979 riot, Johnson said, "and that's pretty remarkable. This is, in fact, a remarkable person, a remarkable leader. There hasn't been anything of significance in the health program that Roger hasn't been involved in, one way or another."

Nationally, "Chairman Jourdain is regarded as the dean of Indian politics," said Roger Buffalohead, director of the American Indian Learning and Resource Center at the University of Minnesota.

Last year, the 19-person intertribal American Indian Heritage Foundation

Exhibit No. 18 (cont.)

named Jourdain the Indian man of the Year, as someone who most helped rural and urban Indians nationally.

Jourdain sits on the national advisory committee of Native American HUD programs, served as chairman of the Minnesota Indian Affairs Council and helped establish the National Tribal Chairmen's Association.

Along with President Wendell Chino of the Mescalero Apache Nation — whom many Indians pair with Jourdain as the other elder statesman of Indian Country, a pair opponents refer to as the Godfather and the King — Jourdain last year co-founded the Alliance of American Indian Leaders to press Congress to recognize the unique sovereign status of Indian nations.

As an officer of the Prairie Island Sioux Community, Joseph Campbell said he looks to Jourdain and Red Lake as a model of what tribes should be. Prairie Island has been annexed by the city of Red Wing, Minn., Campbell said — against the vote of the tribe. During the last 120 years, the reservation has been pared down to a single section of land.

"That's because we have no one who has done what Roger has — kept state and county and city government from stepping in," Campbell said. "I envy them . . . He has fought and kept their rights. Some one else could have been enticed to lose them."

"He's taken on the BIA, the Department of the Interior, congressmen and senators in hearings throughout the country, and I don't think he's ever lost a battle," said Fond du Lac's Houle.

"It's real clear he hates the BIA, but he's not eaten up with it," Harjo said. "He's just not a bitter person. He's very humble, and very, very generous — generous of thought and with his possessions."

"You can have that strong leadership approach, and people may grumble about it, but if you don't make many mistakes, it's OK," she said. "By slim margin or overwhelming majority, he's gotten back in (office) time after time. And that will happen again and again, until they don't want him."

Exhibit No. 18 (cont.)

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PLEASE REPLY TO WASHINGTON, D.C. OFFICE

MEMORANDUM

TO: The Honorable Roger A. Jourdain, Chairman
Red Lake Band of Chippewa Indians

FROM: M. Frances Ayer

DATE: October 14, 1987

RE: Resolution No. 1-87 of the Red Lake Band of
Chippewa Indians

By Resolution No. 1-87 the Red Lake Tribal Council directed that we research and advise the Council about the applicability of the United States Constitution to the inherent sovereign rights of the Red Lake Band of Chippewa Indians. You explained to me that the legislative intent of the Council in enacting Resolution No. 1-87 was that a thorough legal analysis of the origin, scope and constitutional basis for the exercise of plenary power over Indian tribes by the United States Congress be prepared.

Accordingly, there follows our analysis of that issue. We hope

Exhibit No. 18 (cont.)

this analysis is helpful to you and other members of the Council. It is an honor to assist you with this important issue.

JUDICIAL INVENTION OF THE PLENARY DOCTRINE

Introduction

The courts describe Congress' power over Indian tribes as being "plenary".^{1/} The word "plenary" is defined as a power that is full, entire, complete, absolute, perfect, unqualified.^{2/} Since the Federal Government is a government of enumerated powers,^{3/} the plenary doctrine must find its source in some provision of the Constitution. But the Constitution contains no express grant of absolute or plenary authority to Congress over Indian tribes. This paper traces the source of the plenary doctrine and explains how it has evolved to its present state in the field of federal Indian law.

The plenary doctrine was created by the United States Supreme Court. It has no constitutional basis. Rather, it arose from what the Court viewed as a void in congressional powers over Indian tribes.

¹ E.g., National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985).

² BLACK'S LAW DICTIONARY 1038 (5th ed. 1979).

³ McCulloch v. Maryland, 18 U.S. (4 Wheat.) 316 (1819).

Exhibit No. 18 (cont.)

During the era of colonization in America, the European nations mutually agreed that any curtailment of the inherent sovereign powers of Indian tribes should be attained only by consent. The framers of the Constitution recognized this prevailing international commitment when they forged provisions allocating powers among the federal and state governments. Over the past two hundred years of constitutional interpretation, however, the international policy of consent, upon which Indian treaties and this nation were founded, has lost its meaning. Today the sovereign powers of Indian tribes are subject to the complete and relatively unrestrained plenary control of Congress and the courts.

The plenary doctrine directly conflicts with recent international treaties and agreements to which the United States is a party. This paper, it is hoped, will provide a vehicle for serious discussion on how current federal Indian policies must change to conform to international norms and to the original intent of the Constitution.

I. COLONIAL POLICIES

In 1532, the Emperor of Spain sought the legal advice of Francisco de Victoria, a leading Spanish intellectual and academic, concerning the rights of Spain in dealing with Indian tribes in the

Exhibit No. 18 (cont.)

New World. ^{4/} Victoria concluded that tribal governments were to be respected:

So long as the Indians respected the natural rights of Spaniards, recognized by the law of nations, to travel in their lands and to sojourn, trade, and defend their rights therein, the Spaniards could not wage a just war against the Indians . . . , and therefore could not claim any rights by conquest. In that situation, however, sovereign power over the Indians might be secured through the consent of the Indians themselves. ^{5/}

Though the Spanish emperors did not strictly follow Victoria's advice, they did recognize the inherent rights of Indian tribes, ^{6/} as did the British.

In the case of Mohegin Indians, the Privy Council of England upheld a 1743 ruling that required the colonists to purchase land from Indians only by means of treaties with legitimate tribal officers. ^{7/} The Indians were to be treated as a "separate and distinct people", with policies of their own and the power to make peace or war with other Indians, free of English control. ^{8/} King

⁴ See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 46-47 (U.N.M. ed. 1976).

⁵ Id., citing VICTORIA, DE INDIS ET DE JUNE BELLI RELECTIONES (transl. by John Pawley Bate, 1917), 1557, sec. 3, title 1, et seq. (footnote omitted).

⁶ See, e.g., id. at 383-84 (for a brief description of the recognized status of Pueblos under Spanish law).

⁷ R. BARSH, J. YOUNGBLOOD HENDERSON, THE ROAD--INDIAN TRIBES AND POLITICAL LIBERTY 32 (1980).

⁸ Id., quoting 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 218 (London, 1912).

Exhibit No. 18 (cont.)

George III reaffirmed the policy of Mohegin Indians by Royal Proclamation in 1763. 9/

II. The Constitution

The powers of the Crown passed to the states upon the conclusion of the American Revolution. 10/ By 1781, the states had ratified the Articles of Confederation, which set forth the powers of the states and national government and laid the foundation for development of the Constitution. Article IX of the Articles of Confederation empowered Congress with the "sole and exclusive right and power" of entering into treaties. 11/ It also gave Congress the exclusive power of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any state within its own limits be not infringed or violated." 12/

Article IX made clear that only the Federal Government was to enter into treaties and regulate the nation's affairs with the Indians. It said nothing about regulating the affairs of the Indians. This delegation of power to the national government was

9 Id., citing 7 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 663 (Richmond, Virginia, 1819-1823).

10 See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

11 Articles of Confederation art. IX.

12 Id.

Exhibit No. 18 (cont.)

similar to that held by the Crown. The British colonies could enter into treaties with Indian tribes only if delegated that authority in charters issued by the Crown. 13/

The Article IX language was the result of a compromise between the federalists, who wanted the Federal Government to have exclusive control over relations with Indians, and some colonies, who wanted the states to deal directly with Indians. 14/ The language qualifying Congress' power so as not to interfere with state legislative rights caused great confusion and drew strong criticism from James Madison. Madison ridiculed the article as "'obscure and contradictory'", as 'absolutely incomprehensible', and as inconsiderately endeavoring to accomplish impossibilities." 15/ To clarify that the Federal Government was to deal with Indians exclusive of the states, the framers of the Constitution entirely left out the qualifying language of Article IX. 16/ Thus, the framers saw the tribes as significant governments, dealings with whom deserved a national policy.

¹³ See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554-56 (1832).

¹⁴ F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 29-31 (1962).

¹⁵ Id. at 30, quoting J. MADISON, THE FEDERALIST No. XLII.

¹⁶ F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 29-31 (1962).

Exhibit No. 18 (cont.)

The Constitution, drafted to clear up the defects of the Articles of Confederation, was ratified by the states on September 17, 1787. It contains six separate provisions which affect, directly or indirectly, the relationship between the United States and Indians.

Article I provides that in apportioning House Representatives and direct taxes, "Indians not taxed" are not to be counted.^{17/} It also contains the Commerce Clause, which gives Congress the power "To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."^{18/}

The Indian Commerce Clause underwent several revisions before reaching its final state:

The Pinckney plan included "exclusive power . . . of regulating Indian Affairs." This was omitted in the first draft of the Constitution. [Charles] Pinckney then resubmitted the article as "To regulate affairs with the Indians as well within as without the limits of the United States." The Committee of Detail rewrote this as "To regulate commerce . . . with Indians, within the Limits of any State, not subject to the laws thereof," and the Committee of Eleven finally reduced it to its present state. . . ." ^{19/}

The plain intent of the Indian Commerce Clause was to give Congress the exclusive power of regulating commerce with Indian

¹⁷ U.S. CONST. art. I, § 2, cl. 3, also incorporated in the Fourteenth Amendment, amend. XIV, § 2.

¹⁸ U.S. CONST. art. I, § 8, cl. 3.

¹⁹ Barsh, supra n.7, at 34 (author's emphasis).

Exhibit No. 18 (cont.)

tribes, not all affairs of Indians. ^{20/} Indeed, during the first century of federal legislation, Congress limited its exercise of Commerce Clause powers to the regulation of trade and intercourse with the Indian tribes. ^{21/}

Article I of the Constitution also provides that "[n]o State shall enter into any treaty." ^{22/} Article II gives treaty-making power to the President, "by and with the Advice and Consent of the

²⁰ Well before the Supreme Court applied the plenary doctrine to Congress' powers regarding Indian matters in 1899, the Indian Commerce Clause was held in 1876 to be "a power as broad and as free from restrictions as that to regulate commerce with foreign nations." *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 at 194 (1876). *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899), was the first Indian case to use the term "plenary," but the concept as to Indian matters arose in *United States v. Kagama*, 118 U.S. 375 (1886). Because of the development of the plenary power doctrine, the Commerce Clause has not generally been cited by the courts as a source of or limitation upon congressional power to regulate the affairs of Indians. See *United States v. Wheeler*, 435 U.S. 313 (1978) ("By specific treaty provision [tribes] yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." *Id.* at 323 (emphasis added)); *cf.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. . . ." *Id.* at 142); *but see McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from the federal responsibility for regulating commerce with Indian tribes and for treaty making." *Id.* at 172, n.7).

²¹ See Act of July 22, 1790, ch. 33, 1 Stat. 137, carried forward in the Act of March 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of March 3, 1799, ch. 46, 1 Stat. 743; Act of March 30, 1802, ch. 13, 2 Stat. 139; Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729 (repealed in part) (codified as carried forward and amended at 18 U.S.C. §§ 1152, 1160, 1165, 25 U.S.C. §§ 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, 264).

²² U.S. CONST. art. I, § 10, cl. 1.

Exhibit No. 18 (cont.)

Senate . . . , provided two-thirds of the Senators present concur." ^{23/} As with the Articles of Confederation, with minor variation, the clear intent was to confer exclusive treaty-making authority upon the Federal Government.

Article IV provides that the Constitution, the federal laws made pursuant thereto, "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." ^{24/} The clear intent of this provision, the Supremacy Clause, was to ensure that state laws would not interfere with federal laws and treaties and that Congress and the courts would honor the Constitution and treaties. .

Nothing contained in the Constitution gives Congress, the executive branch, the judicial branch or the states any power to curtail the sovereign powers of tribes. The Constitution confirms the status of tribes as governments and Congress early on recognized that any curtailment of tribes' sovereign powers may be achieved only

²³ U.S. CONST. art. II, § 2, cl. 2.

²⁴ U.S. CONST. art. IV, cl. 2.

Exhibit No. 18 (cont.)

with the consent of the tribes through treaties. ^{25/} Such a view was consistent with the well-recognized principles of international law.

III. Judicial Policies

A. The Marshall Court

During his nearly thirty-five year tenure as the third Chief Justice of the United States Supreme Court, ^{26/} John Marshall authored a series of opinions which formed the cornerstone of federal Indian law. ^{27/} Though relatively recent decisions suggest that the basic policies of the Marshall Court remain intact, ^{28/} Chief Justice Marshall likely would be surprised if he could see today the changes wrought by the Court since his death in 1835.

²⁵ See, e.g., H. Rep. No. 474, 23d Cong., 1st Sess. 13 (1834), quoted in FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 116-117 (1982 ed.) (Concerning the legislative intent of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729, the House committee recognized "that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction. . . . It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits".) (emphasis in original).

²⁶ 1801-1835.

²⁷ Principally, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

²⁸ E.g., Williams v. Lee, 358 U.S. 217, 219 (1959); cf. Organized Village of Kake v. Egan, 369 U.S. 60, 71-75 (1962) (for a detailed discussion of modifications since Marshall's decisions).

Exhibit No. 18 (cont.)

Marshall reaffirmed many of the basic principles of international law forged by the European nations as they "colonized" America, but he faced "a cruel dilemma: either Indians had no title and no rights, or the Federal land grants upon which much of our economy rested were void." 29/ Marshall opted for a middle-of-the-road approach by devising a new form of land title. He held in 1823 that the United States--as successor to the rights of the Crown--acquired title to Indians' land by virtue of the "right of discovery", subject only to the Indians' "right of occupancy". 30/ The right of discovery gave the United States "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." 31/

In 1831, the Marshall Court was called upon to determine whether tribes were to be regarded as foreign states for purposes of invoking the original jurisdiction of the Supreme Court. 32/ The Court held that tribes are not foreign nations. 33/ Writing for the majority, Marshall opined:

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when

29 Cohen, Original Land Title, 32 Minn. L. Rev. 28, 48 (1947).

30 Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 at 586 (1823).

31 Id. at 587.

32 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

33 Id. at 20.

Exhibit No. 18 (cont.)

their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. ^{34/}

Marshall's above-quoted passage seems to suggest that he was of the view that Indians were overcome by conquest. In 1832, however, in the landmark decision of Worcester v. Georgia, ^{35/} Marshall expressly rejected the proposition that Indian tribes had been subjugated by conquest, ^{36/} and acknowledged the sovereign status of tribes with whom the United States entered into treaties:

From the commencement of our government, congress [sic] has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All those acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States. ^{37/}

Marshall clarified that "dependency" was a narrow concept, that while tribes were dependent upon the Federal Government for supplies and protection, their sovereign powers were to be respected. ^{38/} He

³⁴ Id. at 17.

³⁵ 31 U.S. (6 Pet.) 515 (1832).

³⁶ Id. at 543-51.

³⁷ Id. at 556-57.

³⁸ "[S]o long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country. . . ." Id. at 547.

Exhibit No. 18 (cont.)

was of the view, as was Congress, that any interference with the sovereign powers of tribes could be effected only with their consent through treaties. ^{39/} The very making of treaties by the United States with tribes, said Marshall, ranked them as nations. ^{40/} Concerning the express provisions of the Constitution dealing with Indians, the Court held that "[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians." ^{41/} Marshall correctly viewed the Constitution as a delegation of power to regulate United States intercourse with tribes, not the affairs of Indians.

The sense of history documented by the Marshall Court often has been ignored or altered by the Court in subsequent cases. ^{42/} On the other hand, when the Court appears comfortable in recognizing, within limited bounds, sovereign powers of tribes, it does not hesitate to draw on Marshall Court principles. ^{43/}

³⁹ Id. at 543.

⁴⁰ Id. at 559.

⁴¹ Id. (emphasis added).

⁴² E.g., Morton v. Mancari, 417 U.S. 535 (1974) (suggesting control of tribes was attained by conquest: "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands. . . ." Id. at 552, quoting Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)).

⁴³ E.g., Merrion v. Jicarilla Apache Tribes, 455 U.S. 130 (1982) (relying in part on Worcester in recognizing the inherent power of the Tribe to impose severance taxes on non-Indians producing oil and gas under leases on tribal land).

Exhibit No. 18 (cont.)

B. The Plenary Doctrine

1. The End of Treaty Making

In 1871, the House insisted on a rider to the Indian Appropriation Act ^{44/} which ended the making of treaties with Indian tribes. That Act provided the impetus for the Court to create the plenary doctrine.

The rider to the 1871 Act stated:

That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; Provided . . . , That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe. ^{45/}

The rider resulted from House resentment of its exclusion from the treaty-making process. ^{46/} The intent of the Act was clear: to end treaty-making. However, this Act presented the Federal

⁴⁴ Ch. 120, 16 Stat. 544 (1871).

⁴⁵ 16 Stat. 544 at 566 (1871) (carried forward into § 2079, Rev. Stat. (1878), 18 Stat. 364; current version at 25 U.S.C. § 71).

⁴⁶ "House resentment first resulted in legislation in 1867 repealing 'all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes,' After further unsuccessful House attempts to enter the field of federal Indian policy, the House refused to grant funds to carry out new treaties. . . . Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Indian Appropriation Act of 1871." Antoine v. Washington, 420 U.S. 194, 202 (1975) (citations omitted).

Exhibit No. 18 (cont.)

Government with a major dilemma. If the United States wanted Indian lands, for example, it could no longer obtain them because it had eliminated its principal means of dealing with tribes.

The solution to this dilemma was first noted by dictum in an 1884 case in which the Court remarked that the "utmost possible effect [of the 1871 Act] is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power." 47/

The following year, in response to the Court's ruling in Ex Parte Crow Dog, 48/ which held that United States' criminal laws did not extend into Indian country over a murder committed by one Indian against another, Congress enacted the Major Crimes Act. 49/ The Major Crimes Act extended federal jurisdiction over eight major crimes 50/ committed by Indians within Indian reservations. In United States v. Kagama, 51/ an 1886 challenge to the constitution-

47 Elk v. Wilkins, 112 U.S. 94 at 107 (1884).

48 109 U.S. 556 (1883).

49 Ch. 341, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153) (Crow Dog recognized treaty commitments which secured to the Brule Sioux the power of self-government to administer "their own laws and customs." 109 U.S. at 568).

50 Murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny. 23 Stat. 385. The current version adds statutory rape, assault with intent to commit rape, assault with a dangerous weapon, assault resulting in serious bodily injury and robbery. 18 U.S.C. § 1153.

51 118 U.S. 375 (1886).

Exhibit No. 18 (cont.)

ality of the Major Crimes Act, the Court unleashed what later was to become the plenary doctrine.

In Kagama, two Indians were indicted under the Major Crimes Act for the murder of another Indian on the Hoopa Valley Reservation. They challenged the Act as having exceeded the constitutional powers of Congress. The Court first noted that the Constitution did not authorize congressional intrusion into the law and order jurisdiction of the tribes: "[T]he Constitution . . . is almost silent in regard to the relations of the government which was established by it to the numerous tribes. . . ." 52/ Concerning the "Indians not taxed" provisions, the Court said they failed to "shed much light on the power of Congress over the Indians in their existence as tribes" 53/ Concerning the Indian Commerce Clause, the Court conceded that "we think it would be a very strained construction of this clause, that a system of criminal laws for Indians . . . was authorized by the grant of power to regulate commerce with the Indian tribes." 54/ The Court then acknowledged that tribes "thus far" had not been "brought under" federal or state laws. 55/

But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure--to govern them by acts of Congress. This is seen in the Act of

52 Id. at 378.

53 Id.

54 Id. at 378-79.

55 Id. at 382.

Exhibit No. 18 (cont.)

March 3, 1871. . . . 56/

What gave Congress the power to unilaterally shift from the well-established commitment of dealing with tribes on a government-to-government basis to one of imposing its will by legislation? The Court, relying in part on Worcester,^{57/} held that the power arose from the United States' duty of protection for its dependent wards.^{58/} The Court's reliance on Worcester was misplaced. Worcester made clear that the duty of protection was limited to that "which treaties stipulate",^{59/} to furnish supplies and to restrain intruders from entering their territory.^{60/} Worcester also expressly confirmed that tribes were to have exclusive authority within their territorial boundaries.^{61/}

The Constitution did not empower Congress to interfere with the sovereign powers of tribes, except by treaty. The only constitutional way to curtail the sovereign powers of all tribes would be to enter into treaties with each and every tribe. The 1885 Major Crimes Act was unilaterally applied to all tribes by Congress, yet no treaties were entered into to limit tribal criminal jurisdiction

⁵⁶ Id. (citation omitted)

⁵⁷ 31 U.S. (6 Pet.) 515 (1832).

⁵⁸ 118 U.S. at 383-84.

⁵⁹ 31 U.S. at 557.

⁶⁰ 31 U.S. at 547, quoted at n.38, supra.

⁶¹ 31 U.S. at 547.

Exhibit No. 18 (cont.)

because the 1871 Act had cut off treaty making. By construing the 1871 Act as Congress' intent that tribes be dealt with by legislation rather than by treaty, the Court invented a scheme to free Congress from the limitations of the Constitution: constitutional treaty making was no longer operative, and the other provisions of the Constitution simply did not authorize such an intrusion into tribal sovereignty. The decision was based on a paternalistic and racist ideology: that Indians were savage incompetents in need of protection. This ethnocentric policy continues to surface today whenever implicit suggestions are made that tribes are incapable of managing their own affairs.

The 1871 Act is of questionable constitutional validity. The Court recently held that Congress may not alter by legislation, "[e]xplicit and unambiguous provisions of the Constitution [which] prescribe and define the respective functions of the Congress and of the Executive" ^{62/} But that is exactly what the 1871 Act did: it curtailed the treaty-making powers of the President and Senate that are expressly prescribed in the Constitution. ^{63/} It is unlikely, however, that the Court would find unconstitutional an act which was pivotal in forming the theoretical basis upon which nearly

⁶² INS v. Chadha, 462 U.S. 919 at 945 (1983) (struck down longstanding legislative practice of the "legislative veto", through which Congress reserved the power to veto administrative decisions of the executive branch).

⁶³ U.S. CONST. art. 2, § 2, cl. 2.

Exhibit No. 18 (cont.)

all Indian legislation derogating tribal sovereignty has been founded since 1871. ^{64/}

Congress could impose limitations on its exercise of legislative intrusion into tribal powers. Congress is not unaccustomed to cur-tailing its own legislative powers. The Gramm-Rudman-Hollings Act of 1985 ^{65/} is one recent example. Though a portion of the Act was found unconstitutional, ^{66/} its unaffected provisions impose strin-gent limitations on how the President and Congress shape annual appropriations legislation.

Similar constraints could be self-imposed by Congress in its dealings with Indian tribes. Following is a brief overview of the historical development of the plenary doctrine subsequent to the Kagama decision. It will provide an appreciation for specific pro-posals that could be advanced to restore the government-to-government relations between the United States and Indian tribes.

⁶⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (upholding the exercise of presidential actions not enumerated in the Constitution but long acquiesced in by Congress); but see *INS v. Chadha*, at 931 n.6 (disregarding the impact the ruling invalidating the legislative veto would have on 196 different statutes). The Treaty Clause, U.S. CONST. art I, § 10, cl. 1, and the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, would provide adequate constitutional authority for other legislation not derogating tribal sovereignty.

⁶⁵ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985).

⁶⁶ *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

Exhibit No. 18 (cont.)

2. "Plenary Doctrine" Introduced

The first use of the term "plenary power" to describe Congress' broad, non-constitutionally based authority to legislate on Indian matters was made by the Supreme Court in 1899, in Stephens v. Cherokee Nation.^{67/} Stephens involved a challenge of Congress' power to establish a mechanism for determining citizenship rolls of several tribes. As to whether Congress had such authority, the Court said:

[A]ssuming that Congress possesses plenary power of legislation in regard to [Indians], subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.^{68/}

Taken out of context, it appears that the Court assumed that Congress had plenary power.^{69/} But the Court went on to conclude that the Act of 1871 was evidence that Congress had plenary power to legislate on Indian matters.^{70/} This, of course, is circular reasoning. The question was whether Congress had the power, which the Court answered by relying on an example of Congress' exercising that power. This complete deference to Congress on whether it had

⁶⁷ 174 U.S. 445 (1899).

⁶⁸ Id. at 478.

⁶⁹ Some have suggested the Court was making that assumption. See, e.g., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 217, n.2 (1982 ed.).

⁷⁰ Id. at 483.

Exhibit No. 18 (cont.)

the power is similar to the Court's development of the political question doctrine, which comprised the next major phase of Court decisions on Indian cases.

The above-quoted passage suggested that the only limitation on Congress' power to legislate on Indian matters was the Constitution itself, i.e., Congress could not pass laws affecting Indians if those laws conflicted with some other provision of the Constitution. Such limitations imply that acts of Congress would be subject to judicial review to determine whether particular legislation violated the Constitution. That implication, however, was quickly rejected by the Court.

3. Political Question Doctrine

The political question doctrine was developed by the Court to limit its review of certain matters which it finds are better left to the exclusive control of another branch of government. ^{71/} At the turn of this century the Court held that Congress' plenary power over Indian legislation was a political question and was, therefore, not subject to judicial review. ^{72/}

⁷¹ See Baker v. Carr, 369 U.S. 186 (1962) (enumerating the standards the Court applies in determining whether a particular case involves a political question); e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (deferring to Congress an issue involving the scope of Congress' commerce power).

⁷² Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

Exhibit No. 18 (cont.)

The 1902 case which first announced this new departure in Indian law involved a challenge by the Cherokee Nation of a statute giving the Secretary of the Interior the exclusive authority to execute mineral leases on all tribal lands. ^{73/} The Court held that the Act of 1871

voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them. . . . ^{74/}

* * *

The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts. ^{75/}

The following year, in 1903, the Court extended the political question doctrine to a statute which affected specific tribes, in Lone Wolf v. Hitchcock. ^{76/} Lone Wolf, probably more than any other case in American history, exemplifies the atrocious consequences that result when Congress and the judiciary lack sufficient standards to limit their exercise of power.

⁷³ Ch. 517, 30 Stat. 495 (1898).

⁷⁴ Cherokee Nation v. Hitchcock, 187 U.S. at 305.

⁷⁵ Id. at 308.

⁷⁶ 187 U.S. 553 (1903).

Exhibit No. 18 (cont.)

Lone Wolf involved an Act of Congress ratifying an agreement signed by less than the number of adult males of the Kiowa, Comanche and Apache Tribes required by their treaty. The agreement called for a cession of tribal lands, but Congress materially altered the agreement in its ratifying act, and there was substantial evidence of fraudulent misrepresentations by the government officials who secured the insufficient number of signatures. Lone Wolf was an individual tribal member who was to be allotted lands pursuant to the agreement. He challenged the Act as being an unconstitutional taking of property and as being in violation of the treaty. The Court held the claim was not subject to judicial review. ^{77/}

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. ^{78/}

The Court was wrong on two counts. First, Congress did not attempt to interfere with "tribal relations of the Indians" until enactment of the Major Crimes Act in 1885. ^{79/} Secondly, Congress' power over Indian tribes was not deemed a political one until 1902. ^{80/} Despite the clear evidence of fraud on the part of the United States, the Lone Wolf Court concluded that "[w]e must presume

⁷⁷ Id. at 567-68.

⁷⁸ Id. at 565.

⁷⁹ Ch. 341, 23 Stat. 362, 385 (1885).

⁸⁰ Note 72, supra.

Exhibit No. 18 (cont.)

that Congress acted in perfect good faith in the dealings with the Indians. . . ." 81/

Lone Wolf paved the way for future treaty violations by the United States by holding that Congress is free to pass laws that conflict with treaty commitments. 82/ Thus, on the one hand, the Court readily relied upon treaty commitments for protection as a means of allowing Congress to interfere with tribal sovereignty; on the other hand, the Court did not hesitate to hold that Congress was under no obligation to honor treaties.

Lone Wolf implicitly overruled the suggestion made in Stephens that Congress' exercise of plenary powers would have to conform to the Constitution. This conflict was further confused by a 1914 case in which the Court looked at whether an Act ratifying a Yankton Sioux cession agreement was

reasonably essential to their protection. . . .
[I]t must be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts. 83/

More recent cases have adopted a somewhat less arbitrary approach: the "tied rationally" test:

81 187 U.S. at 568.

82 Id. at 566.

83 Perrin v. United States, 232 U.S. 478 at 486 (1914).

Exhibit No. 18 (cont.)

The standard of review most recently expressed is that the legislative judgment should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians. . . ." ^{84/}

The tied rationally test is similar to the political question doctrine except that it allows for some judicial review. The problem is the lack of definite standards defining Congress' obligation. The courts have the relatively unrestrained freedom to decide whether the legislation in question is tied rationally to Congress' obligation.

3. Fifth Amendment Taking Claims

The Fifth Amendment provides, in part, that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." ^{85/} In Lone Wolf the Supreme Court refused to hear the Fifth Amendment taking claim and held that Congress must be presumed to have acted in good faith in its dealings with Indians. ^{86/} That is no longer the case. On numerous occasions after Lone Wolf, the Court has agreed to hear Fifth Amendment taking claims made by

⁸⁴ Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 at 85 (1977), quoting Morton v. Mancari, 417 U.S. 535, at 555 (1974).

⁸⁵ U.S. CONST. amend. V.

⁸⁶ 187 U.S. at 568.

Exhibit No. 18 (cont.)

Indians, 87/ and in 1980 the Court expressly held that the political question doctrine of Lone Wolf is now inapplicable to such claims. 88/

The government's simple assertion that it acted in good faith in its dealing with the Indians will no longer foreclose judicial scrutiny of taking claims, and courts now may look to whether the government gave adequate consideration for Indians lands. 89/

C. Tribal Sovereignty

1. Implicit Divestiture

Culminating from the judicially-created plenary doctrine, the Supreme Court has held that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." 90/

87 United States v. Cherokee Nation of Oklahoma, 107 S. Ct. 1487, 94 L.Ed.2d 704, 55 U.S.L.W. 4403 (1987); Hodel v. Irving, 107 S. Ct. 2076, 95 L.Ed.2d 668, 55 U.S.L.W. 4225 (1987); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Menominee Tribe v. United States, 391 U.S. 404 (1968); FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960); United States v. Klamath Indians, 304 U.S. 119 (1938); United States v. Shoshone Tribe, 304 U.S. 111 (1938); Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103 (1935); Choate v. Trapp, 224 U.S. 665 (1912).

88 United States v. Sioux Nation of Indians, 448 U.S. at 415.

89 Id. at 416-17.

90 United States v. Wheeler, 435 U.S. 313 at 323 (1978); accord: National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985); Escondido Mutual Water Co. v. LaJolla, 466 U.S. 765, 788, n.30 (1984); Rice v. Rehner, 463 U.S. 713, 719 (1983); White Mountain

Exhibit No. 18 (cont.)

Prior to 1978, the Court "consistently guarded the authority of Indian governments over their reservations . . . , [holding that] [i]f this power is to be taken away from them, it is for Congress to do it." ^{91/} But in 1978, the Court invented a new judicial technique to strip tribes of their sovereign powers: implicit divestiture.

In Oliphant v. Suquamish Indian Tribe, ^{92/} the Court held that tribes were implicitly divested of their sovereign power to try non-Indian criminal defendants for crimes committed on their reservations. In a companion case in 1978, which clarified the rule of Oliphant, the Court said of tribes that

[t]heir incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. ^{93/}

This new rule was devised out of thin air. Congress had never affirmatively divested tribes of their sovereign powers over non-

Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

⁹¹ Williams v. Lee, 358 U.S. 217 at 223 (1959), citing Lone Wolf v. Hitchcock, 187 U.S. at 564-66.

⁹² 435 U.S. 191 (1978).

⁹³ United States v. Wheeler, 435 U.S. 313 at 323 (1978), citing Oliphant, n.92 supra (Oliphant in turn cited Wheeler for authority).

Exhibit No. 18 (cont.)

Indians, ^{94/} so the Court felt it should do so. This is a dangerous precedent that gives the courts quasi-plenary powers over tribes. It is noteworthy that the Court relied on "protection" and "dependency" to fashion this new racist rule, old terms that are resurrected whenever the Court begins to chip away at tribal sovereignty.

2. Inapplicability of the Constitution

The Court long ago settled that the United States Constitution does not apply to tribal governments in their exercise of sovereign power. ^{95/} The Court has consistently recognized that tribal powers of self-government existed prior to, and did not derive from, the Constitution. ^{96/} However, because the Court has held that all aspects of tribal sovereignty are "subject to the superior and plenary control of Congress," ^{97/} Congress may "limit, modify or eliminate" tribal powers of self-government almost at whim. ^{98/}

⁹⁴ Cf. Act of June 30, 1834, ch. 161, 4 Stat. 729 (extending federal criminal jurisdiction over non-Indians who violate federal trader laws on reservations).

⁹⁵ Talton v. Mayes, 163 U.S. 376 (1896); accord Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

⁹⁶ Talton v. Mayes, 163 U.S. at 384.

⁹⁷ Santa Clara Pueblo v. Martinez, 436 U.S. at 58.

⁹⁸ Id. at 56. Presumably, such congressional action must be tied rationally to its unique obligation toward Indians. Morton v. Mancari, 417 U.S. at 555. Arguably, such action would also be subject to Fifth Amendment limitations, see n.87, supra.

Exhibit No. 18 (cont.)

One example of a congressional attempt to limit tribal powers was the 1968 Indian Civil Rights Act, ^{99/} which purported to apply limitations similar to many provisions of the Bill of Rights to tribal governments. The Court, however, has narrowly construed this particular limitation by holding that claims of alleged violations of the Act must be heard in tribal, not federal, courts. ^{100/} The one exception is writs of habeas corpus, of which federal courts have jurisdiction. ^{101/}

3. Policy of Self-Government

Apart from the court-created doctrine of implicit divestiture, the Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." ^{102/} But just as the Court has flip-flopped on the issue of recognizing tribal

⁹⁹ Pub. L. No. 90-284, 87 Stat. 77 (1968), 25 U.S.C. §§ 1301-1326.

¹⁰⁰ Santa Clara Pueblo v. Martinez, 436 U.S. 49.

¹⁰¹ 25 U.S.C. § 1302.

¹⁰² Iowa Mutual Ins. Co. v. LaPlante, 107 S.Ct. 971 at 975 (1987).

Exhibit No. 18 (cont.)

sovereignty, ^{103/} Congress has interfered with tribal self-government as much as, if not more than, it has promoted it. ^{104/}

On an international level, the United States consistently has supported positions concerning indigenous peoples which directly conflict with its policies concerning American Indians. ^{105/} In 1945, the United States was party to the United Nations Charter, an international agreement among world powers "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." ^{106/}

Concerning nations which administer "territories whose peoples have not yet attained a full measure of self-government," the members of the United Nations agreed they have a trust obligation

¹⁰³ Compare, e.g., Oliphant, n.92, supra (holding that tribes were implicitly divested of criminal jurisdiction over non-Indians), with National Farmers Union Ins. Co. v. Crow Tribe. 471 U.S. 845 (1985) (holding that tribal courts should be given the first opportunity to determine whether they have jurisdiction over civil matters involving non-Indians).

¹⁰⁴ Compare, e.g., "Public Law 280", ch. 505, 67 Stat. 588 (1953), 25 U.S.C. §§ 1321-22 (which transferred civil and criminal jurisdiction over Indian country within five states and one territory to state and territorial control), with the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, 25 U.S.C. §§ 450a-450n (which enabled the transfer of federal control of Indian programs and services to tribes).

¹⁰⁵ See generally Barsh, Book Review, 57 Wash. L. Rev. 799 at 804-07 (1982) (reviewing FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.)).

¹⁰⁶ U.N. CHARTER preamble.

Exhibit No. 18 (cont.)

to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement. ^{107/}

The Charter and recent United Nations treaties and interpretive resolutions, which are to supercede contrary provisions of domestic law, ^{108/}

have condemned "trusteeship" to the ashheap of legal history. No state has a legal right to subject another to "tutelage" on the excuse of the latter's helplessness or ignorance, and existing de facto guardianships are subject to immediate dissolution upon a determination of the administered people's own aspirations for their future political status. ^{109/}

If the United States were truly committed to its international positions, it would seek to restore its treaty promises made to tribes by reversing the trend of the Court's and Congress' assertion of absolute power over tribes.

IV. CONCLUSION

The European nations early recognized the sovereign powers of tribes. They rejected the policy of acquiring Indian lands by con-

¹⁰⁷ U.N. CHARTER art. 73, cl. (b).

¹⁰⁸ Barsh, Book Review, n.105 supra, at 805, citing H. GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION, IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 11-13 (1980).

¹⁰⁹ Barsh, Book Review, n.105 supra, at 805.

Exhibit No. 18 (cont.)

quest, but chose instead a policy of acquisition by consent, and dealt with tribes through treaties on a government-to-government basis. The American revolutionaries followed suit when they drafted the Constitution. Congress was not to have any control over tribes, other than regulating commerce with tribes, except as agreed upon by treaty. For nearly 100 years, Congress honored the original intent of the Constitution in its dealings with Indians.

Congress' termination of treaty-making by the Act of 1871, which is of questionable constitutional validity, opened the way for the creation of the plenary doctrine. That doctrine has allowed the courts and Congress to wield almost total control over tribes without their consent.

Senate Concurrent Resolution 76 will help restore the government-to-government relationship between the United States and Indian tribes as recognized by the framers of the Constitution. Hearings on the resolution will afford tribes the opportunity to educate the current Congress on some of the fallacies of the United States' Indian policies of the past 100 years. Tribal leaders can explain to congressional committees how the plenary doctrine of the Supreme Court is founded, not on principles of law, but on ethnocentric views of "protectionism" and "dependency", views which deviate from historical and current international commitments.

Exhibit No. 19



UPPER SKAGIT INDIAN TRIBE

2284 Community Plaza • Sedro Woolley, Washington 98284
Phone (206) 856-5501 • SCAN 578-3171 • FAX (206) 856-2712

January 26, 1988

Clarence M. Pendleton, Jr.
Chairman
U.S. Commission on Civil Rights
c/o Brian Miller
1121 Vermont Avenue N.W.
Washington, D.C. 20425

Re: Commission Inquiry - Indian Civil Rights Act

Dear Mr. Chairman:

This letter is in response to a request forwarded to the Upper Skagit Indian Tribe from the Bureau of Indian Affairs concerning the Civil Rights Commission's inquiry into enforcement of the Indian Civil Rights Act of 1968. Specifically, we have been asked to answer a series of written questions (Part II, questions 5-23) which are part of an enclosure with your letter to Secretary of Interior Hodel, dated December 19, 1987. Our answers to those questions are enclosed, and we ask that they, together with this letter, be made part of the record of the Commission's inquiry and hearing scheduled for January 28, 1988.

We do not believe that amendment to the Indian Civil Rights Act (ICRA) is necessary at this time. Any expanded role for either the Bureau of Indian Affairs or the federal courts in monitoring tribal actions under the ICRA would be a direct assault on the federal policy of Indian self-determination. It would also frustrate a fundamental purpose of Congress in enacting the ICRA -- to promote and strengthen tribal courts.

Adequate safeguards already exist to insure that redress is available for violations of the ICRA. The Act itself allows for habeas corpus review by a federal court in criminal cases. Supreme Court and lower federal court decisions recognize federal court authority in civil cases to review actions of tribal courts or tribal officials to determine if they have exceeded the scope of their authority. In addition, tribal courts and tribal

Exhibit No. 19 (cont.)

Clarence M. Pennell, Jr.
January 25, 1988
Page 2

governmental agencies are available in the first instance to provide relief in appropriate cases.

Concern over civil rights violations in the context of tribal government must be kept in perspective. Many tribes, including our own, have had active court systems for only a short period of time. The ICRA itself has been in effect for barely two decades. On the other hand, state, local and federal governments, and their courts, have had up to 200 years or more experience with the Bills of Rights to develop a civil rights jurisprudence to where it is today. Examination of the early years of that development, and even in more recent times, reveals a civil rights record that is checkered at best, and one from which Indians and tribes have suffered as victims. This is not to suggest that tribes be sanctioned to commit the same civil rights abuses that these other governments did. But they should be supported in their efforts to develop in a thoughtful and orderly manner a civil rights jurisprudence consistent with tribal culture and values, and not as dictated by non-Indian philosophy, culture and values. This is the essence of self-determination.

This is not to suggest that there are no impediments to the full realization of the protection of civil rights. There are. For the Upper Skagit Tribe, the unavailability of legal counsel for indigent individuals appearing in court makes it very difficult to insure that individual rights are fully protected. Without counsel in non-Indian court systems these rights would not be fully protected there, either. As evidence of our commitment in this area, we recently requested, but were denied, funding from the State bar association's legal foundation to provide legal counsel for low income persons in tribal court as a way of monitoring ICRA compliance.

We are not, however, advocating that the ICRA be amended to add right to free counsel as an additional obligation on tribes. The civil rights record of tribal governments does not justify such an intrusion on tribal self-government. Nor do most tribes have the revenue base to financially bear such a burden. Rather, what is needed is sustained federal funding which would allow indigent persons appearing in tribal court access to free legal representation. This is currently not available.

If any legislative proposal comes out of the Commission's inquiry, it should be for additional congressional appropriations to provide this type of legal assistance, perhaps in the form of voluntary demonstration projects. However, because of the additional strain on court

Exhibit No. 19 (cont.)

Clarence M. Pennington, Jr.
January 26, 1988
Page 3

and prosecutor budgets from a likely increase in the number and expense of trials, and increased briefing and argument of fundamental civil rights issues, additional funds to support these functions will also be needed. The proper focus of Commission recommendations should be positive incentives to encourage tribal civil rights development, rather than negative intrusions into tribal self-governing powers.

Sincerely,



Floyd Williams
Chairman

cc: William A. Black, Superintendent, Puget Sound Agency
(BIA)
Northwest Intertribal Court System

Enclosures

Exhibit No. 19 (cont.)

1-25-88

ANSWERS TO QUESTIONS FROM U.S. COMMISSION ON CIVIL RIGHTS
RE: INDIAN CIVIL RIGHTS ACT OF 1968

BY: UPPER SKAGIT INDIAN TRIBE

PART TWO (Questions 5-25)

5. The following ICRA rights are included in the Tribe's constitution or laws:

CIVIL

- a. Freedom to practice religion
- b. Freedom of speech
- c. Freedom of the press
- d. Freedom of assembly
- g. Equal protection of the laws

Though not specifically enumerated rights, the following are provided for in one form or another in most tribal ordinances or as a matter of tribal policy:

- f. Freedom from bills of attainder and/or ex post facto laws
- h. Due process

The only right not included is "e. Eminent Domain". All land within the tribe's reservation is tribally owned, so this provision is not needed.

CRIMINAL

There is no specific enumeration of these rights in the tribal constitution or ordinances. However, all of these rights are provided for in one form or another by provisions designed to be consistent with the ICRA in the Tribe's Law and Order Code, e.g., warrant and probable cause requirements for searches, seizures and arrests; jury trial conditions and procedures; sentencing limitations; right to counsel; right to confront and compel witnesses; right to speedy trial; etc.

6. Judges are hired by the Northwest Intertribal Court System (NICS), a consortium of 15 tribes. The Tribal Council then appoints the NICS judge to hear cases in its court. Removal of judges must be for cause, after a full hearing, and requires a 4/5 vote of the Council.

7. The Tribe has its own court clerk, a part-time position.

Exhibit No. 19 (cont.)

8. The Tribe has one prosecutor provided through NICS. NICS provided a public defender from 1979-85, until federal funds were severely curtailed. The Tribe has sought funding for a tribal court civil rights project which would provide counsel to indigents in tribal court (civil and criminal), but was denied funding by the state bar association's legal foundation.

9. Yes.

10. Upper Skagit Tribal Court is a court of record.

- a. Court reporters are not used.
- b. yes. Tapes are transcribed as needed for appeals, etc.
- c. yes. Available from the tribal court clerk or from NICS.
- d. yes. Ordinances are available from the tribal office.

11. The Tribe has both a trial and appeals court. (Note that a right to appeal is not a guaranteed right under the U.S. Constitution, even under the Due Process Clause.) There is no appeal to the Tribal Council from the Tribal appeals court.

- a. The tribal appeals court is composed of 5 judges.
- b. Upper Skagit Court of Appeals
- c. Appellate review is on the record.

12. Judges who hear cases at the trial level do not sit on appeals cases for this court.

13. ICRA issues were raised in the only appeal (Criminal case) ever heard by the Court of Appeals.

14. Because of lack of counsel, ICRA issues have been raised in the pleadings in only one case (1987).

15. That case involved tribal members only.

16. Unknown. It is possible that the tribal judge has ruled on violations, e.g., search without a warrant or probable cause, etc., but this information is not readily available and would require a more extensive search of court files.

17. The lack of free legal counsel for low income persons, in both civil and criminal cases, is a major problem. The Council can legislate individual rights, but if those rights are abused by a judge, a prosecutor or the police the individual is usually not able to know what his rights are and be able to adequately assert them without competent counsel. Federal funding is needed. However, ICRA mandated requirements on tribes to provide free counsel is not the

Exhibit No. 19 (cont.)

answer. This Tribe could not afford it and would likely suffer a de facto termination of its judicial authority. Federally funded demonstration projects, available to tribes on a voluntary basis, is a better alternative.

20. Because judges are selected by a 15 member intertribal consortium, and because tribal law places severe restrictions on removal of judges, politics plays even less of a role in the independence of tribal courts than it does in state or federal courts. The Tribal Council is committed to the independence of its tribal court. Separation of powers does not guarantee an independent judiciary. Even under the U.S. Constitution, separation of powers did not provide expressly for judicial review. That has only occurred as a result of executive and legislative branches' acquiescence to the authority of the judicial branch. Tribes should have the freedom to reach the same result.

21. No. Supreme Court and lower federal court decisions already provide for federal court review of tribal court or government actions to determine if the tribe has exceeded its jurisdictional authority. Further erosion of tribal powers is not warranted and is counter to important and long-standing federal policies favoring tribal self-determination.

22. No.

23. None.

Exhibit No. 20



Nora Garcia - Chairperson
Llewellyn Barrackman - Vice-Chairperson
Gary Arrison - Secretary
James D. Bryan - Member
Patricia Madueno - Member
Melba Guerrero - Member
Archie Knox - Member

500 MERRIMAN • NEEDLES, CALIF 92363 • (619) 326-4591

February 10, 1988

CERTIFIED - RETURN
RECEIPT REQUESTED

Mr. Brian Miller
Deputy General Counsel
U. S. Civil Rights Commission
Room 600
Washington, DC 20425

Dear Mr. Miller:

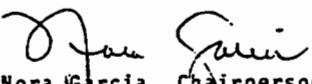
SUBJECT: STATEMENT BEFORE THE CIVIL RIGHTS COMMISSION

Enclosed find the Fort Mojave Tribe's written statement to the U. S. Civil Rights Commission for inclusion with the testimonies received at the Commission's hearing of January 28, 1988, concerning the enforcement of the Indian Civil Rights Act (ICRA).

It is our understanding that written statements are being accepted until February 28, 1988, and trust that the Tribe's position will be registered and recorded within the Commission's investigative report.

Very truly yours,

FORT MOJAVE TRIBAL COUNCIL


Nora Garcia, Chairperson

NG:leh

Enclosure

cc: D. Hester, Fredericks & Pelcyger, Boulder, CO
V. Mitchell, Inter-Tribal Council of Arizona, Inc.
C. L. Henson, BIA-Colorado River Agency, Parker, AZ
S. McCord, FM Tribal Court

Exhibit No. 20 (cont.)

STATEMENT OF NORA GARCIA, CHAIRPERSON
FORT MOJAVE INDIAN TRIBE
BEFORE THE UNITED STATES
CIVIL RIGHTS COMMISSION

Washington, D.C.

January 28, 1988

Chairman Pendleton and Members of the Commission, my name is Nora Garcia and I am the Chairperson of the Fort Mojave Indian Reservation. Our Reservation is located in the states of California, Nevada, and Arizona. Our Tribal government offices are in Needles, California.

In August of 1987, the Chief Judge of the Fort Mojave Indian Tribal Court, Sheila McCord, presented testimony to the Civil Rights Commission on behalf of the Tribe in Flagstaff, Arizona. In her testimony, Judge McCord expressed the Tribe's interest in the scope of and motivation for the Commission's investigation into the enforcement of the Indian Civil Rights Act (ICRA). While the Commission has failed to respond to our inquiries, we are committed to participating in the Commission's review of ICRA implementation. In my testimony, I wish to present several comments on ICRA enforcement on the Fort Mojave Reservation and some comments directed at the focus of today's hearing: the function of the Bureau of Indian Affairs (BIA) in ICRA enforcement.

I. ICRA Enforcement on the Fort Mojave Reservation

At the outset, I feel it is important to reiterate an important point. Our Tribal government exercises its sovereign

Exhibit No. 20 (cont.)

authority consistent with the Constitution and By-Laws of the Fort Mojave Tribe and with ICRA. I asked our Chief Judge, Sheila McCord, to review her files for the last three (3) years to ascertain the number of complaints filed in our Tribal court system containing counts alleging violations of ICRA. Only one (1) case containing such a charge was found. That case, Barrackman v. Fort Mojave Tribal Council, No. CI-3032-85, Feb. 1985, involved a claim by a Tribal member that the Tribal Council violated the Fort Mojave Constitution by appointing three (3) council members following a successful recall campaign. The petitioner claimed a special election was required to fill the vacancies. Both Fort Mojave Tribal judges recused themselves from the case because of close blood ties to interested parties, and a visiting judge was brought in to hear the case. The judge heard oral argument on the briefs for summary judgment and a written decision was rendered in favor of the Tribe. The case required an interpretation of our Constitution. The petitioner, Mr. Barrackman, did not appeal the decision.

I would suggest to the Commission that the sparsity of complaints alleging ICRA violations is a good indication the Fort Mojave Tribal government operates with due regard for the rights of our members and non-Indian residents of the Reservation. Furthermore, when a civil rights issue is raised, our court system has demonstrated it will deal with such cases in an objective, competent fashion.

The Fort Mojave Tribe is displeased with the Commission's

Exhibit No. 20 (cont.)

review of ICRA enforcement in tribal courts. We bristle at the implication that civil rights abuses are rampant in Tribal courts, or at the suggestion that additional federal or state control is warranted to correct any alleged abuses. We are unaware of any such widespread abuses, and we are certain they have not arisen in our court system. Moreover, we are concerned that the Commission does not understand the unique role of Tribal courts on reservations. The U.S. Supreme Court noted the distinctive character of Tribal courts in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), when, in rejecting federal court review of a Tribal court ruling on an ICRA claim, the Court stated:

"Congress may also have considered that resolution of statutory issues under § 1302 (ICRA), and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. . . . (W)e have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments."

In the absence of a sincere effort by the Commission to understand our Tribal courts and customs, we question the completeness of your investigation.

Finally, let me point out that the Fort Mojave Tribe is committed to the development of a fair and efficient Tribal court system. Our Chief Judge, Sheila McCord, is President of the Southwest Indian Court Judges Association. She is vigilant in her

Exhibit No. 20 (cont.)

efforts to improve Tribal courts on our Reservation and in our region. Presently, Judge McCord is working to establish a college to train Tribal court judges and she is negotiating with the faculty of the Arizona State University Law School to get law students to spend time on the Reservation serving as law clerks to the Tribal judges. The intent of Judge McCord, and the Fort Mojave Tribal Council, is to develop a Tribal court system that resolves disputes arising on the Reservation consistent with our customs, our Constitution and By-Laws and with due regard for the civil rights of all parties before our Court.

II. The BIA Role in ICRA Enforcement

It is apparent from the materials I received concerning this hearing that the Commission is interested in the BIA role in ICRA enforcement. As the April 1986 memorandum from Tim Vollman, Assistant Solicitor for Indian Affairs, recognizes, the BIA role is limited to review of 638 contracts and certain tribal council actions. The primary ICRA enforcement authority appropriately lies in tribal courts as the Supreme Court ruled in Martinez.

We support Mr. Vollman's characterization of the BIA's role as one seeking to develop a program to "enhance tribal institutions and encourage ICRA compliance." However, recent BIA funding cut-backs have had a severe impact on that objective and our tribal court and law enforcement programs. In the past year, we have had to absorb a decrease in our BIA grant to run and improve our Tribal Court. Our total annual tentative amount for FY 88 for

Exhibit No. 20 (cont.)

our Tribal court is now only \$30,000.00. We have always been informed each Fiscal Year that funding would be decreasing but are not made aware until the last month of the Fourth (4th) Quarter of the Fiscal Year that funds are available, thus causing a carry-over showing non-expenditure of funds.

Although additional funds have been secured to meet the deficit during the last two (2) years--FY 86/87, it is a recurring problem which causes a hardship on the staff as well as the Tribal government, i.e., lack of adequate training funds, planning, staffing cuts, etc.

I have also been advised that our BIA law enforcement and training budget is to be reduced by an unidentified percentage this year. I question this since more monies were appropriated this Fiscal Year for law enforcement programs. We urge the Commission to assist us in informing the President and Congress that creating a fair and efficient Tribal court system requires proper training and funding. The present Federal Indian Policy which supports Tribal self-determination is admirable in intent, but it is hollow without Federal assistance in developing the Tribal institutions essential to the implementation of the policy. The Fort Mojave Tribe strongly supports the protection of the civil rights of our Reservation residents, while they are on or off the Reservation; but Federal cut-backs in aid to our law enforcement and Tribal court programs reduce our ability to provide this protection.

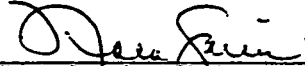
III. Conclusion

On behalf of the Fort Mojave Tribe, I thank you for the

Exhibit No. 20 (cont.)

opportunity to submit this testimony. If I can be of any further assistance to the Commission's investigation, or if I can answer any questions, please do not hesitate to contact me.

FORT MOJAVE INDIAN TRIBE



Nora Garcia, Chairperson
Fort Mojave Tribal Council

NG:leh

Exhibit No. 21

Civil Rights Commission

**Hearing on Indian Tribal
Court Systems and the
Indian Civil Rights Act**

WRITTEN COMMENTS

BY

GEORGE AUBID, SR.

CHIEF JUDGE

MILLE LACS BAND OF CHIPPEWA INDIANS

SUBMITTED:

February 25, 1988

Exhibit No. 21 (cont.)

As Chief Judge of the Non-Removable Mille Lacs Band of Chippewa Indians, I am devoted to the inherent right of bands, tribes and individuals to resolve disputes in tribal court.

The Mille Lacs Reservation is located in Central Minnesota. Over six years ago we decided to adopt a separation of power form of government. Our government features an Executive, Legislative and Judicial Branch.

There is a fair and equitable system of checks and balances among the three branches. The Band Assembly is the Legislative Branch of our government; all appropriations originate in the Band Assembly and all laws are written by the Assembly. The Executive Branch includes a Chief and several Commissioners who execute and enforce our laws. The Judicial Branch is responsible for the interpretation of our laws and the adjudication of disputes.

Each Branch is dependent upon the other two and our government cannot operate properly if the powers of any Branch are diminished.

Therefore, any attack upon the Judicial Branch is an attack upon our government as a whole. Any attack upon our government is an attack upon our sovereignty. Sovereignty is our right and ability to control our own destiny. We existed as a sovereign nation prior to the existence of the United States and we retain and vigorously defend our sovereign status.

As a sovereign nation, we have the inherent right to be self-governing. The Supreme Court has consistently upheld our right to have a court system, and operate under our own system of laws.

In 1832, the Supreme Court recognized that Indian tribes are independent political communities which retain their natural rights in matters of self-government. Worcester vs. Georgia, 31 U.S. 515 (1832).

In 1896, the Supreme Court held that the United States Constitution does not apply to internal tribal matters. Talton v. Mayes, 136 U.S. 376 (1896).

Beginning in 1962, Congress began holding hearings about possible abuses of discretion in tribal courts.

Exhibit No. 21 (cont.)

To remedy these alleged abuses, Congress passes the Indian Civil Rights Act in 1968 (Title 24, USC. Section 1301-411). This Act provided tribal court litigants with most of the rights guaranteed in the first ten amendments to the U.S. Constitution. Among the civil rights which were conferred by the ICRA are the rights of free speech, press and assembly; protections against unreasonable searches and seizures; the right to a speedy trial; the right to hire a lawyer in criminal cases; protections against self-incriminations and cruel and inhuman punishment; and the rights to equal protection and due process of law. (At Section 1302)

All of these rights are provided for in the Band Code of the Mille Lacs Chippewa. Most of the guarantees are found in Chapter 5 of our Code which deals exclusively with civil rights.

A portion of the Statute follows:

Section 1: Individual Freedom under Band Law. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from enacting any Ordinance which prohibits the free exercise of religion or abridging the freedom of speech or of the press or the rights of the people to peaceable assembly and to petition for a grievance.

Section 2: Individual Protections under Band Law. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which violates the rights of the people to be secure in their persons, houses, papers and effects against the unreasonable search and seizures. Any warrant shall be founded upon probable cause supported by oath or affirmation.

Section 2.01: No judicial officer, but upon probable cause, oath or affirmation shall issue any warrant, Said warrant shall describe the place to be searched and the person or thing to be seized.

Section 3: Prohibition against Double Jeopardy. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance subjecting any person for the same offense to be twice put in jeopardy.

Section 4: Self-Incrimination in Criminal Proceeding. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which compels any person in any criminal case to be a witness against himself.

Section 5: Expropriation of Private Property. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the

Exhibit No. 21 (cont.)

Section 5:(continued) powers of self-government is now and hereafter prohibited from adopting any Ordinance which confiscates any private property for public use without just compensation.

Section 6: Individual Rights during Judicial Proceedings. the Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising te powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies to any person in a criminal and civil proceeding to the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his or her favor, and at his or her own expense, to have th assistance of counsel for his or her defense.

Section 7: Bails, Fines and Penalties. The Band Assembly for the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which requires excessive bail, impcses excessive fines inflicts cruel and unusual punishments and in no event imposes for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six month or a fine of \$500.00 or both.

Section 8: Due Process of Band Law. The Band Assembly for the Mille lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

Section 9: Bills of Attainder. The Band Assembly of the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited frim adopting any Ordinance of attainder or ex-pose facto law.

Section 10: Rights to Trial by Jury. The Band Assembly of the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies to any person accused of an offense punishable by imprisonment, the right upon request to a trial by jury of not lessthat six persons.

Section 10.01: The Band Assembly of the Mille Lacs Band of Chippewa Indians, in exercising the powers of self-government is now and hereafter prohibited from adopting any Ordinance which denies the privilege of the writ of habeas corpus from any United States Federal District or Appeals Court.

The Mille Lacs Band feels strongly that the ICBA remedied any problems Triba; Court were having and that any additional legislation would infringe on the Bands right to be self-governing.

Exhibit No. 21 (cont.)

Again, the supreme Court upheld the right of Indian Tribes to adjudicate disputes in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). That case interpreted the ICRA as meaning that when a tribe violates a person's rights., that person can seek Federal review only if he is being wrongfully detained. This is in accordance with Section 1303 of the Act which states:

"The privilege of the right of habeas corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian tribe,"

Hence, the intent of Congress, as interpreted by the Supreme Court, was to only get involved in the decisions of Indian courts if someone is wrongfully jailed.

Any amendments to the ICRA would be a disservice to Indian tribes. In 1968, Congress achieved two goals by passing the ICRA. First, it imposed upon the tribes parameters for their court systems. Second, it guaranteed the right of tribal courts to exist into perpetuity.

It is the position of the Mille Lacs Band that any compromise of these two initial goals would be an aggregious error by Congress. The ICRA struck a nice balance, Congress got its civil rights laws into tribal court. The tribes got the right to permanently operate their Court systems.

Should Congress impose more civil rights laws upon tribal court, it will be infringing on the tribal right to self-government which is the coernerstone of Federal-Tribal relations. Should Congress attempt to eliminate tribal courts, it will have broken a promise to the Indians.

It Was our impression that breaking promises to Indians was out of fashion in this Century.

As o people, we have different folkways and mores from the predominant white society. Consequently, we have cultural and traditional matters which can only be heard in our court system. No other tribunal in the world can make decisions which interpret our ancient laws and age old traditions.

Exhibit No. 21 (cont.)

We believe that mankind constantly searches for truth. We as a people need some tribunal in our midst to seek truth. If you remove a court from a community, you remove the community's ability to ferret out truth and purge itself.

We also believe that mankind seeks justice. We enjoy the rights to dispense justice. Many of our Band members, don't believe justice is possible in the white man's court. We believe our Band Court satisfies a need for justice among our people.

Therefore, the Mille Lacs Band Court is on complete compliance with the ICRA, and the Court is a fundamental element of our government as well as our best forum for seeking truth and justice.

Further legislation is not needed and we will oppose any further restrictions on our court system and our right to be self-governing.

In addition, the Mille Lacs Court concurs with the testimony given by Daniel Getches at the hearing before the Senate Select Committee on January 22, 1988. We support the concept of a National Indian Justice Center which would train our judges and staff. We support the Amelioration for judicial funding by the BIA, we feel the need for greater funding on a daily basis and urge Congress to instruct the BIA to place our needs at a higher position on the list of priorities. We support the increase of criminal jurisdiction by tribal courts. A mechanism which would allow us to retrocede Public Law 280 with greater ease is needed. We support a Tribal-State Cooperative Jurisdiction Act. We would like to work with the State of Minnesota and be assured that our courts are shown the proper respect by the State. We agree that CFR courts should be eliminated. Finally, we agree that the federal government must curtail its plenary powers and respect the sovereignty of the Indian tribes and bands.

