Hearing before the United States Commission on Civil Rights

Enforcement of the Indian Civil Rights Act

Hearing Held in

PORTLAND, OREGON

March 31, 1988

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- 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;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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CONTENTS

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Proceedings

Morning Session

CHAIRMAN PENDLETON. If there are those who are hearing impaired, please identify yourselves, as we would like to have you accommodated. We have people who can handle that. I think there's just one person. Thank you.

Before I give opening remarks let me say that we have several panels this morning comprised of several, or many, persons. The Chair will hold each person to between 3 and 5 minutes of opening remarks. We need to [ask] some questions to you.

If you have written testimony, please feel free. We encourage you to give that to Ms. Connell, who's our clerk, just to my right, and your left.

I do know that each member of the association would like to say something. We'll have to limit that as much as we possibly can in order to be able to have an exchange.

Good morning. I am Clarence M. Pendleton, Jr., Chairman of the U.S. Commission on Civil Rights.

With me today are Commissioner Robert Destro, Acting Staff Director Susan Prado, Solicitor William Gillers, Deputy General Counsel Brian Miller, and Staff Attorney Susan Muskett.

I'd like to thank the Northwest Tribal Court Judges Association for inviting the Commission here today for the purpose of receiving testimony concerning enforcement of the Indian Civil Rights Act of 1968.

This is the Commission's fourth and final hearing on this subject. Previously, the Commission has held hearings in the Midwest, the

Southwest, and Washington, D.C., where tribal judges, tribal council members, Indian scholars, private attorneys, lay advocates, Legal Services attorneys, and individual Indians addressed the Commission.

Today, we are pleased to hear from the Northwest tribal judges and from presidents of tribal judges associations from across the country. We are anxious to hear from you today because you work with the Indian Civil Rights Act [ICRA] daily and have firsthand experience with its strengths and weaknesses.

We have set up the hearing so that individual member judges will testify this morning concerning their personal experiences and personal views without any obligation to speak for or on behalf of the association. A representative from the association will speak on its behalf during the afternoon session.

This morning is the time to speak freely and candidly about your personal opinions. We would like to hear positive things about ICRA enforcement. But we also want to hear about the problems too. On the positive side, we want to hear about how ICRA cases are successful, about how sovereign immunity is being waived, about how tribal judges are independent and free from influence from tribal councils and chairmen, and about how all of the provisions of the ICRA are being enforced.

But it will not help anyone to gloss over problems and to hide the things that threaten tribal courts and tribal judges. We want tribal courts strengthened so they can better enforce the ICRA. This cannot be done unless you honestly tell us about the problems you are facing.

I must also warn you that a Federal criminal statute, 18 United States Code section 1505, makes it a crime punishable by a fine of $5,000 or more—sorry, or, 5 years' imprisonment, or both, to interfere with a witness before this Commission.

You may want to put your best foot forward. That's understandable. But you must not attempt to influence anyone's testimony in any way. The witnesses today should speak their minds freely and should not fear retaliation of any kind. If any witness does experience retaliation, that witness should call the Commission at area code 202, 376–8351 immediately. The number, again, is area code 202, 376–8351, and do that immediately.

The morning session will consist of panels of five tribal judges each. If you are here today as a member of the Northwest Tribal Court Judges Association, and you're not sure what panel you're on, please come forward and speak with our clerk, Ms. Connell, and she will make sure that you're on a panel.

In the afternoon, the presidents of tribal judges associations from across the country will address the Commission. At the end of the afternoon session, we will have an open session. The open session provides an opportunity for anyone to address the Commission for 5 minutes, on

matters relevant to this hearing. If you wish to speak at the open session, please give your name to our clerk.

Written testimony is welcome, and the hearing record will be kept open for 30 days for the inclusion of this material.

I might also add that during the 5-minute open session you can say what you'd like, but it is not our policy to ask questions during that particular period of time, so that we can get as many witnesses as we possibly can to present their views.

With that, I'd like to turn to my colleague, Commissioner Bob Destro, for his opening comments.

COMMISSIONER DESTRO. Thank you, Mr. Chairman.

As the Chairman indicated, my name is Robert Destro. I'm one of the Commissioners.

I'm very pleased that you invited us out here today, and I think that the materials that I've looked over in preparation for this hearing were very, very useful and have prompted a lot of questions. I'm going to have a lot of questions for you as the day wears on.

It seems to me that there are a number of misconceptions about this hearing or, I should say, the project, and I would like to explore those with you today as well. In my view, this hearing is to help us to make a dual determination of not only how the ICRA is being enforced in Indian country, but also a far broader issue, which is how justice is administered in Indian country, and what are its pluses and minuses.

The broader issue in dispute really is how we can make the administration of justice more effective and more just in Indian country. Funding is obviously one of the most important issues. It's relevant, but is, in many respects, from the materials I've looked at, so obvious that you don't need to say a whole lot about it.

What is of greater interest to me, and what I hope all the witnesses will address in one form or another, is the way in which we should go about looking at what, in essence, we have here, which is the merger of two different systems of justice: the Anglo-American adversarial system of justice and the justice systems, the native justice systems of the many different tribes that make up Indian country.

So my question for you today is: what can you add to the record concerning how those people who live in Indian country can obtain justice consistent with both the ICRA and notions of Indian self-determination? That's my question. I'm not convinced that those two things are inconsistent. And I would like all of you, if you would, to think about that as you make your comments because that's what I'm going to be asking you about today.

Thank you.

CHAIRMAN PENDLETON. I'm sorry there's this great gulf between us. I don't know why we're sitting way back here and you're sitting out there,

and there're all these barriers between us. I hope that that would not dissuade you from some feeling of camaraderie here as we begin to take this testimony. And from the Commission's point of view, blame the hotel for the setup. Please don't blame us, that we don't want to get near you. That's not the case at all. We've been much closer before and hope that can sort of put you at ease. I don't feel comfortable being this far away from you, and I'm sure that my colleagues don't, either.

Our first panel will be Judge Edythe Chenois—is that correctly pronounced?

JUDGE CHENOIS. Chenois.

CHAIRMAN PENDLETON. Chenois; Judge David Harding, Judge Emma Dulik, and Judge Elizabeth Fry. Are those persons all here? Come forward, please. If you would let me swear you in. Would you raise your right hand, please?

[Edythe Chenois, David Harding, Emma Dulik, and Elizabeth Fry were sworn.]

CHAIRMAN PENDLETON. Thank you. Please have a seat.

Now I'll swear in the clerk and the support staff.

[The staff were sworn.]

CHAIRMAN PENDLETON. Please have a seat.

VOICE. Excuse me, Mr. Chairman; would it be appropriate for—our colleagues here would like us to move this forward.

CHAIRMAN PENDLETON. If you can move forward, I have no problem at all. I mean, the microphones are in the ground there; I don't know whether they can or not.

If you folks want to flip a coin to see who gives us the first 3 minutes, it's okay with me, or you decide among yourselves. Please identify yourselves for the recorder and for the clerk as you begin to make statements.

JUDGE FRY. I'll begin. Is this on?

CHAIRMAN PENDLETON. Bring it closer to you, and maybe try to—is it on?

MR. MILLER. Mr. Chairman, if I could ask the witnesses to state their position, the tribe at which they are a judge, and also their tribal affiliation for the record, we would appreciate that.

TESTIMONY OF ELIZABETH FRY, ASSOCIATE JUDGE, COLVILLE TRIBAL COURT

JUDGE FRY. To begin, my name's Elizabeth Fry; people call me Betty. I'm an associate judge at Colville Tribal Court. I'm a tribal member of the Colville Tribe. I was formerly chief judge for 2½ years, beginning in 1980. I'm also an attorney. I graduated from Gonzaga University in 1976 with two majors, in English and political science. I graduated from Gonzaga Law School in 1979, and I'm members of the bar in Washington and Utah. I have a law practice in Omak, Washington, next to the Colville

Reservation, and I'm an associate judge 2 days a week with the Colville Tribal Court.

The Colville Confederated Tribes' first court—to give you some history of the court—was a CFR [Code of Federal Regulations] court presided over by Albert Orr, a tribal member. This was in the 1940s. In 1952 the business council established a tribal court and adopted a law and order code. The Colville Tribal Court currently is presided over by attorney Chief Judge Anita Dupris, and there are two associate judges, myself and Howard Stewart. Mr. Stewart is not an attorney.

The Colville Tribal Court employs three court clerks, a court administrator, and two probation officers. The prosecutor, however, is not an attorney, though he is under the supervision of the office of the reservation attorney, who assists him with difficult cases. The Colville Tribal Court handles criminal misdemeanors and gross misdemeanors. It also processes civil cases of general jurisdiction, there being no monetary limit. Also, the court deals with dependency juvenile cases, administrative cases, and appeals. In 1987 the court handled 498 criminal cases, 54 civil cases, 36 juvenile and dependency cases, 12 administrative cases, and 5 appeals. Total new cases opened were 605.

Our current appellate process is composed of a three-judge panel which decides appeals from the tribal court level. It's the final court of appeal.

The Indian Civil Rights Act applies on the Colville Indian Reservation through incorporation in the Colville Tribal Law and Order Code. On January 22, 1988, the Colville Tribe passed a civil rights ordinance which ensures important civil rights to people living on the reservation and within the jurisdiction of the Colville Tribal Court. I can elaborate on that more later, if you like.

As spokespersons in our court we have numerous attorneys, and also nonattorneys who are of exceptionally high quality and often beat the pants off the attorneys. We have good staff persons who have been in position for many years, most notably Jane Smith, our court administrator, and Diana James, our court clerk.

The types of cases of interest—we've handled writs of habeas corpus, one of which has gone to the local Federal district court, which dismissed the petition. We grant search warrants on probable cause, and our chief judge has closed down our jail on two different occasions because of her view of conditions amounting to civil rights violations.

That's the end of my statement. Thank you.

CHAIRMAN PENDLETON. Thank you very much.

Next?

TESTIMONY OF EDYTHE CHENOIS, CHIEF JUDGE, QUINAULT TRIBAL COURT

JUDGE CHENOIS. Good morning. My name is Edythe Chenois.

CHAIRMAN PENDLETON. A little louder, if you would, Ms. Chenois.

JUDGE CHENOIS. Hello; my name is Edythe Chenois. I'm the chief judge of the Quinault Tribal Court, where I've been employed since 1980. I am also a Quinault tribal member.

To give you a little historical background on the Quinault Tribal Court, it has been in place officially since the mid-1970s when the tribal government passed the ordinances governing the tribal court.

CHAIRMAN PENDLETON. Can you hear in the back, by any chance? If you could speak up, it would be a big help, judge. It's okay.

JUDGE CHENOIS. All right. As I said—

CHAIRMAN PENDLETON. Okay.

JUDGE CHENOIS. All right. The Quinault Tribal Court is one of which the tribe has been heavily in support of for many years. The tribal council has implemented laws which allow the court to look to other jurisdictions if there is something that is not written in our code. We may go to other applicable laws. The chief judge—let me back up and give you a little overview of the court.

The court consists presently of myself as chief judge, and one part-time associate, a full-time court clerk. We also have two attorneys practicing as prosecutor and public defender. We have, in our court, many attorneys coming in from other jurisdictions and practicing law. We allow lay counsel to practice before the court. We hear criminal cases; we hear civil disputes; we hear children's dependency hearings; we hear juvenile offender cases. And in the last year, I believe we've processed 770, excuse me, 373 new cases, as well as the remaining cases that we've carried over, such as children's dependencies.

The Quinault Tribal Court is separated and has a written separation clause in the tribal constitution. We are constitutionally separated under the constitution which was passed by the tribe in 1975. This is accurate, inasmuch as it is a practice separation, as well as one on paper.

The council has consistently, during my tenure, been aware of the separation and has been very good about observing that. And I am confident that the tribal court is accorded all of the separation issues. We do not answer to the council. I've ruled against the tribe on several major issues, and I've been in there since 1980. I have had no problem with the council. Of course, we have a very good council, and I'm very happy.

We do have all types of cases. We have conservation issues. We also are one of the two self-regulating tribes in the State of Washington, and as such we have off-reservation fishing which we also take care of ourselves. And it has been one of the issues before the court. When one of the tribal members is charged by any jurisdiction, it has been the practice recently that the State or any other jurisdiction will bring it in and turn it over to the tribe. And they will file appropriate charges in tribal court and process it.

I believe that's pretty much what I wanted to say.

CHAIRMAN PENDLETON. Thank you.

Ms. Chenois, would you spell your name for us so that the recorder—we may have the wrong spelling.

JUDGE CHENOIS. C-h-e-n-o-i-s.

CHAIRMAN PENDLETON. We're right. Thank you.

JUDGE CHENOIS. It sounds different than that.

CHAIRMAN PENDLETON. All right.

Judge Dulik?

TESTIMONY OF EMMA DULIK, CHIEF JUDGE, MAKAH TRIBAL COURT

JUDGE DULIK. Yes. Good morning. My name is Emma Dulik.

CHAIRMAN PENDLETON. Bring the microphone up closer, would you, please? Thank you.

JUDGE DULIK. Okay. My name is Emma Dulik. I am the chief judge for the Makah Tribe. I've been a judge for 14 years. And I am a nonattorney judge.

The majority of my training has been received through the National American Indian Court Judges Association and the National Indian Justice Center in Petaluma, California.

My position is by appointment by the council for 6 years. And the last time I was interviewed, I was interviewed by community members, such as a principal, and they asked a retired judge to come in and interview me.

Presently, I share my position with an associate juvenile judge. For lack of funding, we—she works 1 week and I work another week. We handle criminal, fishing, civil, and traffic on our reservation.

And I have a specific format that I use when I have an arraignment. And it—you know, it asks them—or, it advises them of their rights. They have the right to be represented by a spokesman or attorney at their own expense, the right to have witnesses subpoenaed in their own behalf, the right to confront the witnesses against them, the right to remain silent and not testify against themselves, and the right to trial by jury, the right to plead guilty or not guilty, the right to bail if their plea is other than guilty, until time for court.

I also have a format that I use when—if they enter a plea of guilty, advising them that with their plea of guilty that they give up the rights that have been read to them, and asking them if they understand fully the charges and the penalties that have been read to them, and asking if they have been threatened or forced to plead guilty, or advised that the court would be more lenient if they entered a plea of guilty, and asking if they are making their plea of their own free will.

And if I'm satisfied that they do understand their rights and they do understand what their guilty plea is, then I will accept their plea of guilty.

And they will also be advised that they have—once they've entered a plea of guilty, that they do not have the right to appeal.

We have an appellate process in our court. We have attorneys that come into our court from Seattle, Sequim, and Port Angeles, that are registered with our bar.

And right now I can't think of anything else.

CHAIRMAN PENDLETON. Thank you very much, Judge Dulik.

Judge Harding?

TESTIMONY OF DAVID HARDING, JUDGE PRO TEM, COEUR D'ALENE TRIBE, AND ASSOCIATE JUDGE, NORTHWEST INTERTRIBAL COURT SYSTEM

JUDGE HARDING. My name is David Harding. I'm a juvenile judge court consultant for the Burns-Paiute Tribe. I'm a judge pro tem for the Coeur d'Alene Tribe in Idaho, and also an associate judge at times with the Northwest Intertribal Court System. I was first appointed to the bench in 1980 by the Confederated Tribes of Warm Springs. I worked in their court system for approximately 5½ years. For the last 2½ years I've been working in several positions, in as far as a personal part-time private consulting business, and also I work for the Bureau of Indian Affairs Forestry Administration at the Warm Springs agency in Warm Springs, Oregon.

I have, over the years, probably heard most of the types of cases that are heard in any court: criminal cases, juvenile cases, cases involving tribal members suing tribal members, being given the responsibility of trying to determine the scope of sovereign immunity as it may or may not apply in any situation.

I have been involved with the National American Indian Court Judges Association. I'm past acting president, twice, of the Northwest Tribal Court Judges Association, and I'm currently on the board of the Northwest Tribal Court Judges Association.

It's with much anxiety and concern that I appear before this Commission. I feel that in some ways the word has gotten out in Indian country that this Commission is on a witch hunt, and I'm very concerned about that.

I, like other persons, would like to be honest and straightforward with the Commission and its members, and let you know that I think my colleagues here today want to do just that also. I am open for questions and would like to answer any questions to the best of my ability.

CHAIRMAN PENDLETON. Thank you, Judge Harding.

Let me say at the outset that I don't know what is meant by "witch hunt." And I've heard this before. There are those who believe we just suddenly decided to do something, and we just did it, and we decided to come out and find out how bad things are with fishing rights and oil rights

and mineral rights and all kinds of other arrangements. That is simply not the case. And I think that the record will show that that is not the case, when one reads the transcript of the Rapid City hearings, as well as the hearings in Flagstaff.

I do want to say to you that our concerns go back to 1984, '85, about whether or not the ICRA is being enforced. And we did this under our administration of justice mandate. This is nothing more than we would do in any other area where there are Federal civil rights laws.

Commissioner Destro and I have been present at every one of these hearings as a subcommittee. This is not the first time that this Commission has gone to Indian country or talked with Indians about the situation of civil rights.

It's important also to say that when we read the testimony of 1972 or thereabouts in the Navajo Reservation, that hearing had nothing to do with civil rights. It talked about economic development and education, and those kinds of activities, of which this Commission has no statutory responsibility. We have responsibility only for civil rights.

This hearing is only about civil rights. We would dissuade anyone from giving us information about anything else, and we would—and we have been constrained in our own manner of handling these hearings, from a staff point of view, from the Commission's point of view, about going beyond the bounds of civil rights.

There are lots of questions about the ICRA. Some places it works good, and some places it works bad. And we've heard testimony on both sides. We are anxious—and we came here because we haven't had as much time as we'd like to have to talk to the people who administer justice under the ICRA. So therefore, we're here to be able to broaden the record so that when this Commission—when this subcommittee makes recommendations to our other six colleagues, other five colleagues—Commissioner Allen is not here today; he was unable to attend because of a pressing schedule—that we can have a solid study, a solid set of recommendations going to our colleagues that provide policy guidance to the administration and to the Congress. I believe we will do just that, and that is why your cooperation is important.

And if someone can tell us what a witch hunt is, we'd like to know.

I'd also let you know that we have had tremendous resistance on the part of some tribes and some tribal officials in the conduct of this study. We even have a resolution from your association; I understand, that is negative in its content. We accept that as how you feel. We're going to carry ourselves in the way that we think is appropriate under the mandate, and will stick only to civil rights. I make those comments only in light of what Mr. Harding has just said, and in light of my own opening statement.

And perhaps, Mr. Destro, you might want to make a comment about the same thing. I'm not tying to force you to, but you might want to make a comment.

COMMISSIONER DESTRO. I mentioned that in my own opening comments, too, that we're well aware that people are concerned—I mean, as anybody who is under somebody else's microscope will always be concerned that their perspective, in looking at the problem, is a fair one. And this is really one that is. As I look through the materials that we've been sent, I look through the hearing testimony, most of the comments we have are, "Will you work with us to make what we have better?" This is coming from the testimony. Although, the perception of the Commission's hearing is largely, "You're trying to destroy whatever we have." And I can tell you, at least from the perspective, that we've been approaching it, that our perception is that we want to try and help in whatever way we can to make recommendations that will further the administration—the fair administration of justice in Indian country.

Now, in that regard it's useful to have your input because you know what the conditions are that you labor under. You know what you need. You also know how ICRA might be made to fit with tribal custom. I mean, one of the things we've talked about, in almost all these hearings, is how ICRA may or may not work in a unitary tribal government system where the council is in charge of everything, including the judges.

While we have not heard a lot of testimony about whether or not some of the traditional dispute resolution techniques in Indian country are consistent with the ICRA, because, in fact, they're fair—basically all Congress is trying to do is assure a modicum of justice in Indian country. So these are the questions. We really want to know the answers. We want to know what you have to say.

And I can guarantee you that if there are witches out there to be hunted, we all have an interest in getting rid of them. I'm not sure whether all of them reside in Indian country. Some of them may well reside in Washington.

So the question really becomes, what are we after and what are we trying to accomplish? And I think if we all approach this with the perspective that what we're after is improving the administration of justice in Indian country, we can all move in the same direction.

CHAIRMAN PENDLETON. A final note before we go to counsel for questions. We don't think Congress' hands are clean, either. So if you think that we're doing something—we don't think in many cases the administration's hands are clean. And I am—as you well know, I am an appointee of this President and this administration, as well as some other things that I do. But you know, we don't think everybody's hands are clean in this respect. And we do think that we need to know, from your perspective, as Commissioner Destro said, what's really on your mind. If you'd like to tell

us, we'd like to hear it, because we want the best set of recommendations we can to go to the Congress and to the administration, that makes your condition better. It is not our condition. It's only the job that we propose to do—not in your behalf, but in terms of how this country's laws are carried out.

I'll turn now to counsel for questions, and counsel will ask all of you questions, and then Commissioner Destro and I will probably have some others, following counsels' guidance.

MS. MUSKETT. Judge Chenois, I'd like to start with you. Before proceeding with specific questions regarding the Quinault court, I wanted to ask you a couple of initial questions as president of the Northwest Tribal Court Judges Association in order to get a general overview.

JUDGE CHENOIS. Okay.

MS. MUSKETT. What types of problems, if any, have your member judges encountered in implementing the Indian Civil Rights Act?

JUDGE CHENOIS. Generally speaking, one of the major problems in Indian country at this point is being able to carry out the Indian Civil Rights Act without proper funding. That results in no personnel to bring these into the tribal court in a proper forum. I think that's one of the major problems that you're going to find in all Indian tribal courts, is that there's no proper funding in order that we can do the job. When it comes in, we can handle it. It's just getting it there. Because if there's no one out there to address the issue, it makes it real difficult to have it brought in properly to be addressed.

MS. MUSKETT. Have your member judges encountered any other problems?

JUDGE CHENOIS. In my tenure as president, which has been about a year and a half, there have been some courts that, to my knowledge, have had personnel turnover. Again, we look at funding. I hate to keep bringing that up, but that's true. Tribal court judges have a hard time with their funding levels. There's just not enough money.

MS. MUSKETT. When you refer to personnel turnover, are you indicating that they voluntarily are leaving the court system due to their salaries, or are you indicating something else?

JUDGE CHENOIS. Generally speaking, I think the majority leave voluntarily because they have found a higher paying job somewhere else. In the last couple of years I know of tribal court judges that have gotten job offers that are like three to four times their salary. And it's real difficult, no matter how dedicated the tribal judge may be, to turn down a salary which is four times what you're earning in tribal court. And a lot of our own tribal members really want to stay, but given the economics of the entire country at this point, it's very difficult to stay on if you're getting a job offer which is a lot more money.

MS. MUSKETT. Does control by some tribal councils over appointment of their judges and funding of their tribal courts pose a problem for some of your member judges?

JUDGE CHENOIS. The tribal courts vary in large degree. For instance on the Quinault, I am appointed by the Quinault business committee, but my tenure is forever unless I am removed for cause, mis- or malfeasance, or I decide I'm going to resign because I get a better job offer. That's not the case—other tribes that I know of elect the tribal court judges, and the judges are responsible only to the general council, which is the membership of the tribe, and the business committee or governing legislative body has nothing to do with it.

Some are appointed for 2-year terms, some are for 6. Our tribal court membership varies in their appointment procedures, they are varied as far as their tenure, they vary as far as their qualifications.

MS. MUSKETT. Are there any tribes that this would pose a problem for?

JUDGE CHENOIS. Are you speaking of the Northwest or generally?

MS. MUSKETT. Yes, in the Northwest. I just mean, have you encountered any problems in that area in the past.

JUDGE CHENOIS. I haven't.

MS. MUSKETT. In his response to the Commission's request for information, President DeLaCruz had written that the court's ability to do its job continues to be hampered, however, by the refusal of the Federal Government to fulfill its trust responsibility to this Indian tribe by adequately funding the court and law and order systems. How much does the Quinault Tribal Court receive in funding from the Federal Government?

JUDGE CHENOIS. Well, let me back up. I believe it was 2 years ago when I attended a meeting with the Bureau of Indian Affairs, and one of my grants and contracts officers. The Bureau informed me that the base funding for the tribal court at Quinault was going to be $15,000 a year. And I was supposed to operate with a full-time judge, a full-time clerk, and all the paperwork on $15,000 a year. And I believe that was back in 1985 when that was at that level. It has risen since that, as has everything else. Inflation—it's all gone up.

MS. MUSKETT. How much funding does the court receive from the tribe?

JUDGE CHENOIS. The tribe at this point has given over to the court for its operation basically—I would have to think about that for a second. I went to the administration some weeks ago, and I believe they were talking about allotting us somewhere in the neighborhood of $50,000, $59,000 out of tribal monies.

MS. MUSKETT. How many cases does the court handle on the average per year?

JUDGE CHENOIS. On the average we run about 300 to 400 cases a year.

Ms. MUSKETT. I had one last question I wanted to ask. Has sovereign immunity ever been raised as a defense in an Indian civil rights action?

JUDGE CHENOIS. The tribe has raised that in several of the tribal cases, tribal court cases that I've processed personally. But the tribal ordinances at Quinault allow for that to be waived if the government so desires to do.

And I might point out at this time that the court rules on whether or not the sovereignty is applicable in each case as it comes up. And that is what I've done; I've faced that. And they do allow in Quinault tribal law to waive that, or they choose not to raise it at all. And it is written into several of our ordinances which have passed in the last 10 years, that the tribe may be sued in tribal court.

Ms. MUSKETT. Has your court ever ruled that sovereign immunity is applicable to an Indian Civil Rights Act action?

JUDGE CHENOIS. That's currently pending in a couple of my cases.

Ms. MUSKETT. You have no past precedent?

JUDGE CHENOIS. Not as such, no.

MR. MILLER. Judge Chenois, how many ICRA cases have you heard personally?

JUDGE CHENOIS. Personally? In the last—let's see, I've been on the bench about 8 years. I think I've processed maybe six, seven.

MR. MILLER. Were they successful? Do you recall?

JUDGE CHENOIS. They were ruled on. I mean, it depends on your perspective which party—

MR. MILLER. That's true. Did the plaintiff prevail?

JUDGE CHENOIS. Sometimes they have, to my recollection.

MR. MILLER. And I assume from your previous answer that the defense of sovereign immunity was not raised.

JUDGE CHENOIS. Most of these cases that I can remember were some time ago, and I would have to go back and check the case files to give you a real, real accurate—

MR. MILLER. Sure. I was assuming that, because you mentioned that there was no precedent for the defense of sovereign immunity being used in an ICRA case. Is that a proper assumption?

JUDGE CHENOIS. Yes, I would think so.

CHAIRMAN PENDLETON. Please speak up. I can't hear you.

MR. MILLER. In your opening remarks you mentioned that you have ruled against the tribe. What types of cases did you rule against the tribe on?

JUDGE CHENOIS. Oh, in children's court, dependency hearings, in fishing rights cases, in fishing disputes, etc., even to some degree in contract law.

MR. MILLER. Contracts that the tribe has made with residents on the reservation?

JUDGE CHENOIS. Yes.

MR. MILLER. Okay. Does the tribal court receive funding directly from the tribal council? Or maybe you could explain where the funding for the tribal court comes from.

JUDGE CHENOIS. All right. My tribe's court gets its base funding from the Bureau of Indian Affairs. And I've said that's usually ranging from anywhere between $15,000 and $39,000 per year. And that's simply not adequate, given today's economy. So what the tribe does is, when the tribal court needs funding, it allocates it out of its tribal heart money.

MR. MILLER. Does that come directly to the tribal court?

JUDGE CHENOIS. What is done is, it's put in a separate fund in administration, and the tribal court simply writes out what we call requisitions, and they just process it.

MR. MILLER. So it's not in the tribal budget at all?

JUDGE CHENOIS. It's one of their separate accounts. The tribal court is labeled somehow in administration. They have all these neat numbers that they assign different accounts, and they just write it off on that, as I understand it.

MR. MILLER. They have no power to touch that?

JUDGE CHENOIS. Once the money is allocated, they don't take it and do strange things with it; they just spend it for what they allocated it for.

MR. MILLER. Do they allocate additional money to the tribal court?

JUDGE CHENOIS. Yes, they have.

MR. MILLER. Okay. About how much, for the last year?

JUDGE CHENOIS. I believe we got somewhere in the neighborhood of $40,000 to $50,000 from the tribal council last year.

MR. MILLER. And that may vary from year to year?

JUDGE CHENOIS. Yes, depending on the needs of the court.

MR. MILLER. Also depending on the tribal council, too?

JUDGE CHENOIS. Our tribal council has been real consistent in its dealings with the court.

MR. MILLER. I see. You mentioned a constitutional separation of powers. When was that? Was that a part of the constitution from the start, or when was that adopted?

JUDGE CHENOIS. The tribal government prepared a constitution for consideration by the general membership of the tribe in 1975, and it was adopted during the general council meeting of the Quinault Tribe in 1975. And that document does have a clause separating the court and the rest of the government.

MR. MILLER. I see. How are judges selected?

JUDGE CHENOIS. They are basically people who have an interest and demonstrated that interest in the tribal government, or they are people from the community, generally speaking, although in the past the tribe has advertised, and we have had non-Quinaults sitting on the bench. But they have always been Indian law-related type people.

MR. MILLER. Are they appointed or elected or—

JUDGE CHENOIS. The tribal court judges at Quinault are appointed by the business committee after they go through the screening process.

MR. MILLER. How long are the terms?

JUDGE CHENOIS. The terms are indefinite. Once you're on the bench, you're on the bench until they remove you for cause or you voluntarily resign.

MR. MILLER. For life?

JUDGE CHENOIS. Yes, that's true.

MR. MILLER. Do you know of any judges that have been removed from the bench in the last 5 years?

JUDGE CHENOIS. No. I've been on the bench since 1980, so—

MR. MILLER. Okay. Judge Fry—Susan, do you have anything?

MS. MUSKETT. I had a couple of questions for Judge Fry.

We noted in your tribe's response to the questions we posed in our December 9 letter to Secretary Hodel that you indicated that sovereign immunity has been successfully raised as a defense against all cases brought against the Colville Confederated Tribes. Can we assume, then, that no one has been successful in bringing suit against the tribe under the Indian Civil Rights Act?

JUDGE FRY. That's true. I believe there's only one case that has been brought, arguing violations of civil rights. The tribe on January 22—it's too bad they didn't send their response a month later—passed the Colville Tribal Civil Rights Act, which allows declaratory or injunctive relief for claims of civil rights violation against employees and officials of the Colville Tribe, and is a limited waiver of sovereign immunity to the extent of the tribe's insurance policy, which I see and others see as a real advance in this area.

MS. MUSKETT. And that was passed January 22 of this year?

JUDGE FRY. Yes.

MS. MUSKETT. In your responses your tribe indicated that the Colville Tribal Court does not have a public defender system, but that the Colville Tribal Legal Services does represent some of the defendants for a nominal fee. How is that working out?

JUDGE FRY. I believe it's working out. The Colville Tribal Legal Office employs two attorneys and a paralegal, and they often give free consultations to tribal members that they don't end up representing, and assisting them in preparation of their cases. Plus, they're also given references to local attorneys who represent people.

But there is no public defender system. There had been one several years ago, where every person charged was allowed a paralegal to represent them. And she was very experienced, very qualified. But that—again because of funding cuts, the tribe wasn't able to continue doing that for free, so they charge a nominal fee now.

MS. MUSKETT. Is the Colville Tribal Legal Services funded by the Legal Services Corporation?

JUDGE FRY. It's Colville Tribal Legal Office. It's not Legal Services.

One of the attorneys, I believe, is half-time Legal Services and does only those types of cases allowed under Legal Services, civil.

MS. MUSKETT. And the tribe funds the rest of the office?

JUDGE FRY. Yes, just the rest of the positions.

CHAIRMAN PENDLETON. Who funds the legal services office, other than what tribal funds go to that activity? From where does their money come?

JUDGE FRY. Where does Legal Services money come from?

CHAIRMAN PENDLETON. Yes.

JUDGE FRY. The Evergreen Legal Services office in Seattle, I believe.

CHAIRMAN PENDLETON. And is that a part of Legal Services Corporation per se?

JUDGE FRY. Right. Yes.

CHAIRMAN PENDLETON. So that's, in a sense, then, an addendum to the budget to the tribes, by being able to offset some of the cost from the—

JUDGE FRY. Half an attorney.

CHAIRMAN PENDLETON. I see.

JUDGE FRY. And there may be a Legal Services attorney in the area, geographical area.

MS. MUSKETT. So are there any criminal defendants that come before your court that are nonrepresented? Or between the Legal Services Corporation and obtaining their own counsel, does it work out that generally everyone is represented?

JUDGE FRY. I would say that many of the people that come before the court are pro se.

MR. MILLER. You mentioned that the tribe has a prosecutor. Who does the prosecutor report to? In other words, who's—

JUDGE FRY. The senior attorney in the office of the reservation attorney's office. It's an inhouse counsel. There are three attorneys there now. And that's who the prosecutor reports to and goes for, you know, advice and assistance.

MR. MILLER. The tribe's attorney?

JUDGE FRY. Right.

MR. MILLER. I see. And the prosecutor is funded by the tribe, I assume.

JUDGE FRY. Yes.

MR. MILLER. Okay. Where does the funding for your court come from?

JUDGE FRY. It would be similar to the Quinaults, in that a base amount is given every year through 638 [Public Law 93–638, Indian Self-Determination and Education Assistance Act] contract funds. And then the tribe would supplement whatever is needed by the court. I'm not certain of the amounts, since I don't do the budgeting. I couldn't help you in the amounts.

MR. MILLER. Did you personally preside over that one ICRA case that you mentioned?

JUDGE FRY. No.

MR. MILLER. At any time has the tribal council or the tribal Chairman ever tried to influence you in any of your decisions?

JUDGE FRY. There was a case back in 1980 when I held the public defender in contempt. She wanted to—this was a paralegal. She wanted to withdraw from a case for conflict of interest. And I said that—I asked for the basis, and I think she said her office had represented the person before on a speeding ticket or something. I said that this is like a custody matter now, and I said that was insufficient basis, and that she had to keep representing him. And so she said she couldn't. So I held her in contempt and gave her some time before I would put her in jail and fine her for not following the court's order. And I got a call—I'm trying to remember; this has been 8 years ago.

That was a situation where one of the tribe's attorneys in Seattle called to ask me about the decision, and to say that they were filing papers in Federal district court. And then the law and order—well, yes, the law and order chairman called and said that they weren't filing papers in Federal district court. So I guess I'm getting that wrong. I thought somebody had tried to influence me, but—

CHAIRMAN PENDLETON. We can't hear at all, I don't think. I can't hear up here, and they certainly cannot hear in the back.

Are we having trouble with the volume on the microphones, or is it the speakers' voices? Because I think that people are missing part of this testimony. They can't even hear it. Can you hear in the back at all? If you can't hear at any time, just raise your hand. Maybe we can try to make some adjustment.

JUDGE FRY. So I guess that was a situation where one of the attorneys tried to talk to me about a decision. And the law and order chairperson said kind of to ignore them, or something like that. So never mind.

MR. MILLER. Okay. So your testimony is that there has been no—

JUDGE FRY. To my recollection, I guess, which apparently is faulty, is no, I can't—

MR. MILLER. We understand your testimony is according to your recollection.

JUDGE FRY. Thank you.

MR. MILLER. And that you do not recall any attempts at all to influence you in any of your decisions.

JUDGE FRY. Right. I feel that we have a very independent court, and that it's kind of treated with kid gloves by the council, like they're afraid of claims of exactly what you're talking about. And I think—I feel like our tribe is real sensitive about civil rights, and that we're becoming more so

all the time, which I think is what prompted the enactment of the civil rights act for our tribe, and—

MR. MILLER. Given that sensitivity, do you think that the tribe would ever consider waiving sovereign immunity?

JUDGE FRY. That's what they've done in the civil rights act. It's a limited waiver of sovereign immunity.

MR. MILLER. Oh, so they do not claim sovereign immunity in civil rights.

CHAIRMAN PENDLETON. Limited waiver?

JUDGE FRY. Right.

CHAIRMAN PENDLETON. You mentioned limited waiver to the extent of their insurance policy, insurance coverage?

JUDGE FRY. Right.

MR. MILLER. I see. And there have been no cases under that since that amendment?

JUDGE FRY. Not since the enactment in January, no.

MR. MILLER. I see. This January, then?

JUDGE FRY. Right.

CHAIRMAN PENDLETON. But suppose it doesn't involve an insurance claim, an ICRA violation. What happens then? Or maybe you can't speculate, but you sort of—well, you let us know that there are constraints to the limited waiver of sovereign immunity.

JUDGE FRY. In the funding.

CHAIRMAN PENDLETON. And the constraint is, if that is a matter of money—

MR. MILLER. For instance, if it's an injunctive action or declaratory relief?

JUDGE FRY. Right. Those are the only two types of relief that can be sought under the act.

COMMISSIONER DESTRO. Well, could we get—

CHAIRMAN PENDLETON. This is an important point. I don't want to get away from this one yet.

COMMISSIONER DESTRO. It's a—I had jotted down a couple of questions as I was listening to the various comments.

How do you think the—and any of the judges, but since you're on tap first, Judge Fry—how do you think your council understands sovereign immunity as it relates to the ICRA? And do they see themselves as being exempt from it except to the extent that they've adopted it as a part of the tribal code? Or do they see it—do they see the ICRA as having independent force as a statement of Congress' power to act? This has come up in any number of places that we've had these hearings. It came up at a conference I was at recently. And it's important for us to know, because it really goes to some of the questions that we're going to have to deal with as we write our report.

JUDGE FRY. Well, I'm here to talk on behalf of the court, and I wish that the councilmen had been present so that you could let them know your concerns. But I feel like I can't really answer for them. They file things in court, and that's how I know.

COMMISSIONER DESTRO. Well, from what you understand from the court filings—I mean, it's actually—this really is more directed to you as a judge. What's your understanding of the tribal council's position with respect to the sovereign immunity claims?

JUDGE FRY. In the past, when civil rights claims were made, they filed the defense of sovereign immunity, and that's—

CHAIRMAN PENDLETON. Let me try this another way. Would I be wrong in assuming—the word's "assuming"—that the ICRA is a threat to the tribal council's politics and a threat to their power? Does anybody want to—or should I ask that of a tribal council?

JUDGE FRY. I think you're asking a real complicated question, and I have a lot of views on it, personally, but—

CHAIRMAN PENDLETON. Well, we said you can speak personally. But if you have some fear to speak, of course, I understand.

JUDGE FRY. Not fear, exactly.

CHAIRMAN PENDLETON. Let me say what we've heard in other cases is this—and I'm sure a lot of you've seen the January 28 letter of the Justice Department on S.1703. In our hearings in South Dakota, we heard in more than one place that the only people that have civil rights on a reservation are the tribal council. And a couple of tribal council members—I mean, tribal presidents, in a sense, said that. And we have some problem with that.

But if you—I understand that you have some personal views. If you want to keep them, that's okay, but you can feel free to speak here.

The reason why I think we are pressing this question is that we need to have some feel for what my colleague is asking here: how do they view this issue of sovereign immunity in terms of the ICRA? It is a critical question, and it is critical that we are able to get as much information as we can, because it's going to be somewhere in the report, how people begin to feel about it.

Maybe somebody else wants to join in. Do you want to join in, Judge Dulik or Mr. Harding?

I don't want to get away too much from here, but it does seem like, to me, that while we have you here in the few moments that we have you, we'd like to have some way to get some feel for this.

JUDGE HARDING. Mr. Chairman, I think the judges, my colleagues, these persons who are present, are generally intimidated.

CHAIRMAN PENDLETON. Okay.

JUDGE HARDING. And I think that—

CHAIRMAN PENDLETON. By whom?

JUDGE HARDING. By the Commission, because the Commission is investigating the Indian Civil Rights Act.

I think one of the things that I have learned over the years by talking to elder statesmen of Indian tribes is that the Indian Civil Rights Act was opposed by many tribes when it was passed 20 years ago.

This is the first investigation that I've heard of into the happening, you know, what's going on with Indian civil rights. Here 20 years later we're looking into it.

Your comment that tribal councils don't want to give up power—I believe that's what you said, or in essence you said that. And I'm saying it to you, that tribal councils do not want to give up power. If you put yourself in—

CHAIRMAN PENDLETON. Neither does Congress.

JUDGE HARDING. Right; neither does Ed Meese.

But if you put yourself in that subjective situation, I think that you can see that anytime a legislative body gives up anything that has to do with or simulates power, they do it really reluctantly, or they're going to take a hard, glaring look at reasons why they should give up any power.

In situations that I have been involved with—and I don't want to get too much into my personal situation—I feel that there's—there are big problems. The problems are that there is influence in tribal courts from councilpersons. And it's not just on one reservation; the problems are similar on a lot of reservations. But it still has to do with whether or not the persons who are bringing the action have the social structure or status, or whether or not they're somebody or nobody. And that has a lot to do with how the cases, at times, are dealt with.

I don't think that there is, quote, "evenhanded," type things going on. And it's not dissimilar to other court systems, State and Federal court systems. If you're able to lobby Congress and you have the money and the power to do things, you can get things done. If you don't have the knowledge to lobby Congress and you don't know the issues, you're not going to get anywhere.

And I think a lot of dissident people that come before tribal courts don't understand what's going on to begin with, and a lot of times don't get what some would call fairness, and maybe are not treated fair.

CHAIRMAN PENDLETON. I'm sorry. Mr. Destro?

COMMISSIONER DESTRO. Well, maybe Judge Dulik would like to say something. Everybody else has had a chance.

Do you agree with what has just been said? You were shaking your head one way or the other.

CHAIRMAN PENDLETON. Do all of you agree with what's just been said?

MR. MILLER. I'm sorry. If I could just interrupt for a second, I had one quick followup question for Judge Fry, and that was back on the enactment of the waiver of sovereign immunity in January.

Do you know what prompted that?

JUDGE FRY. My understanding is that it's been in the works for numerous years, like since 1983 or '82. It was discussed when I was in the office of the reservation attorney, the frustration that the tribe had in dealing with civil rights, so—and then it just kind of came out in January.

MR. MILLER. So the tribal attorneys—

JUDGE FRY. If I can say something, too, I think my reluctance to speak on behalf of the council has been interpreted as intimidation, but I don't believe it is. I'm an attorney, and I don't want to speak for someone else, especially when it's a separate part of government, you know, and they have their own policies and their own—

MR. MILLER. Okay. Yes.

JUDGE FRY. You should have asked them to come and talk to you.

COMMISSIONER DESTRO. We understand that.

JUDGE FRY. I'm here to talk for the court.

COMMISSIONER DESTRO. We understand that. The thing that, I think, Judge Harding said that really captures the essence of the thing that I find most difficult with this whole set of hearings is that, when push comes to shove in the question of ICRA enforcement, what we're really talking about is whether or not the ICRA—if we're talking within the context of the *Martinez* decision—we're talking about whether or not the final word is going to be in Indian country or is it going to be in the Federal courts. I think that's what it finally comes down to. So it's a question of whether you take the power out of Indian country or do you leave it there. Okay.

Now, I'm willing to assume at the outset that, for purposes—as we lawyers say, for purposes of the argument that we're having, the question that we're discussing, that that's okay, that the Supreme Court—let's assume that the Supreme Court decision should be left on its merits, exactly the way it is, with no change.

Then it seems to me that the discussion is consistent with Indian tribal sovereignty. And the question then becomes, not so much, are Indian tribal councils the only ones that have the final word, but should they have—should the tribal council be the only one that has the final word? It would be—it's a different question when you say, "Should a Federal court have the final word?" than when you say, "Should other members of the tribe be able to look over their shoulder, and perhaps maybe they should have the final word as to what the law means."

Now, I don't know whether that's consistent with traditional notions of justice and fair play within the tribes, because I think at least it may well be somewhat overstepping. And we know at least—and I was going to ask this question; I will get to it later—there are a number of tribes that don't even have tribal courts, you know, and are not under anybody's jurisdiction. And I'm not convinced that everything that they do is unjust,

as long as it doesn't comply with the way Congress wants people to do things.

So it seems to me that what we really ought to be asking ourselves the question of, is what would make the systems that are in existence work fairly, and are there recommendations that could be made with respect to funding or with respect to alternative dispute resolution, or other things, recognizing that poor people don't get the same justice sometimes as rich people do, that people with political influence don't get the same kind of justice that other people get.

I come from a State where they elect trial court judges. That's different in many respects than when they appoint them. And so it's a complicated question, but it seems to me that if we start with the assumption that maybe these disputes ought to be left to be resolved in Indian country, then the question becomes: how can we best resolve them within Indian country, both consistent with Indian tribal tradition as well as with notions of justice, that we could have a much more frank discussion, because we're not out to attack that sovereignty.

Do you see the—I mean, it's hard. It's a very complicated question to grapple with. But you're the people on the line. You can tell us whether or not you think that's possible.

JUDGE FRY. I like the question you raised regarding how, in Indian country, can Indian civil rights best be, I guess, guaranteed by the tribe. There are processes, I think, on other reservations—I know on Colville—that are not strictly within a judicial setting; that are forums, nonetheless, for civil rights issues to be raised between the tribe and other people.

When I was in the office of the reservation attorney, I drafted an employment appeal system for terminations, which has been expanded to grievances. And this is a new thing that hadn't existed before, and a very significant way for tribal members to feel that they're getting heard regarding employment appeals and problems in termination, and unfair terminations. That's an administrative process.

I am currently working as an associate judge to establish community tribal board and a peacemaker program on the Colville Reservation, which is a program which I believe does exist through the Northwest Intertribal Court System—through the Northwest Intertribal Court System.

Now you know why I don't talk into this thing.

And we're kind of stealing their idea. Several tribes on the coast have run this program successfully. I see that as another way of having a forum in which civil rights are, you know, discussed between the tribe and individuals, in addition to any tribal court action.

CHAIRMAN PENDLETON. Judge Dulik, do you have comments, or are you just listening?

JUDGE DULIK. Well, I've been sitting here listening, you know, to a lot of the comments. Some of the comments kind of—I really feel like tribal

courts are very unique. We are unique in that, if we need to, we will have, like—you know, hold a—have an informal setting, maybe what they call a roundtable.

And I feel that one of our courts' worst enemies is ignorance. And that's not understanding what the due process of law is. I know that in the past, if any of the community members maybe have a question about what's happening in the court system, well, they'll get on the hotline and start calling the Bureau. And then the Bureau will call us and question the action, and then I'll respond. And one time I told them, I said, "I wish you would call us when there were more positive things happening in the court." Because I am proud of what I do. I am a nonattorney judge. I have been a judge for 14 years, and I've realized over the years the dual responsibility as a judge is to protect the people as well as uphold the laws of the tribe.

We are a sovereign nation within a nation, and that also is not by choice. We were put on reservations many years ago, and we still struggle for survival.

I'm only a 638 contract judge, and I work half-time because I share my judgeship with an associate and a full-time clerk. And my funding is $42,000. I don't have a supplement, because my tribe doesn't have the money to supplement my position.

And I think the main thing that I would like to see come out of this Commission hearing is more positiveness for tribal courts, more support for tribal courts.

It's so important to us, because for some reason we have to struggle through whatever—it's like they treat us like—they'll give us a lot of candy. Like one time my budget was $75,000. We were—the judges—we were all full time; we had a full-time clerk. We even had a prosecutor in our contract. And now, like I say, we're down to half-time. It's like teasing us, you know. They throw us a certain amount; then it gradually disappears.

COMMISSIONER DESTRO. Judge Dulik, could I interrupt you for one second? That's something that was in the background materials we were sent I was reading.

How often do these swings take place? I mean, when you say, "They treat us, you know, like by giving us candy and increasing"—are you talking about the Bureau? I mean, the Bureau when they do the 638 contracts?

JUDGE DULIK. Well, it's all 638 contract. And my budget was like Judge Chenois'. I had $15,000, and then we had—what was that called, the supplement? They supplemented us with other Bureau monies.

CHAIRMAN PENDLETON. Other Bureau monies or—

JUDGE DULIK. I can't—

CHAIRMAN PENDLETON. Like what? Okay. That's all right.

JUDGE DULIK. I can't remember what it's called. It isn't "indirect"; there's another word for it.

COMMISSIONER DESTRO. So basically, what you're telling us is that the ability to perform your function is, in some respects—I don't want to have you characterize it in terms of amount, but you're pretty much at the mercy of how much the BIA throws your way in the contract.

JUDGE DULIK. That's correct, sir.

CHAIRMAN PENDLETON. Mr. Harding said it depends upon—I mean, you even have to get to the point of determining what your caseload is. If your caseload is too high, they want to know why you need more—I mean, too low, why you need more money. If it's too high, you're not doing your job. Is that what you mentioned in your paper, Mr. Harding?

JUDGE HARDING. Well, I think you've hit on at least one part of our problems out in Indian country, at least in the Northwest, and that is, if you have a caseload of 400 criminal cases a year, and it gets out into the community that if you're a criminal defendant and you ask for a jury trial, the chances of you ever going to trial are real slim, then anybody who hears that in the community is going to ask for a jury trial, because they know that there's only going to be a small percentage of those cases that actually receive a jury trial, because the courts cannot afford to give everybody a jury trial. And a lot of times that happens. We have at times—have had stacked up jury trials, where if you tried to add up in dollars how much it would cost to give every defendant that jury trial, you could not do it with the amount of money that was budgeted for that year.

CHAIRMAN PENDLETON. Judge Dulik, what did you want to say?

JUDGE DULIK. Well, I would like to say that, for my tribal court, I'm sure that we would find—I mean, having the jury trial is one of the—I mean, I feel like we'd find the money to have a jury trial if we didn't have, you know—

CHAIRMAN PENDLETON. I need to go back to Mr. Harding for just a second.

Mr. Harding—

COMMISSIONER DESTRO. But isn't—

CHAIRMAN PENDLETON. I'm sorry.

COMMISSIONER DESTRO. But isn't—I mean, her point, I think, is an important one, you know, which is—and I don't think they're inconsistent. And you can correct me if I'm wrong, but why should you have to scrounge to find—

JUDGE DULIK. That's true.

COMMISSIONER DESTRO. —to find the money?

JUDGE DULIK. That's true.

COMMISSIONER DESTRO. I mean, isn't that the more bottom line question, is that if you have to find the money somewhere? Because if you have the money—if you had the money to run your court systems the way

you want to run them, in a way that you as judges think that you need to do your job, do you think that that would give you—again, looking at the whole thing within your system, within the tribe itself—and it's going to differ from tribe to tribe—do you think that would put you on a more equal footing with the tribal council, if you had your money to do your job the way you saw fit?

JUDGE CHENOIS. Maybe I could respond from the Quinault tribal viewpoint.

COMMISSIONER DESTRO. Judge Chenois, yes.

JUDGE CHENOIS. In the past 8 years, as long as I've been on the bench, no one on the reservation has ever been denied a jury trial. What happens on my reservation is, we summon the jury people and we submit the billing to the tribe, and they pick it up automatically, no questions. They just do it.

COMMISSIONER DESTRO. They just do it.

JUDGE CHENOIS. And that—we have never made anyone wait for a jury trial. And I just—I can't imagine that happening.

CHAIRMAN PENDLETON. Well, we've heard that, but it's good to hear something positive, that somebody is trying to do it the right way.

But Mr. Harding, I'm going to go back to you just a minute. I have some problems, some personal problems with Congress deciding in many ways to order society like it wants it ordered, through public policy. You indicated this is the first time since the ICRA has been in force that any government committee has investigated the ICRA. We remind the Congress about that too. They just give you something and say, "Go make it work. And we don't care how much it costs, but we'll give you this much money. But you make it work, and you're held responsible for implementing the ICRA."

I guess what I need to hear from you is: should we go back to Congress and say, "Why don't you drop this ICRA? You don't put enough money into it. People are having all kinds of problems with it. It interferes with tradition." Should we go back and say to Congress, "Maybe the ICRA ought to be repealed"?

JUDGE HARDING. Well, I think that you should go back to Congress and tell them that the ICRA was a rider on other legislation, and that there wasn't the proper investigation done before the act was passed in the first place, and that tribes were split at the time that it was passed 20 years ago, and tribes are still out there in Indian country being split.

Insofar as my comment about having the money to afford persons jury trials, I didn't mean to indicate that persons are routinely being denied jury trials. What I'm indicating to the Commission is that the reality of dollars is that, if you have 100 jury trials pending and a budget of $100,000, and it costs you $1,000 to actually conduct a jury trial, you've eaten up all your court fees for that year in jury trials alone. What about child sexual abuse?

What about traffic court? What about divorce court? What about domestic disputes? You know, that's jury trials alone.

But if you went back to Congress and said, "Hey, we didn't do our investigation before we passed the act," I think you'd be telling the Congress the truth.

CHAIRMAN PENDLETON. Then what you're saying is that perhaps one of the recommendations we need to consider is just what you said, that perhaps if you had had better hearing from the Indian population itself, you might have had a different way of handling the ICRA. Because I guess this probably also goes back to 1934 when we had the IRA [Indian Reorganization Act] and began to organize the Indians in a way that we thought the white man's society was the best society in the world. I'm not so sure that was best either.

On the other hand, there is evidence that things were much better before *Martinez* in ICRA enforcement, from what I can read. Is that true or not true? Did tribal councils take better or take more interest in ICRA enforcement before *Martinez?* Or is it better after *Martinez?* Does anybody want to answer, or is that too much of a loaded question?

JUDGE HARDING. Well, I can't answer, because I was in—I was still going to school in 1978 when *Martinez* was decided. But I can tell you that it didn't take long for tribes and their attorneys to learn that what *Martinez* meant was that the bottom line and the end of the road on reservations for persons who have problems is the tribal council, that the tribal council—that's where the notion that the tribal council has the review authority for civil rights or violations of civil rights, so that councils became not only a legislative body but a review body for matters that pertain to certain rights that individuals may or may not have on reservations.

CHAIRMAN PENDLETON. I guess my question is unclear. I'm just trying to find if there were some feelings from those who are here about enforcement of the ICRA by tribal councils before *Martinez* and the enforcement after *Martinez.* Was it better—was it enforced more before *Martinez* or enforced more after *Martinez* by the tribal council?

JUDGE FRY. I was in school, too, so I can't—

CHAIRMAN PENDLETON. Okay. Well, if you have any more questions, we want to end this panel and go to—

Go ahead.

MR. MILLER. Judge Harding, a while back you mentioned that the tribal judges were influenced by tribal councils and tribal Chairmen, yet Judge Fry told me that she, to her recollection, has not ever been influenced, and no attempt has ever been made. On what basis do you make your statement?

JUDGE HARDING. The basis that I make my statement about being influenced is the political realities that you end up with at times on reservations, where you may get a call. It may not be directly from the

tribal councilperson or persons themselves, but it may be, maybe, the tribal attorney gives you a call and says, "Hey, the council's authorized me to call you," and so therefore they've protected themselves from direct communication with the judge, and tried to maybe offer you a way to work the situation out. Those are the ways.

It's not a—a lot of times it's a real subtle influence that goes on, but it doesn't take too much smarts to know that a person or other persons are trying to influence the judge. And a judge has to make a decision at that time as to whether you're going to listen to this or not, and politely say, "I can't talk to you about this," and hang up the phone, or say, "I don't want to meet with you."

MR. MILLER. Can you remember approximately how many times this has ever happened to you, or you have gotten those types of hints?

JUDGE HARDING. Well, I can't remember, and I don't think it would be right for me to bring up any certain situations, that I couldn't specifically remember times and dates and facts. But it's—let me say this, that it's not uncommon. And I think that although maybe some of my colleagues would not want to say that themselves, I don't have anything to lose by telling this Commission the truth.

CHAIRMAN PENDLETON. Mr. Destro has the last question.

COMMISSIONER DESTRO. Yes. Again, it goes to the broader question of whether or not—you're talking in one respect about the attempts to influence the process. I'm not at all convinced that in every respect, even if all the cases were tried before the council itself and there were no tribal court, that in every respect things would be unjust. That's just not—I don't think that's a warranted assumption to make, that the tribal councils themselves would be unjust.

It seems to me the more appropriate question is: what protections do people who live in Indian country need to make sure that on the occasion that the council is going to act in an unjust manner, what kinds of protections ought we to suggest might be written into the law, either to strengthen tribal courts or to in some respects limit the claim of sovereign immunity for the tribal council in the tribal courts, again speaking in the context of the tribal system itself, not going outside.

Do you understand my question, Judge Harding? I mean, is that the right track? Am I looking at it the right way? Because if I'm not, that's what I really need to understand, that I'm looking at these things the right way.

JUDGE HARDING. I think if a person were to say to me, "What do you think should be done to afford equal rights to persons on reservations?" there would be three classes of persons—and I'm not going to prioritize those, one, two, three. But there are three classes of persons. There are members of the tribe or the reservation where you're located, there are non-Indians, and there are nonmembers of that tribe.

Some form of mandamus should be allowed. Some form of review should be allowed, so that if a person, whether he be Indian or non-Indian, or a member of the tribe, or whoever it is, has a forum or has a mechanism to use to say that—or be able to prove, if the facts will support his case—and we all have to go by individual reservation, individual set of circumstances, and the facts—and that is that if the merits or the facts support the case, then maybe he should be allowed a review by a Federal court.

Right now, if you go—if you have what you feel is a violation of your right, and the defense of sovereign immunity is successfully raised, you're sunk. It doesn't matter how much anxiety, how much hurt has been caused to you, how much disgrace, or whatever it might be. You're sunk.

CHAIRMAN PENDLETON. Thank you.

JUDGE HARDING. And it doesn't matter if you're Indian or non-Indian.

CHAIRMAN PENDLETON. Judge Fry?

JUDGE FRY. I just wanted to mention that I feel like the difficulty is payment for the process, which we've discussed already, and also payment for recovery if, in fact, a claim is found to be just. And I think that if tribes were able to pay for the process of a claim through the court system and pay for persons recovering under civil rights, for civil rights violations, there would be no question whatsoever on, you know, any possible person having a possible claim on any Indian reservation in the U.S. They would, no doubt, be able to bring the claim.

And that's all I'll say. Thanks.

COMMISSIONER DESTRO. Judge, thank you.

CHAIRMAN PENDLETON. Thank you very much, panel.

We'll take a break. Our next panel will be Judge Jeannette Whitford, Judge Lola Sohappy, Judge David Ward, and Judge David Hutchison. Thank you. We'll take about a 10-minute break.

[Recess.]

CHAIRMAN PENDLETON. We'd like to convene with Judge Sohappy, Judge Whitford, Judge Ward, and Judge Hutchison.

JUDGE HUTCHINSON. Hutchinson, -i-n-s-o-n.

CHAIRMAN PENDLETON. Hutchinson.

JUDGE HUTCHINSON. Hutchinson.

CHAIRMAN PENDLETON. One of my colleagues when I worked in Washington was Hutchison, and everybody was calling him Hutchinson, so I kind of get—

JUDGE HUTCHINSON. It happens all the time.

CHAIRMAN PENDLETON. Thank you. I understand. As long as they don't put it on your paycheck the wrong way, you're okay.

JUDGE HUTCHINSON. That's right.

CHAIRMAN PENDLETON. Let's see; who's here? Would you identify yourselves? Judge Hutchinson.

JUDGE HUTCHINSON. Yes. Douglas Hutchinson.

JUDGE WARD. David Ward.

CHAIRMAN PENDLETON. David Ward.

JUDGE WHITFORD. Jeannette Whitford.

CHAIRMAN PENDLETON. It's good to see you again.

JUDGE WHITFORD. Yes. I wondered if you would remember.

CHAIRMAN PENDLETON. I have a long memory, I think.

JUDGE WHITFORD. Oh, that's great.

CHAIRMAN PENDLETON. If you'd please stand, I'd like to swear you in.

[Jeannette Whitford, David Ward, and Douglas Hutchinson were sworn.]

CHAIRMAN PENDLETON. Thank you very much. Have a seat please.

We will enter into the record without objection Judge Whitford's written statement and Judge Fry's statement from the previous panel. If there are any other documents or statements for the record, please feel free to submit those either now or within that 30-day time period that I mentioned in the beginning in my opening statement.

Judge Whitford, would you like to go first, please?

JUDGE WHITFORD. I see it's still ladies before gentlemen.

CHAIRMAN PENDLETON. Well, you're number one on the list. And I want to tell you that chivalry lives, but chauvinism is dead.

TESTIMONY OF JEANNETTE WHITFORD, CHIEF JUDGE, COEUR D'ALENE TRIBAL COURT AND KALISPEL TRIBAL COURT

JUDGE WHITFORD. Thank you. My name is Jeannette Whitford, and I am the chief judge for the Coeur d'Alene Tribe, and I'm also the chief judge for the Kalispel Tribe. The Coeur d'Alene Tribe is located in northern Idaho, and the Kalispel Tribe is in northeastern Washington.

I will talk about the Coeur d'Alene first, because this is where I work four-fifths' time.

The Coeur d'Alene Tribe has a membership of 1,188 enrolled members. We have about 1,100 Indians living on the reservation. About two-thirds of enrolled membership live off of the reservation, but we do have that pool of 1,100 Indians living on the reservation that come under our jurisdiction. The Coeur d'Alene Reservation is 68,640 acres.

Our tribal organization—we have a tribal council. It is a non-Indian Reorganization Act tribe. We have a tribal constitution that was approved on August 8, 1947. We have a police department consisting of three Bureau of Indian Affairs officers. The tribe recently went out of the business of law enforcement because of the financial constraints.

Our court organization consists of a chief judge. The authorization comes from the tribal code and constitution. We have an associate judge that is on call. We have a list of six visiting judges that we can call from

other reservations. We have a full-time court clerk and a full-time administrator/probation officer. We have a prosecutor on contract part time. We have public defenders that are from the law clinic at the University of Idaho. And the reason that we use this service is because we know we do not have to provide counsel under the Indian Civil Rights Act. However, we take that one step further and we do provide counsel for people that want to use this service. It has worked quite well for us. Our students rotate about every 6 months, and they do a real good job representing people in our court. Our contract calls for these people, defenders, to come to our court for mileage only, so it is of great benefit to us, with constraints of our budget, to use this service. And it has been copied by the Nez Perce Tribe.

Our funding is under 638. And in the last 2 years the council has allowed us to keep our court fines and fees, which then supplements our budget. But it doesn't amount to a whole lot, because we're looking at a reservation that in the past couple of years has experienced 80 percent unemployment. Our economic base is primarily agriculture and timber, and northern Idaho is a depressed area. Last summer the seasonal workers, when these people were working, the unemployment rate dropped to about 76 percent.

On the second page—I think that some of you have the report—I have some court statistics for 1985, '86, and '87.

In 1985 we had a caseload of 426, and that was criminal, traffic, juvenile, probate, appeals, and marriages. We had no appeals that year and no marriages.

In 1986 our caseload was 751, and that was criminal, traffic, civil, juvenile, and the list that I have listed.

Last year, in 1987, our caseload was 555, and that was because we lost our shelter program, and the tribe went out of the business of law enforcement. So it isn't that everyone all of a sudden became real good, upstanding citizens; we just don't have the people to field to do our work and serve our people the way we would like to.

I have been a judge for 12 years, chief judge for the last 3 years. I started as an elected judge for 3 years. I was out of the court system for 5 years, and I was recruited back by my tribe. And when I was recruited back I was not asked if I was available, if I would, or if I could do the job, and I was elected chief judge. I thought it was some kind of a bad joke when people were congratulating me on my new position, because I had not been notified in any form.

A couple of weeks later I received official notice that I had been appointed chief judge, and I was really apprehensive in accepting this kind of responsibility. I was at a point in my life where I had an apartment in Alaska and my home in Spokane; I was bouncing back and forth between the two places. And I had not worked from 8 to 5 or any long hours of any kind for pay. Most of the things I did were on a volunteer basis. My family

said, "We are raised; you don't have any responsibility. Go for it." So I did.

Two weeks later I was demoted from chief judge to alternate judge. The chief judge appealed for her position and got it back. And it was relief, because I didn't have to put that much effort into the position. It was a bit frightening.

From when I was first elected, and then when I was appointed, I spent a lot of time taking classes. And part of this was going 2 years to night school. And I have obtained my certificate as a paralegal. In the State of Idaho, we still have magistrates that are nonattorney magistrates, and I have taken some training with these people at State level. In our tribal court, our salary levels are probably half or a third of the salary levels of those magistrates. And they're assigned to certain specific areas of responsibility.

In tribal court we use, on a day-to-day basis, our tribal code, State law for traffic, and Federal. We have a little clause that says if it isn't in the code, you go to the next best law. In civil we do—we have unlimited civil responsibility, and we have a small claims court.

Our small claims court has a ceiling of $5,000; State is $2,000. The reason we set the ceiling at $5,000 was that most of our Indian people that purchase automobiles, major appliances on contract basis, are under $5,000. And these people usually come into court without legal counsel or without an attorney to help them. So when we set it at $5,000, most of these people come in without attorneys, but also the plaintiffs come in without attorneys in our process.

We do some probate. We are expected—we are a very small court, as I've showed in the statistics of the court. But we are expected to do very sophisticated legal work and we do.

CHAIRMAN PENDLETON. Judge, could you sort of wrap it up a little bit?

JUDGE WHITFORD. Yes.

CHAIRMAN PENDLETON. We want to get as much time as we can in for questions.

JUDGE WHITFORD. I have my statement before you, and you can read one—the one last comment that I really wish to make is with regard to—you know, you mentioned a witch hunt. And part of the problem has been with the press releases and with people of the press and the media lumping tribal courts and tribes together. We have over—we have about 445 different tribes and 145 different tribal courts. And each tribe and each court is in a different state of development. And when the press lumps us together, it either makes us all look bad, or it makes us all look good. But I wish they would be more specific on zeroing in on the particular courts and their particular problems, and not say we're all having these kinds of problems.

I am open to any questions that the Commission would like to pose.

CHAIRMAN PENDLETON. Thank you, Judge Whitford.

Judge Ward, I'm going to say we're going to take about 5 minutes or so for initial comments, and then we'll have some questions with you, and that will allow us enough time to get in as many judges as we possibly can this morning.

TESTIMONY OF DAVID WARD, CHIEF JUDGE, YAKIMA TRIBAL COURT

JUDGE WARD. My name is David Ward, and I'm the chief judge of the Yakima Tribal Court at Toppenish, Washington. I have been the chief judge there since April of 1981. And I am a member of the Washington State Bar Association.

The problem with the enforcement of the Indian Civil Rights Act seems to have surfaced about a year ago when the Schermerhorn document was circulated throughout the country. And when I reviewed what he saw as problems with the courts—denial of counsel, no right to a jury trial, no opportunity to be heard—I didn't perceive that as a problem at Yakima Tribal Court. But there were these other things that courts supposedly weren't doing regarding the act.

MR. MILLER. Excuse me; for the record, could you identify the Schermerhorn document?

JUDGE WARD. That is—maybe I'm not pronouncing it correctly; it's Schermerhorn.

MR. MILLER. Close enough.

JUDGE WARD. Do I have the citation? Yes, I do.

MR. MILLER. Or just an approximate description so that we can have it in the transcript.

JUDGE WARD. "Statement of James Schermerhorn, Civil Rights Division, United States Department of Interior, before the United States Civil Rights, February 11, 1986."

MR. MILLER. I see; at our briefing.

JUDGE WARD. Yes. So this situation caused me to pause and attempt to review what we were doing, what we weren't doing, and what we should be doing.

In 1953 the tribe passed the first code. The rights contained in the act are not enumerated in that code. In 1968 the Indian Civil Rights Act was passed, and it wasn't until the current code was implemented in 1979 that most of the rights in the Indian Civil Rights Act are contained in the code. And I have outlined that in the questionnaire I sent to you.

The criminal provisions of the Indian Civil Rights Act work in Yakima Tribal Court, in my opinion, not because I am there, but because there is a system. There is a full-time prosecutor; there is a public defender. And when issues come up, both of those individuals argue their case vigorously.

Regarding the civil provisions in the Indian Civil Rights Act, those cases are rare. And as a matter of fact, I can't think of one offhand. And whether or not there is a problem on the Yakima Reservation regarding the civil portion of the Indian Civil Rights Act, I am not aware of it. And I am not a good barometer on whether or not those type of problems exist.

There is also an appellate court at Yakima. And I want to point out that if an individual is upset or aggrieved by the trial court, the appellate court—regarding a criminal matter, there is a writ of habeas corpus. If a non-Indian is brought into court, they have the avenue, through the Federal courts, under *National Farmers Insurance.* I think it's those individuals who are alleging violations of the civil provisions who may not have a place to go if they don't like the tribal system.

The kind of cases that are handled at Yakima Tribal Court are diverse. The tribe has assumed exclusive jurisdiction over tribal welfare matters, and those are handled by children's court. We exercise criminal jurisdiction over Indians. *Duro* has caused us to pause in several cases. Non-Indians are allowed to file civil actions against tribal members in our court. Non-Indian victims file criminal charges against Indians in our court. Non-Indians bring their judgments from outside jurisdictions and file them in our court for recognition.

And what I would like to see this Commission come up with is some sort of criteria or characteristics that you see existing in tribal courts where they are doing a good job enforcing the act. If there are problems with enforcing the act, what are the characteristics or the—the characteristics of that court? Give us a good idea what we should look like to properly enforce the act.

And that's all I have.

CHAIRMAN PENDLETON. Thank you very much.

Judge?

TESTIMONY OF DOUGLAS HUTCHINSON, FORMER JUDGE, NORTHWEST INTERTRIBAL COURT SYSTEM

JUDGE HUTCHINSON. My name is Douglas Hutchinson. I'm an enrolled member of the Osage Indian Tribe of Oklahoma. I'm also a licensed member of the State bar here in Oregon.

From 1976 until approximately 1986, '87, I've been involved directly with tribal court programs, tribal court development programs, and tribal court training. For a number of years, almost 9 years, I worked as an Indian legal consultant with the folks who did much of the training of the judges who are appearing here today, the National American Indian Court Judges Association, the American Indian Lawyer Training Program, and the National Indian Justice Center. So in establishing my credentials, I can say that I've probably worked with people from every court, practically every court in the Western United States, and many in the Midwest and

East as well. I've also served as a legal advisor for a tribal court for approximately 2½ years. And until just recently I was—for about a year and a half I acted as a circuit court judge with the Northwest Intertribal Court System in the State of Washington.

I guess what I would like to take this opportunity to say is that I think that before this package is put together, your final recommendations are being made to whoever, that the whole thing should be put into perspective. I certainly don't mean to insult your intelligence or your background work you have done in this area. But I'd like to remind you that Indian tribal courts—there is not a one of them in the United States today existing in a constitutional form which has been in existence longer than 50 years. So many of these tribal courts have come into existence in the last 20 years, 20–25 years.

If one were to measure their progress against the progress of the American judicial system from the earliest American courts, and see where they are in that 20 or 25 years, I think you'd be astounded at the comparison, because these courts have come a long way.

I think, for example, that one of the reasons the people who've preceded me have enumerated all of the services of their local institutions for you is to show you that they have worked very diligently, their governments have, at trying to put together governments that would satisfy the imposed limitations of the Indian Civil Rights Act and other unreasonable—my personal—unreasonable expectations that others have of them. And they have done a magnificent job, an extraordinary job. They have created these institutions out of nothing. They had very little funding—and one could go on to some length, Commissioner Destro, as you said, on that, in that area.

But more importantly, they've had no guidance. And it is truly unsettling to find that they are now being examined and potentially criticized for not measuring up to some arbitrary standard of another system which has had 200 years in which to identify its problems and resolve them. As someone else has said previously, problems of enforcement of civil rights exist in every municipal, county, State, and Federal court in the United States.

And I would like to point out as well that when we talk about the Indian Civil Rights Act, we are not talking merely about cases where an individual challenges what a government has done, and that the government, the Indian government, tries to hide behind some idea of sovereign immunity.

The Indian Civil Rights Act, since its passage in 1968, goes through every aspect of everyday life on every Indian reservation in this country. It has to do with the very fundamentals of every action and policy made and taken by those Indian governments, and by all of their employees, including their contract employees and their consultants.

And when you measure what they have done in 20 years, as against the occasional claim that someone's civil rights have been violated, I think that you would see that the numbers of violations are very small. And they try to deal with them. They keep improving their institutions despite reduced funding in the last 7 years, despite intrusions by various Federal agencies trying to impose their concepts, foreign concepts, upon these Indian governments. And they have done extraordinary jobs.

And their people—it's exciting. I was able to work with these people for about 9 years. And few of them had college educations. Almost none of them had legal background. And they are handling today on a daily basis complex legal issues, not merely involving civil rights, but involving every aspect of a judicial—normal judicial program. They are courts of broad jurisdiction, and they handle it all. They do extraordinarily well.

They would do better if they had more funding, if they had more training, if they had more available people, if they had resource support and not external guidance. The one thing these tribal courts do not need today is further imposition of standards arbitrarily set by some outside agency. They need simply support and resource support for the efforts that they have undertaken themselves. And I think if a little good faith effort will show that in time they will be exemplary systems, if they are not now.

Thank you.

CHAIRMAN PENDLETON. Thank you, judge. I'm sorry; did I cut you off?

JUDGE HUTCHINSON. Yes, I was through.

CHAIRMAN PENDLETON. We'll have just a short time for questions. All of you represent the association, so I would presuppose you understand that we are getting a broad spectrum of the membership of the association, how they feel about ICRA.

We have a short time for questions again, like I just mentioned. I'll turn to counsel for a couple of questions, and we might have some from here.

MR. MILLER. Judge Whitford, I'd like to ask you the same question that I've asked Judge Fry earlier. And I think it's important, since Judge Harding made the comment about influence by tribal councils or tribal Chairmen.

In your years as a judge, has the tribal council or Chairman in any way tried to influence you in making a decision?

JUDGE WHITFORD. I can count three times.

Once the tribal Chairman tried to intercede for people that had appeared before the court. I listened to him politely, and then I told him that I resented his coming down and trying to influence a decision or a future ruling. And at that point we parted company.

On another occasion the Catholic priest on the reservation—and the Catholic religion used to have a very firm hold on our tribe; they do not anymore—tried to intercede for parties that were appearing before the court, and I told him the same thing.

The other occasion was a person from one of the political entities on the reservation. And we do have those people trying to—I think she opened by saying, "You have upset my family because of this ruling," and I reminded her that I had taken an oath to uphold the laws of the tribe, and I believed in equal application of the laws of the tribe. And that was the end of the conversation.

MR. MILLER. What was the approximate time frame? Was this in the last 5 years, 10 years?

JUDGE WHITFORD. In the last 5 years.

MR. MILLER. The last 5 years. Do you ever fear for keeping your job? You mentioned before that you had been appointed, and not appointed, and reappointed, and then demoted, and promoted.

JUDGE WHITFORD. For a long time I had the luxury of working part time for the tribe, that my husband supported me. He has been very successful in business in that area, so that my work amounted to service. I look at it as a service to my tribe.

MR. MILLER. Does that mean that if you are—if your job was taken away, you would just miss an opportunity for service? I'm not sure what your answer was.

JUDGE WHITFORD. I would be disturbed, in the sense that when you've put a lot of yourself and your time into building a system—my concern would be the continuation of that building and that growth that we have experienced in the last few years. It has been rapid, and it has been frightening at times.

MR. MILLER. Are you saying that there are times when you are afraid that you would not retain your current position?

JUDGE WHITFORD. No.

MR. MILLER. Okay.

JUDGE WHITFORD. If I walk away, I will walk away with my integrity intact, and my scruples.

MR. MILLER. Judge Ward, Susan Muskett has a question.

MS. MUSKETT. We received two responses from the Yakima Indian Nation to our letter to Secretary Hodel of December 9, and these questions will address both of the responses that we've received.

In response to our question regarding the types of problems affecting ICRA enforcement in the tribal courts, two main areas of concern were pointed out.

The first area was with regard to advising people of their rights and of the charges against them in order to make an informed plea of guilty or not guilty. The response read:

"About half of the people arrested are not read their rights as required under the code, and others are not given a [citation, and still others are not given a] copy of the warrant. As a result, some defendants don't know what they're pleading to until after they've entered a guilty plea. In that

context, some of the judges will withdraw the plea and enter a not guilty plea, but not all."

Would you please respond to this?

JUDGE WARD. That wouldn't happen if I was presiding.

MS. MUSKETT. Are you aware of this happening with other judges at the Yakima Tribal Court?

JUDGE WARD. It may. I don't know. Do you know who wrote that? I don't—

MS. MUSKETT. It's from your public defender's office. Is it Mr. Tulee?

MR. MILLER. It was a response to the questionnaire that our office received.

CHAIRMAN PENDLETON. Just so that you understand the questionnaire, we asked Secretary Hodel to—for the BIA to send a questionnaire to all tribes for answers. There're about 21 questions there. And we got great response from across the country. The reference here is to that questionnaire.

If anybody has not seen the questionnaire, I'd be glad to give you my copy to take a look at. It's no secret document.

JUDGE WARD. I distributed that internally because I didn't think that my views of enforcement would be necessary—would be necessarily the same as the views of the prosecutor, the defender, or the other judges in the system.

But when I conduct arraignments, they are always read their rights.

And there is a problem about them getting a copy of the report in that response. Is that correct?

MS. MUSKETT. A copy of the warrant.

JUDGE WARD. A copy of the warrant. I'm not sure what that—I don't see how they could get into the system unless they had a copy of the warrant.

CHAIRMAN PENDLETON. Perhaps—maybe you ought to share the response with Judge Ward. Not now—that's okay, you can give it to him—I mean, you may want to take a look at that and respond to us.

JUDGE WARD. Okay.

CHAIRMAN PENDLETON. You're probably disadvantaged by not having seen the response, and we're asking you questions about it. We'd like to give it to you.

MS. MUSKETT. Another concern we had was with regard to bail. What is your procedure for releasing those arrested for public drunkenness on bail?

JUDGE WARD. This is before they are arraigned or—before they are arraigned?

MS. MUSKETT. Yes.

JUDGE WARD. That authority rests with the police department.

MS. MUSKETT. I see.

MR. MILLER. What about after they are arraigned?

JUDGE WARD. After they are arraigned and they plead not guilty, it is very unusual to require an individual to post money. Cosigners are usual—cosigners is the usual case.

MR. MILLER. I understand that there was, I guess, a famous case that you presided over, the *Sohappy* case.

JUDGE WARD. Yes.

MR. MILLER. Was there a bail hearing in that case? Was Sohappy allowed bail?

JUDGE WARD. He was allowed bail pending appeal. When the tribe brought him back from Federal custody, he was not allowed to be released on bail.

MR. MILLER. Was that was because of the Federal Government's role or—

JUDGE WARD. The argument made to me by the special prosecutor was that if Mr. Sohappy and the others were released under any condition from custody, the Feds would automatically come in and take them back to Federal custody. The argument on the other side was that they did have a right to bail. But the governing authorities at that—decided that they would be held in custody pending trial.

COMMISSIONER DESTRO. Judge Ward, would you just state for the record, please—because I saw it in the documents, the reference to the *Sohappy* case. Would you state for the record what it was? What was involved? I mean, what were the individuals charged with? There was a reference to the tribal council charging people. Would you describe it so that we have an accurate reflection on the record? Because at this point all we have is a reference to the *Sohappy* case in the record, with no indication of what it was.

JUDGE WARD. Various fishing violations were filed against five members of the Yakima Tribe.

COMMISSIONER DESTRO. Okay. By whom?

JUDGE WARD. By a special prosecutor who was hired.

COMMISSIONER DESTRO. By the tribal council or by the Federal—

JUDGE WARD. The special prosecutor was hired by the tribal council, who filed the charges.

COMMISSIONER DESTRO. I see. Then how did the Federal Government—how did the Feds get involved in it? This is the information that we don't have for the record. And the record's just not going to be clear unless we have that. I mean, there're no tricks in here; I'm just trying to understand what the case involved.

JUDGE WARD. A pretrial motion in that case was to dismiss because it was too old. I agreed with that motion. And after the order was entered dismissing all the charges against everybody, the police took the individu-

als from the tribal jail to Federal authorities, who took them. And it took several months to get them back.

COMMISSIONER DESTRO. For a violation of what laws? Federal fishing laws, tribal—

JUDGE WARD. Tribal fishing laws.

COMMISSIONER DESTRO. In other words, the Federal Government was attempting to enforce the tribal laws which you had—

JUDGE WARD. Are you talking about their case, or the one in tribal court?

COMMISSIONER DESTRO. Well, that's what I'm trying to understand. I don't know the difference, I mean that's—were there two *Sohappy* cases, one involving the tribal court system and another one involving the Federal Government?

JUDGE WARD. Yes.

COMMISSIONER DESTRO. I'm just trying to understand. The charge that was filed that you dealt with was the one that was filed by the special prosecutor hired by the tribe.

JUDGE WARD. Alleging violations of the Revised Yakima Code.

COMMISSIONER DESTRO. And then there was another case involving allegations of Federal violation?

JUDGE WARD. Alleging—they were convicted of violating the Lacey Act—

COMMISSIONER DESTRO. All right.

JUDGE WARD. —in Federal court.

COMMISSIONER DESTRO. All right.

JUDGE WARD. And that was appealed to the Ninth; *certiorari* was denied.

COMMISSIONER DESTRO. I see.

MR. MILLER. That was prior to the Yakima Tribal Court case?

JUDGE WARD. Yes.

MR. MILLER. And at the time the Yakima Tribal Court heard the case was Mr. Sohappy in Federal custody?

JUDGE WARD. He was—

MR. MILLER. Serving part of his—

JUDGE WARD. He was arraigned on the day he was to report to Federal custody.

COMMISSIONER DESTRO. I see. All right. Thank you.

MS. MUSKETT. With respect to this same case, did you indicate that at one point there was a discussion that perhaps he had violated or exceeded the statute of limitations?

JUDGE WARD. The argument was made to that effect, and I agreed with the argument.

MS. MUSKETT. That it had exceeded the statute of limitations?

JUDGE WARD. Yes. The violations occurred in 1981 and 1982, and these were filed in 1986.

MS. MUSKETT. Is the statute of limitations written into the Yakima Tribal Law and Order Code?

JUDGE WARD. There is not a specific statute of limitations in the Revised Yakima Code. There is a provision which limits the authority of the judges over the subject matter for a 2-year period, and that's the provision I was dealing with.

MS. MUSKETT. Is that for all crimes?

JUDGE WARD. Yes.

MR. MILLER. Were there ICRA claims involved in the *Sohappy* case? Were there motions about denial of bail and about jail conditions and motions of that nature, based on the ICRA?

JUDGE WARD. Arguments were made that he should have been granted bail, which I did not agree with.

His attorney litigated the conditions of the jail in the press.

And there were arguments about his religious freedom during trial.

MR. MILLER. Did you make a ruling on those ICRA claims?

JUDGE WARD. The jury was—jury instructions were prepared, and the jury decided those.

MR. MILLER. They were given to the jury, though?

JUDGE WARD. Yes.

COMMISSIONER DESTRO. That was in Federal court, right? Is that what we're talking about? Or in the tribal court?

JUDGE WARD. Tribal court.

COMMISSIONER DESTRO. All right. But you said you dismissed the case in the tribal court.

JUDGE WARD. And that was appealed. The dismissal was appealed—

COMMISSIONER DESTRO. Oh, I see. And then it came back.

JUDGE WARD. Yes.

COMMISSIONER DESTRO. I see. All right.

MR. MILLER. Does the Yakima Nation claim sovereign immunity to ICRA claims?

JUDGE WARD. I am sure they would claim sovereign immunity to the same extent that any other State or the Federal Government would. And there are two provisions in the Revised Yakima Code about their—the sovereign immunity of the tribe.

MR. MILLER. I take it they did not raise that defense in the *Sohappy* case, if those issues were given to the jury.

JUDGE WARD. The tribe—

MR. MILLER. You mentioned—

JUDGE WARD. The tribe brought the charges.

MR. MILLER. Right. But you also mentioned that there were motions—claims made by Sohappy's attorney concerning—

JUDGE WARD. No. Okay, I see. No, there wasn't any claim in that regard.

MR. MILLER. I see. So there were no ICRA claims brought in Yakima Tribal Court, based on—

JUDGE WARD. There were arguments made about the freedom of these individuals to practice their religion.

MR. MILLER. But there was not a trial—there was not a claim filed in Yakima Tribal Court claiming a violation of Sohappy's ICRA rights?

JUDGE WARD. No, not a specific claim. But testimony and arguments were made in that regard.

COMMISSIONER DESTRO. And then the jury decided not to—they didn't make any findings with respect to those issues, right?

JUDGE WARD. The jury decided that they were entrapped and entered a finding of not guilty for all charges.

COMMISSIONER DESTRO. I see.

MR. MILLER. We'll move away from the *Sohappy* case.

Generally, how many ICRA cases have you heard?

JUDGE WARD. Now, I consider all criminal cases ICRA cases because—

MR. MILLER. Civil ICRA cases.

JUDGE WARD. What?

MR. MILLER. Civil ICRA cases.

JUDGE WARD. Civil ICRA cases. I haven't—there is one pending now.

MR. MILLER. And that's the only one?

JUDGE WARD. There was a case filed by an employee who did not get a job, allegedly wrongfully. And she sued a lot of people. But the case has languished. There's an attorney involved. I do not know why it is not moving forward.

MR. MILLER. Has sovereign immunity been claimed?

JUDGE WARD. It hasn't got to that point. But if it does, I'm sure it will be.

COMMISSIONER DESTRO. A couple of questions: first, with respect to one of Judge Hutchinson's comments. You made a personal commentary and then corrected yourself and said, "Well, that's just a personal comment"; I'd like to explore it for a minute, when you talked about intrusions and foreign concepts. Could you expand just a bit on both the notion of the foreign concepts that you have in mind, as well as the ability of the tribes to use their own traditional concepts as justice-seeking tools for people who live on the reservation?

JUDGE HUTCHINSON. Before I do, I need to make one caveat that I had forgotten. I'm presently employed as the executive officer for the Oregon Commission on Indian Services. My appearance here today is in no way connected with that employment, and I do not speak for any Indian tribes in the State of Oregon. I speak only for myself as a former judge with the Northwest Intertribal Court System.

As far as the subject of foreign concepts, I think it's so fundamental that it almost goes without saying, that any review of Indian history is that these were communal people having competent social orders that predated the arrival of the Europeans on this continent.

Those social orders were in good shape until the late 1800s, almost exactly 100 years ago, when with great malice and with absolute intent, certain special interest groups within the government, and advisors to the government, suggested the Indian Allotment Act. And that act was passed into law, survived for about 50 years, with Indian governments being supervised totally by the Bureau of Indian Affairs.

At the time that the Indian Allotment Act was passed into law, its intent was to destroy the existing Indian societies with this grand plan that ultimately—if their religious practices were forced to be abandoned, if their governments were destroyed in their existing form, and if they were—their lifestyles were changed immutably, then ultimately they would have to be forced into accepting assimilation and no longer would become an Indian problem.

So that's the background, I think, of foreign concepts. Because 50 years of the General Allotment Act was absolutely disastrous. It's been described repeatedly. The Meriam Report chronicled the fact that it was—bordered on American Indian genocide.

So we were forced, then, to—the United States was forced to review its practices in that regard, and they came up with the concept of the Indian Reorganization Act of 1934, John Collier's concept.

Like any such concept, there were some flaws in it and there were some good aspects. Unfortunately, when it came to be passed into law, as often happens with legislation, the flaws were retained and some of the good aspects were dropped out.

But the whole idea of the Indian Reorganization Act was that these Indian governments could reorganize once again, Indians could govern themselves, because the Federal Government had already demonstrated that its government of them had been a failure. And the Indian governments could reorganize again, but they must do so in a constitutional form. That was a foreign concept to them.

They accepted that because they wanted to govern themselves. They wanted to stem this disaster that had been happening to them for over 50 years.

When they attempted to establish themselves in a constitutional form, as you can well imagine, they had to say to someone, "What does this mean, and how do we do it?" Unfortunately, their key advisor was the Bureau of Indian Affairs, who submitted to them a model constitution and a model law. The model laws were based fundamentally upon criminal laws, and so they provided for criminal penalties even for things that normally are considered to be civil actions.

The bad part was that the format that they suggested that these tribes organize under was one that provided for no separation of powers, provided for no judicial review, and provided for no independent judiciary.

Now, you'd think that after 150 years the United States Government, having gone through this agonizing process itself, would have learned about that, but they didn't. And so these Indian governments accepted the format that was suggested, and they created themselves in this new form.

That has caused problems. Any one of those problems—independent judiciary, judicial review, separation of powers—no one of those is fatal to effective operation of a judiciary, nor even taken together in sum are they fatal. They can—there are solutions. Some of these Indian tribes have been very inventive and innovative in finding ways to get around that. But they have had to deal continually with a foreign concept: the law as it is seen and as it has grown here in the United States in 200 years.

So they are foreign concepts. The fact that this Commission today is asking the kinds of questions you're asking—your questions are based upon your background, those of you who are lawyers, based upon your legal training. That's all you know. You've never explored other systems.

As an example, in—

COMMISSIONER DESTRO. Judge, could I interrupt for 1 minute? You've talked about the foreign concept part, but there was the second part of the question—

JUDGE HUTCHINSON. Okay.

COMMISSIONER DESTRO. —was, what about the traditional concepts? Is there someplace that either we or our staff can look, or are there some people who can help us, to understand those traditional justice-finding and seeking concepts? Because I gave one of the judges, just a few minutes ago, a copy of a resolution by the Administrative Conference of the United States, which basically suggests that maybe it's time for the Federal Government to go out and start looking for other justice-seeking concepts, other than the traditional adversarial system. And so if you can help us to understand that, or somebody can help us to understand those concepts that are not—we don't—American lawyers don't understand European concepts of justice which are not adversarial, any more than we do Native American concepts of justice which are not adversarial.

CHAIRMAN PENDLETON. Just before you answer, let me get to one of my questions too. My question goes to this point: are there tribal forums available to vindicate the rights created by the ICRA, and if so, what are those forums?

JUDGE HUTCHINSON. Those are the tribal courts and the tribal court system.

CHAIRMAN PENDLETON. Are there forums other than the tribal courts?

JUDGE HUTCHINSON. There're the appellate court systems.

CHAIRMAN PENDLETON. Other than the court system. Are there forums other than the court system that's been imposed on you?

COMMISSIONER DESTRO. Some tribes don't have courts, I understand.

CHAIRMAN PENDLETON. There are 150 tribes without courts.

JUDGE HUTCHINSON. That's true.

CHAIRMAN PENDLETON. There must be some way to talk about the vindication or relief from ICRA kind of violations in some forum other than the ones that exist. And I think we'd be happy to hear what those forums might be.

JUDGE HUTCHINSON. Well, I certainly couldn't speak for all of the tribes that do not have tribal courts. I do know that many of the tribes that do have tribal courts, and those—some that do not, have tried and are in the process of exploring alternative means of resolution of conflict. And the Navajo Peacemaker Court was one attempt.

We have seen, individually, other court systems, realizing that historic conflicts that exist on Indian reservations, very different than what exists within the dominant society's communities—conflicts, large conflicts between families and so forth—that a court system, a tribal court system or any other system in a formalized setting does not resolve those kinds of problems. And therefore, many of the tribes are going back to square one and saying, "Well, let's start. Let's take the baby steps, then. Let's explore negotiation, mediation, some of these alternative methods."

I don't know—personally, I haven't been dealing with these issues on a national basis for about a year and a half or 2 years, but I know that there's progress being made in this respect.

COMMISSIONER DESTRO. Well, could you help us identify—and that's really what we need. I would hate to see this Commission be in a position, either by design or by default, of suggesting recommendations that go in the opposite direction, not only of what you consider to be the good way to go, but the Federal Government itself is moving in those same directions when it comes to administrative hearings, when it comes to judicial hearings. We need to find out where that information is so that we can get it into the record, as to where those steps are.

So if you know who we should talk to, or if you know if there are things written on it, it would certainly be very helpful.

CHAIRMAN PENDLETON. I guess what we're also pleading for at this point is, if there's anything that we don't know, we should know, that's in the back of somebody's mind that might be creative and innovative in a way to ensure those conditions under the ICRA.

You know, as you call it, the dominant society is talking about a level of court between the appellate court, appeals court, and the Supreme Court. Is there going to be a little Supreme Court? I mean, there's talk about that. I'm not saying you have to do this or that, but there is that kind of discussion.

And you're right, we're not Indians. We don't know. I think, as Mr. Harding said earlier, this is the first time there's been any oversight by any governmental agency since the ICRA's been in place. And we're straining to get answers, like you're straining to give them, if you will. But at some point along the line we've got to know what it is that's on your mind, because for us to make recommendations to the Congress that are no more than mirrors of what already exist is not fair to the Congress, and certainly not fair to you. And that's not a witch hunt; that's asking. That's, in a sense, pleading the other way around. I find myself, in a sense, being a witness to you. What is it? I mean, where do we go from here?

We can sit here all day and talk about sovereign immunity. We can talk about whether or not this person's rights have been violated, whether or not the tribal court has some independent separation of powers. But what is it that is going to be different, if there is anything different, that we can take back to our colleagues? So it isn't just to you, Judge Hutchinson, but also to anyone who comes up today. I don't want to keep going over the same ground, the same ground, the same ground. I'm looking for something that I can put my teeth in, I can understand, and something where I can promote it, if you will, back to those people who decide to write the laws, who have not taken the time to come and spend with you like we have, out of all the negativisms we've received. We're here to learn.

COMMISSIONER DESTRO. Judge Harding's comment earlier was, "Would you make suggestions as to what looks good and what looks bad in the system?" And I guess my comment is—

CHAIRMAN PENDLETON. Judge Ward said that.

COMMISSIONER DESTRO. Oh, I'm sorry. Judge Ward said that. I'm sorry, Judge Ward.

That what looks good and what looks bad in the system. I'm not sure we have enough information to do that. That's partially what we're pleading for now.

If we were to suggest, for example, more money to go into the system, given what the Administrative Conference, for example, is doing, and some of the studies that the National Judicial Center is doing, the Administrative Offices of the United States Courts—they're all into alternative dispute resolution now. It's one of the big coming issues in law school and legal training. If there are innovative things going on in that, maybe the Federal courts and the Federal administrative apparatus can learn something from what the Indian tribes are doing.

This is really a question of justice for Americans who are both Indians and non-Indians. So what we really need to do is put our heads together and figure out what a good justice system looks like and then figure out how to go about getting it. So that's why we say that, rather than perceive it as an investigation where somebody's going to be hung out to dry, it

really ought to be an investigation where we can hang some ideas out for people either to shoot at or to salute, depending on the idea's individual merit or lack of merit.

JUDGE HUTCHINSON. Let me respond, if I may, before we go too far.

You asked for something specific. I can give you something specific. If you're asking for me to tell you about a certain type of forum and the way it's created and the way it operates that resolves these problems, I cannot. But I can tell you that in Indian country today they will find solutions to these kinds of problems if someone tells the Congress, or speaks nationally and says to other people, "Back off. Give them the space to do it. They cannot create these kinds of necessary systems as long as they're undergoing these constant pressures and attacks upon their very survival, their jurisdiction."

At the present time we have the Justice Department investigations that have gone on for the last 4 or 5 years by Mr. Jim Schermerhorn into ICRA violations. We've got this investigation. We've got the—National Governors Association is looking at Indian jurisdiction. The Western Governors Association has set up a panel to study Indian jurisdiction. The Western attorney generals have signed a resolution to Ed Meese saying, "Reexamine U.S. representation of Indians in litigation," and so forth.

As long as the tribes are having to defend themselves in this kind of context, they're not going to have the opportunity to develop what you're suggesting.

CHAIRMAN PENDLETON. Then, is one of the ways to repeal the ICRA?

JUDGE HUTCHINSON. Oh, I would say that that's—sure, that is a—

CHAIRMAN PENDLETON. Is that in the ballpark?

JUDGE HUTCHINSON. I don't think it is reasonable. I don't think that the tribes would suggest that today. I don't know; I can't speak for the tribes. I can tell you—

CHAIRMAN PENDLETON. How about you, Judge Ward?

JUDGE HUTCHINSON. —that before those tribes—before the Indian Civil Rights Act was passed, most Indian constitutions provided for some of those protections—maybe not all, but at least four or five. Every constitution I've seen made some kind of provision.

These governments, these young governments understand their responsibility. And that Indian Civil Rights Act wasn't a brilliant dream by the non-Indians that suddenly brought justice to Indian country. It existed out there in its earliest forms, and it's existed out there even since the—they reorganized as constitutional governments.

MS. PRADO. Let me ask you, Judge Hutchinson, however: wouldn't you say that it's reasonable for the—I'm trying to think how to ask you this.

How would you suggest that the enforcement of the Indian Civil Rights Act be looked at, then, by the Federal Government? I mean, we continue to hear from each panelist that there's a need for more money, a need—

that's a constant that we're hearing. And yet you're saying, "Well, why is the Federal Government coming out here trying to see what we're doing?" I think you would agree, as is accorded generally, the principle that the government needs to see how the money is being spent.

JUDGE HUTCHINSON. Absolutely.

MS. PRADO. How would you suggest that they look at the enforcement of the act, then, if you feel that these things are being intrusive, or you call us an investigation? We're doing what we're required to do, and we're monitoring the enforcement of an act. As has been noted before, it has not been looked at thoroughly in its 20 years. How would you suggest that the government go about that?

JUDGE HUTCHINSON. Well, I think that it needs to be done. There's no question that the subject should be monitored. But I think it should be done in a positive way, and it should be in a very controlled manner.

I was quite distressed to read the hearings reports from Rapid City to find that one of the witnesses there was permitted to go on and on repeatedly alleging tribal ICRA violations because he kept saying, "And I have heard that they did this," and, "I have heard that they did that." And no one on the Commission panel challenged that for probity, and no one said—

CHAIRMAN PENDLETON. It's not a matter of not challenging that. But what we wanted to have was to have that on the record.

See, I think what gets confused here is, if we hear it, we believe it. And that's just not so. We have to hear what people have to say. You might not agree with it, and we may not agree with it, or we may agree. But we have to hear it. To challenge people, saying, "You shouldn't say that," is just not the way we should go either. So if it's a matter—if you take the record—I think in some cases the Rapid City record is taken as a report. The Rapid City record is only a transcript. It is not a report. There is not one recommendation in it. There is not one finding in the Rapid City report. Not one. There is not one finding or one recommendation out of Flagstaff. Not one. Not a one.

This subcommittee has come to no conclusions. It is critical that we hear everything, and then we have to go back with this volume, these reams of material, and go through that again to find out what it is that we recommend.

If there hasn't been oversight in 20 years, we sure can't do it in 20 minutes or one report. So we have to hear it all. I'm sorry you're distressed by that, but I have to make that comment.

COMMISSIONER DESTRO. Let me ask Judge Whitford and then Judge Ward this—really, it's the same question, but it may get to one other problem.

As I look through the various things that we got from the profiles on the various tribes, one of the things that struck me—in part because of some of

the courses I teach in law school—but one of them is agreements with other courts with respect to enforcement of judgments. That was—by and large there were not very many, that there were agreements where the courts would enforce each other's judgments.

But doesn't it really raise the question that if Congress were to make—if we were to make a recommendation that tribal court jurisdiction ought to be clarified—here's what they have jurisdiction over, here's who they have jurisdiction over—that that would go a long way to staking out the boundaries, of getting tribal courts taken more seriously? Do you understand my question? Is it—

JUDGE WHITFORD. Are you talking about full faith and credit between tribal courts?

COMMISSIONER DESTRO. That would be a more detail-oriented question. But as I've been to various conferences—and I've heard Judge Canby of the Ninth Circuit say, at a conference a couple of years ago, really what it comes down to is tribal court jurisdiction.

A colleague of mine who's visiting in Washington, D.C., from the University of Vienna, who's an international expert on Indian law, says that really the issue anymore is jurisdiction, and what do Indian courts have jurisdiction over, and what don't they have jurisdiction over? And if that were made clear—that here's what the Indian Nations have jurisdiction over, and their tribes, or their courts have to be taken seriously, or their dispute resolution has to be taken seriously—then that would elevate the level at which some of this discussion takes place.

Because as I read through this, when we talk about agreements—enforcement agreements—what the Western Governors Conference is talking about is jurisdiction, what should people have power over. All jurisdiction is, is who has the power to govern a certain topic. And so it seems to me that what we're really talking about is, what do the tribes and their courts have power over, and what don't they?

Is that a fair way to put the question?

JUDGE WHITFORD. Yes. It's extremely long. I think you're referring to my report where, after the tribal court system and the tribal government was evaluated by the National Indian Justice Center on the Coeur d'Alene, one of the recommendations was that the tribe should seek agreement for concurrent jurisdiction in the area of major crimes.

You see, up to now tribal courts have been limited to being misdemeanor courts, or equivalent of misdemeanor courts in the criminal area. And I think that's what you're referring to.

We are Public Law 280, and we do have concurrent jurisdiction in some areas.

The attorney for our tribe and our tribal Chairman were responsible for drafting that document for the State of Idaho. It's very difficult to respond

to that because in the State of Idaho we have, for instance, five tribes. And each tribal court system is different.

The Kootenai north of us, which is a very small tribe, is still a CFR court.

And the Coeur d'Alene—I think we have a very sophisticated court system, even though we're very small. And we could use a lot of additional funding, as Judge Hutchinson stated. There's a lot we can do if we had the money and the people. We always have to come back to money, as to how much service we can pay for.

The Nez Perce Tribe just south of us are retroceding, and their jurisdictional area is limited to three or four different areas.

Then we have the Sho-bans, which have a very sophisticated system, also. And we have a border tribe that we really don't hear too much about because of the geographic distances.

We work quite closely with the court systems within our area. We use comity. We can call up a judge and say, "You know, we have this problem," or, "These people are going to be coming to your reservation," or whatever is happening, and particularly under the Indian Child Welfare Act. So we're able to work through a lot of these kinds of things. We're very innovative and use everything available to us to expedite something.

COMMISSIONER DESTRO. I'm not just talking about recognition of judgments between tribes, but I'm talking about recognition of judgments between the State and the tribe and—

JUDGE WHITFORD. In my tribe we have a very good working relationship. We are in two counties. Our law enforcement people are cross-commissioned. We contract with the county to incarcerate people that have to be incarcerated. We have—we were one of the first tribes to have a State agreement in place under the Indian Child Welfare Act. We use the social services; we use everything available to coordinate these services.

Our tribe does a lot of things that service the whole community, not just the tribe, but also the non-Indian community. For instance, our food bank and food services, health services—some of these things we share jointly, because we feel that cooperation is the best way to serve that community.

So what I'm saying is that each tribe is just a little bit different. And we work to the limit of our capabilities, in terms of resources and people, expertise, and what we can pay for consultive work. So I can't speak for David's court or for other people's courts, just mine, although I'm very aware of what's happening in those other court systems.

CHAIRMAN PENDLETON. We're going to ask just a couple of more questions, one or two from you, because we're already backed up one whole panel. So we're going to try to get as much as we can in. We'll move the other panel to the afternoon.

Go ahead, Ms. Prado.

MS. PRADO. Thank you. Judge Hutchinson, I wanted to follow up on what you said before. I want to make something clear, also, in terms of this Commission's work and what it is we're doing.

You had said that any investigation should be done in a positive manner. And indeed, of course, the Commission has attempted to do that. We've often run into noncooperation. That's a problem. Our coming here today was a major attempt at, again, reaching out and accepting your invitation, the invitation of the Northwest Tribal Judges Association. I do want to emphasize that.

Going back to what you were saying about foreign systems coexisting, numerous times now we've asked the question, "Do you want to see the ICRA repealed," and generally people say, "Well, no."

But aren't we really talking here, then, about two—a foreign system? Isn't this at the root of what you're talking about, that you're saying, "We have a system, and a foreign system has been imposed upon us"? But Indians are American citizens, and they have the benefits and the rights of American citizens. So I guess the question—certainly one way of looking at this question is: can these two systems exist jointly?

JUDGE HUTCHINSON. Well, I believe so. I think that there's precedents all around the world of two jurisdictions coexisting in the same geographical area. Monaco, France—there are many, many demonstrations of that.

I think that the Indian governments must continue to be recognized as having some unique cultural aspects. And they must be given every opportunity to—if the Federal Government wants them to have these court systems, you must give them the opportunity to make some mistakes and to grow a little bit.

And I think that the idea that they can suddenly, by fiat of Congress, go from not dealing with a thing like Indian civil rights, to suddenly dealing with it perfectly, with no realization that no one made a provision for where they were going to get their judges, no one made a provision where they were going to get their lawyers—'cause lawyers aren't going to work out there on those reservations, because there's no money. No one made those kind of provisions. And these Indian people have solved this problem themselves. These Indian governments have given up their own monies that they were due, the monies that were due from the government. They've said, "Divert those to court systems," and so forth. "Divert those to training of court personnel." And they have done yeoman's work in making this system work.

And so they believe it will work. They believe that two governments can coexist, and they do believe that, given an opportunity, they can find avenues to resolve some of these problems.

But it is very difficult when this foreign influence I talk about is constant. For example, you had asked a previous question, and I hadn't had a chance to respond, about what could they do.

Well, if there's going to be an investigation—and there should be monitoring of the Indian Civil Rights Act in Indian country—

MS. PRADO. Let's call it monitoring; that's what it is.

JUDGE HUTCHINSON. —why isn't it being done by Indian people? I mean, I don't see any Indians sitting up there. And I think that that's critical.

And I don't think that you can investigate civil rights enforcement or violations in Indian country by sitting and looking at it as a whole from four geographical hearings. I think that if you want to know who's doing what, you've got to go out to where it really happens on the reservation.

CHAIRMAN PENDLETON. Let me be clear with you. We went. Our staff—we don't just call up people and say, "Come sit down and talk to us." Our staff spent time on the reservations in South Dakota. When we could we spent time at Flagstaff, except when we were—what, almost thrown off the reservation, trying to ask questions to give us an underpinning.

Mr. MacDonald, in writing, has said even in a resolution, "My people can't come over and testify." But everytime we've had an open hearing—and wouldn't just be about today—I'm hearing a lot of good things about the ICRA. But I'm wondering whether or not, if we had open discussions on reservations from rank-and-file, if you will, nontribal council people and noncourt people, would we hear the same thing? I don't know. The record shows that we hear a little something different. And I can realize that that's their time to gripe, when things may or may not be true. I understand that, the part that you're concerned about—about the South Dakota hearing.

But to say that we can't just do this sitting here, you're right. But when we're denied access to some reservations, then one has to begin to raise some questions.

The same argument you're making now, Governor Lewis made when the ICRA was being discussed—Governor Lewis of the Zuni Pueblo made the same point in 1968. When we had him back in 1988, '87 in Flagstaff, he said the same thing 20 years later. So now, what you're saying to us, "We need more time," I won't dispute that. But we've heard that one before. Others have heard that before. When do we come to some resolution about what is the forum, how should it work?

Now, I have said in some of my speeches, "Twenty years after the war on poverty, poverty won." Big Federal dollars, and poverty won that war.

Public policy may not be the answer. I don't know. But we want to find out some things, and I think that's why we're here.

So we just encourage people to come and tell us what is going on, and how we should give—what, as much of a positive message as we can. But I'm sure if you were in our position, Indian or non-Indian, and somebody says, "You can't come and talk to the people," yet somebody says, "You

should talk to the people," how do we do that? That's one reason why every one of our hearings, as you sort of indicated, we have an open session. A lot of the comments you heard—and we didn't ask questions—came in the open session. My remarks this morning clearly indicate that during the open session we don't challenge witnesses. We allow people, who have not been interviewed by our staff people, to come and testify, to give the people, if you will, a chance to say what is on their mind. It does not mean that's right; it does not mean that's wrong. But they deserve a right to be heard.

With that, we're going to end the morning hearing.

MS. PRADO. One question.

CHAIRMAN PENDLETON. I'm sorry, we have to—

MS. PRADO. Just one clarification on something.

CHAIRMAN PENDLETON. Just make it a short answer.

MS. PRADO. I will. You said tribal monies, that this is imposed on you, and the tribes even use their own monies. Now, don't you mean Federal monies?

JUDGE HUTCHINSON. Dedicated Indian monies, yes.

MS. PRADO. Dedicated Indian monies.

JUDGE HUTCHINSON. Yes. There are certain monies that the Federal Government owes to the tribes in meeting their trust responsibility. Those kinds of monies are dedicated congressional monies, and they go through the Bureau of Indian Affairs. Rather than have the Bureau apportion those monies, the tribes have gone in and said, "Okay, we want certain monies sent into these areas because these are our major concerns." And so they have given up money support for some programs in order to support the tribal courts, for example.

JUDGE WHITFORD. I think I'd better enlarge on that because there are some tribes that have resources, income from timber, agriculture, whatever.

MS. PRADO. Of their own. Yes. That's why I wanted to make the clarification.

JUDGE WHITFORD. And this is part of their administrative money. So they can take some of that and channel it into tribal courts or, you know, wherever they want to put that money.

MS. PRADO. Thank you. That's the clarification I wanted.

JUDGE WHITFORD. Okay.

CHAIRMAN PENDLETON. We'll convene this afternoon at about 1:15, if you will. It looks like we're going to get backed up, so we'll do the best we can. But I think it's important that we spend some time in order to be able to get as good a record as we possibly can.

Thanks very much for being with us here this morning.

[Recess.]

Afternoon Session

CHAIRMAN PENDLETON. We'll try to resume where we left off this morning, with Judge Coochise, Judge Hawk, Judge Atkinson, and Judge Rowe.

If you will stand, I will swear you in.

[Elbridge Coochise, Cecilia Hawk, Francis Rosander, and John Rowe were sworn.]

CHAIRMAN PENDLETON. Thank you very much. Please be seated.

We would like to take from you 5-minute overview statements, and have some time for questions. If you have any remarks or any written material for the record, we'd be glad to accept it. If you want to submit material later, the record is open for 30 days.

Judge Coochise, do you want to start, or do you want to—

JUDGE COOCHISE. That would be fine. No, that will be fine.

CHAIRMAN PENDLETON. Fine.

JUDGE COOCHISE. I also have written testimony to submit. Is my microphone on?

CHAIRMAN PENDLETON. Is the microphone on here?

JUDGE COOCHISE. That's the original, and two extra copies. Can I proceed?

CHAIRMAN PENDLETON. Go right ahead, Judge.

TESTIMONY OF ELBRIDGE COOCHISE, ADMINISTRATOR AND CHIEF JUDGE, NORTHWEST INTERTRIBAL COURT SYSTEM

JUDGE COOCHISE. Okay. I'm Elbridge Coochise, currently administrator for the Northwest Intertribal Court System, also a chief judge at 13 of our 14 member tribes.

The Northwest Intertribal Court System is a consortium of 14 small tribes in western Washington, ranging with enrollment from 200 to 2,000 members, the largest tribe. It's governed by a governing board with representatives from each tribe, each of 14 members. It's a circuit court system with courts being held at tribal locations once a month, at least, or more than that if the caseload requires.

The system was implemented in 1979 by several larger tribes, as well as the small tribes, mainly as a cost-effective measure, because some of the small tribes didn't have enough caseload to warrant full-time judges or prosecutors to handle cases.

Since its inception in 1979 the system provides—basically, it's a personnel bank, providing to the tribes a judge and a prosecutor. Initially, it also provided a public defender, when they started out, to its member tribes, both at the trial and appellate court levels. But in 1983 the public defender portion was deleted because of lack of funds. We went from a $350,000 a year budget to a $264,000 budget, so something had to go.

All our—in the trial level we do provide judge trials as well as jury trials. We have always allowed attorneys to represent parties in the proceedings, both criminal and civil. All the proceedings are tape recorded, and if there's an appeal, then those tapes are transcribed for the appellate court. The appellate court is comprised of contract judges with the system, and each appellate panel is a three-judge panel.

The courts are all courts of record, and most appeals are done on the record. There are a couple of tribes also have the alternative as *de novo* for appellate proceedings. The judge who sits on the trial court does not sit on the appellate court panel. Currently there are seven judges on contract with the system. And three are attorneys and three are nonattorneys who are sitting judges at other tribal courts.

The judge or judges for NICS are selected through an interview process by members of the governing board, and they select the judge for that—in other words, the position I'm in. It's not just one tribe who selects the judge. Once the selection is made, then it's up to each council to appoint the judge to be a judge in their court, as well as the other judges.

I think this in itself helps towards the concept of an independent court, although none of the members in our system are basically—the term, "separation of powers." But because of the selection process, there's more independence, in fact, in the court systems that they sit at.

As far as training, the judges are allowed training, and as I have been, to attend the National Judicial College 4 years in a row for two or three sessions each, as well as the National Indian Judges Association and National Indian Justice Center trainings.

Basically, as to some of the questions regarding—that were sent out, which I got later, after—somewhat after the D.C. hearings, the questionnaire that you sent out, we do provide a lot of those, as stated, jury trials. We have appeals. Those things are in place, and they have been since the inception of this system.

I have one question before I—and it's good from what comments you made, Commissioner, this morning, that you're here to see what positive results we can have by information. But also I'm concerned with the letter dated February 6 to the executive director of the National Congress of American Indians, where Commissioner Allen is basically stating in the 3- or 4-page letter his movement, basically, to outright repeal ICRA and put Indian tribes in the mainstream of America, without basically to leave them as tribal entities as they are now known. And so I have a little question if, from what you said in the letter that I have here from Commissioner Allen.

Thank you.

CHAIRMAN PENDLETON. Just to respond: Commissioner Allen's letter is Commissioner Allen's letter to Ms. Harjo, after she encouraged him to read material about her tribe. That material is somewhat outside of the

bounds of where we are. He was just responding to her, and not to the Indian tribes as a whole.

I would suggest that if you have questions of Commissioner Allen, you write him. We'd be glad to give you his address and—

JUDGE COOCHISE. Right. I testified before your Committee in D.C., and that's still the implication that I got from Mr. Allen, to do away with tribes per se and put them in mainstream America. That's reiterated in the letter that he wrote to Ms. Harjo. And like I'm saying about what you stated this morning, if that is the case and that's what your probe is about, you know, it's good. But if he is one of the members, and that's his inclination, then our concern is that this is a way to downgrade or do away with tribes—then it becomes a big concern.

CHAIRMAN PENDLETON. Well, I've heard you use this tack—I heard it before in Washington, and I understand why you use it. I will only say to you that you have to ask Commissioner Allen about that. If you want to paint the others of us with Commissioner Allen's brush, that's up to you. But I respect anybody's right to say what he or she would like to say about an issue.

JUDGE COOCHISE. Right.

CHAIRMAN PENDLETON. To imply to the people here and to, I guess, infer to the people here that that is where we are going, that's not where we're going at all. We've drawn no conclusions. And so I would, in a sense, just reject out of hand that that's where we're going. We don't know where we're going until we get there. And what we have now is a developing road map. And that's the best way I can respond.

JUDGE COOCHISE. That's fine.

CHAIRMAN PENDLETON. I've found it a fascinating approach. I'm not saying that I agree with it or disagree with it. But I think if you relate Commissioner Allen's letter back to some of the testimony we heard in the previous panel, and to me—I asked the question: "All right, should we repeal the ICRA?" And maybe that's something that we need to hear something about later on. I don't know. It's a legitimate question to ask in a forum like this. If that's not the case, then people can so respond.

Our next—I lost my witness list. Oh, here it is. I figured you would also—I'm reminded if you would refer to my own opening statement, it's quite different from what you have in Commissioner Allen's letter.

JUDGE COOCHISE. Right. And that's what I said—what you've stated this morning, if that's the way it's going, I think that's good. But then, to get something like this later on, that's the question.

CHAIRMAN PENDLETON. Remember, my statement came today.

JUDGE COOCHISE. Right.

CHAIRMAN PENDLETON. That one came some time ago. And Commissioner Allen shared that with the subcommittee, the staff, and whomever else it was to go to. I must say that my colleague is quite prolific. He is

quite a constitutional scholar, and is reflecting his own interests and his own training and his own expertise as a constitutional scholar. I have no problem with him sharing that with the public. It would have been a little different if he had kept that to himself, and maybe used at some other point, and you'd have said, "I wonder why." But at least he came out with it now.

Judge Hawk.

TESTIMONY OF CECILIA HAWK, ASSOCIATE JUDGE, SUQUAMISH TRIBAL COURT

JUDGE HAWK. My name is Cecilia Hawk. I've been the—

CHAIRMAN PENDLETON. Could you pull the microphone a little closer to you, please. Thank you.

JUDGE HAWK. I am the associate judge in the Suquamish Tribal Court, Suquamish, Washington.

We were elected by the general membership of our tribe in April of 1973. We hear all types of cases, from children's, family court, criminal cases, civil cases. We both work—the chief judge and I both work part time. We are a very small tribe. We have only a part-time clerk now, and we are situated in the same building as the police department. The tribal council is housed about 3 miles away from us in chambers at the tribal business center.

We were both working in 1973 full-time jobs. She worked for the United States Government and I worked for the State of Washington. And so we hear cases in the evening.

Our jury trials are always on Saturday. Most of the people in our area work, and it's easier to get a jury together on Saturdays.

Some of my training has been with the National American Indian Court Judges Association and the National Judges Association of Non-Lawyers, the Association of Women Judges in the 13th Region, especially, and the National Judicial College at Reno. I have about 350 credit hours there.

There was some talk earlier today about the money for jury trials. We never run into that problem, even though we are a small tribe. Very often we—both of the judges work for no pay, because there's not enough money in the budget. However, we've never had a problem with getting a jury, because we can just send the billing to the tribal office, and they take care of it.

I'm not too sure what else I need to say, but I can answer any questions you have.

CHAIRMAN PENDLETON. Thank you.

Identify yourself, please, judge. I'm sorry that I've forgotten. I've been doing a whole bunch of things at one time here, and I apologize.

TESTIMONY OF FRANCIS ROSANDER, ASSOCIATE JUDGE, QUINAULT TRIBAL COURT

JUDGE ROSANDER. My name is Francis Rosander. I'm currently an associate judge in the Quinault Tribal Court.

I think our chief judge, Edythe Chenois, explained how our court works earlier, and I think the only thing in that respect that I—I don't recall whether she explained the appeals process, but the court does have an appeals process where a case can go on to be heard by the appeals court.

I've worked in the tribal court on several different occasions. And prior to that I was a member of the business council and involved in fishing committees where we were responsible more for the legislative part of our tribal government.

And of course, after going to work in the court, I've never had any experience with any interference from council people. I've never experienced that. I don't—I can't say that maybe some time in the future that maybe something might come up that—about civil—Indian Civil Rights Act.

But when we—I've experienced working in the tribe back since the termination period in the fifties, and I can recall when our courts were—and our enforcement on the reservation was threatened to a great degree by the Termination Act. And it took many years to rebuild the court to what it is today. I've seen a lot of progress, and especially in the last—through the sixties and seventies. It was a Code of Federal Regulation court to begin with, and the tribe in the seventies adopted a tribal code that took into consideration the Indian Civil Rights Act of 1968 and protected people's rights.

I think most of the people that I've worked with on the business committee in prior years—our council is pretty stable, and most of the people are real concerned about people's rights. I don't—I think there's a balance there in our tribe. And unless it changes a lot, I think that's going to continue.

But it kind of scares me a little, you know, to some degree, to hear about possibilities of just doing away with the tribal courts, especially after the progress that's been made and all the work that's gone into bringing them up to the condition that they're in today, where they're much better than they were a few years back.

Let's see; I can't really think of anything else that I might say, but I'd be glad to answer any questions.

CHAIRMAN PENDLETON. Just let me say that I don't think anybody here said, "Get rid of tribal court."

JUDGE ROSANDER. Yes. I haven't heard that.

CHAIRMAN PENDLETON. But you said that earlier. What we talked about was whether it needs to be repealed, the ICRA.

JUDGE ROSANDER. Well, I've heard that. I thought I heard—I thought someone might have implied that that may be a solution. And—

CHAIRMAN PENDLETON. Let me just disabuse you of the fact, that that is not what we're talking about. That is not what we said. You may think it is, and govern yourself accordingly, but that's not on our mind at all. I mean, how could we get rid of tribal court?

JUDGE ROSANDER. Well, I hope not.

CHAIRMAN PENDLETON. Amazing. I know you're not convinced about that, but I understand.

Mr. Rowe? Mr. Rowe, are you a judge? I'm sorry, you didn't have "Judge"—are you Judge John Rowe?

JUDGE ROWE. Not since December 15.

CHAIRMAN PENDLETON. Not since December. All right.

JUDGE ROWE. I'll explain it, I guess.

TESTIMONY OF JOHN ROWE, FORMER CHIEF JUDGE, CONFEDERATED TRIBES OF SILETZ INDIANS

JUDGE ROWE. My name is John Rowe. I graduated from Northwestern College of Law. I'm a member of the Oregon State bar.

Maybe to give you a little bit of an idea of where I'm coming from—I've been a member of the NAACP since 1954. I served on the executive board of the Vancouver chapter of the NAACP. I was a member and worked with the National Association of Human Rights Workers of America. I was a member and worked with the National Association of Intergroup Relations Officials. I was a director of police-community relations with the Portland Police Bureau, where I worked for 25 years. During that time I worked closely with the Portland Metropolitan Human Relations Commission and the National Conference of Christians and Jews, who sent me back to Athens and Atlanta, Georgia. This was during 1969 and '70. I also served in Justice Court and Municipal Court of Richfield, Washington, in 1969 and 1970. Some of these careers overlapped. In fact, at one time I was the JP in Richfield, I was a police officer in the City of Portland, had a small law practice, limiting my practice to probate in Multnomah County.

I'm a Siletz tribal member. In 19—well, first of all, in 1954 my tribe, the Confederated Tribes of Siletz Indians of Oregon, was terminated. In 1977 on November 18 we were restored, and the act or legislation of restoration, in fact, made us like a P.L. 280 tribe, in that the State of Oregon had both civil and criminal jurisdiction over our tribe and the reservation we later acquired in 1980.

We received some extensive training by our tribal attorney, Leroy Wilder, and there were 26 tribal members who completed the training. At the end of that time, we were all certified as judges. The tribal council asked for the names of those that would be interested in serving as chief

judge, and I was one of those, and was selected amongst those to be the chief judge of the tribe.

I served in that capacity until December 15 of 1987, when I either retired or resigned of my own volition, rather reluctantly, because of my health.

Our tribal constitution provides for separation of powers. And since I may misquote myself, I did write down—or, I can quote, I believe, pretty close to verbatim, the other things our tribal constitution says.

Our constitution says our tribal government shall not inhibit any person's right to enjoy freedom of worship, conscience, speech, press, assembly, and other rights enumerated by Federal law.

The tribal constitution also sets forth the responsibilities of the tribal court, and that is to exercise all judicial authority of the government, including but not limited to power of review, and overturning tribal legislative and executive actions for violation of the tribal constitution or of the Federal Indian Civil Rights Act of 1968, as well as to perform all other judicial and court functions. And during the time that I served as chief judge of our tribal court, we did overturn the tribal council and their legislative and executive acts upon occasion.

And I'd be glad to answer any of your questions.

CHAIRMAN PENDLETON. Thank you.

Just let me try to add something for the record here and for the public. At our last hearing involving the BIA, Jane Smith from the National American Indian Court Clerks Association, said to us that her number one concern was that, "I think the Commission should have, first of all, asked 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"—and I quote—"'This is what we're going to do for you, and this is what you're going to have to do.' They really haven't asked us. I don't want to alienate you, but I feel that's what's going on here."

Commissioner Allen, of whom Judge Coochise has spoken, added these words. I think they're important to add to the record here. I made some comments, indicating we were not trying to tell people what to do. These are Commissioner Allen's comments that I think may be applicable at this point:

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 which have played an instrumental role in generating this series of hearings. But our much more serious mandate—or, the much more serious mandate imposed upon us by Congress is to monitor the 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 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 individual Indians. We have sought them out. I wish we could go everywhere, but of course we can't. But our individual interest in this matter is most certainly with the question of what persons who live on reservations think about their own experience. And as the scholars just before you conceded in their exchange, they are not going to establish this for this Commission, whether violations of civil rights, or successes in the guarantee 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.

And I happen to concur with my colleague's observations, but in many ways I need to say that I thought, when we came here today, we would be able to hear—Judge Coochise, at your direction—be able to hear from some individual Indians.

We have heard from all tribal court judges. That is important to do. I can only hope that before today is out we can hear from some individual members of the reservation, how they feel about their civil rights, how they feel about the ICRA, similar to the way we heard open testimony in Flagstaff, and similar to the way we had open testimony in Rapid City.

And I do need to say to you that that is an important part of the testimony. It is not just a discussion about the law and the public policy. It is a discussion about how people feel as individuals about their civil rights and the enforcement of the ICRA on the reservation. I say that to you in a spirit of cooperation and in a positive sense. We need to have that kind of testimony, and if you can get it for us, either now or later, we'd certainly appreciate having it. I'm now turning the microphone over to counsel.

JUDGE COOCHISE. Commissioner, I have a—you had asked earlier in the panel about information regarding dispute resolutions. We have five tribes in our system who use the community boards concept, the local panels, both mediation and arbitration system. And we have that information available. We can supply you with—

CHAIRMAN PENDLETON. We'd love to have it. That's a great way to go.

JUDGE COOCHISE. —worksheets and the training material that implements this program.

CHAIRMAN PENDLETON. I was going to ask about that later, but now that you've come forward with it, that's fine. We'd like to have it. I might have some questions about that later.

JUDGE COOCHISE. All right.

CHAIRMAN PENDLETON. Questions, counsel?

MS. MUSKETT. Judge Coochise, you're the chief judge of the Upper Skagit Tribe, aren't you?

JUDGE COOCHISE. Right.

MS. MUSKETT. In their response to our questions, they had indicated a need for legal counsel for the indigent.

JUDGE COOCHISE. Right.

MS. MUSKETT. And I understand from your testimony here today that the Northwest Intertribal Court System used to have a circuit-riding public defender. Is that right?

JUDGE COOCHISE. Right.

MS. MUSKETT. Now, did he travel around to all 14 member tribes?

JUDGE COOCHISE. Yes. At that time there was 15 members for a while, and then 2 dropped out, so it went to 13. Then the other one came back into the system.

The system originally was set up to get the—each tribal court started, and then at some point they were to take over on their own. But with the depletion in funds, that's down the road a bit. But yes, that was also the case with the public defender's office. They did travel, the same as—in the same circuit type system as the judge and the prosecutor.

MS. MUSKETT. How did he arrange his schedule? Did he go to a tribe as needed, or did he have a formal schedule?

JUDGE COOCHISE. Repeat the question.

MS. MUSKETT. Well, I guess I want to get an idea. Did he go to, say, the Upper Skagit Tribe every 2 weeks or something like that? Was there a certain date set for when he would be arriving for the court date?

JUDGE COOCHISE. Right. He went, and at the request of members from the particular tribe, if they were cited into court, then they could contact his office. The office was down in Tacoma—well, in Seattle, and our office, the main office, was in La Conner, Washington, at the time.

MS. MUSKETT. How is the Northwest Intertribal Court System funded?

JUDGE COOCHISE. It's funded through the Bureau of Indian Affairs for the prosecutor and the judge component. The code-writing services is funded through the American Administration for Native Americans grant. And the community boards program is funded through three private foundations. So it's several funding sources for the whole system.

MS. MUSKETT. And the member tribes don't fund it in any way?

JUDGE COOCHISE. No.

MS. MUSKETT. What is the criminal caseload for the Upper Skagit Tribe, on an average basis per year?

JUDGE COOCHISE. I don't recall particularly with the tribe—I know you run 13, 14 cases a month at Upper Skagit.

MS. MUSKETT. Criminal cases?

JUDGE COOCHISE. Yes. There's very little civil, per se, at Upper Skagit, other than the children's cases, the child welfare type of cases. But most of it's fishing-related cases.

MS. MUSKETT. Does Legal Services Corporation ever represent any civil or criminal parties?

JUDGE COOCHISE. Does the what?

Ms. MUSKETT. Legal Services—do they ever represent any civil or criminal—

JUDGE COOCHISE. Not individuals, that I'm aware of. The only legal service I know of that represents tribes is the Evergreen Legal Services in Seattle. But they don't represent individual Indians per se in the criminal action.

MR. MILLER. Judge Coochise, at our last hearing you began to talk about the types of influence that tribal councils sometimes exert over you. Could you elaborate on that more now?

JUDGE COOCHISE. Well, I think one of the ones that I referred to back then was when I was sitting the first year in court, the Hopi Tribe, when we arrested—when they arrested, the police arrested the tribal secretary. I got calls from several councilpeople. And in short, about a year after that we went to the tribal council and said, "Hey, you either got to cut that out and give us our due as an independent entity, or you can take it back and do your own judgments." That was both the chief judge and I. From that, both the chief judge and I got lifetime appointments, so that we eliminate that sort of problem.

But here in the system it's less than that, because you have—there's no one tribe where you're at, other than you need to go into the system, to the court, and then you're back out. So in this particular case it's less of an influence, if anything, that would be there.

MR. MILLER. Because of the length—I'm a little unclear. What are the lengths—

JUDGE COOCHISE. Well, because the way the selection process—selection is by the governing board. And no one tribe can basically, you know, give you that much influence, because you've got all those other tribes who are also part of your circuit.

MR. MILLER. I see. How is that court funded?

JUDGE COOCHISE. I just answered. It's funded through the Bureau of Indian Affairs—

MR. MILLER. Okay.

JUDGE COOCHISE. —on a 638 contract.

MR. MILLER. And that's the total funding?

JUDGE COOCHISE. For the court and for the prosecutor, the judge and the prosecutor.

Now, each individual tribe provides their own court clerk, whether it's on the half-time or full-time basis. That's part of the agreement when they set up this, that they would provide their own location and the clerk to do those functions.

MR. MILLER. And the 638 contract money covers the travel?

JUDGE COOCHISE. Right, both for the judge and the prosecutor.

MR. MILLER. What's your term, again?

JUDGE COOCHISE. The terms are different. They're from 1 year to 4 years, depending on which tribe it is. One of the small tribes, the term is year to year, and so every year they have to do resolutions. Others are 2 years; others are 4 years. So it's a constant updating of the terms at that tribe.

CHAIRMAN PENDLETON. Judge Coochise, when you were able to spend time with us in Washington, I think it was inopportune that we had to abbreviate our session. I feel as though you kind of woke us up, and you gave rise to some questions in me. I need to try to reframe those now. Whether I can do them with the same acumen I had before—but let me ask you this:

You say you have a lifetime appointment.

JUDGE COOCHISE. Well, I did at Hopi.

CHAIRMAN PENDLETON. Hopi?

JUDGE COOCHISE. Yes.

CHAIRMAN PENDLETON. Now, everything seems to be okay between tribal councils and tribal courts in the Northwest. Everything is not okay, apparently, between tribal courts and tribal councils in Rapid City and in—we've referred to Flagstaff.

Why is it such harmony between the councils and the courts in the Northwest region? You have been able to put before us people today that only discussed harmony. And I'm trying to find out if there's—why there may be this distinction between the Northwest region and what happens elsewhere because we heard some pretty interesting testimony other places.

JUDGE COOCHISE. I think one of the reasons is because a lot of these tribes in the Northwest are small, that in order to reach the end result they have to cooperate. And I'm not saying it's all roses out there either. We have our problems, and we're not saying we don't have any problems. But we're more apt to sit down and work it out. And for what I've seen in the Northwest is that, because there's less money and they're so small, that they have to be more compromising, I guess, with one another to make the thing work.

CHAIRMAN PENDLETON. Are you saying to us that perhaps the size of the reservation or the nation dictates the cooperation or lack of cooperation between tribal council and tribal court? And let me be even more specific. I don't know how big some of the reservations are, nations are in Rapid City. I've forgotten that.

But there's such an ironclad way the tribal councils apparently handle the legal affairs and other affairs of the reservation—to wit, the exchange between Mr. Guerue and Ms. Miller and Garreau, and Trudell Guerue's testimony in Rapid City, and my discussion with Morgan Garreau. And all three of those persons said to us that there's absolutely no way that these tribes are going to waive sovereign immunity, and we will probably

continue to hear the horror stories, that if the tribal courts render an opinion or make a decision that's adverse to where the tribal council is, that judges are going to be turned out, courts are going to be turned out, the whole system's going to be cleaned out, and they're going to put into place people that will do their bidding.

What we're hearing today, for the most part, is that that does not happen in the Northwest. And are we to take that away from here as being fact, and [be] able to make two distinctive assessments, or three assessments?

The testimony at Flagstaff was certainly not complimentary of Mr. MacDonald and the Navajo. And I think Mr. MacDonald did not help his case with his resolution and his subsequent letter to me. I don't know whether you got my answer to Mr. MacDonald or not, but I guess we were playing nasty with one another, or something. But I did answer his letter.

I guess what I'm asking you is, is all this harmony for real, or is something else behind this?

JUDGE COOCHISE. Well, I think it's there. And if you—the judges who've testified, a lot of them have been there 15 years, 14 years. That's what we started doing after our last hearing, trying to get how many—our tenure of judges. And there seems to be less turnover in this Northwest area on judges.

And like I said, I don't really know what the answer is, but there are problems. We're not saying there isn't. But I think most of the tribes in this area are trying to work, compromising with the councils. And I think we have that with several of the Chairmen who are here.

CHAIRMAN PENDLETON. What do you mean by "compromising with the councils"?

JUDGE COOCHISE. Well, working the problems out. If there's a problem, I think they're able to sit down.

CHAIRMAN PENDLETON. Okay.

JUDGE COOCHISE. Because I know with our system, several are—in fact, our chairman of the board here, who's a councilman, Chairman at his tribe—you know, if we're having problems with part of the system, we sit down. We can talk about it and try to reach a solution. And I think that may have, like I said, an impact on it. But a lot of judges in the Northwest, when I came here, have been here and are still here.

CHAIRMAN PENDLETON. I'm not doubting you. I'm just trying—I hope you understand what I'm saying.

JUDGE COOCHISE. Well, I understand.

CHAIRMAN PENDLETON. I'm trying to get you to amplify what it is you're saying about this harmony. Because there's so much on the other side. And people are talking about a balance and positive record. If it is there, then we need you to say that. I mean, I'm not being judgmental at all.

JUDGE COOCHISE. No, I understand that.

CHAIRMAN PENDLETON. Okay.

JUDGE COOCHISE. And I've been here in the system—there's only been two chief judges since they implemented the system in 1979. And the other left because of personal—wanted to practice law.

CHAIRMAN PENDLETON. Okay.

Yes, Judge Hawk?

JUDGE HAWK. Yes. What you asked Judge Coochise—I've been in the system since our doors opened in 1973. We were elected by the tribal members. And it's for an indefinite period of time, but not less than 6 years. And we did this because of the things that we had heard while we were trying to write our tribal codes. While we were trying to set up the court system, and so that it would give us time to get the training we needed, and also—so the council has a turnover every 3 years. And they have a lot of conflict. We thought if we had enough training, they could go to training with us, they would see what needed to happen in the courts, and we couldn't destroy our tribe by gaining that training together.

I think that there is a lot of that in the Northwest because our tribes are small. Our membership is less than 1,000; there's about 400 of us that live on the reservation. It's a checkerboard reservation where all of the streets are county. We have all jurisdictions there, the State and the county and the tribal. And even though we argue a lot with the other jurisdictions—and there's no love lost in our county with the other jurisdictions—but we do have a good rapport with the judges in our county, and we do continuing education with the State superior court judges here.

And so I think it all helps when you work together to build the system and then maintain it. I think that's what the Northwest judges and the councils have done.

CHAIRMAN PENDLETON. Would you—I'm sorry, Judge Coochise. Go ahead.

JUDGE COOCHISE. Another thing is, maybe it's that there's always—because at trial level we do maybe make errors in our ruling, or whatever. But there's always that process of appeal. It's always been here, at least when I came into the system, not only in the system I'm working, but in other tribes where they bring judges from other areas to sit on the appeal and look over the work of a trial judge. And so that may be part of the reason for the tenure of judges too.

CHAIRMAN PENDLETON. You're also saying to us, in light of Mr. Hutchinson's comments this morning, that you're really trying to make this thing work. You might not like it, you might like some parts of it, but you're really trying to make this thing work and, therefore, the kind of cooperation you have between council and tribal courts is an indication of that effort.

JUDGE COOCHISE. I think so. Because if you're asking me personally, yes.

There's one part of the ICRA I have never liked since I've come on the court, and that is where an individual has to be—can be represented, but at his own expense. I've never cared for that provision, but it's law, and we try to work with it.

JUDGE HAWK. We do have it in our code, though, that if that person has the possibility of going to jail, or an excessive fine, that—and can't afford an attorney, then the judge refers it to the lawyers or whoever in our court that can represent them, and then we just notify the council. And they need to pay that person so they can have representation if there's the possibility of their going to jail.

CHAIRMAN PENDLETON. Counsel?

MR. MILLER. Judge Coochise, do you believe that the enactment of the ICRA waives sovereign immunity on behalf of tribes?

JUDGE COOCHISE. Do I think the act waives that sovereign immunity?

MR. MILLER. Yes.

JUDGE COOCHISE. No, I don't think so.

MR. MILLER. You don't. Okay.

JUDGE COOCHISE. Not necessarily. I think—

COMMISSIONER DESTRO. Could I interject—

JUDGE COOCHISE. —it's something we need to look at and give the tribes the opportunity, like any other government, to either say, "Yes, we waive that," or, "No, we don't."

COMMISSIONER DESTRO. Judge Coochise, let me just ask you along those lines, though, that—do you agree with what the witnesses said earlier, that if the—let's assume that the ICRA were not interpreted to include money damages, if you were just to take the whole money damage issue out of it, and be talking purely about equitable relief, cease and desist orders, mandamus orders, would there be the same resistance—or the same use of sovereign immunity to avoid ICRA claim?

JUDGE COOCHISE. I don't really know. I don't feel it's going to make that much difference.

COMMISSIONER DESTRO. So the real question is whether or not the tribal councils are bound by the IRA, isn't it—the ICRA, right?

JUDGE COOCHISE. Right.

COMMISSIONER DESTRO. Really, isn't that what we are talking about, not a question of whether or not—because as soon as you've raised the question of immunity, then essentially what you're saying is, "We're not bound by it."

JUDGE COOCHISE. Yes.

COMMISSIONER DESTRO. Okay. So that the councils are only bound to the extent that they adopt it in their own tribal codes or constitutions.

JUDGE COOCHISE. Yes. I think, at least what I've seen in the Northwest judges who've been sitting on those types of cases, it's still up to them to rule on whether that can be raised or not, or allowed. And I haven't seen anybody, like I said, fired over ruling against a tribe in that area.

COMMISSIONER DESTRO. I'm just asking the question—

JUDGE COOCHISE. Right.

COMMISSIONER DESTRO. —of what your perception of it is. Other witnesses may want to comment on that.

CHAIRMAN PENDLETON. Mr. Rowe—I think I saw him shake his head. Maybe that wasn't an answer.

JUDGE ROWE. Sovereign immunity has never been a problem for the Siletz Tribal Court. And when the tribal court has reviewed council action, overruled their action, and awarded money damages to a petitioner, the tribal council has paid it without a whimper. When we've overruled their action on other reviews, they've gone along with it. Never a word was heard from a council member.

My only objection I even had with our tribal council and the court was that we only have a part-time clerk. And as chief judge, I was there part time, and the judges that sat on our panels in five- or three-judge panels, depending on the time frame, was the only time they were present, except for training. And a petition would come, and maybe there would be nobody in the court office. They'd leave a message with the receptionist in the building the court was located in. And then the tribal council or the council staff would get wind of this complaint, and before the petitioner would come back to file a petition, they'd corrected it. And so if there had been some of these other violations of their rights under the ICRA—and most of them seem to pertain to employment by employees, both Indian and non-Indian—if it didn't get before the court and the court didn't resolve it, then the council by its own action, or the executive staff of the council, resolved it before we ever got there to take the petition. And we had small caseloads. So I sort of objected to that because we'd like to have seen some more business. Because if they resolve it before it ever came to us, why—

COMMISSIONER DESTRO. Well, I mean, that's—

JUDGE ROWE. I suppose I can't complain, but—

COMMISSIONER DESTRO. Well, no, I think you raise a very important point, and that is that just because the tribe raises—may raise—I mean, in your case they did not, but even in the cases in which they did, just because you raise the question of sovereign immunity doesn't mean that the tribal council is trying to do something unjust or inconsistent with people's rights. I think that's an assertion of a defense that they feel that they have. If they resolve it in advance, or even during the course of the trial, that speaks to their good faith, not to their bad faith. So I don't want the implication on the record that merely because they raise the issue, that

they're doing something wrong. I don't think they are. It's just a question of how do they perceive the ICRA. Do they perceive it as something that applies to them by its own force, or do they see it as something that they need consent to before it can be applied to them?

JUDGE ROWE. I think that in our case, that our council believes that it applies to them, and they would do everything to conform with it when it's brought to their attention, and to change the way that they conduct their business, if it's not in compliance with the ICRA.

CHAIRMAN PENDLETON. Judge Coochise, I'm sorry; did you want to make a comment about that?

JUDGE COOCHISE. No, that was a good answer. I think most of our tribes, through their prosecutors, through their prosecutor, believe that ICRA does apply to their tribes.

COMMISSIONER DESTRO. That was—

CHAIRMAN PENDLETON. Does not apply to their tribes?

JUDGE COOCHISE. It does.

COMMISSIONER DESTRO. It does.

CHAIRMAN PENDLETON. It does. Okay. If that's the case—if that's the case, Judge Coochise, my next question comes from Assistant Attorney General John Bolton's letter to Mr. Inouye of January this year, with respect to S.1703.

He is proposing in here that, as tribes begin to receive 638 monies, that they should be like other State and local government entities and sign an assurance that they will carry out all the provisions of the ICRA, before they receive the cash. How do you four feel about that?

JUDGE COOCHISE. Well, since I work with the contracts a lot, the forest system, I really don't see any—if that's a part of the Federal mandates—I mean, they in essence do, although it may not be specific spelled out to receive that contract. You have to comply with the Federal regulations.

CHAIRMAN PENDLETON. Now you don't, though.

JUDGE COOCHISE. But it's basically implied. And I have no problem with—

MR. MILLER. You mean by the requirement that they comply with Federal law?

JUDGE COOCHISE. Yes.

MR. MILLER. But you said a minute ago that, at least for yourself, you didn't believe that the ICRA applied.

JUDGE COOCHISE. No, in contract. It's basically—it's going to be a tort action, a contract case.

CHAIRMAN PENDLETON. Let me give you the language specifically. It says in this proposal to add section 112 to the act, the Indian Self-Determination and Education Assistance Act: "Any program or activity receiving Federal financial assistance from the Secretary of 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."

In other words, what's being said here is that you cannot spend one dime of that money unless you comply with the ICRA.

How do you feel about that?

JUDGE COOCHISE. Well, as I stated earlier, I think that most of the tribes in our system accept that they're under those bounds. So—

CHAIRMAN PENDLETON. That's not what I'm asking. I mean, I'm asking another question.

COMMISSIONER DESTRO. You're talking about other kinds of Federal oversight.

CHAIRMAN PENDLETON. Other kinds of—there's all kinds of oversight. State and local governments have to do this. Why shouldn't the tribes have to do this if they receive the same Federal money?

JUDGE COOCHISE. I know under A&A grants we have to sign that—

CHAIRMAN PENDLETON. The waiver?

JUDGE COOCHISE. The compliance, yes, that assurance. It's assurance to get those grants.

COMMISSIONER DESTRO. But one of the questions is that wouldn't this particular provision of the law potentially expose the tribe to Federal court review, in any event? That's—this may well be a back door around *Martinez.*

JUDGE COOCHISE. Oh, I see what you're saying.

COMMISSIONER DESTRO. That as soon as you sign it away, you have implicitly signed away *Martinez.*

CHAIRMAN PENDLETON. It says here in section B of this Justice Department proposal: "Federal district courts shall have jurisdiction of civil actions alleging the failure of programs and activities, or activities funded by this Act to comply with Section 202 of Title 2 of the Civil Rights Act of 1968." That's one. And what they're saying here is that: "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 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."

How do you feel about that?

JUDGE ROWE. I know how I feel.

CHAIRMAN PENDLETON. How do you feel?

JUDGE ROWE. I feel like our tribe is already adhering to the guidelines of the ICRA. If it ain't broke, don't fix it.

CHAIRMAN PENDLETON. My question is, how do you feel about the legislation, if it happened to pass?

JUDGE ROWE. I don't feel that we need any additional legislation.

CHAIRMAN PENDLETON. If the State and Federal Government have to do it, and you say you should be the same as they are, have a chance to work it out, why shouldn't this apply to you?

JUDGE ROWE. Slow down a little bit.

CHAIRMAN PENDLETON. If State and local governments have to sign the same assurances, why shouldn't Indian tribes sign the same assurance?

JUDGE ROWE. We've been dealing with it, and dealing with it as far as my tribe is concerned. I don't think we need any additional burdens—

CHAIRMAN PENDLETON. Okay.

JUDGE ROWE. —on our people.

CHAIRMAN PENDLETON. Okay.

JUDGE ROWE. You know, I'm happy the way it is.

CHAIRMAN PENDLETON. I just wanted you to know, this is exactly what has happened in the *Grove City* case. It's exactly the same thing. And I think it's going to apply to everybody across the country. You might want to give some consideration to that.

I'm trying to inform you; I'm not trying to give you some law. But it's here. This is a proposal. Now, whether or not Senator Inouye's committee does anything with it or not, I don't know.

JUDGE ROWE. Of course, like I told you, I'm retired now, so I'm one of these individual Indians. Although I don't live on the reservation, because our tribe is sort of unique, in that nobody at this time lives on the reservation that I know of. But we have an 11-county service area.

MR. MILLER. Just a brief question, Judge Rowe. For the record, can you state whether your tribe is part of another confederated tribe, or what reservation is your tribe on?

JUDGE ROWE. The Confederated Tribes of Siletz Indians of Oregon. I'm descended personally from Klickitat and Chinook Indians.

MR. MILLER. Thank you.

CHAIRMAN PENDLETON. Well, thank you very much, panel. We'll assemble our next panel in about 5 minutes. Our next panel is panel 1 for the afternoon. That's about an hour late, but that's okay.

JUDGE COOCHISE. Commissioner, before we leave, I just want to say thank you for making the time available to come out to the Northwest at our invitation.

CHAIRMAN PENDLETON. At no pay.

JUDGE COOCHISE. Right.

[Recess.]

CHAIRMAN PENDLETON. Is Judge Rousseau available, Judge Chenois, and is Jane Smith here?

Oh, hi; how are you, again?

MS. SMITH. Real fine.

CHAIRMAN PENDLETON. Thank you.

[Edythe Chenois, Lorraine Rousseau, Carey Vicenti, and Jane Smith were sworn.]

CHAIRMAN PENDLETON. Thank you. Please be seated. We'll take some remarks from everyone but Judge Chenois; we've heard from you this morning. You can give us a summary of what it is you want to say. We may have some questions.

Gentlemen first this time.

JUDGE VICENTI. I appreciate that.

TESTIMONY OF CAREY VICENTI, CHIEF JUDGE, JICARILLA APACHE TRIBAL COURT

JUDGE VICENTI. My name is Carey Vicenti. I'm chief judge of the Jicarilla Apache Tribe, graduate of the UNM School of Law, just recently admitted to the bar of New Mexico.

I am not the representative per se of New Mexico judges. There is no organization in New Mexico, but I can say that we meet regularly. We talk about a lot of issues that are of concern to all of us, including these hearings, including relations between the tribes and the States.

I think you can realize from this, I come to you in part as a trustee, trying to represent what I perceive to be their problems. And in part, I do represent them, insomuch as we have had discussions about this.

Now, I really have two statements to make.

One is regarding law and policy. Now, you mentioned earlier that you may not want to hear a little bit of that. Obviously, you're going to make recommendations about how the law's going to change.

CHAIRMAN PENDLETON. We want to hear about law and policy.

JUDGE VICENTI. Okay. And I do want to make statements about facts that go on in Indian country, as they affect the law that has been imposed upon them in 1968.

First of all, I've had this discussion before with Mr. Miller there. He was very cordial to give me some time on this. But I think one of the problems that we run into in the ICRA is that, as was mentioned by Mr. Hutchinson earlier, we have not had the benefit of 200 years of creating a jurisprudence regarding rights. And we're not likely, because of our very independent natures, to just simply wholeheartedly adopt what America has done in the implementation of their Bill of Rights.

There are also—there are also problems with regard to the fact that the rights were imposed upon us. And they relate more to—as you were talking about earlier, traditional practices.

I've found, as I got on the bench, that it was very difficult for me to decide in the context of the tribal court, with the various dynamics that went on around the tribal court system—I found it difficult to figure out just to what extent do I enforce these various laws.

I found also that a lot of people just really didn't see these laws as being of much value to them. And I think my urge to you is, as you go back with your report to Congress, would be that you might have to reconsider whether ICRA was prudent in its being accepted and imposed upon Indian country. I think that should be within the realm of possibilities.

I'll also just qualify that a bit. I think that—I think the real problem with the ICRA is that it was imposed from without. And I trust that virtually through every tribe in the United States, that they would have ultimately come up with their own Bill of Rights, and they probably would have reflected a lot of these things like due process, equal protection, the rights to jury, and so forth. And I suspect that if you decided to repeal ICRA because it was imprudent at the time, that most likely a lot of tribes would say, "Well, we like the way it works, and we're going to keep it."

I think something you might want to consider in here—the reason the rights might not be such an appropriate mechanism in the administration of tribal government is that tribes do vary in terms of size and in terms of tradition.

A good example of it, a problem with tradition: cruel and unusual punishment is a good example. One of the pueblo tribes down in New Mexico would never impose corporal punishment on a child. But once the person became a man, then if that man were to commit a crime that was described by tribal law as a crime—perhaps not by non-Indian law—but if that person were to commit a crime, then it would be appropriate to flog him in public.

Now, we—Americans get their concept of rights in their tradition, in the English tradition, I guess you might say. When you impose this restriction upon cruel and unusual punishment upon a tribe, and they say, "Well, but it isn't cruel, nor is it unusual; as a matter of fact, it is fully consistent with our expectations." Yet, you take an outsider and put him into the same context, and they say, "I abhor this; this is awful."

Now, the other thing is that—and I think it hasn't been addressed fully here—is that many tribes—and again, we're getting back to dynamics—are so small that if there is perhaps perceived violation of rights, you could go to your 20 or 30 relatives, and petition government, and government will redress them. They'll redress those rights. They don't have to come to court. It is sufficient to petition. It's very efficient to petition in many tribal governments. And because that relationship between the elected officials, the council, is so direct to the people, you can find redress without going to court.

Now, my recommendation, as I said—and I'm really going to have to say this is a personal recommendation—I'd say, repeal the ICRA. I say, as was alluded to earlier—I say, restore substantial jurisdiction to tribes so that tribal councils will dedicate more money to those court systems, realizing how important it is to the maintenance of the tribal sovereignty.

I say that if you're going to start looking at individual tribes for violations, and using this suggested 638 clause—personally, I don't think it's a good idea. But if you're going to start looking at them, it can't be—you can't look at them in the broad sense, 440-odd tribes, and say, "Well, now let's come up with uniform legislation." Uniform legislation will just simply tend to try to homogenize peoples who just cannot be homogenous.

And I think that I would just simply say that I'd recommend a repeal. I think, though, that most tribes would say, "Well, let's keep portions of it on our own initiative."

And I'd say, definitely restore—restore jurisdiction.

Now, I don't want to get too lengthy for you here, but—

CHAIRMAN PENDLETON. Thank you. Is there more you wanted to say?

JUDGE VICENTI. I just wanted a moment further here.

I worry—I think right now that I worry that tribal sovereignty is always such a special issue. And courts are probably at this point in history the primary force to preserve that sovereignty.

The problem though, is that we're really like small towns, every one of us, every one of the small towns. I'm the only person who's admitted to the bar from my tribe. We have two people who are just now getting up to that level. But you see, 9 years ago I was just chopping wood at a buck seventy-five an hour. And I would guess that in some of these tribes there are a couple of woodchoppers out there who really, maybe in 9 years, will be presiding judges and law-trained attorneys.

Now, one thing I caution here, the mention—I mean, maybe we've had 20 years to implement the act. I'm not too sure how you implement it—and I speak, again, as a law-trained individual. Twenty years is never going to be enough. You've got to give us the room. It's got to be 40, 50, 60, 70, 80. We'll make our *Dred Scott* mistakes and we will make our *Plessy* v. *Ferguson* mistakes.

CHAIRMAN PENDLETON. Hopefully, you won't.

JUDGE VICENTI. Hopefully, we won't. But I can't guarantee that. As a matter of fact, the whole jurisprudence of civil rights is based upon mistakes made by judges.

CHAIRMAN PENDLETON. Amen. Thank you. That's a great ending statement.

Judge Rousseau, it's good to welcome you to us again.

TESTIMONY OF LORRAINE ROUSSEAU, PRESIDENT, NORTHERN PLAINS TRIBAL COURT JUDGES ASSOCIATION

JUDGE ROUSSEAU. Thank you, Commissioner. It's a pleasure to be here again addressing the Commissioners.

I don't know how much you recall of what I testified to in Rapid City, South Dakota.

CHAIRMAN PENDLETON. We read it already.

JUDGE ROUSSEAU. Pardon?

CHAIRMAN PENDLETON. We read it again already.

JUDGE ROUSSEAU. You read it already. Okay.

But we do have a separation of powers, and I did bring that as an exhibit for the Commissioners today, the revised constitution and bylaws of the Sisseton-Wahpeton Sioux Tribe. We do have a Bill of Rights in our constitution, article 9, section 1. And the Commissioners can review that as an exhibit.

And the ordinance 1 that governs judicial powers, I brought that as an exhibit.

The Commissioners did want some cases that came out of our Intertribal Court of Appeals—*Sterling Kills Plenty.* And we have a case that came out of the Sisseton-Wahpeton Sioux Tribal Court, *Miller* v. *Adams.* And I'd like to have those entered as exhibits also for your records.

CHAIRMAN PENDLETON. So ordered, without objection.

JUDGE ROUSSEAU. I think Judge Coochise probably touched on why it appears that—it appears that the smaller tribes in the Northwest have a working relationship with their tribal councils. If you look at the tribes from where most of the complaints about the Indian civil rights violations came from, you probably would see that it is the larger tribes in the United States, Cheyenne River, the Rosebud Sioux Tribe. And I don't know, you know, what the Commissioners heard in Flagstaff regarding the Navajo Nation, but these are very, very large tribes. Even our tribe, which is one of the smaller bands of the Sioux Tribes, has 4,000 population on reservation and approximately 4,000 population off reservation. So we have 8,000 tribal-enrolled members.

And I believe when you have to work with tribal councils that number 33, as in Rosebud—and I think Pine Ridge probably has three tribal members—you're getting into a very cumbersome type of legislative body.

And I see the other problem as being the changeover in council members, as being every 2 years. You just get a council educated as to separation of powers—and I have run across this problem myself in my—you know, running my own judicial system there at Sisseton—that every 2 years we're in danger of being restructured, things changing as far as our court system is concerned. And it's basically because of lack of knowledge or information on the part of the new tribal council members who come in towards the tail end—and they're only in there for 2 years. And most of the Sioux Tribes' constitution bylaws require that there be election every 2 years. You just get them educated, and new councilpeople come in. At least half of the tribal council changes. Then you go through the turmoil again and again and again in trying to educate the council, that we do have separation of powers, or that the court should be an independent branch of the government, there should be no council interference. And I think this

is what's happening with the Sioux Nation, is the largeness of their councils.

Now, for our tribe, we have 18 councilpeople, and it is a cumbersome group to work with. But once they get educated, then we have no further problem with the interference.

I also see, with the Sioux Tribes, a withdrawal from the Intertribal Court of Appeals at the time of elections, just prior to elections. Those tribes withdraw from the Intertribal Court of Appeals.

Presently, our Intertribal Court of Appeals has only two tribes, the Sisseton-Wahpeton Sioux Tribe and the three affiliated tribes from North Dakota. And I think that tribe is moving in the direction of separation of powers.

The other thing that I've observed is who's in those leadership positions at any particular time. The other variable, as I see it, is who is in there as the chief judge, and just how strong and aggressive is that chief judge when it comes to telling council members or the executives, the Chairmen of the tribe, that, "I'm sorry, I cannot discuss this with you. You are not a party to the action."

So I think there's a lot of variables to be considered, and when you're looking at violations of the Indian Civil Rights Act.

We have had numerous cases coming into our court involving violations of the Indian Civil Rights Act. But when you look at the merits of the case, 9 out of 10 are unsubstantiated, and they're not really violations. It's the defendant telling their attorney this, this, and this, but then, when the true facts come out, there has been no violation.

There have been some actions on the part of the tribal council or a tribal program manager where someone was terminated from their position, and those kind of cases have come into our court. And I think, as one of the gentlemen mentioned before, there's usually a resolution, though, before it gets to the actual litigation on the merits of the case.

That's about all I have to say at this time, and I'd be happy to answer any questions.

CHAIRMAN PENDLETON. Thank you, judge.

Ms. Smith, it's good to see you again.

TESTIMONY OF JANE SMITH, PRESIDENT, NATIONAL AMERICAN INDIAN COURT CLERKS ASSOCIATION

MS. SMITH. Thank you. I feel like we're kind of beating this whole thing to death, so I won't get into too much of what they've talked about.

For the record, I am Jane Smith, president of the National American Indian Court Clerks Association. And I am talking, I guess, in terms of the national organization, rather than as a court administrator for my tribe, which our associate judge was able to give you a background on that prior.

We do have experiences with—have talked about council interference at our organizations. Most of them have, I would not consider, really interference by council, but more of an uninformed council calling up the tribal courts and asking what is going on in a particular case. And I personally believe that that is a responsibility of the tribal council, that if one of their constituents comes to them and has—maybe doesn't understand just what went on in court or something, that they should be able to go to their councilman and have him explain it more fully. And in order for the councilman to do that, he's got to call up the court. In that type of a respect, I don't consider that interference. And we've had that several times in our court, where a councilman has just called me up to say, "Hey, what went on in this case? Can you explain it to me, so I can explain it to John Doe, who's sitting here in front of me."

We have not experienced interference in the Northwest. And it's my personal feelings that the reason we haven't is, traditionally, we're not warring nations. Your Apaches, in the Plains Indians—I mean, they love going out and just killing people for the fun of it. And I think that traditionally may be—you know, could be attributable to why there are more problems.

CHAIRMAN PENDLETON. I'm glad you said it and I didn't.

[Laughter.]

MS. SMITH. But a small—

CHAIRMAN PENDLETON. That may be defaming against the tribe you mentioned. We'd want to just disabuse them of that.

JUDGE VICENTI. I'd like a rebuttal on that.

MS. SMITH. Right.

But we have to compromise up here in order to get things that we wouldn't be able to if we were a larger tribe. And I'm not going to go back into that.

I would—what I see as things that we could get out of these hearings, possibly to make our lives easier, some of the more pressing issues—I think the big thing is communication. And not just communication between you and us, but communication in the world in general.

Just recently I had applied for a security clearance for the Naval Reserve, and I was interviewed by one of their officers. And he had brought back some myths that had gone out in the 1960s, had asked us questions—he didn't know anything about tribal people. And it just amazed both my boss and myself, some of the questions he was asking—had no idea what was going on in tribal courts. I think, with all the people that I've talked to, the general population, that is something that's still going on. They don't know what we are; they don't know what we're doing; so, therefore, they're afraid of the unknown. And what they see us doing, and don't have the background on why we're doing it, that's why they are kind of in a panic situation, thinking that if they ever have to come

into tribal court, say even in a civil situation, they're not going to be treated equally.

Most people, when we have talked to them and explained how we do things, we usually get the usual reaction, "Well, you operate just like a real court." Well, we are a real court. We have—we make mistakes, like they've said before, like everybody else, but we do do the best we know how.

We do need more training. And as the president of the National Court Clerks Association, we try to have training for those court clerks that can attend at least twice a year. I'll put in a little spiel for that. We are having our next training session in Oklahoma City June 1, 2, and 3. And I would invite the Commission to come and attend that training. And if they would like to ask more questions of the individual clerks, I'd be more than happy—we'll be more than happy to have you there. This training is in conjunction with the Oklahoma State Supreme Court, so they are recognizing that we're an entity out there, that we have training needs. They want to learn from us, and I'm sure we're going to be able to learn a lot from them. And if you'd like to attend, just let me know, or Tom Colosimo, who's back in Washington, D.C. I'm sure you all know him.

We really need to be treated more on a professional basis. And I think that comes along with the unknown too. We try to treat everybody in our sister-brother court system as professionals, and we're not always being afforded the same considerations, because they don't believe we're a true court system.

And I think this Commission could go a long ways into letting the general public know that, from all the testimony that they've heard, that we are a viable entity out there, and we're professional, and we do our jobs. We're not—we don't—or, above not making mistakes, but yes, we are doing something. And you know, we need to be seen in a more positive light. As individuals, I think we all need to be aware that we need to promote ourselves more in those respects.

I think that's probably about all I really had to—or, wanted to say to the Commission, other than the fact that our association is going to be going, on-going—we keep learning from each other every year, and we're going to try to push ahead. And I agree with everybody here that says, you know, we're going to need another 20 or 30 years before we can probably look as professional and be respected out there as everybody else, even though now we may be doing a similar job. It's just that we need the credibility behind us of having 40, 50, 60 years under our belt before people believe we know what we're doing right now is right.

CHAIRMAN PENDLETON. Thank you, Ms. Smith.

Mr. Vicenti, let me just say to you that I kind of like your statement about the history of civil rights is based upon judges' mistakes. Is that what you said? What did you say? Is that it?

JUDGE VICENTI. Something like that.

CHAIRMAN PENDLETON. Something like that; close enough.

JUDGE VICENTI. Yes.

CHAIRMAN PENDLETON. One of the things that interests me is—did you want to say something else, judge?

JUDGE CHENOIS. I think just a short statement from me—

CHAIRMAN PENDLETON. I'm sorry.

JUDGE CHENOIS. —at this point.

TESTIMONY OF EDYTHE CHENOIS, PRESIDENT, NORTHWEST TRIBAL COURT JUDGES ASSOCIATION

JUDGE CHENOIS. The Northwest tribal court judges have all come before the Commission this morning, and I think that they've pretty clearly indicated what their individual tribes and their courts are into.

I heard this morning someone asking—I believe it was Chairman Pendleton—if we were for real, and the relationship we enjoy with our tribal councils. And I think that—

CHAIRMAN PENDLETON. This afternoon I asked that.

JUDGE CHENOIS. I knew it was today. And I think that it's clear to the Northwest tribal court judges that, yes, we are for real, and we do enjoy that sort of decent relationship between the courts and the tribal councils.

The organizations that we are involved with in the Northwest—we have been invited to attend the State court judges' trainings in both Oregon and Washington. Both those States have indicated that they enjoy speaking with us. We have attended their national conferences. Most of the judges in the Northwest are educated through the judicial college in Reno. And that is the same training that State and Federal judges attend. We go through the same thing that they do. If they don't do that, some of our judges in the Northwest are attorney-judges, and we have a pretty good percentage of attorney-judges sitting on the bench at this point.

Earlier today—since I don't remember whether it was this morning or this afternoon—earlier today I heard someone ask for something that sounded to me as though it might have wanted—you wanted to hear the opinion of people. We do have tribal councilpeople who are available today, and they are, I believe, still in the room. If you're interested in hearing from tribal councilpeople, we do have some who are sitting in this room. I'm sure that if you called them, they would come up and talk to you.

I think that pretty much covers the Northwest stand. We did present to the Commission earlier in your hearing process the position paper which Judge Whitford presented to you, and I know you have it in your records. And we would only reiterate that—what I've already gone over, so I'm not going to belabor it any more. But that's the stand of the tribal court in the Northwest, anyway.

CHAIRMAN PENDLETON. It was I who asked about hearing from people, but it was not so much the tribal councilpeople, but individual Indians who are members of reservations, who could tell us how they feel their civil rights are being cared for, where the tribal council is, and where the tribal courts are. That's a little bit different. We have some assessment, real or imagined, from some tribal council members. But at least we do have some assessment that way.

Judge Vicenti, I just want to say to you that this morning I was talking about the matter of Congress organizing society like it thinks it should be organized. And I think probably one of the mistakes that might have been made earlier in 1964, the Civil Rights Act of '64, as it was an attempt to reassert the equal protection clause of the 14th amendment—that clause talks about people being similarly situated. But in the 1964 Civil Rights Act they created four groups of minorities: Native Americans, Hispanic Americans, Asian Americans, and black Americans. And to me, that in itself dissimilarly situated us. So now what we have is a predominantly white government deciding how the rest of America should live, and making sure that they can make those decisions by having designated some of us as minorities. And as a result of that, I think some of our freedoms are taken away, in terms of how it is we can take care of our own destinies, in a sense, and that we may not need those protections—I mean, that kind of special protection. And perhaps they're giving us what we already have. And I guess where some of this comes out is that I hear what you're saying about, I think, the pueblo in New Mexico, where it might be customary for the smaller pueblo to flog an adult, but not a youngster. But where does that work in between that Indian being an American citizen and being a member of a tribe? Isn't this the basic kind of conflict we're talking about here?

JUDGE VICENTI. I don't know that I'd characterize it as conflict.

One of the problems that I see that you suggest here is that we are not of the same origin in many respects. My tribe is sovereign. I stand on that solidly.

I think that if a person is tried in tribal court for manslaughter, via a declination from the Federal Government, and if they should somehow decide that they want to take the case, I think they ought to be able to try him too.

We're different. We have a different political status. And I think that entitles us to have that difference. I think that entitles us to rights based upon our traditions and our notions of justice.

CHAIRMAN PENDLETON. Okay. That's a good answer.

COMMISSIONER DESTRO. Let me explore that for a minute, Judge. If I hadn't been so asleep last night when I saw you on the way from the airport, I would have introduced myself then.

JUDGE VICENTI. I figured you were from Washington because of the way you dressed.

COMMISSIONER DESTRO. That must have been it. I thought maybe it was because I was sleepy, and it was almost midnight last night.

But I wanted to explore for a minute the comments you made about jurisdiction. It seems to me—and I could totally be wrong on it; I'd like your impression—is that it's only really in the last, oh, probably 30 years that we have a great expansion through the 14th amendment of Federal jurisdiction over the internal affairs of States. It's really since the 1930s, 1940s, so maybe 50 years' worth of expanded Federal civil rights jurisdiction over States. And there's all kinds of elaborate legal fictions that are brought up to get around the 11th amendment immunity of States. And I mean, those of us who are lawyers know all that stuff.

But one thing [that] is a given in all of those, is that the States, assuming they meet certain minimum standards, are pretty much allowed to do what they think needs to be done, as long as there's not a big deviation. They all more or less come out of the same tradition as the Federal Government does.

Your comments going to jurisdiction are intriguing in the sense that, if you were to avoid the political hot potato that you've raised, of repealing the ICRA, say, "Look, leave the ICRA but give the tribes back the jurisdiction that was taken away from them. If you really think they're sovereign, treat them that way, give them the criminal jurisdiction back, give them the jurisdiction back over non-Indians. Make the tribes sovereign in their own spheres. And then we can talk about what's cruel and unusual, and one person's way of looking at things, and another person's way of looking at things." But wouldn't that way be a way to assure that the funds would follow, because neither the States nor the Federal Government, it seems to me, take the tribes' sovereignty very seriously. And until they actually have the power, then the degree to which you're taken seriously and the degree to which you'll get the money is the degree to which you'll have your sovereignty. Do you understand the thrust of that? I'm not sure I'm really expressing it the right way, but it's—

JUDGE VICENTI. I hear what you're saying. I'm assuming you want me to clarify more, just simply respond to it. There isn't really a question there.

COMMISSIONER DESTRO. Well, we make recommendations to Congress and the President.

JUDGE VICENTI. Right.

COMMISSIONER DESTRO. The vast majority of the negative commentary that I have heard about the Commission's investigation or monitoring of the ICRA is that we're insufficiently sensitive to notions of tribal sovereignty. Were we to make a recommendation that one of the ways to

really bolster tribal courts would be to give them back the jurisdiction that they should have as sovereigns, the immediate response is, "Well, they're not going to be able to carry the burden," I think. I'm talking in terms of strategy, in terms of getting things accomplished that the tribal courts need as a realistic matter to have accomplished. How would you react to a recommendation like that? Would that be a plus, a minus? Because you can guarantee that the State of Washington might take tribal courts more seriously if they had to give full faith and credit to their judgments.

JUDGE VICENTI. Well, I'll tell you this much: first of all, the practicalities. There doesn't have to be a wholehearted just donation of jurisdiction back to Indian country. I think we all admit that Indian judges don't have as much training as we all would like to have. We all want to have more—same with court clerk, same with the advocates, and so forth. But we can't do that without better funding.

Now, I would certainly recommend a retrocession. I think it would be prudent to do it on a step by step basis, backed by substantial funding. And I think you're right. I think States would be dealing with us much more up front if they knew that, for instance, we could incarcerate non-Indian individuals in tribal jails.

I mean, the other thing, too, is, you yourself, when you approached our reservations, would probably act with a bit more respect for our laws if you knew how substantially they could affect your life.

COMMISSIONER DESTRO. At the Flagstaff hearing, we had a presentation by the—I think it was the Assistant Attorney General of the State of Utah, because of a Federal court judgment that ceded back to the tribes a certain amount of—a rather large geographic area that incorporated certain incorporated towns. The question is, "Whose jurisdiction now are all these people under? Who do they vote for? Under whose power are they?"

JUDGE VICENTI. Maybe now—

COMMISSIONER DESTRO. It was presented as a real question.

JUDGE VICENTI. Sure.

COMMISSIONER DESTRO. And the answer was, "We don't know. What should we suggest?" Because there would be a lot less concern of those people if they felt that the tribal court was someplace that they could go to and get the kind of justice that they felt they were entitled to.

JUDGE VICENTI. I can't work your way out of that one. I think, by analogy I can—by analogy, I can tell you that—

CHAIRMAN PENDLETON. See how lawyers do—I mean, they understand one another real well.

JUDGE VICENTI. Right. No, let me just tell you by analogy. These Utah residents in this ceded territory are pretty much in the same position that Hopis and Navajos find themselves in Arizona. And you ask for an easy solution. You will not get one.

On the other hand, if you don't work with us, we won't come out with a solution that suits either of us. It will suit—well, it will probably suit one side.

But still, it comes down to it, I think, if we were given sufficient control over our jurisdiction, that we would exercise it responsibly, knowing that there's always the plenary power of Congress to take it away once again.

COMMISSIONER DESTRO. Would anybody else on the panel want to respond to any of that?

The real question is really what people have said: it goes to jurisdiction, the question of the power of the tribe.

JUDGE ROUSSEAU. I'd like to make—what happened?

JUDGE CHENOIS. She didn't touch it; I did.

MR. MILLER. Try turning it on and off again.

COMMISSIONER DESTRO. You might try turning it on again.

CHAIRMAN PENDLETON. Use another one.

JUDGE ROUSSEAU. I might break this one, too.

COMMISSIONER DESTRO. It's working now.

JUDGE ROUSSEAU. No, I just wanted to make a humorous comment.

CHAIRMAN PENDLETON. We need it.

JUDGE ROUSSEAU. That's the boat the Sisseton-Wahpeton Sioux Tribe found itself in after the Supreme Court came out with *Dakota* v. *District County Court,* in which we lost our boundaries. And we have tracts of land sitting, nontrust—you know, the deeded land, sitting right next to deeded land. There's highway running through it, and nobody knows who has jurisdiction. And we don't have cross-deputization. I mean, the Supreme Court of the United States left us in one heck of a mess.

But somehow, when you're left in those messes, because it entails survival for both races, the non-Indians and the Indians, somehow there is a gradual resolution to the problem. And it comes about, usually, informally. And I mean, so Sisseton—the Sisseton people, both the Indians and the non-Indians, have been sitting in the mess you're talking about in Utah. But we have, you know, gradually come to some resolution of the problem, both by court memorandum decisions, and whoever thinking they have the jurisdiction just asserting it, and then leaving it up to the defendants to challenge it.

And ours has gone to the Intertribal Court of Appeals, where we state that we did have jurisdiction on BIA roads, simply because 80 to 90 percent of the motorists are Indian people, and the potential victim of a drunk driver is our people. Of course, it's a 14-page memorandum, but it explains thoroughly in there and in depth why the tribe takes jurisdiction, irregardless if that road runs between two tracts of deeded land. Because, you know, you're going from one jurisdiction into the next. And yes, there is a terrible problem when it comes to a checkerboard jurisdiction.

So Congress gets us in these messes by passing laws, and tribes have to comply with them. And the Supreme Court of the United States gets us into these kinds of messes when they come down with a decision like that. But somehow the people survive and somehow they work it out. That's all I wanted to say about that.

COMMISSIONER DESTRO. One last question—this is just a very short one, and it's really a, "Where can we find" question.

Judge Vicenti, you mentioned—you were one that gave an example of a difference in cultural approach to questions. I asked the question earlier about alternative cultural dispute resolution forums as well.

I mean, do any of you know, or can you give us information as to where we could find either written down, or put us in touch with experts, about how the tribes traditionally resolved disputes in ways that may not even be relevant to—that are outside of a court system? Because that would be very useful as background for us.

JUDGE VICENTI. It would probably help all of us too. A lot of our elderly are—they're still around, and they know what used to happen. I'm sad to say, though, that since we were made into IRA governments or whatever, they were more or less forgotten. And we haven't had the resources to go back to them and say, "Well, what did—how did they used to do this?" I mean, I have had a chance once in a while to ask somebody. But that's where you look. And you've got to look quick, because they're not going to stick around. Secondly, you look to the medicine men that live in the community. They can tell you.

Along the lines I was mentioning earlier about inconsistencies when you apply the ICRA to our system, to tribal systems, my role, I'm sure you think, ought to be just simply an impartial judge, accepting argument from prosecutor and public defender, let's say, in a criminal case. Traditionally, medicine men were the ones in our society who would figure these things out. And the person would play a rather inquisitional role, but he was expected to. He could play prosecutor, and he wanted to get at the truth.

Now, as it is, people come to me and they want me to enforce the law against someone. Well, we don't have a prosecutor. But I'd say those are the two sources you'd look to.

COMMISSIONER DESTRO. Thank you.

MS. SMITH. I'd kind of just like to add to that, that in our court system we have used the elderlies to come in on court cases where traditional law has been requested. We've allowed each moving party to bring in two elderlies; the court themselves goes out and gets two elderly people, and we ask them certain questions on how this matter was dealt with. So we do have, you could say, caselaw that goes back to traditional ways. And I think that's something the Commission might want to look into, is to going back and seeing—I know the Yakima court, too, has handled custody matters, those type of things, in traditional ways. And they're not written

down. They're not supposed to be written down, but I'm sure you could probably get the testimony somehow.

JUDGE VICENTI. One warning, though, is that some of the tribes have religious sanctions against releasing that information, and there's no way you get around that.

COMMISSIONER DESTRO. All right.

CHAIRMAN PENDLETON. I thank the panel very much.

JUDGE ROUSSEAU. Could I make just one statement before we go? I didn't get a chance to say this. With most of the Sioux Tribes, there's been a huge turnover of judges. I mean, they just come, and they go. And the reason for that is, they're let go by council motion or council resolution. And they can't go back into the same court systems where they're no longer a judge, or they don't feel comfortable going back into that court system, feeling that, as a former judge who's just been terminated by the tribal council, that they have no place to go with their termination.

There was a case that came out of the Pine Ridge Sioux Tribal Court; it's the Margaret Moore case. Are you gentlemen aware of that case?

MR. MILLER. Yes, we are.

JUDGE ROUSSEAU. Okay. And in that case now, I was talking to some of the judges from Pine Ridge the other day, and they said anybody that has a civil violation of the Indian Civil Rights Act, such as termination from employment—it's usually that, the type of case that they would take into the tribal court there—the judges are saying now, that since tribal council has overruled both the tribal court and the appellate court, that they will no longer take those kinds of cases in there. Now, where are these people going to go? And all I wanted to say was, I favor a limited type of review by the Federal court on those types of situations. Cheyenne River was a good example that came out of the Rapid City hearings, where those judges have no place to go.

MR. MILLER. Judge Rousseau, the Oglala Sioux Tribal Council passed a resolution overturning that case.

JUDGE ROUSSEAU. That's right.

MR. MILLER. And in that resolution, it stated that before anyone can sue the tribal council or the Oglala Sioux Nation, they must appear before the tribal council to obtain permission to do so, as I understand that resolution. I'll be glad to send you a copy.

JUDGE ROUSSEAU. I'd appreciate that.

CHAIRMAN PENDLETON. I thank the panel very much.

We're going to have an interlude between this panel and the next panel. I'd like to call up, just for a moment, to add to part of the morning testimony, Mr. Thomas Patrick Keefe, Jr., who is an attorney for Mr. Sohappy. We have a statement for the record, and we'll allow you 5 minutes, sir, to say a few things to us.

TESTIMONY OF THOMAS PATRICK KEEFE, JR., ESQ.

MR. KEEFE. Thank you very much, Mr. Chairman. I appreciate the opportunity to be here, and I'm grateful to see that this Commission has returned again to the Northwest. Some of your predecessors were here in the late 1970s, and I think it made a major contribution to the dialogue concerning Indian treaty rights in our State of Washington.

Part of my prepared statement urges you to consider, perhaps, revisiting the Pacific Northwest and taking a look again at your landmark study that was released in 1981 concerning Indian tribes, [*Indian Tribes:*] *A Continuing Quest for Survival.* Very specific findings and recommendations were made in that report concerning the State of Washington and its treatment of the numerous treaty tribes in our State. And I think the State of Washington's conformance with those findings and recommendations has been absolutely deplorable, and I hope you will consider revisiting us, or at least perhaps inquiring of them as to their performance.

I won't go back over my prepared statement, but I hope each of you will read it. I'm very grateful to have had the opportunity to have participated in a very significant case in the Yakima Tribal Court system. It lasted 13 days. To the credit of the Yakima Tribe, they allowed substantial media access to that court process, and to the system, and I think some of the surrounding community in Yakima learned a great deal about the Yakima people and about their court system. And a lot of press was written about it, and some of the —most newspapers in the State of Washington have been editorializing in support of the Federal Government releasing my client, David Sohappy, from the terms of his Federal confinement.

So in my view, the more non-Indians learn about Indian societies and Indian communities, the better we will be in a position to understand some of the complexities and the numerous sensitivities that exist. I happen to be married to a member of the Nez Perce Indian Tribe, who is in the field of Indian health. And so my sensitivity to Indian communities is more than just as an advocate and as an attorney.

I want this Commission to know that I deeply believe that the problems are probably considerably more significant than what you are hearing here today.

I think you need to be a fly on the wall of a court system, or to have someone spend some time in a tribal court, and in the tribal community, to get a feel for some of the real problems that those communities face.

And just as one small example—because I don't believe the case of *Yakima Indian Nation* v. *David Sohappy* is a typical tribal court prosecution. But after invoking the authority and support of our United States Senators, and after having Mr. Sohappy returned to his tribal court system for trial, he was held, at the direction of the Department of Justice, in the tribal court jail, was denied bail that is routinely granted to people who are held in the tribal court system, and he was held under conditions that

would be intolerable in a State jail, intolerable in a Federal jail, and intolerable under the model standards of the American Kennel Association.

He received 15 minutes of visitation with the immediate family members only on Sunday, 1 day per week. He was denied any exercise, in spite of a written recommendation from his doctor that his diabetic condition necessitated exercise. He was—when returned from Federal custody, he was allowed that visitation in a converted broom closet that had a triple steel mesh screen. This is a level of security that is above and beyond what Walla Walla penitentiary in our State has for convicted murderers awaiting the death penalty.

My efforts to get the tribal court system to address that issue were met with the response that it was under the purview of the tribal council, and that I would have to address my concerns to the tribal council, which I did repeatedly, in writing, to no avail.

And it seems to me that as we grapple with this sometimes ephemeral notion of sovereignty, that we also need to balance it with a Federal trust responsibility. And it's a trust responsibility that runs to individual Indian people who are members of tribal communities, who are also citizens of this United States of America. They should not be flogged, they should not be abused in the name of sovereignty. And whether there is existing authority under Federal law, or existing oversight within the legislative branch of government, I think is probably not terribly relevant. They have rights, and they ought to be protected, and they aren't always protected.

I think you—I hope you will hear from some people here today who will have some stories about how their tribal court systems are failing them on occasion. And I think the lack of independence that has already been noted sometimes in the tribal court judiciary is part of the problem. Something needs to be done to see that the judges who dedicate their lives to trying to bring justice to their tribal court systems are not tampered with, and meddled with, and interfered with by their tribal councils; or not fired for doing their jobs. And that happens. It's happened in this State.

So I guess I would like to close by telling you that justice can be found in tribal court systems. A six-member jury in the Yakima Indian Nation succeeded in finding justice for my clients, and the complexities of their case dictate that they still be held in a Federal prison. But I would like to see, at some point in the future, the State of Washington face up to one of the preconditions of statehood, that it honor and respect the Indian treaties that were signed in 1855.

We are now celebrating our 99th year of statehood, and for all intents and purposes it's the equivalent of having Ross Barnett still standing in the schoolhouse door, or George Wallace still proclaiming, "Segregation today, segregation tomorrow, segregation forever." State officials ignore seven United States Supreme Court decisions. And tomorrow I will be in

Skamania and Klickitat County representing members of the Yakima Indian Nation who are charged with State criminal violations for fishing from scaffolds during a year when non-Indians took millions of dollars worth of salmon from the Columbia River.

So I appreciate the opportunity to be here. Your work is important, and if, as Felix Cohen said, that Indians are the miner's canary, I believe that the U.S. Commission on Civil Rights is the beacon in the lighthouse in a stormy sea off the coast of our State, and we need you to let State officials know that you know what's going on, and you care about what's going on, and you intend to hold the State of Washington responsible for the findings and recommendations that were noted in your 1981 report.

Thank you very much for the opportunity to present this small insight into the Indian tribal court system.

CHAIRMAN PENDLETON. Thank you very much. Thank you. And thank you, Mr. Sohappy.

COMMISSIONER DESTRO. Mr. Chairman, I can't help noting for the record that the eloquence of Mr. Keefe's testimony may well have been related to the fact that he was trained at the law school at which I teach. So I just thought I would put that into the record so that—

CHAIRMAN PENDLETON. But not when you taught there.

COMMISSIONER DESTRO. That's right.

MR. KEEFE. No. Thank you very much. I appreciate it.

CHAIRMAN PENDLETON. Thank you.

We will move to our next panel, our final panel for the afternoon. The Chair will try its best to stick to the time frame.

The Honorable Donald Dupuis, Honorable Thomas Maulson, Honorable Sheila McCord, and Honorable Donald Sollars. If you're all here, please come forward. We'll take a 5-minute break in between.

[Recess.]

CHAIRMAN PENDLETON. Judge Dupuis, you've asked to go first, because of time commitments.

Let me say at the outset that we've asked whether or not Judge Ward wanted to make any comment on Mr. Keefe's statement, and he has declined at this time. Just so you'll know that we've tried to make certain that both sides of the issue are heard, and I thought we'd best announce that to the public.

Judge Dupuis, sir?

TESTIMONY OF DONALD D. DUPUIS, PRESIDENT, NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

JUDGE DUPUIS. Thank you, Mr. Chairman. My name is Donald D. Dupuis. I have a position as chief judge of the Flathead Tribe in western Montana. I'm also president of the National American Indian Court Judges Association. I've been involved in the training of tribal court personnel for

a number of years, and I think I have to say at the outset, I didn't want to go through a rehash of what I heard this morning, and talk about, you know, some of the things that have already been talked about and discussed, and I think been filleted enough.

[Laughter.]

There's about 250 tribal judges in the United States and probably about 200 reservations. And you know, we're involved in a lot of training to try to bring us, as judges, to a level where we can handle our caseload. As far as the Indian Civil Rights Act goes, almost every training session that we ever have will have a session and a section on the Indian Civil Rights Act. And usually everybody receives a complete copy of that act. We've been through it, for at least 14 years now, and what I've asked is to have an advanced training on some of these matters, and not just the primary basis that we've been through and through, and go through everyday in our court system.

And on the Flathead, we've only had one or two civil rights violations, but after the special officer of the Bureau has investigated, they haven't gotten any farther. I think that's a tribute to the training that most tribal judges have gone through. Myself, being on the bench for 14 years, on a 6-year term, I'm real proud to be a tribal judge.

I think that, if we look at the flip side, if you didn't have tribal courts, tribal personnel, who would handle these cases? The Federal system on or near reservations doesn't thrill me. I've heard the U.S. attorney in Montana say that he will not take testimony of any child who isn't 9 years old. What do you do when you have a 7-year-old girl that's been violated, or a 5 year old? We just ignore it.

Judge Sollars from the Blackfeet can speak to that question more than I, as we have a limited Public Law 280 in our reservation. And I mean limited. We don't allow the State to dictate to us. We don't allow the county to dictate to us. We dictate to them what we will allow them to do with tribal court people—or, I should say, tribal people. Or if a child is called to their attention, that if we want to reassume jurisdiction we will, and if we won't, it's up to them. But most of the time we reassume.

So we don't allow the State to dictate to us the things that we will do. The Feds virtually have nothing to do with our system. We had one group of attorneys that removed a case in tribal court because they felt better off in Federal court, but the wise Federal judge says, under *National Farmers Union,* and *LaPlante,* Wellman, it must go back to tribal court. So Congress must think we're okay, if they can say, "We will not review the merits of the matter," which is reasonable, "We'll only review if the tribal court had jurisdiction." I think that says a lot about tribal courts.

Recently, as you're aware, in November of '86, that they allowed the tribe to expand their jurisdiction in fining to $5,000 and a year in jail, or both, which sets us far and above the county people, the city justices of the

peace, in whatever States has those. They must think we're doing things okay.

I think why I'm so proud of our tribal judges is that many of them are not law trained. We have about 30 who have their law degree, but the real, good decisions that they make, the common sense overwhelms. I think that's part of being a judge.

A number of Indian tribes have a separation of powers. About 30 are enumerated in their statutes. There's many of us, like in our court, that the tribal council does not interfere, as a matter of hands off. I'm happy with how the court is being handled, and if we've had complaints—which we have—I've been over to our tribal council to try to explain something, and after about 5 minutes, they say, "Get out, you guys. You go back to court." And that's where it stays. I think the majority of the judges probably have that same ability.

I think that when the Supreme Court tells us that we must exhaust all tribal remedies, that really puts a real poor need for another magistrate system. You know, that's not a good bill Senator Melcher has come up with. I let his office know that we don't need any more U.S. magistrates.

In Montana, for example, we have one on one side of the reservation, which takes care of Glacier Park, the south end of the reservation, which takes care of Yellowstone Park, etc. And I explained to them, they need to put more money in the tribal courts, instead of taking another person, making him a Federal magistrate, pay him $50,000, $60,000 a year, and plus their office expense, it probably comes to $100,000 a year per magistrate. Tribal courts can use that to help enhance us.

Unfortunately, we have about a 25 percent turnover every year in tribal court judges, mainly because the pueblos sweep their judges every January 1. That takes care of a number of judges right away. And many of us, you know, after a while you look to do something else. As you heard this morning, some of the judges try and operate a court system on $15,000 of Federal funds. I think the clerk of a district court gets about 70,000 bucks a year.

And so that—I would close my testimony before the system, that, as president of the association, I'm real proud to be a tribal court judge, and I'm proud of our association. Thank you, Mr. Chairman.

CHAIRMAN PENDLETON. Thank you. Before you leave, and before we go to the next witness, would you please stand and be sworn in?

JUDGE DUPUIS. Oh, I'm sorry. Gee, I didn't realize you made mistakes.

CHAIRMAN PENDLETON. I'm reminded by our industrious clerk that I did not do this.

The Honorable Donald Dupuis, Honorable Thomas Maulson, Honorable Sheila McCord, and Honorable Donald Sollars. If you're all here, please come forward. We'll take a 5-minute break in between.

[Donald Dupuis, Thomas Maulson, and Don Sollars were sworn.]

CHAIRMAN PENDLETON. Thank you, gentlemen.

Judge Dupuis, you are excused, if you need an official excusal.

JUDGE DUPUIS. Okay. Thank you. I'll be back in a few minutes.

CHAIRMAN PENDLETON. Who wants to go next?

Judge Dupuis, could you stay for one or two questions?

MR. MILLER. I'm sorry. I had a few questions I just wanted to make sure I got a chance to ask.

JUDGE DUPUIS. Oh, yes. I'd be glad to help you out.

MR. MILLER. Could you tell us more about your association? How many times does it meet?

JUDGE DUPUIS. It's a very good question, Brian. We haven't met since April, 3 years ago, for the reason is, the funding of the judges association has been cut off. We were training tribal court personnel along with the American Indian Lawyer Training Program out of Oakland. The Bureau saw fit, for a shotgun marriage, in their wisdom, and so the National American Indian Justice Center was born as a result of that. They do the training. I think I had $3,000 for 4 years, and I just started spending some of that. That's how down we are.

MR. MILLER. How many members does your association have?

JUDGE DUPUIS. About 250.

MR. MILLER. What other tribal judges associations are there throughout the country? Do you happen to know offhand?

JUDGE DUPUIS. Offhand, the Northwest Tribal Court Judges, which is this invitation—

MR. MILLER. Right.

JUDGE DUPUIS. —that's where the national association was born from. Right after the Indian Civil Rights Act, there are two or three judges here who are plank owners of that meeting. There is the Southwest, there is the Plains, the Great Lakes, the Montana-Wyoming, are the ones that I am familiar with at this time, and the New Mexico. The Navajo has their own.

MR. MILLER. Right. I'm not sure how they relate to each other, and how they relate to your organization. Maybe you could clear that up.

JUDGE DUPUIS. At one time, Brian, you know, the judges association, nationally, did all the training, and the rapport was excellent. Where we are now, it's still very good. The question I get is, "When are we getting more money to get anything else going?" And it's really been real dried up. But we relate to one another through our associations, or at meetings, and we have training sessions. We usually always try to get there two or three times a year.

MR. MILLER. I see. And you were elected president during what year?

JUDGE DUPUIS. April of '84.

MR. MILLER. Thank you. That's all I have.

CHAIRMAN PENDLETON. Thank you.

JUDGE DUPUIS. Okay. Thank you.

CHAIRMAN PENDLETON. Judge Sollars, we're going to save Judge Maulson for last.

JUDGE MAULSON. I think you did last time.

CHAIRMAN PENDLETON. You want to go next?

JUDGE MAULSON. No, I was just kidding.

CHAIRMAN PENDLETON. Are you sure? Okay.

TESTIMONY OF DON SOLLARS, PRESIDENT, MONTANA-WYOMING TRIBAL COURT JUDGES ASSOCIATION

JUDGE SOLLARS. I'm Don Sollars. I'm the chief judge and court administrator from the Blackfeet Reservation in Montana, and I'm also president of the Montana-Wyoming Tribal Court Judges Association.

CHAIRMAN PENDLETON. Is your microphone on, judge?

JUDGE SOLLARS. Can you hear me now?

CHAIRMAN PENDLETON. Yes.

JUDGE SOLLARS. Okay. I've been around one way or the other in law enforcement for the last 20 years. I don't think anybody's an expert in tribal laws. I've heard a lot of them call themselves experts, but it'd be pretty hard, the way things change, to become an expert in that area. What we've done in our court, we have—we allow outside attorneys to come in. We have advocates. We have a bar that they have to pass to—like, for the attorneys, more or less, to make them familiar with tribal laws, and for the advocates, to make sure that when they are representing these people in court, that they do have a knowledge of the tribal code.

We—I'll give you a few figures here. We had 2,592 criminal cases last year. There's three judges that handle this, myself and two associate judges. We have one law-trained judge. So there are three of us that had to handle these cases. All total—I'm not going to go through all these figures, because they don't mean that much as far as what this is concerning, but we had 7,395 cases last year through our court, which is an awful caseload for judges. So I'm sure you know that there can be mistakes made. With a caseload like that, it's easy to do. Just in the traffic, we had 1,500, just traffic cases. We have paralegals working there through the State, but they do not handle any criminal cases whatsoever. They're strictly just on custodies and what have you.

And as for interference from councils, I'd be scared to say that we don't. I go the rounds with them, and as somebody stated earlier, I guess, your separation of powers at this stage—and I think in almost any tribe—is how strong you want to be. Luckily I've been chief judge now for 4 years. I—as they said, getting them trained, but they tend to leave us alone now that we've kind of established our territory, so to speak.

So as far as the separation goes, it's not in writing. I would like to see it in writing, but we don't have that. Yet, we don't have that much interference from our council. We get calls, as somebody stated, also

saying, you know, "What happened with this? I've got so-and-so sitting in front of me." I will, at that time, explain to them what happened. I will not discuss the case with them.

Well, with that, I'll just answer any questions that you have, or try to.

MR. MILLER. We'll have questions later.

CHAIRMAN PENDLETON. Judge Maulson?

TESTIMONY OF THOMAS MAULSON, PRESIDENT, GREAT LAKES JUDGES ASSOCIATION

JUDGE MAULSON. Thank you, Chairman.

I'd like to just identify—I'm from the Great Lakes area, and I'm the president of the Great Lakes Judges Association, which is a very infant organization, compared to some of the organizations that have testified before this here Commission.

First of all, like I say, I'd like to just share with you that we're a new organization, and we do—

You should afford respect. I mean, if you don't want to listen to me, you don't have to.

MR. MILLER. We're listening, Judge Maulson.

CHAIRMAN PENDLETON. This is going to be when we're on the record. I mean, if I'm offending you, I'm sorry, but I'm trying to do two things at one time.

JUDGE MAULSON. Mr. Pendleton, I think you've offended a lot of people today.

CHAIRMAN PENDLETON. Well, thank you.

JUDGE MAULSON. But first of all, I'd like to just say, I mean—

CHAIRMAN PENDLETON. That's the kind of thing I like to hear everyday.

JUDGE MAULSON. Right. I think maybe you should. But going back to what I'm trying to say—

CHAIRMAN PENDLETON. The amount of time I—

JUDGE MAULSON. Well, I spent a lot of time coming here, also. I could be back on my reservation, and—

CHAIRMAN PENDLETON. It's up to you.

JUDGE MAULSON. —dealing with some of the civil violations that are going on in reference to whites doing to Indians, not Indians doing to Indians.

CHAIRMAN PENDLETON. That's fine.

JUDGE MAULSON. So first of all, I'd like to just share with you that we are new, we are learning from each and every one of our brother and sister tribes in identifying the problems that are occurring out there. And I'd like to just ask the Commission to take back some of the things that my colleagues have said here in reference to their particular needs in trying to identify that, in order to have equality among courts out there, that Indian

courts—you have to come back with those dollars, to show that we can do exactly what the white courts can do, if we had those dollars to support our court systems. But yet we still have the ability to work within the framework of the dollars that are afforded our tribal courts.

I had a lot of things to say up until just this little incident, but I just want to say once again that I thank the Commission for asking me to come out. And I support every one of the testimony that has been brought before this Commission here today because I think we should afford to have people aware of the problems that are occurring to Indian courts, people putting Indian courts down. And I think that we, as Indian people, if we don't stand up and argue that point, and tell people like yourselves that we have those problems, we need those things to put us back on the track and work with our people, then we're always going to be put down.

I'm sorry if I offended anybody here, or you, Mr. Pendleton. But like I say, I think that we need to be afforded that time also, and not to be—

If you've got any questions of what the association is all about, and my area is—we're trying to, like I say, afford the fact that we need support not only from the Commission to identify our problems in our Midwest area up there, in the Great Lakes—

That's all I got to say.

CHAIRMAN PENDLETON. Do you have a question?

COMMISSIONER DESTRO. Actually, I have a question that goes to something that Mr. Sollars said, but it also relates to what Judge Maulson said.

Judge Sollars, you said that, to a certain extent, the degree of independence that you have as judges relates somewhat to the degree to which you've staked it out and defended it. Am I translating correctly from what you said, more or less?

JUDGE SOLLARS. I would say you're pretty close to it.

COMMISSIONER DESTRO. Okay. Would you agree with that, Judge Maulson, that the degree to which you're independent as a judge is the degree to which you stand up for your independence as a judge?

JUDGE MAULSON. Yes. I've sort of calmed down a little bit now.

COMMISSIONER DESTRO. Okay.

JUDGE MAULSON. I'd like to just share, you know, being a new court—going back again—especially the 280. I think we've got to understand where Indian people are coming from. Prior to 280, Indian people were subject to Federal jurisdiction on reservations. 280 came into effect; State jurisdiction applied to them; tribal jurisdiction applied to them; and it's very confusing for our people to understand which jurisdiction that they're coming to. Granted, in my court I've had councilpeople ask me what's going on, not in reference to interference, but how our court systems are going to be running, why this one was getting this type of fine, what the

fine system was all about. So it was confusing to those people, and still confusing today.

And like I say, the Commission has—or how the news media has put the Commission's role, has put somewhat of a burden on small court systems like ours in the Great Lakes, because of some of the things that are happening within Indian country in that area.

So like I say, I, too, am proud to be a tribal judge. We try to do the best we can within our reservations.

COMMISSIONER DESTRO. Let me go along with the—I understand the confusion part that you talked about, and we talked about it earlier outside the hearing room. But in terms of the—and this may be a crass way to put it, but in terms of the prestige or leadership position that a tribal judge has, would you say that a strong tribal judge, one who knows what he or she is doing and is respected for integrity and honesty, stands in a fairly strong position vis-a-vis members of the tribal council?

Either one of you.

JUDGE SOLLARS. Well, I don't know how strong. I just ruled against the tribe in a tax case. So far, there's been nothing come from it. So I don't know if that's answering your question or not. I'm still here.

COMMISSIONER DESTRO. Well, there are many cases—I know of at least one instance where the United States Supreme Court ruled against Congress, and we can find no record of anything that ever came of it either. So that's not totally beyond the pale.

But what I'm getting to, and so I can make it—so that it's clear, is that even if you were to have—let's say you were to have a system in the tribal system—we've talked a lot about separation of powers, and I was reminded a little earlier in an outside conversation that the British system has appeals to a committee of Parliament from judicial decisions. So in essence, they really don't have the same kind of separation of powers that we do here in the United States. Is there some way, consistent with the more or less unitary systems that the tribes have, to make sure that people's civil rights are taken care of? I guess the question is, is the degree to which—do you really need separation of powers to make sure that people's rights are protected?

JUDGE SOLLARS. Tribal courts are pretty unique. And this is my own opinion: I don't think we'll ever have separation of powers, to be truthful with you. That's still the governing body on these reservations. I mean, that's my own personal opinion.

JUDGE MAULSON. Like I say, within the confines of jurisdiction on my reservation, I believe some of the other tribes in Wisconsin, except, I believe, for the Menominee Tribe, they also do not have separation of powers.

But our association has talked about it and brought to light at different meetings—and somewhat—some of the judges have identified that they

don't believe that their tribal government will, you know, move in that direction. So I don't foresee us moving that way.

COMMISSIONER DESTRO. If that's the case, then wouldn't part of the answer be, assuming that the tribes don't want to have separation of powers—wouldn't some of the answer be to not only train the judges, but to get some training for tribal council members?

JUDGE MAULSON. Right. I agree with you. I think education is the key there. I believe a lot of tribal councils are reluctant to—other than what I heard here this morning and this afternoon, some have overturned rulings on some judges. But I think it's very far apart, I believe, percentagewise.

JUDGE SOLLARS. You know, I think—you mentioned this training, and I'm for training. But as far as councilmen, we—every training session that we've put on through our association, we've invited councilmen. And to get them to come to the training is another question.

Every 2 years you're looking at a possibility of having all new councilmen. We have nine councilmen. So every 2 years you'd be looking at training councilmen, so it would be a continuous thing.

COMMISSIONER DESTRO. Well, that's certainly part of the problem. But if there is no separation of powers —and one of the difficulties, I think, that at least the public perception of these monitoring hearings has been is that if the problem is a violation of people's civil rights by the tribal council, it seems somewhat unfair to blame the problem on the tribal court. And that's the—it really has been like, "Who's really to blame for the violations?" In some instances, it has been the tribal judges have tried as best they can to enforce people's rights under the ICRA, and got fired in the bargain. I don't see that as being a failing of the court. It's really much more a failure of the system. And how that's to be remedied is going to require us to be fairly creative. That's why I asked the question, because not every tribe is going to elect, in the powers of its self-government, to have separation of powers.

JUDGE MAULSON. Probably, you know, coming from my experience, and like I say, being probably one of the most infant courts in this here room here today, is that yes, we do have councilpeople asking why the defendant does not have representation. And when you bring up the Indian Civil Rights Act, identify that the court does not have the dollars to afford them that, and yet they still have the right to go out and get represented by whoever—in my court system we try, whether it's Indian Legal Service or pro bono attorneys, to try to afford these here rights for these here people. But sometimes you exhaust that, too, and you have to bring that particular case to trial. And it's just unfortunate that that becomes an issue in the community. And it's talked about. So these are some of the things that we have to solve as tribal courts with our tribal government. And I think the talking stage, and educating tribal governments to the fact that maybe they need dollars from their coffer, or from wherever, to have representation,

lay advocates or whatever, to represent the people. So I mean, this is, in reality, what I find, and I hear at this here particular meeting here this afternoon.

CHAIRMAN PENDLETON. I think my colleague's hit on an important part of these proceedings, that the tribal court is trying to exert justice for people in terms of the ICRA, as we've seen in several different places.

Separation of powers does seem to be a problem. I wonder whether or not, if we didn't have separation of powers in the American Constitution, where some of us who are minorities, or majorities, today would be. If you can recall some sense of history, the 14th amendment to the Constitution was really the 1866 Civil Rights Act. And when the Congress decided that it was in their best interests, or the citizens' best interests, to have this as a constitutional amendment, as opposed to the 1866 Civil Rights Act, that's what happened. There was fear that when the South and North got together, that the influx of Southern Congressmen would overturn the 1866 Civil Rights Act.

COMMISSIONER DESTRO. Not just that, there was fear that the Supreme Court would overturn it.

CHAIRMAN PENDLETON. I was coming to that point. There was also some fear that the Supreme Court would declare it to be unconstitutional.

JUDGE MAULSON. There's fear today that the Indians are getting educated.

CHAIRMAN PENDLETON. Now let me just say this, that as long as there's no separation of powers, the courts, it seems to me, are going to operate under a cloud. That is, "Whether or not I can make this decision and make it stick." Some will stick and some won't. But it does seem like, to me, for the sake of the people on reservations, the individual noncouncilmember Indians—that includes also the tribal court personnel—that there does need to be some protection, that you don't wind up at the whim of the tribal council.

Civil rights policy, to my way of thinking, can never be the subject of annual debate in our Congress. Budgets, yes. But this kind of policy cannot be the subject of annual debate, that we can decide that there will be civil rights this term and no civil rights next term.

And what I am hearing Judge Rousseau say is that the turnover of judges disturbs her. And when they're turned out, they can never come back. And that does seem like, to me, that that does disturb institutional memory. I'm glad that many of you have been able to be around 12, 14 years. There does seem to be some sense of institutional memory about the problem—about the process. And perhaps that might shrink that 20, 40, 60-year term that Mr. Vicenti talked about earlier.

But I would just say to you, from my perspective, I think people, for their own comfort, need to have separation of powers in this case.

Susan?

MS. PRADO. Judge Sollars, one of the things that's been noted in terms of separation of powers, or a question that we are trying to address, was the question of how the length of judges' terms affects or strengthens any separation of powers. Can you speak to that? Can you say what the length of terms are in your tribes, and do you think that has an effect?

JUDGE SOLLARS. Well, we're appointed by the tribal council and can be removed for cause; otherwise, we're there.

You know, it's been brought up in the past that maybe electing judges would be a form of separation of powers. And if you look at it, your council still is going to be controlling the purse strings, so there's really not going to be much separation, even with an election.

MS. PRADO. Do any of the tribes in your association have judges appointed for fixed terms? Are they all appointed for life?

JUDGE SOLLARS. Yes. I believe—I'm not sure, I believe the Flathead appoint theirs for 6-year terms.

MS. PRADO. And when you say, "removed for cause," does this happen with frequency, or does this happen rarely? What kind of cause can someone be removed for?

JUDGE SOLLARS. Well, we had—as a matter of fact, the chief judge before I was here was removed. It was over a misdemeanor that she'd gotten involved with, and she was removed. She ended up in Federal court over it. But I mean, that's what I mean.

They're not—and I'm sure that most councils aren't just going to call you and tell you that you're finished. I haven't seen it happen.

MS. PRADO. So you don't think that's been abused, then? Would you find that this could be something that's political? In other words, if the council doesn't like your ruling, can they decide there's some reason why you should be removed and remove you?

JUDGE SOLLARS. I think it goes back again, if you're going to sit in a corner, they're going to run over you. I mean, they're going to drag you around. If you stand up for what you believe, I don't think that these councils are going to fool with you.

MS. PRADO. Judge Maulson, do you want to add anything to that?

JUDGE MAULSON. Well, I'd like just to add to it. Mr. Pendleton has identified the separation of powers. I, as a tribal judge, would like to see that happen within our jurisdiction. But like I say, different councils think different ways. And to take that power away from them is sort of like—like they talk about witch hunting, and then the wand that you talk about.

I think if we can educate people to that factor that Mr. Pendleton has said, that in order to make sure that we have justice the way it should be, that if separation of powers was to help it, I think that would go a long ways within our jurisdiction in the Great Lakes. But once again, it's a scary situation for tribal councils that never faced that before.

I would like to see some of the provisions in that civil rights, in reference to dealing with defendants, where dollars be afforded those. I think that could put a lot of tribal councils to rest, because their constituents are out there hollering at them, they don't have that representation. And you know, or dollars to do it, or there's no dollars available for it. And we as judges are looking at those separation of powers from that legislative body, to afford the fact that we can do the righteous thing out there.

MS. PRADO. How about this, the question of terms? Did you want to address that?

JUDGE MAULSON. The terms—like I say, I think that we should have longer terms. I am a sitting judge for 3 years at a time. And I think our tribe's spent a lot of dollars. And with the whim of whatever council comes on, they can replace you if they don't like you. So I think that, yes, we would look at longer terms, and those separations that you're talking about.

CHAIRMAN PENDLETON. I'd like to just make a point. I don't think that we can expect, reasonably expect that Congress is going to increase the budgets of tribes for tribal court activity, especially when we've got Gramm-Rudman staring us in the face and the deficit that we have now. It does seem like, to me, that there are going to have to be other ways, when one looks at resolving some of the complaints.

One way was suggested by Judge Coochise earlier and I think it might bear some discussion—not here, but perhaps among the tribes, individual tribes themselves. Dispute resolution centers—perhaps every case is not a case that needs to come to court, if there's some way in a more expeditious manner. And that's a way that you can resolve some of the disputes that may be minor or civil in nature, as opposed to always having to come to court. It might be a way to resolve some of these matters and not have to get into these full-blown trial situations. I would think that perhaps one might look at some of the more social crimes as being ones that may be resolved by dispute resolution, or arbitration, if you want to call it that, as opposed to having a trial.

How do you feel about that?

JUDGE SOLLARS. I think that—yes, I think it would work. There again, though, we're looking at money to set something like this up. So everything we do—see, I have a—

CHAIRMAN PENDLETON. I'm thinking about how to work with what you already have, as opposed to saying there's going to be—I frankly don't think you should count on more money. I mean, that's my honest assessment. I heard Mr. Vicenti say more money for more courts, and more training—maybe. But I don't see that coming anytime soon. And I'm not the one who decides on appropriations. And if you can make that case, I think you should make it and try to get it. The question is, can you get it? I mean, Congress has decided to give themselves 20 percent pay raises, but

the rest of us get 2, 3, maybe 4 percent. And now we have situations where congressional committee heads make more money than Cabinet Secretaries in the executive branch. So I don't know whether or not—you need to find out how you can convince them you can have more money. Maybe there needs to be some other arrangement. But Congress does seem to do well by themselves, as opposed to doing well by the people, in most cases.

JUDGE MAULSON. Chairman Pendleton, I believe the tribes have worked this far with limited monies. And probably 20 years from now we'll be saying we need some more monies, and we probably won't get them. And we'll be working with those options that we have within the tribal structures.

CHAIRMAN PENDLETON. Thank you. Thank you, gentlemen.

I'm sorry; a couple of more questions.

MR. MILLER. One or two more questions.

Judge Sollars, you mentioned before that separation of powers was a problem, at least among judges in your association. Can you think of any examples of where that has been a problem? I don't mean examples in terms of names of tribes or anything. But if you could think of one or two examples of the types of cases and problems that that has created—

JUDGE SOLLARS. I think I'll take my own reservation. As far as interference, it comes more from the custody or abuse type of cases, rather than criminal.

MR. MILLER. You mean child custody?

JUDGE SOLLARS. Right. More that type of cases, and family-type disputes, you know, that—the criminal, they really don't get too much involved in that.

MR. MILLER. Judge Sollars, for the record, on those types of cases you're referring to, a case where there is a custody case for a child that has been abused, and are you saying that the tribe exerts influence so that the child is not placed in different custody, or the child is returned to the parent that has been abusing the child?

JUDGE SOLLARS. They used to. I mean, they've tried it. They don't do it anymore. We had quite a dispute over that.

MR. MILLER. Okay. What other types of situations come up that are problems?

JUDGE SOLLARS. Oh, in the civil areas is the main ones. For instance, car repossessions or something to this effect, they'll call you. "Do you have to take this guy's car?" "You know, well, he's been to court. Yes, we have to take it."

MR. MILLER. How frequent are these types of situations?

JUDGE SOLLARS. Just like I said, they're not as bad as they used to be. And I'm not going to sit here and say that our councils never interfere, because they have tried. And again, it goes back to how much are you going to allow.

MR. MILLER. Have the councils ever overruled a judge in your association?

JUDGE SOLLARS. I don't know in my association if they have or not. We haven't discussed them overruling anybody. But on our reservation I cannot think of a time that they did overrule a judge. We do have a good appellate court system.

MR. MILLER. Is the doctrine of sovereign immunity a problem? Does that present a problem for courts enforcing the Indian Civil Rights Act, in your association generally?

JUDGE SOLLARS. I don't think so, no.

MR. MILLER. Do you mean by that that sovereign immunity is not claimed?

JUDGE SOLLARS. No, it's claimed in almost every case. I mean, you're going to have to look at it.

But what I'm getting at, I guess, is that, you know, I've heard somebody say, "Well, what's the solution? Repeal?" I think if you repealed it, you would still have it. I don't think you're going to get rid of it.

MR. MILLER. Repeal sovereign immunity?

JUDGE SOLLARS. No, the Indian Civil Rights Act. I don't think you're ever going to get rid of it.

Before 1968, if you'll look, I think you'll see that a lot of that was in place already.

MR. MILLER. But if there is an explicit waiver of sovereign immunity, assuming that it's not already waived by the ICRA, would that help any?

JUDGE SOLLARS. Again, I don't think you're going to get any waiver of sovereign immunity, to start with. So I think we're just—

MR. MILLER. I see.

CHAIRMAN PENDLETON. Thank you very much, gentlemen.

Do you have a question?

MS. MUSKETT. I was just going to ask, how would you suggest amending the Indian Civil Rights Act? Or do you have any suggestions?

JUDGE SOLLARS. Oh, you've got me on that one. Really, just like I said, you know, it's going to be there.

I think the biggest problem is the right to an attorney at your own expense, which I realize the tribes cannot afford to hire these attorneys to come in and appoint them to these cases. But that's the biggest problem I have.

The State questions the fact—say, for instance, in a DUI [driving under the influence] case. The State questions the fact that these people are going into tribal court without an attorney. They're having advocates defend them. So if they get their fourth DUI in the State, they're questioning the fact that, you know, "Do we count this as the fourth DUI? Did he have proper representation in court?" And that's where some of the problems are coming in.

Ms. MUSKETT. Well, do you think the Congress should clarify whether the Indian Civil Rights Act waives sovereign immunity of the tribes? And if so, how would you suggest they clarify it?

JUDGE SOLLARS. I wouldn't know how to have them clarify it, but yes, I think it has to be clarified, as to what their—what they see it is. As to how to do it, I really don't know.

Ms. MUSKETT. What are your thoughts on providing for Federal judicial review of only those tribes whose constitutions do not provide for separation of powers?

JUDGE SOLLARS. You're getting into here, and all that—you know, this has always been a question. You mention—anytime you mention the Federal Government coming in, you're going to run into a problem on a reservation, or on ours, anyway. That's why they oppose the Melcher bill.

One big thing that most reservations have, at least in our area, is they do have a Federal magistrate right at or on the reservation, or near the reservation. And why he would want to go and have another one set on the reservation, I don't know.

CHAIRMAN PENDLETON. Thank you very much. Thank you very much, gentlemen.

We'll now move to the public witnesses, if you'll all come up: Mr. Goode, Mr. DeLaCruz, Mr. Tonasket, and Ms. Bean. We'll swear you all in at the same time, and we will give you an order of speaking.

[William R. Goode, Joe DeLaCruz, Mel Tonasket, and Gloria R. Bean were sworn.]

CHAIRMAN PENDLETON. Thank you. Mr. Goode, you're first. You have 5 minutes.

TESTIMONY OF WILLIAM R. GOODE, ESQ.

MR. GOODE. Thank you, Mr. Pendleton, Mr. Destro, and the staff.

I'm an attorney. My office is here in Portland, Oregon. My credentials really aren't significant, but my clients are. I represent a man by the name of Rex Kenneth Huesties.

And I've heard many questions raised today of what you would like to hear. Unfortunately, I also heard a comment that you probably will not be asking any questions, so you may not hear all that you want to hear.

My client has a case right now that is in three different courts. It involves four different governments, or their employees. He was formerly a police officer on the Umatilla Tribal Reservation. He and seven other employees complained about their chief of police and a lieutenant. After 6 months of complaints and several hearings, much of which no one really knew what was going on or what was happening, or how to resolve it—he was a witness. He was ultimately discharged, and without—and was discharged without a hearing. 25 CFR 11.304[k] requires that, as an

employee of a government contractor, that prior to any adverse action be taken against him that he be provided with a hearing.

Now, after $10,000 in legal expenses—which we got by suing a local government employee for defamation related to the case, which has funded part of it—in 1 year we have finally gotten one sentence from Judge Redden that has said, "Although plaintiff"—my client—"may not have precisely met the requirements of the policies and procedures manual as defendant Wilcox"—the former chief of police of the tribe—"interprets them, I believe he adequately expressed his request for the hearing."

The BIA has ignored this, although the board of trustees directed all the people to complain to the BIA. They're a party in the Federal court. The State of Oregon has ignored this, although they willingly have revoked my client's police certifications, because the tribe requires Indian police officers to be certified by the State of Oregon. This is now at the Oregon Court of Appeals.

And for 1 year we have repeatedly requested that the board of trustees do one simple thing: grant my client a hearing and send a message to the State of Oregon that they cannot stand in the shoes of the tribe and judge whether or not my client should have been discharged, until they do so. They have consistently refused.

I am more concerned with the flip side of tribal sovereignty. I'd like to see some sovereign power exerted.

Now we have gone 3 days ago into tribal court as well. And I hope that we will have a forum.

Unfortunately, the Umatilla Tribal Employment Rights Ordinance has a few things that, as long as it's been passed, are in violation of the Indian Civil Rights Act.

For example, it says, "The term, 'employer,' shall include government entities, including tribal contractors." That's the tribe. Yet the TERO [tribal employees rights office] office refuses to take any complaints against the tribe, the most significant employer.

Further on down it says that, "Indians aggrieved by the action of the tribal government may seek back pay and other relief"—Indians. Unfortunately, my client, who, although he's worked for the Burns-Paiute as a first police officer, he's worked on Warm Springs as a police officer, he was born on the Yakima Reservation, and he claims Indian ancestry through the Sisseton-Wahpeton Tribe, he's not enrolled. So under their own ordinance, he's not entitled to backpay or anything else. And yet the Indian Civil Rights Act requires that he receive due process and equal protection. He hasn't received that.

Further on in the ordinance it says that, whatever hearings there are before the commission, that attorneys of the claimants cannot cross-examine any witnesses. I cannot think of anything more basic to basic due

process than the right of confrontation of witnesses and the right for the claimant's attorney to so cross-examine.

There are other problems with the TERO office. I won't go into them. Yet I hope that if we do get before the tribal court that they will rule them in violation of the Indian Civil Rights Act.

Part of the problem that I think that exists in our case is that, true, there is tribal sovereignty, but the tribe exists within the United States. And very often it can become entangled with many other governments.

For the purposes of the Federal Tort Claims Act, someone who is cross-deputized as a BIA deputy—which my client was, and so is the chief of police—they're considered Federal employees. So in a sense, for the purpose of the Federal Tort Claims Act, the chief of police, a Federal employee, discharged my client. They're also deputized under State law. That's why my client had his State BPST certifications revoked.

There is no forum at this point where my client can bring all of the defendants. We tried in Federal court, and yet the board of trustees of the tribe were dismissed. Yet we still had the chief of police. Summary judgment was denied him, even though he wanted to get out of that case based upon sovereign immunity.

We still have a State employee—but that's going to the Ninth Circuit.

Ironically, we're proceeding under 42 USC 1983 and 1985, and the Federal judge still believes that the—Mr. Wilcox, the former chief of police at the tribe, will be going to trial on that basis, since he denied summary judgment under 1983, color of State law, and 1985, conspiracy with a State employee and a local government employee. But I can't, for the life of me, understand why Judge Redden didn't let him out on sovereign immunity.

That's all I have. Thank you.

CHAIRMAN PENDLETON. Do you have some document for us, to leave with us?

MR. GOODE. I have submitted one statement, with a synopsis of each of the cases that I've outlined, and a copy of the judge's opinion. This is—these are just the motions in summary judgment from last month. I've got five banker's boxes of all sorts of cases. I'll be happy to send you anything you want. But I think we probably cover in our case every conceivable issue related to tribal government and tribal sovereignty because we've sued all levels of government in the State, local, Federal, State, and tribal.

MS. PRADO. I think we should have for the record a copy of the document you were referring to when you were leafing through it, the tribal ordinance. If you haven't given us that, I think we should have that for the record.

CHAIRMAN PENDLETON. If you can, would you please send it to us?

MR. GOODE. Sure.

CHAIRMAN PENDLETON. And your notations—

MS. PRADO. And leave the notations. If you're going to give us that one, leave them. Thank you.

MR. GOODE. Okay. Let me take a moment.

CHAIRMAN PENDLETON. Mr. DeLaCruz?

TESTIMONY OF JOE DeLaCRUZ, PRESIDENT, QUINAULT INDIAN NATION

MR. DELACRUZ. Yes, Mr. Chairman. Mr. Chairman, members of the committee, for the record, my name is Joe DeLaCruz. Presently I'm the President of the Quinault Indian Nation.

And I wanted to testify before your committee to give some history of the development of our tribal courts and our tribal infrastructures in the Pacific Northwest.

I'm a member of the American Indian Law Center board since 1965. I was early on involved in disputes over Public Law 280 back in the early fifties. And I served for 5 years as advisor to the National Law and Justice Committee.

In the Pacific Northwest there's a question asked by you, "Are things a little different in the Pacific Northwest?" And through the various programs and institutions that were available a decade ago and in the late sixties, a lot of these young fine lawyers and a lot of these judges participated through the law center to get their law degrees. The judges were trained. And through the law and justice administration there were training dollars, where judges could get together more often, and there could be better communications. Tribal councils were involved in those meetings. I addressed, almost every year, Northwest judges. I've addressed the National Judges Association.

And after the 1968 Civil Rights Act was passed, yes, tribes really drug their feet, whether or not they were going to move into development or changing their laws to comply with the Civil Rights Act. And in the early seventies in the Pacific Northwest, through grants from the law and justice administration, ACBAR, and the Donner Foundation, we contracted the law center, and we had attorneys from Wilkinson, Cragun & Barker, and judges from several of the tribes in the Pacific Northwest to develop, basically, what we were considering a model code to come into compliance with the Civil Rights Act. And Quinault adopted that in 1974. Other tribes in the Northwest soon after that adopted those codes.

And we began to see a deterioration in about 1981, '82, '83—again, when resources were not available to continue the type of training activities and stuff to keep people up to the various standards of the law.

A lot of the judges didn't point out where their training came from. A lot of them were trained at the law center, or through the justice training school in Reno—very fine judges.

A lot of questions come up about separations of powers. And one thing I believe very strongly in, I believe in the United States Constitution. Most of the tribes in the Pacific Northwest are treaty tribes. I believe there is a special relationship between the tribes of the United States. I believe the President's 1983 policy that the relationship is government to government. And I also believe that, since it's the bicentennial of the United States Constitution, one of the things that would straighten a lot of this out, if the United States would live up to its Constitution and live up to some of the policies as far as relationship between Indians and the United States.

On the question of funding, there's tribal leaders and our tribal institutions and tribal organizations that continuously, regardless of what administration sits in office and what they request, that go before committees to try to get the dollars we feel we are entitled to for the territories that we gave up in those treaties.

The United States made certain promises to us. In international arenas, since the forming of the U.N., the United States promoted various international covenants on the rights—economic, human rights, and all these things of indigenous populations—decolonization. And they haven't lived up to any of these things.

My tribe gave up what is basically 6 million acres of what is now the Olympic National Park and the Olympic National Forest. And I always maintain that the United States can live up to what it obligated itself to in that treaty, which was to strengthen our government; the treaty fishing rights—that's been through so many court cases; the health and education which is mentioned in the treaty. It's no wonder we have a problem.

And I believe very strongly that, since it's the bicentennial, one thing this Commission could recommend—and there are attorneys on there—that some of the legislation actually violates the United States Constitution when it comes to tribal-Federal relationships, especially based on the Indian treaties.

Thank you.

CHAIRMAN PENDLETON. Thank you very much. That was enlightening, really.

Mr. Tonasket.

TESTIMONY OF MEL TONASKET, CHAIRMAN, COLVILLE BUSINESS COUNCIL, COLVILLE CONFEDERATED TRIBES

MR. TONASKET. I hate to take this microphone away from Joe. We usually travel around to the Joe and Mel show.

CHAIRMAN PENDLETON. Can we just say we are happy to have your whole statement in the record as it is, and put it in without objection?

MR. TONASKET. Fine.

CHAIRMAN PENDLETON. Thank you.

MR. TONASKET. Fine. My name is Mel Tonasket, for the record. I am presently the Chairman of the Colville Business Council of the Colville Confederated Tribes in the State of Washington. I've been on the council going on 18 years now.

Joe DeLaCruz and myself are past presidents of the American Congress of American Indians. We've certainly got to do our share of traveling around the United States, talk about all kinds of things, including the problem that you're talking about here today.

I think that what we realize as tribal leaders, elected tribal leaders, is that we know that we live in a glass house. We know that there is always going to be somebody that is going to try to knock down that glass house. And they look through the windows trying to find every little mistake that they can find in our government, in our processes, procedures. We know that we have handfuls of people that live on our reservations who would love to see us fail. And we know that they put a lot of political pressure around the country to abrogate Indian treaties, to do away with Indian treaties, to do away with Indian tribes and reservations. We know that.

And with that knowledge, we know that we have to do the best that we can do with what we've got.

We know that we have to have due process. We know that we have to have a better due process than what is available on the outside.

It wasn't very many years ago when the Colville Tribe implemented a legal aid program in Okanogan County. Half our reservation is in Okanogan County in the State of Washington. The county never had a legal aid program. We funded it totally by tribal money. And the only way that our legal aid attorneys could practice law, representing Indian clients in the county courts, was to also be available to be legal aid attorneys for non-Indian clients before the county court. And we paid for that. And we gladly paid for it, because the poor people had no place to go.

And that, to us, helped us open the door. And when we went to the State of Washington for retrocession of law and order jurisdiction, that sort of history really helped us in the relationship and understanding of the non-Indian community around us, except for that handful of people that are going to be anti-Indian no matter what.

I think it's safe to say that our system of government is probably one of the most open types of government you can ever find. And let me give you an example.

When we're in council session, when our tribal council is in session doing business, just like the State legislature or just like the United States Congress, we allow people, our tribal members, to come in and sit with us. We recognize them when they raise their hand when they have a question about anything we're discussing on the floor at that moment. We let them ask questions. We let them give their advice, their concerns to the resolution that is being considered. And if I—I challenge us to go to a State

legislature when they're in session on the floor, and you raise your hand from the gallery and say you want to talk about the issue that's down there, they're going to run you out.

Now, we spend a lot of time in State legislatures, and we spend a lot of time in Congress. And there's not another type of government that's more open than ours.

A lot of the problems that come up are resolved at that level, before they ever get into a court system. So the tribal courts could have a lot more problems if we didn't have that kind of an open governmental system.

The Colville Tribe provides the big majority of the law enforcement within the boundaries of our reservation. And we have a 1,300,000 acre reservation, four major towns. But the counties are poor. And they don't have the manpower, they don't have the budget to provide the law and order. So we do it. We use cross-deputization so that the loopholes in arresting anybody, whether it be State, Federal, or tribal law, the loopholes are closed.

I think that if you want to talk about civil rights and where people are having problems, let's compare our tribes' types of civil rights, compared to what we all face, you and I face with just IRS, for example. I mean, we have people who are attacked by IRS whose land and resources are taken away, their houses are locked up, their farm equipment taken. And where do they go for a hearing? They go before an IRS court, for Christ's sakes. Right? We're not that bad. We can't take our people's property. But maybe you guys should be investigating some of their activities.

You asked the tribal judges if tribal councils have tried to influence them. I think sometimes the reverse is true. I think that sometimes the tribal judges try to lecture to us about policy and about politics when, in my mind and in the mind of many of my colleagues who are councilmen around the country, our tribal judges should only be dealing with interpreting the facts of law and making decisions on those facts and those laws.

You asked also about other judicial systems. And earlier today, and one of the tribes that came to my mind immediately, was the Onondagas. They don't have a court system. They don't have cops. They don't have jails. They utilize the old way. An example is if a child from one family steals a bicycle from a child of another family, they don't go to court. They don't get arrested. They call a community meeting and they bring both families in, and they deal with it in a public session. And they'll stay there for hours and hours and hours until the two families have worked out the problem, and things are settled, and the community's back on the level again. I mean, to me, you don't need to have a Civil Rights Act to deal at that—with that kind of old style of system.

You also asked questions about sovereign immunity, what about tribes, tribal governments utilizing sovereign immunity, should you folks recom-

mend to the Congress to do something about tribal sovereign immunity, some controls on it, or some exceptions to it, or whatever it is.

I think you asked the wrong people. The decision of whether or not sovereign immunity should be dealt with should be between the tribal governments and the United States Government, because the treaties are made between the two nations, not between a commission or a committee, or our tribal court, but between two governments. Some tribes might want to do that.

My tribe has sovereign immunity in some instances, and we also waive sovereign immunity, because we have to deal with the economic development of our people. We have to provide due process to our people, and sometimes the waiving of sovereign immunity has to be. But we limit it. Our contracts that we have with banks, we have limited waiver of sovereign immunity. We can't afford the white man insurance policies any more, so we have self-insured programs where we waive sovereign immunity. So if somebody gets hurt on our property, we're going to let them sue us for what's fair—not to abuse it, but what's fair.

CHAIRMAN PENDLETON. Could you sort of wind up, Mr. Tonasket?

MR. TONASKET. Well, there's a lot of questions that you've asked a lot of people. And I was sitting in the back, and sometimes I'd get up and walk around, because I was getting a little antsy. Because it appeared to me that the questions asked was questions that were trying to find negative things about tribal government and how we influence or try to direct tribal courts. Well, we're here now. You have a couple of tribal chairmen. Ask us.

CHAIRMAN PENDLETON. I just want to say that we're in the middle of our—in terms of our own ruling that we have to go by. This is a 5-minute open session. And we're not trying to be negative toward anyone at all. If you want to give us testimony, you can give it to us in writing. But we've got this ruling, and that's what we have to go by.

MR. TONASKET. We understand that. We've gone through a lot of hearings in a lot of places through the years.

You know, we were told earlier when one of the tribal judges was trying to get us on a panel earlier so we could go back home, that it couldn't be deviated from the agenda. But yet apparently a deviation could be made, because Mr. Sohappy's attorney was crowded into the agenda. And so that's what makes us suspicious, okay?

CHAIRMAN PENDLETON. Yes. But you've had more than 5 minutes. I have not cut you off beyond the 5-minute time. I'm only asking you that, if we want to make some waivers—yes, we did make some waivers. I make no apology for that. But we've given you as much time as we possibly could, and I'm only trying to be fair with you.

MR. MILLER. We've also been in contact with Mr. Keefe before the hearing, so that this is not quite a last-minute deal.

By the way, his client had to be returned to Federal custody, and that's why we—

MR. TONASKET. Nothing against Mr. Sohappy. It's crossed—

CHAIRMAN PENDLETON. Well, all I can say to you is that I can only apologize to you, that if you don't like our process, it's not one that we designed. It's one that Congress designed. We go by it. We gave you more than a 5-minute amount of time. I'm sorry if that offends you, but that's the best I could possibly do.

COMMISSIONER DESTRO. Well, there's one other thing, too, and that is that the transcripts will be available. And if there are questions that were raised that you think you'd like to get into the record, please include the—

CHAIRMAN PENDLETON. Open for 30 days.

COMMISSIONER DESTRO. The record will be open for 30 days. Please feel free to answer those questions. Because in many ways your answers, unvarnished by our questions, may actually be more informative than trying to answer direct questions from us.

CHAIRMAN PENDLETON. Ms. Petersen, would you stand and be sworn in, please?

[Bonnie Petersen was sworn.]

TESTIMONY OF BONNIE PETERSEN, MEMBER, TRIBAL COUNCIL, CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON

MS. PETERSEN. My name is Bonnie Petersen. I am a tribal council member of the Siletz Tribe. I've been a former court clerk, and I was also an associate judge.

I'm here today on behalf of the Siletz Tribe to ask—to request that this Commission not recommend to Congress any modifications to the Indian Civil Rights Act that would authorize greater Federal agency or judicial interference in tribal self-government.

I'm not here to seek protection for any system that fails any legitimate test of fairness. Rather, I'm here to voice a concern over any potential interference with what the Siletz Tribe considers our most fundamental right—and namely, that's the right of self-government.

The Siletz Tribe has complied with and will continue to comply with the Indian Civil Rights Act.

Mr. Rowe testified earlier and described our constitution as a clear separation of powers. Our tribal court does review and has overturned council decisions.

I wanted to note something. Mr. Pendleton had asked how—I don't know if you asked what tribal council members thought of the Indian Civil Rights Act, but I wanted to point out that when we had training for our judges, the council attended that training. And we still—there are still three people on the council right now that are very familiar with the

Indian Civil Rights Act, particularly with due process and equal protection.

And in my experiences on council, we spend a great deal of time paying attention to that, whether it's a personnel decision or some kind of allocation of resources.

Another thing that was noted this morning was—there was a lot of talk about budgets. I understand, when you say that you can't recommend funding, and you don't see funding coming. There was recently an article in the *Arizona Republic* several months ago that noted that when funds are allocated to Indians through the Bureau of Indian Affairs, for every dollar that gets allocated, they keep 90 cents and we get a dime. If more of that money could come down, I think that our courts would—you wouldn't be hearing so much about all these problems with funding. If you're examining the Bureau's role in this, I'd ask that you take a look at that and make sure that funding—that what Congress is intending to fund actually makes it to the tribes.

Another point I want to make is, when—excuse me; I'm losing my place.

CHAIRMAN PENDLETON. Did you not have a written statement for us?

MS. PETERSEN. Yes, I did, but I wanted to—

CHAIRMAN PENDLETON. Entered without objection. I just wanted to make sure you understand that.

MS. PETERSEN. Okay. I just wanted to highlight some of—

CHAIRMAN PENDLETON. Sure.

MS. PETERSEN. —the stuff that was in there.

Another thing that I felt was real important was, when you're looking at—I read some earlier stuff that came out maybe about 8, 9 months ago that gave a lot of anecdotal stories about some abuses within—I think I counted up four or five different tribes.

When something like that happens, you know, you tend to look at it like you were saying you're looking for the answer. You know, what's the question? It's not going to be that way. There are—you've got anecdotal incidents from four or five different tribes. And you're going to look for the answer for that, and when you get that answer, or you think you've found an answer, you're going to apply it wholesale to all of us. That's the fear when we're talking about perceptions of witch hunts, etc., because it's happened time and time again.

CHAIRMAN PENDLETON. Yes.

MS. PETERSEN. And I'd like to recommend that this Commission review the record carefully and take that into consideration.

We need to pay deference to the uniqueness of those tribes that do practice traditional judicial systems such as Mr. Tonasket was talking about. Because if you impose this—the ICRA or some enforced—what I fear is that it can be used as a tool that will eradicate those differences, the things that make us unique.

I think there's an inherent contradiction here. On the one hand we have, you know, a Federal policy of self-determination which, by definition, recognizes the uniqueness of tribes. And on the other hand we have this movement to force tribes to match a universal code for protecting individual liberties. I just—I think I have problems with this process.

Coming here today, I thought we were just coming and giving a statement. I didn't realize that you would be asking questions back. Or I didn't know what to expect. I think I'd feel more comfortable if I had an idea of what you guys were thinking—not just the questions you're asking, but some of the things you found preliminary, if you've even proposed the types of solutions you're looking at. I mean, all I hear is that you have no findings, no recommendations.

CHAIRMAN PENDLETON. It wouldn't be appropriate for us to have findings and recommendations at this point. It would be prejudging what we already have. There's too much to go over.

MS. PETERSEN. Okay.

MR. MILLER. We'd be happy to send you a transcript.

CHAIRMAN PENDLETON. Of this session.

MS. PETERSEN. Yes, I'd like one also, if you have one available of—what was it, Rapid City? And there was another one at Flagstaff?

MR. MILLER. Yes. And if you put your name on the list, we will send you a copy. Could you see the clerk, and she will put your name on the list.

MS. PETERSEN. Yes, I will. Have I used up my 5 minutes?

CHAIRMAN PENDLETON. Yes.

MS. PETERSEN. Okay. Well, just in summary, I just don't believe that greater intrusion into governmental—into tribal governmental activities is warranted or wise.

And I hope that—I don't know what the solution is for dealing with individual—what I call isolated cases. But I don't think it's fair to impose that on all the tribes when we have systems that are working.

CHAIRMAN PENDLETON. Thank you very much.

CHAIRMAN PENDLETON. Ms. Bean?

TESTIMONY OF GLORIA R. BEAN, PUYALLUP TRIBE

MS. BEAN. Thank you for the opportunity to be able to give testimony. I, too, was not well informed of the exact context of testimony, or what was to happen today.

I have no tribal position. I'm not in an official capacity. I'm here as an individual, and a very concerned individual. I come from a large family of nine. I'm enrolled with the Puyallup Tribe. I have six sons, and I have one grandson. I have a number of nieces and nephews. And I do have a stake in the future.

You've been asking for recommendations. And if we'd understood the way things are today and had the hindsight—it's a typical statement that's

made, but we Indians should have had stricter immigration laws pretreaty times. We have survived through racism, poverty, and reorganization.

Relocation has been a very serious problem in the Indian community, and it still happens today. It is not our choice. It is imposed on us.

Some of the major problems that we've had with the various organizations are the BIA, CIA, IHS, IRS, and the FBI.

Genocide has been happening from day one, the non-Indian occupation of this United States of America, upon our Indian people.

Drugs and alcohol is a major problem on most of our reservations. This is not only our problem, but it is a national problem. And this is not our fault. And this has nothing to do with tribal politics.

Another major problem is a lack of recognition of tribal rights by the non-Indian community. I come from a very honorable people, with a very long history. And our history dates back to the creation here. As I've been told, the Great Spirit put us here to be responsible for this part of Mother Earth.

And we have been deprived of practicing our traditional ways. This reorganization is not a traditional way. It's no wonder it's not working within the Indian community. Tribal councils are not our traditional way.

In regards to a specific instance on my reservation, there was a Mr. Bob Satiacum who was illegally tried in a Federal court system. I haven't had an opportunity to read any of the proposed material or background for doing this, or your past hearing, but our people do not believe that the Federal court system is working in behalf of our Indian people. That is not going to be the answer, particularly in my part of the country.

I've heard you mention that you didn't necessarily want testimony from council members, but wanted to hear from individuals. As an individual who is active within the community with the elders program, the parent committees, and various other committees, one of the problems that we've had is within the CPS program. At one time we had a very competent court system, and our kids were being protected. The good court system that we did have at one time was also supportive of our fishing activity. They took an honorable position in defense of our tribal fishermen against another tribe, of which the council provided no support. It was done solely with the fish committee, tribal fish committee, and our tribal court system.

CHAIRMAN PENDLETON. Ms. Bean, could you sort of wind up for us, please?

MS. BEAN. The tribal court system at one time also did protect membership constitutional rights. And because of tribal politics we did lose two very competent judges who were non-Indian, that never claimed to be Indian. We had a good, functional court system, qualified court clerk, qualified prosecuting attorney, and a well-qualified law and order division. I cannot say that this is true on all reservations, but it has happened on mine. Now we have a politically appointed [word deleted] judge.

I realize that a lot of people are not wanting to hear this, but I am here in the best interests of the future, and wanting justice to be properly happening, as it would be from an honorable people.

You've asked about traditional recommendations. And in my part of the country we are a matrionic society, and clan mothers are important and provide direction to the family. Also, so are the elders. But in the reorganization there's no room for those types of people. They're not qualified on paper to be serving in an official capacity.

Another problem in the court system is that there is no representation for individual cases.

Some of the tribes are small, like mine. And in my particular tribe if someone has been charged, and if this particular individual comes from a large family who has lots of votes, the court system will pursue the powerless and fail to protect our children who have no vote. I am primarily concerned about our children. They are sexually and physically abused. That also is not a local problem; that's a national problem.

CHAIRMAN PENDLETON. I'm going to have to ask you to complete your testimony, please.

MS. BEAN. In regards to the smaller tribes, I would like to suggest that there should be a regional—regionalized court system, unless it is a larger tribe. And for instance, in our area the Northwest Intertribal Court System has been able to retain their professional staff year after year. They do work with small tribal councils, and have been able to function properly as a court system.

Thank you for the time.

CHAIRMAN PENDLETON. Thank you very much.

I thank you, the open witnesses, very much.

Mr. Coochise—is he still around? Would you give us one more moment, please? Thank you very much.

COMMISSIONER DESTRO. Mr. Chairman, I'd like to ask that a recommendation by the Administrative Conference of the United States, its recommendation, noted for the record, is recommendation 86–3, "Agencies' Use of Alternative Means of Dispute Resolution," which was adopted on June 20, 1986, and the actions of the assembly of the Administrative Conference, be placed in the record. And it has a number of recommendations in it with respect to alternative dispute resolution which might be able to help our staff as they put together their look at the alternative ways in which tribes resolve disputes.

CHAIRMAN PENDLETON. So ordered, without objection.

Judge Coochise, you're the reason why we're here. I just wanted to ask you for the record, do you have some understanding of where we are now, and is there anything that we missed at the hearing today that we need to look at? We can't come back, but I need to have some kind of response from you.

JUDGE COOCHISE. Yes, I think I'm pleased with what we wanted to present to you from the Northwest. I'm not saying that we don't have problems, but there are some better run courts than what we were getting the implication from the previous hearings. And yes, we are satisfied that you've opened your ears, basically, to us to give us an opportunity to tell you what's happening within our systems in the Northwest.

CHAIRMAN PENDLETON. Thank you very much. With your last word, these hearings are adjourned.

JUDGE COOCHISE. Thank you, Commissioner.

Supplemental Exhibits to the Hearing in Washington, D.C., January 28, 1988

Exhibit No. 1

United States Department of the Interior

IN REPLY REFER TO

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
[illegible] Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

April 16, 1987

BIA.TC.9950

Mr. Earl J. Barlow
Area Director
Minneapolis Area Office
Chamber of Commerce Building
15 South Fifth Street
Minneapolis, MN 55402

Re: Proposed Red Lake Judicial Services Contract

Dear Mr. Barlow:

As we have discussed from time to time over the past several months, this office and the United States Attorney believe that modifications of the proposed Tribal Courts contract with the Red Lake Band are necessary to insure that the services to be provided - the administration of justice - will be satisfactory. In the last several years there have been a number of complaints from tribal members that justice at Red Lake is not even-handed and that civil rights have not been protected. In a habeas corpus proceeding before the Federal District Court, Judge Magnuson strongly chastised the manner in which the court was operating. That admonition must be taken seriously; and the Bureau of Indian Affairs cannot even appear to be trying to sidestep its responsibilities to secure adherence to the Indian Civil Rights Act by contracting the function to the tribe. We do not believe the courts will be kind to the government if we contract the courts without making every effort to safeguard individual Indian's rights before the court. To that end, we make the following comments and observations.

I. Statement of Work. This language is suggested:

A. The Contractor:

1. Shall administer justice on the Red Lake Indian Reservation by creating and maintaining a tribal court as authorized in Article VI, Section 5, of the Constitution of the Red Lake Band.

2. Agrees that the administration of justice on the Reservation is an exercise by the Tribal Council of the sovereign powers of the Red Lake Band.

3. Shall provide a system for the adjudication of civil and criminal matters over which the tribal court has jurisdiction, as authorized by ordinances adopted and approved pursuant to the Constitution of the Band. The tribal court shall exercise its jurisdiction in compliance with Title II of the Indian Civil Rights Act of 1968, as amended. 25 U.S.C. §§1301-1303.

4. Shall not deny defendants in criminal proceedings the right to counsel. Until such time as the contractor has adopted and the Secretary of the Interior has approved an ordinance prescribing standards governing admission to and practice in the tribal court (of both professional attorneys and lay counsellors), persons authorized to practice law in the courts of the state of Minnesota shall be permitted to represent defendants in all proceedings in the tribal court.

5. Agrees that in habeas corpus proceedings brought pursuant to 25 U.S.C. §1303, the Contractor will respond to all petitions for such writs, regardless of whether or not the tribal court or a tribal employee is a named respondent in such a proceeding. The Contractor shall as soon as practicable after receipt provide the COR with copies of all pleadings or other documents filed in any habeas corpus proceeding and in any other judicial proceeding relating to the operation or jurisdiction of the tribal court.

6. Shall provide to any person accused of an offense punishable by imprisonment, upon request, a trial by a jury of not less than six persons. Until the Secretary or his designated representative has approved a jury trial system, the procedures contained in Attachment ____ shall apply. [This is the Jury Trial section of the court manual developed by the National Center for State Courts under a BIA contract in August 1982.]

II. Objectives. I have attached a copy of an outline styled the "Model Judicial Services Contract Under Public Law 93-638"; and believe the Goals and Objectives section from it should serve as the basis for the corresponding section of the Red Lake Contract. With respect to the statements of objectives starting on page 2 of the proposed contract, I have these comments:

4a. I do not understand the need to refer to that provision of the tribal constitution.

4c. Again, there was a docketing system proposed by the National Center for State Courts in its 1982 report, so development of a records system should be quite easy.

4g. The role of the prosecutor has to be more clearly set out. Allowing the prosecutor to represent the Tribe "in other cases of public interest" is too broad, and provides little guidance on the prosecutor's role in civil cases - which should be at most minimal. Similarly, the description of the prosecutor's duties in Attachment J-2, at paragraph B, puts the prosecutor in the role of counsel to the Court. The prosecutor cannot serve as both the representative of the people in a criminal case and also as advisor to the court. The defendant would surely argue that such a dual role prevents an impartial trial.

5a. (page 3) I question whether or not the method by which the Tribal Council appoints the various officers should be prescribed by contract. Shouldn't that be a prerogative of the Tribe, which can select as provided in an ordinance?

5t. (page 6) Does this requirement to hire "defenders" for indigents include both lay counsellors and professional attorneys?

5u. Is "immediate family member" now defined by tribal law? If it is, the reference should include a citation to that law.

I realize that these comments are substantial, but it is imperative that we be able to demonstrate to a court that the contract is written with <u>specific</u> attention to protection of civil rights. Accordingly, there should also be a statement that failure to afford the rights prescribed by the Indian Civil Rights Act constitutes a failure to perform under the cancellation clause. That will, of course, require diligent monitoring of contract performance. Your file is enclosed, as is the Model Contract referred to above.

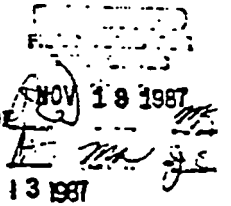
Sincerely,

Mark A. Anderson
For the Field Solicitor

Exhibit No. 2

States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240



BIA.TC.1266 PRIVILEGED--ATTORNEY-CLIENT COMMUNICATION

Memorandum

To: Assistant Secretary--Indian Affairs

From: Acting Associate Solicitor, Division of Indian Affairs

Subject: Proposed contract for the Red Lake court

Our Twin Cities Field Office recently drafted language for inclusion in the proposed Public Law 93-638 contract with the Red Lake Chippewa Tribe for the operation of a tribal court on the Red Lake Reservation. The draft language would commit the tribe to compliance with the Indian Civil Rights Act. The tribe would be required to permit attorneys licensed in Minnesota to appear in the court until the tribe establishes its own bar standards in an ordinance approved by the BIA. The tribe would also be responsible for responding to any habeas corpus petitions alleging errors in the operation of the court. The tribal court would be required to provide a jury trial in appropriate cases without cost to the defendant. The draft language also provides that failure of the court to afford rights guaranteed under the Indian Civil Rights Act could lead to cancellation of the contract.

The BIA Minneapolis Area Office sent this language to the Central Office Division of Tribal Government Services for review and that office recommended against its inclusion in the contract. David Etheridge of my staff urged Joseph Little of the Tribal Government Division staff to reconsider his decision to oppose including the draft language in the contract, but he declined to do so.

Given the lengthy and well-documented record of the Red Lake Chippewa Tribe on civil rights matters, it is our view that contracting with the tribe for operation of the court without including explicit civil rights safeguards is likely to lead to litigation against the Interior Department that the Department will probably lose.

Complaints about the refusal of the tribe to permit legal counsel to represent individuals before the court in defiance of the mandate of the Indian Civil Rights Act, 25 U.S.C. § 1302(6), were documented as early as 1972 in a law review article, Note, Tribal Injustice: The Red Lake Court of Indian Offenses, 48 N.D.L. Rev. 638, 654-655 (1972). The Civil Rights Division of the Justice Department brought suit in federal court against the tribe because of allegations of civil rights violations. The suit was dropped only after the Supreme Court ruled in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that relief from most violations of the Indian Civil Right could not be obtained in federal court.

The federal courts are, however, available to grant writs of habeas corpus for persons imprisoned by an Indian court in violation of their rights. A number of such cases have been brought with respect to the Red Lake court. The federal court ordered the prisoners in one such case released because they had not been given a right to counsel, were told they would have to pay for a jury trial if they wanted one, and were denied the right to post bail—all in violation of the Indian Civil Rights Act. Good v. Graves, No 6-85-508, slip op. (D. Minn. May 20, 1985) (a copy is attached). Because our field office was aware that the practices condemned by the federal district court in the Good case were standard operating procedure in the Red Lake Court, that office wrote the Area Director the attached letter dated June 6, 1985, recommending that the court change the way it operates.

When the Central Office issued the attached directive dated November 12, 1985, prescribing procedures for all C.F.R. courts in order to assure protection of civil rights, the Red Lake Tribe, in the attached memorandum dated November 23, 1985, sought to order local BIA agency personnel to ignore the directive.

When the Bureau of Indian Affairs sought to make public court records available as it was required to do in response to a Freedom of Information Action request from the Minneapolis Star and Tribune, the tribe seized the records and the BIA was compelled to sue in federal court to recover possession of the records. Although the BIA won in both the district court and the court of appeals, the records have still not been returned. The newspaper has since published the attached series of articles on problems with Indian courts featuring the Red Lake court as a particularly egregious example.

In summary, it is clear that the Red Lake Tribe has no intention of operating its court in accordance with the requirements of the Indian Civil Rights Act.

On several occasions recently, individuals who believe their rights have been violated by tribal courts have unsuccessfully sought to compel the Department to exercise its authority under 25 U.S.C. § 450m to rescind Pub. L. 93-638 contracts for the operation of an Indian court. See e.g., Weatherwax on behalf of Carlson v. Fairbanks, 619 F. Supp. 294 (D. Mont. 1985). See also Eriksen v. United States, No. 589-86C, slip op. (Cl. Ct. July 31, 1987) (a copy is attached).

These cases involve attempts by the plaintiffs to force the Department to retaliate against a tribal court for a decision with which the plaintiff disagrees. Plaintiffs in these cases are attempting to force the Department to serve as an appellate tribunal for tribal courts by threatening to cut off funds to tribal courts that wrongly decide cases.

An adverse decision by a federal court is much more likely, however, if the plaintiff, instead of complaining about an alleged individual violation of rights, can establish that a court is routinely violating civil rights and that the BIA contracted the court to the tribe knowing that such violations were likely to occur. A federal court might well decide in such a case that the Department had a mandatory duty to exercise its authority under 25 U.S.C. 450m to protect tribal members by rescinding the contract. One loss in such a case would make it much more difficult to defend the other type of case where a plaintiff is simply trying to use the Department to overturn a single adverse decision in a tribal court.

Given the past record of the Red Lake Tribe, it is unlikely that it will operate the court in compliance with the Indian Civil Rights Act unless compelled to do so. We recommend that the problem be addressed at the outset by insisting on specific language in the contract rather than waiting until individual Indians seek to hold us accountable for the foreseeable actions of the tribal court.

If the tribe agrees to the conditions recommended by our field office, the Department will be in a stronger legal position to insist that the tribal court be operated in compliance with the Indian Civil Rights Act and to persuade a federal court that we are exercising our authority under 25 U.S.C. § 450m in a responsible manner. Conversely, if the Department declines to contract with the tribe because it refuses to agree to comply with the Act, the tribe will be in a weak legal position should it attempt to persuade a federal court to order us to contract with the tribe without explicit civil rights safeguards in the contract. By taking a firm position in this instance where a serious civil

rights problem clearly exists, we can substantially reduce the risk that federal courts will force us to become routinely involved in internal tribal disputes.

C. B. Hughes

Attachments

cc: Twin Cities FSO

bcc: Solicitor's Docket
Solicitor's RF
DIA RF
DEtheridge RF
RBuckner RF

DEtheridge:de 10/27/87

CABINET: DIA/TC
DRAWER: ETHERIDGE,D.
FOLDER: Tribal Law
DOCUMENT: Red Lake 2

Exhibit No. 3

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Memorandum

DEC 23 1987

To: Acting Associate Solicitor, Division of Indian Affairs

From: ACTING Assistant Secretary - Indian Affairs

Subject: Contract for Red Lake Court

Based on my staff's recommendations I will decline, at this time, from attempting to insert any draft language to the Public Law 93-638 Tribal Court Contract with the Red Lake Chippewa Tribe as proposed by your Twin Cities field office.

/S/ Hazel E. Elbert

cc: Minneapolis Area Director
Supt., Red Lake Agency

Exhibit No. 4

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:

SEP 26 1988

Mr. Brian Miller
Deputy General Counsel
U.S. Commission on Civil Rights
Room 604
1121 Vermont Avenue, N.W.
Washington, D.C. 20425

Dear Mr. Miller:

On September 19, you expressed an intent to publish six United States Department of the Interior internal memoranda as supplemental documents to your series of hearings on tribal court enforcement of the Indian Civil Rights Act. Some of these memoranda concern the Bureau of Indian Affairs' decision not to attempt the insertion of ICRA guarantees into the language of the Red Lake Chippewa Tribe's Public Law 93-638 contract for the operation of a tribal court on the Red Lake Reservation.

To put the decision in context, we would like to supplement the record with the enclosed documents which reflect the BIA's efforts to uphold the enforcement of not only the ICRA, but also the more stringent requirements of the United States Constitution. These efforts occurred in the era immediately preceding the tribe's decision to change from a Court of Indian Offenses, which was a federal agency, to a tribal court exercising inherent tribal sovereignty. We believe that these documents reflect, in the context of the relationship between the Red Lake Chippewa Tribe and the BIA, the proper role of the BIA in overseeing the practices of CFR courts as federal agencies.

We do not believe Congress intended for the Bureau to undertake a role in the enforcement of ICRA, in the administration of Pub. L. 93-638 grants. Our role in the administration of these grants is to assist Indian tribal governments to achieve self-determination, a goal which necessarily presupposes a limited federal role in the administration of the program. As the United States Supreme Court stated concerning the enforcement of the ICRA,

> [A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent (citations omitted).

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978). Further, at the time Congress considered the ICRA, it rejected a substitute measure proposed by the Interior Department which would have provided an adjudicative role for the Department. 436 U.S. 68.

We find no implication in Pub. L. 93-638 that Congress intended to authorize the BIA to enforce the Indian Civil Rights Act through the threatened denial of federal funds. As a practical matter, to enforce the ICRA would require an expanded administrative law apparatus for making such determinations. That would run counter to the development of tribal justice systems, while further strengthening the authority of the Bureau of Indian Affairs over tribal governments. These developments would tend to negate the ICRA's second goal as stated in the Martinez case, the Congressional "policy of furthering Indian self-government." 436 U.S. 62 (citations omitted).

Thank you for the opportunity to comment upon these documents prior to their publication. If there are other documents which you may have previously requested in conjunction with your inquiry and which we may not have furnished, please let us know.

Sincerely,

Hazel E. Elbert

Hazel Elbert
Deputy to the Assistant Secretary -
Indian Affairs (Tribal Services)

Enclosures

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
RED LAKE AGENCY
REDLAKE, MINNESOTA 56671

IN REPLY REFER TO:

MAY 27 1982

Mr. Roger A. Jourdain
Chairman, Red Lake Tribal Council
Red Lake, MN 56671

Dear Mr. Jourdain:

The purpose of this letter is to advise you that I have reviewed Resolution No. 101-82, dated May 26, 1982, relating to the exclusion and removal of news media from Red Lake lands during tribal elections. I have decided to approve this ordinance despite the fact that the Tribal Council did not incorporate my specific request that the ordinance provide that removals be in accordance with Section III of Resolution No. 85-63, dated September 5, 1963. Instead, Resolution No. 101-82, provides that removals are to be conducted pursuant to Section III(4), of the 1963 ordinance. The following paragraphs delineate the circumstances in which the Bureau of Indian Affairs will enforce Resolution No. 101-82.

Section III(4) of Resolution No. 85-63 provides that "in extreme cases involving grave danger to the life, health, morals, or property of the tribe or any of its members, the Superintendent, upon request by the Chairman, shall order any Red Lake policeman to remove a non-member, with or without a hearing." Accordingly, removal is appropriate only where the circumstances support a finding that a particular person's presence constitutes a grave danger to the Red Lake community.

In addition, the Superintendent will act only upon receipt of a written request, signed by the Chairman of the Red Lake Tribal Council. Each written request must contain the following:

1. The name and address of the person whose removal is requested (This information being necessary in the event notice must be served by registered mail);

2. A statement that the person is either a non-member Indian or a non-member non-Indian;

3. A brief, concise summary of the facts and circumstances which support a finding that the person's presence constitutes a grave danger to the life, health, morals, or property of the tribe or its members;

4. A statement indicating whether notice pursuant to Section III(1) of Resolution 85-63 has been made, and

5. If notice has been served, copy of such notice and proof of service must be attached.

If notice has not been served, arrangements should be made for service as soon as possible. The contents of the notice are prescribed in Section III(1).

Finally, although the proceedings under Section III(4) permit removal "with or without a hearing", (prior to removal) I prefer that any removal be preceded by a hearing which complies with all due process requirements.

(Dennis Whiteman)
(Superintendent)

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Tribal Government Services (JS)

NOV 12 1985

Memorandum

To: All Area Directors

From: Acting Deputy Assistant Secretary - Indian Affairs

Subject: Personnel Conduct and Responsibilities in Courts of Indian Offenses

It has come to our attention that courts of Indian offenses may be violating mandates set forth in the Constitution of the United States; the Indian Civil Rights Act, 25 U.S.C. §1301-1303; the Freedom of Information Act, 5 U.S.C. §552; 18 U.S.C. §2071; 43 C.F.R. §20.735-15; and 18 U.S.C. §209.

Courts of Indian offenses are created by the Secretary of the Interior in accordance with his general authority 5 U.S.C. §301 and 25 U.S.C. §§2 and 200 and operate pursuant to 25 C.F.R. Part 11. The authority of the Secretary to promulgate regulations with respect to courts of Indian offenses was recognized in U.S. v. Clapox, 35 Fed. 573, 577 (D.C. Ore. 1888). Courts of Indian offenses are federal instrumentalities that are required to comply with federal statutes as well as the Constitution of the United States. Therefore, you are directed to take immediate steps to have reviewed the conduct and responsibility of court personnel and their operations to ensure violations are not occurring and will not occur in the courts of Indian offenses under your administrative responsibility:

1. **Employees in courts of Indian offenses are prohibited from willfully and unlawfully removing, concealing, destroying or falsifying public records (i.e. court proceedings, maps, books, papers, court documents, etc...).** Violators of this provision will be referred to the U.S. Attorney for felony prosecution. Penalties for such a violation can include a fine not more than $2,000 or imprisonment for not more than three years, or both. A violator also may forfeit his/her office and be disqualified from holding any office under the United States, or be subject to disciplinary action. See 18 U.S.C. §2071; See also 43 C.F.R. §20.735-15.

2. **Federal employees in courts of Indian offenses are prohibited from supplementing their salaries from the money accumulated through criminal fines, court fees and from other sources.** Violators of this provision will be referred to the the U.S. Attorney for felony prosecution. A fine of not more than $5,000 and/or imprisonment of not more than one year applies. See 18 U.S.C. §209.

3. **Courts of Indian offenses personnel must comply with a request for court records made in accordance with the Freedom of Information Act, 5 U.S.C. §552.** Any federal employee in the court who acts contrary to this provision will be subject to adverse action.

4. The Indian Civil Rights Act and the Constitution of the United States guarantee that individuals appearing before courts of Indian offenses will be afforded all of those rights guaranteed by the Constitution to all citizens of the United States in any federal court.

5. **An indigent criminal defendant facing imprisonment must be afforded a court appointed attorney if he/she so desires.** The responsibility for paying for the attorney is with the CFR court (federal government).

6. **A criminal defendant facing possible imprisonment has the right to a trial by jury of not less than six persons.** The cost for paying for a jury trial is the responsibility of the CFR court (federal government).

7. **Professional attorneys can not be denied the right to practice before courts of Indian offenses.** Tribes may establish criteria that place reasonable requirements on the eligibility to practice (ie. tribal bar examination and membership fees, etc..). Criteria of that nature must be made equally applicable to all persons who practice before a particular CFR court.

8. **In locations where CFR courts have been established tribal and BIA law enforcement officers are required to comply with both the Constitution of the United States and the Indian Civil Rights Act in making arrests and in conducting search and seizures.**

9. **Courts of Indian offenses shall not enforce any tribal resolution or ordinance which is in conflict with any of the foregoing provisions.** Review all resolutions and ordinances that have been adopted in accordance with 25 C.F.R. §11.1(e) to insure that they comply with present constitutional and statutory requirements.

The Superintendent is responsible for the appraisal of job performance at the local level. Accordingly, he is charged with the responsibility for assuring that the CFR personnel are performing in accordance with the federal mandates and incorporating performance standards for CFR magistrates which will insure that individual civil rights are protected in courts of Indian offenses.

Every CFR court judge and employee shall be provided a copy of this memorandum to read and be required to sign a copy of it as evidence that they have read and understand it prior to assuming any CFR court duties. The signed copy shall be made a part of each judge's and employee's official personnel file.

Please complete the attached questionnaire for each of your CFR courts and return them to the Branch of Judicial Services, Room 2618, Code 440 by COB November 18, 1985. If you have questions regarding this directive or the questionnaire please contact Allen Davis at FTS 343-7885.

Hazel E. Elbert

Attachment

CFR COURT SURVEY

1. Does your CFR Court allow professional attorneys to represent litigants in civil/criminal trials? (Yes or No) If No, please explain.

2. Does your tribe have formal procedures for allowing professional attorneys to practice in your court (i.e. tribal bar examination, etc.)?

3. When requested, does your court provide indigent criminal defendants with a court appointed professional attorney, when the defendant is faced with a jail term? (Yes or No) If No, please explain.

a) Who assumes the cost of appointing an attorney? / / BIA / / Tribe
b) What is the cost to have a court appointed attorney in a single trial? $_____
c) How many criminal defendants request an attorney? _____

3. If a criminal defendant requests a jury trial, does your court pay the cost? (Yes or No) If No, please explain.

a) Who pays the cost for juries? / / BIA / / Tribe
b) What is the average cost of a jury trial? $_____
c) How many jury trials does your court have per year? _____

4. Does your court ever impose a criminal penalty of more than five hundred dollars ($ 500.00) or six (6) months in jail or both? (Yes or No) If Yes, please explain.

5. Does your court honor Freedom of Information Requests (5 U.S.C. §552)? (Yes or No) If No, please explain.

6. Does your court assert criminal jurisdiction over non-Indians? (Yes or No) If Yes, please explain.

7. Does your court enforce ordinances and resolutions adopted by the tribal council which have not been approved by a delegate of the Secretary of the Interior in accordance with 25 CFR §11.1(e)? (Yes or No) If Yes, please explain.

8. Do you consider any of your Tribe's ordinances to be in violation of Federal Law? (Yes or No) If Yes, please explain.

9. Do the federal employees in your court supplement their incomes with monies collected through fines and fees? (Yes or No) If Yes, please explain.

10. Do you handle your court records in accordance with Federal Law? (Yes or No) If No, please explain.

11. How many writs of habeas corpus have been issued against your court by a federal district court? If any, please explain.

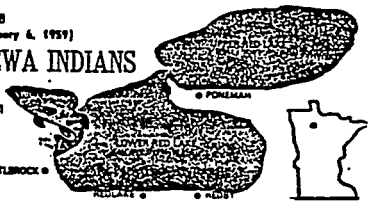
12. Does your court refuse bail in any cases? (Yes or No) If Yes, please explain.

13. What does your court consider as excessive bail?

14. Please send a copy of the FY 85 638 contract document for the following CFR courts under your administrative responsibility:

- Minnesota Chippewa - Nett Lake/Bois Forte (Minnesota)
- Cocopah (Arizona)
- Kaibab Band of Paiute (Arizona)
- Te-Moak Band of Western Shoshone (Nevada)
- Yomba Shoshone (Nevada)
- Kootenai Tribe (Idaho)
- Shoalwater Bay (Washington)
- Hoopa Valley (California)
- Anadarko (Oklahoma)
- Mississippi Choctaw (Mississippi)
- Eastern Band of Cherokee (North Carolina)
- Lovelock Paiute (Nevada)

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



M E M O R A N D U M

23 November 1985

TO : Rex Mayotte, Superintendent
Rob Moran, Agency Special Officer
Earl Barlow, Area Director

FROM : Roger A. Jourdain, Chairman

SUBJECT : Memo from Hazel Elbert re: Personnel Conduct and Responsibilities in Courts of Indian Offenses

You are hereby directed to withdraw your order to B.I.A. personnel enforcing the Hazel Elbert memorandum. Failure to do so constitutes a crime against the Red Lake Band of Chippewas. Even the most uninformed B.I.A. employee must recognize that laws applicable to 25 CFR 11 can not be unilaterally changed to comply with personal agendas.

The Hazel Elbert memo is the most blatant and direct attack on the integrity of the Red Lake Band of Chippewas that I have seen in over 25 years as Chairman. The Bureau of Indian Affairs has reached a new low in the insidious attempts to undermine the sovereignity of Indian Tribes. Even the most casual lay reading of the memo makes self-evident the fact that the B.I.A. is intent on assisting a few criminal conspirators in their effort to overturn the orderly process of Tribal self-government. While all of the nine point directives are considered a direct attack on the Red Lake Band of Chippewas, the inclusion of items (5), (7), and (9) forcefully demonstrate the lengths to which the B.I.A. will go in their all out mission to destroy Tribal government.

In reference to item (5), while the current 25 CFR Part 11 is silent on this new infringement on Tribal sovereignty, Supreme Court decisions have held contrary opinions to this directive.

Item (7) is contained in the proposed regulations which, even if approved, will not take effect until 6 months after publication in the Federal Register.

In reference to item (9), it has been established that Tribal Councils may enact ordinances which, after approval by the B.I.A., will supercede CFR regulations.

Section 11.74 25 CFR speaks directly to item (9) in Hazel Elbert's memorandum.

> "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."

The threat contained in the final three paragraphs of the memorandum explicitly demonstrate how the B.I.A. forces their employees to blindly follow directives that are not in the best interests of Tribes under their trust responsibility.

The fact that this memorandum was not shared with the Red Lake Tribal Council prior to implementation supports all prior charges of B.I.A. misuse of the trust responsibility and demonstrates to all the untrustworthy calibre of those who pretend to serve the Red Lake Band of Chippewa Indians.

In consideration of the above, if personnel of the Red Lake B.I.A. Agency choose to arbitrarily enforce the memorandum of Hazel Elbert in the Red Lake Court of Indian Offenses, the Red Lake Tribal Council, as the duly elected government of the Red Lake Band of Chippewa Indians, has no alternative but to order the removal of all individuals who enforce said memorandum.

I would also remind you of violation of 25 CFR 11.21 which specifically prohibits the interference of field personnel in the functions of the Court of Indian Offenses.

Roger A. Jourdain
Chairman

C.C. Tribal Attorneys, EDWARDS, EDWARDS & BODIN
Tribal Council Members
Red Lake Law Enforcement Personnel
Red Lake Court of Indian Offenses Personnel

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

MINNEAPOLIS AREA OFFICE
15 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA 55402

IN REPLY REFER TO:
Tribal Operations

DEC 27 1985

Roger A. Jourdain, Chairman
Red Lake Tribal Council
Red Lake, MN 56671

Dear Mr. Jourdain:

This is in response to your memorandum of November 23, 1985, in which you expressed your desire that I not comply with the directives contained in the Acting Deputy Assistant Secretary-Indian Affairs' November 12, 1985, memorandum respecting the enforcement of individuals' rights in the Red Lake Court of Indian Offenses. Although I understand your position in this matter, I cannot defer to it, nor am I at liberty to disregard the directives of the Acting Deputy Assistant Secretary. Furthermore, while you characterize the substance of the memorandum as an insidious and direct attack on Tribal sovereignty, I view it as an affirmation and clarification of the way Courts of Indian Offenses must be administered. While there may be some ramifications for the Tribal Government, Tribal sovereignty is not at risk.

Your specific objections to Paragraphs 5, 7 and 9 of the memorandum do not persuade me to change my mind. Paragraph 5, which relates to the right of indigent defendants to a court-appointed attorney at Federal expense, is in keeping with and the result of Paragraph 4. That paragraph is taken verbatim from Federal Law 25 USC 1311 and constitutes a recognition of the fundamental distinction between Tribal courts and Courts of Indian Offenses. See 25 USC 1301(3) which defines "Indian Court", as a "Tribal Court or Court of Indian Offenses", and 25 USC 1903(12), to the same effect. The Department is unaware of any Supreme Court decisions on this issue and I would appreciate learning the citations to cases you feel are relevant.

Next, the acknowledgement in Paragraph 7 of the right of professional attorneys to practice before Courts of Indian Offenses does not have to await the publication of final regulations to be enforced. Federal agencies which administer criminal justice systems are obligated to ensure that the protections of the Constitution are honored; and need not promulgate regulations to implement measures aimed at affording rights created by the Constitution and already held by the people. The promulgation of specific regulations which incorporate those rights is necessary only to make sure that no further misunderstandings occur. You should, of course, submit your comments on the proposed regulations as set out in the Federal Register.

Paragraph 9 reminds those in the Bureau of Indian Affairs who administer Courts of Indian Offenses that Tribal ordinances which either directly, or in their application, conflict with Federal Law and the Constitution cannot be enforced. The agencies of the United States are obligated to enforce the Constitution and laws of the United States. It may be true that approved Tribal ordinances may take precedence over certain provisions in 25 CFR Part 11 (see 25 CFR 11.1(e)), but no Federal official is authorized to approve or to enforce Tribal ordinances which violate Federally-guaranteed rights.

Finally, the "non-interference" provision at 25 CFR 11.21 could not possibly countenance the violation of guaranteed rights in a Court of Indian Offenses. As we learned in Judge Magnuson's opinion last spring, both the rights we seek to protect and the sanctions for violations of those rights are real and I am unable to turn a blind eye under the guise of "non-interference". Notwithstanding the vigor of your objections, I remain optimistic that we can work together to accomplish legitimate law enforcement goals while at the same time fully protecting the rights of individuals. Perhaps the presence of attorneys in the Red Lake Court of Indian Offenses will be unsettling at the outset. Nevertheless, I believe that we can use our resources to minimize the growing pains and move on to other issues.

Sincerely,

Earl J. Barlow

Area Director

Barlow — Mark Anderson Attorney-Advisor

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

MINNEAPOLIS AREA OFFICE
15 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA 55402

IN REPLY REFER TO:
Administration

RECEIVED
FIELD SOLICITOR
TWIN CITIES
JAN 14 1986

JAN 10 1986 RECEIVED
FIELD SOLICITOR
TWIN CITIES
JAN 28 1986

MEMORANDUM

TO: Superintendent, Red Lake Agency

FROM: Office of the Area Director

SUBJECT: Red Lake Court of Indian Offenses

I am advised that two members of the Red Lake Band are scheduled to appear before the Red Lake Court of Indian Offenses and that those defendants have retained the services of an attorney (Richard Meshbesher) to represent them at the proceedings. You are aware, of course, that Mr. Meshbesher has brought suit against the United States on behalf of several tribal members, seeking to enjoin the operation and funding of the Red Lake Court. That suit is based, at least in part, on allegations of denial of access to legal counsel in the court; and the government's motion to dismiss the case will be heard Friday, January 24, 1986, by Judge Magnuson.

As indicated in my December 27, 1985, letter to Chairman Jourdain, it is the position of the Bureau of Indian Affairs that defendants have a right to counsel, including attorneys, in the Red Lake Court. Although Tribal Resolution No. 237-85 has established criteria for purposes of admission to practice before the court, the criteria are so restrictive that it is a virtual certainty that no professional attorney could qualify for admission to practice. Imposition of those criteria would have the effect of denying the right to counsel and, accordingly, the Bureau of Indian Affairs can neither approve nor recognize the criteria in Resolution No. 237-85. The existing Tribal Code provision (Chapter 1, §4 (1) is equally restrictive because it limits licensing to Band members. In these circumstances - where there is no specifically approved tribal ordinance governing admission to practice and the present code effectively prevents attorneys from appearing in the Court - attorneys appearing in the Red Lake Court of Indian Offenses will be required to meet the standards for practice before the Department of Interior. The regulations at 43 C.F.R. Part 1 provide that:

> Attorneys at law who are admitted to practice before the courts of any state...will be permitted to practice (before the Department of the Interior) without filing an application for such privilege. 43 C.F.R. §1.3 (b) (2) (1984).

You should satisfy yourself that Mr. Meshbesher is eligible under the standard set out above. This can be accomplished by asking to see his Minnesota Attorney License.

Next, I am also aware that the Red Lake Band has issued an order that Mr. Meshbesher be removed from the Reservation by Law Enforcement Services personnel. Bureau personnel are hereby directed not to enforce that removal order. Doing so would implicate the BIA in a denial of right to counsel. Although Superintendent Whiteman approved a removal ordinance on May 27, 1982, and in the approval letter (copy attached) expressed the circumstances under which the Bureau would enforce removal, in the circumstances at hand I can see no reason to enforce the order for Mr. Meshbesher's exclusion or removal from the Reservation.

Mr. Meshbesher intends to visit the Red Lake Reservation for a legitimate purpose, will be traveling the public highways, and visiting a public facility. Bureau Law Enforcement personnel are to be available to protect Mr. Meshbesher's person and property while he is on the Reservation representing his clients. Any efforts to interfere with Bureau officials engaged in these duties must be viewed as unlawful interference with federal officers (see 18 U.S.C. §§111 and 1114) and handled accordingly. A copy of this letter is being sent to the United States Attorney along with a request that the Department of Justice assist in this situation should that become necessary.

Earl J. Barlow

Area Director

Attachments

Exhibit No. 5

COPY

1/26-1

UNITED STATES GOVERNMENT

memorandum

DATE: January 22, 1988

REPLY TO ATTN OF: Superintendent, Red Lake Agency

SUBJECT: U.S. Commission on Civil Rights Inquiry

TO: Area Director, Minneapolis

Regret the seeming delay in responding to the request for information; however, insufficient time was allowed for earlier response.

Our response to Part 1, Questions #5 through #7, and #13, and Part II, Questions #1 through #4 are as follows:

Part 1, Question #5: a) Vollmann's outline asserts that ICRA violations may be a basis for BIA declination to contract programs with a tribe under P.L. 93-638. Is this current policy?

Response: It could be, however, it is not entirely clear what current policy is in this regard.

b) Since Martinez, has BIA ever declined to contract such programs because of (alleged) ICRA violations? In how many cases was ICRA non-compliance the stated reason for agency action or inaction? If so, when and on what basis?

Response: Yes, with the following chronology of events:

Pre-May, 1978 Ms. Stephanie Hanson aligned herself in opposition to the elected tribal government alleging a variety of administrative wrongdoing and misfeasance on the part of the tribal council and tribal officers. She became a candidate for the Tribal Treasurer position in the May, 1978 election and won the election. Thereupon internal tribal government dispute arose and increasingly escalated to a censure action taken against the tribal treasurer, a suspension and finally a removal action enacted by the tribal council by resolution on 5/18/79.

On 5/19/79 a civil protest takeover of the BIA Law Enforcement Center in the early morning hours turned violent with hostages taken, gunfire, and the eventual burning of the facility, destruction of other public and private property and the tragic loss of two young lives and millions of dollars in damage resulted from a small group protesting Ms. Hanson's removal from the office Tribal Treasurer.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11
5010-114

* U.S. GOVERNMENT PRINTING OFFICE : 1983 O - 381-516 (8

Calm was restored and the situation defused within three days and the government to government consultation process between the Bureau and the tribal government began in an attempt to bring about resolution of the internal tribal disputes.

On 7/10/79 the Assistant Secretary-Indian Affairs issued a major policy memorandum to the Area Director describing the Bureau's position and response to internal tribal dispute in the context of the Martinez decision and its application in the Red Lake situation.

The Bureau notified the tribal government that it would continue to recognize Ms. Hanson as the duly elected tribal treasurer for failure to accord due process in the removal and questioning process and procedure of her removal. On 7/20/79 the Area Director denied a tribal request for release of tribal trust funds to operate their government and refusing to recognize a provisionally appointed tribal treasurer.

On 8/14/79 the tribal council appealed the Area Director's decision to the Assistant Secretary-Indian Affairs and the appeal was denied by Interior Secretary Cecil Andrus as final for the Department on 9/13/79.

The Bureau had reached agreement with the tribal leadership on 6/8/79 to permit an Inspector General audit of all tribal programs. However, in spite of the agreement the tribal leadership continued to exercise delay tactics. On 10/29/79 Under Secretary James Joseph announced that an economic sanction was being imposed against the Red Lake Tribal Council which would curtail all Federal funds to the tribe, due to unsuccessful efforts to audit Red Lake tribal accounts.

On 10/29/79 the Assistant Secretary-Indian Affairs directed the Area Director to advise the Red Lake Tribal Council that the federal government 1) will not make any payments on outstanding contracts or grants, nor 2) process any request for advance payments, nor, 3) process any letter of credit, nor 4) extend, renew, or enter into any new contracts or grants until access to tribal records is granted and audit findings resolved.

On 1/13/80 the Red Lake Tribal Council and the DOI negotiated a new agreement for DOI audit of Red Lake Tribal accounts.

Meanwhile a petitioning process was ongoing on the reservation proposing constitutional amendment advocated by political oppositionists to the tribal council and the council was employing various delaying tactics. On 1/16/80 Assistant Secretary-Indian Affairs Gerrard imposed a 10-day deadline for Red Lake Tribal Council action on the petition presented and holding that the Bureau wanted a proper election on the issues to be conducted not less than 60 days or the Assistant Secretary would withdraw recognition of the tribal government as a sanction.

On 2/1/80 Acting Deputy Assistant Secretary Mills appointed a special two-man team (Robert L. Bennett and Graham Holmes) to help settle the tribal crisis and in doing so, he temporarily lifted the 10-day deadline previously imposed pending a report and recommendations of the two-man team.

On 2/18/80 the two-man team visited Red Lake and conducted interviews and community meetings throughout that week and completed a report making some twenty-five specific recommendations. One of their recommendations was that the Bureau provide supervision and poll watchers for a special referendum election on tribal council action in removing Ms. Stephanie Hanson from the office of Tribal Treasurer, which the tribal council had independently scheduled for 3/26/80.

On 3/17/80 Acting Assistant Secretary-Indian Affairs Mills issued a press release announcing that DOI continues to recognize Ms. Stephanie Hanson as Red Lake Tribal Treasurer and that the referendum election could not make legal an action which, as originally taken, was contrary to the tribe's own governing documents and proclaiming that such election would be advisory only and not binding on DOI.

On 3/26/80 a special referendum election was held under Bureau supervision to approve or disapprove the tribal council resolution removing Ms. Stephanie Hanson. The referendum vote of the people strongly supported the tribal council action in removing her from office. The vote was 584 approve to 164 disapprove.

In May, 1980 a regular tribal council election was held and again the electorate strongly supported the incumbent government, although the treasurer position was not up for election. The provisionally appointed tribal treasurer continued to serve and the tribal council protested the Bureau's refusal to recognize their dismissal of Ms. Hanson to their congressional delegation and to the Office of the President.

On 9/26/80 in response to correspondence directed to the Office of the President and referred to the Bureau for direct reply the Acting Director, Office of Indian Services notified the Chairman of the Red Lake Tribal Council that the Bureau continued to not recognize the tribal council's dismissal of Ms. Hanson and expressed regret that a number of contracts and grants had been withheld, holding however that this action is necessary and justified given the circumstances. Meanwhile the DOI audit of tribal programs was ongoing.

In February, 1981 the IG Audit Report of the Red Lake Housing Program was completed and issued separately from audit of other tribal programs because of the voluminous documentation of questioned costs totaling $326,500.

In June, 1981 the Final Audit Report, 2-CC-BIA-MN-79-16, was completed and issued for selected Red Lake tribal programs. Of the total federal programs audited with costs claimed of $5,716,585. a total of $553,239. was questioned and only $131,124. was identified as disallowed. For the ten Bureau contracts audited, costs questioned were $477,971. and costs disallowed were $127,341.

On April 20, 1982 the Assistant Secretary-Indian Affairs withdrew his prohibitions against contracting with the Red Lake Band of Chippewa.

On May 12, 1982 the Minneapolis Area Office submitted a "final determination and findings of all questioned and disallowed costs" to the IG and recommended its acceptance. A total of $70,767 was unresolved pending further resolution efforts with the tribal government. This was finally resolved down to a final unresolved cost of $600+, although I cannot locate documentation that I recall viewing and reflecting this.

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COPY

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UNITED STATES GOVERNMENT

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OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11
5010-114

* U.S. GOVERNMENT PRINTING OFFICE : 1983 O - 381-526 (3

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In May, 1982, the primary election of the Red Lake Band of Chippewa was held and again Ms. Stephanie Hanson was a candidate for election to the office of tribal treasurer. She succeeded in being one of the two top finalists for the run-off election.

On August 11, 1982 Ms. Hanson was soundly defeated in the tribal run-off election for tribal treasurer by Mr. James Strong with a vote of 1216 to 791. Mr. Roger A. Jourdain was returned to office as Tribal Chairman by a wide margin over his opponent, Mr. Joe Head, a former Bureau Tribal Operations Specialist and Acting Superintendent, who also was a principal activist in the political contest to unseat the incumbent tribal government.

Aftermath. Relations were normalized in a fashion between the BIA and the tribal government. The oppositionists continued their opposition to the incumbent tribal officials and government. Bureau sanctions imposed were just allowed to fade away and a rebuilding process initiated. The Bureau policy stance developed in response to the Red Lake civil unrest became the genesis for a broad policy statement issued on June 12, 1980 and commonly referred to as the "Martinez Policy." The issuance of this policy statement drew wide opposition from tribes across the country which resulted finally in the withdrawal of the policy on January 27, 1981. Current tribal dispute situations are handled on a case by case basis with no clear policy direction as to whether we are to become involved and/or when and how to become involved or evaluate the action of the tribal governing body.

Part 1, Question #6: Since Martinez, how often has the Department's exercise of its trust responsibility been affected by ICRA violations?

Response: Once locally, as described in #5 preceding.

Part 1, Question #7: Since Martinez, how often has the Department refused recognition of tribal representatives because of "gross ICRA violations"? What is a "gross violation" and where is it defined?

Response: Once locally as described in #5 preceding, although to my knowledge our situation was never described or defined as a "gross ICRA violation," and we have no knowledge of any such definition.

Part 1, Question #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.

Response: Enclosed as Attachment #1.

a) How many are for tribal courts?

Response: One and identified as F50C14208214.

b) How many are for tribal police?

Response: None, however, the tribe submitted a proposal for contract of our local BIA Law Enforcement Services and is pending review and approval.

c) How many are for appeals courts?

Response: Appeals court provision is included with the tribal court contract identified above.

d) How many are for tribal councils?

Response: We have no contract for tribal council per se, however, we have approved a Self-Determination Grant for purpose of developing the administrative capacities of the Red Lake Tribal Council. See attachment #1.

e) How many are for Public Defender services?

Response: Provided for in the tribal judicial system as an operational budget line item in the tribal court contract identified above.

f) How many are for Judicial training?

Response: Provided for in the tribal court contract identified above as an operational budget line item.

Part III, Question #1: Please indicate what training is provided to judges and court personnel.

Response: Enclosed as Attachment #2.

a) What specific training is given with respect to implementation of the safeguards contained in the ICRA?

Response: See attachment #2.

Question #2: What is the total number of tribal judges in your area?

Response: Four. (3 trial judges and 1 appeals court judge)

a) Of this total, how many have law degrees?

Response: The question reflects an unfair bias and an ethnocentrism that we reject.

b) How many have received special training on the ICRA?

Response: Three. Our appeals court judge is only recently appointed and has not had the opportunity to attend special training. However, he is learned in the law generally and is knowledgeable about ICRA.

Question #3: Do you beleive those subject to tribal law need to be better informed of their rights under ICRA? What steps has your office taken to inform those subject to tribal law in your area of their rights under the ICRA?

Response: Yes, Indian people generally have need to be better informed, not only of their rights under ICRA, but of the purpose, function, and responsibility of their government(s) and the responsibility of tribal citizenship. We have made ourselves available for direct response to inquiry, participated in local school civics class discussion, acted in an advisory non-directive capacity to tribal government on specific issue, and actively inform all detainees, arrest subjects, and individuals who come before the court of their specific ICRA rights.

Question #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.

Response: The Red Lake Agency serves only the Red Lake Band of Chippewa Indians. A copy of their written constitution is enclosed as Attachment #3.

Included as Attachment #4 is an updated tribal court profile. Because delayed receipt of the request for information allowed only two workdays to respond, we simply were not able to solicit or obtain tribal government response to Part II questions #5 through #23 as directed. It took over a month to get from Department to Area and an additional week to get from Area to agency. This allowed us only two workdays to respond by the due date and was terribly inconsiderate of local need. Obviously, our communication linkages need improvement. This concludes our limited response. If we can be of further assistance, please advise.

Attachment #1

C O N T R A C T S - Fiscal Year 1988

F50C14208201	Johnson O'Malley (JOM) Red Lake Tribal Council	$ Pending
F50C14208202	Higher Education Red Lake Tribal Council	$109,200.00
F50C14208203	Law Enforcement Services Red Lake Tribal Council	$ Pending
F50C14208204	Credit Red Lake Tribal Council	$ 48,400.00
F50C14208205	Housing Red Lake Tribal Council	$ Pending
F50C14208206	Roads Maintenance Red Lake Tribal Council	$ Pending
F50C14208207	Facilities Management Red Lake Tribal Council	$ Pending
F50C14208208	Forestry Management Red Lake Tribal Council	$ Pending
F50C14208209	Social Service- GA & Misc. Asst. Red Lake Tribal Council	$ Pending - old contract extended to 3/31/88
F50C14208210	Tribal Operations Red Lake Tribal Council	$ 38,286.00
F50C14208211	Realty Services Red Lake Tribal Council	$ 30,352.00
F50C14208212	Higher Education - see #F50C14208202 Red Lake Tribal Council	$ CANCELLED - Number already issued
F50C14208213	AVT and Other Employment Assistance Red Lake Tribal Council	$375,585.00
F50C14208214	Tribal Court Red Lake Tribal Council	$ CANCELLED - old contr extended to 9/30/88
F50C14208215	Fisheries Management Red Lake Tribal Council	$ 87,417.00

G R A N T S

F52G14200113	Ponemah Juvenile Center Red Lake Tribal Council	$56,570.00 FY81
F50G14200142	S-D Grant--Develop Admin Capabilities Red Lake Tribal Council	$106,500.00 FY82
F50G14200159	S-D Grant--Evaluation of Programs Red Lake Tribal Council	$32,000.00 FY82
F50G14200183	GRANT--Review of Agency Programs & Services Red Lake Tribal Council	$18,000.00 FY83
F50G14200222	S-D Grant--Strengthen TRibal Government Red Lake Tribal Council	$100,900.00 FY83
F50G14200241	ICWA--Ponemah Juvenile Center Red Lake Tribal Council	$50,000.00 FY83
F52G14200251	ICWA--Foster Care & Juvenile Center Red Lake Tribal Council	$91,730.00 FY84
F50G14200291	Federal Highway Safety Grant--Infant Car Seats Red Lake Tribal Council	$4,500.00 FY85
F52G14200406	PL 93-638 Grant--Strengthern Tribal Government Red Lake Tribal Council	$76,900.00 FY86
F52G14200407	GRANT for Retail Center Red Lake Tribal Council	$150,000.00 FY86
F52G14200408	Federal Highway Safety Grant--DWI Equip Etc. Red Lake Tribal Council	$28,304.00 FY86

Attachment #2

Bruce E. Graves: Chief Magistrate

Tribal Government Workshop, Oklahoma City--------12-1-85 to 12-7-85
Upper Great Lakes Intertribal Judges Assoc Meeting,
Lac du Flambeau, WI----------1-15-86 to 1-17-86
Northern Plains Tribal Court Judges Assoc., Aberdeen, SD-----1-23-86 to 1-25-86
Welfare Fraud Seminar, St. Paul, MN--------2-13-86 to 2-14-86
Juvenile Justice Center, Las Vegas, NV----------3-31-86 to 4-6-86
Northern Plains Tribal Court Judges Assoc.-------4-9-86 to 4-12-86
Indian Civil Rights Act, Scottsdale, AZ-------10-1-86 to 10-5-86
Great Lakes Tribal Judges Meeting, Greenbay, WI-------10-14-86 to 10-17-86
National Indian Justice Center, Minneapolis---------10-30-86 to 11-4-86
Conference on Judicial Services, Greenbay, WI----------1-27-87 to 1-29-87
Annual Conference of Judges, Brainerd, MN---------6-7-87 to 6-10-87
Probate Training, Bismarck, ND----------4-27-87 to 5-1-87
Conservation, Preservation & Tribes Role on Resource Management,
Duluth, MN---------10-14-87 to 16-16-87
Evidence & Objections, Las Vegas, NV----------December 1987
Tribal Court Probation, Albuquerque, NM----------1-11-88 to 1-15-88
Criminal Procedures, Salt Lake City, UT-----7-15-86 to 7-18-86

Clifford C. Hardy: Associate Magistrate

Civil Rights in Indian Country, Scottsdale, AZ--------10-1-86 to 10-5-86
Great Lakes Tribal Judges Assoc., Lac du Flambeau, WI---------10-14-86 to 10-17-86
Criminal Law, Minneapolis, MN-------10-30-86 to 11-4-86
Child Abuse & Neglect, Minneaplis, MN----------7-19-87 to 7-23-87
Evidence & Objections, Las Vegas, NV---------12-1-86 to 12-17-86

Wanda L. Lyons: Associate Magistrate

Realty Probate Training Seminar, Bismarck, ND--------4-23-87 to 4-30-87
Child Abuse & Neglect, Minneapolis, MN---------7-20-86 to 7-22-86
Criminal Procedures, Salt Lake City, UT-----7-15-86 to 7-18-86
How to Treat Sex Offenders, Bemidji, MN----------5-1-86
Juvenile Justice Systems, Las Vegas, NV----------4-30 to 4-4-86
Police Sciences----------3-19-81 to 3-21-81
ICWA, Bemidji, MN----------11-23-81 to 11-24-81
Report & Report Writing, Red Lake, MN--------8-21-81
Performance Appraisal Training, Red Lake, MN--------7-15-80
Evidence & Objections---------7-12-85
Advanced Criminal Law, Minneapolis, MN--------10-31-86 to 11-3-86
Indian Civil Rights Act, St. Paul, MN--------9-26-84 to 9-28-84
Permanency Planning Workshop, Minneapolis, MN---------6-17-87 to 6-18-87

Doris Seki: Court Clerk

Child Abuse & Neglect, Minneaplis, MN--------7-20-87 to 7-22-87
Court Clerk Procedures, Albuquerque, NM----------9-30-85 to 10-1-85

Deborah Hegstrom: Court Clerk

Court Clerk Procedures, Albuquerque, NM--------9-30-85 to 10-1-85

Cynthia King: Prosecutor

Evidence & Objections, Las Vegas, NV-------12-14-87 to 12-17-8
Tribal Court Probation, Albuquerque, NM--------1-12-88 to 1-14-88

Exhibit No. 6

TRIBAL COUNCIL
Organized April 18, 1918
(Revised Constitution and By-Laws, January 6, 1959)
RED LAKE BAND of CHIPPEWA INDIANS
Phone 218/751-0160
P.O. Box 1457
BEMIDJI, MINNESOTA 56601

UPPER RED LAKE
FOREMAN
LOWER RED LAKE
REDLAKE
REDBY

RESOLUTION NO. 36-80

WHEREAS, the Red Lake Indian Reservation is a legacy left by our forefathers for the Indians to enjoy forever, and;

WHEREAS, recent one-sided presentations by the news media has only served to create unrest and create a false picture of the Red Lake Reservation, and;

WHEREAS, the Red Lake Triabl Council deems the presence of any news media to be detrimental to the peace and tranquility of the Red Lake Band of Chippewa Indians, and serves only to kindle unrest, and their presence is frowned upon by the two-man team from the Department of Interior.

NOW, THEREFORE, BE IT RESOLVED, that any of the news media, either local or national, is hereby declared barred and restricte from the Red Lake lands and the Bureau of Indian Affairs is hereby directed to remove such persons under the establishec removal ordinance who do not possess a special permit issued by the Red Lake Tribal Council Chairman, Roger A. Jourdain.

For : 9

Against : 0

We do hereby certify that the foregoing resolution was duly presented and enacted upon at the Regular Meeting of the Tribal Council held on March 21, 1980, at the Tribal Offices, State Service Center, Bemdiji, Minnesota.

Roger A. Jourdain, Chairman

Boyce Graves, Secretary

Exhibit No. 7

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
RED LAKE AGENCY
REDLAKE, MINNESOTA 56671

IN REPLY REFER TO:

MAR 24 1980

Memorandum

To: Commissioner of Indian Affairs
Attn: Division of Tribal Government Services

From: Superintendent, Red Lake Agency

Subject: Resolution No. 36-80 - Removal of News Media

The Tribe by Resolution No. 36-80 is attempting to control the presence of the news media on the Red Lake Reservation

Although the allegations cited in the third paragraph of the resolution may be well founded in some instances, Section 202, Item 1 of the Indian Civil Rights Act does not allow the prohibition of freedom of speech or the press. Please also refer to page 446 of Volume 1 of "Opinions of the Solicitor". I feel that the question is complex and needs a thorough review by the Tribal Government and Solicitor's staff at the Central Office level.

We have received numerous inquiries as to how the Bureau Law Enforcement Services will react to the presence of the press on the reservation.

Please give this resolution high priority and furnish this office with a legal opinion.

Everett L. Munson
Acting Superintendent

Attachment

Exhibit No. 8

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 7 1980

Memorandum

To: Commissioner of Indian Affairs

Attn: Chief, Division of Tribal Government Services

From: Associate Solicitor, Division of Indian Affairs

Subject: Red Lake Resolution No. 36-80

This resolution, enacted on March 21, 1980, bars the news media from the Red Lake Reservation, except for persons possessing a special permit issued by the tribal chairman, and directs the Bureau of Indian Affairs to remove the barred persons "under the established removal ordinance." We have been asked whether the resolution is consistent with the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.

In our view, the resolution as presently drafted violates the prohibition in 25 U.S.C. § 1302(1) against abridgment of freedom of the press, but it is also our view that the resolution could be revised to cure the violation.

Case law interpreting the constitutional guarantee of freedom of the press establishes that there is no absolute right of access to information and that the press can be excluded from areas or events from which the general public is also excluded. See, e.g., Zemel v. Rusk, 381 U.S. 1 (1965); Pell v. Procunier, 417 U.S. 817 (1974); Houchins v. KQED, 438 U.S. 1 (1978). On the other hand, except under compelling circumstances, the press normally cannot be excluded from areas or events from which the public is not excluded. Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973). Moreover, particular reporters cannot be excluded because they represent a particular point of view or because officials dislike them, when other reporters are not excluded. Consumers Union v. Periodical Correspondents' Assoc., 365 F. Supp. 18 (D.D.C. 1973); Borreca v. Fasi, 369 F. Supp. 906 (D. Hawaii 1974).

Since the right to access to information is a limited right, it may be balanced against a state's interest in precluding access. The state's interest must be compelling, and the relationship between the restraint on the press and the state's interest is probably required to be substantial, so that a state would have to show that it could not achieve its goal by any less drastic means. Lewis v. Baxley, supra, 368 F. Supp. at 778-779.

These constitutional principles state the general standard by which the tribal action should be judged with respect to compliance with the Indian Civil Rights Act. However, consideration must also be given to the long-recognized sovereign power of Indian tribes to exclude non-members from their reservations.1/ This seems a particularly relevant consideration in the case of Red Lake, because the Red Lake Band owns the lands of the Red Lake Reservation and thus has a proprietary, as well as a governmental, interest in the reservation. This does not mean, of course, that the Band may act with the impunity of a private landowner because, in its governmental capacity, it is subject to the constraints of the Indian Civil Rights Act.

We think the appropriate way to take these considerations into account is to apply a balancing test, as in constitutional analysis, but to add the traditional sovereign power of exclusion and the proprietary interest of the Band as elements favoring the Band's right to exclude the press. Thus, the Band would not need to show the same degree of compelling interest and substantial relationship between that interest and a restraint on the press that a state would be required to show. It is probably sufficient for the Band to show a reasonable relation between exclusion of the press and a valid tribal interest, such as protection of the public safety. If, as we understand the case to be, the presence of the news media has caused disruption on the reservation and therefore has endangered public safety, we think that exclusion of the news media is a reasonable means of providing for the public welfare, and that the Band may, therefore, exclude reporters without violating the free press provision of the Indian Civil Rights Act, as long as their presence may reasonably be viewed as posing a threat to public safety.

It is questionable whether the Band may permanently bar the press, because it is difficult to see how the Band could reasonably conclude that the press will always pose a danger. Therefore, we recommend that the Band be advised to revise the resolution to provide for its expiration at a definite time (subject to reenactment if necessary) covering a time period for which the unsettled situation can reasonably be foreseen to continue. Another alternative would be to provide for exclusion of the press only for certain events, such as elections, which are particularly sensitive to disruption.

In our view, the prevention of "one-sided presentations by the news media" is not a tribal interest sufficient to support exclusion of the press. Nor may tribal officials, in our view, permit some members of the press to enter while excluding others. Both of these aspects of the resolution

1/ "Powers of Indian Tribes," Solicitor's Opinion, 55 I.D. 14, 48 (1934) 1 Op. Sol. on Indian Affairs 445, 466 (U.S.D.I. 1979).

come too close to an apparent attempt to authorize censorship of the news; e.g., the tribal official authorized to grant permits would have the power to control what is to be published by favoring reporters with a particular point of view. Therefore, a ban directed at the press should not allow for exceptions. (This is not to say that individual newspeople might not be excluded for valid reasons unrelated to their status as members of the press. However, such exclusions should be effected under an ordinance of general application, not one applicable to the press only, and would require consideration of due process and equal protection questions.) Also, the resolution should not recite as a reason for its enactment, or in any way depend upon, a conclusion that news presentations have previously been one-sided, because, again, control of what is published is not a valid reason for governmental regulation of the press.

We do not see any due-process problems in the ordinance insofar as it bars newspeople from entering the reservation. When removal of a person already on the reservation is required, however, some due process provisions should be included. It may be that the provision of the resolution calling for removal of persons by the BIA "under the established removal ordinance" (We assume the ordinance referred to is Resolution No. 85-63) intends to incorporate all the procedural provisions of that ordinance, including the notice and hearing provisions. However, that intent is not clear, and we therefore recommend that the Band be advised to revise the present resolution to incorporate by reference Section III of Resolution No. 85-63.

We understand that the present resolution has not been approved by the Superintendent. Review is required under Article VI, Sec. 4, of the Red Lake constitution, and therefore the resolution is not now in effect. The resolution should be returned to the tribal council with recommendations for its revision.

(Sgd.) Hans Walker, Jr.

Hans Walker, Jr.

Exhibit No. 9

[redacted]

21 DEC 1979

[redacted]
Office of Indian Rights
Civil Rights Division

[redacted]
Deputy Director

Results of the [redacted] Investigation and Recommended Courses of Action

Background

On April 13, 1979, we received an FBI letterhead memorandum concerning an alleged whipping of [redacted] by officials of the [redacted] in [redacted]. On July 2, 1979, the FBI sent us reports of interviews with the victim, subjects and other witnesses. We discussed the need for further investigation with [redacted] and concluded that an attorney from this office and one from the Criminal Section should conduct follow-up interviews in the field. From November 18 to 21, [redacted] and I interviewed the victim and BIA police officers familiar with this incident. We did not attempt to interview the subjects.

We have investigated this case sufficiently for us to decide whether it merits criminal prosecution or whether some other course of action is preferable.

Facts

[redacted] is a full-blooded pueblo Indian in his mid-thirties. He lived on the [redacted] until age 14. He then left the pueblo for BIA boarding school in [redacted]. He completed high school, received some higher education in Oklahoma and joined the military in the late 1960's. He served in the Navy in Vietnam. Upon his discharge in 1971 he returned to the [redacted] area to seek employment and resume his education. He presently has a full-time job with [redacted] in [redacted] as an inspector of power stations that are under construction. He also takes courses in fine arts at [redacted] in [redacted].

cc: [redacted]

[redacted]' sisters, stepfather, grandparents and other relatives still live at the [redacted]. [redacted] lives in [redacted] and visits the pueblo for holidays. He is permitted to take part in the traditional ceremonies of the pueblo and is regarded as a member.

On March 13, 1979, [redacted] decided to visit his relatives in [redacted] for the weekend. After visiting his grandparents and sisters for a few hours, he decided to walk from the village to a bar approximately three to five miles away. He left his grandparents' home around 9 p.m. and arrived at the bar around 10 p.m. He had four or five beers and left to walk home about midnight. He states that he was not drunk and had no trouble walking or speaking coherently when he left the bar. [redacted] was about two miles from the bar, on pueblo land, when he saw a car approaching him. The car passed him, turned around and pulled up next to him. He recognized the occupants as tribal officials and realized that they were out patrolling the roads for drunken drivers, drunks, and persons who were bringing alcohol back on the reservation. They asked where he was going. He said it was none of their business. They said to get in and they would give him a ride. He responded, "bullshit." At that point the occupants, four or five persons, got out of the car, surrounded him, and ordered him to get in. They grabbed his arms and escorted him to the vehicle. [redacted] does not know the names of these individuals but he can identify them and can find out their names if need be.

[redacted] states that he did not resist the officers or verbally threaten them. He said he refused their offer of a ride because he feared they would pick him up and take him to the Governor's office where he would be "hassled" about whether he had been drinking and what he was doing. He said on other occasions he had run into a field when he saw a tribal officer's car approaching to avoid any confrontation. Other young men from the pueblo have, according to [redacted], had similar experiences with tribal officers.

We visited the place where [redacted] was stopped and noted that it was about two to three miles from the village and not in sight of any houses. The BIA police officer who transported [redacted] to jail on March 13 confirmed that tribal officials had picked [redacted] up at that location. The officer also said that it was customary for tribal officers to patrol the roads leading into the pueblo at night.

When [redacted] arrived at the community hall, the tribal officers called the BIA police station to ask for an officer to transport [redacted] to jail. He was not handcuffed by the tribal officials. The BIA officer who responded to the call said [redacted] spoke with him for awhile before the officer realized that [redacted] was the prisoner. He said [redacted] did not appear to be intoxicated although he believes he recalls smelling alcohol on his breath. The officer said that [redacted] put his hands behind his back and backed against the wall when he was told that he was headed for jail. He also verbally protested his arrest. The officer handcuffed [redacted] without a struggle and led him to the police car. He said [redacted] was angry and upset about going to jail and protested that he had done nothing wrong. [redacted] says he can't recall exactly what he said but admits that he was upset and probably shouted at the officer and the tribal officials.

[redacted] indicated that he never was advised of his rights or of the charges against him on the night of his arrest. He also said that he never knew whether bail had been set. His sister informed us she had called the lieutenant governor of the pueblo to ask about bail but he would not indicate whether there was any bail. Instead, he invited her to his office to discuss [redacted]' case. She said her father advised her not to go because he feared that she might be accused of some crime. His girlfriend and another sister said they called the governor to ask about bail but he refused to discuss it and was angry that they had called. [redacted] says that had he known there was bail (the criminal records indicated $25) he could have arranged to pay it since he had a job. The records indicating bail of $25 are suspect. The part charging the crime is written in pencil and the judgment part (presumably filled in after trial) in pen. Yet the bail amount space, contained in the charging section of the form, is written in pen suggesting that it was filled in when the judgment was entered. The BIA police officer who picked [redacted] up at the community hall did not observe any arraignment proceedings and did not recall if bail had been set.

[redacted] was transported to the [redacted] County jail in [redacted], where he was booked for disorderly conduct. The next day he contacted his sister in an effort to determine whether he could bail out. His sister could not find out whether bail had been set She called the Solicitor's Office of the Department of the Interior in [redacted] and the federal public defender's office. She spoke with attorneys in both offices concerning assistance in obtaining her brother's release. Neither office provided any assistance.

On March 18, 1979, [redacted] was transported from the county jail to the [redacted] to stand trial. [redacted], a BIA police officer, drove [redacted] to the pueblo. En route he advised [redacted] not to argue with the tribal officials concerning his case. He told him that the best posture was to explain his position calmly but not to show disrespect or the court would be harder on him. When [redacted] entered the hall he witnessed the end of a trial of another person, [redacted], who was accused of being drunk and bringing alcohol on the pueblo. [redacted] denied the charge and was counseled and released. [redacted] (no relation) was being sentenced. He received 30 days in the county jail.

The BIA police officer was told to leave after he brought [redacted] to court. BIA police told us they usually do not observe trials and sometimes are asked to leave. However, on occasion they have remained in the rear of the room and observed proceedings. [redacted] and the members of the tribal court were the only persons present for this proceeding. [redacted] could not recall the names of all of the persons present but the court consists of all tribal officers. He does recall the Governor was there and presided, the person who initially arrested him, and later whipped him, served as a principal accuser ([redacted] does not know his name but can identify him, knows where he lives and can find out his name). Other officers included [redacted], [redacted], [redacted] and two [redacted]. The Lieutenant Governor, [redacted], was not present for the proceeding. He arrived after the whipping.

[redacted] was instructed to kneel on the floor before the court which was seated at a table. He was told he was charged with being disorderly. One of the officers who stopped him on March 13 advised the court that he had used the term "bullshit." The Governor questioned him as to what he meant by the term. [redacted] translated it into the pueblo's language, [redacted]. The same accuser also claimed that [redacted] had stated that the Governor stole money. The Governor questioned [redacted] about having beer at his installation in January, 1979. [redacted] denied the charge and asked why he had not been arrested at that time if it were true. The Governor did not respond. [redacted] can't recall what else was discussed during this proceeding, but other officers joined the questioning. There was very little structure or order to the proceeding.

[redacted] insists that he never pled guilty to any charge and never was advised of any procedural rights. The Governor told the FBI [redacted] was advised of his rights. He did not ask for a lawyer or a public trial because he felt it would be useless since he knew such rights were not afforded in pueblo proceedings. BIA police who have observed other proceedings in this court say that [redacted]' account of how trials are conducted is accurate. They have observed defendants forced to kneel before the court on a hard floor for up to five or six hours without getting up. The trials are never public, no lawyers are allowed and they have never heard any defendant formally advised of any procedural rights. All of the tribal officers comprise the court. There is no distinction between judge, jury and prosecutorial functions.

The court did not adjourn to deliberate [redacted]' guilt or innocence or his possible sentence. The Governor told someone to get the whip. An officer got up, left the building and returned 15 minutes later with a whip. [redacted] said the whip was like a horse whip. It had a handle about 1 1/2 to 2 feet long wrapped in rawhide with four leather strands about 1 1/2 to 2 feet long at one end. Each strand had a knot tied in the end. [redacted]' description of the whip is identical to the description given by a BIA police officer who witnessed part of a whipping last May at this pueblo. When [redacted] heard he was about to be whipped he protested that he had injured his back while in the military and that whipping might cause serious problems. The members of the court ignored his pleas.

When the whip arrived the Governor selected an officer to whip [redacted]. It was one of the officers who apprehended him on March 13 and who had acted as an accuser during trial. The Governor told the person selected to kneel and take his shirt off. That person was whipped twice, rather lightly, by the Governor. He was then given the whip and he gave [redacted] four hard lashes. [redacted] says it is traditional that the person who does the whipping first receives the same number of lashes as the person to be whipped. He believes this is done to enrage the whipper. After the whipping, [redacted] was sentenced to 60 days in jail. He was told to put on his shirt so the BIA police officer would not see the whip marks. The BIA officer who witnessed a whipping last May gave a similar account of how the whipping was conducted.

[redacted] returned to the community building after the trial to transport [redacted] to the county jail. He told us that [redacted] was very upset about being sent back to jail. [redacted] said that it is traditional not to inflict further punishment after a whipping because whipping is the ultimate penalty. [redacted] can't recall if he told the BIA officer he had been whipped. However, the next day he advised the jailer of this fact and asked to see a doctor. The BIA police transported [redacted] to the VA hospital in [redacted] where he was examined and treated. No serious injuries resulted but the whip marks are very apparent in photos we have and [redacted] said he experienced considerable pain for three or four days. The BIA officer who transported [redacted] to the hospital wrote up a report on this incident and referred this matter to the FBI after [redacted] asked what could be done about the way the tribal officials had treated him.

[redacted] is a credible, articulate well educated person with good recall of the events. He is very upset about the fact that he was punished for no apparent reason. However, he does not believe that whipping per se is illegal or should be banned. He does feel that he did not deserve to be whipped and that the Governor acted vindictively and contrary to custom by incarcerating him after inflicting this punishment. It is his feeling that he was dealt with harshly because he is educated, does not live at the pueblo and is throught not to respect authority. He admits that he has little respect for the present Governor and his officers. He suspects them of corrupting the leadership selection process by bribing the cacique (religious leader) who selects a governor. This governor has served two terms and is rumored to be seeking a third. BIA police said it was unusual for a governor to serve two consecutive terms. [redacted] also admits that he likes to drink and has, on occasion, been intoxicated while visiting the pueblo. He feels that drinking in the privacy of one's home should not be prohibited. He says there is a great deal of hypocricy in the pueblo's so-called strict enforcement of alcohol prohibitions because the law is selectively enforced. BIA police state that alcohol offenses are common in this pueblo and that persons who now serve as tribal officers have often been charged with this offense. There is a rule that tribal officers should not drink while holding office. Occasionally this rule is violated and an officer is brought before tribal court. (See discussion at p. 11.)

BIA criminal records for the [redacted] indicate that [redacted] was arrested and charged with drunkenness and disorderly conduct on three occasions in April, 1971. He was fined small amounts of money on all three occasions after serving five days in jail pending trial. [redacted] advised us of these prior offenses. He said that he had just been released from the military after serving a tour of duty in Vietnam and had come home to visit his family. He admits that he was intoxicated and had some beer on the pueblo on those occasions. He has no other record of arrests since 1971. He has no criminal record in any other jurisdiction.

Other Information Concerning the [redacted]

The BIA police who work for the [redacted] agency serve the [redacted]. We interviewed three line officers, [redacted] and [redacted] concerning their knowledge of this incident and pueblo criminal proceedings in general.

The BIA police indicated that [redacted] is one of the more traditional pueblos in [redacted]. It has no written code and no clearly defined judicial or prosecutorial roles in the court system. All persons agreed that the Indian Civil Rights Act is uniformly ignored by this pueblo despite the fact that BIA police meet each year with the newly elected leadership to discuss the Act, its guarantees, and how proceedings should be conducted to satisfy the requirements of the Act. [redacted] said that the Lieutenant Governor, [redacted] was the most educated member of the present government at [redacted], spoke English fluently and probably had a good grasp of the meaning of the Act. The Governor, although he knows of the Act, is very old, traditional, uneducated, and rejects the notion that pueblo conduct should be governed by federal law.

By contrast, certain other pueblos in [redacted] have modernized their judicial systems. One pueblo has a non-Indian lawyer serving as a judge. Some have adopted written tribal codes, afford counsel and hold public trials. Although none of the pueblos can be said to have perfect court systems, some have made substantial improvements. Others function like [redacted] does.

None of the BIA police were surprised to learn of this whipping. All had heard from prisoners that this went on. Most officers felt that whipping was not all that infrequent. [redacted], his sister and the BIA police gave varying estimates of how often it happens at [redacted], ranging from 5 to 50 times a year. One officer had witnessed part of a whipping at [redacted] last May but was asked to leave before the defendant was given the lashes. They said they felt that most people living in the traditional pueblos simply accepted the practice without protest (this is not to suggest that they necessarily approve of it). They said it was very unusual for anyone to protest as [redacted] did. All of the officers believe that [redacted] got harsher treatment because the pueblo officials resented his education and his willingness to speak out.

The BIA police have never specifically discussed the practice of whipping and its legality with pueblo officials. They felt that this was a traditional form of punishment and that it was the prerogative of the pueblo. However, they all expressed doubts as to whether it was applied uniformly. None of the police knew when whipping was deemed appropriate or the nature of the claim that it was religious. They said that pueblo officials simply would not discuss these matters with non-members.

The BIA has provided law enforcement services to a number of pueblos for about 20 years. Some pueblos have a contract with the BIA and their own tribal police force. Others, such as [redacted], do not. In [redacted] the service consists of transporting prisoners from the pueblo to jail and back and paying the cost of incarceration for pueblo prisoners. The BIA also keeps records of criminal cases and investigates certain crimes when asked to do so. The BIA does not pay tribal officials. Occasionally it will give the pueblo surplus police equipment. The BIA counsels the pueblo on proper police and trial procedures and has made an effort to encourage the adoption of written codes. [redacted] has not been receptive to these efforts. In 1975 LEAA gave the pueblo $20,000 in discretionary funds for fully equipped police vans which are used to patrol the reservation. That same year the pueblo received a $7,100 bloc grant from LEAA for the purpose of devising a written criminal code. The tribe's attorneys drafted such a code but it was never adopted. Presently the pueblo has no outstanding grants or applications for funds from LEAA.

BIA police take the view that they are there to serve the pueblo and advise them. They cannot second-guess the pueblo's judgment about whether a person has been properly convicted because this is not their role and the pueblo would not tolerate such interference. If the BIA were to intrude in such matters, the pueblo might order the police to stay off the pueblo. This happened once in the [redacted] when the BIA and FBI investigated conditions in a tribal detention facility. Nevertheless, BIA police said they sometimes question tribal officials about why a person is being sent to jail if there appears to be no basis for the action. I asked the officer who picked up [redacted] whether he had questioned the tribal officials about the need for incarceration since [redacted] was neither drunk nor violent. He said he did not ask for an explanation because the officers were adamant that [redacted] be sent to jail.

The BIA has tried to encourage the tribe to incarcerate the people pending trial less frequently and to shorten the length of time between arrest and trial. Prisoners are now held five days before coming to trial. The BIA felt the tribe made liberal use of pretrial detention and that it often constituted a form of punishment rather than a method of insuring appearance for trial. The BIA also told us that they had heard that one of the pueblos had arrested a non-Indian after the Oliphant decision had foreclosed tribal jurisdiction. In that instance the BIA threatened to cut off all assistance to the pueblo unless they dropped the case. The pueblo complied.

The criminal records that are maintained for pueblo cases are scant and inaccurate. One form is used to enter information concerning the complaint and the judgment. The description of offense section merely states the alleged offense "disorderly conduct" but gives no statement of underlying facts. The stated offense comports with terminology used by the state penal code since the prisoner is held in a county jail. It may or may not describe the actual offense which the tribe considers a violation of its traditions. For example, drunkenness is a tribal offense but is described as disorderly conduct since drunkenness is not a crime in [redacted] and the jail might refuse to hold a tribal prisoner for conduct which does not violate state law. Since the tribe has no written code, no one we spoke with was quite sure of what violated tribal law and what the elements of a particular offense were. For instance, it is unclear whether one can be charged for disorderly conduct when the person is apprehended in an open field with no one around to disturb. Apparently this is possible in light of the [redacted] experience.

Secondly, the complaint and judgment form has a place for the defendant to sign acknowledging he has been advised of the charge and his rights. It would appear that this should be done at arraignment. [redacted] said he had never seen the form in his case and had not been asked to sign it. A BIA police officer thought that portion of the form was to be filled in at judgment. Several of the forms on file in other cases were not signed by the defendant although most were.

Finally, the judgment section of the form stating the sentence was confusingly written in the [redacted] case. Someone had entered 60 days in pencil and then 30 days in pen over the entry in pencil. The governor claimed [redacted] had been sentenced to 30 days during the FBI interview. Other BIA records pertaining to this case had either 60 or 30 on them. [redacted] actually spent 35 days in the county jail. He either served 5 more days than he was sentenced to or was released early. These records are of considerable importance because the jail does not know when to release a prisoner other than by reference to the record of judgment. I ran across other records where persons had served 2 or 3 more days than they were sentenced to, apparently because they had been forgotten by the tribe and the jailer.

The BIA also has a jail commitment sheet which contains a section which is used to authorize release from detention. Apparently this section is to be filled in for early releases but this procedure is haphazard also. If the BIA police tell the jailer to release a prisoner he will do so without a signature from the tribe. Sometimes the jailer will release a prisoner if a tribal official he knows calls to request a release. In other cases it is impossible to determine from the records who authorized a release or why. [redacted]' release form was not signed, yet he was released early. I asked him how this had come about. He said he had no idea because he expected to serve the entire 60-day sentence. However, he offered one account which is plausible given the informality of the record keeping system. Another inmate named [redacted] was arrested the same day as [redacted] and sentenced to 30 days. On the day [redacted] was scheduled to be released the jailer called out "[redacted]." They both responded and he told them to get ready because they were to be released. Both [redacted] were released the same day. It could be that the jailer assumed that both [redacted] were to be released although only one was scheduled for release.

There are numerous files containing criminal records from the [redacted]. I did not have a chance to review them systematically, but I did glean some information about the tribe's sentencing practices from them. First, many persons serve five days prior to trial. Release on your own recognizance is relatively infrequent considering the size and close-knit nature of this community. Secondly, most people who are sentenced to jail serve relatively short sentences, i.e., ten days or less. Since January 1, 1978, only four persons have been sentenced to 60 days or more. Thirdly, the sentence usually bears little or no relation to time actually served. Of the four persons sentenced to 60 days or more three served 3 days and one ([redacted]) served 35 days. Only two persons served their full terms in excess of 10 days since January 1, 1978. Both are young men who were arrested around the time that [redacted] was arrested. They were sentenced to 30 days. Finally, it appears that the length of the sentence and the amount of time served bear little relationship to a person's past criminal record or the nature of the offense. [redacted] had fewer prior convictions than any person sentenced to 30 days or more and he served more time than any of these persons. For example, one person, [redacted], had been arrested 24 times and convicted 19 times of offenses involving drunkenness or possession of alcohol. In March, 1976, [redacted], while serving as a tribal official, was charged with the use of alcohol, a more serious offense than if he were not an official. He was sentenced to 90 days but served only 20 days. In conclusion, it appears to me that [redacted]' belief that he received particularly harsh treatment given the nature of the alleged offense and his past record is supported by an examination of records in other cases.

[redacted] does not assert that he is the only person who has received unfair treatment from the tribal court. While in jail he met two other young men, [redacted] and [redacted], who had been sentenced to 30 days by the [redacted] governor. We were unable to reach either person for an interview but [redacted] briefly recounted what had happened to them. [redacted] was charged with disorderly conduct. He had been smoking a cigarette in public on the pueblo when one of the tribal officials told him to put it out. He did so but lit another one after the official had left. The official happened to see him smoking again and had him arrested and charged with disorderly conduct. [redacted] was charged with disorderly conduct and escape from custody.

The disorderly conduct arose from an altercation he had had with his brother. Both had been drinking. He was brought to the community hall and told to wait for the tribal officials. He waited alone for two or three hours and when no one showed up he walked to his home on the pueblo. He was later picked up by tribal officials at home and charged with escape from custody. It is possible the [redacted]' account of these cases is inaccurate or incomplete but I am inclined to believe that it is essentially correct in light of our knowledge about what happened in his case.

Discussion

We have several options to consider before deciding what would be the most appropriate way to handle this matter.

1. Civil Action For Violation of the Indian Civil Rights Act

[redacted] rejected the idea that there was any plausible argument which could be presented to avoid dismissal on Martinez grounds when we suggested a civil suit against the [redacted] tribe for a malapportioned tribal council. His position was based on his understanding of Martinez and not on concerns about the seriousness of the violation in the [redacted] case. The law has not changed since Martinez. Therefore, even though this case is particularly egregious, there is no reason to believe that we can pursue this option. I agree that Martinez probably precludes civil litigation by the United States.

2. Criminal Proceeding Under 18 U.S.C. §242

[redacted]'s memorandum more fully discusses the legal and practical obstacles to prosecution. [redacted]'s memorandum also discusses these issues. My comments constitute a more general assessment of the viability of this option.

There is some question as to whether Martinez would preclude criminal prosecution for substantive violations of the Indian Civil Rights Act. Although this issue, and a color of law issue, are not free from doubt, it is my understanding that our Division has traditionally been willing to take an expansive view of the scope of statutes which are used to vindicate civil rights claims. For example, in the [redacted] case we persuaded the Attorney General to adopt a liberal interpretation of the Hobbs Act despite protestations from the Criminal Division. I think we should maintain that tradition in these types of cases and, assuming we have a reasonably sound legal basis for prosecution, leave the argument that Martinez and the color of law problem precludes prosecution to the defense.

Aside from the legal issues alluded to above, there are other troublesome questions about treating this incident as a criminal matter. First, who should be charged? There is no single culprit or readily identifiable group of culprits unless we consider indicting the whole tribal court. The two most logical targets are the Governor, who appears to have controlled the trial, and the person who arrested, accused and whipped [redacted]. But are these persons any more culpable than the others who took part in this process? The person who did the whipping was selected to do it. He did not volunteer. Besides, we will not seek a cruel and unusual punishment count even if we decide to ask for an indictment. At this stage we do not really know if the Governor is any more culpable than other members of the court. [redacted] did not indicate that there was a principal instigator although he probably feels the Governor is most responsible.

Secondly, what are the substantive violations? Certain counts, like the right to a public trial and the right to counsel, are sufficiently specific in the Act as not to raise due process problems. However, these rights are not the type that have traditionally been protected by criminal prosecution. When viewed in isolation it seems excessive to charge a criminal violation for failure to afford counsel or for closing the trial to the public. Such denials routinely result in reversal of a conviction in the Anglo system, not criminal prosecution.

The most egregious aspect of this case falls under the heading denial of due process. A person was pulled off the street without committing any criminal offense, jailed, tried without knowing the nature of his crime or having an adequate opportunity to defend, whipped and then jailed. The individual rights denied in the process are important ones but our prosecution must focus on the entire process for the jurors to appreciate the arbitrariness and illegality of the official conduct. Since the term "due process" is ambiguous by itself, we would have to argue that it is made clear by some of the specific guarantees of the Act and the legislative history.

A more difficult count to charge is cruel and unusual punishment. There is no precedent which clarifies the meaning of this term in the tribal context. It is probable that a court in a civil action would find whipping to be cruel and unusual but this is an issue of first impression. There would be serious due process problems with indicting some on such a count. Moreover, our victim does not himself believe that whipping is cruel and unusual per se. If he

expressed this view on cross-examination a jury would never base a conviction on this count. We could allege that the whipping in combination with the jail sentence is excessive and therefore cruel and unusual but the jurors are not apt to be impressed with this distinction if they are instructed that whipping alone would be legal. Additionally, there is some claim that the whipping constituted a religious practice. I cannot rule this possibility out but I am doubtful that the whipping [redacted] received was religious rather than punitive. The Governor claimed the whipping was a religious ceremony, yet in another part of the interview he indicated a split in responsibility between the Governor and the war chiefs who administer tribal religious ceremonies and who oversee violations of traditional religious activities. No war chiefs were involved in this whipping. Moreover, it is questionable whether the defendants would raise this defense at trial if it meant being subjected to cross-examination on the religious practices of the pueblo.

Thirdly, it would be difficult to persuade a jury that the Governor acted with criminal intent in this case. The Governor is an elderly (70's), traditional Indian who has had little exposure to Anglo ways. He will speak through an interpreter and, if he testifies, will admit he knows of the I.C.R.A. but doesn't understand it. The defense may take the position that certain rights might have been denied, but out of ignorance rather than with the specific intent needed to prove a violation. No doubt they will put great stress on [redacted]' failure to clearly demand all of the protections he was entitled to. The defense might attempt to show, as it can, that the tribal court always conducts trials in this fashion and that the court had no ulterior motive in denying this particular person his rights.

Fourthly, any trial in this case would probably be a swearing match between our witness and a dozen tribal officials as to what happened at the time of the arrest and during trial. The Governor told the FBI he had advised [redacted] of all his rights. [redacted] denies this. BIA police, without hesitation, say they don't believe the Governor's statement. Yet, it is questionable that we could introduce evidence concerning the practices observed by the police in other cases. Unfortunately we have not had an opportunity to interview the Governor and other potential defendants, so we cannot give an assessment of whether they would be convincing defense witnesses. It is doubtful that an offer of immunity from prosecution to certain tribal officers in exchange for their testimony would produce any takers. The one part of this incident that is not disputed, the whipping, presents other difficulties discussed above.

In conclusion, although we may be able to properly indict certain tribal officials for their actions in the [redacted] case, it is unlikely to result in a conviction. Even an unsuccessful prosecution might produce a deterrent effect but it is questionable whether it would result in any institutional changes such as are needed to bring the tribal court system's operations into compliance with the I.C.R.A. An indictment would also produce a furor in the Indian community. On balance, I would advise against a criminal prosecution in this case.

3. Discontinuance of BIA Payments to County Jails and Transportation of Persons Charged With Crimes By [redacted]

The BIA routinely transports and pays the cost of incarceration for [redacted] prisoners in the [redacted] County jail even though they acknowledge that this pueblo (and other pueblos) makes no effort to comply with the I.C.R.A. in criminal proceedings. We should consider asking Interior to cease providing this type of assistance to [redacted] in light of the evidence that this pueblo systematically violates the provision of the I.C.R.A. 1/

Before proposing this course of action we should carefully consider its ramifications. First, what specific practices violate the Act and what reforms are needed to bring the tribe into compliance? Must the tribe adopt a written criminal code? What about the absence of any clear definition of roles between judge, jury and prosecutor? Should we insist that the pueblos cease whipping even though it is a traditional practice in exchange for a resumption of police services? 2/ Secondly, who is to assess whether meaningful reforms have been instituted? Our office lacks the

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1/ We do not propose that Interior cut off all funds to the pueblo or that it cease to provide investigative services for crimes which occur on the pueblo.

2/ Undoubtedly there is a division of opinion as to whether this practice constitutes cruel and unusual punishment. We know little about how residents of the pueblos feel about the practice. I would be unwilling to accept the leadership's assurance that their people accept it. My personal feeling is that it should be banned. It could result in serious physical injury to someone and it is subject to abuse as in the [redacted] case. I could be persuaded otherwise if there was a ground swell of support in the community in favor of continuing this practice once we advocated that it be banned.

capability to do this on a sustained basis. The Interior Department has daily access to information concerning the operation of these court systems but are they willing and able to make such assessments? In all probability the BIA's institutional concerns about a good working relationship with this and other pueblos will eventually cause civil rights concerns to fade into the background. Thirdly, should we focus our efforts on [redacted] alone when the BIA admits that a number of other pueblos have similar practices? 3/ Finally, is this limited sanction likely to induce the tribe to reform its practices? The actual cost of incarceration in the county jail is not very burdensome and it is possible that the tribe could transport its prisoners to the jail without BIA involvement. Alternatively, the tribe could decide to create its own holding facility on the pueblo. We can only speculate as to the probable impact of the BIA withholding such assistance, but we should not assume that it will necessarily achieve substantial results. At least it will remove the federal government from direct involvement in incarcerating prisoners, many of whom may not have been properly charged or convicted.

4. Meet With the Leadership of [redacted] to Discuss the Problems With the Present System

I think it would be useless to meet to discuss this case and the need for reform absent action which shows our determination to insure compliance with the I.C.R.A. The BIA police we interviewed agreed that a meeting alone, without other action, would be a waste of time. The BIA lectures the leadership on this each year to no avail, and the United States Attorney met with [redacted] leaders five years ago over a similar incident involving a whipping to advise them to discontinue the practice.

5. Take Measures to Insure that Interior, Federal Public Defenders, Legal Aid Offices and the Private Bar Are Knowledgeable About the Availability of Habeas Corpus Relief

[redacted]' sister endeavored to interest the Solicitor's Office and the federal public defender in his case while he was incarcerated. No one took any action. At a minimum the Solicitor's field offices should establish a good referral system when they receive such complaints. Public defenders who work in offices near reservations should receive training relating to the use of federal habeas corpus in these cases.

3/ Indeed, the problem apparently exists nation-wide to varying degrees. See S. Brakel, American Indian Tribal Courts: The Cost of Separate Justice (1978) (C.R.D. library).

We should not delude ourselves that this opinion is apt to bring about substantial reform. First, we are not equipped to undertake the type of educational effort that is necessitated for habeas corpus to be used effectively. Secondly, the form of relief is limited and difficult to invoke when prisoners are typically in custody for short periods of time. Nevertheless, it could prove useful for remedying the more serious deprivations of liberty.

6. Amendment of the I.C.R.A. to Permit Civil Actions

I have always been of the opinion that Congress should consider legislation to alter the results of the Martinez decision. I think this case illustrates the need for such legislation. Moreover, I feel the Justice Department must take the lead in proposing such legislation for no one else will.

Congress is the best forum for addressing the policy considerations raised by this and similar cases. The [redacted] case highlights these issues and the difficulties of achieving reform by using federal programs to induce change. Of course, the fundamental question is whether any part of the federal government, including the judiciary, should be in a position to order tribal governments to afford Indians the rights set forth in the Indian Civil Rights Act. Congressional hearings would afford all interested parties a voice on this important issue.

I firmly favor permitting the federal courts to redress systemic violations of the guarantees of the Indian Civil Rights Act after exhaustion of tribal remedies. I think the [redacted] investigation illustrates the fallacy of the assumption that tribal courts can serve as effective fora for redressing all such complaints. Habeas corpus alone does not provide an effective remedy. The history of I.C.R.A. litigation prior to Martinez demonstrates that federal courts are not insensitive to cultural concerns and to tribal sovereignty.

If we choose this option we must be advocates for a change and work at lining up witnesses to testify as to the need for change. There will be well organized, vociferous opposition to any such legislation, so we cannot float a bill and expect it will receive passage. However, I am convinced that several legal services groups, the ACLU and a number of individual Indians feel there is a need for legislation.

Conclusions

I do not think that options 1, 2 or 4 are viable for the reasons set forth. Option 3, discontinuance of BIA assistance for incarceration of [redacted] prisoners, should be pursued despite the difficulties inherrent in this approach and our doubts about whether it will lead to reform. The federal government should not have direct involvement in the incarceration of prisoners from this pueblo in light of the facts brought to light by this investigation. Option 5, habeas corpus, should not prove too burdensome for us. We should attempt to interest Interior in participating in this effort. The final option, legislation, is the only one which promises to bring about the type of nation-wide, institutional reform which I think this problem requires.

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