JURISDICTION ON INDIAN RESERVATIONS

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 1181

TO AUTHORIZE THE STATES AND THE INDIAN TRIBES TO ENTER INTO MUTUAL AGREEMENTS AND COMPACTS RESPECTING JURISDICTION AND GOVERNMENTAL OPERATIONS IN INDIAN COUNTRY;

S. 1722

THE REFORM OF FEDERAL CRIMINAL LAW PARTICULARLY WITH RESPECT TO SECTION 161(1) PROVIDING FOR RETROCESSION OF JURISDICTION TO THE UNITED STATES FROM STATES THAT PREVIOUSLY ASSUMED SUCH JURISDICTION UNDER PUBLIC LAW 83-280; AND THE FEDERAL MAGISTRATES CONCEPT; AND

S. 2832

TO ESTABLISH A SPECIAL MAGISTRATE WITH JURISDICFEDERAL OFFENSES IN INDIAN COUNTRY
(INTRODUCED JUNE 16, 1980)

MARCH 17, 18, AND 19, 1980

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STATEMENTS RECEIVED SUBSEQUENT TO THE HEARING

JURISDICTION ON INDIAN RESERVATIONS

MONDAY, MARCH 17, 1980

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to notice, at 10:10 a.m., in room 457, Russell Senate Office Building, Senator John Melcher (chairman of the committee) presiding.

Present: Senator Melcher and Senator DeConcini.

Staff present: Max Richtman, staff director; Peter Taylor, special counsel; Jo Jo Hunt, staff attorney; Tim Woodcock, staff attorney; and John Mulkey, professional staff member.

Senator MELCHER. The Select Committee on Indian Affairs will come to order.

This morning we are meeting on the first of 3 days of hearings on jurisdiction on Indian reservations. There are several concepts to be discussed. The first thing I would like to draw to your attention is a section in S. 1722, the bill to reform the Federal criminal law. In this bill the Congress is rewriting the entire Federal criminal law.

One section of S. 1722, section 161(i), deals with retrocession of jurisdiction to the United States from States that previously assumed jurisdiction under Public Law 83-280. That is a very small part of S. 1722. So, the only testimony we are interested in, on that particular bill, is just on that one section of S. 1722.

We are also going to hear testimony today on S. 1181 which would authorize the States and the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country. A very similar bill was passed by the Senate in the last Congress but was not enacted by the House, so it is here before us again in the committee. We would be pleased to have your testimony concerning that bill.

The third matter we are going to receive testimony on deals with the concept of having a Federal magistrate hold certain powers on an Indian reservation. There is no particular bill on that. We have a concept as a proposal which we will distribute during these hearings—a three or four page summary of the bare bones of our feelings.

The Federal magistrates system, as it now operates, does not look as if it will fill the gap we are trying to fill. So, whatever we do on the concept of the Indian reservation will give additional powers to a Federal magistrate, with specific powers to specific authorities on the reservation—the magistrate, or the special U.S. Justice of the Peace, whatever the title, it makes no difference. The question is whether or not a Federal authority, as part of a Federal court on an

Indian reservation, can fill the gap that does exist for rather minor crimes. I guess, in general, you could call them misdemeanors involving Indians, and also involving non-Indians.

There have been complaints that the ready and willing delivery of justice is now all too often lacking.

So, while we are asking for comments on this concept, we are working in the rough. Do our witnesses have any feelings on this? If you do, let the committee know of any ideas you have. This will be helpful.

At this time, without objection, I will introduce into the record excerpts from existing title 18; a copy of S. 1181; an excerpt from S. 1722—part C, section 161; an excerpt from the report of the Judiciary Committee accompanying S. 1722; a list of States and tribes affected by Public Law 83-280; a copy of the Indian reservation magistrates concept; and a copy of the Federal Magistrates Act, as amended, October 10, 1979.

[The material follows. Testimony begins on p. 55.]

Excerpts From Existing Title 18—Crimes and Criminal Procedure

CHAPTER 53—INDIANS

AMENDMENTS

1960—Pub. L. 86-634, § 3, July 12, 1960, 74 Stat. 469 added items 1164 and 1165.

1956—Act Aug. 1, 1956, ch. 822, § 1, 70 Stat. 792, added item 1163.

1953—Act Aug. 15, 1953, ch. 502, § 1, 67 Stat. 586, added item 1161.

Act Aug. 15, 1953, ch. 505, § 1, 67 Stat. 588, added item 1162.

CROSS REFERENCES

Government employee having interest in Indian contracts, see section 437 of this title.

Receiving money in connection with Indian contracts for services, see section 438 of this title.

Unauthorized Indian enrollment contracts, or receiving money in connection with such contracts, see section 439 of this title.

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits

[1] Public Law 85-86, July 10, 1957, 71 Stat. 277, which repealed section 1157 of this title, did not amend analysis to reflect the repeal.

of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(June 25, 1948, ch. 645, 62 Stat. 757; May 24, 1949, ch. 139, § 25, 63 Stat. 74.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 548 and 549 of title 18, and sections 212, 213, 215, 217, 218 of title 25, Indians, U.S. Code, 1940 ed. (R.S. §§ 2142, 2143, 2144, 2145, 2146; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318; Mar. 4, 1909, ch. 321, §§ 328, 329, 35 Stat. 1151; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 28, 1932, ch. 284, 47 Stat. 337).

This section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law.

R.S. §§ 2145, 2146 (U.S.C., title 25, §§ 217, 218) extended to the Indian country with notable exceptions the criminal laws of the United States applicable to places within the exclusive jurisdiction of the United States. Crimes of Indians against Indians, and crimes punishable by tribal law were excluded.

The confusion was not lessened by the cases of *U.S.* v. *McBratney*, 104 U.S. 622 and *Draper* v. *U.S.*, 17 S.Ct. 107, holding that crimes in Indian country by persons not Indians are not cognizable by Federal courts in absence of reservation or cession of exclusive jurisdiction applicable to places within the exclusive jurisdiction of the United States. Because of numerous statutes applicable only to Indians and prescribing punishment for crimes committed by Indians against Indians, "Indian country" was defined but once. (See act June 30, 1834, ch. 161, § 1, 4, Stat. 729, which was later repealed.)

Definition is based on latest construction of the term by the United States Supreme Court in *U.S.* v. *McGowan*, 58 S.Ct. 286, 302 U.S. 535, following *U.S.* v. *Sandoval*, 34 S.Ct. 1, 5, 231 U.S. 28, 46. (See also *Donnelly* v. *U.S.*, 33 S.Ct. 449, 228 U.S. 243; and *Kills Plenty* v. *U.S.*, 133 F.2d 292, certiorari denied, 1943, 63 S.Ct. 1172). (See reviser's note under section 1153 of this title.)

Indian allotments were included in the definition on authority of the case of *U.S.* v. *Pelican*, 1913, 34 C.St. 396, 232 U.S. 442, 58 L.Ed. 676.

1949 ACT

This section [section 25], by adding to section 1151 of title 18, U.S.C., the phrase "except as otherwise provided in sections 1154 and 1156 of this title", incorporates in this section the limitations of the term "Indian country", which are added to sections 1154 and 1156 by sections 27 and 28 of this bill.

AMENDMENTS

1949—Act May 24, 1949, incorporated the limitations of the term Indian country which are contained in sections 1154 and 1156 of this title.

CROSS REFERENCES

Destroying boundary and warning signs, see section 1164 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1164 of this title; title 15 sections 1175, 1243.

§ 1152. Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

(June 25, 1948, ch. 645, 62 Stat. 757.)

HISTORICAL AND REVISION NOTES

Based on sections 215, 217, 218 of title 25, U.S.C., 1940 ed., Indians (R.S. 2144, 2145, 2146; Feb. 18, 1875, ch. 80, §§ 1, 18 Stat. 318).

Section consolidates said sections 217 and 218 of title 25, U.S.C., 1940 ed., Indians, and omits section 215 of said title as covered by the consolidation.

See reviser's note under section 1153 of this title as to effect of consolidation of sections 548 and 549 of title 18, U.S.C., 1940 ed.

Minor changes were made in translations and phraseology.

CROSS REFERENCES

State jurisdiction over offenses committeed by or against Indians in the Indian country, see section 1162 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1162 of this title.

§ 1153. Offenses committed within Indian country

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

(June 25, 1948, ch. 645, 62 Stat. 758; May 24, 1949, ch. 139, § 26, 63 Stat. 94; Nov. 2, 1966, Pub. L. 89-707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub. L. 90-284, title V, § 501, 82 Stat. 80; May 29, 1976, Pub. L. 94-297, § 2, 90 Stat. 585.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 548, 549 (Mar. 4, 1909, ch. 321, §§ 328, 329; 35 Stat. 1151; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 28, 1932, ch. 284, 47 Stat. 337).

Section consolidates said sections 548 and 549 of title 18, U.S.C., 1940 ed. Section 548 of said title covered 10 crimes. Section 549 of said title covered the same except robbery and incest.

The 1932 amendment of section 568 of title 18, U.S.C., 1940 ed., constituting the last paragraph of the section, is omitted and section 549 of said title to which it applied likewise is omitted. The revised section therefore suffices to cover prosecution of the specific offenses committed on all reservations as intended by Congress.

Words "Indian country" were substituted for language relating to jurisdiction extending to reservations and rights-of-way, in view of definitive section 1151 of this title.

Paul W. Hyatt, president, board of commissioners, Idaho State Bar, recommended that said section 548 be considered with other sections in title 25, Indians, U.S.C., 1940 ed., and revised to insure certainty as to questions of jurisdiction, and punishment on conviction. Insofar as the recommendation came within the scope of this revision, it was followed.

The proviso in said section 548 of title 18, U.S.C., 1940 ed., which provided that rape should be defined in accordance with the laws of the State in which the offense was committed, was changed to include burglary so as to clarify the punishment for that offense.

Venue provisions of said section 548 of title 18, U.S.C., 1940 ed., are incorporated in section 3242 of this title.

Section 549 of title 18, U.S.C., 1940 ed., conferred special jurisdiction on the United States District Court for South Dakota of all crimes of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny committed within the limits of any Indian reservation within the State, whether by or against Indians or non-Indians. The Act of February 2, 1903, 32 Stat. 793, from which said section 549 was derived, accepted the cession by South Dakota of such jurisdiction.

The effect of revised sections 1151, 1152, and 1153 of this title is to deprive the United States Court for the District of South Dakota of jurisdiction of offenses on Indian reservations committed by non-Indians against non-Indians and to restore such jurisdiction to the courts of the State of South Dakota as in other States. This reflects the views of the United States atorney, George Philip, of he district of South Dakota.

Minor changes were made in translation and phraseology.

1949 ACT

This section [section 26] removes an ambiguity in section 1153 of title 18, U.S.C., by eliminating the provision that the crime of rape in the Indian country is to be punished in accordance with the law of the State where the offense was committed, leaving the definition of the offense to be determined by State law, but providing that punishment of rape of an Indian by an Indian is to be by imprisonment at the discretion of the court. The offense of rape, other than rape of an Indian by an Indian within the Indian country, is covered by section 2031 of title 18, U.S.C., and the offense of burglary by sections 1152 and 3242 of such title.

AMENDMENTS

1976—Pub. L. 94–297 made changes in phraseology, added the offense of kidnapping to the enumerated list of offenses subjecting any Indian to the same laws and penalties as all other persons, struck out applicability to assault with a dangerous weapon and assault resulting in serious bodily injury from paragraph covering the offenses of burglary and incest only, and substituted paragraph, relating to offenses in addition to offenses of burglary and incest, for paragraph relating to offenses of rape and assault with intent to commit rape.

1968—Pub. L. 90–284 added the offense of assault resulting in serious bodily injury.

1966—Pub. L. 89–707 added the offenses of carnal knowledge and assault with intent to commit rape, defined and proscribed the punishment for assault with intent to commit rape in accordance with the laws of the State in which the offense was committed, and required assault with a dangerous weapon and incest to be defined and punished in accordance with the laws of the State in which the offense was committed.

1949—Act May 24, 1949, eliminated the provision that the crime of rape is to be punished in accordance with the law of the State where the offense was committed and in lieu inserted provision leaving punishment up to the discretion of the court.

SHORT TITLE

Section 1 of Pub. L. 94–297 provided: "That this Act [amending this section and sections 113 and 3242 of this title] may be cited as the 'Indian Crimes Act of 1976'."

CROSS REFERENCES

Jurisdiction—
Conferred on State of Kansas, see section 3243 of this title.
Of offenses, section 3242 of this title.

State jurisdiction over offenses committed by or against Indians in the Indian country, see section 1162 of this title.

Wire or oral communications, authorization for interception, to provide evidence of murder or robbery, see section 2516 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1162, 3242 of this title.

§ 1154. Intoxicants dispensed in Indian country

(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the Department of the Army or any officer duly authorized thereunto by the Department of the Army, but this subsection shall not bar the prosecution of any officer, soldier, sutler, or storekeeper, attache, or employee of the Army of the United States who barters, donates, or furnishes in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian.

(c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(June 25, 1948, ch. 645, 62 Stat. 758; May 24, 1949, ch. 139, § 27, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 241, 242, 244a, 249, 254 of title 25, U.S.C., 1940 ed., Indians (R.S. § 2139; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 244; July 4, 1884, ch. 180, § 1, 23 Stat. 94; July 23, 1892, ch. 234, 27 Stat. 260; Mar. 2, 1917, ch. 146, § 17, 39 Stat. 983; June 13, 1932, ch. 245, 47 Stat. 302; Mar. 5, 1934, ch. 43, 48 Stat. 396; June 27, 1934, ch. 846, 48 Stat. 1245; June 15, 1938, ch. 435, § 1, 52 Stat. 696).

Section consolidates sections 241, 242, 244a, and 249 of title 25, U.S.C., 1940 ed., Indians. The portion of section 241 of said title which defined the substantive offense became subsection (a); the portion relating to the scope of the term "Indian country" was omitted as unnecessary in view of definition of "Indian country" in section 1151 of this title; the portion of section 241 of said title excepting liquors introduced by the War Department became subsection (c), as limited by section 249 of said title; the portion respecting making complaint in county of offense, and with reference to arraignment, was omitted as covered by rule 5 of the Federal Rules of Criminal Procedure; and the remainder of section 241 of said title was incorporated in section 1156 of this title.

Section 254 of title 25, U.S.C., 1940 ed., Indians, was omitted as covered by this section and section 1156 of this title. That section was enacted 1934 and excluded from the Indian liquor laws lands outside reservations where the land was no longer held by Indians under a trust patent or a deed or patent containing restrictions against alienation. Such enactment was prior to the

June 15, 1938, amendment of section 241 of title 25, U.S.C., 1940 ed., Indians, in which the term "Indian country" was defined as including allotments where the title was held in trust by the Government or where it was inalienable without the consent of the United States. This provision, by implication, excluded cases where there was no trust or restriction on alienation and thereby achieved the same result as section 254 of title 25, U.S.C., 1940 ed., Indians. That amendment also repealed the act of Jan. 30, 1897, referred to in section 254 of title 25, U.S.C., 1940 ed., Indians. Insofar as the reference in section 254 of said title to "special Indian liquor laws" included section 244 of title 25, U.S.C., 1940 ed, Indians, the definition of Indian country in section 1151 of this title covers section 254 of title 25, U.S.C., 1940 ed., Indians.

Words "or agent" were deleted as there have been no Indian agents since 1908. See section 64 of title 25, U.S.C., 1940 ed., Indians, and note thereunder.

Mandatory punishment provisions were rephrased in the alternative and provision for commitment for nonpayment of fine was deleted. This change was also recommended by United States District Judge T. Blake Kennedy on the ground that, otherwise, section would be practically meaningless since, in most cases, offenders cannot pay a fine.

The exception of intoxicating liquor for scientific sacramental, medicinal or mechanical purposes was inserted for the same reason that makes this exception appropriate to section 1262 of this title.

Minor changes were made in phraseology.

1949 ACT

Subsection (a) of this section [section 27(a)] substitutes "Department of the Army" for "War Department", in subsection (b) of section 1154 of title 18, U.S.C., to conform to such redesignation by act July 26, 1947 (ch. 343, title 11, § 205(a), 61 Stat. 501 (5 U.S.C. 1946 ed., § 181–1)). Subsection (b) of this section [section 27(b)] adds subsection (c) to such section 1154 in order to conform it and section 1156 more closely to the laws relating to intoxicating liquor in the Indian country as they have heretofore been construed.

AMENDMENTS

1949—Subsec. (b). Act May 24, 1949, § 27(a), substituted "Department of the Army" for "War Department".

Subsec. (c) Act May 24, 1949, § 27(b), added subsec. (c).

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department were, with two exceptions, transferred to the Secretary of the Interior, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by Reorg. Plan No. 3 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

CROSS REFERENCES

Application of Indian liquor laws, see section 1161 of this title.

Application of Indian liquor laws, see section 1161 of this title.

Indian country, general definition, see section 1151 of this title.

Possession as prima facie evidence, see section 3488 of this title.

Searches, seizures, and forfeitures; Indians as competent witnesses, see section 3113 of this title.

Seizure and forfeiture of vehicles, see section 3618 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1151, 1161, 3113 of this title.

§ 1155. Intoxicants dispensed on school site

Whoever, on any tract of land in the former Indian country upon which is located any Indian school maintained by or under the supervision of the United States, manufactures, sells, gives away, or in any manner, or by any means

furnishes to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, except for scientific, sacramental, medicinal, or mechanical purposes, whether medicated or not, or who carries, or in any manner has carried, into such area any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into such area any of such liquors or drinks, shall be fined not more than $500 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 758.)

HISTORICAL AND REVISION NOTES

Based on sections 241a, 244a, of title 25, U.S.C., 1940 ed., Indians (Mar. 1, 1895, ch. 145, § 8, 28 Stat. 697; Mar. 5, 1934, ch. 43, 48 Stat. 396.)

Section consolidates sections 241a and 244a of title 25 U.S.C., 1940 ed., Indians. The effect of section 244a of said title in repealing section 241a of said title, except as to lands upon which Indian schools are maintained, was to continue prohibiting the dispensing of liquor in such areas.

The words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

The minimum punishment provision was omitted to conform to the policy adopted in revision of the 1909 Criminal Code.

Mandatory punishment provision was rephrased in the alternative.

The exception of intoxicating liquor for scientific sacramental, medicinal or mechanical purposes was inserted for the same reason that makes this exception appropriate to section 1262 of this title.

Minor changes were made in phraseology.

§ 1156. Intoxicants possessed unlawfully

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(June 25, 1948, ch. 645, 62 Stat. 759; May 24, 1949, ch. 139, § 28, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 241, 244, 244a, 254 of title 25, U.S.C., 1940 ed., Indians (R.S. 2139; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 244; July 23, 1892, ch. 234, 27 Stat. 260; May 25, 1918, ch. 86, § 1, 40 Stat. 563; June 30, 1919, ch. 4, § 1, 41 Stat. 4; Mar. 5, 1934, ch. 43, 48 Stat. 396; June 27, 1934, ch. 846, 48 Stat. 1245; June 15, 1938, ch. 435, § 1, 52 Stat. 696).

The revision of section 244 of title 25, U.S.C. 1940 ed., Indians, conforms with the effect thereon of sections 241 244a and 254 of said title.

The provisions relating to scope of term "Indian country" were omitted as unnecessary in view of definition of "Indian country" in section 1151 of this title.

Mandatory punishment provisions were rephrased in the alternative and provision for commitment for nonpayment of fine was deleted. Such change was also recommended by United States District Judge T. Blake Kennedy. (See reviser's note under section 1154 of this title.)

The exception of intoxicating liquor for scientific, sacramental, medicinal or mechanical purposes was inserted for the same reason that makes this exception appropriate to section 1262 of this title.

Minor changes were made in phraseology.

1949

This section [section 28] adds to section 1156 of title 18 U.S.C., a paragraph to conform this section and section 1154 of such title more closely to the laws re-

lating to intoxicating liquors in the Indian country as they have been heretofore construed.

AMENDMENTS

1949—Act May 24, 1949, added the last paragraph.

CROSS REFERENCES

Application of Indian liquor laws see section 1161 of this title.
Indian country defined, see section 1151 of this title.
Possession as prima facie evidence, see section 3488 of this title.
Searches, seizures, and forfeitures; Indians as competent witnesses see section 3113 of this title.
Seizure and forfeiture of vehicles, see section 3618 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1151, 1161, 3113 of this title.

[§ 1157. Repealed. Pub. L. 85–86, July 10, 1957, 71 Stat. 277]

Section, acts June 25, 1948, ch. 645, 62 Stat. 759; May 24, 1949, ch. 139, § 29, 62 Stat. 94; Aug. 15, 1953, ch. 506, § 2(a), 67 Stat. 590, prohibited purchase of Indian-owned livestock subject to unpaid loans from Federal revolving fund or from tribal loan funds.

§ 1158. Counterfeiting Indian Arts and Crafts Board trade mark

Whoever counterfeits or colorably imitates any Government trade mark used or devised by the Indian Arts and Crafts Board in the Department of the Interior as provided in section 305a of Title 25, or, except as authorized by the Board, affixes any such Government trade mark, or knowingly, willfully, and corruptly affixes any reproduction, counterfeit, copy, or colorable imitation thereof upon any products, or to any labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of such products; or

Whoever knowingly makes any false statement for the purpose of obtaining the use of any such Government trade mark—

Shall be fined not more than $500 or imprisoned not more than six months, or both; and shall be enjoined from further carrying on the act or acts complained of.

(June 25, 1948, ch. 645, 62 Stat. 759.)

HISTORICAL AND REVISION NOTES

Based on section 305d of title 25, U.S.C., 1940 ed., Indians (Aug. 27, 1935, ch. 748, § 5, 49 Stat. 892).

The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of misdemeanor in section 1 of this title.

The words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Maximum fine was changed from $2,000 to $500 to bring the offense within the category of petty offenses defined by section 1 of this title. (See reviser's note under section 1157 of this title.)

Minor changes were made in phraseology.

TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department were, with two exceptions, transferred to the Secretary of the Interior, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by Reorg. Plan No. 3 of 1950 §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

§ 1159. Misrepresentation in sale of products

Whoever willfully offers or displays for sale any goods, with or without any Government trade mark, as Indian products or Indian products of a particular

Indian tribe or group, resident within the United States or the Territory of Alaska, when such person knows such goods are not Indian products or are not Indian products of the particular Indian tribe or group, shall be fined not more than $500 or imprisoned not more than six months, or both.

(June 25, 1948, ch. 645, 62 Stat. 759.)

HISTORICAL AND REVISION NOTES

Based on section 305e of title 25, U.S.C., 1940 ed., Indians (Aug. 27, 1935, ch. 748, § 6, 49 Stat. 893).

The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of misdemeanor in section 1 of this title.

The last paragraph of section 305e of title 25, U.S.C., 1940 ed., relating to duty of district attorney to prosecute violations of such section, will be incorporated in title 28, U.S. Code.

Maximum fine of $2,000 was changed to $500 to bring the offense within the category of petty offenses defined by section 1 of this title. (See reviser's note under section 1157 of this title.)

Minor changes were made in phraseology.

ADMISSION OF ALASKA AS STATE

Admission of Alaska into the Union was accomplished Jan. 3, 1959, upon issuance of Proc. No. 3269, Jan. 3, 1959 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85–508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

§ 1160. Property damaged in committing offense

Whenever a white person, in the commission of an offense within the Indian country takes, injures or destroys the property of any friendly Indian the judgment of conviction shall include a sentence that the defendant pay to the Indian owner a sum equal to twice the just value of the property so taken, injured, or destroyed.

If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence.

(June 25, 1948, ch. 645, 62 Stat. 759.)

HISTORICAL AND REVISION NOTES

Based on sections 227, 228 of title 25, U.S.C., 1940 ed., Indians (R.S. 2154, 2155).

Section consolidates said sections 227 and 228 of title 25, U.S.C., 1940 ed., Indians, with such changes in phraseology as were necessary to effect consolidation.

The phrase "or whose person was injured," which followed the words "friendly Indian to whom the property may belong," was deleted as meaningless.

§ 1161. Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

(Added Aug. 15, 1953, ch. 502, §2, 67 Stat. 586.)

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian

country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory, shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of section 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(Added Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588, and amended Aug. 24, 1954, ch. 910, § 1, 68 Stat. 795; Aug. 8, 1958, Pub. L. 85–615, § 1, 72 Stat. 545; Nov. 25, 1970, Pub. L. 91–523, §§ 1, 2, 84 Stat. 1358.)

AMENDMENTS

1970—Subsec. (a). Pub. L. 91–523, § 1, substituted provisions relating to the jurisdiction of the State of Alaska over offenses by or against Indians in the Indian country, and certain excepted areas, for provisions relating to the jurisdiction of the Territory of Alaska over offenses by or against Indians in the Indian country.

Subsec. (c). Pub. L. 91–523, § 2, added "as areas over which the several States have exclusive jurisdiction" following "subsection (a) of this section".

1958—Subsec. (a). Pub. L. 85–615 gave Alaska jurisdiction over offenses committed by or against Indians in all Indian country within the Territory of Alaska.

1954—Subsec. (a). Act Aug. 24, 1954, brought the Menominee Tribe within the provisions of this section.

ADMISSION OF ALASKA AS STATE

Admission of Alaska into the Union was accomplished Jan. 3, 1959, upon issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by section 1 and 8(c) of Pub. L. 85–508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

CROSS REFERENCES

Amendment of State Constitutions to remove legal impediments and effective date thereof, see note set out under section 1360 of Title 28, Judiciary and Judicial Procedure.

Consent of United States to other States to assume jurisdiction, see note set out under section 1360 of Title 28, Judiciary and Judicial Procedure.

Retrocession of criminal jurisdiction by State, see section 1323 of Title 25, Indians.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 section 1323.

§ 1163. Embezzlement and theft from Indian tribal organizations

Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.

As used in this section, the term "Indian tribal organization" means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

(Added Aug. 1, 1956, ch. 822, § 2, 70 Stat. 792.)

§ 1164. Destroying boundary and warning signs

Whoever willfully destroys, defaces, or removes any sign erected by an Indian tribe, or a Government agency (1) to indicate the boundary of an Indian reservation or of any Indian country, as defined in section 1151 of this title or (2) to give notice that hunting, trapping, or fishing is not permitted thereon without lawful authority or permission, shall be fined not more than $250 or imprisoned not more than six months, or both.

(Added Pub. L. 86-634, § 1, July 12, 1960, 74 Stat. 469.)

§ 1165. Hunting, trapping, or fishing on Indian land

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

(Added Pub. L. 86-634, § 2, July 12, 1960, 74 Stat. 469.)

ASSIMILATIVE CRIMES ACT

§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United Sates, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(June 25, 1948, ch. 645, 62 Stat. 685; July 12, 1952, ch. 695, 66 Stat. 589.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 451 (Mar. 4, 1909, ch. 321, § 272, 35 Stat. 1142; June 11, 1940, ch. 323, 54 Stat. 304).

The words "The term 'special maritime and territorial jurisdiction of the United States' as used in this title includes," were substituted for the words "The crimes and offenses defined in sections 451–468 of this title shall be punished as herein prescribed."

This section first appeared in the 1909 Criminal Code. It made it possible to combine in one chapter all the penal provisions covering acts within the admiralty and maritime jurisdiction without the necessity of repeating in each section the places covered.

The present section has made possible the allocation of the diverse provisions of chapter 11 of Title 18, U.S.C., 1940 ed., to particular chapters restricted to particular offenses, as contemplated by the alphabetical chapter arrangement.

In several revised sections of said chapter 11 the words "within the special maritime and territorial jurisdiction of the United States" have been added. Thus the jurisdictional limitation will be preserved in all sections of said chapter 11 describing an offense.

Enumeration of names of Great Lakes was omitted as unnecessary.

Other minor changes were necessary now that the section defines a term rather than the place of commission of crime or offense; however, the extent of the special jurisdiction as originally enacted has been carefully followed.

AMENDMENTS

1952—Subsec. (5). Act July 12, 1952, added subsec. (5).

CROSS REFERENCES

Laws of states adopted for areas within federal jurisdiction, see section 13 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 13, 112, 878, 1116, 1201 of this title; title 15 sections 1175, 1243; title 49 section 1472.

§ 13. Laws of States adopted for areas within Federal jurisdiction

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(June 25, 1948, ch. 645, 62 Stat. 686.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 468 (Mar. 4, 1909, ch. 321, § 289, 35 Stat. 1145; June 15, 1933, ch. 85, 48 Stat. 152; June 20, 1935, ch. 284, 49 Stat. 394; June 6, 1940, ch. 241, 54 Stat. 234).

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Act March 4, 1909, § 289 used the words "now in force" when referring to the laws of any State, organized Territory or district, to be considered in force.

As amended on June 15, 1933, the words "by the laws thereof in force on June 1, 1933, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal," were used.

The amendment of June 20, 1935, extended the date to "April 1, 1935," and the amendment of June 6, 1940, extended the date to "February 1, 1940".

The revised section omits the specification of any date as unnecessary in a revision, which speaks from the date of its enactment. Such omission will not only make effective within Federal reservations, the local State laws in force on the date of the enactment of the revision, but will authorize the Federal courts to apply the same measuring stick to such offensses as is applied in the adjoining State under future changes of the State law and will make unnecessary periodic proforma amendments of this section to keep abreast of changes of local laws. In other words, the revised section makes applicable to offenses committed on such reservations, the law of the place that would govern if the reservation had not been ceded to the United States.

The word "Possession" was inserted to clarify scope of section.

Minor changes were made in phraseology.

II

96TH CONGRESS
1ST SESSION

S. 1181

To authorize the States and the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country.

IN THE SENATE OF THE UNITED STATES

MAY 21 (legislative day, APRIL 9), 1979

Mr. DECONCINI (for himself, Mr. MCGOVERN, Mr. DOMENICI, Mr. BURDICK, Mr. MCCLURE, Mr. HATFIELD, and Mr. LEVIN) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To authorize the States and the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Tribal-State Compact Act of 1979".

DECLARATION OF POLICY

SEC. 2. The Congress hereby declares that it is the policy of this Nation to continue to preserve and protect the

tribes of the American Indian people. The policy of this Nation is premised on the status of tribal governments as a continuing part of the American political fabric. Accordingly, the United States has a responsibility to establish a legal framework which will enable the tribes and the States to achieve maximum harmony and facilitate their cooperative efforts in the orderly administration of their governments. Federal enabling authority for the establishment of viable intergovernmental agreements between the tribes and the States based on mutual consent must be established.

DEFINITIONS

SEC. 3. For purposes of this Act:

(a) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community exercising powers of self-government which is recognized as eligible for services provided by the United States to Indians because of their status as Indians, including any Alaska Native villages included in the Alaska Native Claims Settlement Act (85 Stat. 688, 697).

(b) "State" means any of the States of the United States, including cities, counties, municipalities, or other political subdivisions thereof.

(c) "Secretary" means the Secretary of the Department of the Interior unless otherwise designated in this Act.

(d) "Indian country" shall be defined in accordance with the provisions in section 1151 of title 18, United States Code.

TITLE I—AUTHORIZATION OF COMPACTS AND AGREEMENTS

SEC. 101. (a) Notwithstanding the Act of August 15, 1953 (67 Stat. 588), as amended, or any other Act transferring civil or criminal jurisdiction over Indians within Indian country from the United States to the various States, or establishing a procedure for such transfers, and notwithstanding the provisions of any enabling Act for the admission of a State into the Union, the consent of the United States is hereby given the States and the Indian tribes and the same are hereby authorized to enter into compacts and agreements between and among themselves on matters relating to (1) the enforcement or application of civil, criminal, and regulatory laws of each within their respective jurisdiction, and (2) allocation or determination of governmental responsibility of States and tribes over specified subject matters or specified geographical areas, or both, including agreements or compacts which provide for concurrent jurisdiction between the States and the tribes, and (3) agreements or compacts which provide for transfer of jurisdiction of individual cases from tribal courts to State courts or State courts to tribal courts in

accordance with procedures established by the laws of the tribes and States.

(b) Such agreements and compacts shall be subject to revocation by either party upon six months written notice to the other unless a different period of time is agreed upon. No agreement may provide for a period for revocation in excess of five years unless first approved by a majority of the adult enrolled Indians within the affected area voting at a special election as prescribed in title IV, section 406 of the Act of April 11, 1968 (82 Stat. 80; 25 U.S.C. 1326), but such approval shall not curtail the right of the parties to revoke the agreement by mutual consent within a shorter period of time.

(c) Agreements or compacts entered into under the provision of this section must be filed with the Secretary within thirty days of consummation. In the event an agreement is not so filed, it shall be subject to immediate revocation by either party. The Secretary shall cause the jurisdictional provisions of any such agreement, compact, or revocation to be published in the Federal Register unless requested otherwise by all parties to the agreement or compact.

(d) Such agreements, compacts, or revocation thereof shall not affect any action or proceeding over which a court has already assumed jurisdiction and no such action or proceeding shall abate by reason of such agreement, compact, or revocation unless specifically agreed upon by all parties to

any such action or proceedings and by the parties to the agreement or compact.

(e) Nothing in this Act shall be construed to: (1) enlarge or diminish the jurisdiction over civil or criminal matters which may be exercised by either State or tribal governments except as expressly provided in this Act; (2) authorize or empower State or tribal governments, either separately or pursuant to agreement or compact, to expand or diminish the jurisdiction presently exercised by the Government of the United States to make criminal laws for or enforce criminal laws in the Indian country; (3) authorize or empower the government of a State or any of its political subdivisions or the government of an Indian tribe from entering into agreements or exercising jurisdiction except as authorized by their own organizational documents or enabling laws; (4) authorize agreements or compacts which provide for the alienation, financial encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or (5) to enter into agreements or compacts for the transfer of unlimited, unspecified, or general civil and criminal jurisdiction of an Indian tribe, except as provided under title IV, section 406 of the Act of April 11, 1968 (82 Stat. 80; 25 U.S.C. 1326).

FUNDING AND IMPLEMENTATION—FEDERAL ASSISTANCE

SEC. 102. (a) In any agreement or compact between an Indian tribe and a State authorized under this Act, the United States, upon agreement of the parties and the Secretary, may provide financial assistance to such party for costs of personnel or administrative expenses in an amount up to 100 per centum of costs actually incurred as a consequence of such agreement or compact, including indirect costs of administration which are clearly attributable to the services performed under the agreement or compact. In determining the amount of Federal assistance, if any, to be provided the Secretary may consider among other things:

(1) Whether or not the party assuming an obligation under the agreement or compact is already obligated or entitled to perform the function which is the subject of the compact.

(2) Whether or not the Federal assistance will cause or enable the contracting party to perform the function at a standard above that which it is already obligated to perform.

(3) The financial capacity of the contracting parties to underwrite the expenses without Federal assistance.

(4) The extent to which the success or failure of the compact may depend upon Federal assistance.

(5) The extent to which the proposed compact or agreement will contribute to fostering of community relations between Indian and non-Indian communities.

(6) The extent to which the proposed compact or agreement will enhance protection of resources of both Indian and non-Indian communities.

(7) The comparative costs if the function which is the subject of the compact or agreement were to be performed by the United States.

(8) The extent to which Federal funding is already supplied through revenue sharing, grants in aid, or other Federal program moneys.

(b) Whenever a party to such agreement or compact seeks financial assistance from the United States, to offset their costs, such party shall prepare a detailed statement of the projected costs; a copy of such statement shall be supplied to the other party; and the original of such statement shall be supplied to the Secretary at the time said agreement or compact is tendered to him for his approval.

(c) In any agreement or compact in which one of the parties qualifies for Federal assistance, the other party shall be supplied with copies of all vouchers for payment at the time they are submitted and shall be fully informed of all payments made by the United States to the recipient party. In the event disputes arise between the parties, "either party

may request an audit. The books and records of the party receiving Federal assistance which are relevant to the agreement or compact shall be open to inspection by authorized representatives of the United States.

(d) In the funding of governmental operations authorized under this Act, the Secretary may enter into agreements or other cooperative arrangements with any and all other Federal departments, agencies, bureaus, or other executive branches for transfer of funds or contributions of funds appropriated for programs within the category of the functions to be performed by the parties under such agreements or compacts, and such departments, agencies, or bureaus are hereby authorized to use such funds in the implementation of this Act.

(e) All Federal departments, agencies, and other executive branches are authorized to provide technical assistance and material support and assign personnel to aid tribal and State authorities in the implementation of the agreements or compacts they may enter into under the terms of this Act.

(f) The Secretary is hereby authorized to promulgate such rules and regulations as may be necessary to carry out the purposes of this Act.

(g) There are authorized to be appropriated such sums as may be necessary during fiscal year 1981 not to exceed $10,000,000 and each subsequent fiscal year in order to

carry out the agreements or compacts entered into pursuant to this title. Such funds shall be expended by the Secretary only after determination that there are no funds available from alternative sources as provided in subsection (d) of this section. The Secretary shall provide for such records as may be necessary for the accounting and justification of the funds expended under this authorization.

TITLE II—PLANNING AND MONITORING BOARDS

SEC. 201. (a) The Secretary is hereby authorized and directed to encourage the tribes and the States to establish councils, committees, boards, or task forces comprised of representatives of the States and individual tribes, or on a statewide or regional basis, to discuss and confer upon jurisdictional questions which exist between the parties, and to provide Federal representatives from his Department as may be used at such conferences.

(b) In furtherance of this objective, the Secretary is authorized and directed to provide adequate representation of tribal members at such conferences, and such further conferences among the tribes as may be necessary for their separate deliberations, and to participate in the payments of expenses in employment of reporters, transcription of statements, and preparation of reports as in his judgment may be appropriate.

(c) There are authorized to be appropriated not to exceed $1,000,000 during fiscal year 1981; and such sums thereafter as may be necessary during each subsequent fiscal year in order to carry out the purposes of this title.

TITLE III—JUDICIAL ENFORCEMENT

SEC. 301. The United States district courts shall have original jurisdiction of any civil action brought by any party to an agreement or compact entered into in accordance with this Act to secure equitable relief, including injunctive and declaratory relief, for the enforcement of any such agreement or compact, but no action to recover damages arising out of or in connection with such agreement or compact shall lie except as specifically provided for in such agreement or compact.

Excerpt from S. 1722 To Reform Federal Criminal Law

[Calendar No. 587; S. 1722, 96th Congress, 1st session]

[Report No. 96-553]

A BILL To codify, revise, and reform title 18 of the United States Code; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Code Reform Act of 1979".

PART C—AMENDMENT RELATING TO INDIANS, TITLE 25, UNITED STATES CODE

JURISDICTION OVER OFFENSES COMMITTED IN THE INDIAN COUNTRY

SEC. 161. (a) As used in this section, the term "Indian country" includes—

(1) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, and including any right-of-way running through a reservation;

(2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without a State; and

(3) all Indian allotments, the Indian titles to which have not been extinguished, including any right-of-way running through such an allotment.

(b) Except to the extent specifically set forth in this Act, nothing in this Act is intended to diminish, expand, or otherwise alter in any manner or to any extent State or tribal jurisdiction over offenses within Indian country, as such jurisdiction existed on the date immediately preceding the effective date of this Act.

(c) Except as otherwise specifically provided, the general laws of the United States as to the punishment of offenses committed within the special jurisdiction of the United States shall extend to the Indian country.

(d) (1) Except as provided in paragraph (2) of this subsection, the general laws of the United States as to the punishment of offenses within the special jurisdiction of the United States shall not extend to offenses committed by one Indian against the person or property of another Indian or to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

(2) Any Indian who commits against the person or property of an Indian or other person any of the following felony offenses as defined in title 18, United States Code, namely, Murder (section 1601), Manslaughter (section 1602), Negligent Homicide (section 1603), Maiming (section 1611), Aggravated Battery (section 1612), Terrorizing (section 1615), Kidnapping (section 1621), Aggravated Criminal Restraint (section 1622), Rape (section 1641), Sexual Assault (section 1642), Sexual Abuse of a Minor (section 1643), Arson (section 1701), Aggravated Property Destruction (section 1702), Burglary (section 1711), Criminal Entry (section 1712), Robbery (section 1721), Extortion (section 1722), Theft (section 1731), Trafficking in Stolen Property (section 1732), Receiving Stolen Property (section 1733), or incest shall be subject to the same law and penalties as all other persons committing any of the above offenses within the special jurisdiction of the United States. As used in this section, the offense of incest shall be defined and punished in accordance with such laws of the State in which the offense was committed as are in force at the time of such offense. In the event of a criminal prosecution of an Indian for one or more of the ongoing offenses, this subsection shall not be construed to preclude a finding of guilty of a lesser included offense of such offense or offenses.

(e) The provisions of subsection (c) and (d) of this section shall not be applicable within the areas of Indian country, subject to State jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), or any other federal statute authorizing a State to assume jurisdiction over Indians or Indian country within its boundaries.

(f) Any State which comes within either of the following classifications may exercise jurisdiction over any offense committed by or against Indians in those specific areas of Indian country within its borders to the same extent that such

State has jurisdiction over offenses committed elsewhere within the State and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State.

(1) States which have been granted or have assumed criminal jurisdiction over any portion of Indian country within their respective borders pursuant to sections 2, 6, and 7 of the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of August 8, 1958 (72 Stat. 545), and the Act of November 25, 1970 (84 Stat. 1358), and which jurisdiction has not been retroceded to the United States pursuant to section 403 of the Act of April 11, 1968 (82 Stat. 79).

(2) States which have assumed or in the future do assume criminal jurisdiction over any portions of Indian country within their respective borders pursuant to section 401 of the Act of April 11, 1968 (82 Stat. 78), and which jurisdiction has not been retroceded to the United States pursuant to section 403 of the Act of April 11, 1968 (82 Stat. 79), or the provisions of this Act.

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or within any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(g) Jurisdiction is conferred on the States of Iowa and Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the respective States of Iowa and Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the respective States in accordance with the laws thereof. This subsection shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

(h) The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State, except that nothing contained in this paragraph shall be construed to deprive any Indian tribe, band, or community, or members thereof, of hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

(i) Ninety days following the adoption of a resolution to that effect by the Indian tribe occupying the particular Indian country or part thereof affected by such grant or assumption, the United States shall, upon the consent of the Secretary of the Interior acting on behalf of the United States, reacquire such measure of the criminal jurisdiction granted to or assumed by a State pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), section 145(f), (g), or (h) *subsection (f), (g), or (h) of this section*, of the Criminal Code Reform Act of 1979, or the Act of April 11, 1968 (82 Stat. 73), as shall have been determined in the resolution of such tribe. The resolution authorized by this subsection shall be considered adopted only where the enrolled Indians within the affected area of such Indian country accept the resolution by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe when requested to do so by the tribal council or other governing body or by 20 per centum of such enrolled adults.

(j) No retrocession of jurisdiction pursuant to subsection (i) of this section shall deprive any court of a State of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such retrocession, if the offense charged in such action was cognizable under any law of such State at the time of commission of such offense. For the purpose of any such criminal action, such retrocession shall take effect on the day following the date of final determination of such action.

(k) Notwithstanding section 3601(a) and (b) of title 18, if an Indian juvenile or Indian person between the ages of eighteen and twenty-one is arrested and

charged with a misdemeanor and an Indian tribe has concurrent jurisdiction of the conduct, the Attorney General may forego prosecution and surrender the person to the jurisdiction of the tribe governing such area of Indian country.

Excerpt From Report of Judiciary Committee To Accompany S. 1722

In section 161 of the bill, the Committee has continued the definition of Indian country found in 18 U.S.C. 1151, as well as the various provisions in current law (18 U.S.C. 1162, 3243; 25 U.S.C. 232) that grant State jurisdiction over offenses committed in Indian country by or against Indians. In addition, the Committee has retained the basic structure of 18 U.S.C. 1152 and 1153 (the Major Crimes Act), while making modifications to improve and clarify those statutes.

Currently, under 18 U.S.C. 1152 the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, are made to extend to the Indian country. However, the section does not "extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in Indian country who has been punished by the local law of the tribe." Notwithstanding its apparently plain language the Supreme Court has held that 18 U.S.C. 1152 also does not apply to offenses committed by a non-Indian against a non-Indian victim in Indian country.[54] Such offenses are triable in the States under State law.[55] This means, in general, that section 1152 applies only when the offense is by a non-Indian against an Indian or when an Indian has not been punished by the tribe.[56] Section 1152 incorporates those specific Federal statutes that apply only in the special territorial jurisdiction of the United States, e.g., assault (18 U.S.C. 113), theft (18 U.S.C. 661), rape (18 U.S.C. 2031), homicide (18 U.S.C. 1111–1112). Significant gaps in Federal coverage of criminal offenses exist in such statutes (for example, there is no Federal burglary statute), and offenses not specifically covered are incorporated by the provisions of the Assimilated Crimes Act, 18 U.S.C. 13, which "borrows" the applicable State definition of the offense and penalty.

Serious offenses by Indians against "the person or property" [57] of an Indian or another person in Indian country are governed by 18 U.S.C. 1153, the Major Crimes Act. As recently amended by P.L. 94–297, this statute lists fourteen major offenses that apply in such circumstances.[58] As to twelve of these offenses, Federal statutes exist that prescribe the definition and penalty; as to two offenses, however (burglary and incest), no Federal definition or penalty exists, and the Major Crimes Act provides for the adoption of the laws of the State in which the offense is committed that are in force at the time of such offense.

Although the Major Crimes Act reaches most serious offenses against the person or property, some gaps in coverage remain. For example, maiming (18 U.S.C. 114) and forcible sodomy [59] are not within the statute and as a conse-

[54] E.g., *New York ex rel Ray* v. *Martin*, 326 U.S. 496, 499–500 (1946).

[55] *United States* v. *Burland*, 441 F.2d 1199 (9th Cir.), cert. denied, 404 U.S. 842 (1971). In *United States* v. *Antelope*, 430 U.S. 641 (1977) the Supreme Court unanimously rejected a claim that this scheme constituted an unconstitutional discrimination against Indian defendants charged with a crime involving a non-Indian victim.

[56] It must also be recognized, however, that the general laws of the United States, as opposed to the laws of the United States applicable in places under the sole and exclusive jurisdiction thereof, apply to both Indians and non-Indians in Indian country. See *Walks on Top* v. *United States*, 372 F.2d 422 (9th Cir.), cert. denied, 389 U.S. 879 (1967); *United States* v. *McGrady*, 508 F.2d 13 (8th Cir. 1974).

[57] It has been held that gambling is an offense that is not "against the person or property" of another, so that 18 U.S.C. 1152, rather than the Major Crimes Act or tribal law, is applicable. *United States* v. *Sosseur*, 181 F. 2d 873 (7th Cir. 1950).

[58] Murder, manslaughter, kidnaping, rape, carnal knowledge of any female (not the accused's wife) who has not attained sixteen years of age, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larency. Where the offense is enumerated in section 1153 and is committed by an Indian against a non-Indian, it has been held that the prosecution must be brought under section 1153, notwithstanding that section 1152 also would seem to reach the conduct. *Henry* v. *United States*, 432 F.2d 114 (9th Cir. 1970), modified on rehearing, 434 F.2d 1283, cert. denied, 400 U.S. 1011 (1971).

[59] The lack of coverage of forcible sodomy (sodomy is not included as a form of rape) has created a serious enforcement problem in some instances. In one recent case in Utah, prosecution of an Indian for sodomizing his three-year old grandson had to be declined. Plainly, in a case such as this where the victim and the offender are in the same family, such a result may have tragic consequences since there may be no other practicable way to remove the offender from the situation and to protect the victim from his unwanted sexual attention.

quence are punishable today (if committed in Indian country by or against an Indian) only by a tribal court, which can impose a maximum prison sentence of only six months.[60]

At the same time, the Major Crimes Act belies its title in at least one respect. extending to misdemeanor (i.e. under $100) as well as serious "larcen[ies]".[61] The term "larceny", moreover, is ambiguous. While it has been held to refer to the offense described in 18 U.S.C. 661, there is a division of judicial viewpoint whether that statute reaches a taking of property in the nature of embezzlement rather than larceny at common law.[62]

Under the proposed new Federal Criminal Code, 18 U.S.C. 1152 is carried forward virtually verbatim in subsections (c) and (d)(1) of section 161 of the bill. 18 U.S.C. 1153 has, however, been recast in subsection (d)(2). In place of the fourteen offenses listed in section 1153, the Code lists twenty "felony" offenses against the person or property contained in chapters 16 and 17 of the Code that include as a jurisdictional base the special jurisdiction of the United States.[63] The offenses are: murder, manslaughter, and negligent homicide (sections 1601–1603); maiming and aggravated battery (sections 1611–1612); terrorizing (section 1615); kidnapping and aggravated criminal restraint (sections 1621–1622); rape, sexual assault, and sexual abuse of a minor (sections 1641–1643); arson and aggravated property destructions (sections 1701–1702); burglary and criminal entry (sections 1711–1712); robbery and extortion (sections 1721–1722); theft, trafficking in stolen property, and receiving stolen property (sections 1731–1733);[64] and incest. Although on balance the twenty offenses enumerated may somewhat enlarge the scope of this section as compared to current law, the Committee perceives no reason not to permit Federal prosecution of all serious crimes against the person or property when committed by an Indian in Indian country. Such a decision indeed is consistent with the congressional policy inherent in the Major Crimes Act.

Unlike the Major Crimes Act, the sole instance in section 161 where it is stated that recourse shall be had to State law occurs with respect to the crime of incest, since that crime is not defined in the Code.[65] Subsection (d) also contains a sentence which makes it clear that, in the event of a criminal prosecution of an Indian for one or more of the offenses listed therein, nothing in the subsection shall be deemed to preclude a conviction for a lesser included offense, whether or not such lesser offense is enumerated in the subsection. This carries forward the interpretation of the present Major Crimes Act in *Keeble* v. *United States*.[66]

It should be noted that the provisions of section 161 and indeed of the Criminal Code Reform Act in general, take no position with respect to the scope of jurisdiction possessed by tribal courts; for example, there is no attempt in this bill to alter the recent determination that tribal courts may not exercise jurisdiction over non-Indians accused of offenses in Indian country.[67] It is the Committee's intention to preserve the extent of concurrent court jurisdiction as it now exists. To that end, section 205(a)(2) makes clear that the existence of Federal jurisdiction over an offense does not in itself preclude an Indian tribe, band, community, group, or pueblo from exercising its jurisdiction in Indian country to enforce its laws applicable to the conduct involved.[68] Moreover, subsection (b) of section 161 reinforces this policy by evincing a plain legislative intent that nothing in this Act (except to the extent specifically set forth) is intended to diminish, expand, or otherwise alter in any manner or to any extent State or tribal jurisdiction over offenses within Indian country, as such jurisdiction existed on the date immediately preceding the effective date of this Act.

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[60] 25 U.S.C. 1302(7).

[61] *United States* v. *Gilbert*, 373 F. Supp. 32, 89–93 (D. S. Dak. 1974).

[62] Compare, in this regard, *United States* v. *Armata*, 193 F. Supp. 624 (D. Mass. 1961) (embezzlement is included in 18 U.S.C. 661) with *United States* v. *Beard*, 436 F.2d 1084. 1088–1090 (5th Cir. 1971) (doubting the correctness of *Armata*).

[63] Offenses having general jurisdictional applicability will continue to be prosecutable without regard to the provisions of section 161. See the cases cited in note 56, *supra*.

[64] The grading of the theft series of offenses varies from felony to misdemeanor status depending on the type or value of property involved. Section 161 is worded so as to reach only a felonious violation of these provisions, thus narrowing the scope in this respect of the Major Crimes Act but reflecting the policy adhered to generally in that Act that only serious offenses by Indians should be federally prosecutable.

[65] See 18 U.S.C. 1153; and see *Acunia* v. *United States*, 404 F.2d 140 (9th Cir. 1968).

[66] 412 U.S. 205 (1973).

[67] See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[68] See also, holding that the double jeopardy clause is not a bar to successive tribal and Federal court prosecutions of the same defendant for the same act, *United States* v. *Wheeler*, 435 U.S. 313 (1978).

Finally, as stated above, the Supreme Court has ruled that 18 U.S.C. 1152 does not apply to offenses committed by a non-Indian against a non-Indian in Indian country and that such offenses are triable by State courts in accordance with State law. The Committee believes that there is Federal power under the Constitution to punish such offenses.[69] In redrafting the provisions of current 18 U.S.C. 1152 in section 161 of the bill in conjunction with the definition of the special territorial jurisdiction in the Code, it is not the intention of the Committee that current law with respect to Federal jurisdiction of offenses by non-Indians against non-Indians be changed.

The special territorial jurisdiction also includes, under subparagraph (a)(4), any island, rock, or key which may, at the discretion of the President, be considered as appertaining to the United States. This carries forward the provisions of 18 U.S.C. 7(4).[70] Currently crimes committed on such places are treated as if committed on the high seas on board a United States vessel.[71]

Finally, the special territorial jurisdiction includes any facility for exploration or exploitation of natural resources constructed or operated on or above the outer continental shelf as defined in section 2(a) of the Outer Continental Shelf Lands Act.[72]

States and Tribes Affected by Public Law 83-280

State	Status re Public Law 280	Other assumption of jurisdiction	Case law development/ validity of assumption
Alaska	Full assumption of jurisdiction except for Metlakaite Reservation ever which criminal jurisdiction is not asserted.		
Arizona	Assumption of jurisdiction only over air and water pollution.		
California	Full assumption of jurisdiction		
Colorado	No jurisdiction		
Florida	Full assumption of criminals and civil jurisdiction.		
Idaho	Assumption of jurisdiction in the following areas: Compulsory school attendance. Juvenile delinquency and youth rehabilitation; Dependent, neglected, and abused children; Insanities and mental illnesses; Public assistance; Domestic relations; Operation and management of motor vehicle upon highways and roads maintained by the county, or State, or political subdivision thereof.		
Iowa		Limited criminal jurisdiction re Sac and Fox pursuant to act of June 30, 1948, ch. 759, 62 Stat. 1161.	
Kansas	No jurisdiction	Criminal jurisdiction pursuant to act of June 8, 1940, ch. 276, 54 Stat. 249.	
Louisiana	do		

[69] See *United States* v. *Mazurie*, 419 U.S. 544 (1975). Regardless of the Indian status of the perpetrator or victim, offenses in Indian country frequently constitute a breach of the peace and security of the enclave sufficient to invoke the exercise of Federal jurisdiction. Cf. *Relford* v. *Commandant*, 401 U.S. 355, 367–369 (1971). The Committee intends and anticipates, however, that the Federal government's new jurisdiction under section 161 of the bill over non-Indian versus non-Indian offenses, which is concurrent (see section 205(a) (1) and (2)) with that of the States and tribes, will be exercised sparingly to vindicate a distinct Federal interest or to insure against an apparent failure of justice. Cf. the Department of Justice policy in *Petite* v. *United States*, 361 U.S. 529 (1960).

[70] The constitutionality of this statute is established by *Jones* v. *United States*, 137 U.S. 202 (1890). The limitations to keys "containing deposits of guano" has been eliminated.

[71] See 48 U.S.C. 1417; *Jones* v. *United States*, *supra* note, 70.

[72] 43 U.S.C. 1331(a). By including such facilities, the Committee accepts the recommendation of the American Bar Association. See statement of Prof. Livingston Hall on behalf of the ABA, Hearings, p. 5784.

STATES AND TRIBES AFFECTED BY PUBLIC LAW 83-280—Continued

State	Status re Public Law 280	Other assumption of jurisdiction	Case law development/ validity of assumption
Maine	No jurisdiction	Issue open to question, re Federal recognition of previously only State recognized tribes.	
Michigan	do	State asserts historically; no apparent legal basis.	
Minnesota	Full assumption of jurisdiction except for the Red Lake Reservation, and criminal jurisdiction has been retroceded over Bois Forte—Nett Lake Reservation.		
Mississippi	No jurisdiction		
Montana	Assumption of limited civil and criminal jurisdiction on Flathead Reservation in the following areas: Compulsory school attendance; Public welfare; Domestic relations (except adoptions); Mental health and insanity; care of the infirm, aged, and afflicted; Juvenile delinquency and youth rehabilitation; Adoption proceedings (with consent of tribal court): Abandoned, dependent, neglected, orphanced or abused children; Operation of motor vehicles upon public streets, alleys, roads, and highways.		McDonald v. District Court 496 p. 2d 78 (Mont. 1972) court held constitutional disclaimer amendment and that statutory action was sufficient. Kennerly v. District Court of 9th District of Montana, 400 U.S. 423 (1971). Consent provision of the 1968 amendments literally construed to void tribal council consent where statutory language referred majority of the tribe.
Nebraska	Full assumption of jurisdiction that criminal jurisdiction (excluding traffic) retraceed to Federal Government for Thurston County portion of Omaha Reservation.		U.S. v. Brown, 334 F. Supp. 536 (1971), and Omaha Tribe of Nebraska v. Village Walthill 460 D. 2d 1327 (1972). The Secretary of the Interior has discretion to accept less than a State offers to retrocede. Robinson v. Wolff, 468 F. 2d 438 (1972), Public Law 280 hald not to be an unconstitutional delegation of power reserved to the Federal Government.
Nevada	Originally asserted over some reservations. Now retroceded for all reservations, except, for Ely Colony.		
New Mexico	No assumption pursuant to Public Law 280.	Claim of criminal jurisdiction re particular felony crimes pursuant to New Mexico Constitution art. 19. sec. 14. No apparent legal basis to State claim.	
New York	do	State jurisdiction pursuant to act of Sept. 13, 1950 ch. 947, 64 Stat. 845.	
North Carolina	do	Full jurisdiction assumed by State pursuant to citizens of state provision of the treaty of 1835, and by court decision Eastern Band of Cherokee v. U.S. and Cherokee Nation, 117 U.S. 288 (1886).	
North Dakota	Civil jurisdiction extended where tribe or individual Indian consents. No tribal consent—individuals have consented.	Criminal jurisdiction on Devils Lake Reservation, pursuant to act of May 31, 1946, ch. 279, 60 Stat. 229.	
Oklahoma	No jurisdiction pursuant to Public Law 280.	Jurisdiction exercised in all matters pursuant to various Federal statutes.	
Oregon	Full assumption of jurisdiction except for Warm Springs Reservation.		
South Dakota	No jurisdiction. Attempt at assumption defeated in statewide referendum vote in 1966.		

State	Status re Public Law 280	Other assumption of jurisdiction	Case law development/ validity of assumption
Utah	No jurisdiction. State has passed a statute establishing tribal consent mechanism for assumption.		
Washington	Assumption of jurisdiction is piecemeal and varies per individual tribe: 1. State assumed full civil and criminal jurisdiction with respect to—Colville, Chehalis, Nisqually, Mackleshoot, Quileute, Skokomish, Squaxin Island and Tulalip. 2. State assumed full criminal and civil jurisdiction on fee patented lands re Swonomish. 3. State has assumed civil and criminal jurisdiction with respect to only nontrust land, in the following areas: (a) Compulsory school laws; (b) Public assistance; (c) Domestic relations; (d) Mental illness; (e) Juvenile delinquency; (f) Adoptions of minors; (g) Dependent: Status; (h) Motor vehicle operations on public roads. On the following reservations: Hoh, Kalispel, Lower Elwha, Lummi, Makah, Nooksack, Port Gamble, Port Madison, Puyallup, Quinault, Shoal Water, Spokane. Retrocession of some with respect to Port Madison Reservation.		Quinault v. Gallagher, 368 F. 2d 648 (9th cir. 1966), 387 U.S. 907 (1967). Defers to State court determination of what State action is necessary to assert jurisdiction pursuant to sec. 6 of Public Law 280 when a State constitutional disclaimer exists. See also State v. Paul, 53 W. 2d 789; 337 P. 2d 33 (1959) abd Makah Tribe v. State, 76 W. 2d 645, 457 P. 2d 590 (1969).
Wisconsin	Full assumption of jurisdiction except that jurisdiction has been retroceded over the Menominee Reservation.		
Wyoming	No jurisdiction		

Tribes Affected by Public Law 83–280

Alaska—Native Villages:
- Ahtna, Incorporated
  - Copper Center
  - Gulkana
- Aleut Corporation
  - Akutan
  - Atka
  - Belkofsky
  - False Pass
  - King Cove
  - Nelson Lagoon
  - Nikolski
  - Pauloff Harbor
  - Sand Point
  - Squaw Harbor
  - St. George
  - St. Paul
  - Unalaska
- Arctic Slope Regional Corporation
  - Anaktuvak Pass
  - Barrow
  - Kaktovik (Barter Island)
  - Point Hope
  - Wainwright
- Bering Straits Native Corporation
  - Brevig Mission
  - Diomede (Inalik)
  - Elim
  - Gambell
  - Golovin
  - Koyuk
  - Nome
  - Savoonga
  - Shaktoolik
  - Shismaref
  - Stebbins

St. Michael
Teller
Unalakleet
Wales
White Mountain
Bristol Bay Native Corporation
Chignik
Chignik Lagoon
Chignik Lake
Clark's Point
Dillingham
Egegik
Ekuk
Ekwok
Igiugig
Ivanof Bay
Koliganek
Lake Aleknagik
Levelock
Manokotak
Newhalen
New Stuyahok
Nondalton
Pedro Bay
Perryville
Pilot Point
Port Heiden (Meshik)
South Naknek
Togiak
Twin Hills
Calista Corporation
Akiachak
Akiak
Akolmuit
Alakanuk
Aniak
Bethel
Chefornak
Chevak
Crooked Creek
Eek
Emmonak
Goodnews Bay
Holy Cross
Hooper Bay
Kipnuk
Kongiganak
Kotlik
Kwethluk
Kwigillingok
Kwinhagek (Quinhagek)
Lime Village
Lower Kalskag
Marshall (Fortuna Ledge)
Mekoryuk
Mountain Village
Napakiak
Newtok
Nightmute (Nightmuit)
Oscarville
Pilot Station
Pitkas Point
Platinum
Russian Mission (Yukon)
Scammon Bay
Sheldon's Point
Sleetmute
St. Mary's
Stony River
Tanunak
Toksook Bay
Tuluksak
Tuntutuliak
Upper Kalskag (Kalskag)
Chugach Natives, Incorporated
English Bay
Port Graham
Seldovia (Indian Possessions)
Tatitlek
Cook Inlet Region, Incorporated
Eklutna
Ninilchik
Tyonek
Doyon, Limited
Alatna
Allakaket
Anvik
Arctic Village
Beaver
Cantwell
Chalkyitsik
Circle
Dot Lake
Eagle Village (Eagle)
Fort Yukon
Galena
Grayling
Hughes
Huslia
Kaltag
Koyukuk
McGrath (McGrath Native Village)
Mentasta Lake (Mentasta)
Minto
Nenana Addition (Nenana)
Nikolai
Northway
Nulato
Rampart
Ruby
Shageluk
Stevens Village
Tanacross
Tanana
Tetlin
Venetie
Koniag, Incorporated
Akhiok
Karluk
Kodiak
Larsen Bay
Old Harbor
Ouzinkie
Port Lions

Nana Regional Corporation
- Ambler
- Buckland
- Deering
- Kiana
- Kivalina
- Kotzebue
- Noatak
- Noorvik
- Selawik
- Shungnak

Sealaska Corporation
- Angoon
- Craig
- Hoonah
- Hydaburg
- Juneau (Juneau Indian Village)
- Kake
- Klawock
- Klukwan
- Saxman
- Sitka Village
- Yakutat
- Annete Island Reserve

Arizona: Assumption of jurisdiction only over air and water pollution.
California (Full assumption of Jurisdiction):

- Aqua Caliente
- Alpine Colony (see Nevada)
- Alturas Rancheria
- Augustine
- Barona
- Berry Creek Rancheria
- Big Bend Rancheria
- Big Lagoon Rancheria
- Big Pine
- Big Sandy Rancheria
- Bishop
- Cabazon
- Cahuilla
- Campo
- Capitan Grande
- Cedarville Rancheria
- Chemehuevi
- Cold Springs Rancheria
- Colusa Rancheria
- Cortina Rancheria
- Cuyapaipe
- Dry Creek Rancheria
- Enterprise Rancheria
- Fort Bidwell
- Fort Independence
- Fort Mojave
- Fort Yuma
- Grindstone Creek Rancheria
- Hoopa Extension
- Hoopa Valley
- Hopland Rancheria
- Inaja-Cosmit
- Jackson Rancheria
- La Jolla
- La Posta
- Laytonville
- Likely
- Lone Pine
- Lookout Rancheria
- Los Coyotes
- Manchester-Point Arena Rancheria
- Manzanita
- Mesa Grande
- Middletown Rancheria
- Montgomery Creek Rancheria
- Morongo
- Pala
- Pauma and Yuima
- Pechanga
- Ramona
- Resighini Rancheria
- Rincon
- Roaring Creek Rancheria
- Round Valley
- Rumsey Rancheria
- San Manuel
- San Pasqual
- Santa Rosa Rancheria
- Santa Rosa
- Santa Ynez
- Santa Ysabel
- Sheep Ranch Rancheria
- Sherwood Valley Rancheria
- Soboba
- Stewarts Point Rancheria
- Sulphur Bank Rancheria
- Susanville Rancheria
- Sycuan
- Table Mountain Rancheria
- Torres Martinez
- Trinidad Rancheria
- Tule River
- Tuolumne Rancheria
- Twentynine Palms
- Upper Lake Rancheria
- Viejas
- Woodsford Colony (see Nevada)
- XL Ranch

Colorado: (No Jurisdiction).
Florida: (Full assumption of criminals and civil jurisdiction):
- Big Cypress (Seminole).
- Brighton (Seminole).

Idaho: Assumption of jurisdiction in the following areas:
- Compulsory school attendance; Juvenile delinquency and youth rehabilitation; Dependent, neglected, and abused children; Insanities and mental illnesses; Public assistance; Domestic relations; Operation and management of motor vehicle upon highways and roads maintained by the county, or State, or political subdivision thereof.

Iowa: Limited criminal jurisdiction re Sac and Fox pursuant to act of June 30, 1948, ch. 759, 62 Stat. 1161.
Kansas: No Jurisdiction. Crim. Juris. pursuant to act of June 8, 1940, ch. 276, 54 Stat. 249.
Louisiana: No Jurisdiction.
Maine: No Jurisdiction. Issue open to question, re federal recognition of previously only State recognized tribes.
Michigan: State asserts historically; no apparent legal basis.
Minnesota (Full assumption except for the Red Lake Reservation, and criminal jurisdiction has been retroceded over Bois Forte-Nett Lake Reservation):
Fond du Lac
Grand Portage
Leech Lake
Lower Sioux
Mille Lacs
Minnesota Chippewa
Prairie Island
Prior Lake (Shakopee)
Upper Sioux
White Earth
Mississippi: (No Jurisdiction).
Montana: (Assumption of limited civil and criminal jurisdiction on Flathead Reservation in the following areas: Compulsory school attendance; public welfare; domestic relations (except adoptions); mental health and insanity; care of the infirm, aged, and afflicted; juvenile delinquency and youth rehabilitation; adoption proceedings (with consent of tribal court); abandoned, dependent, neglected, orphaned or abused children; operation of motor vehicles upon public streets, alleys, roads, and highways.)
Nebraska: (Full assumption or jurisdiction that criminal jurisdiction (excluding traffic) retroceded to Federal Government for Thurston County portion of Omaha Reservation):
Omaha
Santee Sioux
Winnebago
Iowa
Nevada: Ely Colony.
New Mexico (No Jurisdiction pursuant to 280): Claim of criminal jurisdiction re particular felony crimes pursuant to New Mexico Constitution art. 19. sec. 14. No apparent legal basis to State claim.
New York: (No Jurisdiction). State jurisdiction pursuant to act of Sept. 13, 1950 ch. 947, 64 Stat. 845.
North Carolina (Full jurisdiction assumed by State pursuant to citizens of state provision of the treaty of 1835, and by court decision Eastern Band of Cherokee v. US and Cherokee Nation, 117 U.S. 288 (1886):
Cherokee (Eastern Band)
North Dakota: Civil jurisdiction extended where tribe or individual Indian consents. No tribal consent-individuals have consent. Criminal jurisdiction on Devils Lake Reservation, pursuant to act of May 31, 1946, ch. 279, 60 Stat. 229.
Oklahoma: No jurisdiction pursuant to PL 280. Jurisdiction exercised in all matters pursuant to various Federal statutes.
Oregon (Full assumption of jurisdiction except for Warm Springs):
Burns-Paiute
Siletz
Umatilla
Celilo Village
South Dakota: (No jurisdiction). Attempt at assumption defeated in statewide referendum vote in 1966.
Utah: (No jurisdiction). State has passed a statute establishing tribal consent mechanism for assumption.
Washington—Assumption of jurisdiction is piecemeal and varies per individual tribe:

1. State assumed full civil and criminal jurisdiction with respect to—Colville, Chehalis, Nisqually, Machleshoot, Quileute, Skokomish, Squaxin Island and Tulalip.

2. State assumed full criminal jurisdiction and civil jurisdiction on fee patented lands re Swonomish.

3. State has assumed Civil and criminal jurisdiction with respect to only nontrust land, in the following areas:

Compulsory school laws; public assistance, domestic relations; mental illness; juvenile delinquency; adoptions of minors; dependent status; motor vehicle operations on public roads.

On the following reservations: Hoh, Kalispel, Lower Elwha, Lummi, Makah, Nooksack, Port Gamble, Port Madison, Puyallup, Quinault, Shoal Water, Spokane.

Retrocession of some with respect to Port Madison Reservation.

Wisconsin—Full assumption of jurisdiction except that jurisdiction has been retroceded over the Menominee Reservation:

Bad River
Forest County Potawatomi
Lac Courte Oreilles
Lac du Flambeau
Oneida
Red Cliff
Sokaogon
St. Croix
Stockbridge-Munsee
Wisconsin Winnebago
Mole Lake

Indian Reservation Magistrate Concept

Concept as Considered at March Hearing

JURISDICTION AND POWERS

Sec.—. Each U.S. Justice of tlie Peace serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment:

(a) All powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts.

(b) The power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(c) The power to conduct trials under section 3401, title 18 States Code, in conformity with and subject to the limitations of that section with respect to the following:

(1) misdemeanors alleged to have been committed by an Indian against the person or property of a non-Indian within Indian country;

(2) misdemeanors alleged to have been committed by a non-Indian against the person or property of an Indian within Indian country;

(3) victimless misdemeanors alleged to have been committed by a non-Indian which directly or indirectly threatens or jeopardizes the security of the person or property of an Indian within Indian country;

(4) misdemeanor offenses set forth in Chapter 53, title 18 U.S.C.

(Note.—Subsections (a), (b) and (c) are verbatim from section 636, title 28, U.S.C. The subsections to subsection (c) track the provisions of section 1152, title 18, U.S.C. Reference to the remaining provisions of chapter 53, title 18, U.S.C. refer to liquor sale violations, destruction of posted signs, and trespass on tribal lands for purposes of hunting or fishing without tribal permission.

PRACTICE AND PROCEDURE

Sec. (a). Except as otherwise provided in this section, the practice and procedure for the trial of cases before officers serving under this chapter, and the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(b) Any defendant appearing before a U.S. Justice of the Peace may be assisted by a lay spokesman of his or her choice, and assistance by such spokesman, whether paid or voluntary, shall not be considered the practice of law. Assistance by such lay counsel shall not waive the right of the defendant to

appoint counsel in any case in which he or she is entitled to such appointed counsel.

(c) (1) In any case in which the defendant requests a trial by jury before the U.S. Justice of the Peace, only persons who actually reside within the reservation in which the offense is alleged to have been committed shall be eligible to serve on the jury panel.

(2) The U.S. Justice of the Peace, in consultation with tribal authorities and county and municipal officials, shall develop and maintain for purposes of jury selection a list of persons within the reservation, or districts within the reservation, over which he has jurisdiction. In developing such list the Justice of the Peace shall take care that such list fairly reflects a cross section of the population within the reservation or reservation district.

(3) Except as provided in this section, the rules of the district court pertaining to the selection of jurors and juror eligibility shall be applicable.

(d) Tribal police officers, Bureau of Indian Affairs police officers, and state and local police officers, acting within the geographic areas in which they have jurisdiction under the laws of their respective governments, are authorized to execute any warrant for arrest, or warrant for search and seizure, or any other summons, subpoena or order which the Justice of the Peace is authorized to issue under the general rules of Federal Criminal Procedure or the Federal Rules of Procedure for the Trial of Minor Offenses before the United States Magistrates.

(e) The provisions of the Court Interpreters Act of 1978 (P.L. 95-539; 92 Stat. 2040) shall apply to trials before the Justice of the Peace.

(NOTE.—The provisions of section (a) are nearly verbatim from section 636(d) of title 28, U.S.C.

The provisions of section (b) are designed to recognize that there is a growing body of para-legals practicing in tribal courts and that many Indian defendants could benefit substantially from their assistance in trial of minor cases.

Sec. 3401 of title 18, U.S.C., provides that any person charged with a misdemeanor may request a jury trial before a magistrate. There is no statutory procedure established for selection of such a jury. Sec. (c) is designed to address the special purpose of this legislation and the unique character of the areas to be served.

The Federal Rules of Criminal Procedure govern proceedings before a magistrate which are not covered by the special Magistrate Rules. Rules 4 and 41 of the Federal Rules of Criminal Procedure covering warrants for arrest and search and seizure provide that warrants may be executed by "a mashal or by some other officer authorized by law." The purpose of Sec. (d) is to make clear that tribal police, BIA police, and state and local police, acting within their respective jurisdictions, are "authorized by law" to execute such warrants or other orders of the Justice of the Peace.)

STATEMENT OF SENATOR JOHN MELCHER ON S. 2832 AS APPEARED IN THE CONGRESSIONAL RECORD

Senator MELCHER. In March of this year the Select Committee on Indian Affairs held 3 days of hearings on jurisdictional issues affecting Indian reservations. The vast majority of the testimony was directed toward problems associated with law enforcement.

Among the proposals upon which we received testimony was the concept of the bill which I am today introducing. This bill, the Indian Reservation Special Magistrates Act of 1980, directs the President to appoint special magistrates to exercise jurisdiction over Federal offenses committed within Indian country. The concept of the bill received wide support from the witnesses who testified.

In many respects, this bill tracks existing law. It does not alter the existing law governing jurisdiction in Indian country. The United States already has jurisdiction over an ample number of offenses in Indian country. The bill adopts by reference many of the provisions in the existing Federal Magistrates Act in chapter 43 of title 28, United States Code. It also, however, provides special provisions designed to meet special concerns in Indian country.

In addition, this legislation need not result in a vast increase in the judicial or law enforcement machinery of the Government. There are already a large number of U.S. magistrates, either full time or part time, sitting throughout the United States, many either on or near Indian reservations.

Why then is this legislation necessary? It is needed because of a general lack of law enforcement through the structures now in place. This legislation is designed to strengthen those structures by providing a clear and simple procedure for processing and disposing of minor Federal offenses which now go unpunished for lack of Federal enforcement.

This bill is very brief and simple in its content. The bill directs the President, by and with the advice and consent of the Senate, to appoint a special magistrate to serve each Indian reservation over which the United States exercises criminal jurisdiction under existing law. Preferential consideration is to be given to persons who are already sitting as judicially appointed magistrates and who are reasonably available to the reservation they would serve. The remainder of the provisions relating to the character of service and compensation are taken from the existing Federal Magistrates Act.

The jurisdiction and powers conferred upon the special magistrate for criminal offenses occurring within the Indian country to which the magistrate is assigned are as full and complete as those powers which the Federal Magistrates Act now authorizes judicially appointed magistrates. This includes the authority to try minor offenses, and for any Federal offense, to issue summons and warrants of arrest, warrants for search and seizure, conduct preliminary hearings to determine whether there is probable cause to hold a defendant for further proceedings before a U.S. district court, and establish bail and provide for release of a defendant. The consent of the defendant shall not be required in order for the magistrate to exercise trial jurisdiction. In addition, the special magistrate is authorized to exercise any other power which the district court elects to delegate under the Federal Magistrate Act.

Practice and procedure in the trial of minor offenses or disposition of other matters will generally conform to rules of law currently applicable to proceedings before any U.S. magistrate. This includes the right to appeal to district courts. However, for cases arising within the Indian country, this bill specifically authorizes a defendant to be assisted by a lay spokesman of his or her choice and such assistance shall not be considered the practice of law. This bill does not include any provision regarding extradition in view of the fact the special magistrates' jurisdiction extends both within and without an Indian reservation.

There is a growing body of paralegal persons throughout the country, particularly in Indian country. In the case of Indian defendants, they may well feel comfortable with assistance from persons who have appeared in tribal courts and have generally oriented themselves toward problems on the reservation or are themselves Indian. Since the prosecution may be informally presented by nonlegally trained persons, there should be no objection to having the defense assisted by

paralegals, particularly in cases where the defendant might not otherwise be entitled to court appointed counsel. On the other hand, when a person is charged with a major offense, he is constitutionally entitled to appointment of counsel. This bill will not waive this entitlement.

The provision in this section stating that the appearance of a lay spokesman shall not constitute the practice of law is necessary in order to assure that such persons will not be criminally prosecuted under State or Federal laws dealing with the unauthorized practice of law.

The bill further provides that jury panelists will be drawn from persons residing within the reservation in which the offense occurred and who are registered to vote in State, county, municipal or tribal elections. The jury panel shall be composed of six persons. The list of potential jurors shall be composed in cooperation with the Indian tribal officials and officials of local municipal and county governments to assure a cross-section of Indian and non-Indian residents within the reservation.

Tribal police, BIA police, and Federal, State and local police officers, acting within their respective jurisdictions, are authorized to execute any warrant for arrest, or warrant for search and seizure, or any other summons, subpena or order which the special magistrate is authorized to issue. This will provide local police, both Indian and non-Indian, with the necessary authority to aid in the enforcement of Federal law and act as officers of the special magistrates court.

This may be the most important provision in this bill for purposes of implementing existing Federal jurisdiction. One of the most serious criticisms to emerge from our March hearing was the failure of Federal law enforcement authorities and Federal prosecutors to vigorously discharge those duties within existing law. Among other reasons given is an excessive caseload. This provision authorizes State and tribal police officers as well as Federal officers to initiate proceedings before the special magistrate. The provision contemplates that most of the minor offenses charged will be informally presented by police officials as is the current practice now for minor offenses in such Federal enclaves as national parks.

The remaining provisions of this bill are drawn from the Federal Magistrates Act and are of a housekeeping nature.

Many of the complaints of Indians and non-Indians relate to lack of enforcement of laws or hardships imposed on defendants, witnesses and families arising from the distance of Federal courts from reservation area. Federal investigators are many times slow to respond to requests for investigations; U.S. attorneys are reluctant to undertake prosecutions for offenses—particularly minor offenses—occurring miles from the courthouse, particularly when obtaining witnesses may be difficult; witnesses are reluctant to respond to subpenas which require them to travel great distances; obtaining juries which are representative of the community in which an offense occurs is not possible. Establishment of magistrate courts to sit in Indian country will not correct all of these problems, but it can go a long way to resolving many of the problems.

II

96TH CONGRESS
2D SESSION

S. 2832

To establish a special magistrate with jurisdiction over Federal offenses within Indian country and to authorize tribal and local police officers to enforce Federal laws within their respective jurisdictions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16 (legislative day, JUNE 12), 1980

Mr. MELCHER introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To establish a special magistrate with jurisdiction over Federal offenses within Indian country and to authorize tribal and local police officers to enforce Federal laws within their respective jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Reservation Special Magistrate and Law Enforcement Act of 1980".

SEC. 2. Title 28, United States Code, is amended by adding immediately after chapter 43 thereof, the following new chapter:

"CHAPTER 44—INDIAN RESERVATION SPECIAL MAGISTRATES

"§ 650. Appointment and tenure

"(a) The President, by and with the advice and consent of the Senate, shall appoint special magistrates as may be necessary to serve each Indian reservation and such additional areas as are within the Indian country as defined in section 1151, title 18, United States Code, and over which the United States exercises criminal jurisdiction under the provisions of chapter 53 of title 18, United States Code.

"(b) No person may be appointed or reappointed to serve as a special magistrate under this chapter unless such person is and has been for at least five years a member in good standing of the bar of the highest court of the State (or one of the States) in which he or she is to serve.

"(c) In any case in which the President finds that a United States magistrate who meets the qualifications of this Act is already reasonably available, the President shall give preferential consideration to such sitting magistrate for appointment as special magistrate under this Act.

"(d) The appointment of any individual as a special magistrate shall be for a term of eight years and his or her reappointment shall be subject to the requirements of subsection (a) with respect to the advice and consent of the Senate.

"(e) Upon appointment and confirmation, the special magistrate shall reside within the exterior boundaries of the reservation to be served or at some place reasonably adjacent thereto.

"(f) Persons appointed as special magistrates under this chapter shall be appointed as full-time magistrates and shall receive compensation at the rates fixed for full-time magistrates under section 634 of this title: *Provided,* That whenever, in the discretion of the President, it is determined that the position to which the special magistrate is being appointed will not have a sufficient caseload to warrant appointment as a full-time magistrate, then such special magistrate shall be appointed as a part-time magistrate and shall receive compensation at the rates fixed for part-time magistrates under section 634 of this title, the level of compensation to be determined by the President.

"(g) Except as otherwise provided herein, the provisions of sections 631 (c), (g), (h), (i), and (k) of this title, relating to limitations on employment, oaths of office, recordation of appointment, removal from office, and leaves of absence shall apply to special magistrates appointed under this chapter.

"(h) Expenses of special magistrates shall be paid in the same manner as provided in section 635 of this title for payment of expenses for magistrates.

"(i) The provisions of section 632 of this title describing the character of service to be performed by full-time and part-time magistrates shall apply to any person appointed as a special magistrate under this section.

"§ 651. Jurisdiction and powers

"(a) Each special magistrate serving under this chapter shall have, within the territorial jurisdiction prescribed by his appointment—

"(1) all powers and duties conferred or imposed upon United States Commissioners by law or by the Rules of Criminal Procedure for the United States District Court.

"(2) the power to administer oaths and affirmations, impose conditions of release under section 3146, United States Code, of title 18, and take acknowledgments, affidavits, and depositions; and

"(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section except that the special designation provided for in subsection 3401(a) of title 18, United States Code, shall not be required, and the provisions of section 3401(b) of title

18, United States Code, extending to a defendant the right to refuse trial before a magistrate and elect to be tried before a judge of the district court for the district in which the offense was committed, shall not be applicable to trials before the special magistrate.

"(b) Each such magistrate so serving under this chapter shall have any other duty or power which may be exercised by a United States magistrate in a civil or criminal case, to the extent authorized by the court for the district in which he serves.

"§ 652. Remand of custody

"(a) If the special magistrate determines there is no Federal jurisdiction over an offense brought within his court, he may direct that custody of the defendant be remanded to the appropriate law enforcement officials.

"§ 653. Practice and procedure

"(a) Except as otherwise provided in this section, the practice and procedure for the trial of cases before magistrates serving under this chapter, and the taking and hearing of appeals to the district courts, shall conform to that set forth in section 3401, title 18, United States Code, and in rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code, and section 636(c) of title 28, United States Code.

"(b) Any defendant appearing before a special magistrate may be assisted by a lay spokesman of his or her choice, and assistance by such spokesman, whether paid or voluntary, shall not be considered the practice of law. Assistance by such lay counsel shall not waive the right of the defendant to appointed counsel in any case in which he or she is entitled to such appointed counsel.

"(c)(1) In any case in which the defendant requests a trial by jury before the special magistrate, only persons who actually reside within the reservation in which the offense is alleged to have been committed shall be eligible to serve on the jury panel.

"(2) The special magistrate, in consultation with tribal authorities and county and municipal officials, shall develop and maintain for purposes of jury selection a list of persons residing within the reservation over which the special magistrate has jurisdiction. Such list shall be developed or compiled from lists of persons eligible or registered to vote in State, county, municipal, or tribal elections. In developing such list, the special magistrate shall take care that such list fairly reflects a cross section of the population within the reservation.

"(3) In any case in which the defendant requests a trial by jury before the special magistrate, such jury shall be com-

posed of six persons whose names appear on the jury selection list prepared by the special magistrate.

"(4) Except as provided in this section, the rules of the district court pertaining to the selection of jurors and juror eligibility for trial before magistrates shall be applicable.

"(d) Tribal police officers, Bureau of Indian Affairs police officers, and Federal, State, and local law enforcement officers, acting within the geographic areas in which they have jurisdiction under the laws of their respective governments, are authorized to execute any warrant for arrest, or warrant for search and seizure, or any other summons, subpena, or order which the special magistrate is authorized to issue in criminal cases arising within the Indian country, or under the general rules of Federal Criminal Procedure or the Federal Rules of Procedure for the Trial of Minor Offenses before the United States Magistrates.

"(e) The provisions of the Court Interpreters Act of 1978 (Public Law 95–539; 92 Stat. 2040) shall apply to trials before the special magistrate.

"§ 654. Contempt

"(a) In a proceeding before a special magistrate, any of the acts or conduct described in section 636(e) of this title as constituting a contempt of the district court when committed before a magistrate shall constitute a contempt of court when committed before a special magistrate, and the procedures

provided in section 636(e), of this title, for prosecution of such contempt shall govern prosecutions for contemptuous conduct when committed before a special magistrate.

"(b) All property furnished to any special magistrate shall remain the property of the United States and, upon the termination of his or her term of office, shall be transmitted to the successor in office or otherwise disposed of as the Director orders.

"(c) The Director shall furnish to each United States special magistrate appointed under this chapter an official impression seal in a form prescribed by the conference. Each such officer shall affix his seal to every jurat or certificate of his official acts without fee.

"§ 656. Training

"(a) The periodic training programs and seminars conducted by the Federal Judicial Center for full-time and part-time magistrates as provided in section 637 of this title, shall also be made available to special magistrates appointed under this chapter. This shall include the introductory training program offered new magistrates which must be held within one year after their initial appointment. The cost of attending such programs shall be borne by the United States.

"§ 657. Authorization of appropriations

"(a) Beginning October 1, 1981, there is hereby authorized to be appropriated such sums as may be necessary to carry out the purpose of this Act.".

§ 631. Appointment and tenure

(a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. Where the conference deems it desirable, a magistrate may be designated to serve in one or more districts adjoining the district for which he is appointed. Such a designation shall be made by the concurrence of a majority of the judges of each of the district courts involved and shall specify the duties to be performed by the magistrate in the adjoining district or districts.

(b) No individual may be appointed or reappointed to serve as a magistrate under this chapter unless:

(1) He is and has been for at least 5 years a member in good standing of the bar of the highest court of the State in which he is to serve, or, in the case of an individual appointed to serve—

(A) in the District of Columbia, a member in good standing of the bar of the United States district court for the District of Columbia or;

(B) in the Commonwealth of Puerto Rico, a member in good standing of the bar of the Supreme Court of Puerto Rico, and in the Virgin Islands of the United States, a member in good standing of the bar of the district court of the Virgin Islands except that an individual who does not meet the bar membership requirements of the first sentence of this paragraph may be appointed and serve as a part-time magistrate if the appointing court or courts and the conference find that no qualified individual who is a member of the bar is available to serve at a specific location;

(2) He is determined by the appointing district court or courts to be competent to perform the duties of the office;

(3) In the case of an individual appointed to serve in a national park, he resides within the exterior boundaries of that park, or at some place reasonably adjacent thereto;

(4) He is not related by blood or marriage to a judge of the appointing court or courts at the time of his initial appointment and

(5) He is selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.

(c) A magistrate may hold no other civil or military office or employment under the United States: *Provided, however*, That, with the approval of the conference, a part-time referee in bankruptcy or a clerk or deputy clerk of a court of the United States may be appointed and serve as a part-time United States magistrate, but the conference shall fix the aggregate amount of compensation to be received for performing the duties of part-time magistrate and part-time referee in bankruptcy, clerk or deputy clerk: *And provided further*, That retired officers and retired enlisted personnel of the Regular and Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, members of the Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, and members of the Army National Guard of the United States, the Air National Guard of the United States, and the Naval Militia and of the National Guard of a State, territory, or the District of Columbia, except the National Guard disbursing officers who are on a full-time salary basis, may be appointed and serve as United States magistrates.

(d) No individual may serve under this chapter after having attained the age of seventy years: *Provided, however*, That upon the unanimous vote of all the judges of the appointing court or courts, a magistrate who has attained

the age of seventy years may continue to serve and may be reappointed under this chapter.

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years, except that the term of a full-time or part-time magistrate appointed under subsection (j) shall expire upon—

(1) the expiration of the absent magistrate's term,

(2) the reinstatement of the absent magistrate in regular service in office as a magistrate.

(3) the failure of the absent magistrate to make timely application under subsection (i) of this section for reinstatement in regular service in office as a magistrate after discharge or release from military service,

(4) the death or resignation of the absent magistrate, or

(5) the removal from office of the absent magistrate pursuant to subsection (b) of this section,

whichever may first occur.

(f) Upon the expiration of his term, a magistrate may, by a majority vote of the judges of the appointing district court or courts and with the approval of the judicial council of the circuit, continue to perform the duties of his office until his successor is appointed, or for 60 days after the date of the expiration of the magistrate's term, whichever is earlier.

(g) Each individual appointed as a magistrate under this section shall take the oath or affirmation prescribed by section 453 of this title before performing the duties of his office.

(h) Each appointment made by a judge or judges of a district court shall be entered of record in such court, and notice of such appointment shall be given at once by the clerk of that court to the Director.

(i) Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial district in which the magistrate serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges of such court concur in the order of removal; and when there is a tie vote of the judges of the district court on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council or councils. Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council, or councils an opportunity to be heard on the charges.

(j)(1) A magistrate who is inducted into the Armed Forces of the United States pursuant to the Military Selective Service Act of 1967 (50 U.S.C. App. 451 et seq.), or is otherwise ordered to active duty with such forces for a period of more than thirty days, and who makes application for a leave of absence to the district court or courts which appointed him, shall be granted a leave of absence without compensation for such period as he is required to serve in such forces. Every application for a leave of absence under this subsection shall include a copy of the official orders requiring the magistrate's military service. The granting of a leave of absence under this subsection shall not operate to extend the term of office of any magistrate.

(2) A magistrate granted a leave of absence under this subsection who—

(A) receives a certificate of service under section 9(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. 459(a)), or is released under honorable conditions from the military service.

(B) makes application for reinstatement to regular service in office as a magistrate within ninety days after he is released from such service or training or from hospitalization continuing after discharge for a period of not more than one year, and

(C) is determined by the appointing court or courts in the manner specified in subsection (a) of this section to be still qualified to perform the duties of such position,

shall be reinstated in regular service in such office.

(k) Upon the grant by the appropriate district court or courts of a leave of absence to a magistrate entitled to such relief under the terms of subsection (i) of this section, such court or courts may proceed to appoint, in the manner specified in subsection (a) of this section, another magistrate, qualified for appointment and service under subsection (b), (c), and (d) of this section, who shall serve for the period specified in subsection (e) of this section.

(June 25, 1948, ch. 646, 62 Stat. 915; May 24, 1949, ch. 139, § 73, 63 Stat. 100; July 9, 1952, ch. 609, § 1, 66 Stat. 509; July 25, 1956, ch. 722, 70 Stat. 642; Oct. 17, 1968, Pub. L. 90–578, title I, § 101, 82 Stat. 1108; Oct. 17, 1976, Pub. L. 94–520, § 2, 90 Stat. 2458; Oct. 10, 1979, Pub. L. 96–82, § 3, 93 Stat. 645.

28 U.S.C. 631 NOTE

The merit selection panels established under section 631(b)(5) of title 28, United States Code, in recommending persons to the district court, shall give due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities.

Magistrates serving prior to the promulgation of magistrate selection standards and procedures by the Judicial Conference of the United States may only exercise the jurisdiction conferred under the amendment made by section 2 of this Act after having been reappointed under such standards and procedures or after having been certified as qualified to exercise such jurisdiction by the judicial council of the circuit in which the magistrate serves.

The amendment made by subsection (c) of this section shall not take effect until 30 days after the meeting of the Judicial Conference of the United States next following the effective date of this Act.

The Judicial Conference of the United States shall undertake a study, to begin within 90 days after the effective date of this Act and to be completed and made available to Congress within 24 months thereafter, concerning the future of the magistrate system, the precise scope of such study to be recommended by the Chairmen of the Judiciary Committees of each House of Congress.

Such sums as may be necessary to carry out the purposes of this Act are hereby authorized to be appropriated for expenditures on or after October 1, 1979.

§ 632. Character of service

(a) Full-time United States magistrates may not engage in the practice of law, any may not engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers.

(b) Part-time United States magistrates shall render such service as judicial officers as is required by law. While so serving they may engage in the practice of law, but may not serve as counsel in any criminal action in any court of the United States, nor act in any capacity that is, under such regulations as the conference may establish, inconsistent with the proper discharge of their office. Within such restrictions, they may engage in any other business, occupation, or employment which is not inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers.

(June 25, 1948, ch. 646, 62 Stat. 916; Oct. 17, 1968, Pub. L. 90–578, title I, § 101, 82 Stat. 1110.)

§ 633. Determination of number, locations, and salaries of magistrates

(a) Surveys by the Director

(1) The Director shall, within one year immediately following the date of the enactment of the Federal Magistrates Act, make a careful survey of conditions in judicial districts to determine (A) the number of appointments of full-time magistrates and part-time magistrates required to be made under this chapter to provide for the expeditious and effective administration of justice, (B) the locations at which such officers shall serve, and (C) their respective salaries under section 634 of this title. Thereafter, the Director shall, from time to time, make such surveys, general or local, as the conference shall deem expedient.

(2) In the course of any survey, the Director shall take into account local conditions in each judicial district, including the areas and the populations to be

served, the transportation and communications facilities available, the amount and distribution of business of the type expected to arise before officers appointed under this chapter (including such matters as may be assigned under section 636(m) of this chapter), and any other material factors. The Director shall give consideration to suggestions from any interested parties, including district judges, United States commissioners or officers appointed under this chapter, United States attorneys, bar associations, and other parties having relevant experience or information.

(3) The surveys shall be made with a view toward creating and maintaining a system of full-time United States magistrates. However, should the Director find, as a result of any such surveys, areas in which the employment of a full-time magistrate would not be feasible or desirable, he shall recommend the appointment of part-time United States magistrates in such numbers and at such locations as may be required to permit prompt and efficient issuance of process and to permit individuals charged with criminal offenses against the United States to be brought before a judicial officer of the United States promptly after arrest.

(b) Determination by the conference

Upon the completion of the initial surveys required by subsection (a) of this section, the Director shall report to the district courts, the councils, and the conference his recommendations concerning the number of full-time magistrates and part-time magistrates, their respective locations, and the amount of their respective salaries under section 643 of this title. The district courts shall advise their respective councils, stating their recommendations and the reasons therefore; the councils shall advise the conference, stating their recommendations and the reasons therefor, and shall also report to the conference the recommendations of the district courts. The conference shall determine, in the light of the recommendations of the Director, the district court, and the councils, the number of full-time United States magistrates and part-time United States magistrates the locations at which they shall serve, and their respective salaries. Such determinations shall take effect in each judicial district at such time as the district court for such judicial district shall determine, but in no event later than one year after they are promulgated.

(c) Changes in number, locations, and salaries

Except as otherwise provided in this chapter, the conference may, from time to time, in the light of the recommendations of the Director, the district courts, and the councils, change the number, locations, and salaries of full-time and part-time magistrates, as the expeditious administration of justice may require. (June 25, 1948, ch. 646, 62 Stat. 916; Aug. 13, 1954, ch. 728, § 1(a), (b), 68 Stat. 704; Sept. 2, 1957, Pub. L. 85-276, §§ 1, 2, 71 Stat. 600; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1111; Oct. 10, 1979, Pub. L. 96-82, § 4, 93 Stat. 645.

§ 634. Compensation

(a) Officers appointed under this chapter shall receive as full compensation for their services salaries to be fixed by the conference pursuant to section 633 of this title, at rates for full-time and part-time United States magistrates not to exceed the rates now or hereafter provided for full-time and part-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), as amended, except that the salary of a part-time United States magistrate shall not be less than $100 nor more than one-half the maximum salary payable to a full-time magistrate. In fixing the amount of salary to be paid to any officer appointed under this chapter, consideration shall be given to the average number and the nature of matters that have arisen during the immediately preceding period of five years, and that may be expected thereafter to arise, over which such officer would have jurisdiction and to such other factors as may be material. Disbursement of salaries shall be made by or pursuant to the order of the Director.

(b) Except as provided by section 8344, title 5, relating to reductions of the salaries of reemployed annuitants under subchapter III of chapter 83 of such title and unless the office has been terminated as provided in this chapter, the term in which he is serving, below the salary fixed for him at the beginning of salary of a full-time United States magistrate shall not be reduced, during that term.

(c) All United States magistrates, effective upon their taking the oath or affirmation of office, and all necessary legal, clerical, and secretarial assistants employed in the offices of full-time United States magistrates shall be deemed to be officers and employees in the judicial branch of the United States Government within the meaning of subsection III (relating to civil service retirement) of chapter 83, chapter 87 (relating to Federal employees' group life insurance), and chapter 89 (relating to Federal employees' health benefits program) of title 5. Part-time magistrates shall not be excluded from coverage under these chapters solely for lack of a prearranged regular tour of duty.

(June 25, 1948, ch. 646, 62 Stat. 917 Oct. 17, 1968. Pub. L. 90–578, title 1, § 101. 82 Stat 1112; Sept. 21, 1972, Pub. L. 92–428, 86 Stat. 721; Oct. 17, 1976, Pub. L. 94–520, § 1. 90 Stat. 2458; Oct. 10, 1979, Pub. L. 96–82, § 8, 93 Stat. 647.)

§ 635. Expenses

(a) Full-time United States magistrates serving under this chapter shall be allowed their actual and necessary expenses incurred in the performance of their duties, including the compensation of such legal assistants as the Judicial Conference, on the basis of the recommendations of the judicial councils of the circuits, considers necessary, and the compensation of necessary clerical and secretarial assistance. Such expenses and compensation shall be determined and paid by the Director under such regulations as the Director shall prescribe with the approval of the conference. The Administrator of General Services shall provide such magistrates with necessary courtrooms, office space, furniture and facilities within United States courthouses or office buildings owned or occupied by departments or agencies of the United States or should suitable courtroom and office space not be available within any such courthouse or office building, the Administrator of General Services, at the request of the Director, shall procure and pay for suitable courtroom and office space, furniture and facilities for such magistrate in another building, but only if such request has been approved as necessary by the judicial council of the appropriate circuit.

(b) Under such regulations as the Director shall prescribe with the approval of the conference, the Director shall reimburse part-time magistrates for actual expenses necessarily incurred by them in the performance of their duties under this chapter. Such reimbursement may be made, at rates not exceeding those prescribed by such regulations, for expenses incurred by such part-time magistrates for clerical and secretarial assistance, stationery, telephone and other communications services, travel, and such other expenses as may be determined to be necessary for the proper performance of the duties of such officers: *Provided, however,* That no reimbursement shall be made for all or any portion of the expense incurred by such part-time magistrates for the procurement of office space.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90–578, title I, § 101, 82 Stat. 1112; Oct. 10, 1979, Pub. L. 96–82, § 8, 93 Stat. 646.)

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b) (1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objection to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the

conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporter referred to in this paragraph may be transferred for temporary service in any district court of the judicial court for reporting proceedings under this subsection, or for other reporting duties in such court.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall

have no authority to perform any other function within the territory of a foreign country.

(June 25, 1948, ch. 646, 62 Stat. 917; As amended Oct. 17, 1968, Pub. L. 90-578, Title I § 101, 82 Stat. 1113; Mar. 1, 1972, Pub. L. 92-329, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, Pub. L. 94-577, § 1, 90 Stat. 2729; Oct. 28, 1977, Pub. L. 95-144, § 2, 91 Stat. 1220; Oct. 10, 1979, Pub. L. 96-82, § 2, 93 Stat. 643.)

§ 637. Training

The Federal Judicial Center shall conduct periodic training programs and seminars for both full-time and part-time United States magistrates, including an introductory training program for new magistrates, to be held within one year after initial appointment.
(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1114.)

§ 638. Dockets and forms; United States Code; seals

(a) The Director shall furnish to United States magistrates adequate docket books and forms prescribed by the Director. The Director shall also furnish to each such officer a copy of the current edition of the United States Code.

(b) All property furnished to any such officer shall remain the property of the United States and, upon the termination of his term of office, shall be transmitted to his successor in office or otherwise disposed of as the Director orders.

(c) The Director shall furnish to each United States magistrate appointed under this chapter an official impression seal in a form prescribed by the conference. Each such officer shall affix his seal to every jurat or certificate of his official acts without fee.
(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1114.)

§ 639. Definitions

As used in this chapter—

(1) "Conference" shall mean the Judicial Conference of the United States;

(2) "Council" shall mean the Judicial Council of the Circuit;

(3) "Director" shall mean the Director of the Administrative Office of the United States Courts;

(4) "Full-time magistrate" shall mean a full-time United States magistrate;

(5) "Part-time magistrate" shall mean a part-time United States magistrate; and

(6) "United States magistrate" and "magistrate" shall mean both full-time and part-time United States magistrates.
(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1114.)

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

CHAPTER 219—TRIAL BY UNITED STATES MAGISTRATES

§ 3401. Misdemeanors; application of probation laws

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

(c) A magistrate who exercises trial jurisdiction under this section, and before whom a person is convicted or pleads either guilty or nolo contendere, may, with the approval of a judge of the district court, direct the probation service of the court to conduct a presentence investigation on that person and render a report to the magistrate prior to the imposition of sentence.

(d) The probation laws shall be applicable to persons tried by a magistrate under this section, and such officer shall have power to grant probation and to revoke or reinstate the probation of any person granted probation by him.

(e) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. For purposes of appeal a copy of the record of such proceedings shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(f) The district court may order that proceedings in any misdemeanor case be conducted before a district judge rather than a United States magistrate upon the court's own motion or, for good cause shown, upon petition by the attorney for the Government. Such petition should note the novelty, importance, or complexity of the case, or other pertinent factors, and be filed in accordance with regulations promulgated by the Attorney General.

(g) The magistrate may, in a case involving a youth offender in which consent to trial before a magistrate has been filed under subsection (b) of this section, impose sentence and exercise the other powers granted to the district court under chapter 402 and section 4216 of this title, except that—

(1) the magistrate may not sentence the youth offender to the custody of the Attorney General pursuant to such chapter for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense;

(2) such youth offender shall be released conditionally under supervision no later than 3 months before the expiration of the term imposed by the magistrate, and shall be discharged unconditionally on or before the expiration of the maximum sentence imposed; and

(3) the magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense.

(h) The magistrate may, in a petty offense case involving a juvenile in which consent to trial before a magistrate has been filed under subsection (b) of this section, exercise all powers granted to the district court under chapter 403 of this title. For purposes of this subsection, proceedings under chapter 403 of this title may be instituted against a juvenile by a violation notice or complaint, except that no such case may proceed unless the certification referred to in section 5032 of this title has been filed in open court at the arraignment. No term of imprisonment shall be imposed by the magistrate in any such case. (June 25, 1948, ch. 645, 62 Stat. 830; July 7, 1958, Pub. L. 85-508, § 12(j), 72 Stat. 348; Oct. 17, 1968, Pub. L. 90-578, title III, § 302(a), 82 Stat. 1115; Oct. 10, 1979, Pub. L. 96-82, § 7, 93 Stat. 645.)

§ 3402. Rules of procedure, practice and appeal

In all cases of conviction by a United States magistrate an appeal of right shall lie from the judgment of the magistrate to a judge of the district court of the district in which the offense was committed.

The Supreme Court shall prescribe rules of procedure and practice for the trial of cases before magistrates and for taking and hearing of appeals to the judges of the district courts of the United States.

(June 25, 1948, ch. 645, 62 Stat. 831; Oct. 17, 1968, Pub. L. 90-578, title III, § 302(b), 82 Stat. 1116.)

Senator MELCHER. Our first witness this morning is from the Blackfeet Tribe of Montana, Tribal Councilman Bob Gervais.

Bob, we are pleased to have you here this morning. We will be pleased to hear your testimony.

STATEMENT OF BOB GERVAIS, COUNCILMAN, BLACKFEET TRIBE OF MONTANA

Mr. GERVAIS. I am Bob Gervais, councilman of the Blackfeet Tribe.

Mr. Chairman and members of the Senate Select Committee on Indian Affairs, the Blackfeet Tribal Business Council has carefully

reviewed S. 1181, a bill to authorize the States and the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country.

In 1972, the constitutional convention adopted the present Montana Constitution which was ratified by the people on June 6, 1972. In article 1 of the constitution entitled "Compact With the United States," the well-known Montana disclaimer clause which was also a part of our 1889 constitution was retained fully intact. This disclaimer clause states clearly that, "all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana."

The Indian people of Montana carried out a lengthy dialog with the constitutional convention to insure that this disclaimer clause was reenacted in the new constitution.

The tribal business council in reviewing S. 1181 stopped abruptly at lines 12 and 13 of page 3 wherein it states: "The consent of the United States is hereby given the States and the Indian tribes and the same are hereby authorized to enter into compacts and agreements between and among themselves on matters relating to * * *" and so on.

This would be in the minds of the Blackfeet Tribal Business Council and their constituents; a total renunciation and relinquishment by the U.S. Government of its trust responsibility toward the tribe. The disclaimer of the 1972 Montana Constitution states that the U.S. Government had absolute jurisdiction of all lands owned or held by any Indians or Indian tribe until revoked by the consent of the United States and the people of Montana. This appears to be such a renunciation by the U.S. Government, if S. 1181 is enacted.

Most importantly, it is our opinion that the above referred to language of S. 1181 totally denigrates and abolishes the Indian-Federal trust relationship regarding jurisdiction over Indian lands. This complete abolishment of the trust relationship would be directly contrary to decades of established Federal legal precedent in this country.

The establishment of a magistrate's system within reservation boundaries has basic merit as it is an extension of the trust responsibility of the U.S. Government toward Indian tribes. We do have great concerns about the ability of non-Indian offenders to sign a disclaimer and agree to be prosecuted in Federal district court. Our concern is that we want to see the prosecutions expeditiously pursued and completed and that declinations not be given by the U.S. attorney's office except for good legal cause based on the merits of the case. All too often, the U.S. attorney's offices in the past have handed down declinations based upon workload and other administrative conflicts.

The Blackfeet Tribe wishes to express deep gratitude to you, Senator Melcher, and to the select committee for giving us the opportunity to testify on this potentially disastrous bill, S. 1181.

Also, we wish to express our gratitude for the opportunity to testify regarding the Federal magistrate concept prior to any bill being introduced.

This procedure provides the tribe adequate time and opportunity to give their input and express their thoughts and feelings regarding these all-important matters.

I would like to enter into the record a copy of the Constitution of the State of Montana, article 1.

Senator MELCHER. Without objection, it will be inserted in the record at this point.

[The Constitution of Montana, article 1, follows:]

THE CONSTITUTION OF THE STATE OF MONTANA, AS ADOPTED BY THE CONSTITUTIONAL CONVENTION, MARCH 22, 1972, AND AS RATIFIED BY THE PEOPLE, JUNE 6, 1972

PREAMBLE

Article

PREAMBLE

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

ARTICLE I—COMPACT WITH THE UNITED STATES

All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Senator MELCHER. On this concept, I think you stated it would be unworkable if the accused had to give their consent to the tribe before a magistrate?

Mr. GERVAIS. No, we did not say it would be unworkable. We think it does have merit, any way it goes.

Senator MELCHER. I think that is a part of the present Federal magistrates system that I would not want to see incorporated in—the magistrates or justices of the peace—giving them special authority on an Indian reservation. If you are accused of doing something and have to give your consent before you are brought before a magistrate, I do not

think you would give your consent; I do not think anyone would. It would be a way of avoiding prosecution.

I think there is a basic flaw in the Federal magistrates system as it is now set up, as it applies to an Indian reservation. I do not see how it will work at all.

If you give special authority for a Federal magistrate on a reservation to mete out justice, the question of the consent of the accused to go before that magistrate will not work.

What if a person who is accused of a crime on a reservation, when we do have a Federal entity there—whether we call him "magistrate" or "special justice of the peace"—is hauled before that magistrate or special justice of the peace and does not feel that the outcome, whatever the sentence or fine is, is fair? Would the individual's rights still be protected? Would they have the right to appeal that in district court or at a higher level?

Mr. GERVAIS. Yes.

Senator MELCHER. Are you saying yes?

Mr. GERVAIS. Yes, I agree with that.

Senator MELCHER. I understand there is a particular matter of concern to the Blackfeet Tribe; some murders that have occurred on the reservation which have not been properly or adequately investigated.

Mr. GERVAIS. Homicides and assaults; I believe they are the concern.

Senator MELCHER. On the reservation?

Mr. GERVAIS. On the reservation, yes.

Senator MELCHER. Is it the slowness of the U.S. attorneys to respond and conduct an investigation?

Mr. GERVAIS. That could be part of the problem. We believe that the investigations are not going properly either. There are not only the two particular cases that happened recently, but there are also several that happened in the past which we think are not being handled properly by the FBI.

Senator MELCHER. How long does it take, from the time of the crime until the FBI is on the scene or collecting evidence?

Mr. GERVAIS. The FBI are stationed in Montana about 33 miles from Browning. Sometimes it takes 3 to 4 hours for them to respond to a call, and other times it takes longer than that.

Senator MELCHER. How long?

Mr. GERVAIS. Depending on the priority, I believe it could take a day or so.

Senator MELCHER. Does that occur in the case of a homicide?

Mr. GERVAIS. In the case of a homicide it might take 3 hours.

Senator MELCHER. And in the case of an assault?

Mr. GERVAIS. In the case of an assault, it could take days.

Senator MELCHER. Several days?

Mr. GERVAIS. Yes.

Senator MELCHER. How serious an assault are we talking about? Is the victim hospitalized?

Mr. GERVAIS. Probably. One of the things we do have is a BIA Federal investigator in Browning, around the reservation. Also, we have tribal investigators who usually go right in and try to pickup the evidence, and the FBI comes in later.

Senator MELCHER. Is this investigation hampered in any way by the special BIA officer or the tribal police if there is a non-Indian involved?

Mr. GERVAIS. It certainly is. The U.S. attorney is called on the telephone first to give his consent in the case of non-Indians.

Senator MELCHER. Where is the U.S. attorney?

Mr. GERVAIS. Butte.

Senator MELCHER. What happens if it is after hours or on the weekend?

Mr. GERVAIS. I imagine the assistant is probably called.

Senator MELCHER. Is the assistant also in Butte?

Mr. GERVAIS. No.

Senator MELCHER. Where is he?

Mr. GERVAIS. He is in Great Falls or Billings.

Senator MELCHER. Does this slow down any proper police work?

Mr. GERVAIS. We believe it does.

Senator MELCHER. What is the relationship of the special BIA officer to the tribal police? Does he have more authority than the tribal police?

Mr. GERVAIS. Yes, he does.

Senator MELCHER. Is he on the reservation?

Mr. GERVAIS. Yes, he lives on the reservation.

Senator MELCHER. What is his title?

Mr. GERVAIS. Criminal investigator.

Senator MELCHER. Is he an employee of the Bureau of Indian Affairs?

Mr. GERVAIS. Yes.

Senator MELCHER. Is he of assistance to the tribal police officer?

Mr. GERVAIS. They assist each other, I should say, but he is the supervisor of the tribal investigators. We have two tribal investigators.

Senator MELCHER. Is he the supervisor to them?

Mr. GERVAIS. That is right.

Senator MELCHER. When it is necessary to call the U.S. attorney, does the tribal investigator appoint a police chief or a special BIA investigator?

Mr. GERVAIS. Usually the BIA investigator.

Senator MELCHER. One of the points we think should be in this Federal magistrates concept on an Indian reservation is that that person have authority, even on major crimes, to make preliminary investigations, to gather the pertinent evidence that would be necessary in the prosecution of a crime. Do you favor that type of authority?

Mr. GERVAIS. I do.

Senator MELCHER. I know that later today you will be meeting with the staff of the committee to discuss in detail the complaint of the Blackfeet Tribe concerning these two recent homicides on the reservation and whether or not the investigations have been conducted expeditiously and thoroughly. It seems to me that while our basic thrust with the Federal magistrates concept is with the lesser crimes—misdemeanors—in light of the complaint regarding these two homicides, perhaps this function should also be part of our concept: That is, gathering preliminary evidence in this field, acting immediately as an officer of the court.

For instance, I think the authority we would want to draft would be that we remove this one little hangup of whether or not you have to call the U.S. attorney to make a proper investigation—if we want this authority given to an officer of the court. He or she would be there and could grant that authority immediately. The ongoing authority would not be something hit or miss. It would be an officer of the Federal court entrusted with the responsibility of making sure that all the evidence of a major crime were gathered. That authority would be for that Federal officer of the court, whether he was called the Federal magistrate or U.S. justice of the peace. We believe the authority should be vested in that person.

Mr. GERVAIS. Yes, sir.

Senator MELCHER. Thank you very much.

I have one further question. Please return to the witness table.

The tribe is opposed to enactment of S. 1181. Is that correct?

Mr. GERVAIS. That is correct.

Senator MELCHER. Does the tribe's position represent the position of other tribes in Montana? Do you know?

Mr. GERVAIS. I do not know.

Senator MELCHER. OK. Thank you very much.

Our next witness is Sam Deloria, director of the American Indian Law Center, University of New Mexico.

Mr. Deloria, welcome to the committee.

STATEMENT OF SAM DELORIA, DIRECTOR, AMERICAN INDIAN LAW CENTER, UNIVERSITY OF NEW MEXICO

Mr. DELORIA. Good morning, Mr. Chairman. Thank you for inviting me to appear before the committee today.

The American Indian Law Center has been working for the last few years, providing staff support to the Indian members of the Commission on Tribal-State Relations, which is a commission composed of 12 State legislators and 12 tribal chairmen who are looking into the intergovernmental relationships and who are trying to examine the present state of affairs in determined areas in which States and tribes can cooperate.

I am not appearing here on behalf of the Commission on Tribal State Relations, but my comments on S. 1181 will be drawn from my experience in providing staff support.

Before I get into a discussion of the bill, I would like to make it very clear that the interest of the committee in improving tribal State relations is one that I think States and tribes welcome and are very appreciative of. However, I feel, personally, that there are some real problems with this particular piece of legislation.

The first problem we have identified is that the introduction of the Tribal State Compact Act has been interpreted by many members of State legislatures and elected tribal officials as indicating that there is not now authority for them to enter into agreements of any kind and that discussions between tribes and States cannot begin until this act is passed. So, ironically, the introduction of the act is having the effect of discouraging the very process that it is trying to encourage.

In our work with the commission, we have done a survey of intergovernmental relations between tribes and States throughout the

country and the kinds of arrangements—I think it is more instructive to refer to them as cooperative arrangements because the range of formality is very broad and ranges all the way from highly detailed agreements, written agreements to settle Federal litigation, all the way down to the simplest kinds of understandings between executive agencies to administer their programs in a coordinated way.

Looking at this range of agreements, we find that, for the most part, they have been undertaken in response to the needs of the communities and within the context of present law, particularly within the context of existing Federal law very often without having to amend tribal and State law. So, we have started from the assumption that arrangements take place wherever possible with the minimum of disruption of the present statutory structure.

My next objection to the Tribal-State Compact Act is the one I presented to this committee several years ago when the act was first introduced. That is, it is premature in the sense that it removes barriers in the Federal law which have not as yet been identified as real barriers to tribal-State cooperation.

In setting a Federal structure, it affects the negotiating process between States and tribes. The problem is that the concept of agreements or compacts is a horizontal complex that can cut across all of the substantive areas of law and government. It is difficult to discuss in the abstract because, in talking about a compact or agreement, you have to think of an infinite variety of specific situations in which an agreement could be made.

With respect to almost any subject matter of an agreement, it is possible to draw up a proposed agreement for which there is some Federal statutory barrier. But in my opinion that does not mean we now need Federal legislation removing all statutory areas; we need draftsmen working for States and tribes who can draft agreements that do not stumble into Federal statutory barriers.

The one most often discussed is the civil commitment of reservation Indians in State institutions and the litigation that is surrounding this issue. The most celebrated litigation in Montana and South Dakota both involved attempts to extend the jurisdiction of State courts onto reservations without going through the procedures required by the 1968 Civil Rights Act and the *Kennerly* case. However, the attempt that was not made, to my knowledge, was an attempt for the State to authorize its institutions to accept tribal courts' civil commitments, which would not have required Federal legislation.

Had this approach been taken, it would have, even if the States had been reluctant to do so at first, opened a very productive series of discussions between the State and tribe concerning the State's reasons for either supporting or being reluctant to get into this area of full faith and credit.

I think a lot of what we are talking about is a piecemeal concept with full faith and credit between governments. I think this is an example of unnecessarily removing Federal barriers to some kinds of agreements, and my guess would be that the tribes would be very reluctant to support legislation which essentially weakens the *Kennerly* case and allows for transfers of jurisdiction without a tribal referendum.

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I think the question of amending the 1968 Civil Rights Act and the Kennerly interpretation of that extends more to its importance in attracting tribal opposition to this legislation. It will affect the discussion process between tribes and States in a way that, in my opinion, will discourage cooperative relationships.

If the tribal delegation and the delegation of State officials sit down to discuss an important governmental concern, which discussion might result in an agreement of some kind, if the tribe is able to say to the State officials that any discussion of transferring jurisdiction is out of the question because it would require a referendum and a referendum would not be successful on the reservation, that permanently removes that item from the agenda and permanently removes that source of pressure on the tribal delegation. The discussions can then proceed.

However, if this act passes and it is possible for jurisdiction to be transferred, that raises, once again, all the worst fears of tribal officials about dealing with States at all: That is, they are going to lose their jurisdiction to the States, and they are going to be put under pressure to transfer jurisdiction. I think that is going to affect the entire negotiating process and will raise such suspicions, about any kind of discussion between States and tribes, that people simply will not sit down at the negotiating table.

So, this is another aspect in which this bill may discourage the very process that it is designed to encourage.

I think Mr. DeLaCruz from the Quinault Tribe is here, and they have some very specific historical experiences of being pressured into giving the appearance of consent to jurisdiction by the Bureau of Indian Affairs in the State of Washington.

I have several objections to the funding provisions of the bill. My first objection to the funding provision is that, in light of the Snyder Act, it seems that the authorization of $10 million is an illusion unless the act provides that authority where it did not exist before.

The Snyder Act is open-ended, and so its seems that this $10 million is misleading to some people in that there is already authority to appropriate money. My understanding is that there is probably authority already in the Interior Department to spend money to support most agreements that tribes will be likely to make use of.

The other objection to the funding provision in this act is that it has led a number of States and tribes to support the legislation in the hope that this would bring new money. But I think we all know enough about the Federal process to know that if this act is funded at $10 million the Office of Management and Budget will simply take $10 million out of some other Indian category and put it in this act. Whereas, under the Indian Self-Determination Act, it seems to me that tribes already have the authority to devote BIA or Indian Health Service money to supporting activities which might be covered by an agreement.

So, essentially, if this bill is passed and funded, the decision as to what budget category should be cut to support agreements would be transferred from the tribes to OMB, which is quite powerful in its own direction, in my opinion.

Also, to the extent that the act provides the Federal dollar incentive to agreements, it tends to force discussions between tribes and States

to deal with the very issues that agreements are designed to avoid, that is, ultimate jurisdictional agreements.

If one government or another has to demonstrate, in order to get funding, that it is not legally obligated to provide a service, then the very first item for discussion between the tribe and the State in coming to an agreement is who is obligated to provide the service and who is not.

Very often, agreements are designed to assure that the service is provided, regardless of who is obligated to do so or not.

Is my time expired?

Senator MELCHER. Yes, it is. We have a couple of questions.

Can you give us the types of agreements the States and tribes have entered into? Has it been the case that those agreements require Federal participation?

Mr. DELORIA. I did not understand the last part of the question.

Senator MELCHER. In those instances where States and tribes have entered into agreement, has it always been the case that there has been Federal participation?

Mr. DELORIA. You mean financial or in approving the agreement?

Senator MELCHER. In approving the agreement or participating in the actual agreement.

Mr. DELORIA. I do not know whether tax collection agreements, for example, must be approved by the Federal Government. There are various informal agreements having to do with the administration of social services which very often are not approved. But I think the question of whether the Federal Government participates in the agreement by approving it is precisely the point. If they need to participate and approve the agreement, then they already have the authority to do so, and I do not see that this act provides any new authority that does not already exist.

Senator MELCHER. Thank you.

Senator DeConcini?

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Deloria, the inference you left with me is that perhaps a large number of tribes oppose the legislation. Have you done a survey or had contact with a substantial number of tribes in this regard?

Mr. DELORIA. I have not done a survey on this legislation, but from informal conversations with a number of people, I know that they have very strong misgivings about it. I think there has been a good deal of support expressed for the legislation, but I think you will find, in all honesty, that it is very brittle support in the sense that people tend to be responding to the funding provision and to the idea of cooperation rather than the details of the legislation.

Senator DECONCINI. On September 1, we held hearings in Phoenix, and we did have two people who opposed the legislation give testimony; for the reasons that you point out—we already have the authority; we do not need any more.

However, we had a number of Indian tribes appear in support of it: The Colorado River Indians; the Navajo Tribal Council, Mr. MacDonald; the Hopi Tribal Council; the Salt River; the Pima-Maricopa Indian community; just to mention some of them.

I am surprised by your statement, or the inference left here, that a great number of tribes are not in favor of this because one of the reasons I got into it was just the contrary—that there was a great desire on the part of many Indians or tribes to have some clarifying legislation. It was not considered a hammer over their heads, that they are going to be held up on appropriations, but, if anything, it would make it easier. So, I am a little amazed at your statement. If you could give us something to substantiate the number of tribes opposed to it, I think it would be helpful, for the record. I am not interested in supporting legislation that does not have Indian support.

The purpose of this is to do something to enhance the ability of the Indian nations, or people, to deal with the non-Indian community.

Mr. DELORIA. I am certainly not in a position to explain the tribal positions or to represent myself as speaking for any tribe. My guess, again, would be this. We have found in the work of the commission on tribal-State relationships that there is a tremendous interest on the part of tribes in improving relationships with the States. My opinion, quite frankly, is that tribes are very interested in improving this situation and are very appreciative of the committee's interest in it.

Senator DECONCINI. Do you think this bill could be corrected?

Mr. DELORIA. I do not think there is a need for legislation at this point—for broad-gaged Federal legislation on the subject. If there is a need for anything maybe it is a resolution from Congress.

The basic problem that prevents cooperation, other than substantive comments having to do with different subject matters, is the sense on the part of States that tribes are temporary forms of government. The thing that would support cooperative agreements the most would be a resolution from Congress urging cooperative agreements in relationships on the basis that tribes are permanent forms of government so they had better buckle down and get the job of governing together done. I think there is great sympathy for this.

I simply do not see that this bill provides any authority that does not already exist or any money that does not already exist.

Senator DECONCINI. But it does do a little of what you suggest. You gave an indication that, on a voluntary basis, this is all right to do. I do not know what better signal we could give—maybe a Senate resolution—but this says, "on a voluntary basis." Tribes and non-Indian government entities may enter into it or may not. I do not know how else to send a signal or encourage both sides to participate. If nobody wants to participate this certainly does not say they must.

Mr. DELORIA. I think the problem is that this bill provides a very real possibility for the transfer of jurisdiction. The kind of thing that people seem to be looking at is a joint or coordinated exercise of jurisdiction, for one government acting as the agent of another government rather than a transfer of jurisdiction. That is what the tribes seem to fear. When you get down to it, I think there is going to be a lot of tribal opposition.

Senator DECONCINI. I appreciate that. This is not the intent of the legislation.

Rather than throwing out the whole thing, is it not worthwhile to construct this in such a manner that would lay aside these fears? I think that might be within the ability of the committee. We will ask

the staff to write such language. Your assistance might be very helpful. Perhaps you could give us some language that would alleviate some of these fears.

Mr. DELORIA. I would be glad to help in any way I can. I think a strong signal from Congress would be welcome here. I think this bill, if anything, confuses the matter because it has people confused as to whether this is the way agreements have to be made. It is very confusing.

Could I suggest one correction to the Labor Day hearing, Senator?

Senator DECONCINI. Certainly.

Mr. DELORIA. The question came up as to whether this act would amend or override provisions in tribal constitutions which require Secretarial approval of certain tribal action. I believe the answer was that it would. I would like to suggest that legislative history might be changed.

Section 101(e)(3) on page 5 says:

> Nothing in this act shall be construed to authorize or empower a government of a State or any of its political subdivisions or the government of an Indian tribe from entering into agreements or exercising jurisdiction, except as authorized by their own organization documents or enabling law.

I would suggest that that means that this does not override specific tribal constitutional provisions.

Senator DECONCINI. You are correct; I stand in error. I hope we can make that clear in the record of the September 1 hearings. That response I gave was inaccurate, and, indeed, you are correct.

I have no further questions, Mr. Chairman.

Senator MELCHER. Mr. Deloria, will you submit if you find time and have the inclination, your comments on the Federal magistrates concept?

Mr. DELORIA. Yes, sir.

The next witness is Frank Tenorio, secretary-treasurer of the All-Indian Pueblo Council.

Mr. Tenorio?

STATEMENT OF FRANK TENORIO, SECRETARY-TREASURER, ALL-INDIAN PUEBLO COUNCIL; ACCOMPANIED BY JOSEPH LITTLE, GENERAL COUNSEL

Mr. TENORIO. Mr. Chairman, I would like to make a correction. Mr. Bernal is not with us today, so I will handle the testimony.

Mr. Chairman and members of the Senate Select Committee on Indian Affairs, my name is Frank Tenorio. I am the secretary-treasurer of the All-Indian Pueblo Council—AIPC—which is comprised of the 19 New Mexico Pueblos.

Thank you for the opportunity to come before this distinguished committee to submit a few comments concerning S. 1181 and the Federal magistrates concept.

With me this morning is Mr. Joe Little, general counsel of the All-Indian Pueblo Council who will also provide comments on the issues at hand and answer questions that may arise concerning our testimony.

May we begin by first stating that this draft of the Tribal-State Compact Act is much better than the previous bills submitted dealing

with the same concept. Though the AIPC agrees with the concept of State and tribal governments entering into agreements on an equal footing, the question still remains as to the necessity for having these agreements controlled by the Federal Government.

Under the Indian Reorganization Act of 1934, it seems that the Federal Government has already provided a mechanism for entering into such agreements. Under section 16 of the act, tribal governments organized under the act have the power to "negotiate with Federal, State, and local governments." It would appear that such legislation has already acknowledged the ability of tribal governments to enter into such agreements with State governments as governmental entities. It should be pointed out that the majority of the Pueblo tribes in New Mexico come under the provisions of the Indian Reorganization Act of 1934.

The Pueblo tribes in New Mexico have long considered themselves governmental entities capable of negotiating with State governments except where restricted by specific Federal legislation. In line with that, we have taken the initiative to amend the New Mexico State law to allow the State and tribal governments to enter into police agreements which would allow for the arrest of Indian and non-Indian violators of criminal actions on the reservation and removal of the offenders to the appropriate tribal or State courts. A copy of this standard agreement worked out between the State of New Mexico, the tribes, and the Bureau of Indian Affairs is included with our testimony.

The BIA Law Enforcement Division was very active and supportive in the development of the agreement. Several tribes have also worked out agreements between the State Health and Social Services Division to allow for the licensing of various social care programs on the reservation so that the tribes would qualify for the appropriate Federal funding. Presently, we are working with the State Division of Health and Social Services and the Indian Health Service in an attempt to enter into State-tribal agreements governing the commitment of mentally ill Indian patients into State hospitals. Such intergovernmental agreements have been functioning or planned for without the necessity of Federal intervention.

Basically, there are two main issues we would like to highlight concerning the provision of the bill. First, if the Federal Government is suggesting the implementation of intergovernmental agreements between tribes and State governments, such Federal direction should not be given without first and finally giving full recognition to tribal governments as local units of government. Though the Federal Government and Federal courts have long recognized tribal governments as independent self-governing units, they have also perpetuated a cruel irony in never acknowledging them as local governmental units for direct Federal funding except in specific legislative enactments. If tribal governments are acknowledged as having the authority to enter into such intergovernmental agreements, we believe that they should also be given the recognition of local governmental entities capable of receiving direct funding.

Second, the provisions of the bill found in section 102 may be the best provisions of the bill itself. In our experience with the implemen-

tation of intergovernmental agreements, the problem is not so much in establishing the agreement as in implementing it. For instance, though the development of the New Mexico State Police-tribal agreements was in no way easy, it was accomplished. But a very strong factor in limiting the number of tribes that are directly involved in such agreements is tied to the fact that tribes would be required to take out large insurance policies to cover their officers and equipment under the agreements. Many of the tribes do not have the funds to cover such insurance policies and therefore could not anticipate entering into such agreements for very practical reasons.

The funding and Federal support directed in section 102 of the act could very well meet many of these practical needs and not necessarily enforce stringent Federal regulations as such agreements would surely happen when the Federal rules and regulations would be instituted to carry out the provisions of the act.

It would appear to the All-Indian Pueblo Council less important for the Federal Government to be concerned with regulating or even instituting such agreements as it would be for the Federal Government to fiscally and administratively support agreements instituted by two equally autonomous local governments who have a better idea of their concerns, needs, limitations, and capabilities in developing compacts that would benefit their local communities.

In conclusion, the AIPC would support the concept of such intergovernmental agreements but would seriously question the necessity of direct Federal regulation of such agreements. Furthermore, the council would like to see a strong acknowledgment of the tribal governments as local governmental entities and strong Federal support of agreements entered into by local tribal and State governments.

Thank you.

Senator MELCHER. Mr. Tenorio, your submission of the copy of the agreement between the New Mexico State Police and the Bureau of Indian Affairs will be made a part of the record at this point, without objection, along with the document of authorization of tribal and Pueblo police officers to act as New Mexico peace officers, the authority and procedure for commissioning.

[The documents follow. Testimony resumes on p. 77.]

AN AGREEMENT BETWEEN THE

NEW MEXICO STATE POLICE

AND

BUREAU OF INDIAN AFFAIRS

WHEREAS the Legislature of the State of New Mexico has granted authority to the Director of the State Police Division (hereinafter referred to as the "Chief of the New Mexico State Police") to issue commissions as New Mexico Peace Officers to members of the police or sheriff's department of any New Mexico Indian tribe or pueblo or a law enforcement officer employed by the Bureau of Indian Affairs, Section 29-1-11, N.M.S.A., 1978 Comp. (Laws of 1979, Chapter 39); and

WHEREAS the New Mexico State Police and the BUREAU OF INDIAN AFFAIRS (hereinafter referred to as the "Department") desire to effectuate such legislative authorization according to the terms and conditions contained in this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual promises and conditions hereinafter set forth, the Chief of the New Mexico State Police and the duly authorized official or officials of the Department agree as follows:

Section 1. Commissions:

A. "Commission", as hereinafter referred to in this Agreement, shall mean a commission to act as a New Mexico Peace Officer issued by the Chief of the New Mexico State Police. Upon receiving a request from the Department, the Chief of the New Mexico State Police shall supply to the Department applications for commissions to act as New Mexico Peace Officers pursuant to this Agreement. These applications shall be completed and returned to the Chief of the New Mexico State Police who shall grant or deny each application within a reasonable period of time.

B. An application for a commission will not be granted by the Chief of the New Mexico State Police in the absence of compliance with the following requirements:

1) The applicant has complied with all of the prerequisites for permanent appointment as a police officer as set forth in Section 29-7-8A, N.M.S.A., 1978 Comp. (as amended by Laws of 1979, Chapter 202), said prerequisites being as follows:

a) is a citizen of the United States, and has reached the age of majority;

b) holds a High School diploma or the equivalent;

c) has not been convicted of a felony or other crime involving moral turpitude;

d) is found, after examination by a licensed physician, to be free of any physical, emotional or mental condition which might adversely affect his or her performance as a police officer;

e) has met such other requirements as may be prescribed by the New Mexico Law Enforcement Academy Board; and

f) has previously been awarded a certificate by the Director of the New Mexico Law Enforcement Academy attesting to such applicant's satisfactory completion of an approved police officer basic training program.

2) The Department (unless said department is the Bureau of Indian Affairs) submits proof of adequate public liability and property damage insurance for vehicles operated by peace officers and police professional liability insurance covering the Department and each of its peace officers commissioned pursuant to this Agreement from a company licensed to sell insurance in the State of New Mexico. Such insurance policies, amendments thereto or applicable certificate of insurance shall contain a provision requiring the insurance company or appropriate agent thereof to give immediate notice to the Chief of the New Mexico State Police of any cancellation or termination of the policy or policies. Such policies shall be exhibited to the Chief of the New Mexico State Police upon his request, are subject to his approval, and shall be in the amount and shall contain such terms and conditions as may be required by the Chief of the New Mexico State Police.

3) The applicant for a commission has successfully completed 240 hours of basic police training which has been approved by the Director of the New Mexico Law Enforcement Academy.

4) In addition to the 240 hours of required basic police training which has been approved by the Director of the New Mexico Law Enforcement Academy, the applicant for a commission has successfully completed the New Mexico State Police course for applicants for said commission consisting of approximately 40 hours of training. This training shall include instructions in the New Mexico Court system, New Mexico Motor Vehicle Code, New Mexico Criminal Code, New Mexico traffic and criminal procedures and other related matters as determined necessary by the New Mexico State Police. The Department agrees to reimburse the New Mexico State Police for reasonable costs incurred during this instruction process, e.g., reproduction costs, the necessary materials, supplies, etc., provided to the applicants or the Department by the New Mexico State Police. These costs are to be agreed upon by the Department and the Chief of the New Mexico State Police prior to the beginning of the 40 hour course of instruction or prior to said materials, supplies, etc., being provided to the applicants or the Department. There will be no charge by the New Mexico State Police for the necessary New Mexico State Police person-hours involved in the 40 hour training process.

C. After compliance with the prerequisites of Section 1, Commissions, Paragraph B, the Chief of the New Mexico State Police will issue a commission hereunder unless he determines, in his discretion, that grounds exist for denying the applicant a commission.

D. The Chief of the New Mexico State Police may, at any time, suspend any commission for reasons solely within his discretion. Within ten (10) days of receipt of verbal or written notice of suspension from the Chief of the New Mexico State Police, the Department shall cause the commission to be returned to the Chief of the New Mexico State Police, unless otherwise directed by the Chief of the New Mexico State Police. The reasons for suspension include, but are not limited to, the following:

1) Termination of the peace officer, voluntarily or involuntarily, from the Department's law enforcement unit or agency.

2) Transfer or reassignment of the peace officer out of the area which is coextensive with the exterior boundaries of the Department's reservation or, if the department is the Bureau of Indian Affairs, transfer or reassignment out of the area which is coextensive with the boundaries of the reservation or reservations to which the law enforcement officer employed by the Bureau of Indian Affairs is assigned.

3) Conviction of the peace officer of a felony or other crime involving moral turpitude.

4) Upon examination by a licensed physician, the peace officer is found not to be free of any physical, emotional or mental condition which might adversely affect his or her performance as a peace officer.

E. The Department shall inform the Chief of the New Mexico State Police of the existence of any grounds, including those set forth under Section 1, Commissions, Paragraph D., of this Agreement, for suspending a commission.

F. The Department will receive written notice from the Chief of the New Mexico State Police if a commission is denied or suspended as provided in this Agreement with the reason stated therein. The decision of the Chief of the New Mexico State Police to suspend a commission, whether temporarily, indefinitely or permanently, shall be final.

G. This Agreement, or any commission issued pursuant to it, shall not confer any authority on a Tribal court or other Tribal authority which that court or authority would not otherwise have.

Section 2, Territorial Limitation:

The authority conferred by this Agreement shall be coextensive with the exterior boundaries of the Department's (unless the department is the Bureau of Indian Affairs) reservation boundaries. If the department is the Bureau of Indian Affairs, the authority conferred by this Agreement shall be coextensive with the boundaries of the reservation or reservations to which the law enforcement officer employed by the Bureau of Indian Affairs is assigned. An exception to the provisions herein contained concerning territorial limitation is that a peace officer commissioned under this Agreement may proceed in hot pursuit of an offender beyond the exterior boundaries of the reservation or reservations.

Section 3, Scope of Powers Granted:

A. Peace Officers commissioned pursuant to this Agreement shall have the power:

1) To enforce the New Mexico Motor Vehicle Code and arrest for violations as necessary.

2) To enforce the New Mexico Criminal Code and arrest for violations as necessary.

B. Peace Officers commissioned pursuant to this Agreement shall comply with the applicable statutory provisions concerning enforcement of the New Mexico Motor Vehicle Code and the New Mexico Criminal Code.

Section 4, Uniform Traffic Citations:

A. Peace Officers commissioned pursuant to this Agreement, when acting pursuant to said commission, shall use the New Mexico Uniform Traffic Citation when issuing traffic citations for violations of the New Mexico Motor Vehicle Code.

B. The Department agrees to reimburse the New Mexico State Police for the cost of New Mexico Uniform Traffic Citation forms provided to the Department by the New Mexico State Police.

C. The Department's law enforcement unit or agency shall issue, keep a record of, and require a receipt for, each serially numbered citation issued to individual Peace Officers commissioned pursuant to this Agreement.

D. The goldenrod-colored Officer's second copy of any citation issued pursuant to a commission authorized by this Agreement must be submitted within five (5) days to the Chief of the New Mexico State Police or his authorized agent.

E. Any citation issued pursuant to a commission issued pursuant to this Agreement shall be to a Magistrate Court of the State of New Mexico, except that any citation issued to Indians within the exterior boundaries of an Indian reservation shall be to Tribal Court.

F. Additional requirements concerning the citations, including specific distribution and control procedures, as designated in the Uniform Traffic Citation Manual, may be issued to the Department by the Chief of the New Mexico State Police.

Section 5, Custody of Persons:

A. No person shall be detained by a Peace Officer commissioned pursuant to this Agreement for a period in excess of two (2) hours without oral notification to a Commissioned Officer of the New Mexico State Police.

B. Any person arrested by a Peace Officer commissioned pursuant to this Agreement shall be immediately taken to the nearest State of New Mexico Magistrate, State Police Commissioned Officer or County Sheriff for further proceedings in accordance with law.

C. Any person taken into custody by a Peace Officer commissioned pursuant to this Agreement shall be immediately informed of his or her United States Constitutional Rights by the Peace Officer as specified on a written form to be supplied by the Chief of the New Mexico State Police and that person shall also be afforded any other rights conferred by law.

Section 6, Indemnification:

The Department agrees to hold harmless and promptly indemnify and reimburse the State of New Mexico, the New Mexico State Police, their agents, employees and insurers from any claim, judgment or liability of any nature whatsoever which may arise out of the actions of a Department Peace Officer commissioned pursuant to this Agreement. This section is not applicable to the Bureau of Indian Affairs.

Section 7, Status of New Mexico Peace Officer:

The Department, its agents and employees, including Peace Officers commissioned pursuant to this Agreement, are not employees of the State of New Mexico and no insurance coverage, retirement benefits nor any other benefits afforded to employees of the State of New Mexico shall be provided by the State of New Mexico or the New Mexico State Police to the Department, its agents and employees, including Peace Officers commissioned pursuant to this Agreement. It is understood and agreed by the parties to this Agreement that the State of New Mexico, the Criminal Justice Department and the New Mexico State Police, their agents, employees and insurers, have no authority nor any right whatsoever to control in any manner the day-to-day discharge of the duties of the persons commissioned pursuant to this Agreement but rather that these persons are acting in a capacity of an independent contractor as an employee of the Department and that they are not an employee or agent of any kind of the State of New Mexico, the Criminal Justice Department and the New Mexico State Police. It is further understood and agreed that the State of New Mexico, the Criminal Justice Department and the New Mexico State Police, their agents, employees and insurers, do not, by this Agreement, assume any responsibility or liability for the actions of those persons provided commissions pursuant to this Agreement.

Section 8, Status of Department:

Nothing in this Agreement impairs or affects the existing status and sovereignty of the Department or members thereof as established under the laws of the United States.

Section 9, Suspension or Termination of Agreement:

A. If any provision of this Agreement is violated by the Department or any of its agents, the Chief of the New Mexico State Police shall suspend the Agreement on five (5) days verbal or written notice, which suspension shall last until the Chief of the New Mexico State Police is satisfied that the violation has been corrected and will not reoccur. Reinstatement of this Agreement may be made contingent upon satisfaction of such conditions as the Chief of the New Mexico State Police may specify.

B. Either the Department or the Chief of the New Mexico State Police may terminate this Agreement at any time by giving written notice to the other of such termination which shall be effective thirty (30) days after the date of receipt of said notice. Upon such termination, the Department shall forthwith return to the Chief of the New Mexico State Police all New Mexico Uniform Traffic Citation forms in its possession and be reimbursed therefor by the Chief of the New Mexico State Police and return all commissions issued pursuant to this Agreement.

Section 10, Amendments To And Enforcement Of The Agreement:

A. This Agreement shall not be altered, changed or amended except by an instrument in writing executed by the Chief of the New Mexico State Police and the duly authorized official or officials of the Department.

B. This Agreement and any amendment hereto shall be governed by the laws of the State of New Mexico.

Section 11, Effective Date:

The effective date of this Agreement shall be the 19th day of JUNE, 1972, this being the date that the Chief of the New Mexico State Police executes the Agreement.

Michael Bowles
SECRETARY, CRIMINAL JUSTICE DEPT.

Kenneth L. Payton
Acting Area Director,
Albuquerque Area Office
Bureau of Indian Affairs

DIRECTOR, NEW MEXICO STATE POLICE

By
NEW MEXICO ATTORNEY GENERAL

Section 29-1-11, N.M.S.A., 1978 Comp.
(Laws of 1979, Chapter 39)

29-1-11. AUTHORIZATION OF TRIBAL AND PUEBLO POLICE OFFICERS TO ACT AS NEW MEXICO PEACE OFFICERS--AUTHORITY AND PROCEDURE FOR COMMISSIONING.--

A. All persons that are duly commissioned officers of the police or sheriff's department of any New Mexico Indian tribe or pueblo or who are law enforcement officers employed by the bureau of Indian affairs and are assigned in New Mexico are, when commissioned under Subsection B of this section, recognized and authorized to act as New Mexico peace officers. These officers have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including but not limited to the power to make arrests for violation of state laws.

B. The director of the state police division [chief of the New Mexico State Police] is granted authority to issue commissions as New Mexico peace officers to members of the police or sheriff's department of any New Mexico Indian tribe or pueblo or a law enforcement officer employed by the bureau of Indian affairs to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments shall be set forth in a written agreement to be executed between the director of the state police division [chief of the New Mexico State Police] and the tribe or pueblo or the appropriate federal official.

C. The agreement referred to in Subsection B of this section shall contain the following conditions:

(1) the tribe or pueblo, but not the bureau of Indian affairs, must submit proof of adequate public liability and property damage insurance for vehicles operated by the peace officers and police professional liability insurance from a company licensed to sell insurance in the state;

(2) each applicant for a commission must successfully complete two hundred forty hours of basic police training which is approved by the director of the New Mexico law enforcement academy;

(3) the director of the state police division [chief of the New Mexico State Police] must have the authority to suspend any commission granted pursuant to Subsection B of this section for reasons solely within his discretion;

(4) if any provision of the agreement is violated by the tribe or pueblo or any of its agents, the director of the state police division [chief of the New Mexico State Police] shall suspend the agreement on five days' notice, which suspension shall last until the director [chief] is satisfied that the violation has been corrected and will not reoccur;

(5) the goldenrod-colored officer's second copy of any citation issued pursuant to a commission authorized by this section must be submitted within five days to the director of the state police division [chief of the New Mexico State Police];

(6) any citation issued pursuant to a commission authorized by this section shall be to a magistrate court of the state of New Mexico; except that any citations issued to Indians within the exterior boundaries of an Indian reservation shall be cited into Tribal Court;

(7) the agreement, or any commission issued pursuant to it, shall not confer any authority on a tribal court or other tribal authority which that court or authority would not otherwise have; and

(8) the authority conferred by any agreement entered into pursuant to the provisions of this act shall be coextensive with the exterior boundaries of the reservation; except that an officer commissioned under this act may proceed in hot pursuit of an offender beyond the exterior boundaries of a reservation.

D. Nothing in this section impairs or affects the existing status and sovereignty of tribes and pueblos of Indians as established under the laws of the United States.

57-83.

In absence of emergency, patrol member must be furnished request. — When no actual emergency exists, a member of the mounted patrol whose assistance is requested by the state police must be furnished the request in writing, signed by the officer making the request. 1959-60 Op. Att'y Gen. No. 60-239.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 70 Am. Jur. 2d Sheriffs, Police, and Constables §§ 1 to 5.

Power to appoint sheriff for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1287.

Validity, construction and application of regulation regarding outside employment or occupation of a sheriff's deputy or assistant, 88 A.L.R.2d 1235.

62 C.J.S. Municipal Corporations § 571; 80 C.J.S. Sheriffs and Constables §§ 6, 14, 24.

29-1-10. [Law enforcement agencies, state and local; participation in federal programs.]

All state and local law enforcement agencies are hereby authorized to participate in the Federal Law Enforcement Assistance Act of 1965 (Public Law 98-197 [89-197]).

History: 1953 Comp., § 39-1-11, enacted by Laws 1966, ch. 24, § 1.

Federal Law Enforcement Assistance Act. — For the Federal Law Enforcement Assistance Act, see 18 U.S.C. § 3001 et seq.

29-1-11. Authorization of tribal and pueblo police officers to act as New Mexico peace officers; authority and procedure for commissioning.

A. All persons that are duly commissioned officers of the police or sheriff's department of any New Mexico Indian tribe or pueblo or who are law enforcement officers employed by the bureau of Indian affairs and are assigned in New Mexico are, when commissioned under Subsection B of this section, recognized and authorized to act as New Mexico peace officers. These officers have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including but not limited to the power to make arrests for violation of state laws.

B. The director of the state police division [chief of the state police] is granted authority to issue commissions as New Mexico peace officers to members of the police or sheriff's department of any New Mexico Indian tribe or pueblo or a law enforcement officer employed by the bureau of Indian affairs to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments shall be set forth in a written agreement to be executed between the director of the state police division [chief of the state police] and the tribe or pueblo or the appropriate federal official.

C. The agreement referred to in Subsection B of this section shall contain the following conditions:

(1) the tribe or pueblo, but not the bureau of Indian affairs, must submit proof of adequate public liability and property damage insurance for vehicles operated by the peace officers and police professional liability insurance from a company licensed to sell insurance in the state;

(2) each applicant for a commission must successfully complete two hundred forty hours of basic police training which is approved by the director of the New Mexico law enforcement academy;

(3) the director of the state police division [chief of the state police] must have the authority to suspend any commission granted pursuant to Subsection B of this section for reasons solely within his discretion;

(4) if any provision of the agreement is violated by the tribe or pueblo or any of its agents, the director of the state police division [chief of the state police] shall suspend the agreement on five days' notice, which suspension shall last until the director [chief] is satisfied that the violation has been corrected and will not reoccur;

(5) the goldenrod-colored officer's second copy of any citation issued pursuant to a commission authorized by this section must be submitted within five days to the director

of the state police division [chief of the state police];

(6) any citation issued pursuant to a commission authorized by this section shall be to a magistrate court of the state of New Mexico; except that any citations issued to Indians within the exterior boundaries of an Indian reservation shall be cited into Tribal Court;

(7) the agreement, or any commission issued pursuant to it, shall not confer any authority on a tribal court or other tribal authority which that court or authority would not otherwise have; and

(8) the authority conferred by any agreement entered into pursuant to the provisions of this act [this section] shall be coextensive with the exterior boundaries of the reservation; except that an officer commissioned under this act may proceed in hot pursuit of an offender beyond the exterior boundaries of a reservation.

D. Nothing in this section impairs or affects the existing status and sovereignty of tribes and pueblos of Indians as established under the laws of the United States.

History: 1953 Comp., § 39-1-12, enacted by Laws 1972, ch. 8, § 1; 1979, ch. 39, § 1.

The 1979 amendment substituted "tribal and pueblo" for "Navajo" in the catchline, inserted "or sheriff's" preceding, and substituted "any New Mexico" for "the Navajo" following, "department of" near the beginning of Subsections A and B, inserted "or pueblo or who are law enforcement officers employed by the bureau of Indian affairs" following "Indian tribe" near the beginning of Subsections A and B, substituted "director of the state police division" for "chief of the New Mexico state police" near the beginning and near the end of Subsection B, substituted "tribe or pueblo or the appropriate federal official" for "superintendent of the Navajo police department" at the end of Subsection B, added Subsection C, redesignated former Subsection C as Subsection D and substituted "tribes and pueblos" for "the Navajo tribe" near the middle of Subsection D.

Emergency clauses. — Laws 1972, ch. 8, § 2, makes the act effective immediately. Approved February 14, 1972.

Laws 1979, ch. 39, § 2, makes the act effective immediately. Approved March 15, 1979.

Director of the state police division. — The bracketed references to the chief of the state police were inserted by the compiler in view of the changes made by Laws 1979, ch. 202. See 29-2-3 NMSA 1978.

29-1-12. Authorization to maintain and retake custody of Arizona prisoners.

An officer or employee of the Arizona department of corrections who has in his custody, pursuant to Arizona law, a ward, offender or prisoner of the state of Arizona whom he is transporting from a facility in Arizona to another point in Arizona via New Mexico or to a point in New Mexico for fire fighting or conservation work shall maintain custody of such ward, offender or prisoner in New Mexico. Such officer or employee may, in the event of escape of such ward, offender or prisoner in New Mexico, retake such ward, offender or prisoner in the same manner as if such officer or employee were a New Mexico police officer and such ward, offender or prisoner had been committed to his custody under New Mexico law.

History: 1953 Comp., § 39-1-13, enacted by Laws 1975, ch. 281, § 1.

ARTICLE 2

State Police

Senator MELCHER. Does the agreement between the State police and the Bureau of Indian Affairs involve only authority on the highways?

Mr. LITTLE. Mr. Chairman, may I answer that? My name is Joe Little. I am an attorney practicing law in New Mexico. I practice both on the reservation, off the reservation, and in the Federal courts; and helped in the development of this agreement. It was more on the development of the legislation than to get the agreement instituted.

The initial problem was with the State highways. In New Mexico, as you know, we have a unique situation in that most of our tribes are landlocked, you might say, and we have very few non-Indians on our reservations. But we do have many interstate highways running through the reservation areas, and this causes quite a problem.

We approached the U.S. attorneys to see if they could not take care of the situation by expanding the authority of the BIA police officers to make the arrests and then have them forwarded into a Federal court, much as you have proposed in the other piece of legislation.

However, the Justice Department at the district court level and the U.S. attorneys said this was a little unfeasible because the Federal magistrates would balk immediately, having to increase their caseload for speeding violations. So they sort of threw us out in the cold.

Our next attempt was to approach the State legislature. There was already a law enacted that allowed for Navajo police to enter into such agreements but not with other tribes. We expanded that particularly in order to deal with a particular situation and arranged it so that tribal police officers could then be designated as State police officers, provided they took the adequate training and other necessities required to qualify.

At this point the Bureau of Indian Affairs was very helpful. They provided moneys to get the training done, which the State charged us for.

But the one thing that held us up was the additional insurance policies we needed because the State had to be indemnified to some extent to enter into the agreement. They did not want to get caught in some kind of lawsuit later on down the line.

The agreement you see before you is mainly with the Bureau of Indian Affairs because they mainly had the initial training for their men to do that. We are trying to get the tribal police into the next training session at the State level.

What we are trying to point out is, that the majority of the tribes in the New Mexico area would much rather deal with agreements on a local level rather than having, not Federal intervention, but having a whole set of Federal rules and regulations governing something that may be too unwieldy for them to work with.

I think we have done this effectively at this point. Again, the only drawback in some instances is support money to either develop the capabilities we need at the local level, in this instance, or more training for our police officers, more money to cover insurance, and this sort of thing, so that more tribes can enter into the agreement.

Senator MELCHER. Does the authority extend beyond the highways?

Mr. LITTLE. Yes; it does.

Senator MELCHER. How far?

Mr. LITTLE. Initially, the way it operated, the Bureau was commissioning State police officers as BIA officers on their completion of

their work at the State academy, but it was limited by their policy to only interstate highways or only in most instances in where tribes or the Bureau called in the State police officer to help with an arrest. This agreement changes that to where their authority is throughout the reservation.

However, it works both ways again. If, under the agreement, a State police—and again, by policy, they are going to do the same thing; they are only going to regulate interstates unless called into a situation. They are not going to patrol the whole reservation. If an arrest is made of an Indian, he is referred to the tribal court; if it is an arrest of a non-Indian, he is referred to the State court. If the tribe or BIA officer makes the arrest of a non-Indian, he is referred to the State officer; if he makes an arrest of an Indian, he is referred to a tribal court.

Senator MELCHER. Can a case be filed before a court that has nothing to do with an individual?

Mr. LITTLE. This is referring to your magistrate's concept under the proposed bill under which you have sections 1, 2, and 3. Under 1, you have misdemeanors and property crimes; and 2 concerns assault cases involving non-Indians.

The U.S. attorney has already issued a policy, and I am sorry, I did not bring it with me. I can send you a copy. It states that those kinds of crimes would be referred to and heard in Federal magistrates courts as they are now.

Senator MELCHER. Would that require that the accused be referred?

Mr. LITTLE. No, sir. It depends on who arrests him. In other words, if there is an assault case down there and the Bureau officer arrests him, it will be referred; if a State officer arrests him; it will be referred; if a tribal officer arrests him and it is not under one of the agreements, referred—there is no jurisdiction.

Senator MELCHER. Does not the Federal magistrates system, as it stands, require the consent of the accused?

Mr. LITTLE. There was no allusion to that in the U.S. attorney's directive. We discussed it, but they never mentioned it to us.

Unless they are operating on a different basis, I do not think so.

Senator MELCHER. We had the understanding that it would require the consent of the accused.

Mr. LITTLE. Not as I understand it down there. As I said, it would depend on who made the arrest.

Senator MELCHER. Is the arrest being made under the authority of the Federal magistrate?

Mr. LITTLE. As I understand it, if a Bureau of Indian Affairs officer makes the arrest, he would be making the arrest on the basis of an act being committed on a Federal reserve and then referred on that basis. As I said, if a tribal officer, who was not commissioned as a State officer, arrested him, the arrest would not be valid.

Senator MELCHER. It is our understanding that the accused must give his consent to be tried by the Federal magistrate.

Mr. LITTLE. As I understand it, it is a policy directive. I do not know if it has been instituted, so I do not know if it has been tested at this point; this was only in the last year.

Senator MELCHER. It has not been in effect long enough to establish what the ramifications would be.

Mr. LITTLE. There tends to be a lot of confusion at the local level as to what directives the local attorney's officers and the Justice Department give in terms of what is actually implemented.

Senator MELCHER. Would you advocate that an accused on an Indian reservation, as a non-Indian, be under the jurisdiction of a Federal magistrate?

Mr. LITTLE. I am going to hedge on that in the sense that there are two issues, I think. If you are talking about expanding the Federal magistrates' authority, I might question that. I do not think the tribes we represent are too happy about having Federal magistrates' authority on the reservation especially in misdemeanor areas. However, if there were no other way to arrest a non-Indian, I guess they would accept that rather than anything else. They would prefer to have criminal jurisdiction reinvested in the tribes.

Senator MELCHER. Is it not true that if the accused must give his consent to go before the Federal magistrate, since nothing happened to get him before the U.S. district court, the accused would be wise not to give his consent?

Mr. LITTLE. Of course, Mr. Chairman. That is why under the agreement, if it is a misdemeanor and an arrest is made, they would be able to cite him in a State court and it would be handled there. It goes back to the arresting capability of whoever made the arrest.

Senator MELCHER. You may have covered the ground that was left bare by giving the States authority to the arresting officer as being an officer of the State rather than an officer of the tribe. That may have covered the ground.

Let me ask you this. If that is the case, and that does satisfy the law, is the function of the State court for a misdemeanor before the justice of the peace of New Mexico?

Mr. LITTLE. A county magistrate—yes; that is so.

Senator MELCHER. OK. The small misdemeanor court?

Mr. LITTLE. Yes.

May I make a statement? I presume what you are alluding to is whether justice would have been served once the individual was brought into the courtroom, no matter who makes the arrest. I might also point out that that may still be the case even with an expansion of the Federal court.

In our dealings with Federal systems, again, the problem is not so much that the courts have no jurisdiction to arrest or bring in anybody; the problem arises in getting the case out of the grand jury. We hardly ever get enough evidence to try a case in the Federal court—rape, homicides, and crimes of that sort. That is basically because they are understaffed in terms of the Federal investigation. Our tribal officers have not been trained adequately enough at this point to take up that slack. If that slack were taken up, I think you would have more evidence; you would have more convictions. I do not know whether extending the jurisdiction of the magistrates' courts would necessarily solve the problem as much as just extending the capabilities of the men out in the field to make sure that they tie the case down tight when they do take it to court.

Senator MELCHER. Thank you, very much.

Senator DeConcini?

Senator DECONCINI. I have no questions, Mr. Chairman.

Senator MELCHER. Thank you both, very much.

Our next witness is Joe DeLaCruz, president of the Quinault Business Committee.

STATEMENT OF JOE DeLaCRUZ, PRESIDENT, QUINAULT BUSINESS COMMITTEE

Mr. DELACRUZ. Thank you, Mr. Chairman. It is a privilege to be requested to come and testify before this committee on an issue with which I have lived most of my life, and that is jurisdiction on Indian reservations and the types of controversies that have come about because of Public Law 280.

I would like to submit for the record a pamphlet that was put together at the request of the tribes of the Pacific Northwest when S. 2010 was presented and there were hearings on that. I have left some copies of this report with the committee.

Senator MELCHER. Without objection, it will be included in the record at this point.

[The pamphlet follows. Testimony resumes on p. 94.]

JURISDICTION and the EXERCISE OF GOVERNMENT TRIBAL-FEDERAL-STATE PL 83-280

Art donated to the AFSC by Tom Speer, a Seattle area Indian artist

American Friends Service Committee
814 N E 40th
Seattle, WA 98105

The Pacific Northwest office of the American Friends Service Committee has had a long term interest in the concerns of Indian tribes in this area. In 1970 the University of Washington Press published the American Friends Service Committee report in a book entitled An Uncommon Controversy. This book is a detailed investigation into the issue of Indian treaty fishing rights of tribes of the Pacific Northwest.

Please send___ copies of PL 280 pamphlet. 50¢ per copy

Name_____

Organization_____

Address_____

zip

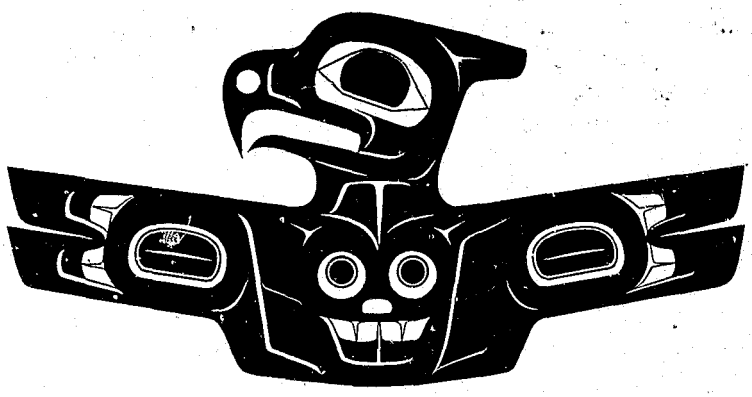
A report on Public Law 83-280, which authorizes state law enforcement jurisdiction on Indian reservations- alongside tribal and federal jurisdiction- has been prepared by the Seattle office of the American Friends Service Committee. The report examines the law and the effect it is having on the tribes under its aegis.
It says:

" You live in the United States. You have a home and twenty acres (which) your grandparents left you.....they reserved it for themselves and their heirs in perpetuity....' For as long as the rivers run and the grass grows'...But what is it like to live on that land in 1977."

Since 1975 the Western Washington Indian Program of AFSC has been involved in research on Public Law 280. This law has been described by Mel Tonasket, Colville Tribal Councilman as a 'noose choking Indian tribes and the Indian way of life out of existence since 1953' . The PL 280 pamphlet is a result of the Western Washington Indian Program research and was printed in 1976 by the United Indians of All Tribes Foundation. It is available from the American Friends Service Committee.

In addition to the pamphlet there are speakers who are available to speak on matters relating to Public Law 280 and Treaty guaranteed fishing rights.

Contact persons: Elizabeth Furse-Tom Morris
206-632-0500



SCENARIO

You live in the United States. You have a home and twenty acres. Your grandparents left you this land which they had *reserved* for themselves, when they *gave away* 20,000 acres to the state. They reserved it for themselves and their heirs in *perpetuity*. "For as long as the rivers run and the grass grows."

It is 1976 now and this is what it is like to live on this land left for your exclusive use.

ACTION

Someone enters your living room and steals your chair. You call the local police. "Sorry," they say, "Your living room is not in our jurisdiction. Call the state police." (The state police are located 20 miles away.)

The state police arrive but by then the thief is gone. At that moment another person enters the house, this time the kitchen. This person takes your toaster. "Quick, police!" you cry. "Catch the thief!" "Sorry," say the state police, "we have no jurisdiction over your kitchen, you will have to call the federal police."

The federal police arrive. "Oh dear," they say, "this person is a juvenile, the state has jurisdiction over juvenile delinquency, not us. You will have to get the state police back again." So saying, the federal police depart. Meantime, a fight breaks out next door and the combatants come onto your land, you call the local police. The local police arrive. "Sorry, they say, "we have no jurisdiction over these people, they are non family members. Yes, we have jurisdiction over your family, and this piece of land, but these people are not members of your family and *we cannot arrest them.*"

Fiction? Fantasy? A fairy tale? Not if your home happens to be an *Indian Reservation* in a state that adopted

Public Law 83-280

Some Cases Under P.L. 280.

1. Bryan v. Itasca County, 44 L.W. 4832 (June 14, 1976).

The United States Supreme Court held that Public Law 83-280 does not give Itasca County, Minnesota, jurisdiction to impose personal property tax on a mobile home belonging to an enrolled Chippewa Indian, used as his permanent home and located within the Leech Lake Reservation on trust land.

2. Omaha Tribe of Indians v Peters, 44 L.W. 3746 (June 29, 1976).

By summary order the United States Supreme Court vacated the judgment of the Eighth Circuit Court of Appeals and remanded it for further consideration in light of **Bryan v. Itasca County** 426 U.S. (1976.)

Quileute Indian Tribe v. State of Washington, U.S.D.C., W.E. Washington, Civil No. C 74-7615.

Issue: Does Public Law 280 authorize the state of Washington to apply its sales, use, business, occupation and cigarette tax laws to the activities and property of plaintiff tribes and individual Indians within federally recognized reservations in situations where, absent Public Law 280, an immunity from taxation would exist.

4. United States v. State of Washington, U.S.D.C., E.D. Washington, Civil No. 3909.

Issue: Whether Public Law 280 gives the state of Washington the authority to impose its excise tax laws on transactions of tribally licensed retailers on the Yakima Reservation on their sales to Indians and non-Indians.

5. Confederated Tribes of the Colville Indian Reservation v. State of Washington

Issue: Whether Public Law 280 gives the state of Washington the authority to impose its excise tax laws on transactions of tribally licensed retailers on the Yakima Reservation on their sales to Indians and non-Indians.

6. Santa Rosa Band of Indians v. Kings County, U.S. Court of Appeals, Ninth Circuit, Civil No. 74-1565, decided November 3, 1975.

Petition for rehearing was denied at some unspecified date. The case held that Public Law 83-280 does not make county ordinances applicable inside Indian Reservations, but only state laws of general application throughout the state.

7. Quinault v. Gallagher, 387 U.S. 907

In this case the Ninth Circuit Court of Appeals held that the question of whether Washington had complied with state law in assuming Indian jurisdiction was a state question which had been decided by the state Supreme Court in the **Paul** case and the **Makah** case.

8. Snohomish v. Seattle Disposal Co., 389 U.S. 1016. See 425 P. 2d 22.

This case turned on the state Supreme Court's saying that zoning by Snohomish County would constitute an "encumbrance" on trust lands in violation of federal. So the case really did not turn on Public Law 280. However, the question is now decided by **Santa Rosa v. Kings County.**

9. Kennerly v. District Court of the Ninth District of Montana. 404 U.S. 823, See 90 Cal. Rptr. 794.

In this case the tribal council of Blackfeet Reservation voted to give the state jurisdiction. The Supreme Court however held that such jurisdiction could not be assumed by the state without specific compliance with Public Law 83-280.

Erratum –

Page 1

Northwest Ordinance 1789

Note:
in 95th Congress (1977)
S 2010 will be re introduced
under different number but
still titled

INDIAN LAW ENFORCEMENT ACT

Each room in this fictional home represents a geographical and jurisdictional entity on an Indian reservation. Trust land, Fee Patent, individual Indian owned land, are under differing jurisdictional authority (Tribal, Federal, State and County). 'Checkerboard' jurisdiction causes great problems for tribal governments and tribal members. There is a crucial breakdown in law enforcement with agencies being unwilling to take responsibility and thereby creating a vacuum of authority. The tribes have indicated their willingness to fill this vacuum but are often denied the jurisdictional authority as a result of PL 83-280.

PUBLIC LAW 83-280

A REPORT PREPARED BY AMERICAN FRIENDS SERVICE COMMITTEE

TRIBAL SOVEREIGNTY... does it exist? If so, how much exists?

When the Europeans arrived in this country the sole governments that existed were obviously those of Indian tribes. This would mean that the Indian tribes at that time possessed SOVEREIGN JURISDICTION.

As the time passed the jurisdiction of the tribes was eroded by various U.S. Acts and treaties. The law confirmed, however, that the Indian tribes still possessed rights and ownerships unique and sovereign.

As a result of Worcester v. Georgia (1832) the sovereign jurisdiction of Indian tribes was limited to "internal" as opposed to "external sovereignty", but the "internal sovereignty" was emphatically confirmed. (Internal: the right to govern members within boundaries. External matters, i.e., trade, was the responsibility of the federal government.)

In 1889 the Northwest Ordinance recognized the Possessory Title of the Indian tribes.

The 1834 Act of Congress confirmed that Indian land could only be obtained through treaties and conventions pursuant to the U.S. Constitution.

In the case of Ex Parte Crow Dog (1881) the U.S. Supreme Court held that only the Indian tribe had jurisdiction over tribal members on the reservation.

The Enabling Acts of States entering the Union often contained a clause that disclaimed jurisdiction over Indian lands within the State.

Treaties between the tribes and the United States invariably specified the land the Indian retained for themselves while they gave to the United States most of the land that they possessed. It is worthwhile noting that the reservation lands owned by the tribes today are only a small fraction of the land that once was theirs and that the reservation lands are not a gift from the United States but were reserved by the tribes for their **own exclusive** use. Hence the word "reservation" came from the fact that the Indians reserved lands rather than having been given them by the federal government.

EROSION OF TRIBAL SOVEREIGNTY or "If you can't steal power away...legislate it away."

In 1869 Congress authorized the President to settle tribes on reservations and "civilize" them.

1885 Major Crimes Act

After the Supreme Court ruling of **Ex Parte Crow Dog** the U.S. extended federal jurisdiction over crimes on Indian reservations to include Murder, Manslaughter, Rape, Assault with Intent to Kill, Arson, Burglary, Larceny. (These seven crimes have since been extended to thirteen). The results of the Major Crimes Act was to emasculate the authority of the tribal court system and the tribal government.

1887 The General Allotment Act

This Act authorized the alloting of the tribal lands to individual tribal members, the land to remain in trust for 25 years. Ostensibly the reason for allotment was that the tribal members would become self-supporting members of the community, i.e., farmers, a life occupation totally at odds with their historical ways of making a livelihood. The result was that after the twenty-five year trust period the land became eligible for state taxes. Too often the Indian owners were unaware of the taxes or unable to pay them, and land thus became available for sale to non-Indians. A direct result of the Allotment Act has been the loss to Indian tribes of over 17-1/2 million acres. (Giving up three-quarters of the land mass of the United States was not enough; now a large portion of the remaining 1/2fell into non-Indian hands.)

TERMINATION ACT -- An attempt to turn Indians into non-Indians

1953 House Concurrent Resolution No. 108 Termination Act

This Act made possible the "termination" of a tribe. Tribes that were deemed ready for termination were paid a per acre fee and the unique relationship between the tribe and the federal government was then ended. What tribes discovered was that the termination of the reservation meant the termination of federal benefits and services and also the termination of the tribe as an institution.

The Klamath tribe of Oregon was terminated. Each Klamath was to receive $43,000 on total termination of the reservation and sale of trust land and timber assets. Many Klamaths unschooled in the way of white finance and money management hocked their future $43,000 for a few thousand dollars in immediate cash. At the present time the effort to restore Klamath has begun.

The Menominee tribe is another tragic example of a disasterous effect of termination. Within a few years of termination the Menominees, a tribe formally paying for all of its own services, was reduced to having to sell lands to pay taxes. The hospital was closed and the infant mortality rate rose dramatically. At the time of termination the tribe had over ten million dollars in the federal treasury. By 1964, the fourteen percent of the county which was the former reservation area was receiving welfare payments. The ten million dollars had been paid out in per capita payments and there was no more tribal treasury. Menominee termination was repealed on December 22, 1973.

The disastrous effects of termination were soon clear to most tribes. As a result, few petitioned the United States for such action. PL 83-280 is seen as the next attempt of the U.S. government to end its responsibility to the Indian people for whom it had assumed wardship.

PUBLIC LAW 83-280 -- "A noose choking Indian tribes and the Indian way of life out of existence since 1953"

1953 Public Law 83-280

This Act gave to the various states the right to extend state jurisdiction to Indian reservations within their boundaries.

PL 280 allowed for the termination of federal law enforcement and the substitution of the laws of the state in which the reservation was located. Despite the vast increase in state law and order responsibility there were no funds appropriated with the bill. Lack of sufficient funds has often hampered the efficient provision of law enforcement. Counties that have large reservations within their borders are unable to provide sufficient personnel (the Yakima reservation was provided with 1-1/4 officers to cover an area of 1,366,505 acres and a population of 5,975.) Juvenile crime is seen by most of the tribes to be best adjudicated by the community yet in most cases the jurisdiction for juveniles under PL 280 rests with the state authorities.

PL 280...What does it authorize...What does it say

PL 83-280 was passed by the U.S. Congress August 15, 1953. This Act authorized the transference of civil

and criminal law enforcement jurisdiction from the federal government to the various states. (The concurrent tribal authority still remains the same.) The various states were divided into three categories.

Certain states were granted **mandatory assumption of jurisdiction.** These were:

1. **California**
2. **Minnesota**, except over the Red Lake Reservation
3. **Nebraska**, the Omaha tribe retroceded state jurisdiction
4. **Oregon**, except over the Warm Springs
5. **Wisconsin**
6. **Alaska**, upon reaching statehood, except for criminal jurisdiction on Metlakatla Indian community (1970).

States with constitutional disclaimers of jurisdiction over Indian tribes.

The following states, despite jurisdictional disclaimers over Indian reservations in both their enabling acts (by Congress) and their own constitutions, nevertheless assumed PL 280 jurisdiction:

1. **Arizona**, air and water pollution laws only
2. **Montana**, criminal jurisdiction over Flathead Indian tribe only.
3. **North Dakota**, civil jurisdiction over consenting tribes, no tribe has to date consented.
4. **Utah**, civil and criminal jurisdiction upon tribal consent.
5. **Washington**, civil and criminal jurisdiction in eight specific subject areas. Option for tribes to request total state jurisdiction.

States with no constitutional disclaimers.

1. **Florida**, civil and criminal jurisdiction.
2. **Idaho**, civil and criminal jurisdiction in seven areas.
3. **Nevada**, civil and criminal jurisdiction upon tribal request. (Nevada has since adopted a law providing retrocession of jurisdiction on all of its reservations, this is on a county by county basis.)

In 1968 the passage of PL 90-284 **The Indian Civil Rights Act** made the consent of the tribes mandatory for the assumption of further state jurisdiction.

On January 1975 PL 93-638 **Indian Self-determination and Educational Assistance Act** was passed by Congress. This Act recognizes the right of Indian tribes to manage their own affairs to the greatest possible extent and also stresses the need of tribes to exercise the principles of self-determination.

PL 280 is seen by many Indian people as the major stumbling block to empowerment and eventual self-sufficiency.

Over the years since the passage of PL 280 the Indian tribes have found the confusion of jurisdiction and the encroachment of the states into Indian reservations, has caused grave problems in the management of tribal affairs. State encroachment under the PL 280 authority includes zoning, pollution control, taxation, health and safety regulations, etc. Taxation encroachment has been halted due to the U.S. Supreme Court decision in **Bryan v. Itasca County, 1976.** In a 9-0 decision the Court found the PL 280 did not give states the right to tax Indian reservations.

RECENT INDIAN ACTION ON PL 280 -- S 2010
Indian Law Enforcement Act of 1975

The National Congress of American Indians met in Denver, February 1975 and resolved that PL 280 constituted a major threat to tribal sovereignty. As a result of the Denver meeting the tribes and their attorneys drafted legislation entitled "Indian Law Enforcement Improvement Act of 1975" to be known as S 2010. This bill was introduced June 25, 1975 by Senator Henry Jackson. Hearings on S 2010 took place December 3 and 4, 1975, before the Subcommittee on Indian Affairs of the Committee on Interior And Insular Affairs, United States Senate. Subsequent hearings were held March 4 and 5, 1976.

RETROCESSION...S 2010
A national Indian answer to PL 83-280

An analysis of S 2010 states:

The basic principle of S 2010, adopted by the National Conference of PL 83-280 is the principle of local option repeal of PL 83-280. That is that true self-determination of Indian people requires that each tribe determine for itself whether all or any measure of state jurisdiction should apply in the Indian country it controls and whether tribal jurisdiction should be current with state or federal jurisdiction.

On December 3, 1975, tribal leaders came to Washington D.C. to present testimony on the problems that have resulted from PL 83-280. They spoke of the need for a bill such as S 2010.

Mel Tonasket, President National Congress of American Indians, Councilman Colville Confederated Tribes:

I have been looking forward to this hearing for all of my adult life and I know that many of the other tribal leaders here, of far more experience than I, have been awaiting this hearing since 1953, the date of enactment of Public Law 83-280. Public Law 280 has been choking the Indian way of life out of existence since 1953.

Public Law 83-280 is an outgrowth of the termination philosophy of the early 1950's. Public Law 83-280 was not a termination bill, but was one act in a series of bills whose eventual design was termination. Public Law 83-280 was a law and order statute whose aim was merely the transfer to states of jurisdiction over civil and criminal causes of action on Indian reservations.

After 22 years, it is now conclusively proven that Public Law 83-280 is a total failure by an standard. And the termination philosophy which underlines Public Law 83-280 is defunct.

Joe DeLaCruz, President, Quinault Tribal Council, Taholah, Washington:

S 2010, which you have before you today, is a bill which is intended to place the Indian people back in a position where they can exercise their rightful authority to control the land and the people of their reservation as strong governments based upon clear legal jurisdiction over their territory and peoples. The legislation which took some of that power away, Public Law 83-280, adopted in 1953, has been the source of endless problems and suffering for the Indian people made subject to its provisions. I am sure that all here today agree that Public Law 83-280 was a misguided attempt to forcibly assimilate my people. The problem today is what to do about it. The answer of the Indian governments is S 2010.

Roger Jim, Yakima Tribal Councilman, Toppenish, Washington:

This bill represents the desires of the Indian people and should not be found to be objectionable by other interests. This bill's basic provision provides that those tribes placed under state jurisdiction, by a now discredited termination policy, will be returned to the same status as Indian tribes that missed the consequences of this termination policy. This bill is firmly within the policy of Congress and administration.

Roger Jim also spoke to the committee of the problems resulting from PL 280 and the confusion of jurisdiction on Indian Lands.

This breakdown is directly caused by the State assumption permitted under Public Law 83-280. The present system of a partial, checkerboard system of justice could not be worse no matter what system is devised. Congress owes the people, Indian and non-Indian, on the Yakima Reservation that action be taken to bring order out of this mess. The foundation of this mess is Public Law 83-280.

Odric Baker, La Courte Oreilles, Wisconsin:

The state and county judicial systems, its juvenile program as well as the foster children laws of the state demonstrate a deplorable and inhuman and callous disregard for Indian children. The doors of secrecy behind which minor tribal members are imprisoned constitute a serious violation of their civil rights inasmuch as it extinguishes the right to culture and family and in some cases disinherits them from lands and resources handled by probate courts. The failure of the state to license tribal governments in their work with foster children and juvenile delinquents results in the complete withholding of cooperation and information. Legal recognition and jurisdiction is considered very important. Because of Public Law 280, the State of Wisconsin is attempting to tax trust property of the tribe. In its efforts to tax, they have attached and confiscated tribal moneys held at our local bank.

Lucy Covington, Colville Tribal Councilwoman, and since Tribal Chairwomen, Nespelem, Washington.

Under Public Law 83-280, the State of Washington has attempted to assume jurisdiction over juveniles on the reservation. Indian children are constantly being taken from Indian homes and placed in foster care with non-Indians or placed for adoption with non-Indian families.

These children grow up with a sense of alienation from the culture surrounding them. Attempts by our tribal social services programs to deal with juvenile matters have met with opposition from the state which resists any efforts of our people to deal with these problems by ourselves. In addition, the existence of State Public Law 83-280 jurisdiction on our reservation has had bad effects in the area of criminal jurisdiction. The state asserts its jurisdiction over offenses on the reservation, but refuses to provide the manpower necessary to protect the residents of the reservation properly. As a result, the state has shown very little interest in protecting the personal and property rights of Indians, while at the same time proclaiming its jurisdiction over our lives.

In March 1976, the hearings on S 2010 were largely to determine the government position on the proposed legislation. The various states were given the opportunity to express their feelings on return of jurisdiction to the federal government and the Indian tribes. John Keeney, Deputy Assistant Attorney General Department of Justice had this to say on behalf of the Department of Justice:

We strongly support the concept of Indian tribes having the right to decide for themselves whether they are to be under state or federal jurisdiction, and that any requests for a return to federal jurisdiction should come from the tribes alone. We believe that the tribes, rather than the states, should be given the option, in an orderly fashion and with reasonable control by the Department of the Interior, to return to that criminal and civil jurisdiction which prevailed in Indian country prior to 1954 and the enactment of Public Law 280.

James Dolliver, Administrative Assistant to the Honorable Daniel J. Evans, Governor of the State of Washington:

Let me begin by saying it is the policy of the Governor in the State of Washington that we believe in retrocession. I think the record will show in our state that the Governor has at least in one instance granted retrocession to the Suquamish Port Madison Tribe. It was approved by the Secretary of the Interior. He was in the process of granting retrocession to other tribes who requested. Regrettably, someone asked the question of the Attorney General whether inherent executive authority rested in the Governor to do this. We assumed that it had, and the Attorney General, after much study, said that in fact it did not. We felt bound by the Attorney General's decision, but that does not lessen the Governor's support of retrocession. We feel that Indian persons are fully competent to conduct their affairs, and if retrocession is what they desire, we support it.

Statement of Jack Olsen, District Attorney, Umatilla County, Pendleton, Oregon:

Mr. Chairman, those very principles which we consider dear to the hearts of every American citizen, those very principles which served as the catalyst to the development of this great land -- liberty and the right of self-determination -- are in fact still being denied to that very group of Americans who first settled this continent. It is inconceivable to me that any nation should be denied the right to self-determination; and in fact, it is still being denied here. We espouse liberty, yet we deny liberty. It will be a sad day for America if this denial is perpetuated. Mr. Chairman, on a more practical vein it is essential that jurisdiction be returned, at least to the Confederated Tribes of the Umatilla Indian Reservation. Our county consists of over 3,200 square miles and our reservation is some 286,000 acres. With these vast areas state and county law enforcement simply cannot provide the protection it ought to be providing. This applies both to the Indian and to the non-Indian living on or passing through the reservation.

The State of Nebraska expressed opposition to retrocession. The major faction being the "checkerboarding" of Indian and Non-Indian lands and the consideration of loss of revenue to the state.

Ralph H. Gillan, Assistant Attorney General, State of Nebraska:

There is little or no question that, if this bill is passed, the Omaha and Winnebago Tribes, at least will ask for civil as well as criminal retrocession. The Winnebago Tribe has already asked for both criminal and civil retrocession, but this session of the Nebraska Legislature declined to adopt the resolution. Since the payment of state sales, income and cigarette taxes, and probably other taxes, is dependent upon the state having civil jurisdiction, there will, of course, be an almost irresistible incentive for the tribes to remove that jurisdiction. It is very possible that even the Santee Sioux will follow suit. The Santee Sioux Reservation is approximately 220 miles from Omaha, so the problems of going to federal court will be even greater for persons on that reservation.

(The question of state revenue gain through taxation has been settled with the 9-0 decision, June 1976 in Bryan v. Itasca County. The U.S. Supreme Court found the PL 83-280 does *not* grant any taxing jurisdiction to states.)

In the last decade the national policy towards Indian tribes and reservations has been stated as that of tribal self-determination. In 1968 PL 90-284 Indian Civil Rights Act made further state assumption of jurisdiction possible only upon tribal request.

SELF DETERMINATION AND TRIBAL SOVEREIGNTY

In 1975 PL 93-638 affirmed the principle of Indian self-determination.

July 1976, President Ford met with 200 Indian governmental leaders and pledged his support to the realization of the goal of self-determination for tribes and the reassertion of tribal jurisdiction over tribal lands.

Despite the many promises there has been minimal action to return jurisdiction over Indian lands to those most able to assert it -- the Indian people themselves.

Indian people, both individually and as tribes, are united in the desire to govern themselves. The destruction of the environment, the decay in the quality of life is seen by Native Americans to be the result of poor and thoughtless management and unacceptable values. It is safe to say that the U.S. treatment of both the environment and people of alien cultures has not been flawless. Too often expediency and lack of understanding have destroyed the best of both. Today, the Indian people are demanding the reassertion of their right to govern both their land and their people. A culture belongs to those who love and respect it -- only they can preserve the very best aspect for delight and strength of future generations.

WASHINGTON STATE UNDER PL 83 280

Washington State implemented the provisions of PL 83-280 by legislative action in 1957. In 1963 it amended and extended this Act. These two Acts have certain very important differences.

1957 SB 56. The assumption of PL 280 jurisdiction which became RCW 37.12.010. The terms of the 1957 Act show that the State of Washington was concerned for the sovereignty of the Indian tribes within its borders. a.) The Act could only go into effect on a reservation upon specific request by that tribe (this was later to become a requirement throughout the nation with the passage in 1968 of PL 90 284, the Indian Civil Rights Act); b.) No property was to involved; and, c.) Treaty hunting and fishing rights were precluded. There were, however, certain grave shortcomings in the Act. a.) No trial period was required in order for the tribe to determine the effects of state jurisdiction; b.) No method was included to allow for the retrocession of state jurisdiction should the tribe, or the state, so desire it.

Eleven tribes requested total state jurisdiction on their lands. **1. Chehalis, 2. Muckleshoot, 3. Nisqually, 4. Quileute, 5. Quinault, 6. Skokomish, 7. Squaxin Island, 8. Suquamish, 9. Tulalip, 10. Colville, 11. Swinhomish.** When the tribes requested state law enforcement they believed that they could obtain superior services, when they found that this was not the case they also found that the mechanism for the return of jurisdiction was nonexistent. Most of the reservations that requested state jurisdiction have since asked that it be returned to the federal and tribal authorities.

1963 TERMINATION LEGISLATION IN THE STATE OF WASHINGTON. EXTENSION OF JURISDICTION WITH NO TRIBAL CONSENT CLAUSE

The state legislature extended and amended the 1957 Act by asserting *total jurisdiction over all fee patent land, and partial jurisdiction over all land* (tribal trust, individual trust, alloted land and fee patent.) With no consent clause required, the legislature with one act ignored the concept of tribal sovereignty.

The partial jurisdiction asserted by the State of Washington consisted of eight subject areas. **1.) compulsory school attendance; 2.) public assistance; 3.) domestic relations; 4.) mental illness; 5.) adoption proceedings; 6.) juvenile delinquency; 7.) dependent children; 8.) operation of motor vehicles upon public streets.**

The obvious cultural implications of these eight areas was not lost on the tribes, numerous court cases were brought to obtain relief from what was seen as cultural strangulation.

The responsibility for Indian children was taken from tribal government and placed into the hands of a culture with entirely different standards in child raising. The extended family concept is not present in the dominant culture yet it is one that is both traditional and logical for tribes.

CHECKERBOARD JURISDICTION... The game of confusion in law enforcement.

Only the government that has jurisdiction has the legal right to exercise law enforcement. When a crime is committed on Indian land in the State of Washington it is necessary to determine which authority has the jurisdiction...the tribe, the federal government or the state and county government. The determination must often be made on the spot by a police officer; to do this certain facts must be established:

- the status of the land,
- the status of the crime,
- the status of the persons involved.

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a.) **The status of the land. Trust,** the jurisdiction on trust land rests with the federal authorities, the tribal authorities and in the eight subject areas with state and county authorities. **Fee Patent:** The jurisdiction belongs to the state authorities concurrent with the tribe. This fact is often ignored by the state.

b.) **The status of the crime.** Does the crime fall within the eight areas of jurisdiction assumed by the State in 1963? Does the crime belong under the thirteen major crimes under the jurisdiction of the federal authorities or is it under the jurisdiction of the tribal court?

c.) **The status of the persons involved.** Indian or non-Indian, juvenile or adult.

It is small wonder the state and county authorities are often reluctant to get involved in the confusion, the reluctance, however, leaves the Indian tribes with little or no protection, or as Roger Jim of the Yakima Nation describes it, "The reservation has the law, but no order." The tribes have been forced to provide law enforcement for their people at great expense and met with no recognition by the state of their having legal jurisdiction.

RETROCESSION...
First you see it, then you don't.

On January 11, 1971, the Suquamish Tribe of the Port Madison Reservation presented a resolution for retrocession August 26, 1971 and the Secretary of the Interior accepted the proclamation april 5, 1972.

The Quinault tribe believed that the original request for state jurisdiction (1958) was illegally obtained. Governor Evans voided state jurisdiction on the above grounds in 1965. In 1972 the State Attorney General was requested to present an opinion on the legal authority of the Governor of Washington to retrocede jurisdiction to an Indian reservation. The Attorney General's opinion (Wash. A.G.O. 1972, No. 9) noted that he could find no authority to retrocede partial jurisdiction over the eight subject areas assumed in 1963, neither did he find authority to retrocede jurisdiction which had been proclaimed by the Governor under either the 1957 or 1963 Acts pursuant to a petition by a particular tribe. The power of the Governor was confirmed to rescind a previous proclamation on discovery of error.

The result of this Attorney General's opinion has been to freeze state jurisdiction over tribes. At the present time the Ninth Circuit Court is considering the question of the legality of State of Washington assumption of jurisdiction by simple legislative action rather than constitutional amendment (1957) and the assumption of partial jurisdiction without consent of tribes (1963). The Yakima Nation v. Yakima County and State of Washington case incorporates the argument made by Quinault tribe in Quinault v. Gallagher (1966) and amicus briefs compiled by every tribe in the state. The legislation presently before the U.S. Senate S 2010, has the support of every tribe of the State of Washington. The tribes are united in their determination to reassert tribal jurisdiction over tribal lands.

BIBLIOGRAPHY

Books:

Uncommon Controversy: American Friends Service Committee. Seattle: University of Washington Press, 1970, reprinted 1975.

Justice and the American Indian: National American Indian Court Judges Association. Boulder Native American Rights Fund, 1974.

Law and the American Indian: Price, Monroe E. New York. Bobbs-Merrill Co., Inc. 1973.

Hearings, Reports, Law Review Articles.

Goldberg, Carole E. UCLA Law Review, Vol. 22. Number 3, February 1975.

Hearings before the Subcommittee on Indian affairs of the Committee on Interior and Insular Affairs, United States Senate. Ninety-Fourth Congress. First session of S 2010, December 3 and 4, 1975. Second session on S 2010 March 4 and 5, 1976.

Report of Indian Affairs Task Force: State of Washington.

Are You Listening Neighbor? State of Washington, 1971.

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Mr. DeLaCruz. Mr. Chairman and members of the select committee, my name is Joseph DeLaCruz. I am chairman of the Quinault Indian Nation in Washington State and past president of the National Tribal Chairman's Association. I appreciate this opportunity to explain why retrocession of reservation criminal jurisdiction is necessary and important and to comment on the other proposals your committee is considering. One of the biggest roadblocks in the path of good reservation law enforcement is the confusing and overlapping jurisdictional system in Indian country. You have here a unique opportunity to remove a particularly troublesome part of that roadblock through the proposed retrocession provision.

I first want to explain some of the background of the present situation. Because the congressional committee that proposed Public Law 280 primarily consulted only the States, the extent of tribal opposition to the bill and the reasons for opposition were unknown to Congress. For the most part, those few tribes that Congress did consult, such as Warm Springs in the State of Washington, expressed their opposition to State jurisdiction and were exempted from the act's extension of State jurisdiction.

Washington State's first action under Public Law 280 extended State jurisdiction over only those reservations that requested it. This appears to have left the tribes a choice, but in fact there was no real choice. Shortly after enactment of the State's so-called voluntary law, Washington State tribes were told by the Bureau of Indian Affairs that Federal law enforcement services were about to be discontinued because State enforcement was available under Public Law 280. Faced with this dilemma, only a small number of tribes elected to continue with basically no enforcement at all. The rest, including Quinault, in desperation requested State criminal jurisdiction.

Then in 1963 Washington State assumed jurisdiction over eight subject areas that are very poorly defined. Again, tribes were not consulted, and this time no choice was allowed at all.

One source of the difficulty with State jurisdiction on the reservations is the incorrect assumption that States can do a better job of law enforcement there than the Federal authorities and the tribes themselves. Public Law 280 offered the States additional responsibilities without providing any additional resources to meet the task. For this reason some States refused to accept the offer, and those that did take jurisdiction found themselves either stretching their already strained law enforcement budgets or neglecting their new territorial jurisdiction. The result has been that reservation law enforcement has not improved or has gotten worse.

The indifference of the State authorities, the State's reluctance to bear the added cost of policing reservations, and the distance of reservations from established State courts and police agencies have caused Indian tribes to become advocates of repeal of State jurisdiction. Of the 11 Washington tribes that requested State jurisdiction, all have either sought retrocession or have considered doing so.

Trying to work with Public Law 280 is not an enjoyable experience. The reservation is patrolled by tribal officers. Because the Supreme Court has held that non-Indians cannot be processed through tribal enforcement systems, tribal officers call for State assistance when a

non-Indian violator is apprehended. The State often refuses to respond, and the result is that the offender must be released at the scene. In one such case the non-Indian was driving while drunk. Upon his release he drove a mile down the road and ran into a guardrail. The officers involved may be liable for false arrest if they detain such a man and may be liable for the damage he caused if they release him. You can see what an impossible situation has grown up.

As I said earlier, the most severe problem with Public Law 280 is the confusion it creates in jurisdictional matters. On the Quinault Reservation, for example, tribal, Federal, and State jurisdiction can all, at various times, apply to criminal activity depending on the specific plot of land on which the crime is committed and what kind of crime it is. Policemen need tract books, surveyors, and a battery of lawyers to determine the probable extent of their jurisdiction. The waste of law and justice system time and money is substantial.

Another layer of complexity has been added by the language of Public Law 280 itself. The statute by its terms allows something less than full State jurisdiction over reservations, but the exact extent is unclear. As a result, States have tried to use Public Law 280 as a platform from which to apply State tax, zoning, and fishing regulations to reservations. Such interference with tribes' control of their homelands has understandably been resisted by the tribes in court and, indeed, the courts have held that such regulatory authority was not given to the States in Public Law 280. Thus, the exact scope of tribal authority on reservations is left to be determined by piecemeal litigation.

Retrocession will significantly improve reservation law enforcement. Even with Public Law 280, tribal and Federal enforcement mechanisms are essential and have never been dismantled. Thus, there is already in place a tribal-Federal enforcement apparatus that can be used where now there are only overextended and indifferent county patrols.

The tribal enforcement and judicial systems have matured dramatically in recent years, a fact noted by the Supreme Court. Retrocession will have the advantage of removing from the criminal jurisdiction scene one whole layer of authority, clarifying and simplifying responsibilities in the field.

Public Law 280 was passed during a period of Federal Indian policy that called for termination of Indian tribes. Assimilation of Indian people and termination of reservations have both been explicitly abandoned in recent legislation. A renewed congressional commitment to Indian self-determination and tribal self-government can be found in the recent policy statements and text of the Indian Self-Determination Act, the Indian Finance Act, the Indian Child Welfare Act, the Menominee Restoration Act, and the Siletz Restoration Act. The report of the American Indian Policy Review Commission strongly favors removal of State authority from reservation affairs. The policy that spawned Public Law 280 has been rejected as a failure, but its effects live on in a jurisdictional system that is even more cumbersome than the one that existed before. Peeling off the layer of confusion represented by Public Law 280 jurisdiction can only result in a clearer, more economical system of justice.

I would next like to discuss the proposal to put Federal magistrates on or near Indian reservations to hear cases involving non-Indian offenders. At first glance, such a proposal looks useful, but there is a serious question about whether it would further complicate the existing jurisdictional confusion in reservation law enforcement. Also, such a measure should be carefully examined for its effect on the emerging strength of tribal court systems.

Any bill involving criminal jurisdiction in Indian country should try to improve the present situation by simplifying it. This is why we find the retrocession provision so encouraging. The proposed magistrate legislation has the potential to add a layer of Federal authority on reservations where now the tribal government has primary responsibility. Any move in that direction should be made only with strict limitations on the magistrate's scope of authority and after careful review of the possible effects on the tribes' control of their reservations and the clarity of jurisdiction on the reservation.

Also, the existence of tribal courts should not be jeopardized by the nearness of a Federal court whose presence might suggest that the tribal governments and courts are not capable of governing their reservations. A better approach would be to return to tribal courts jurisdiction over all reservation activity, including crimes by non-Indians. This would surely provide the most unencumbered and easily understood enforcement system. It would also place enforcement responsibility with the government that is closest and has the most interest in reservation matters.

I expect that questions will be asked about whether tribal courts can be relied on to protect the rights of defendants. I am certain that they can be at least as capable as most non-Indian courts. But if this is a serious concern, and not just based on prejudice, it is easy to provide the necessary assurance. A certification system can be provided whereby the Secretary of the Interior can review the capability of the court. The judge's qualifications, the procedural codes, and the rights given to the defendants can all be reviewed to be sure that they meet established Federal standards. As with the Indian Civil Rights Act, a maximum sentence that the court can impose can be set. Juries can be made up of all reservation residents to insure Indian and non-Indian participation.

There are several advantages to this approach. It avoids the overlaps of jurisdiction that presently result in so much confusion and waste. It does not detract from tribes' use and control of their homelands. It assures that all defendants will enjoy the protection of the full scope of rights in court. This system would not be costly or difficult to develop, and it is hard to see why such a mechanism should not be developed.

Some officials of the State of Washington can be expected to oppose these measures. They are reluctant to loosen their hold on Indian reservations even though at the local level the State has not been able to perform its reservation law enforcement functions. These officials will point out that there are several law enforcement functions. These officials will point out that there are several thousand non-Indians living on Indian reservations in Washington State. Most of these non-Indians live on just two reservations, and on reservations like Quinault

the Indian population far outnumbers the non-Indian population. Still, these officials seems to think that all reservations should be treated like non-Indian housing subdivisions rather than like Indian reservations.

There are States that never accepted Public Law 280's jurisdiction, and they are proof that the exaggerated fears of Washington attorneys general need not come true with retrocession. Moreover, these officials do not speak for the entire State nor its government. The former Governor of the State of Washington and the present Governor of the State of Washington favor retrocession and will work for its smooth implementation.

I thank you.

Senator MELCHER. How many people live on the Quinault Reservation?

Mr. DELACRUZ. Approximately 2,000 people.

Senator MELCHER. How many of them are Indians?

Mr. DELACRUZ. About 1,850.

Senator MELCHER. If this section of S. 1722 became law, is it your assumption that Quinault would ask for retrocession?

Mr. DELACRUZ. Quinault went through a process of retrocession in 1958 and got the former Governor to retrocede. The Secretary of the Interior at that time, I think, was Secretary Hickle. He accepted jurisdiction back to the Federal level, except for the eight points of law: Juveniles, highways, schools, and whatever those points were. The Quinault Tribe was part of the Yakima County lawsuit to try to get those areas of jurisdiction back under tribal control.

The Indian Child Welfare Act has been very helpful in regard to the juvenile section—of the tribe's jurisdiction over its own juveniles. We have been able to work out agreements with the State so that any of our members who end up in that State system are referred by the State directly back to our tribal social service department and our courts, regardless of where they are in the State of Washington.

Senator MELCHER. I am confused. In your view, would the Quinault Business Committee or the Indian people on the reservation ask for retrocession, or is it necessary?

Mr. DELACRUZ. I would say it was not necessary, except for the areas that were lost under the *Oliphant* decision because the Quinault Tribe and the courts were exercising territorial jurisdiction over all people within the Quinault Reservation prior to the *Oliphant* decision for several years.

Senator MELCHER. Is it your interpretation that this provision in S. 1722 is not needed?

Mr. DELACRUZ. I do not really feel that some things in the present language allow for it. I am very concerned about the section I am reading here which I think was clarified on referendum. Although it does not affect Quinault, it will affect some tribes in the State by the nature of their constitutions.

Senator MELCHER. I am having a hard time following your answer.

Mr. DELACRUZ. Senator, the Quinault Tribe, and I as its chairman, have worked for the past 3 or 4 years with the State government on intergovernmental agreements and transfers of various types of juris-

diction. I am not sure if this present bill is going to enhance what we are trying to do. It is encouraging to see this bill being introduced, but the business committee has just had a very short time to review this. We have been able to work out intergovernmental agreements in most areas of the State regardless of whether it is civil or criminal jurisdiction.

The areas where the agreements have fallen down have been where there was no enabling State law.

Senator MELCHER. Let me see if I understand your response. If this section in S. 1722, section 161(i), becomes law, is it your feeling that the Quinaults will ask for retrocession?

Mr. DELACRUZ. We have asked for it. If the bill provides for it, we will ask for total retrocession of control within the territory of the Quinault Reservation.

Senator MELCHER. What type of courts do you have?

Mr. DELACRUZ. Presently, the Quinault Tribe has a Quinault tribal court that was initially a Bureau of Indian Affairs CFR court. In 1969, under a new code of laws that was adopted by the Quinault Tribe, it is a tribal court. That has been evaluated by the Secretary of the Interior through the Bureau of Indian Affairs. That provides all the safeguards that any other court does.

The judges who sit on the bench in the Quinault Tribe are attorneys, and the tribe really has not had any difficulty, as far as the court goes, administering justice over territorial affairs of the Quinault Reservation.

Prior to the *Oliphant* decision, there were over 120-some non-Indians who got caught, with only two cases appealed through the process of appeals to the Federal courts.

Senator MELCHER. If this section in S. 1722 were adopted, an individual in Alaska, for example, could ask for retrocession. If it were adopted, the tribes in Arizona could ask for retrocession of jurisdiction on air and water pollution. If this section were adopted into law, the various tribes and bands in California could ask for retrocession of jurisdiction also.

On what basis would the Secretary of the Interior, in your judgment, look at these requests for retrocession? I only name the first three States. Not all States, of course, come under Public Law 280, but a number do. To my knowledge, we have not had any requests from tribes or villages or bands in those States asking for retrocession. That is not true in the State of Washington, I understand.

The very fact that this section is in the bill seems to stem from testimony given by tribal members from the State of Washington to the previous Congress. It is a very far-reaching section—if it were to be exercised.

What would be the criterion, in your judgment, for the Secretary of the Interior to use in either accepting or denying the requests of the various bands or tribes asking for retrocession?

Mr. DELACRUZ. My opinion is that it would have to be on a review of the history of that particular tribal government—the history of the stability or court capability, police capability, and governmental capability.

Senator MELCHER. That particular section of the bill, however, does not list any of these criteria. Is that not rather loosely drawn?

Mr. DeLaCruz. I would assume it would come in the regulations that would go along with the bill. The criteria that the Secretary would be looking at would have to be laid out.

Senator Melcher. Your assumption and mine differ on that. I do not think there is much assurance that such regulation would be drafted from the language that is in this particular section. There does not seem to be any guidance.

I wonder if, on the request of this, the attention of the tribes in the State of Washington has been drawn to what the effect might be in a rather broad scope across the United States.

Mr. DeLaCruz. With regard to my answer to your former question, when the tribes in the State of Washington went to court regarding fishing rights, the Supreme Court—or the district court and the Supreme Court—held that 2 tribes out of the 22 that were involved had the complete governmental responsibilities and self-regulating responsibilities over fisheries resources not only within the boundaries of their reservations but within their aboriginal territories. That was the Yakima Nation and the Quinault Nation.

From that decision, we are exercising the management, enhancement, and enforcement of our fishermen and what happens to the fish within our aboriginal territory. We were able to—both the Columbia River tribes and the tribes within the Quinault treaty area—work out the problems that come with overlapping jurisdictions. I think that as tribes' capabilities develop, if the proper criteria are there, these things can be worked out, again, intergovernmentally, government-to-government, which gets into the compact.

Senator Melcher. Even though the fishing rights are involved, is it not more of a property right?

Mr. DeLaCruz. It is a property right. But along with exercising that property right, you have a lot of enforcement problems that overlap.

In the last year or so, that has been one of the biggest controversies—reinforcement of the various fishermen—who is responsible? There is, again, a reluctance by the State; there is a reluctance by the Federal authorities for a couple of years to delay enforcement, but hopefully that has been worked out. It entails the whole management of the resource, the exploitation of it, and the enforcement of who is doing it. It has jurisdictional questions in it, but it is being worked out.

Senator Melcher. We often hear that expression, "mixing apples and oranges"; but in this case I think we are mixing fishing rights and speeding tickets. There is a very definite difference between property rights and the nitty-gritty, day-to-day affairs of law enforcement.

The point I am trying to make is this. Why does the tribe now not have full jurisdiction which would be evolved under Federal law and linked with the jurisdiction of the State—whether or not the tribe can exercise competently that jurisdiction? You have assured me that, in your judgment, the Quinaults could. But I point out to you that the section in the proposed bill, S. 1722, is extremely broad and would leave it to the Secretary of the Interior to determine whether or not the tribe, band, or village, in numerous States, on their own request, could assume jurisdiction.

Let us pass over to the reservations where the majority are not Indians in the State of Washington.

Does your testimony purport that it apply to those reservations also?

Mr. DeLaCruz. I mentioned that a couple of years ago they were shown nationally over TV giving their views on these complex jurisdictional problems. There are only two reservations like that in the State of Washington, and one happened to be the Puyallup, and that is one that was shown on the MacNeil-Lehrer Show, together with some reservation in Oklahoma. You have 36 reservations in the State of Washington where the majority of the population is Indian.

To me, it gets back to this situation. We recognize that Indian governments, because of paternalism, are at different levels of development. I believe that the majority of the tribes in the State of Washington, because of the various controversies, have built their capabilities to handle things as far as law and order is concerned within the boundaries of their reservations. Even absent the law, some of those have been exercising those authorities.

Senator Melcher. How many people reside on those two reservations where the majority of the population are non-Indians?

Mr. DeLaCruz. I am not sure what the population is within the exterior boundaries of the Puyallup Reservation, but the Yakima Reservation is another one that has a couple of non-Indian communities on it which do not really take up that much of the acreage of 1.4 million acres. The Yakima tribe has to provide police protection and jurisdiction over this. They have the communities of Toppenish and Wapato that are under city governments and then, of course, county. Because of the *Oliphant* decision, the State and the Yakima tribe are trying to work out some solution. Again, it gets right back to the question of funding because prior to *Oliphant* the Yakima Nation and the Bureau of Indian Affairs provided all the law enforcement over that 1.4 million acres.

So, you have those two reservations out of a total of 36 in the State that have a substantial number of non-Indian populations.

Senator Melcher. When you say substantial, does that mean the majority?

Mr. DeLaCruz. No, sir. It is probably the majority of the Puyallup, but definitely not in the Yakima.

Senator Melcher. Let us clear up one point. It is the judgment of the attorneys who work for this committee that this section of S. 1722 had nothing to do with the *Oliphant* decision. Do you agree with that?

Mr. DeLaCruz. If it does not, it sure is not going to help us.

Senator Melcher. Under what construction do you see that it does?

Mr. DeLaCruz. I say it does not deal with the *Oliphant* decision, and that is unfortunate.

Senator Melcher. You are testifying that it does not deal with *Oliphant?*

Mr. DeLaCruz. Right; it does not.

Senator Melcher. It does not touch the *Oliphant* decision?

Mr. DeLaCruz. That is right. As I testified when I was discussing the magistrates concept, we have the adequate and capable tribal courts. Jurisdiction should be passed on to those courts under some type of evaluation or review, that all people's rights should be protected.

Senator Melcher. If it does not touch the *Oliphant* decision, what does retrocession do for you?

Mr. DeLaCruz. I do not know as far as your bill goes. We have jurisdiction over our own lands and our own people already. It is a question that came up after *Oliphant*, that is, the non-Indian people who travel into the reservations.

Senator Melcher. My line of questioning referred to Section 161 (i) in S. 1722. If it does not touch *Oliphant* and there is retrocession, would that accomplish your purpose?

Mr. DeLaCruz. This is criminal; we already have that.

Senator Melcher. You already have that at Quinault?

Mr. DeLaCruz. Yes, sir.

Senator Melcher. So, if that section stays in S. 1722, it has no bearing on the Quinaults?

Mr. DeLaCruz. No, sir.

Senator Melcher. But you do favor retaining it in the bill for other tribes; is that right?

Mr. DeLaCruz. That is right.

Senator Melcher. Are you in favor of some type of Federal magistrates concept on the Indian reservations?

Mr. DeLaCruz. I think a good look should be taken at the magistrates concept and a specific criteria laid down as to how that magistrate is going to relate to cases arising from an Indian reservation. In my own opinion, I feel that at least some of the tribal courts I am familiar with in the State of Washington have capabilities of handling all civil and criminal matters. They were handling them for Indian and non-Indian people even prior to the *Oliphant* decision.

I am very fearful that if the criteria are not laid down properly, where you need magistrates near reservations, we would just have another layer of Federal bureaucracy to further complicate things.

Senator Melcher. If it stands as the existing law is, a non-Indian on a reservation cannot be arrested on a complaint filed by the tribal authorities. Let us assume that that were not the case prior to *Oliphant*. How would a non-Indian appeal the sentence of the tribal court?

Mr. DeLaCruz. Under the laws of the Quinault Nation—and I am only speaking of Quinault—our appeals court and our law and order were based on the U.S. Civil Rights Act of 1968. The appeals process for Indians and non-Indians was a process from three justices from other reservations, whether they be from Federal CFR courts or tribal judges, and if they were not satisfied with that step of the appeal, their next step was to the Federal court.

We have two cases out of 120 of non-Indian appealing to the Federal district court in Takoma.

Senator Melcher. Only 2 out of 120?

Mr. DeLaCruz. Out of 120, and both of those cases were sent back by the district court judge because they did not follow all the due processes and satisfy the process that was laid out for them under the law.

Senator Melcher. Two out of 120 is a very low percentage. Do you suspect that only 2 out of 120 appealed because it was such a lengthy procedure to appeal?

Mr. DeLaCruz. No. Most of the cases at the time that were coming before the Quinault tribal court were cases in the nature of forestry trespass and timber theft. The people were satisfied, I think, that they

got off so easily in the tribal courts with the types of fines that were set for their sentences, rather than appealing them.

Senator MELCHER. If you had a Federal magistrates system enacted on the Quinault Reservation, does it follow that the appeal from the Federal magistrate to the U.S. district court would be a reasonable procedure?

Mr. DELACRUZ. Yes. We do have a magistrate—and this is since I have been chairman of the Quinault, going on 12 years—at Port Angeles which is 125 miles from Quinault. Various types of hunting and fishing trespasses are very definitely under the Code of Federal Regulations, but we have only been able to get them to look at one case.

Senator MELCHER. Thank you very much.

Mr. DELACRUZ. Thank you, Mr. Chairman.

Senator MELCHER. Our next witnesses are Alan Parker and Gilbert Hall, representing the American Indian lawyer training program.

Please come forward.

STATEMENT OF ALAN PARKER AND GILBERT HALL, AMERICAN INDIAN LAWYER TRAINING PROGRAM

Mr. PARKER. Mr. Chairman, I would like to express our appreciation for the invitation to present testimony to the committee.

The American Indian lawyer training program is a nonprofit corporation founded in 1973 and devotes its attention primarily to the development and strengthening of Indian tribal government institutions. A major emphasis of our organization has been in the area of training, research, and support activities directed at tribal courts.

My colleague, Gil Hall, will present testimony that describes our organization's understanding of the needs of the tribal courts and the relationship of those issues to the issues before the committee.

I would like to present for inclusion in the record the complete text of our testimony, and both Mr. Hall and I will summarize from this text.

Senator MELCHER. Without objection, your complete statement will be made a part of the record at this point.

[The prepared statement follows:]

PREPARED STATEMENT OF ALAN PARKER AND GILBERT HALL, THE AMERICAN INDIAN LAWYER TRAINING PROGRAM

Mr. Chairman, members of the Committee: The American Indian Lawyer Training Program (AILTP) is a non-profit corporation founded in 1973 and concerned with the development and strengthening of Indian tribal government institutions. A major emphasis in our training, research and support activities has been encouraging the development of effective tribal courts.

It is fortuitous for us that these hearings are being conducted now so soon after a three-day meeting on essentially the same subject, sponsored by AILTP in Phoenix, Arizona, January 3–5, 1980. That meeting was conducted similar to a hearing and the panel consisted of representatives from The White House, the House Committee on Interior and Insular Affairs, Department of Justice, Department of the Interior, Department of Health, Education and Welfare, the Legal Services Corporation, the National Center for State Courts, tribal attorneys, and AILTP staff. The purpose of that meeting was to provide a forum for tribal and federal officials to examine the problems involved in the administration of justice in Indian country and seek solutions to those problems. Presenting testimony were 16 witnesses, including tribal chairmen and judges, attorneys, tribal court advisors and staff, tribal police officers, and

others concerned with the administration of justice. AILTP is currently preparing a report on those proceedings, a copy of which we would be glad to submit to this Committee at a later date. In the meantime we would like to report to you our analysis of the testimony presented in those proceedings and how it bears on the issues being considered today by this Committee.

As this Committee is aware, there are presently some 289 Indian tribal governments recognized by the federal government and exercising varying degrees of governmental power over 268 federally-protected reservations comprising some 51 million acres of land. Without exception those tribal governments today are in a state of great transition, struggling to adapt to the demands which modern life imposes on them and at the same time retain a sense of their historical Indian identity. It is an extraordinarily difficult task which few people fully appreciate. Because there is so much diversity among the various tribes the pace of the changes which they are undergoing, and indeed sometimes the path of the changes, differ considerably.

This means, of course, that tribal problems and needs are not always uniform in either nature or scope. One can compare but not meaningfully equate the problems facing, for example, the tribes on the Flathead Reservation, a large reservation which has a high percentage of non-Indians living and owning land and considerable economic development, with one of the small Pueblos in New Mexico which is almost 100 percent Indian in terms of resident population and land ownership. The studies of the American Indian Policy Review Commission in 1977 revealed clearly that many of the mistakes in federal policy in the past have resulted from attempts by Congress to resolve the related problems of all the tribes with one inflexible legislative solution. The General Allotment Act (25 U.S.C. §§ 331–358) is one example of this type of sweeping measure which left little room for adaptation to the particular requirements of specific tribes. Public Law 280 (18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–1326) is another example.

By contrast, the successes in federal Indian legislation have most often been those measures which were either very specific in application and tailored to particular tribes or areas or quite limited in what they were designed to accomplish. Probably the most important key to those successes may be found in the degree of flexibility which the federal statute permitted tribes. A good example is the Indian Child Welfare Act of 1978 (25 U.S.C. §§ 1901–1963). That act authorizes a retrocession of all or partial jurisdiction over Indian child custody matters to the tribes in Public Law 280 states (25 U.S.C. § 1918). It also authorizes tribes and states to negotiate agreements for a specific allocation of jurisdiction between them. The significant point here is that the Indian Child Welfare Act authorizes but does not require either retrocession or tribal-state agreements. Generally the initiative for acting under the statute rests with each tribe. It is this feature which has been important to the overall favorable response which the Indian Child Welfare Act has received so far from tribes and states alike. In addressing the other jurisdiction problems facing Indians today, we recommend that this factor of maximum flexibility serve as a guiding principle.

AILTP's analysis of the testimony in our Phoenix meeting supports the premise implicit in these proceedings today that there are serious inadequacies in law enforcement in Indian country. This is especially true since the Supreme Court decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). The result of that case, of course, is that tribes can no longer prosecute non-Indians for violation of tribal law. It means that tribes cannot enforce their traffic regulations, hunting and fishing regulations, or ordinances designed to control public nuisances such as disorderly conduct, against non-Indians. Generally, the states do not have the interest or the resources to prosecute these minor offenses and federal authorities seem to be most reluctant. The problems which this has created have apparently been a nuisance but to date have been relatively noncritical. The potential, however, for far more serious and more widespread problems looms larger as the situation remains unaddressed. Several tribal judges and law enforcement officers who testified in Phoenix alluded to a feeling of helplessness in the face of non-Indian crime on the reservation. The criminal jurisdiction problems which create, or at least contribute to, this situation are vexing, enormously complex, and demanding of congressional attention. It is a tribute to this Committee that it has undertaken this initiative in an attempt to identify solutions.

While acknowledging the problem, the participants at our Phoenix proceeding would disagree with the analysis of this Committee in its preliminary character-

ization of the causes for law enforcement problems and some of the solutions proposed. As we read the correspondence to tribes from the Committee, the federal magistrate concept as proposed implicitly rests on the judgment that tribal institutions cannot insure adequate law enforcement on the reservation (except perhaps among tribal members) and that a greater and permanent federal presence will be necessary to do the job. Our analysis suggests that virtually every one of the 16 witnesses at our Phoenix hearing would disagree with that premise.

There are currently approximately 120 Indian courts in the nation of varying sophistication and effectiveness. Some exercise a full range of civil and criminal powers effectively and fairly. Some have grave shortcomings and serve principally as an arbiter of domestic disputes and a forum exclusively for minor offenses. I might add that this same dichotomy may be observed among many county courts in rural areas throughout the land. Despite the operational handicaps, however, tribal courts, like their companion institutions in tribal government, are improving steadily and adapting to the responsibilities being placed on them. Positive signs of improvement can be seen in a number of areas. In recent years there has been a significant increase in the level of funding allocated to tribal courts by councils. The money has come from tribal funds and federal funds subject to the Bureau of Indian Affairs' Band analysis which reflects tribal council priorities. This is a clear indication of the increasing importance being placed by tribal government on the strengthening of their judicial systems. Another such example may be found in the Northwest Intertribal Court System where 21 small tribes in the State of Washington have created a unified court system with trial and appellate functions.

This can serve as a model for other small tribes where the case load and economies of scale do not justify individual court systems. We understand that some 12 petitions for reassumption of jurisdiction under the Indian Child Welfare Act have been filed with the Bureau of Indian Affairs by tribes wishing to improve the ability of their tribal courts to adjudicate matters concerning the welfare of their children. The recent creation of Courts of Indian Offenses in Oklahoma and the increasing use of judges from other tribes to resolve tribal election or other internal government disputes also indicate progress being made in Indian judicial systems. The positive response from tribes which AILTP has received to the publishing of a quarterly Tribal Court Reporter demonstrates an interest in improving the record-keeping of tribal courts. And the great interest we have seen in AILTP's training programs for tribal court prosecutors and defenders and courses in the Indian Civil Rights Act and Indian Child Welfare Act also suggests a determination by many tribes to upgrade their judiciaries. All of these improvements suggest that tribal courts are assuming an increasingly important role—and being accepted in the community in that role—as a permanent institution of tribal government.

If this is true, as we believe it to be, then a significant conclusion naturally follows. The most promising, most appropriate, most permanent, and probably most economical solution to many of the problems of law enforcement in Indian country lies with the tribal courts themselves. Dollar for dollar it is probably a more efficient use of federal funds to upgrade the tribal judiciary rather than expand the federal system, as is contemplated by the federal Indian magistrate concept.

Improving existing local institutions, i.e. tribal courts, is an approach consistent with the developing trends in government today of encouraging local solutions for local problems. And, more importantly, it is also directly supportive of the federal policy which Congress has repeatedly stated in recent years, that of encouraging Indian self-determination. Not only would the creation of another layer of federal magistrate courts probably be inconsistent with this federal policy, it might lead to the ultimate dismantling of tribal courts. This would follow if the magistrate courts started hearing a broad range of cases involving Indians as well as non-Indians. In such a situation the two court systems would be essentially competing with each other in terms of jurisdiction and availability of federal funds. It is unlikely that the tribal instrument could survive that competition.

TRIBAL COURT NEEDS

Many Indian tribal courts presently do an adequate job of fairly and efficiently trying criminal offenses which occur on the reservation. Others need significant help, far more than they are now receiving from the federal government. Most of those needs have been previously identified by studies done by

the American Indian Lawyer Training Program, the Bureau of Indian Affairs, and the National American Indian Court Judges Association. (See Indian Self-Determination and the Role of Tribal Courts, AILTP, 1977; Indian Courts and the Future. NAICJA, 1978).

These studies demonstrate that tribal judicial systems are in great need of better court facilities, more and better training for judges, prosecutors, and court personnel, more research and law interpretation services, better record-keeping systems, more effective appellate systems, and a list of other improvements. In AILTP's survey, nearly two-thirds of the tribal court judges who responded indicated a need for increased training. They also expressed a need for at least rudimentary law libraries, resource materials, and more readily available legal advice. It was to address this range of needs that AILTP has proposed creation of a federally-assisted Tribal Justice Center. It would serve as a centralized support facility for all tribal courts, offering technical assistance, research support and training for all elements of the tribal court system. Its objective would be the upgrading and long-term support of the tribal judiciary as a permanent institution in tribal life.

In addition to federal support for improvements, it is clear that for tribal courts to function effectively they must have cooperation from the states. Except for what is required by the Indian Child Welfare Act, many state courts still do not grant full faith and credit or comity to tribal court judgments. Likewise, in some cases, tribal courts refuse to honor state court judgments. And the overlapping and confusing jurisdictional lines between tribal and state authorities often render it impossible to provide uniform, rational law enforcement. It is in this context that the Tribal-State Compact Act which this Committee is proposing could prove to be an important mechanism for improving cooperation between the state and the tribes. The key to its effectiveness in resolving criminal jurisdiction matters rests, however, upon acceptance by all participants to any tribal-state compact of the proposition that tribal courts are viable institutions which are here to stay. Similarly, tribes must be willing to cooperate with one another as well as the states in resolving the practical problems of exercising jurisdiction. In this regard cooperation in devising inter-tribal judiciaries and law enforcement entities should be encouraged by the federal government. The Inter-Tribal Court System in Washington could be a model for such cooperation.

TRIBAL COURT SENTENCING POWER

In 1968 when the Indian Civil Rights Act was enacted by Congress, the sentencing authority of Courts of Indian Offenses (CFR courts) as established by federal regulation was a maximum of six months imprisonment and a $500 fine. Although CFR courts are instrumentalities of the federal government and tribal courts are not, the same sentencing limitation was applied to tribal courts in the Indian Civil Rights Act. Nothing in the legislative history of the act suggests a serious consideration of that limitation by Congress. So despite the fact that tribal courts have the power to try serious offenses (see *United States* v. *Wheeler*, 435 U.S. 313 (1978)), they are restricted to essentially misdemeanor sentencing power. In light of this history and the severe restriction which this sentencing limitation places on the ability of tribal courts to effectively deal with criminal activity on the reservation, the Indian Civil Rights Act should be amended to permit tribal courts more flexibility. The sentencing power should be expanded to permit at least one-year imprisonment and a $1,000 fine.

TRIBAL COURT JURISDICTION OVER NON-INDIANS

In AILTP's 1977 survey of tribal courts (Indian Self-Determination and the Role of Tribal Courts) approximately 85 percent of the surveyed courts indicated that they were exercising, were planning to exercise, or wanted to exercise criminal jurisdiction over non-Indians. Since the *Oliphant* decision, of course, no tribal court may exercise such jurisdiction although many tribes have seen a need to do so. Others conceivably may never desire to.

In order to account for these differences, we recommend a flexible mechanism for delegating criminal jurisdiction over non-Indians. A federal delegation to tribes of criminal jurisdiction could be authorized by Congress and effectuated on a case-by-case basis upon request of the tribe, patterned after the reassumption mechanism established in the Indian Child Welfare Act. Criteria could be established by statute to insure the tribe's capability of exerting jurisdiction.

For example, upon request by a tribe the Department of the Interior could examine the tribe's particular circumstances, size and condition of the tribal court, proximity to federal and state facilities, crime rates on the reservation and the percentage attributable to non-Indians, and other factors. Upon certification that specified criteria were met, the Department could issue an authorization, pursuant to statute, and publish it as a regulation. The statute should perhaps also specify criteria upon which the regulation would be subject to rescission. The delegation of jurisdiction could be a blanket authorization, limited to a certain area, or limited to a certain subject matter depending upon the capabilities and status of the petitioning tribe.

INTERIM MEASURES

While witnesses at AILTP's Phoenix hearings uniformally endorsed tribal courts as the best vehicle for resolving the jurisdictional uncertainties in Indian country created by *Oliphant*, it was recognized that there was room for improvement on the part of tribal courts. A dramatic strengthening of their capabilities is for most courts at least a medium-range goal and some tribes may never sustain a court system exercising the total range of potential jurisdiction. Therefore, there are some measures which the Congress could take in order to alleviate current problems and provide effective law enforcement where tribes are unable to do so with present resources.

Implicit in the federal magistrate concept as being considered by this Committee is the judgment that law enforcement over non-Indians is deficient at least partially because of an insufficient number of courts with jurisdiction to hear the cases. The proposal to place a federal magistrate in Indian country before whom United States Attorneys could prosecute minor offenses by non-Indians and Major Crime Act offenses, apparently springs from this judgment. This analysis of the problem may be accurate in some locales but we doubt that it addresses the actual problem experienced on most reservations.

Aside from the legal inability of tribes to try non-Indians, the principal problem appears to arise from the reluctance on the part of many United States Attorneys to fill the gap left by *Oliphant* and vigorously prosecute the minor offenses previously handled by tribal courts. This reluctance stems partly from the emphasis which most United States Attorneys place on the prosecutions of felonies and white collar crime. The day-to-day misdemeanors creating problems in Indian country are simply not considered important. This orientation along with a lack of sufficient staff, transportation and communication difficulties, and an apparent insensitivity towards law enforcement problems generally in Indian country suggest an overall subpar performance of United States Attorneys in Indian country. To address this problem and acquire some sense of its magnitude it might be appropriate for Congress to conduct a series of oversight hearings for the purpose of determining how responsive United States Attorneys are in those western states where most of the reservations are located. If those hearings should reveal a need for additional magistrates in certain locations and a desire by the affected tribes to have them, then we suggest that existing statutory authority would probably prove sufficient to provide them.

Pursuant to the Federal Magistrates Act of 1968, federal district judges may appoint federal magistrates and delegate a broad range of power to them, including the authority to try petty offenses and sentence a maximum of six months imprisonment and $1,000 fine, issue arrest and search warrants and subpoena witnesses. It appears that this authority alone would be sufficient to place magistrates in Indian country where necessary. This, however, may not significantly affect the law enforcement problems in Indian country. Unless criminal complaints are processed before the magistrate by the United States Attorney, the magistrate has no case load. Also under present law criminal defendants can refuse to have their case heard by a magistrate and thus have it transferred to federal district court for trial. These factors could result in the magistrate's duties consisting primarily of pre-trial conferences, reviewing requests for arrest warrants, arraignments and other such matters. While this could be helpful on those reservations where a heavy criminal case load is handled, we doubt that it would be a significant advancement in law enforcement for most tribes.

Regardless of what measures, if any, are taken by Congress to implement a magistrate concept in Indian country, it should logically include an amendment to the Assimilative Crimes Act, 18 U.S.C. § 13, which would enable federal courts

(and magistrates) to have the power to enforce tribal law against non-Indians. It is our understanding that the Assimilative Crimes Act presently serves as a useful tool, available to federal authorities on a discretionary basis, to police criminal activity in federal enclaves which are not covered by federal statute. In this context, it can be effectively argued that tribal laws which protect unique tribal interests ought to be assimilated as federal law where the prohibited activity is engaged in by non-Indians who, by virture of the *Oliphant* decision, are completely outside the jurisdiction of tribal authorities. Since the "vacuum in federal law" theory is the premise of the Assimilative Crimes Act, it would seem to be particularly justified in the context outlined above. This recommendation, including the proposal to amend the Indian Civil Rights Act to increase sentencing powers of tribal courts, should properly be viewed in the same context.

Mr. PARKER. As we mention in our statement, our organization recently sponsored and conducted in Phoenix, Ariz., a meeting which we called an investigative hearing into the administration of justice on Indian reservations. That hearing was conducted early in January and at that hearing some 16 witnesses presented testimony to a panel of representatives from the Federal Government including the White House, Department of Justice, Department of Interior, HEW, Legal Services Corporation, and the National Center for State Courts. It was chaired by two members of our organization's staff.

The primary elements in our testimony will be derived from the hearing record that was developed at that meeting, and our organization intends to publish a report which summarizes the testimony presented there. We will be pleased to present it to the committee at a later date—in approximately a month.[1]

Mr. Chairman, the proposed magistrates bill, which I understand is made more specific by the draft which your staff provided to witnesses this morning, I feel, would be opposed by representatives who testified at our hearing if it were interpreted to expand the scope of Federal jurisdiction. I think the tribal representatives have presented to congressional committees and to executive agencies over a number of years their sense that the Federal authorities were not adequately enforcing what Federal jurisdiction existed with respect particularly to criminal offenses by non-Indians on reservations.

If you analyze the reason those Federal efforts have been deemed to be inadequate, I think you will come up with some very obvious conclusions. No. 1, in our experience, there is a lack of commitment on the part of U.S. attorneys serving areas or States where there is a significant Indian population; a lack of commitment to policing the type of predominantly minor offenses committed on reservations. I think that, for the most part, U.S. attorneys view their role as having responsibility primarily for major felony offenses as well as white collar crimes. The type of offenses which are viewed as significant problems by the residents, both Indian and non-Indians, on the reservation are not viewed as priority matters by U.S. attorneys' offices. So, I think it is a question of policy of the U.S. attorneys' offices and the degree of priority to which they would assign the prosecution of what they would view, I think, as housekeeping duties.

No. 2, it is our understanding that the law enforcement services that would prosecute and investigate offenses for presentation before Federal courts have obviously been inadequate. Earlier this morn-

[1] Material not received at time of printing.

ing, a witness described to the committee a situation in Montana where there is a U.S. attorney in Butte with an assistant in Billings and an assistant, I believe, in Great Falls to serve a State which covers 700 miles from east to west and another 300 miles from north to south.

I think the custom in the past has been that U.S. attorneys, whether they are prosecuting a case before the magistrates' system or before the district judge, rely almost exclusively on the investigative services of the Federal Bureau of Investigation, and that has been a significant problem in terms of having the manpower to go out and investigate crimes and present a good case for prosecution. I understand there is no legal reason why U.S. attorneys could not rely on local law enforcement services, including those of tribal officials, to form this investigative service. I think if that custom were adopted there would be a significant improvement in the capabilities of U.S. attorneys' offices to police criminal activity on reservations.

Before turning the microphone over to my colleague, I would like to mention two other legislative proposals which were presented at our Phoenix session. I think they should be viewed in the same context by the committee as it considers this very complicated question of jurisdiction on Indian reservations, namely, a proposal to amend the Indian Civil Rights Act to increase the sentencing power of tribal courts, and, second, a proposal to amend what is called the "Assimilative Crimes Act," title 18, United States Code section 13, an amendment which would authorize Federal authorities to prosecute essentially tribal offenses or offenses of tribal ordinances.

The legislative history to the 1968 Indian Civil Rights Act reflects a sense of Congress that they were simply incorporating the penalty provisions which presently govern Courts of Federal Regulation, or CFR courts, that is, a $500 limit on fines that those courts can impose and a 6-month detention limit. Those limits existed in the Federal regulations prior to the 1968 Civil Rights Act. It is my understanding of the legislative history that they were simply borrowed and incorporated into the 1968 Indian Civil Rights Act with little, if any, attention directed to the effect of imposing those penalty limits on tribal courts as distinct from the Code of Federal Regulation courts which are really just arms or instrumentalities of the Federal Government.

I think the progress the tribal courts have been making in increasing their capability to effectively administer justice warrants an examination of amending those penalty limits and setting them at some reasonable level.

Second, the Assimilative Crimes Act, which has been on the books for quite a while, exists for the purpose of authorizing Federal authorities to, in effect, fill in a vacuum in Federal law when they are exercising jurisdiction over what is called Federal enclaves—the National Parks Service, military reservations, and to some extent Indian reservations. The idea there, again, essentially was that Federal statutes would not cover a lot of housekeeping kinds of offenses and that, therefore, Federal authorities were authorized to, in effect, borrow or assimilate State law to make sure that they had authority to prosecute where there were vacuums in Federal law.

I think that rationale applies equally to tribal offenses. That is, where you have Federal authority, whether it is presenting cases before magistrates or district courts, policing Indian reservations where the areas of jurisdiction are properly spelled out, they should also be able to police reservations and enforce tribal ordinances against non-Indians since that vacuum results from the *Oliphant* case.

I think there is adequate justification, and this is, in a sense, a special case where the Federal authorities would be using their discretionary power to enforce the Assimilative Crimes Act. If the Assimilative Crimes Act included tribal ordinances, I think that would be a significant help to Federal authorities in terms of being able to respond to a vacuum in the law that results from the *Oliphant* case.

I would like, at this time, to ask my colleage, Mr. Hall, to amplify our testimony with respect to the issue of tribal courts.

Mr. HALL. Mr. Chairman, at the Phoenix meeting which our organization conducted, we took some 300 to 400 pages of testimony. We are not going to attempt to summarize all that to this committee, but I would like to point out one overriding conclusion, which came out of it as far as our staff's ability is concerned in analyzing that testimony.

Tribal courts can indeed and should serve a very important and long-term function in addressing the law enforcement problems in Indian country. There was a great deal of discussion at the proceedings about the shortcomings in tribal courts, and they are great, indeed. There is no question about that. Those of us who worked with them actively see it daily.

There are approximately 120 Indian courts in the United States exercising a whole range of jurisdiction, some fairly and effectively—civil and criminal jurisdiction both—some with great shortcomings, which is going to take a long-term effort to overcome.

The people who testified at our proceedings presented a long list, a litany, if you will, of shortcomings of the tribal court system, and they were very, very consistent with a survey which the American Indian lawyer training program conducted in 1977 and a survey which the Native American Indian Court Judges Association conducted the following year. The list was long, and it was somewhat discouraging in the sense that it is going to take a long-term effort to overcome.

They talked a great deal about the need for better court facilities, across-the-board court facilities all the way from courtrooms to facilities for clerks, to holding rooms, to jails, et cetera. They talked at some length about the need for better training for all court personnel: Judges, prosecutors and defenders, law enforcement officers, clerks, et cetera. They talked at some length about the need for more prosecutors and defenders in tribal court systems, the need for research support, law libraries, law interpretation services, better recordkeeping, and more effective appellate systems.

They also felt confident, however, that all of that could be done. As a result, there was some discussion of a concept which our organization, again, came up with about 2 years ago. That is to create a federally assisted entity which we characterize as the Indian Tribal Justice Center.

This would be an institute which would provide research facilities, training, and day-to-day advice to those tribal courts that requested it.

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Its purpose would be the long-term upgrading and support of the tribal judiciary.

We would suggest that that institute could serve an important role in helping tribal courts to fill some of the gaps in law enforcement in Indian country which we are addressing today including, I might add, in some circumstances, the exercise of criminal jurisdiction over non-Indians.

However, our written testimony suggests that a possibility, short of a massive delegation of criminal jurisdiction to the tribes, is this. Some tribes may not want criminal jurisdiction over non-Indians at all, and some of those that may want it do not have currently the facilities or the capabilities to exercise jurisdiction fairly and efficiently; some do. We are suggesting that consideration be given to establishing a criteria by which criminal jurisdiction over non-Indians should be delegated back to tribes, by, presumably, the Department of Interior or the Department of Justice, in those circumstances in which the criteria were met by the tribal courts and the governing body on that reservation. The criteria could be a look at the tribal court, its effectiveness, the size of its caseload, what percentage of non-Indians might be living on the reservation, and so on.

If a tribe requested that delegation of criminal jurisdiction and complied with the criteria, then it could be delegated back. I say "delegated" because it is really a Federal jurisdiction which is being delegated to the tribe.

The point of those hearings and the point of our testimony this morning, in effect, is that tribal courts, we feel, should not be ignored as a viable institution for dealing with law enforcement problems in Indian country. And addressing their problems and their needs should necessarily, be a part of the overall look at law enforcement in Indian country.

Thank you, Mr. Chairman.

Senator MELCHER. Is your testimony in favor or not in favor of legislation being drawn up—of enactment of S. 1181?

Mr. PARKER. May I respond to that, Mr. Chairman? I think it could best be characterized as neutral. We are a private organization. Tribal representatives are more than prepared to respond and take positions on that. Clearly, a proposal to authorize and encourage tribal-State compacts, tribal-State agreements, is something well supported out in Indian country, but obviously there have been people who have raised significant questions about the language of the bill and whether it is actually needed as a matter of law.

Senator MELCHER. Are you testifying in favor or not in favor of section 161(i) of S. 1722?

Mr. PARKER. I think there is little question, Mr. Chairman, that we could report that, to the extent that we know the position of tribal representatives, they are overwhelmingly in favor of the retrocession provision in the Criminal Code.

Senator MELCHER. Does that mean they have given it attention, or have you had any indication?

Mr. PARKER. I think the Justice Department held hearings in the last Congress and in the Congress before that—I believe the 94th Congress. The bill, S. 2010, was introduced, and extensive hearings were

held before the then Interior and Insular Affairs Committee. S. 2010 was essentially a retrocession proposal. At that time, the national Indian organizations and representatives of tribal organizations were unequivocally in support of that proposal. And the section in the Criminal Code provision essentially tracks that proposal in S. 2010 in concept.

Senator MELCHER. My understanding is that S. 2010 was not acted on in any way, even in the committee.

Mr. PARKER. That is right. There were just hearings held, and I do not think the committee took a vote or any action on it.

Senator MELCHER. It is also my understanding that in the last Congress the predecessor of S. 1722, or whatever it was, did not originally contain this particular section. That was inserted after. I think two witnesses testified for it. Is that correct?

Mr. PARKER. I am not sure of the record there, Mr. Chairman, but I believe that you are correct—that the provision was inserted at markup. It was a committee-proposed amendment.

Senator MELCHER. So it was not a question of the committee asking for testimony on it; it was just added on later.

Mr. PARKER. The history of that particular provision in the Criminal Code—and I can speak from some personal knowledge, having been on the staff of the Interior Department Solicitor's Office at the time the Brown Commission first came up with their proposal, which was the first vehicle for the Criminal Code Reform Bill——

Senator MELCHER. What year was that?

Mr. PARKER. I believe it was 1972.

At that time, they did not include a retrocession provision. S. 1 was the first bill actually introduced to reform the code, and that contained no retrocession provision.

Senator MELCHER. Did you say it did or did not?

Mr. PARKER. It did not. That is my understanding or my recollection. But I also can speak from personal knowledge, that the committee staff was simply unaware that that was an issue. I believe that the Judiciary Committee and its staff was presented with the Indian position. They responded by including the retrocession provision, so, essentially, it was a matter of oversight.

I do not feel, based on my personal knowledge of the background of that bill, that there was a conscious, deliberate decision made by the bill's sponsors not to include that section.

Senator MELCHER. You are aware, of course, that when a Senate or a House committee presents a bill and asks for testimony on the bill, the provisions that are in there are open for anyone to give their opinion on. Along that same line of thought, if the bill would mean, for instance, the State of California had a full assumption of jurisdiction, an Indian tribe or band in California, if it were to ask for retrocession, would have it easily granted. We might assume that it might be easily granted. What does that mean for the State of California?

Mr. PARKER. With respect to the State of California, I think, obviously, the State is going to have an interest in whether those tribal governments have the capability to effectively administer justice within the territorial boundaries over which they would have jurisdiction.

Senator MELCHER. Under the terms of this section, as I understand it, the State of California does not have anything to say about it.

Mr. PARKER. That is correct. That is my interpretation of the section; that it does not provide for a State approval or veto.

Senator MELCHER. Should they have something to say about it?

Mr. PARKER. As a practical matter, I am sure their representative would make their views known to the Secretary of the Interior in the context of his review of a tribal resolution and request for retrocession.

Senator MELCHER. As I read this section, the Secretary is not directed, required, or even encouraged to ask the State of California what their views are. In fact, it could be granted without the State of California knowing that it was being granted, could it not?

Mr. PARKER. Theoretically, but as a practical matter I doubt that would be the case.

Senator MELCHER. Why do you say that?

Mr. PARKER. Because of the present-day experience. Under the Indian Child Welfare Act retrocession provision, the Indian Child Welfare Act is narrowly drawn, and it only authorizes retrocession of jurisdiction over child custody matters. And under the same essential mechanism, that is, a tribe presents a petition, the Secretary reviews it——

Senator MELCHER. I noticed that in your testimony. But, is there not a great deal of difference between that act and the basics of maintaining law and order? Is not the Indian Child Welfare Act dealing with the Indian child?

Mr. PARKER. That is correct. It is confined, as I said—narrowly drawn—to jurisdiction over Indian child custody matters.

Senator MELCHER. As such, would there not be necessarily a major and prime concern with, first of all, the welfare of the child, and second, the tribe? So, when we are talking about retrocession, we are talking about how it affects everyone on the reservation.

Mr. PARKER. In the context of the *Oliphant* case, this bill would now authorize retrocession over criminal jurisdiction, and if you read that with the *Oliphant* case, that means retrocession of criminal jurisdiction, essentially, over tribal members.

Senator MELCHER. The practical thing is this. If the State has been providing law enforcement mechanisms or court mechanisms, what is in place now would be severely disrupted by retrocession.

Mr. PARKER. I am not sure. This is a barebones section.

Senator MELCHER. You have the key point right there. That is the purpose of my questioning of you on this particular section. It is so bare as not to envision any State interest in the matter nor, for that matter, any individual citizen who happened to be a non-Indian resident. I think the bill is weak there. I would assume that if there had been testimony by the States, it would be important. I think we are talking about the entire State of California, the entire State of Nebraska, the entire State of Oregon, and the entire State of Wisconsin, just to name a few.

If the request for retrocession were made—which may or may not be made by a tribe, or for a group of tribes, or all the tribes in one State making a request at the same time—it might have a serious impact on the State itself, it would seem to me. The State would want to have some knowledge, or some function, or some criteria laid down

on whether the Secretary might or might not grant the request of the tribe.

Mr. PARKER. I go back, Mr. Chairman, to practical experience. The State officials are as free as tribal officials are to present their views to the Interior Department and the Secretary of the Interior. I think, as a practical matter, they have had a lot more clout than tribal representatives. So, if they are opposed to a petition for retrocession because they feel it would create a serious practical problem in law enforcement within the boundaries of their State, they are perfectly free to make a very strong case with the Secretary of the Interior. The bill does not say that the Secretary does or does not entertain State views, but as a practical matter I am sure he would. A Cabinet member is a practical politician and certainly responsible to political considerations.

Senator MELCHER. I have lived in Montana with the decisions made by the Secretary of the Interior on a whole host of things. It does not make any difference if we think they are doing the right thing in the Bureau of Land Management in the adoption of a general regulation, but we generally include in the bills we pass, in dealing with that matter, some requirement of listening to the States or listening to the individuals who would be affected by them.

But this section, as I read it—and I may be missing something—but I do not think this section even requires them to put it in the Federal Register to notify them which is always standard procedure, so that people who are interested will be at least notified that the Secretary is about to make a decision that might affect them.

Nevertheless, it is not your bill, and it is not my bill either. I want to make that very clear. We were never consulted, as a committee, on this particular section in this Congress. Perhaps the committee was consulted in the last Congress and, indeed, Chairman Abourezk was on both of the committees, so he was well aware of what was happening. And now Senator DeConcini is sitting on both this committee and the Judiciary Committee, so we cannot now claim that we do not have some knowledge of it. But we were not asked, as a committee, to provide any guidance for this section before the bill was reported.

When I become aware that this section did, indeed, lay out this procedure for retrocession, I asked Chairman Kennedy of the Senate Judiciary Committee to give us some opportunity for input prior to reporting the bill. He did not find it proper or reasonable at that time to allow us to have an input. I cannot disagree with his judgment on that because he felt that the bill had been voted on by the committee and reported out, and all that was needed was to draft the report. So, from his standpoint, I can understand Senator Kennedy's reluctance to allow us to have any input at that particular time. Perhaps we should, as a committee, have been more timely with our request.

Nevertheless, that is the way the circumstances unfolded in regard to this section of the bill. I think it is a particularly objectionable section as it is drawn. That is part of the purpose of these hearings—to see whether we can present some testimony on how to address that section, if it is to remain in the bill, and improve upon it.

Mr. PARKER. Perhaps I could make one final point, Mr. Chairman. In addition to keeping it in the context of an analysis of this particular

section, one should also consider that the existing law, the 1968 amendments to Public Law 280, authorized retrocession. Some States—Nevada, for example—by wholesale State action returned jurisdiction to all the tribes, which includes a number of very small tribes that were having difficult problems exercising that responsibility. In Nebraska, I understand that two tribes have retroceded. In Wisconsin—which you mentioned—the Menominee Tribe is now exercising tribal jurisdiction.

In addition, recent court cases have concluded that what jurisdiction does exist is concurrent between the tribe and the State.

So, if you keep all of that in context, the precedent making or the effect of this proposal would be somewhat tempered, and what is really the crucial question is whether this is going to result in a wholesale turnover of jurisdiction to small tribes or to tribes which do not presently have the capacity. I think the record would show that that is very unlikely.

As to the issue of whether the State ought to have at least a role of being consulted with respect to a petition, I believe a strong argument could be made that Federal policy has been to view these questions as questions between the tribe and the Federal Government—a government-to-government relationship—and the States have not generally been part of that process. I would argue that this is consistent with longstanding Federal policy. But, as you said, it is not my bill, either.

Senator MELCHER. Well, it is not such longstanding Federal policy. Since the passage of Public Law 280, it seems that Federal policy has changed.

Also, the question arises: If it is only needed by one or two States, then what does the record show the one or two States have agreed on?

Mr. PARKER. I think in California, for example, the majority of the tribes are very small. I do not believe that there has been a serious initiative or the question has not been seriously examined. With respect to some of the other reservations, such as in Oregon, sizable reservations, I think these tribes possess the potential to adequately exercise that jurisdiction.

Senator MELCHER. If a State can agree to retrocession for an individual tribe—and if it is true, and I am sure it is true, from the testimony of the previous witness, that the Governor of Washington is in favor of this action—does that mean the Governor is in favor but the legislature is not in favor?

Mr. PARKER. We have the representative here.

Senator MELCHER. Mr. DeLaCruz?

Mr. DELACRUZ. We had both the former Governor and the present Governor submit testimony regarding this whole issue. Governor Dixie Ray submitted testimony to the Judiciary Committee favoring retrocession. She worked for a smooth transition, government to government.

The key chairmen of the various committees in the Washington State Senate and House passed a resolution in their last session for intergovernmental relations with the Indian tribes in the State, and they just finished their session. That committee is going to meet.

The problem we have is the attorney general. Hopefully, after 1980, we will have a new attorney general, and we will not even need this

bill because we will have all the people in the State legislature wanting to turn jurisdiction back to us. But that is the way it is starting to look in the State of Washington. It is in the attorney general's office—the only opposition.

Senator MELCHER. The attorney general?

Mr. DELACRUZ. Yes. He said he won the Yakima jurisdiction case. And the legislature and the Governor had people come back with a Yakima request for appropriations to take care of that void. There are supposed to be certain jurisdiction areas that the State has jurisdiction over—over that 1.4 million-acre reservation. I note that nothing came out of the attorney general's office nor was anything introduced in the State legislature to appropriate the money to fill the vacuum that the Yakima Tribe and Federal Government was provided.

Senator MELCHER. The point comes up, of course, of the Indian reservation where a high percentage, not necessarily the majority, are non-Indian. They may fully desire that the Indian reservation not retrocede. But there is no part of the arrangement in this particular section of S. 1722 where they may take part in that decision. I would suspect that that has something to do with the legislature's action, one reason why they do not want this type of legislation passed.

We simply have not been apprised of a great number of tribes being in favor of that option; that they could either exercise or not exercise and ask for retrocession. But the purpose of the public hearings is to find out how many tribes would be interested in retrocession.

I appreciate the testimony of both of you in all these matters of jurisdiction. The committee will be anxious to review also anything further you wish to submit concerning your meetings in Phoenix, Ariz., and any other matters you believe are pertinent.

Our hearing record will remain open for at least 30 days because we realize that written testimony will be submitted by a number of witnesses, and we, of course, want to read that prior to any action on the Federal magistrates concept or action on S. 1181 since S. 1722 is already awaiting action on the Senate floor, and that may be within the matter of the next 2 or 3 weeks.

We would appreciate it if anyone who has further testimony with regard to that particular section of S. 1722 dealing with retrocession would get that testimony to us as soon as possible, hopefully even by the end of this week. Whatever this committee's recommendation on this particular section will be, we need to formulate that view within the next 10 days, should the bill be taken up on the Senate floor within that period of time.

Thank you very much. The committee is adjourned.

[Whereupon, at 12:35 p.m., the hearing was adjourned to reconvene at 10 a.m., Tuesday, March 18, 1980.]

JURISDICTION ON INDIAN RESERVATIONS

TUESDAY, MARCH 18, 1980

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to recess, at 10:10 a.m., in room 1224, Dirksen Senate Office Building, Senator John Melcher (chairman of the committee) presiding.

Present: Senator Melcher.

Staff present: Max Richtman, staff director; Peter Taylor, special counsel; Jo Jo Hunt, staff attorney; Tim Woodcock, staff attorney; Susan Long, professional staff member; and Doris Ballard, secretary.

Senator MELCHER. The committee will come to order.

This morning we will continue our hearings on S. 1181, Section 161 (i) of S. 1722, and the Federal magistrates concept. All three have to do with jurisdiction on Indian reservations.

The first witness this morning will be Rick Lavis, Deputy Assistant Secretary for Indian Affairs, Department of the Interior.

STATEMENT OF RICK LAVIS, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY HANS WALKER, ACTING ASSOCIATE SOLICITOR, DEPARTMENT OF THE INTERIOR; RALPH REESER, CHIEF, LEGISLATIVE LIAISON OFFICE, BUREAU OF INDIAN AFFAIRS; AND GENE SUAREZ, CHIEF, LAW ENFORCEMENT AGENCY, DEPARTMENT OF THE INTERIOR

Mr. LAVIS. Thank you, Mr. Chairman.

Mr. Chairman, I would ask that my statement on S. 1181 be made a part of the record.

Senator MELCHER. Without objection, it will be made a part of the record at the end of your testimony.

[The statement appears on p. 131.]

Senator MELCHER. You may proceed.

Mr. LAVIS. Before I proceed, let me indicate that Mr. Hans Walker, Acting Associate Solicitor for Indian Affairs is to my left, and to my right is Mr. Ralph Reeser, who is the Chief of our Legislative Liaison Office.

Mr. Chairman, I am pleased to testify in favor of S. 1181, the Tribal State Compact Act, with certain amendments which are more fully set out in our report to this committee on the bill.

S. 1181, would authorize the States and Indian tribes to enter into agreements and compacts respecting jurisdiction and governmental operations in Indian country. Title I would authorize jurisdictional agreements and compacts for periods of up to 5 years between States and Indian tribes. It would also permit the Secretary of the Interior to provide financial assistance for the implementation of such agreements and compacts.

Title II would direct the Secretary to encourage the establishment of joint tribal-State organizations to confer on jurisdictional questions existing between the parties.

Title III would grant Federal district courts jurisdiction over civil actions brought by the parties to enforce agreements and compacts authorized by the bill.

The U.S. Supreme Court has consistently held that State jurisdiction over tribal members or infringement on the self-governing power of a tribe is permissible only with the consent of the Congress. A tribe may not unilaterally grant a State any jurisdiction over tribal members.

The bar to State jurisdiction on Indian reservations has, however, been modified by the Court where essential tribal relations are not involved and the rights of Indians are not jeopardized thereby. Thus, suits by Indians against non-Indians have been permitted in State courts and those courts have been permitted to try non-Indians who commit crimes against each other on a reservation.

However, if a crime is committed by or against an Indian, tribal jurisdiction or jurisdiction expressly conferred on another court by the Congress has remained exclusive. Absent governing acts of Congress, the decisions in the cases set out in our report on the bill indicate that the question has been whether State action infringes on the right of reservation Indians to make their own laws and be ruled by them.

Enactment of S. 1181 would provide clear authority for jurisdictional agreements between Indian tribes and States. We believe that such agreements would lead to the more effective and efficient discharge of governmental responsibilities in Indian areas.

S. 1181 would not enlarge or diminish the governmental powers of States or Indian tribes. It would simply allow these entities to allocate between themselves certain governmental responsibilities.

Thus, agreements would vary as the circumstances demand and the participants determine to be best. Allocation of responsibilities by the involved parties would be consistent with the policy of Indian self-determination and is, we believe, preferable to the allocation of such responsibilities by the Federal Government.

S. 1181 would not provide that agreements and compacts must be approved by the Secretary of the Interior. Many agreements, however, would undoubtedly involve tribes with constitutional provisions requiring departmental approval of any tribal resolution relating to the administration of justice. Where such a requirement applies to a tribal resolution implementing an agreement or compact, that resolution would, of course, be subject to departmental approval.

Agreements involving tribes that have no such constitutional requirement would not be subject to such approval. Appearance of the

Secretary's signature on an agreement or compact for purposes of publication in the Federal Register, as required by section 101(c) of S. 1181, would not constitute departmental approval of such agreement or compact.

Title I of S. 1181 would also provide, upon agreement by the Secretary, for Federal financial assistance for the implementation of agreements and compacts authorized by the bill. We note that agreement by the Secretary cannot carry with it any obligation for funding beyond those funds available to the Secretary under the appropriations acts for the year in which the Secretary's agreement is given.

Title II of the bill would authorize the payment of expenses for the activities of individuals involved in addressing jurisdictional issues.

As already stated, we support a congressional grant of authority for State and tribal governments to enter into compacts. However, we do not support the authorization of financial assistance, as provided by section 102, to pay for personnel, administrative, and indirect costs resulting from such compacts.

Since the bill does not involve any shift of Federal responsibilities to the parties but is rather a redistribution of existing responsibilities among the parties, we see no justification for Federal funding of strictly State and local activities. At a time when both Congress and the administration are striving to curb Federal financial obligations, we believe the enactment of this additional financial assistance would both set a costly precedent and be unwarranted.

However, we would not object to the retention of the provisions of section 102(d), which would facilitate funding of compact functions through existing agency programs, if amended by adding before the period at the end thereof the following: "in accordance with statutes and regulations governing the use of such funds." This would make clear that the funds could not be used for activities other than those intended by other authorizing and appropriations legislation.

With respect to title II of S. 1181, we believe that the authorization of appropriations for the subject activities should be made under the Snyder Act—the general BIA appropriations authority—and accordingly we urge deletion of the appropriations authorization for title II.

Our report on S. 1181 includes some additional suggested amendments to S. 1181 including amendments which were also suggested to the committee by the Department of Justice. We believe that the enactment of S. 1181 with the amendments suggested would provide an effective means for Indian tribes and States to resolve their jurisdictional conflicts.

This concludes my statement on S. 1181.

Concerning S. 1722, we strongly support the premise of section 161 (i) that Indian tribes should have a decisive voice in determining which governmental entities are to have, and the extent to which they shall have, civil and criminal jurisdiction over the reservations of such tribes.

Section 161(i) of S. 1722 would provide for a reacquisition by the United States from States of criminal jurisdiction over Indian country which the States received under Public Law 83-280 or other Federal statutes. The reacquisition in each case would be based on a tribal

resolution approved by a majority vote of the affected Indians in an election called by the Secretary of the Interior. The reacquisition would be subject to the consent of the Secretary and would be effective 90 days following adoption of the resolution.

Section 161(j) of S. 1722 would provide that a Federal reacquisition of jurisdiction under subsection (i) would not cut off State court jurisdiction or the application of State law with regard to offenses committed prior to the effective date of the Federal reacquisition.

The purpose of section 161(i) of S. 1722 is to enable Indian tribes, which are subject to State civil and criminal jurisdiction as the result of certain Federal legislation, to have that jurisdiction restored to the United States and the tribes under certain circumstances. The Congress had granted some States some jurisdiction over Indians prior to the 1950's. However, the major legislative actions were taken in the 1950's in accord with the now discredited policy of termination of the special Federal-Indian relationship. Of these legislative acts the most far reaching has been Public Law 83-280.

The Congress adopted House Concurrent Resolution 108 on August 1, 1953 (67 Stat. B132). One of the expressed purposes of the resolution was to subject Indians within the United States to the same laws as were applicable to other U.S. citizens, thus subjecting Indians to State jurisdiction.

Consistent with this policy, on August 15, 1953, Congress enacted Public Law 83-280 (67 Stat. 588) which divided the States into three groups, each of which was either granted civil and criminal jurisdiction over Indian country or was given a method by which such jurisdiction could be acquired. We are enclosing a more detailed statement of the provisions and history of Public Law 83-280 with this report.

Senator MELCHER. That will be included in the record along with your prepared statement.

[History of Public Law 83-280 and related provisions appear on p. 134.]

Mr. LAVIS. House Concurrent Resolution 108 expressed the sense of the 83d Congress that Indian tribes should be freed from Federal supervision at the earliest possible time and Indian property should be transferred to the Indian owners free of any Federal trust. The 83d Congress was attempting to compel assimilation by severing Federal-Indian relations and discontinuing Federal protection and services to Indians. Conferring jurisdiction on States over Indians and Indian country was one important step in the process.

House Concurrent Resolution 108 has never been expressly repudiated, but termination has been repudiated as a Federal policy by the executive branch in statements by Presidents Johnson, Nixon, and Ford. President Carter has spoken of assuring the maintenance of our trust responsibility for our Indian citizens.

Congress has by implication repudiated termination as a Federal policy by enacting the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450; Public Law 93-638) in 1975. In section 3(b) of that act the Congress declares its "commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy * * *".

Further evidence that the policy of termination has been discredited is Public Law 93–197 (25 U.S.C. 903) which provided for the restoration of the Menominee Indian Tribe in Wisconsin to full Federal services and Indian reservation status with land once again held in trust by the United States. Two other restoration acts have been enacted since the Menominee Restoration Act.

The Civil Rights Act of 1968 (Public Law 90–234; 82 Stat. 77) now requires tribal consent before any States may assume further jurisdiction over Indian country. However, the impact on tribes of pre-1968 State assumption of jurisdiction is heavy. Some Indian tribes under State jurisdiction have complained loudly of State and local government refusal to provide police protection on reservations, of discrimination against Indians in arrests and convictions, and of inability of State and local officials to understand Indian values, moral standards, social organizations, and attitudes.

Further, tribes complain that States have attempted to move into jurisdictional areas not authorized by Public Law 83–280, such as taxation and zoning. Other problems stem from unclear jurisdictional boundaries where States have assumed partial jurisdiction. The result is confusion, conflict, and inadequate law enforcement services for many of the tribes involved.

It is difficult to precisely estimate the costs to the United States that would result from the enactment of section 161(i). However, we believe that the maximum, if there were a wholesale reacquisition of all criminal jurisdiction acquired by States, would be one-time start up costs aggregating $10.5 million and annual costs thereafter aggregating $8 million. We defer to the Justice Department as to the sum of their additional expenses.

Either section 161(i) should be amended, or by regulation we would set out the procedure required to obtain the secretarial consent called for in the section.

Under such a procedure a tribe seeking an end to State-acquired criminal jurisdiction would have the primary responsibility for drawing up a plan to implement a tribal law enforcement and court system, if it does not already have an adequate one in place, to replace the State jurisdiction for all but the major crimes for which Federal jurisdiction is appropriate under current law.

The current maximum limitation on tribal court sentences—6 months in jail and a $500 fine—is set out in section 202 of the Civil Rights Act of 1968 (25 U.S.C. 1302). Only in the most extenuating circumstances—for example, where a breakdown of State law enforcement threatens lives—would we consider a reacquisition of criminal jurisdiction for which it would be necessary for the BIA to establish a BIA Court of Indian Offenses and a BIA police force instead of tribal courts and tribal police.

Such a procedure would also require Department of the Interior and tribal consultation with the appropriate State and local officials and with the Department of Justice on the tribe's request and plan in order to assure that the ending of State jurisdiction is achieved in a desirable and orderly fashion.

In addition to the above consultation such a procedure would provide for approval of the Federal reacquisition if: No. 1, the tribe's

plan contains an adequate criminal law and order code; No. 2, the tribe has the capacity to implement the plan and, if the plan calls for Federal assistance, such assistance can begin as proposed; No. 3, the resident tribal membership is not so small or scattered as to make the Federal reacquisition of criminal jurisdiction clearly impracticable; and No. 4, in cases where the tribe has proposed only a partial Federal reacquisition of criminal jurisdiction, the proposed allocation of jurisdiction among the tribe, the United States, and the State is practicable, and the appropriate State official has agreed that the appropriate jurisdiction will remain with the State.

Because it might not be possible for the required consultation, tribal election, and development of an acceptable tribal plan to all be accomplished within 90 days of the adoption of a tribal resolution, we recommend that section 161(i) be amended by inserting "(or such later date as may be agreed to by the chief executive officer of the tribe and the Secretary of the Interior)" on page 354, line 23, after "such grant or assumption,". This would avoid the necessity for Secretarial disapproval of a request when the necessary requirements cannot be met within the 90-day period.

The Office of Management and Budget has advised that there is no objection to the presentation of this statement from the standpoint of the administration's program.

This concludes my statement on S. 1722.

Finally, on the magistrates question, I will read from the statement prepared by Hans Walker. The subject has its origins both in the long established legal status of jurisdiction on Indian reservations and in recent developments in the law.

Under the General Crimes Act (18 U.S.C. 1152) the Federal Government has long exercised jurisdiction over offenses committed by non-Indians against Indians and crimes by Indians against non-Indians. In 1883 the Supreme Court ruled in *Crow Dog* that crimes committed by Indians against other Indians in Indian country are within exclusive tribal jurisdiction.

Congress responded by passing the Major Crimes Act, providing for Federal jurisdiction over certain serious offenses when committed by an Indian on an Indian reservation, without regard to who the victim is. The Supreme Court has ruled in the *McBratney*, *Draper*, and *Martin* decisions that States have exclusive jurisdiction over offenses committed by non-Indians against other non-Indians in Indian country.

While Federal jurisdiction over crimes in which both accused and victim are Indians is limited to certain specified serious crimes, the United States has jurisdiction over even the most minor offenses involving Indian against non-Indian or non-Indian against Indian. A problem is thereby created because the Federal criminal justice system is designed primarily for serious cases.

This is reflected in the familiar expression, "Don't make a Federal case of it!"—meaning, "Don't treat it as a serious matter." The view that Federal courts should be reserved only for the most serious offenses is also reflected in the FBI's policy of emphasizing quality not quantity in deciding where to place its investigative priorities.

Because of the Federal Government's special concern for the protection of Indian interests—as described in both the *Kagama* and

Oliphant decisions—Congress has chosen to make a Federal case of the prosecution of offenses that are ordinarily regarded as rather minor.

In most instances the Federal criminal justice system can afford to concentrate only on the most serious offenses because State courts have ample jurisdiction over most minor offenses. Even when a minor offense does violate a Federal criminal statute the U.S. attorneys frequently decline to prosecute since they know the matter can be handled adequately in State courts.

To a certain extent this approach also works with tribal courts. Tribal courts, however, operate with two major limitations on their jurisdiction that are not imposed on State courts. Since the passage in 1968 of the Indian Civil Rights Act tribal courts are limited to imposing a penalty of not more than $500 and 6 months in jail for any single offense. In 1978 the Supreme Court ruled in the *Oliphant* decision that tribal courts have no criminal jurisdiction over non-Indians unless Congress gives it to them.

An unresolved problem exists with respect to crimes committed by non-Indians against Indians because the courts have not ruled definitively on whether States have jurisdiction over such offenses. The Office of Legal Counsel in the Justice Department has indicated its view that a strong possibility exists that prosecution may be commenced under State law against a non-Indian whose illegal conduct represents a direct and immediate threat against an Indian person or property.

It should be noted that while a single minor offense may pose no great threat to the community, a systematic failure to prosecute minor offenses can pose a serious danger to the peace and well-being of a community. Uncontrolled vandalism, for example, can quickly create very serious problems for a community.

We believe the establishment of Federal magistrates with jurisdiction to try minor violations of Federal criminal laws on Indian reservations could be a way to accommodate the need of Indian communities for the protection promised by Federal laws with the need of Federal district courts to concentrate most of their resources on serious offenses. However, it is not clear that an increased use of magistrates would be the best approach.

Such an approach would create a special section of the Federal judiciary that would view the handling of minor offenses as their primary responsibility rather than as a nuisance. Such magistrates would view themselves as part of the local criminal justice system on a par with county and tribal courts.

It could be very helpful to have U.S. magistrates close at hand to perform their normal duties of issuing search and arrest warrants and handling preliminary hearings in criminal cases.

We are aware that some concern has been expressed that such a Federal magistrate system might tend to infringe on the existing jurisdiction of tribal courts. With respect to offenses committed by non-Indians there would appear to be no problem since tribal courts lack jurisdiction over non-Indians under the *Oliphant* decision.

The problem could arise with respect to minor crimes committed by Indians against non-Indians, a situation in which there is now concurrent tribal and Federal jurisdiction. In that case, Congress might

wish to limit any special authority for Federal magistrates on Indian reservations to those offenses committed by non-Indians against Indians.

The failure of the Federal criminal justice system to perform adequately its special responsibilities as part of the local criminal justice system on Indian reservations has long been a major concern for Indian tribes and this Department. Tribal assertion of criminal jurisdiction over non-Indians was, at least in part, an effort by the tribes themselves to compensate for the inadequacies of the Federal system. Now that the *Oliphant* decision has ruled out that approach, Federal action may be needed.

Both before and after the *Oliphant* decision, we have been working with the Department of Justice and in consultation with Indian tribes to develop a solution to the problem, but we can make no specific recommendations for legislative action at this time.

This concludes our statements. We would be happy to answer any of your questions on all three issues.

Senator MELCHER. First of all, with respect to S. 1181, we heard some testimony yesterday that the authority already exists under present law for Indian tribes and States to enter into a compact agreement. Is that, in your judgment, correct?

Mr. LAVIS. My understanding is that is correct, Mr. Chairman, but I also understand—you might ask my solicitor to comment upon it—that it is somewhat questionable and somewhat vague. However, it does apparently exist.

Our position here is that it would clarify that issue. There would be no legal doubt as to the status of those compacts or agreements.

Hans, do you want to comment?

Mr. WALKER. Yes. There is authority in the Indian Reorganization Act for agreements by tribes with States and other local governments, but with respect to the granting of jurisdiction, the Supreme Court in a case involving the Blackfeet Tribe ruled that the Civil Rights Act provision under Public Law 83-280 for the granting of jurisdiction to the State was the controlling provision and could only be accomplished by following the provisions of that act.

Hence, it would require, first of all, a vote by the membership of the tribe before a grant of jurisdiction could be made to the State. The entire question of jurisdiction is controlled by that provision of the Civil Rights Act.

Senator MELCHER. Is that the only provision?

Mr. WALKER. That is the only provision.

Senator MELCHER. Are there any tribe's constitutions which require a vote of the tribe?

Mr. WALKER. Yes, it is very likely that some tribal constitutions require a vote of the tribe before there is any change in their jurisdictional status.

Senator MELCHER. My question was: Are there any tribes whose constitutions would not require that?

Mr. WALKER. I am certain there are. I do not know for certain. It is generally true that tribes, when they make a change in their jurisdictional status, require a vote by the tribe.

Senator MELCHER. Do you know of any that do not?

Mr. WALKER. No; I do not.

Senator MELCHER. If 161(i) were enacted into law, what is the attitude of the State of Alaska toward the provision?

Mr. LAVIS. Mr. Chairman, I have no knowledge of the position of Alaska.

Senator MELCHER. I ask these questions because Alaska is one State where there is a full assumption of jurisdiction.

Mr. REESER. Mr. Chairman, the only reservation, as such, is Metlakatla and they have had special language added in an amendment to Public Law 83-280 to give them the kind of tribal jurisdiction that they wanted.

Senator MELCHER. Does the State of Alaska have jurisdiction over all the villages?

Mr. REESER. Yes, sir.

Senator MELCHER. Will this section of S. 1722 not apply to each and every one of those villages?

Mr. REESER. It might. That is why, in our detailing of the criteria for accepting of reacquisition, one of the criteria deals with the size of the population and area involved. If it is not practical for us to set up a separate law and order operation for some village in that State, we would not accept the reacquisition.

Senator MELCHER. Who is we?

Mr. REESER. The Secretary.

Senator MELCHER. Are you speaking of the present Secretary, future Secretaries, or past Secretaries?

Mr. REESER. I guess we can only speak for the present Secretary.

Senator MELCHER. Then you cannot speak for any future Secretaries.

Mr. REESER. We cannot unless the criteria we set out are added to section 161(i).

Senator MELCHER. Did you have any assistance in drafting this section of the bill?

Mr. REESER. No, sir, we did not draft it.

Senator MELCHER. Do you know who drafted it? Do any of you know?

Mr. REESER. I assume it was drafted by the Senate staff——

Senator MELCHER. Of the Judiciary Committee.

Is it your opinion that they are expert in how to draft such legislation?

Mr. REESER. I assume they are, sir.

Senator MELCHER. I do not. I think the way it is drafted, a village in Alaska could well ask the Secretary to make the decision on retrocession. Do you interpret it that way?

Mr. REESER. Yes, sir. They could ask.

Senator MELCHER. Has the State of Alaska ever commented to the Department on this?

Mr. REESER. I do not recall that they have.

Senator MELCHER. Are they aware of it?

Mr. REESER. I do not recall if they commented during the hearings in the 94th Congress or not. Several States did. I do not remember if Alaska was one of them.

Senator MELCHER. Did you say several States commented on this?

Mr. REESER. Yes; to the Senate Interior Committee.

Senator MELCHER. What is your information?

Mr. REESER. The State of Washington is the one I recall for certain.

Senator MELCHER. We have had a letter from the State of Washington. Were there any others that you know of?

Mr. REESER. No, sir. I would have to look back at the hearing.

Senator MELCHER. Concerning Arizona—I am just going alphabetically—it says that under Public Law 83-280, if this section were enacted, the Indian tribe could ask for assumption of jurisdiction over air and water pollution. Is that correct?

Mr. REESER. Yes; I think so. Hans, do you agree?

Mr. WALKER. There is some provision in the Clean Air Act. I am not sure how this would affect that. It may be that that is the controlling statute.

Senator MELCHER. Are you saying that you do not know?

Mr. WALKER. We do not know.

Senator MELCHER. Has California ever talked to the Department about this section of the bill?

Mr. REESER. That was one of the States that testified or sent in a statement at the hearings of the 94th Congress.

Senator MELCHER. What was their testimony?

Mr. REESER. I believe they felt that it was not necessary to authorize the tribes to return jurisdiction.

Senator MELCHER. What about Florida? [No response.]

How about Nebraska? I see on this chart that they have full assumption of jurisdiction with one exception—Thurston County, which is a portion of the Omaha Reservation.

Mr. REESER. I do not recall if they have ever commented. I do not see anything from them.

Senator MELCHER. What about Oregon? We are now in the process of developing a new reservation in Oregon. Is there anything from them?

Mr. REESER. No, sir. I believe they have recently turned jurisdiction back for Burns Paiute and an offer of retrocession for Umatilla is pending.

Senator MELCHER. My chart here says that they have full assumption of jurisdiction except for Warm Springs Reservation. Is that correct?

Mr. REESER. Yes, sir. However, they have retroceded Burns Paiute and offered back jurisdiction on Umatilla.

Senator MELCHER. To whom did they offer it back and who offered what?

Mr. REESER. It was offered back to the Secretary by the Governor. Under the Civil Rights Act of 1968 there is authorization for the States to tender back jurisdiction to the Secretary.

Senator MELCHER. Was the Governor acting on behalf of the Governor, on behalf of the legislature, or on whose behalf?

Mr. REESER. I understand that there has been no question raised as to the power of the Governor to tender the jurisdiction back. The problem has been in getting our budget geared up to accept the jurisdiction back.

Senator MELCHER. Concerning your budget, you said there would be a one-time cost of a little over $10 million and then $8 million annually thereafter. On what is that based?

Mr. REESER. We have a detailed breakdown that we can give the committee.

Senator MELCHER. Is that based on what you suppose would be requested of the Secretary?

Mr. REESER. That is on the basis of all the tribes being taken back. They are the outside figures.

Senator MELCHER. How many tribes are we talking about?

Mr. REESER. There are 132 reservations.

Senator MELCHER. In what States are they?

Mr. REESER. California, Florida, Iowa, Minnesota, Nebraska, Oregon, Washington, Wisconsin, Kansas, New York, Maine, North Carolina, and Oklahoma, but not Alaska.

Senator MELCHER. Has there been no discussion with the States except for Washington? You mentioned Washington and California. I understand the State of Washington is split on this. The Governor says OK, and the attorney general says no way. California, you tell me, says no.

Mr. REESER. I believe that is correct.

Senator MELCHER. Are those the only two States you are aware of that responded to give us insight into their attitude?

Mr. REESER. Yes, sir.

Mr. MELCHER. You say there are 132 reservations in about 10 States. Is that right?

Mr. REESER. Yes, sir.

Senator MELCHER. It would cost about $8 million a year. How much would a reservation get? What is 132 divided into $8 million?

Mr. LAVIS. Mr. Chairman, bear in mind that this is our cost, that is, the Department's cost.

Senator MELCHER. How much would the Justice Department put out?

Mr. LAVIS. In our statement we defer to them. We do not have figures for them.

Senator MELCHER. Let us just use BIA costs; 132 into $8 million does not seem to be very much money.

Mr. REESER. What this estimate has done is that it has broken the reservations down into categories by size. A reservation with a population of 750 to 1,500 people, for example, would have an estimated budget of $182,000.

Senator MELCHER. It would be an average of $60,000 each, per year, for 132 reservations. Apparently you have taken inflationary factors into account as well if you say $8 million thereafter, or are you talking about 1979 dollars?

Mr. REESER. No, sir; these estimates were done a few years ago.

Senator MELCHER. As to the criteria that you have outlined and said would be necessary, either by amendment to the section or by regulation of the Secretary, what does an adequate law and order code mean? I assume that has already been established by the Department.

Mr. LAVIS. Mr. Chairman, may I have Gene Suarez, chief of our law enforcement agency, join us at the table? I believe he could best answer that question.

Senator MELCHER. Surely.

Mr. SUAREZ. Sir, I will have to give you a couple of measures. An adequate law enforcement system would consist of the ability of the tribe or the Bureau to provide so many police per 1,000 population, plus automobiles, resources, equipment, and training. Then there must be an adequate judicial code, a court system, and any other resources that are needed.

In 1974 and 1975, Senator, the Bureau conducted a task force analysis. What we did was to go all over the United States. We made a fairly adequate survey of all the law enforcement programs we had at the time. From the analysis, we developed a building block formula that, in terms of dollars and cents, is not applicable today, but in working with a number of tribes we established that if they had so many people, so many offenses, they needed so many enforcement people.

Senator MELCHER. Did you say 8 police officers per 1,000 population?

Mr. SUAREZ. No, sir. I would have to look at the figures.

Senator MELCHER. What is it then?

Mr. SUAREZ. What we have currently is about 1.4 per 1,000. The rural statistics that the FBI has are about 2.5 per 1,000. We are understaffed currently in Indian country.

I am talking about all law enforcement, Senator. It has nothing to do with rights protection, fisheries, or anything else. This is just law enforcement officers.

Senator MELCHER. I assumed that. In other words, it is about 2 per 1,000.

Mr. SUAREZ. Yes, sir. This does not include detention officers, or jailers, or radio dispatchers. This is only sworn officers. When you start adding to make a 24-hour-a-day service, you are really talking about, in an 8-hour shift and two men per car, eight officers, probably a radio dispatcher equaling nine officers in any 24-hour police department. That is a small department.

You should have at least two cars per 24-hour shift.

Senator MELCHER. When you say 1.4 per 1,000, which I have to make 2 per 1,000 because you cannot divide a person, you mean 2 per 1,000 at any given time. Is that correct?

Mr. SUAREZ. That is correct.

Senator MELCHER. That becomes about 8 per 1,000.

Mr. SUAREZ. Yes, sir. You have to have an around-the-clock service.

Senator MELCHER. Using what you and Mr. Lavis have just told us—a reservation of about 750 to 1,500 people—that would be about $163,000. Would that provide the automobiles and the police officers?

Mr. SUAREZ. Yes, sir.

I would like to add two things. These figures were compiled about 3 years ago when we were paying $3,500 per car. Now we are up to $6,500. Average salaries were about $4,000 less than they are now.

I would say conservatively that developing a police department for 750 to 1,500 people you would add another 20 percent just to take care of inflation, the cost of gasoline, and all the other increases that have arisen in the last 4 years. The $182,000 would not be adequate today, sir.

Senator MELCHER. I understand.

There are two other things here. I do not believe the States have given us any input. At least, I cannot find any so far in our hearings on this except for two letters from the State of Washington and whatever we can get about the State of California from previous testimony to the Senate Judiciary Committee.

It seems to me that before the Department would know its position they would want to inquire of the attitudes of the States involved.

You have a separate problem that involves a State, particularly when an Indian reservation is inhabited by a majority of non-Indians. Sometimes that majority is quite heavy. I do not know whether the tribe, in that instance, would want to assume jurisdiction or not. However, the State would definitely have something to say in an instance like that with respect to the non-Indian population. It might be quite different than what the Indians desire.

Mr. SUAREZ. Senator, if I may, I would like to say something concerning my short experience in the area of retrocession since the passage of the 1968 Civil Rights Act. We have found that most local units of government are very responsive.

Indian communities do not get adequate law enforcement from local sheriffs' offices for a great number of reasons. A situation in Oklahoma is one that we have just discovered. It may be because of tax bases or just a resistance to go into Indian country. Indian communities are fairly well isolated.

It is my feeling that most States would really like to retrocede jurisdiction over Indian country as such, but we are really talking about retroceding jurisdiction over Indian people as well. They would have their own courts and would have access to services from their own people.

I think the courts have already said who would have jurisdiction over non-Indians in the community. I was stationed in Browning, Mont. for many years with the Blackfeet. Although at that time—this was in the early 1960's—we did have a great number of non-Indians who lived within Browning, we did have a fairly good division of labor, and it was brought about by the system of deputization.

I carried Glacier County commissions and the sheriff's office carried our commissions, so in effect, we had a good working relationship. That is when we had a community within the reservation.

In other areas, Senator, we have found that the sheriff's office, for whatever reason, does not go out in Indian country. The Indian communities sort of stand by themselves, and there may be a number of non-Indians living there. Nevertheless, for all intents and purposes, the Indian communities do not get the services that they should have.

Senator MELCHER. The Blackfeet Reservation is not involved with this.

Mr. SUAREZ. No, sir. I am giving an example of a system.

Senator MELCHER. The only reservation that is involved with this in my State is Flathead, and the Salish Kootenai, as far as I know, have no intention of asking for retrocession for a pretty obvious reason. On any given day there is a tremendous percentage of people on the reservation who are non-Indian. Why would they want to assume jurisdiction? It would cost them for all the tourists flocking in on Highway 93.

Mr. SUAREZ. Flathead has always had a concurrent jurisdiction, not exclusive.

Senator MELCHER. Yes; that is true. They seem to be satisfied.

My concern is this. It is, first of all, a concern for proper procedure. Do these States really know what is involved in this section of this bill? I do not think they do. I cannot find anyone to tell me that they do.

You have listed 132 reservations in about 10 States and we have not heard from those 10 States. For instance, what is Iowa's position? We are sort of passing legislation in the dark.

Mr. Lavis, you testified that you have heard complaints from tribes. We are interested in that. We want to know which tribes. I think your statement was: "We have long heard tribes' complaints objecting to Public Law 280 who want to retrocede." What tribes are involved?

Mr. LAVIS. Mr. Suarez?

Mr. SUAREZ. Senator, if we have not in fact received a letter saying that there are problems, we have had a great number of expressions from tribes, some of which are really not in Public Law 280 States. We found, for instance, that the Seminole tribe in Florida has been making a concerted effort to develop their own jurisdiction.

We found that a number of tribes in Washington State, where you have split jurisdiction—the State has so many offenses and we have so many offenses—are having problems.

We have spoken to some of the people on the Sac and Fox Reservations in Iowa. They would like their own law enforcement program. We consistently get expressions from the communities on the White Earth and other reservations in Minnesota, where there is a dissatisfaction with present arrangements and State jurisdiction, even though there are many non-Indians living in some of this Indian country.

You are right in that we may not have clear expressions from the States themselves, but we have, and have had, a great number of instances wherein residents of a community are sort of living in limbo. On the non-Indian side, the State may or may not come on the reservation because they think that there is jurisdiction, and on the other side, the Indian community feels that the local sheriff is not coming in because it is Indian country.

Somewhere along the line there has to be a distinction. All these lines have to be clearly defined, even in those Public Law 280 States, Senator.

Senator MELCHER. You mention the Seminole in Florida, the White Earth in Minnesota, and the Sac and Fox in Iowa.

Mr. SUAREZ. We have also heard of a number of issues in Washington State. I cannot tell you exactly which reservations. There are a number of small reservations that I am quite sure have had problems.

Senator MELCHER. Whatever lists you have and whatever specific complaints you have we would appreciate having because our list is not very complete.

Mr. SUAREZ. Yes, Senator.

Senator MELCHER. The Quinaults testified yesterday and we may have other testimony developed that would impact on the various tribes in the State of Washington.

We are unaware—and we could be misinformed—that the Senate Judiciary Committee has any material to go on other than testimony offered by tribes in the State of Washington. If that is an incomplete input from the tribes we would like to have that material too. We are struggling on this because we do not believe that there has been any widespread testimony by the tribes themselves on this point except from the State of Washington.

You are envisioning 132 reservations which might ask for retrocession in these Public Law 280 States. If that is going to be the case, we would also like to have any input you have from the States involved.

Mr. SUAREZ. We will make an effort to get that to you.

[The information appears on p. 135.]

Senator MELCHER. I must remind you that this bill may be on the floor of the Senate rather soon, so we do not have a great deal of time.

Thank you all very much.

Mr. LAVIS. Thank you, Mr. Chairman.

[The prepared statements, with enclosures, and letter received subsequent to hearing follow. Oral testimony resumes on p. 137.]

PREPARED STATEMENT OF RICK LAVIS, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman: This responds to your request for our views on S. 1181, the "Tribal-State Compact Act of 1979".

We recommend enactment of S. 1181 if it is amended as suggested herein and in the enclosed additional amendments.

S. 1181 would authorize the States and Indian tribes to enter into agreements and compacts respecting jurisdiction and governmental operations in Indian country. It is similar to two bills in the 95th Congress—S. 2502 (S. Rept. No. 95–1178) as passed by the Senate and H.R. 11489 as approved by the House Indian Affairs and Public Lands Subcommittee.

Title I of S. 1181 would authorize jurisdictional agreements and compacts, for periods of up to five years, between States and Indian tribes. It would also permit the Secretary of the Interior to provide financial assistance for the implementation of such agreements and compacts. Title II of the bill would direct the Secretary to encourage the establishment of joint tribal-State organizations to confer on jurisdictional questions existing between the parties. Title III of the bill would grant Federal district courts jurisdiction over civil actions brought by the parties to enforce agreements and compacts authorized by the bill.

The United States Supreme Court has consistently held that State jurisdiction over tribal members or infringement on the self-governing power of a tribe is permissible only with the consent of the Congress. A tribe may not unilaterally grant a State any jurisdiction over tribal members. *See Kennerly* v. *Montana District Court*, 400 U.S. 423 (1971).

The bar to State jurisdiction on Indian reservations has, however, been modified by the Court where essential tribal relations are not involved and the rights of Indians are not jeopardized thereby. Thus, suits by Indians against non-Indians have been permitted in State courts and those courts have been permitted to try non-Indians who commit crimes against each other on a reservation. If, however, the crime is committed by or against an Indian, tribal jurisdiction or jurisdiction expressly conferred on another court by the Congress has remained exclusive. Absent governing acts of Congress, the question has been whether State action infringes on the right of reservation Indians to make their own laws and be ruled by them. *Williams* v. *Lee*, 358 U.S. 217 (1959). In *Williams*, the Court held that a non-Indian operator of a store on an Indian reservation could not sue in State court to collect for goods sold to an Indian at that store.

It has been held that States may not, absent Congressional consent, tax Indian reservation lands or Indian income, earned solely on the reservation. *McClanahan*

v. *Arizona*, 411 U.S. 164 (1973). Nor may a State impose personal property taxes, licensing fees, or sales taxes on reservation Indians. It may impose sales taxes on non-Indian purchases on the reservation, however. *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976). An act of Congress granting certain States civil jurisdiction over Indians within Indian country was held not to grant any power to tax Indians. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

In another case, a tribal court was held to have exclusive jurisdiction over an adoption proceeding in which all parties were tribal members and reservation residents even though the child involved had been born off-reservation. *Fisher* v. *Montana District Court*, 424 U.S. 382 (1976). Nor could the State exercise jurisdiction over an Indian who resided on a reservation, even though the tribal court had adjudicated her mentally ill and ordered her commitment to the State Human Services Center. *White* v. *Califano*, 437 F. Supp. 543 (D.S.D. 1977) *aff'd* 581 F. 2d 697 (8th Cir. 1978).

The exclusive jurisdiction of tribal courts, and the consequent denial of access to State courts, has been challenged as impermissible racial discrimination. However, the Supreme Court has held that the tribal court's jurisdiction derives not from the race of the parties but from the quasi-sovereign status of a tribe. Occasional denial of a forum to which a non-Indian has access is justified, the Court said, because it is in furtherance of the benefits of the congressional policy of Indian self-government. *Morton* v. *Mancari*, 417 U.S. 535 (1974).

Enactment of S. 1181 would provide clear authority for jurisdictional agreements between Indian tribes and States. We believe that such agreements would lead to the more effective and efficient discharge of governmental responsibilities in Indian areas.

S. 1181 would not enlarge or diminish the governmental powers of States or Indian tribes. It would simply allow those entities to allocate between themselves certain governmental responsibilities. Agreements would thus vary as the circumstances demand and the participants determine to be best. Allocation of responsibilities by the involved parties would be consistent with the policy of Indian self-determination and is, we believe, preferable to the allocation of such responsibilities by the Federal government.

S. 1181 would not provide that agreements and compacts must be approved by the Secretary of the Interior. Many agreements, however, would undoubtedly involve tribes with constitutional provisions requiring Departmental approval of any tribal resolution relating to the administration of justice. Where such a requirement applies to a tribal resolution implementing an agreement or compact, that resolution would, of course, be subject to Departmental approval. Agreements involving tribes that have no such constitutional requirement would not be subject to such approval. Appearance of the Secretary's signature on an agreement or compact for purposes of publication in the Federal Register, as required by section 101(c) of S. 1181, would not constitute Departmental approval of such agreement or compact.

Title I of S. 1181 would also provide, upon agreement by the Secretary, for Federal financial assistance for the implementation of agreements and compacts authorized by the bill. We note that agreement by the Secretary cannot carry with it any obligation for funding beyond those funds available to the Secretary under the appropriations acts for the year in which the Secretary's agreement is given. Title II of the bill would authorize the payment of expenses for the activities of individuals involved in addressing jurisdictional issues.

As already stated, we support a Congressional grant of authority for State and tribal governments to enter into compacts; however, we do not support the authorization of financial assistance, as provided by section 102, to pay for personnel, administrative, and indirect costs resulting from such compacts. Since the bill does not involve any shift of Federal responsibilities to the parties but is rather a redistribution of existing responsibilities among the parties, we see no justification for Federal funding of strictly State and local activities. At a time when both Congress and the Administration are striving to curb Federal financial obligations, we believe the enactment of this additional financial assistance would both set a costly precedent and be unwarranted. However, we would not object to the retention of the provisions of section 102(d), which would facilitate funding of compact functions through existing agency programs, if amended by adding before the period at the end thereof the following: "In accordance with statutes and regulations governing the use of such funds". This would make clear that the funds could not be used for activities other than those intended by other authorizing and appropriations legislation.

With respect to title II of S. 1181, we believe that the authorization of appropriations for the subject activities should be made under the Snyder Act (42 Stat. 208)—the general BIA appropriations authority—and accordingly we urge deletion of the appropriations authorization for title II.

We are enclosing a number of additional suggested amendments to S. 1181, including amendments also suggested to the Committee by the Department of Justice. We believe that the enactment of S. 1181 with the amendments suggested above and these additional amendments would provide an effective means for Indian tribes and States to resolve their jurisdictional conflicts.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Enclosure.

ADDITIONAL AMENDMENTS TO S. 1181 SUGGESTED BY THE DEPARTMENT OF THE INTERIOR

1. First section, page 1, line 4, change "1979" to "1980".

2. To avoid any inference that the Congress is determining that all Alaska Native villages included in the Alaska Native Claims Settlement Act are exercising powers of self-government, we recommend that section 3(a) on page 2, lines 13 through 19, be amended to read as follows:

(a) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688-689), which is exercising powers of self-government and which is recognized by the Secretary of the Interior as eligible for services provided by the United States to Indians because of their status as Indians.

3. To provide a technically more correct definition of "Secretary" (see 43 U.S.C. 1451), we recommend that section 3(c) on page 2, lines 23 and 24, be amended to read as follows:

(c) "Secretary" means the Secretary of the Interior unless otherwise designated in this Act.

4. We concur in the Department of Justice's recommended amendment to section 101(a) on page 3. By deleting "and among" on line 15 and changing "each" to "both" on line 17 it can be assured that the bill cannot be read as permitting compacts between States or between Indian tribes.

5. In section 101(b) on page 4, line 9, "title IV," may be deleted as unnecessary.

6. In line with the Department of Justice's recommendation regarding the importance of publication in the Federal Register, we recommend that section 101(c) on page 4 be amended by inserting a period after "Federal Register" and deleting on lines 19 and 20 the phrase "unless requested otherwise by all parties to the agreement or compact."

7. To remedy the *ex post facto* application of laws problem pointed out by the Department of Justice, we recommend that section 101(d) on page 4, line 22, be amended by deleting "any action or proceeding" and inserting in lieu thereof "any action which arose prior to the effective date of such an agreement, compact, or revocation, or any proceeding".

8. We agree with the Justice Department's amendment to clarify section 101(e) on page 5, line 10, by deleting "criminal laws for or enforce criminal" and inserting "criminal, civil, or regulatory laws for or enforce criminal" and inserting "criminal, civil, or regulatory laws for or enforce those".

9. Section 101(e) could be further amended on page 5, line 24, by deleting as unnecessary "title IV,".

10. To eliminate unnecessary language and avoid the use of "his", we recommend that section 201 on page 9 be amended by deleting on lines 15 and 16 the words "from his Department as may be used", and on line 23 by deleting "in his judgment".

11. Rather than providing a new, unnecessary source of BIA appropriations authorization, we recommend that section 201(c) on page 10, lines 1 through 4, be deleted or amended to read as follows:

(c) Funds appropriated pursuant to the Act of November 21, 1921 (42 Stat. 208) may be utilized for the purposes of this title.

12. In line with the recommendation of the Department of Justice and in order to make clear that actions to enforce agreements are authorized and that

the sovereign immunity of parties to such agreements is waived, we recommend that section 301 be amended to read as follows:

Sec. 301. Any party to an agreement or compact entered into in accordance with this Act may bring a civil action to secure equitable relief, including injunctive and declaratory relief, for the enforcement of any such agreement or compact, but no action to recover damages arising out of or in connection with such agreement or compact shall lie except as specifically provided for in such agreement or compact. The United States district courts shall have original jurisdiction of any civil action authorized by this section. States and Indian tribes, by entering into compacts or agreements in accordance with this Act, shall be deemed to have consented to suit with respect to the subject matter of such compacts or agreements.

HISTORY OF PUBLIC LAW 83-280 AND RELATED PROVISIONS

The Congress adopted House Concurrent Resolution 108 on August 1, 1953 (67 Stat. B132). One of the expressed purposes of the resolution was to subject Indians within the United States to the same laws as were applicable to other U. S. citizens, thus subjecting Indians to State jurisdiction. Consistent with this policy, on August 15, 1953, the Congress enacted Public Law 83-280 (67 Stat. 588) which divided the States into three groups, each of which was either granted civil and criminal jurisdiction over Indian country or given a method by which such jurisdiction could be acquired.

Sections 2 and 4 of Public Law 83-280 (18 U.S.C. 1162 and 28 U.S.C. 1360) granted the first group of five specified States civil and criminal jurisdiction over Indian country within those States as follows: California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation).

Section 6 of Public Law 83-280 (18 U.S.C. 1162 note and 28 U.S.C. 1360 note) provided Federal consent for the second group of States—those whose Enabling Acts prohibit such States from asserting such jurisdiction—to amend their State constitutions or statutes "to remove any legal impediments to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act" despite any contrary provisions of the respective Enabling Acts.

Section 7 of Public Law 83-280 (18 U.S.C. 1162 notes and 28 U.S.C. 1360 notes) provided Federal consent for the third group of States—"any other State"—to assume civil and criminal jurisdiction "as provided for in this Act."

In 1954, the provisions enacted in sections 2 and 4 of Public Law 83-280 were amended to remove the exception for the Menominee Reservation and thereby grant Wisconsin jurisdiction over that reservation (Act of August 24, 1954; 68 Stat. 795). The subsequent termination of Federal trust responsibility and services for the Menominee tribe and its members and the more recent restoration of such responsibilities and services has resulted in the tribe not being subject to state jurisdiction.

In 1958, the provisions enacted in sections 2 and 4 were amended to grant Alaska jurisdiction over all Indian country within its borders (Act of August 8, 1958; 72 Stat. 545). This provision was modified in 1958 by amendment of the criminal jurisdiction provisions enacted in section 2 of Public Law 83-280 to provide the Metlakatla Indian Community with concurrent jurisdiction over offenses by Indians as follows:

"* * * on Annette Islands, the Metlakatla Indian Community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended."

Title IV of the Civil Rights Act of 1968 (25 U.S.C. 1321-1326; 82 Stat. 78) modified the provisions enacted by Public Law 83-280. Section 7 of Public Law 83-280 was repealed and new provisions (25 U.S.C. 1321 and 1322) enacted providing for assumption of jurisdiction by any State, but only with the consent of each affected Indian tribe. It also provided (25 U.S.C. 1323) for retrocession of jurisdiction over Indians by the States that had acquired such jurisdiction pursuant to Public Law 83-280. As a result of that legislation, retrocession has taken place as to the following Indian reservations: Omaha Reservation in Nebraska, 1969; Point Madison Reservation in Washington, 1971; Nett Lake Reservation in Minnesota, 1972; and as to these Nevada reservations in 1975: Duck Water Reservation, Battle Mountain Colony, Carson Colony, Dresslerville

Colony, Elko Colony, Goshute Reservation, Lovelock Colony, Odgar's Ranch, Reno-Sparks Colony, Ruby Valley Allotment, South Fork Reservation, Washoe Tribal Farm, Washoe Pinenut Allotment, Winnemucca Colony, and Yomba Reservation.

The provisions enacted in Public Law 83-280 and in sections 402 and 403 of the Civil Rights Act of 1968, included identical provisions clarifying or restricting the jurisdiction granted to, or which could be assumed by, States. They provided that the criminal and civil jurisdiction provisions did not—

"* * * authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or

"* * * authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement or statute or with any regulation made pursuant thereto; or

"* * * deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." 18 U.S.C. 1162(b); 28 U.S.C. 1360(b); 25 U.S.C. 1321(b) and 1322(b).

Public Law 83-280 and the 1968 Civil Rights Act further provided that with regard to the civil jurisdiction provisions—

"Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section." 28 U.S.C. 1360(c) and 25 U.S.C. 1322(c).

Hon. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: During your recent hearings on section 161(i) and (j) of S. 1722 (the Criminal Code Reform Act of 1979), as reported by the Committee on the Judiciary (S. Rept. 96-253), you asked for any information that we may have regarding the presentation of the views of state or local officials on such provisions. Section 161(i) and (j) "provide for retrocession of State criminal jurisdiction upon resolution of an affected Indian tribe in a manner consistent with the procedure provided for the assumption of criminal jurisdiction by a State pursuant to the provision of the Act of April 11, 1968." (S. Rept. 96-253 at p. 1268.)

Part 2 of the printed December 3 and 4, 1975, hearings of the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs on S. 2010 (94th Cong.), the "Indian Law Enforcement Improvement Act of 1975," includes testimony and material submitted for the record from a number of state and local officials. Parts 1 and 2 of those hearings also include testimony and materials by Indian tribal governments and Indian organizations.

Sincerely,

RICK LAVIS,
Deputy Assistant Secretary—Indian Affairs,
Department of the Interior.

PREPARED STATEMENT OF HANS WALKER, JR., ACTING ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and Members of the Committee, I am pleased to discuss with you today the application of a magistrates concept on Indian reservations.

The subject of today's hearing has its origins both in the long-established legal status of jurisdiction on Indian reservations and in recent developments in the law. Under the General Crimes Act, 18 U.S.C. § 1152, the Federal Government has long exercised jurisdiction over offenses committed by non-Indians against Indians and crimes by Indians against non-Indians. In 1883 the Supreme Court ruled in *Crow Dog* that crimes committed by Indians against other Indians in Indian country are within exclusive tribal jurisdiction. Congress responded by passing the Major Crimes Act, providing for Federal jurisdiction over certain

serious offenses when committed by an Indian on an Indian reservation, without regard to who the victim is. The Supreme Court has ruled in the *McBratney*, *Draper* and *Martin* decisions that States have exclusive jurisdiction over offenses committed by non-Indians against other non-Indians in Indian country.

While Federal jurisdiction over crimes in which both accused and victim are Indians is limited to certain specified serious crimes, the United States has jurisdiction over even the most minor offenses involving Indian against non-Indian or non-Indian against Indian. A problem is created because the Federal criminal justice system is designed primarily for serious cases. This is reflected in the familiar expression, "Don't make a Federal case of it!"—meaning don't treat it as a serious matter. The view that Federal courts should be reserved only for the most serious offenses is also reflected in the FBI's policy of emphasizing "quality not quantity" in deciding where to place its investigative priorities.

Because of the Federal Government's special concern for the protection of Indian interests—as described in both the *Kagama* and *Oliphant* decisions—Congress has chosen to "make a Federal case" out of the prosecution of offenses that are ordinarily regarded as rather minor.

In most instances the Federal criminal justice system can afford to concentrate only on the most serious offenses because State courts have ample jurisdiction over most minor offenses. Even when a minor offense does violate a Federal criminal statute, the United States Attorneys frequently decline to prosecute since they know the matter can be handled adequately in State courts.

To a certain extent, this approach also works with tribal courts. Tribal courts, however, operate with two major limitations on their jurisdiction that are not imposed on State courts. Since the passage in 1968 of the Indian Civil Rights Act, tribal courts are limited to imposing a penalty of not more than $500 and six months in jail for any single offense. In 1978 the Supreme Court ruled in the *Oliphant* decision that tribal courts have no criminal jurisdiction over non-Indians unless Congress gives it to them.

An unresolved problem exists with respect to crimes committed by non-Indians against Indians because the courts have not ruled definitively on whether states have jurisdiction over such offenses. The Office of Legal Counsel in the Justice Department has indicated its view that a strong possibility exists that prosecution may be commenced under state law against a non-Indian whose illegal conduct represents a direct and immediate threat against an Indian person or property.

It should be noted that while a single minor offense may pose no great threat to the community, a systematic failure to prosecute minor offenses can pose a serious danger to the peace and well-being of a community. Uncontrolled vandalism—for example—can quickly create very serious problems for a community.

We believe the establishment of Federal magistrates with jurisdiction to try minor violations of Federal criminal laws on Indian reservations could be a way to accommodate the need of Indian communities for the protection promised by Federal laws with the need of Federal district courts to concentrate most of their resources on serious offenses. However, it is not clear that an increased use of magistrate would be the best approach.

Such an approach would create a special section of the Federal judiciary that would view the handling of minor offenses as their primary responsibility rather than as a nuisance. Such magistrates would view themselves as part of the local criminal justice system—on a par with county and tribal courts.

It could be very helpful to have U.S. Magistrates close at hand to perform their normal duties of issuing search and arrest warrants and handling preliminary hearings in criminal cases.

We are aware that some concern has been expressed that such a Federal magistrate system might tend to infringe on the existing jurisdiction of tribal courts. With respect to offenses committed by non-Indians, there would appear to be no problem since tribal courts lack jurisdiction over non-Indians under the *Oliphant* decision. The problem could arise with respect to minor crimes committted by Indians against non-Indians—where there is now concurrent tribal and Federal jurisdiction. In that case Congress might wish to limit any special authority for Federal magistrates on Indian reservations to those offenses committed by non-Indians against Indians.

The failure of the Federal criminal justice system to perform adequately its special responsibilities as part of the local criminal justice system on Indian reservations has long been a major concern for Indian tribes and this Depart-

ment. Tribal assertion of criminal jurisdiction over non-Indians was, at least in part, an effort by the tribes themselves to compensate for the inadequacies of the Federal system. Now that the *Oliphant* decision has ruled out that approach, Federal action may be needed.

Both before and after the *Oliphant* decision, we have been working with the Department of Justice, and in consultation with Indian tribes, to develop a solution to this problem, but we can make no specific recommendations for legislative action at this time. This concludes my prepared statement. I will be pleased to respond to any questions the Committee may have.

Senator MELCHER. Our next witness is Malachy Murphy, deputy attorney general for the State of Washington.

STATEMENT OF MALACHY R. MURPHY, DEPUTY ATTORNEY GENERAL, STATE OF WASHINGTON, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL AND THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

Mr. MURPHY. Thank you, Mr. Chairman.

I am here today in two capacities. With respect to section 161 of S. 1722, I am speaking on behalf of both the State of Washington and the National Association of State Attorneys General. With respect to S. 1181 and the magistrates concept, I am speaking only on behalf of the Attorney General of the State of Washington.

Senator MELCHER. I have not looked at your testimony yet, but has the Association of States Attorneys General passed a resolution in some form?

Mr. MURPHY. Yes; they have. It is attached. We mailed the testimony Thursday, Senator. Apparently it did not get here. However, I delivered 10 copies to the staff this morning.

Senator MELCHER. I do not think the mail brought it.

Mr. MURPHY. A resolution of a plenary session of the national association authorized the executive committee of the association to render a report to the Congress on S. 1722 in toto. The executive committee did that and finalized their report in February. There is a lot of material in that report with respect to a great many things.

We have excerpted the portion of the final report on S. 1722 relating to section 161, Indian jurisdiction. I have attached it to my statement. The report went to all Members of Congress, I believe, but the remainder of the report is germane only to the other 386 pages of S. 1722, not to section 161.

The National Association of Attorneys General has not had the opportunity to examine and take a position on S. 1181 or the magistrates concept. I will not, therefore, speak for them on those two matters. However, at this time the association in no way opposes those two proposals.

Regarding a second preliminary matter, I wish to commend this committee for holding these hearings and for giving separate and full consideration to section 161 of S. 1722. Ever since section 161 first surfaced, as section 144 of S. 1437, our State has been urging that just this course of action be taken. I thank you most sincerely for taking it.

Further, I wish to commend the committee for considering S. 1181 and the magistrates concept along with section 161 of S. 1722. Your actions demonstrate to me that the committee wishes to look at the

whole problem and to consider all the alternative solutions. Once again, my thanks.

Turning to section 161 of S. 1722, the position of the Association is set forth in the association's final report on S. 1722. A copy of the portion of that report relating to jurisdiction over Indian reservations has been previously submitted to the committee by association staff.

The reasons for the association's strong opposition to section 161 are given in detail in the materials previously submitted to the Senate Judiciary Committee by the Washington State attorney general. Those materials have been submitted to this committee along with this testimony. They consist of Mr. Gorton's letter to Senator Kennedy of October 17, 1979, and the attachments thereto.

Interestingly, a sentence in the declaration of policy in S. 1181 pinpoints the basic problem with section 161. That sentence is: "Federal enabling authority for the establishment of viable intergovernmental agreements between the tribes and the States based on mutual consent must be established." Section 161 completely eliminates the need, indeed the opportunity, for mutual consent before any changes in the presently existing jurisdictional system can be made.

The bilateral effect of section 161 will, of course, vary from State to State. In what are known as the mandatory States—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—the effect of tribal action would be a total shift from State jurisdiction to Federal jurisdiction over non-Indians and Indians alike. The same would be true in New York. In Iowa and Kansas the effect would apparently be to make Federal criminal law, now concurrent with State law, exclusive.

In the optional States, which have assumed jurisdiction under Public Law 280—such as Washington, Idaho, and Montana—similar shifts would occur, though of course to a lesser extent.

The irony in the whole situation is this: S. 1722 is intended to be a modernization of Federal criminal law. Yet section 161 is just the opposite of that.

Complete Federal jurisdiction over both Indians and non-Indians on reservations with no State jurisdiction at all, other than under the *McBratney* decision, may have made complete sense in the 1850's and 1860's. Then Indian reservations were truly just that, with little, if any, non-Indian population. However, Federal policy under various allotment acts changed the whole situation drastically. Large non-Indian populations—often non-Indian majorities—are now the rule rather than the exception. Yet, section 161 would reimpose the old jurisdictional system. This makes absolutely no sense at all.

We need to take a step forward not backward. In my view, S. 1181 represents just such a step forward.

Thus, I suggest the following: First, eliminate subsections (i) through (j) from section 161, or alternatively, in subsection (i), after "United States," and before "reacquire" on line 24 insert "and upon the consent of the affected State, granted in accordance with procedure established by State law.". This amendment would embody in S. 1722 the same basic principle embodied in S. 1181. That is, the changes can be made only by mutual consent.

Second, in the portion of the committee report relating to subsection (c), which is the recodification of the first sentence of 18 U.S.C. 1152,

make it absolutely clear that the *McBratney* decision is not to be overruled. Even more preferable would be to make it clear in the text of subsection (c) itself.

Third, adopt the approach embodied in S. 1181.

To assist the committee's consideration of S. 1181, I have attached a memorandum entitled: "Proposed Amendments to S. 1181." It consists mainly of technical changes though some suggestions are admittedly in the policy area.

Lastly, I would like to say a word about the concept of reservation Federal magistrates. The concept, I believe, will help make more effective Federal criminal jurisdiction especially on reservations in option States which have not assumed Public Law 83–280 jurisdiction or have done so only to a limited extent.

However, adoption of the concept should not provide a justification for retroceding to the Federal Government State jurisdiction already conferred under Public Law 83–280 or for legislating the death of *McBratney*, thus making all non-Indians, regardless of the nature of the offsense, subject exclusively to Federal jurisdiction. The concept, in other words, cannot justify section 161 as presently written.

If you have any questions concerning any matter I have covered, either in this presentation or in any of the materials I have submitted, I would be happy to answer them.

Thank you.

Senator MELCHER. Without objection, the statement and related materials which you provided will be made part of the record at this point.

[The material follows. Testimony resumes on p. 145.]

PREPARED STATEMENT OF MALACHY R. MURPHY, DEPUTY ATTORNEY GENERAL, STATE OF WASHINGTON, ON BEHALF OF NATIONAL ASSOCIATION OF ATTORNEYS GENERAL AND THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

I am here today in two capacities. With respect to S. 1722, I am speaking for the National Association of Attorneys General. With respect to S. 1181 and the application of a magistrate's concept on Indian reservations, I am speaking only for the Washington State Attorney General, Mr. Slade Gorton, and not for the National Association of Attorneys General. This is only because the National Association of Attorneys General has not had the opportunity to examine and take a position on these latter two proposals, and not because the Association in any way opposes them.

A second preliminary matter, I wish to commend this committee for holding these separate hearings, and for giving this separate and full consideration to § 161 of S. 1722. Ever since § 161 first surfaced, as § 144 of S. 1437, our state has been urging that just this course of action be taken. And I thank you, most sincerely, for taking it.

Further, I wish to commend the committee for considering S. 1811 and the migistrate's concept, along with § 161 of S. 1722. This demonstrates to me that the committee wishes to look at the whole problem, and to consider all the alternative solutions. So once again, my thanks.

Turning, then, to § 161 of S. 1722, the position of the Association is set forth in the Association's Final Report on S. 1722. A copy of the portion of that report relating to jurisdiction over Indian reservations has been previously submitted to the committee by Association staff. The reasons for the Association's strong opposition to § 161 are given in detail in the materials previously submitted to the Senate Judiciary Committee by the Washington State Attorney General. Those materials have been submitted to this committee, along with this testimony. (They consist of Mr. Gorton's letter to Senator Kennedy of October 17, 1979, and the attachments thereto.)

Interestingly, a sentence in the declaration of policy in S. 1181 pinpoints the basic problem with § 161. That sentence is: "Federal enabling authority for the establishment of viable intergovernmental agreements between the tribes and the States based on mutual consent must be established." Section 161 completely eliminates the need, indeed the opportunity, for mutual consent before any changes in the presently existing jurisdictional system can be made.

The bilateral effect of § 161 will, of course, vary from state to state. In what are known as the mandatory states, Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, the effect of tribal action would be a total shift from state jurisdiction to federal jurisdiction, over non-Indians and Indians alike. The same would be true in New York. And in Iowa and Kansas, the effect would apparently be to make federal criminal law, now concurrent with state law, exclusive.

In the optional states, which have assumed jurisdiction under PL 280, such as Washington, Idaho and Montana, similar shifts would occur, though, of course, to a lesser extent.

The irony in the whole situation is this: S. 1722 is intended to be a modernization of federal criminal law; yet § 161 is just the opposite of that. Complete federal jurisdiction over both Indians and non-Indians on reservations—with no state jurisdiction at all, other than under the *McBratney* decision—may have made complete sense in the 1850's and 1860's. Then Indian reservations were truly just that, with little, if any, non-Indian population. But federal policy, under various allotment acts, changed that whole situation drastically; large non-Indian populations (often non-Indian majorities) are now the rule, rather than the exception. Yet § 161 would reimpose that old jurisdictional system. This makes absolutely no sense at all.

We need to take a step forward, not backward. And, in my view, S. 1181 represents just such a step forward. Thus, I suggest the following:

(1) Eliminate subsections (i) through (j) from § 161; or alternatively, in subsection (i), after "United States," and before "reacquire" on line 24, insert "and upon the consent of the affected state, granted in accordance with procedures established by state law,". This amendment would embody in S. 1722 the same basic principle embodied in S. 1181; i.e., the changes can be made only by mutual consent.

(2) In the portion of the committee report relating to subsection (c), which is the recodification of the first sentence of 18 USC 1152, make it absolutely clear that the *McBratney* decision is not to be overruled. Even more preferable would be making it clear in the text of subsection (c) itself.

(3) Adopt the approach embodied in S. 1181.

To assist the committee's consideration of S. 1181, I have attached a memorandum entitled: "Proposed Amendments to S. 1181." It consists mainly of technical changes, though some suggestions are admittedly in the policy area.

Lastly, a word about the concept of reservation federal magistrates. This concept, I believe, will help make more effective federal criminal jurisdiction especially on reservations in option states which have not assumed PL 83-280 jurisdiction, or have done so only to a limited extent. Adoption of the concept should not, however, provide a justification for retroceding to the federal government state jurisdiction already conferred under PL 83-280, or for legislating the death of *McBratney*, thus making all non-Indians, regardless of the nature of the offense, subject exclusively to federal jurisdiction. The concept, in other words, cannot justify § 161 as presently written.

If you have any questions concerning any matter I have covered, either in this presentation or in any of the materials I have submitted, I would be happy to answer them.

Thank you very much.

SUGGESTED AMENDMENTS TO S. 1811

1. Page 4, line 6: "revocation" should be changed to "non-revocation," in order to carry out what we perceive to be the intent: i.e., that if the Tribe cannot unilaterally revoke within the five-year period, such a provision must be subject to a referendum by the affected Indians.

2. Page 5, line 6: Change "except as expressly provided in this Act" to "except as expressly provided in agreements or compact, authorized by this Act." Again, we believe this better expresses what we perceive to be the intent.

3. Page 5, line 13: Change "from entering' to "to enter."
4. Page 5, line 14: Change "exercising" to "to exercise."
5. Page 5, line 17: Before "taxation" add "state." In our view, the bill should not preclude any agreement under which the Tribe itself might agree to tax Indian property, in order to obtain tribal revenues needed to finance the tribal governmental program provided for in the agreement. But as presently drafted, the language might be construed to preclude this possibility.
6. Page 5, line 21: Strike "to."
7. Page 7, line 25: Strike the quotation mark.
8. Page 8, line 22: Strike "this Act" and insert "this section and Title II of this Act." One of the most desirable features of S. 1181 is that it lets tribal governments negotiate as equals with state (and local) governments, i.e., without the need of approval by the federal government. But subsection (f), as now drafted, seems to allow the federal government to jump back into the act. Accordingly, the rule-making role of the secretary should be limited to cover, not the Act as a whole, but only the financing functions (§ 102) and the planning and monitoring functions (Title II) assigned to him.
9. Page 10, line 6: Change the entire section to read as follows: The United States district courts shall have original jurisdiction of and civil action brought by any party to an agreement or compact entered into in accordance with this Act or by any person subject to the jurisdiction of either party to such an agreement or compact to secure equitable relief, including injunctive and declaratory relief, for the enforcement of any such agreement or compact. The United States district courts shall also have original jurisdiction of any civil action, including an action for damages, brought by any person, other than a member of the Tribe which is a party to the agreement or compact involved in the action, against a tribe which is a party to the agreement or compact, with respect to a claim by such person, that the exercise of jurisdiction by a tribe over that person including any action by the Tribe's officers or employees are unauthorized by the agreement or compact or is performed in a negligent, arbitrary or otherwise unlawful manner; and the sovereign immunity of the Tribe shall not be a bar to any such action.

POSITION STATEMENT OF THE NATIONAL ASSOCIATION OF STATES ATTORNEY'S GENERAL

INDIAN JURISDICTION

The Association opposes two provisions in the Senate bill which would radically alter existing law. The first would permit an Indian tribe, without the consent of the affected state, to require that the federal government reacquire criminal jurisdiction over certain Indian reservations. Under current law, such a retrocession of state jurisdiction or, conversely, an extension of state jurisdiction, would require both the consent of the state and the affected tribe. In our view, this state of the law should persist. We believe jurisdiction in this area ought not to be removed from the states until Congress has demonstrated a compelling federal interest in such a change. We know of no justification provided for diminishing or altering state jurisdiction in direct contradiction with previous decisions of the Congress and the Supreme Court. Further, such a change would result in unequal treatment being applied to Indians and non-Indians on Indian reservations. This is true because the state's citizens living outside the reservation would be subject only to state jurisdiction while non-Indians living in Indian country could be subject to federal jurisdiction. This means that two people committing the same offense may receive different sentences based solely on the geographical location of their homes. The principles of consistency that Congress seeks to achieve through codification would be demeaned if it were possible for two citizens to be prosecuted, tried, and sentenced under different laws solely because one happened to buy a home in Indian country. We are also concerned about the way in which all of this will be accomplished. Currently 18 U.S.C. Sec. 1152 provides for federal jurisdiction in situations where a crime is committed in Indian country by a non-Indian against another non-Indian. The Supreme Court, however, in the *McBratney* decision has held that the states have jurisdiction over such offenses. While Section 144(b) of the Senate bill provides that nothing in the legislation is intended to diminish, expand, or otherwise alter state or local jurisdiction

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over offenses within Indian country, this rather clearly stated intention not to reduce state jurisdiction is undercut by the Senate Report which indicates that the bill is intended to overturn *McBratney*. Since many reservations include a non-Indian population which greatly exceeds that of the Indian population, this decision would have the effect of permitting a minority to determine for the majority who will have jurisdiction over criminal activity in the area. Such a system is neither fair nor appropriate and the Association therefore urges the Congress to adopt the House formulations in this area which reflect the jurisdictional framework in place in current law.

[Additional material consisting of the Opinion of U.S. Supreme Court in Washington v. Confederated Bands and Tribes of Yakima Nation (77–388, dated Jan. 16, 1979) and legal briefs of the State are retained in Committee files.]

OFFICE OF THE ATTORNEY GENERAL,
TEMPLE OF JUSTICE,
Olympia, Wash., October 17, 1979.

Re S. 1722

Hon. EDWARD KENNEDY,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: The Senate Judiciary Committee has under consideration S. 1722, a comprehensive revision of the federal criminal code. In general, we applaud the approach of that bill.

Section 161, relating to state and federal criminal jurisdiction over Indian reservations, however, contains two provisions which are completely objectionable to the state of Washington. Neither is an appropriate part of a criminal code. Both would drastically change existing law. I here wish to explain what those proposed changes are, and why they are so objectionable.

SUBSECTION (i): RETROCESSION OF STATE JURISDICTION

I first take up subsection (i). This provision would permit an Indian tribe, without the consent of the affected state, to require the United States to reacquire criminal jurisdiction over Indian reservations from those states which had previously acquired such jurisdiction under such laws as Public Law 83–280 (67 Stat. 588).

Since 1953, when Public Law 83–280 was enacted by the Congress, many tribes have constantly attempted to overturn that law, and thereby roll back the extension of state jurisdiction to their reservations. With the passage of the Indian Civil Rights Act of 1968, Public Law 90–284 (82 Stat. 73), they succeeded in preventing any new extensions of state jurisdiction without tribal consent. But they have so far failed to eliminate state jurisdiction which had been assumed by such states as Washington prior to 1968. The 1968 Indian Civil Rights Act in effect then froze the status quo. See § 403 of Public Law 90–284. Any retrocession of state jurisdiction, and any extension of state jurisdiction, now require the consent of both the state and the affected tribe. And, in our view, this is exactly as it should be.

Having failed to accomplish in the Congress their goal of overturning state jurisdiction assumed under Public Law 83–280, the tribes, not surprisingly, took to the courts. Washington's assumption of jurisdiction, for example, has been attacked in six separate lawsuits—in each case unsuccessfully. The last effort reached the U.S. Supreme Court in *Washington v. Yakima Indian Nation*, and was decided in favor of the state on January 16 of this year. Subsection (i) would reverse that decision.

Washington's response to Public Law 83–280 is fully described in that decision, a copy of which is attached (Attachment I). I would here simply note the Supreme Court's characterization of that response as one which ". . . leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation . . ." 58 L.Ed.2d at 767.

This reference by the Court to "the needs of both Indians and non-Indians within a reservation" raises a critical point which is all too easily overlooked.

The debate on the question of state criminal jurisdiction over Indian reservations typically proceeds as if the only issue were state jurisdiction over Indians. This is unfortunate; for it overlooks entirely the question of jurisdiction over non-Indians on the reservation. For example, while there are probably no more than 13,500 Indians residing on Washington reservations, there are more than 55,000 non-Indians residing on these same reservations. These non-Indians will be affected by subsection (i) even more than the Indians. And this is true whether these non-Indians live on land owned by Indians or—as is the case with the vast majority of these non-Indians—they live on land which they own themselves.

I enclose pages 19–27 of our opening brief in *Yakima* (Attachment II) and pages 12–19 of our reply brief (Attachment III), analyzing the effect of a retrocession of state jurisdiction over Indian reservations as applied to both Indians and non-Indians.[1] It is complicated—in large part because the federal statutory scheme which developed in the 19th century is complicated. In simplest terms, subsection (i) would throw non-Indians back into this 19th century federal statutory scheme, and make them largely subject to federal criminal law, rather than state criminal law. For protection they would have to look to a great extent to federal marshals and federal courts, rather than local law enforcement officers and state courts.[2]

Under subsection (i), this change would not be automatic; but subsection (i) would give the tribes the option to make this change for their non-Indian neighbors, without the consent of those neighbors; and it is clear that most of the tribes would exercise this option.

SUBSECTION (C): REVERSAL OF U.S. V. MC BRATNEY

The problem here arises, not so much from the actual language of subsection (c), as from its legislative history, as derived from the legislative history of § 144 of S. 1437.

As correctly stated at pages 1181–1182 of the Senate Judiciary Report on S. 1437:

"Subsection (c) carries forward the first paragraph of 18 U.S.C. 1152, amended to conform the jurisdiction language to the terminology of proposed Title 18."

As also correctly stated at page 42 of that same report:

"Notwithstanding its apparently plain language the Supreme Court has held that 18 U.S.C. 1152 also does not apply to offenses committed by a non-Indian against a nonvictim in Indian country. Such offenses are triable in the States under State law."

The holding referred to, of course, is *U.S.* v. *McBratney*, 104 U.S. 621 (1882). Because it carries forward the first paragraph of § 1152, the language of subsection (c) gives no hint that this Supreme Court holding is to be statutorily reversed. At page 45, however, the report gives much more than a hint that precisely this result is intended.

"Finally, as stated above, the Supreme Court has ruled that 18 U.S.C. 1152 does not apply to offenses committed by a non-Indian against a non-Indian in Indian country and that such offenses are triable by State courts in accordance with State law. The Committee believes, however, that the Federal power under the Constitution to punish such offenses should be exercised. In redrafting the provisions of current 18 U.S.C. 1152 in section 144 of the bill in conjunction with the definition of the special teritorial [sic] jurisdiction in the Code, it is the inten-

[1] Page 26 of the State's opening brief in Yakima (Attachment II) should be corrected in one major respect. The analysis assumes that state criminal jurisdiction over Indians pursuant to Public Law 83–280 is exclusive of tribal jurisdiction. See, e.g., note 9. I now believe this assumption to be incorrect, and have so stated to the 9th Circuit in our brief on remand in *Yakima*. Accordingly, state criminal jurisdiction under Public Law 83–280 displaces no tribal jurisdiction at all, not even for "minor" crimes. It only displaces federal jurisdiction. And in Washington, even that displacement of federal jurisdiction over crimes by Indians is a limited one. See RCW 37.12.010, discussed at 58 L.Ed.2d 746, 747.

[2] Federal jurisdiction over non-Indians under 18 U.S.C. 1152 is exclusive. *Williams* v. *U.S.*, 327 U.S. 711, 714 (1946). Despite the language of § 206(a)(1), this would apparently continue to be the case with respect to federal jurisdiction under the proposed counterpart of § 1152, i.e., subsection (c), at least as it applies to crimes not within the scope of the *McBratney* case. And this would be so by reason of the language of subsection (b).

In using the qualifying phrase "to a great extent," then, I have in mind that cases falling within the scope of *McBratney*, in which state jurisdiction would, as now, be exclusive, or, as proposed by the committee, be concurrent with federal jurisdiction.

tion of the Committee that they be considered applicable to offenses by non-Indians against non-Indians as well as to those offenses previously considered as coming within the scope of that section."

The statement would undoubtedly be followed by the federal courts in construing subsection (c).

This is a major change, of serious and adverse consequence to the more than 55,000 non-Indians resident on Washington reservations.

As justification for this change, the report states in footnote 71, page 45:

"Regardless of the Indian status of the perpetrator or victim, offenses in Indian country frequently constitute a breach of the peace and security of the enclave sufficient to invoke the exercise of federal jurisdiction."

Whoever wrote that sentence knows little, I suggest, about the reservations in the state of Washington, or, for that matter, in most other states. The Puyallup reservation, for example, includes a large portion of the city of Tacoma. Its population consists of fewer than 1,000 Indians and about 25,000 non-Indians. It is not an Indian nor a federal "enclave." As I have already pointed out in discussing subsection (i), on the "enclaves" in Washington, taken as a whole, non-Indian residents outnumber Indian residents by a factor of at least four to one.

The curious reasoning embodied in the Senate report should not go unnoticed. If an offense by a non-Indian against another non-Indian is a "breach of the peace and security" of the community, then, under the same reasoning, an offense by a Indian against another Indian would presumably "constitute a breach of the peace and security" of the surrounding community, which, on most Washington reservations, would be predominantly non-Indian. Yet there is no suggestion anywhere in the report that in such instances non-Indian law—i.e., state law—should apply. Only federal law (in the case of serious crimes) or tribal law (in the case of minor crimes) would apply, just as now. The reasoning is selective in its application, to say the least.

I recognize that under section 206(a), this new federal jurisdiction over non-Indians is concurrent with state jurisdiction. I further recognize that, as stated in the report in footnote 71, page 45:

"The Committee intends and anticipates, however, that the Federal government's new jurisdiction under section 144 of the bill [now section 161 of S. 1722] over non-Indian versus non-Indian offenses, which is concurrent with that of the States and tribes, will be exercised sparingly to vindicate a distinct Federal interest or to insure against an apparent failure of justice." [3]

I, too, would anticipate that this new jurisdiction would be used "sparingly," but not for the reasons stated. The reason would be that our already overburdened federal judges and federal prosecutors simply won't invoke it; they invoke the jurisdiction they already have far too infrequently.

In short, this "new" jurisdiction makes no sense whatsoever. So far as our reservations are concerned, any theoretical justification for it is undercut by the facts.

SUGGESTED ACTION

I know from personal experience the difficulties in passing a comprehensive reform of a criminal code. Washington passed a new criminal code in 1975, after years of study, and now has, I believe, one of the best in the nation. But it was not an easy task.

The suggestions I here make are intended to make your task easier, not more difficult. I would urge that subsection (i), along with subsection (k), be deleted entirely. The proposals contained in the two subsections may then, if the Committee wishes to do so, be considered separately.

S. 1722 is too important to be mired down in a controversy that is essentially outside its true scope and purpose. Moreover, it is a controversy which affects not just Washington, nor even just the Western States; it affects every state in which there exists an Indian reservation. Thus, even the Attorney General of New York last year vigorously opposed subsection (i) as embodied in section 144 of S. 1437.

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[3] By the phrase "which [jurisdiction] is concurrent with that of the States *and tribes*," this sentence seems to suggest that Indian tribes would have criminal jurisdiction over non-Indians. Such a result, of course, is absolutely contrary to the decision of the Supreme Court in *Oliphant v. Suquamish Tribe*, ____ U.S. ____ Mar. 6, 1978). And in view of subsection (b) of § 144, and its counterpart in § 161(b) of S. 1722, we take this sentence to be just an incorrect prediction of the result in *Oliphant*, rather than a statement of intent to change that result.

If your Committee, however, believes that the issue of retrocession should be dealt with in S. 1722, then I urgently request that hearings be scheduled for purposes of presenting testimony on this specific issue. The issue should not be dealt with in the absence of a full consideration of all the facts, and a full exploration of all the problems.

My suggestion with respect to subsection (c) is essentially the same. The committee report should make it clear that the *McBratney* rule is not being overturned or, even preferable, the language of subsection (c) itself should make it clear. If, however, the *McBratney* issue is to be dealt with by the Committee in its consideration of S. 1722, that issue too should be taken up in the hearings, along with subsection (i).

With such hearings, the Committee will understand the full scope of what it is proposing to do in section 161 and its effect on a far broader front than Indians alone; and understanding that, the Committee will, I am confident, abandon the proposal.

Sincerely,

SLADE GORTON,
Attorney General.

SUGGESTED AMENDMENTS TO S. 1811 SUBMITTED BY MALACHY R. MURPHY, DEPUTY ATTORNEY GENERAL, STATE OF WASHINGTON

1. Page 4, line 6: "revocation" should be changed to "non-revocation," in order to carry out what we perceive to be the intent; i.e., that if the Tribe cannot unilaterally revoke within the five-year period, such a provision must be subject to a referendum by the affected Indians.

2. Page 5, line 6: Change "except as expressly provided in this Act" to "except as expressly provided in agreements or compact, authorized by this Act." Again, we believe this better expresses what we perceive to be the intent.

3. Page 5, line 13: Change "from entering" to "to enter."

4. Page 5, line 14: Change "exercising" to "to exercise."

5. Page 5, line 17: Before "taxation" add "state." In our view, the bill should not preclude any agreement under which the Tribe itself might agree to tax Indian property, in order to obtain tribal revenues needed to finance the tribal governmental program provided for in the agreement. But as presently drafted, the language might be construed to preclude this possibility.

6. Page 5, line 21: Strike "to."

7. Page 7, line 25: Strike the quotation mark.

8. Page 8, line 22: Strike "this Act" and insert "this section and Title II of this Act." One of the most desirable features of S. 1181 is that it lets tribal governments negotiate as equals with state (and local) governments, i.e., without the need of approval by the federal government. But subsection (f), as now drafted, seems to allow the federal government to jump back into the act. Accordingly, the rule-making role of the secretary should be limited to cover, not the Act as a whole, but only the financing functions (§ 102) and the planning and monitoring functions (Title II) assigned to him.

9. Page 10, line 6: Change the entire section to read as follows: The United States district courts shall have original jurisdiction of any civil action brought by any party to an agreement or compact entered into in accordance with this Act or by any person subject to the jurisdiction of either party to such an agreement or compact to secure equitable relief, including injunctive and declaratory relief, for the enforcement of any such agreement or compact. The United States district courts shall also have original jurisdiction of any civil action, including an action for damages, brought by any person, other than a member of the Tribe which is a party to the agreement or compact involved in the action, against a tribe which is a party to the agreement or compact, with respect to a claim by such person, that the exercise of jurisdiction by a tribe over that person including any action by the Tribe's officers or employees are unauthorized by the agreement or compact or is performed in a negligent, arbitrary or otherwise unlawful manner; and the sovereign immunity of the Tribe shall not be a bar to any such action.

Mr. MURPHY. I would like to amplify upon a portion of the material I submitted; namely, an amendment to S. 1181. I noticed that the Secretary of the Interior's letter of March 17 to the chairman contains an

amendment offered to section 301 of S. 1181 which goes in a direction that I would suggest, but it does not go quite as far as I think is necessary.

On page 2 of the secretary's letter it suggests that the bill be amended to make clear that both parties waive their immunity so that the district courts of the United States have jurisdiction over disputes arising out of whatever contexts generate agreements arising out of S. 1181.

I would strongly suggest that the Congress take one further step. I realize what the Department of the Interior proposes would leave to the parties the ability to take this step themselves. I am simply suggesting that as a matter of Federal law, individuals, not only the jurisdictions that make the compacts or agreements, be required to waive immunity.

Obviously, the State of Washington does not feel that Congress should waive the immunity for the tribe with respect to its own citizens. That is their decision which they should be allowed to make themselves.

However, with respect to anyone other than a member of a tribe, I think, and I strongly urge, the sovereign immunity of the tribe should be waived with respect to individual citizens.

I will give you an example which, I am willing to concede, is in the extreme. Suppose we consider Okanogan County in the State of Washington which may or may not compact with the Colville Indian Nation to build highways within the Colville Indian Reservation on land which is nontrust and which would otherwise be subject to the governmental authority of Okanogan County.

Suppose they compact to build a highway and a bridge over No Name Creek and the bridge falls down. Whether or not it was negligently constructed by the tribe is immaterial. I believe very strongly that the widow whose husband is killed when the bridge falls out from under his car should have redress against the Indian tribe.

She would have redress against Okanogan County, against the State of Florida, and against the U.S. Government, all of which have qualifiedly waived their immunity. I am not aware of any State in the Nation, Mr. Chairman, which has not at least qualifiedly waived its immunity with respect to tort liability.

To the extent that an Indian tribe wishes and purports and agrees with a State, or county, or the Federal Government, to exercise those governmental powers, that tribe—as a matter of Federal law—ought to stand in the shoes of the Government whose powers it is exercising. To the extent that that Government has waived its immunity, the tribe's immunity should automatically be waived.

The tribe, the State, or the unit of local government involved should be able to present in a court of law the same defenses—no more and no less—as the government whose powers it is exercising could present.

For that reason, I would commend my amendment to the committee rather than the Interior Department's amendment.

I know the letter I received, Mr. Chairman, sets a limit of 10 minutes, so if I exceed my time please cut me off.

You asked a question about Alaska. I guess, since I am appearing on behalf of the National Association of Attorneys General, that I am

authorized to speak for the Alaskan attorney general. If Mr. Gross disagrees with anything I say, I guess he will let me know.

You mentioned, I think, in passing, testimony by the State of Washington before the Senate Judiciary Committee. There is no testimony, Mr. Chairman. That is one of the things for which we have been urging and pleading for 2 years, and for which we very seriously thank this committee.

We have not been permitted to render testimony to the Senate Judiciary Committee. That is the subject of Attorney Gorton's letter to Senator Kennedy—any State's inability to provide testimony on what we see as a very significant issue.

Finally, with respect to the magistrates issue, we think that is an excellent suggestion, although it does not really, as a technical matter, have much application in the State of Washington because of the curious way in which we have assumed jurisdiction pursuant to Public Law 83–280, that is, assuming *Oliphant*, *Wheeler*, and our own assumption of jurisdiction.

We concede that the tribes have concurrent jurisdiction in the State of Washington, or any State, over their own members. Under our assumption of jurisdiction the State has jurisdiction, vis-a-vis the Federal Government, over all non-Indians located anywhere on a reservation. Therefore, we do not think the *Oliphant* problem is really that significant as a conceptual matter in the State of Washington, because in our view the State has exclusive—vis-a-vis the U. S. Government—jurisdiction over all non-Indians anywhere in the State of Washington.

Senator MELCHER. I would like to ask a question on that point. If the State of Washington has jurisdiction over non-Indians on a reservation, as you have just stated, what happens to the arresting police officer in the instance of a simple altercation when the people involved are Indian and non-Indian? What does the arresting police officer do?

Mr. MURPHY. Who is the criminal and who is the victim?

Senator MELCHER. We do not know. Surely, he does not know in an altercation. How does he handle it?

Mr. MURPHY. It depends upon what reservation you are on and on what kind of land you are. Suppose it is a partial jurisdiction reservation——

Senator MELCHER. Let us use the Quinault Reservation.

Mr. MURPHY. Alright. If the incident occurs on what is colloquially called free-patent, nontrust, non-Indian land, regardless of the tribal membership or nonmembership of the individuals involved, those gentlemen go to the county sheriff. They go to the county jail.

Senator MELCHER. Is that what the police officer does?

Mr. MURPHY. Yes, sir.

Senator MELCHER. Does he know where fee-patent land and trust land is?

Mr. MURPHY. Certainly.

Senator MELCHER. What if it is on trust land?

Mr. MURPHY. If the offender is a member of the tribe within the reservation where the incident occurs, and if it does not involve one of our so-called eight enumerated areas—I guess you would have to

add a couple of other ifs—if it is not a major crime, et cetera, then it goes to tribal court. If it is a non-Indian, nontribal member, it goes——

Senator MELCHER. In other words, the police officer on the Quinault Reservation, which is trust land, in an altercation involving both an Indian and a non-Indian, and the Indian is a member of the tribe, will deliver one of the so-called culprits to the tribal court and one to the State court. Is that it?

Mr. MURPHY. Yes; that is, if the incident occurs on trust land and assuming the officer is doing his job.

Senator MELCHER. I am all for supporting our local police. I guess this is a prime example of the necessity for training local police too because that is quite a few ifs and buts for a police officer to figure out. It is probably one of the most basic problems a police officer has.

Mr. MURPHY. There is no question about that.

I wish I could but I cannot really speak specifically with respect to the Quinault Reservation on this technical matter. However, suppose it is the Yakima Reservation. The problem is really only conceptual because of the existence of cross-deputization. Both the deputy sheriffs and the tribal police carry each other's commission.

They all know where that land exists, by and large. If a problem does arise—which we do not believe happens as often as you will probably hear it does from some of the tribes—they check.

As we testified in a lawsuit we had with the Yakimas—one of the deputy sheriffs said it—that is the prosecutor's problem. It is not a law enforcement problem. That, again, assumes that the officer is doing his job.

I am not here carrying a brief for every single sheriff's office in the State of Washington or for every single sheriff's office in the United States. My mission is to try to urge the Congress to give the States the say.

Certainly, some reservations are being treated with less deference than others. Some reservations in my own State, and certainly some others around the country, have less than a perfect system of law enforcement. There is no question about that. I am not here to defend every single law enforcement organization, but the States ought to have a say in the question of who has jurisdiction over their citizens, particularly their non-Indian citizens.

Senator MELCHER. In the case of cross-deputization, either the tribal policeman or the sheriff's office can make an arrest, but once the arrest has been made does not the question of whose court is involved come into play?

Mr. MURPHY. Certainly.

Senator MELCHER. Then, regardless of whether the officer is a tribal policeman or a sheriff's deputy, the Indian offender will go to the tribal court. Is that correct?

Mr. MURPHY. If it is on trust land, that is correct, and if it is not one of our eight enumerated areas.

Senator MELCHER. The non-Indian will go to the State court.

Mr. MURPHY. There is one other qualifying factor. It will go to the tribal court if it is a misdemeanor. If it is a felony he goes, presumably, to the Federal district court.

Senator MELCHER. The non-Indian would still go to the——

Mr. MURPHY. No; the non-Indian goes to the State court, no matter where he or she may be.

Senator MELCHER. I think you may have answered this question. Under the magistrates concept, since that is based on Federal jurisdiction in Indian country, I think you have told us that under Public Law 83–280 that concept would not work.

Mr. MURPHY. No, sir, I think it would work. What I meant to say, Mr. Chairman, was that it may not be, if my view is correct, as necessary in the State of Washington with respect to non-Indian offenses as it is in a non-Public Law 83–280 State. I personally think—and again, I can only testify on behalf of my attorney general—that the magistrates concept, if it is fleshed out correctly, can go a long way toward solving the law enforcement problem on Indian reservations. We would like to work with your staff on that process.

Senator MELCHER. I have a question of you on this point. Under the present Federal magistrates law, consent must be given by the accused to be tried before a Federal magistrate. To me, that looks like more of the same.

If you are accused of something and you are a non-Indian on a reservation, a judicious prudent person——

Mr. MURPHY. If you were a defense counsel, you would insist that your client insist on trial before the district courts.

Senator MELCHER. Right, knowing that in most instances there would never be a trial. Something falls through the cracks.

Mr. MURPHY. Sure. That is the problem. In my view it is not a question of inadequate authority in the statutes. The problem—with all due respect to the Federal Government—is an absolute unwillingness on the part of many—not all—district attorneys to go out to the reservations and do anything about it.

Senator MELCHER. We heard testimony yesterday that what we need to do is beef up the U.S. attorneys' offices and we would get rid of the problem. I do not think I am going to live long enough to see the U.S. attorneys' offices beefed up to that extent.

Mr. MURPHY. Nor will my children.

Senator MELCHER. Or my grandchildren, who are probably the same age as your children.

My concept of a Federal magistrates system on an Indian reservation is that it would not work unless you remove that opportunity to waive a trial for a misdemeanor in front of a Federal magistrate. In order to make it work, the accused would have to go before the Federal magistrate just like the accused—in my State—on a misdemeanor has to go before the justice of the peace. He does not have any choice on that.

Unless we were to waive that, we would clog up the State courts on every misdemeanor, knowing that they would never get around to trying us.

Mr. MURPHY. I do not have any conceptual problem with that, Mr. Chairman.

Senator MELCHER. In your judgment, would a Federal magistrate system work if that obstacle were not removed?

Mr. MURPHY. No, sir. It would not work as effectively as it ought.

Senator MELCHER. I have sort of a technical question on retrocession. Nevertheless, it is an important one. Can retrocession occur in your State by any action other than through the State legislature? How could retrocession, under existing Washington law and under existing Federal law, occur?

Mr. MURPHY. I think that is two different questions, Mr. Chairman. My office has rendered an opinion in that respect to the effect that only the legislature can retrocede or offer retrocession of jurisdiction. However, I have no doubt whatsoever that the law is that once the Secretary of the Interior accepts retrocession under the 1968 Civil Rights Act, regardless of how it may be offered under State law, that is the end of the inquiry as far as the Federal court is concerned.

I guess you are really asking two questions. With respect to State law in the State of Washington, I think, only the legislature can offer retrocession. As a matter of Federal law, when the Secretary recognizes the jurisdiction Congress has conferred upon him, that is probably it.

Senator MELCHER. This very point was litigated in Nebraska, was it not?

Mr. MURPHY. Yes, sir. I wish you had not asked me that question because I cannot remember what the result was.

Senator MELCHER. I think the outcome of that case was that it was a Federal action.

Mr. MURPHY. I think that is right.

Senator MELCHER. The State of Washington's basic law may differ from that of Nebraska. In your judgment, would it be that Washington State's laws are different?

Mr. MURPHY. That is only with respect to the authority of our Governor or State legislature. Nebraska's Governor obviously possesses different authority, but I think as a matter of Federal law, once the Secretary has accepted retrocession, that is probably as far as the U.S. district court is going to go.

Senator MELCHER. We heard that there are a couple of Indian reservations in the State of Washington where the population is largely non-Indian or may even be a majority. Is that true?

Mr. MURPHY. There are more than a couple. The clearest examples, which I think were cited in Mr. Gorton's letter to Senator Kennedy, are on the Puyallup Reservation, which I think has less than 1,000 Indians. I think there are about 750 Indians, although I could be mistaken.

Senator MELCHER. How many non-Indians are there?

Mr. MURPHY. There are around 22,000.

Senator MELCHER. How about the Yakima Reservation?

Mr. MURPHY. My best information, Mr. Chairman, is that it contains around 6,500 to 7,000 members of the Yakima Indian Nation and approximately 25,000 non-Indians. Those are just two examples.

There are several other reservations in the State of Washington with a substantial number of non-Indian citizens. On the other hand, there are several other reservations—Mr. DeLaCruz from the Quinault Nation is here. He can correct me if I am wrong. I believe the Quinault Nation is an example of a reservation which has a substantial Indian majority.

Senator MELCHER. He testified yesterday. There are 1,800 members of the tribe on the reservation and there are about 400 or 500 non-Indians.

Mr. MURPHY. I will accept his figures. In any case, I think it is a substantial Indian majority.

Senator MELCHER. It is 4 to 1, or so, Indian to non-Indian.

I have one final question of you, Mr. Murphy. That concerns your last page which is the National Association of State Attorneys General's comments on section 161 of S. 1722.

Mr. MURPHY. I hope I made that clear in my prepared remarks. This is the paragraph with respect to Indian jurisdiction.

Senator MELCHER. Yes. That is only a portion of the critique of the attorneys general on the whole bill. When was this prepared?

Mr. MURPHY. It has been in preparation for over a year. It was finally approved by the executive committee of the National Association of State Attorneys General around February of this year. I cannot give you the exact date, but it was a month ago.

Senator MELCHER. My basic point was that this is a definite critique on this section of S. 1722——

Mr. MURPHY. Perhaps I should have mentioned it. That language pertains to section 161 of S. 1722.

Senator MELCHER. Alright. It is not on the last Congress' bill. It is on this one.

Mr. MURPHY. It is on S. 1722.

Senator MELCHER. As I glance through this position of the Attorneys General Association, it is basically that the States should have an input and be part of the function.

Mr. MURPHY. Absolutely. That is our mission as the attorneys for the various States. State legislatures are going to make differing decisions, but our mission is to see that our States have a say.

Senator MELCHER. What would that say be? I mean, you can go all the way from saying the States would have to agree, to a point of saying that the States participate in the function of determining what is adequate law enforcement. The Secretary of the Interior's witnesses have just told us that they believe there has to be such a function for a determination of whether or not a tribe on its own reservation has the capability of having a decent law and order code, and of enforcing it.

Mr. MURPHY. On page 4 of my prepared remarks, Mr. Chairman, I say "Thus, I suggest the following:" and I list four points.

If enacted, S. 1181 is the vehicle for the say. Under the Tribal States Compact Act, the States can negotiate the problem with the tribes. Alternatively, I suggest language to be inserted in subsection (i) of section 161. I think that would do the trick.

Senator MELCHER. That is an absolute veto on the part of the State. I am just trying to determine whether that is the position of the Attorneys General Association.

Mr. MURPHY. It is. In other words, S. 1722 currently—if you want to express it this way—has a tribal veto over State jurisdiction. The tribes can unilaterally request the Secretary of the Interior to reacquire Federal jurisdiction. That is in a sense a veto of State jurisdiction.

What we are particularly concerned about are the non-Indian residents on a reservation. If the committee and the Congress were to accept the language I suggest, I prefer not to view it as a State veto but as input by the State and a say in the matter.

I would prefer—and I believe I can accurately speak for the national association—that sections (i) through (j) of S. 1722 be discarded in their entirety and that in their stead S. 1181 be enacted, so that the tribes and the States can negotiate the jurisdictional problems.

Senator MELCHER. Thank you very much, Mr. Murphy.

Mr. MURPHY. Thank you, Mr. Chairman.

Senator MELCHER. Our next witness is Kenneth Black, executive director, National Tribal Chairmen's Association.

STATEMENT OF KENNETH BLACK, EXECUTIVE DIRECTOR, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION; ACCOMPANIED BY JOE DeLaCRUZ, FORMER PRESIDENT, AND DAVID DUNBAR

Mr. BLACK. Mr. Chairman, I have with me Mr. Joe DeLaCruz, who is the former president and also the former chairman of the Interstate Compact Relations Committee. I also have with me David Dunbar, who is kindly conducting a study for NTCA in tribal-State relationships.

We are pleased that you have extended the courtesy to the national tribal chairmen of testifying on this important legislation (S. 1181). At the outset I must advise you that this testimony represents the views of the NTCA and is not binding on any of its member tribes. However, I believe that our testimony represents a consensus of our membership, which, as you know, is composed solely of federally recognized tribes.

After having reviewed the bill, we present the following brief comments with a qualification. We prefer not to comment on section 101(a)(1) which refers to civil, criminal, and regulatory jurisdiction. This is a matter of such complexity and far-reaching implications that it would consume by itself all 3 days of testimony.

However, I will proceed to bring to your attention three provisions of the bill that give us concern. The first is section 101(a)(2). It provides concurrent jurisdiction between the States and the tribes over specified subject matters, specified geographical areas, or both. For years, even decades, many Western States have attempted to gain complete jurisdiction over the tribes and their property. We view this provision as providing the States a foot in the door while giving the tribes little, if anything.

Certainly, no one would expect any Western State Governor to negotiate an agreement with a tribe which would allow that tribe to exercise concurrent jurisdiction over State subject matter or geographical areas. Such a provision would just not be politically available to the State Governor.

Therefore, we ask in what manner and to what extent would the tribes benefit from this particular provision? We find little benefit, if any at all. However, obviously it would be in the interests of and of great satisfaction to the States to assume concurrent jurisdiction

over tribal water, hunting, and fishing rights, even though such rights should not be encumbered or alienated.

Second, section 201 directs the Secretary to encourage the tribes and the States to discuss and confer upon jurisdictional questions which exist between parties. This would be done through committees, task forces, and other entities. We find this the most encouraging part of the bill.

However, it requires further comment. We are all aware that jurisdictional problems exist between the tribes and the States. It is, however, our contention that these problems have been created either by States directly or by the Federal Government at the urging of the State or its citizens.

We can make this statement with some confidence because the tribes have not had the expertise or the money to have created the problems. Hunting, fishing, and water rights provide, perhaps, the best examples here.

Furthermore, we find no comfort in the notion that the Secretary would provide his or her representatives to such conferences. History teaches us that in more instances than not, the Department has been more harmful to our rights, our interests, and our benefits than it has been helpful. Clearly, in many if not most instances, it would have been in the interest of the tribes to have conferred upon the matter before it became a problem, but our pleas for conferences in just this manner have been ignored and we have not been invited.

This causes us to wonder just why it is that the States find the need to confer at this time.

Third, section 301 provides that any party may bring a civil action in a Federal district court for enforcement of the terms of the agreement or compact. We find this provision most disconcerting. For years, States have attempted to gain legal standing in Federal courts to pursue the tribes in actions that would involve treaty and other Federal rights.

However, even where Federal recognition has been withdrawn under Public Law 83–280, the Supreme Court has not allowed this, the *Menominee* decision being a case in point.

Unfortunately, this provision would finally allow the States to do what they have been wanting to do for years but have not been able to do. The National Tribal Chairmen's Association cannot support this provision.

While we find some provisions of the bill are good, at the same time we are constrained in supporting it in toto due to its broad unforeseeable ramifications. We would prefer to see matters left alone.

Each tribe or tribes within a given State should be left to itself to decide internally whether or not to enter into any such compact or agreement. While we realize and appreciate that this is a good faith effort on your part to create a legal mechanism for the resolution of disputes between the tribes and the States, it is our opinion that a tribe would be giving up much more than it would receive.

In our view, the bill is tilted toward State interests without them having to give up anything. Therefore, I advise you that NTCA currently opposes this bill.

While we are presently conducting studies that would enhance and encourage relationships between the States and the tribes, we know that they already have the authority to enter into agreements. There are presently agreements on the books that have been there for years. The relationships between some States and some tribes are such that they have been beneficial to the community, non-Indian and Indian.

If you have any questions, I have with me a gentleman who is conducting our legal study and Mr. Case who has had a grievance with the State of Washington and, I think, with the State of Idaho.

Senator MELCHER. Kenneth, do you have any comments on the other two subjects of these hearings? You have only commented on S. 1181.

Mr. BLACK. No, sir. Mr. Case submitted testimony yesterday but NTCA has not.

We have requested that the tribes make some input on the other two subjects.

Senator MELCHER. We will hold the hearing record open on both S. 1722 and on the Federal magistrates concept, the latter for some time. We do not know how long the hearing record can be held open on S. 1722, section 161, because that bill may be on the Senate floor rather soon.

We would appreciate having any comments you can give us on both matters.

Mr. BLACK. We will let organizations and tribes do the commentaries on those two.

Mr. DELACRUZ. I want to have entered in the record [1] the preliminary studies that we have conducted in the last 1½ years on the tribal-State commission. It is a joint effort between the National Council of State Legislatures and the National Tribal Chairmen's Association and the National Congress of American Indians.

From our preliminary studies, you will see that there are several types of agreements in existence which concern jurisdiction—from taxation to hunting and fishing. Some of them go back several years. There are some pretty good compacts that have been developed.

A few of them have been the result of court cases and the fact that people realized we could stay in court forever. That made them back off and sit around a table to develop a method to coexist. We feel that vehicle is available—as we testified yesterday—without getting tied down right now to a piece of legislation.

We do not know what kind of regulations the Interior Department is going to draw up. It seems as though we always get boxed in when the Interior starts writing up their regulations for something that passes through an act.

Senator MELCHER. Thank you very much.

We will hear now from Linda Bennett, public lands specialist, National Association of Counties.

STATEMENT OF LINDA BENNETT, PUBLIC LANDS SPECIALIST, NATIONAL ASSOCIATION OF COUNTIES

Ms. BENNETT. Thank you for the opportunity to testify today representing the National Association of Counties.

[1] Material not received at time of printing.

I submitted copies of my written testimony. I will highlight from it.

NACo believes that non-Indian jurisdictional problems are far-reaching and deserve a very candid dialog. Involvement of NACo in the arena of Indian issues began about 3 years ago when an Indian affairs task force was created to comment on the draft American Indian Policy Review Commission.

Fred Johnson, who is a county commissioner from Glacier County, Mont., was named chairman. In February 1978, former NACo president, William Beach, created an ongoing Indian affairs committee. This committee was created to recommend policy and strategy to the other standing NACo committees.

The local government crisis presently occurring in many parts of the Nation is due to historically inconsistent Federal policy toward Indian reservations coupled with recently expressed moves by Indian tribes on the reservations toward complete self-government. By failing to spell out tribal jurisdictions, Congress has allowed a situation of conflict to develop in which tribal aspirations and treaty interpretations are pitted against other constitutional principles and rights. The result has been a further deterioration of relations between Indians and non-Indians.

Without denying the validity of any Indian claims, it is clear that Congress must decide on matters of jurisdiction—civil, criminal, control of resources, et cetera. NACo, therefore, calls upon Congress to resolve the situation by clearly defining the nature and scope of tribal jurisdictions, rights, and sovereignty, their relation to the various States and through the States to counties.

In developing legislation, Congress should be mindful of the following questions and considerations: To what extent do tribal governments have sovereign immunity from legal action? Is it that which is accorded to State and local governments? Or, is it something more? Is it something less?

A clear definition of both the government and its immunity is required.

Second, within Indian country what jurisdiction would tribal governments have over tribal members, over nonmembers, or over members outside of Indian country?

Third, regarding criminal jurisdiction in Indian country, what levels of responsibility for enforcement, prosecution, and trial rest with the tribes, with the States, or with the Federal Government?

Fourth, if Congress supports the continued conversion of land to Indian trust status, Congress should develop satisfactory methods of compensation of local governments for the loss of already-leaned tax money necessary for the provision of mandated and requested services.

The National Association of Counties supports the concept behind S. 1181, the bill to authorize the States and Indian tribes to enter into mutual compacts. Many Indian and non-Indian problems can and must be handled on a local, case-by-case basis. S. 1181 takes the initial step in resolving some situations, recognizing the necessity of solving problems at the local level.

The NACo Indian committee recognizes that this bill will not be the remedy for all situations because it does not clearly define the nature and scope of tribal jurisdictions.

Other problems also exist in the bill, perhaps due to the bill's brevity. For example, in situations where a county has been providing services on an on-going basis to the Indian population on a reservation, would that county be eligible for funding under the bill, or would the bill deal strictly with new agreements between counties and tribes?

The bill is voluntary. It does not mandate that tribal and county governments negotiate agreements with each other on jurisdictional conflicts. However, it does provide a mechanism for funding as well as the legal authority for agreements between such governments were they to choose to negotiate among themselves.

To that extent, the bill will not solve all the types of jurisdictional issues. It may alleviate problems in some areas.

The negative fiscal impact of Indian lands on counties amounts to millions of dollars annually. The resultant strains on county and municipal systems cause much ill will between Indian and non-Indian citizens. At times misunderstandings, jealousies, and outright contempt predominate formal relationships.

Many counties provide police and fire protection, access, sanitation, utilities, and so forth to tribal members on tribal lands. Let us examine, for example, Lake County, Mont. This county has a land area of approximately 995,000 acres of which about 299,000 acres are under Indian trust status. Nearly one-third of the county's tax base is exempt from assessment and payment of public revenue.

The county, however, provides many services to all its constituents—public roads, bridges, water and sewer districts, a countywide refuse disposal district, and a countywide weed control district. Currently, the county has six Indian rural subdivisions located on trust land. These subdivisions represent 150 rural zone sites which rely on the county's refuse disposal system.

Access to the subdivisions is from county roads. Another tribal development of approximately 60 units is being planned and will make similar use of these services.

At this time the services provided by the county are relatively unavailable either through the tribes or the Bureau of Indian Affairs. As the demand for the services increases, the ability of the county to provide them via the tax base decreases.

Normally rural development means an equitable increase in the valuation of that property in order that taxes offset the increased cost of services. This is not true of trust lands.

In addition, refuse disposal charges are normally assessed on a per household or per business basis. However, the tribal houses and businesses are exempt.

Where does the county turn for the funding to continue the servicing of the Indian population? Would the funding be available through channels such as S. 1181 were it to be enacted?

Situations encountered primarily with the largely checkerboarded reservations, such as Lake County, Mont., differ from those encountered with large reservations with a primarily Indian-based population. In the latter case the burden of servicing the Indian population rests more with the tribal government and the potential for the duplication of services is not as great.

Due to the wide range of variations, no stock solutions are possible. Rather, solutions lie in working together at the local level.

The National Association of Counties has not established policy either on the application of the magistrates concept for Indian reservations or the section of S. 1722 relating to the Indians resuming Federal jurisdiction where the States have assumed jurisdiction pursuant to Public Law 280. These items are, however, on our agenda for the next committee meeting which will be on April 22, in conjunction with the annual Western Region Conference in Boise, Idaho.

Thank you for the opportunity to testify. I am looking forward to working with staff on these issues. I am available to answer any questions.

Senator MELCHER. Do you have any figures on the number of counties that are impacted by an Indian reservation?

Ms. BENNETT. I think there are approximately 200. I would have to get the exact number of counties that have Indian reservations within their boundaries. There are, of course, other counties nearby Indian reservations that would be impacted.

Senator MELCHER. Do you have any financial estimates involving those counties?

Ms. BENNETT. I do not have them right off. I am working on developing some.

Senator MELCHER. We would be interested in having them when you have developed them. We would also be interested in any comments that are developed at the Boise meeting on April 22 of the NACo committee on Indian affairs.

[Material not available at time of printing.]

Thank you very much.

Our next witness is Frank McCabe, Chairman of the Colorado River Indian Tribes.

STATEMENT OF FRANKLIN McCABE, JR., CHAIRMAN, TRIBAL COUNCIL, COLORADO RIVER INDIAN TRIBES; ACCOMPANIED BY JOHN POWLESS

Mr. MCCABE. Senator Melcher, members of the staff, ladies and gentlemen, my name is Frank McCabe. I am the chairman of the Colorado River Indian Tribes. With me today is Mr. John Powless. He is my administrative aide.

I would like to familiarize you with the Colorado River Indian Tribes and with our interests in the bills that are proposed. Our reservation is about a quarter of a million acres. There is a town within the exterior boundaries of our reservation of about 978 acres.

We are on three counties and in two States. The county in Arizona is Yuma County, one of the 13 or 14 counties in the State of Arizona. Part of our reservation is in California in Riverside County and San Bernardino County. Running right through the middle of our reservation is the Colorado River.

The State of Arizona is a non-280 State. However, the California portion of our reservation is in a Public Law 280 State. We do have some problems with that, in that the Colorado River Indian Tribes, in attempting to fulfill its responsibility to maintain law and order,

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considers our reservation to be one total package. Often we have difficulty meeting some of the regulations imposed by the State under Public Law 280.

The Colorado River Indian Tribes support the intent of S. 1181 which, as we understand it, would provide a mechanism through which States could enter into agreements with Indian tribes for the purpose of resolving jurisdictional problems.

We would like to recommend to the committee that the major emphasis of the bill be directed at State governments. We believe that the bill does not diminish or expand upon the authority of tribal government under the current status of the law and that tribes are not presently prohibited from entering into agreements with State and local governments.

It is the State and local governments that are reluctant to enter into cooperative agreements with Indian tribes. Their reluctance stems from the State enabling acts which generally preclude States from exercising jurisdiction over Indian tribes. S. 1181 is, in our opinion, more for the benefit of States than it is for the tribes.

Under S. 1181 the States and the Indian tribes would submit their agreements to the Secretary of the Interior and he in turn would work with the States and the tribes. The Secretary would be responsible for analyzing their financial needs, requests, capabilities, et cetera, to assist the tribes and States in reaching the objectives of their agreements.

The concern of the Colorado River Indian Tribes is that the Secretary of the Interior, by being the intermediary in these agreements, could possibly have a conflict of interest in such a position. For example, the Department of the Interior, which is supposed to be the trustee of Indian tribes—meaning that the Department has a fiduciary duty to act in the best interest of the tribes—could easily take a position with regard to an agreement that they feel is in the best interest of a tribe and advise a tribe that it should sign an agreement when the tribe might otherwise be reluctant to do so.

We think that those kinds of abuses or conflicts of interest would be more prevalent in the instance of a tribe that did not have access to its own legal counsel which would make it dependent on the advice of the trustee.

It is conceivable that the Department of the Interior could be supportive of agreements that would give State and local governments responsibility for the delivery of certain services to Indian tribes—for example, road maintenance, police protection, fire protection. The danger of such agreements could result in the loss of control and authority over those services and in the placing of the State in a position wherein they would become the trustee responsible for the delivery of the services.

To avoid any conflicts of interest, we recommend that the bill contain a clause that clarifies the role of the Department of the Interior in the agreements. It should be clearly stated that the Department, as trustee, must advocate for Indian tribes and do what is in the best interest of the tribes, as determined by the tribes. The Department should never be in the position of trying to coerce tribes into signing agreements with the States.

The potential for abuse in this process is significant. Therefore, funds should be made available to allow tribal governments to confer

with legal counsel before they sign any agreement with a State or local municipality. We feel that such a provision is consistent with the declared policy of the bill, that is to continue to "preserve and protect the tribes of the American Indian people."

The Colorado River Indian Tribes recommend that the judicial enforcement section of S. 1181 be deleted. If a court has to enforce an agreement to promote maximum harmony and cooperative efforts, there should not have been an agreement in the first place.

If there is going to be a cooperative relationship between a tribe and a State, it will only be achieved when the parties determine that an agreement will be advantageous to both of them. The deletion of this section will also dispel a lot of concern about any waiver of sovereign immunity once an agreement has been entered into. We strongly recommend that the parties be allowed to operate as equals, with the ability to terminate agreements upon written notice, and that the courts be kept out of this process.

In conclusion, the Colorado River Indian Tribes support S. 1181, provided the recommendations which we have made are contained in the bill.

We believe that Indian tribes are sovereign governing bodies in which the States do not have jurisdiction. We do not consider ourselves as municipalities or as local units of government under the jurisdiction of the States. Any agreements or compacts which are made between a tribe and a State must be based on respect for each other's sovereignty. If an agreement or compact cannot be worked out, the parties must be free to return to the original position they held prior to signing any agreement.

The Colorado River Indian Tribes also favor the legislative proposal contained in subsection 161(i) of part C of S. 1722. The jurisdiction exercised by States under Public Law 83-280 has been a source of controversy and vexatious litigation since its inception and has often been used as a means of inhibiting tribal growth.

The supposed rationale for imposition of Public Law 280 jurisdiction was the lack of effective law enforcement on the reservations in certain States because of inadequate tribal control over criminal conduct and other activities on the reservation. In fact, this was assimilationist legislation.

Whatever the reasons may have been for Public Law 280, it is now an outmoded, unnecessary imposition of State control over the vital sovereign interests of the tribes. The law enforcement and judicial systems of the Colorado River Indian Tribes are highly developed and sophisticated and have been for many years effectively operating on the non-280 Arizona side of the reservation—on which the great majority of the Indian and non-Indian population reside and work.

There is no sound reason for requiring the State of California to consent to a retrocession of jurisdiction. This is a decision which should rightfully be made by the affected tribe with the concurrence of the Secretary of the Interior, who is in a superior position to a State to determine if retrocession is in the best interest of the parties involved.

We do wish to point out that while S. 1722 is intended to effect reform in the criminal code, the civil jurisdiction exercised by States under Public Law 280 should be addressed either in this bill or in com-

panion legislation. It is in the civil field that tribes have had to struggle to pursue their own course of economic and political development and growth, free of undesirable restraints imposed by the States.

In spite of recent case law on the subject, the counties of San Bernardino and Riverside in California have periodically attempted to enforce their laws and regulations on economic enterprises authorized by the tribes under the guise of Public Law 280. We strongly urge that retrocession of civil jurisdiction be treated in the same fashion as criminal, that is, that it be subject to the unilateral determination by the tribes.

We suggest one clarification of the wording of subsection (i) at page 354, lines 30 and 31. It should be made clear that the reference to "affected area of such Indian country" means the entire reservation and all enrolled Indians on the reservation, not just that portion of the reservation located in the Public Law 280 State.

As was mentioned earlier, the vast majority of tribal members are located in Arizona and the entire reservation is administered under the uniform political jurisdiction of the Tribal Council without reference to the particular State or county in which any portion of the reservation may be located. It would therefore be illogical to fragment the reservation for purposes of determining the affected area. That should be deemed the entire reservation for voting purposes under subsection (i).

With respect to law enforcement problems on the reservation, this is indeed an area which deserves the critical attention of Congress if difficulties are to be resolved.

We note your intention to move in the direction of delegation of special authority to Federal authorities to address these problems. The Colorado River Indian Tribes firmly believe that initial efforts in this area should explore the potential for extension of tribal criminal jurisdiction over the non-Indian on the reservation as a fair and workable basis for controlling non-Indian criminal activity, particularly on those reservations that have developed law and order and judicial systems to a level of sophistication comparable to State and local agencies. This type of authorization could perhaps be premised upon a program of certification of individual tribes by appropriate Federal authority that adequate procedural safeguards exist in the tribal system.

We further believe that the problem of major crimes committed by Indians on the reservation and the sporadic prosecution thereof by U.S. attorneys should also be first addressed by looking into the feasibility of expansion of the present limited penal authority of tribes, that is, 6 months' imprisonment and/or $500 fine.

Certainly the mandate of the Indian Civil Rights Act provides adequate protection for individual rights of the accused, essentially the same as in non-Indian forums except perhaps for the absence of the right to court-appointed counsel for the indigent.

We do not see the logical or legal distinction for limiting tribal authority in this area, especially since a system of certification could be established, as mentioned earlier, providing for such additional requirements as necessary to support broader penal authority by tribes.

In order to foster the goal of tribal self-determination and preservation of tribes' status as viable sovereign entities, we propose a detailed

and sincere review of potential solutions to the problems outlined in your communication to us. This would first serve to explore and clarify extension of tribal authority consistent with protection of individual rights.

We certainly prefer this approach over pursuing the potentially stifling, limiting, and often inefficient imposition of additional Federal authority on the reservation and on tribes. We recognize that the magistrates approach may be appropriate for those tribes who desire that resolution. However, if other tribes are or will be capable of doing the job and are willing to assume the responsibilities, they should be allowed to do it.

We appreciate the opportunity to comment on these issues. Be certain that the Colorado River Indian Tribes are interested in and concerned about the developments in these areas.

To continue for a moment beyond my prepared testimony, although I make my statements optimistically about our relationship with the local jurisdictions, we do from time to time have problems, but I hope they are isolated situations.

Recently we had a non-Indian arrested on the reservation for speeding—driving 90 miles per hour—and driving while intoxicated. Because of cross-deputization and joint cooperation, we referred the matter to the justice of the peace in the town of Parker. Unfortunately, the justice of the peace judge dismissed the case because of the jurisdictional question. However, as I said, that is an isolated case.

We have had other situations like that. However, we had a county attorney who resigned, and I think much of the problem will be solved as a result. Our U.S. attorney, Michael Hawkins, has a good rapport with the other attorneys and I have had dealings with him. I have had talks with the Governor of the State of Arizona. He has been very cooperative in attempting to remedy some of these problems. He is, as I am, a strong advocate of remedying the problems at the level where they should be remedied.

From our standpoint, if all the other things do not work, one solution is to have a Federal magistrate assigned to Colorado River Tribes for purposes of adjudication and quick disposition of cases. Now, when a non-Indian is a suspect we process him through the Federal court. Often we do have those suspects on the reservation awaiting their arraignment. It does not look too good.

Perhaps to facilitate the process, it would be best to have a Federal district court judge assign a Federal magistrate to the reservation. However, from the political standpoint, if you deprive the county of moneys they would probably not favor this plan.

Nevertheless, if all else failed, I guess, the establishment of a Federal magistrate court would be, perhaps, very practical and workable on the reservation.

Senator MELCHER. Frank, do I gather from your testimony that in Riverside and San Bernardino Counties in the State of California you have a cooperative arrangement of cross-deputization?

Mr. MCCABE. Yes, sir.

Senator MELCHER. Does it work?

Mr. MCCABE. It works. I think it is mainly because they are very practical too.

Senator MELCHER. That is right. You are out there on the extreme eastern end of those counties. Those counties out there in California are as big as Montana counties.

Mr. MCCABE. That is correct.

Senator MELCHER. The county seat in Riverside County is Riverside, is it not?

Mr. MCCABE. Yes, sir.

Senator MELCHER. Is the county seat of San Bernardino County, San Bernardino?

Mr. MCCABE. Yes, sir.

Senator MELCHER. Both of them are almost on the coast and you are on the Arizona-California border. You are 250 miles away from the county seat. Are you not?

Mr. MCCABE. That is correct. We feel that is probably the reason.

Senator MELCHER. I would think so.

Mr. MCCABE. There are county people in there occasionally, but there is generally respect for territorial integrity. For the most part, we have worked it out.

Senator MELCHER. If S. 1722 were enacted with 161(i) as part of it, I take it you are not asking for retrocession in that event. Are you?

Mr. MCCABE. I guess that is just a way of sustaining what has already been worked out by the tribes.

Senator MELCHER. In other words, you would hold a better hand.

Mr. MCCABE. We could, but from our standpoint, we believe in working it out at the local level. If this is a way of doing it, that is fine. It would only be affirmation.

Senator MELCHER. Your testimony states that S. 1722 should not just refer to retrocession of criminal jurisdiction. It ought to refer also to retrocession of civil jurisdiction.

You mention that in spite of the recent case law, the Counties of San Bernardino and Riverside "have periodically attempted to enforce their laws and regulations on economic enterprises authorized by the tribes" and they have used Public Law 280 to do that. What kind of civil jurisdiction are you talking about?

Mr. MCCABE. I am not too sure. I suppose it is all that is not criminal. I think the reason for concern about that was that it was not mentioned. We do maintain that we have civil jurisdiction over non-Indians.

I think the civil part would be such things as building codes, land codes. The States ought to honor our codes. We have set our building codes in a close working relationship to the county.

Senator MELCHER. Do they impose the same sort of building and land codes as they do in the rest of the county?

Mr. MCCABE. Yes; they did initially. Our Bureau of Indian Affairs had staff and we are presently working on a building code.

We did have working arrangements like the landfill. Our land codes are very much similar, if not better. We often have, included in our various codes, the same things that they have. The are not below the county standards.

Senator MELCHER. Our chart shows that in the case of Arizona the State has assumed jurisdiction under Public Law 280 only over air and water pollution. How has that affected you?

Mr. MCCABE. I am not sure. There is a plan to construct a coal-burning nuclear plant. We have taken an adamant position in opposition to that. If they assume exclusive jurisdiction with regard to that, we will have a problem. Our reservation is in something like a basin.

Senator MELCHER. If our chart is correct, that Arizona has assumed jurisdiction over air and water pollution, that surely is an example of civil jurisdiction.

Mr. MCCABE. Right. In line with that same thought, our reservation is agricultural. There is considerable use of sprays, herbicides, pesticides, and those kinds of things. We want to continue to protect our residents.

If there is a request for assumption of those jurisdictions, it would seem that that was the proper way to do it.

Senator MELCHER. As to the Federal magistrate concept, justice is denied for a certain period of time. Sometimes it is just denied, is it not? There is too long a delay. Before a case gets before the court, it has lost the effectiveness of justice. Is that not true?

Mr. MCCABE. That is true. That is why we have made a concerted effort to work closely with the city and the county on some of these problems. I guess the sovereignty issue is one of the sensitive areas, but we have been able to work it out.

From a practical standpoint, your constituents and my constituents are ignorant of existing laws to a large extent and they do not know why there is a criminal out in the street. We tell them: "That is the system." It does stare us in the face.

Senator MELCHER. Thank you very much, Frank, John.

Mr. MCCABE. Thank you, Senator.

Senator MELCHER. Robert Pirtle is here. Mr. Pirtle, I assume you are testifying on behalf of the Colville tribe. Is that correct?

Mr. PIRTLE. Yes, Senator.

STATEMENT OF ROBERT L. PIRTLE, GENERAL COUNSEL, COLVILLE CONFEDERATED TRIBES, THE MAKAH TRIBE, THE SUQUAMISH TRIBE, AND THE METLAKATLA INDIAN COMMUNITY

Mr. PIRTLE. Senator Melcher, I am Robert Pirtle, one of the members of the law firm of Zionitz, Pirtle, Morisset, Ernstoff & Chestnut. We are general counsel for approximately 15 tribes in Western United States, chiefly in the States of Washington, Alaska, Montana, California, and North Dakota.

I would like to thank you and your staff, Senator, for the opportunity to appear before you and testify today.

In keeping with our national policy of self-determination for Indian people, the Colville, Makah, Suquamish, and Metlakatla peoples are steadily progressing in modernizing and expanding the operation of their tribal governments to the end that their reservations will be well governed and the lives of all reservation residents improved.

In the process these tribes have modernized their governmental organizations, upgraded the quality of staff personnel, and made use of every source of technical knowledge which is available. Several of these tribes are in the process of complete overhaul of their tribal constitutions so as to utilize every inherent sovereign power they possess to meet the social and economic challenges of the next century.

These tribes have learned from hard experience that long disuse of governmental power has in many cases resulted in its usurpation by local, State, and county units of government. Often the assertion of tribal rights of self-government has been met by ridicule and opposition from non-Indians unfamiliar with the law governing the rights of Indian tribes. Nevertheless, these tribes are committed to the principle of self-government and self-determination without the threat of eventual termination

The tribes have the full support of the U.S. Government in their efforts toward achieving real self-determination, including revitalization of their law and order codes and court systems. For this reason it would be tragic if Congress were to act upon its long-sought objective of complete revision of the Federal Criminal Code in a way which would inadvertently deal a damaging blow to the efforts of these tribes at self-determination. Accordingly, these tribes wish to address the provisions of S. 1722 which they consider of utmost importance to their future well-being.

In S. 1722, part C—amendment relating to Indians, title 25, United States Code, section 161(i) provides that 90 days after adoption of a resolution by an Indian tribe requesting retrocession of criminal jurisdiction granted to a State under Public Law 83–280, 67 Stat. 588 or the Indian Civil Rights Act of 1968, 82 Stat. 73, the United States shall, upon consent of the Secretary of the Interior, reacquire such measure of criminal jurisdiction as is specified in the resolution.

In 1953 Congress proposed, amidst a series of termination acts, H.R. 1063 which was later enacted as Public Law 83–280, and which for the first time gave States civil and criminal jurisdiction over Indians and Indian reservations. With its enactment the tragic destruction of tribal self-government reached a climax.

In the ensuing 27 years American Indian tribes have seen a steady decline of tribal government, a disintegration of tribal court systems, a total failure of State civil and criminal jurisdiction, a continuing deterioration of reservation law and order, a worsening of checkerboard jurisdiction through partial assumption of jurisdiction by States such as Washington, a growing disrespect for law by Indian youth, and a general increase in crime and lawlessness in Indian country.

By 1968 Indian jurisdiction problems had become so critical that Congress enacted the Indian Civil Rights Act of 1968, Public Law 90–284, which prohibited any further State assumption of Indian jurisdiction without consent of the Indian tribe affected. Today, however, many Indian tribes remain under State jurisdiction and a continuing accumulation of evidence attests to total bankruptcy of State jurisdiction over Indians and Indian country.

By 1974 the situation had worsened to a critical state and at the 1974 convention of the National Congress of American Indians in San Diego, Calif., president Mel Tonasket and executive director

Charles Trimble announced that a major Indian conference would be held in early 1975 in the hope of finding a solution to the jurisdictional crisis.

On February 26, 1975, the National Conference on Public Law 83–280 was held in Denver, Colo., and was attended by hundreds of Indian delegates from all over America, tribal attorneys, representatives from Indian organizations, representatives of the U.S. Solicitor's Office, Bureau of Indian Affairs personnel, and staff members from the Senate Interior and Insular Affairs Committee and the Indian Affairs Subcommittee of the House Interior Committee.

The culmination of the work of that convention was a position paper which led to the drafting of S. 2010 which was introduced into Congress on request of the National Congress of American Indians and the National Tribal Chairmen's Association by Senator Henry M. Jackson on June 25, 1975.

The general tenor of S. 2010 was essentially that of section 161(i) of S. 1722, namely, the principle of "Local option repeal of Public Law 83–280", that is, the principle that true self-determination of Indian people requires that each tribe determine for itself whether any or all measure of State criminal jurisdiction should apply in the Indian country it controls. S. 2010 provided that through resolution an Indian tribe could ask the United States to accept retrocession of jurisdiction in accordance with the specific terms of the resolution.

A series of hearings was held on S. 2010 but in the press of other major national legislation Congress failed to enact S. 2010. Nevertheless, American Indian tribes continue to chafe under the yoke of an alien jurisdiction which was not of their doing and which does not do justice to their members or protect the lives and property of all citizens of their reservations.

The specific failure of State assumption of Indian criminal jurisdiction has been the subject of a great deal of discussion and investigation. The American Indian Policy Review Commission held extensive hearings in States with Public Law 83–280 jurisdiction and Task Force IV of the Commission issued a final report to the Commission entitled "Report on Federal, State, and Tribal Jurisdiction" in 1976, in which it detailed the increasing jurisdictional conflicts between Western States and Indian tribes, many of which can be laid directly at the doorstep of Public Law 83–280.

Several years ago, as general counsel for the Colville Confederated Tribes, I personally accompanied an enrolled tribal member to the office of the sheriff of Okanogan County in an attempt to persuade him to prosecute the known thief of her television set. Although we supplied the name of witnesses to the theft and to a subsequent illegal sale of the stolen set, the sheriff refused to pursue the matter on the shifting grounds that he was short of staff, had no direct evidence, and that the officer assigned to the case was on vacation. Despite our efforts, no prosecution ever occurred.

Yet tribal officials have noted time and again, just after per capita payments by the tribes to their members, that fines levied against Indians in local courts for minor infractions of the law mysteriously rise to a figure of $300, precisely the amount of the per capita payment.

The foregoing examples are typical of the manner in which State jurisdiction operates in Washington. It is a one-edged sword which cuts in favor of prosecution of Indians for crimes they commit but does not cut in favor of protecting Indians and their property from crime.

While the current sheriff of Okanogan County is a dedicated law enforcement officer who was formerly chief of police of the Colville Confederated Tribe, his policy of cooperation with the tribal police is only as secure as his position as sheriff. With a change of administration, the situation will almost certainly revert to its former state and be no different from that of other counties in which Washington tribes are located.

Half the Colville Indian Reservation lies in Perry County, a county with a tax base so small that it cannot possibly provide sheriff's deputies, cars, and other police equipment necessary to make law enforcement on the reservation effective.

Indeed, the remoteness of most Indian reservations from large population centers and county seats and the lack of adequate funding of county sheriff's offices, coupled with today's rampaging inflation, prohibits county sheriffs from even the attempt at adequate law enforcement on Indian reservations.

The Makah Indian Reservation is situated on the northwest tip of the Olympic Peninsula, some 70 miles from Port Angeles, the county seat of Clallam County. It is widely recognized that the Clallam County sheriff's department does not provide adequate law enforcement on the Makah Reservation and has neither the money, staff, nor the intention of doing so.

Similarly, the Metlakatla Indian Community is situated on the Annette Island Reservation, some 2 hours ferry ride from Ketchikan, Alaska. Again, the southeastern borough does not have the ability due to money, staff, and travel constraints to provide effective law enforcement on the reservation.

The criminal law of the State of Washington is peculiarly ineffective in that Washington assumed Indian criminal jurisdiction in a piecemeal fashion. The Washington statute assumed jurisdiction on fee lands inside reservations but limits State jurisdiction on all trust lands to the following areas: Compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles upon the public streets, alleys, roads, and highways.

Thus, a law enforcement officer investigating a crime on a Washington reservation must be armed with the statute and a tract book. If he finds that the crime occurred on fee land he has jurisdiction to continue his investigation but if not, he can only continue the investigation if the crime falls under one of the eight areas of jurisdiction.

However, the eight areas are themselves vague. Neither the State attorney general nor tribal lawyers can be sure of their precise meaning.

It is as true of Indians today as it was in 1886 when the U.S. Supreme Court decided in *United States* v. *Kagama*, 118 U.S. 375 (1886), that "Because of local ill feelings, the people of the States where they are found are often their deadliest enemies."

A major factor which militates against just and effective State criminal law enforcement on Indian reservations is the lack of sympathy of State officials to Indian culture and values. In its long course of dealing with Indian tribes the Federal Government has gradually built an empathy with the Indian way of life and Indian social customs which, to a significant extent, influences the way in which Federal officials approach Indian problems including crimes committed by and against Indians.

When Federal courts and Federal magistrates are involved they draw upon the experience of the Bureau of Indian Affairs and other Federal agencies with direct responsibility to Indian people. Because they are Federal officials the people in those sensitive positions are less apt to be swayed by hostile public opinion. In particular, Federal judges, appointed for life, can deal fairly with Indians whereas State judges, subject to the whim of the populace in the next election, cannot.

Section 161(i) of S. 1772 basically provides for, as I mentioned earlier, "local option repeal of Public Law 83-280." The section is carefully drafted to allow retrocession to be tailored to meet the needs of each individual reservation. Thus, a tribe might actively seek retrocession of jurisdiction respecting certain crimes, but it might well wish to leave others to the State.

In the State of Washington, for example, crimes on State public highways are adequately handled by the superbly organized State Patrol. It is very likely that a tribe in whose reservation a State highway lies would prefer to have State jurisdiction continue regarding traffic offenses for which the State patrol is better equipped than the Bureau of Indian Affairs police.

However, respecting crimes involving, for example, cattle theft, a tribe such as the Colville Confederated Tribes, with game officers and range officials, might well prefer to have jurisdiction retroceded to the Federal Government with which tribal officials could work in close harmony.

It should be noted that section 161(i) is not mandatory. That is, retrocession of jurisdiction cannot be forced upon the United States by a tribe but can only occur upon the consent of the Secretary of the Interior. The consent provision enables the Secretary to monitor each actual situation to see how badly State jurisdiction functions and to compare how effectively Federal jurisdiction might function before consenting to retrocession.

A second safeguard in section 161(i) is the requirement that the tribal resolution be enacted only upon a plebiscite of the enrolled Indians within the affected area. This provision, borrowed from S. 2010, was designed to prevent any irresponsible switching back and forth between State and Federal jurisdiction.

S. 1722 should be considered in conjunction with a bill specifically establishing a Federal network of magistrates of Indian reservations to enforce applicable provisions of the Federal Criminal Code. The need for such a network is clearly manifest. Federal courts are hopelessly overburdened with cases and Federal magistrates are often so busy dealing with the overload that they are unwilling to consider cases involving crimes on Indian reservations. U.S. attorneys, sensitive to the crisis in the Federal court system, often close their eyes to crimes on Indian reservations for the same reason.

In conclusion, the trust responsibility of the United States demands that Congress enact a retrocession provision for the benefit not only of Indian tribes but all residents of Indian reservations.

Senator, I would now like to address myself to a number of matters of confusion which I note have crept into this hearing this morning. First, I think that it is important that we all keep clearly in mind exactly what jurisdiction was ceded by the United States to the States through Public Law 83–280 and then consider the jurisdiction which is to be retroceded pursuant to subsection 161(i) of S. 1722.

In the first place, Public Law 83–280 ceded only Federal jurisdiction to the States. It did not cede tribal jurisdiction to the States, so when we address the problem that was created by Public Law 83–280 we are addressing that cession. Therefore, the retrocession is to provide for retrocession of State jurisdiction back to the United States.

At the time I first began to work on Public Law 83–280 in about 1965, there was some confusion as to whether Public Law 83–280 jurisdiction was exclusive, vis-a-vis the tribes. You will notice that in the suggestions which were made by Mr. Rick Lavis this morning, on behalf of the Secretary of the Interior, concerning provisions either to be made as amendments to section 161(i) or through Federal regulation, namely, the provision of checking by the Secretary to see that a particular tribe has an effective law and order system—those come from S. 2010, a bill which I drafted with the help of a great number of other Indian lawyers, the National Congress of American Indians, and the National Tribal Chairmen's Association in 1975, which Senator Jackson introduced into Congress.

The reason I put those provisions in was that I was concerned at that time about the problems of whether some Federal courts, and perhaps ultimately the U.S. Supreme Court, would decide that Public Law 83–280 made State jurisdiction exclusive with respect to the tribes. S. 2010 was prepared conceptually to make a double retrocession of jurisdiction just to cover that possibility, first a retrocession of State jurisdiction back to the United States, second a retrocession of State jurisdiction to the Indian tribes involved.

Since that time the law has evolved somewhat. In one case in the State of Washington, in which my partner, Barry Ernstoff, represented the Colville Confederated Tribes, the State took the position that 83–280 jurisdiction was exclusive and that the tribal police force had no jurisdiction, even with respect to Indians. We took that case to the Federal district court and we won it.

The State of Washington has, since that time, withdrawn its claim of exclusive jurisdiction. I think it is fairly safe to state at this point that most States take the position that tribal jurisdiction is concurrent with State jurisdiction.

It is important, Senator, when you and the Senate consider this bill to keep in mind that you are talking about retrocession of State jurisdiction to the United States. Therefore, the question of how much Indian population versus how much non-Indian population exists on a reservation really becomes irrelevant. The question is to provide the best possible law and order, protection for people, their lives, their safety, their property, on a reservation. That is the question.

Senator MELCHER. Mr. Pirtle, is it irrelevant on an Indian reservation such as, for example, the Yakima? Is it irrelevant there?

Mr. PIRTLE. Yes, Senator, because both Indians and non-Indians are entitled to good law enforcement protection. My view is, based on long-standing experience with a lot of tribes in a lot of States, that State jurisdiction is an absolute bankrupt failure. If you get Federal jurisdiction, especially if it is keyed into this Federal magistrate concept, I think you will provide a jurisdiction that is far superior.

Concerning the example I cited in my written testimony in which there were several witnesses to the theft and sale of a woman's television set but no prosecution, I can tell you the reason there was no prosecution. The name of the woman was Thelma Marchand. She was a member of the Colville Business Council. She had recently switched her position from a position in favor of termination of the tribes to one of saving the tribes.

Hers was the deciding vote on that issue. It meant that the reservation would not be terminated. It meant that the local people would not be able to get their hands on the Indian land—1.3 million acres of it. It was an act which very much upset part of the local non-Indian people. The response was: No law enforcement.

The reservations on which I have been and for whom I speak today have a long list of examples just like this one. The reasons range from political anger, to lack of manpower, to distance, to logistics, but the end result is the same—no law enforcement. The nonenforcement of the law extends not only to Indians but to non-Indians even in situations where you currently have Federal law which provides for Federal crimes such as 18 U.S.C. 1156—I believe that is the number which covers embezzlement from an Indian tribe—and there is 18 U.S.C. 1165, which, I believe, covers hunting and fishing and trespass on an Indian reservation. We find very often that we cannot get any enforcement, even on non-280 reservations such as the Devil's Lake Sioux Indian Reservation in North Dakota, because the Federal magistrates are too far away. The U.S. attorneys are too busy and nobody knows whether it is really trust land or nontrust land.

The magistrate's concept which your committee is considering and which I hope to see embodied in an act and introduced in the Senate very soon is part and parcel of the retrocession jurisdiction we need. I certainly urge on behalf of the tribes that we represent, that those things be enacted.

I would like to turn to several other points that you inquired about this morning—first, the State of Alaska. In the State of Alaska, Senator, there is only one remaining Indian reservation.

You asked other witnesses this morning whether every little native group and village in the State of Alaska would be able to ask for retrocession jurisdiction. I think my answer would be, "No." The reason is that the Alaska Native Claims Settlement Act specifically destroyed all reservations in the State of Alaska except Metlakatla's reservation.

Besides that, while there are still trust responsibilities of the Federal Government regarding Alaskan Natives, there are no remaining tribes in the "federally recognized tribe" concept. I think the very wording of section 161(i) would preclude every little native village and every native group in Alaska from asking for retrocession jurisdiction.

Next, Senator, I would like to talk about the checkerboard problem. In the State of Washington, contrary to what Malachy Murphy said to you this morning, the checkerboard problem is severe. It is not just a conceptual matter that might blow away.

The Colville tribe has been totally unable to get the sheriff of Okanogan County to cross-deputize tribal policemen. The reservation is a checkerboard of Indian and non-Indian land—some tribal trust land, some allotted land, and much non-Indian fee simple land. There is no little sign on the ground that says, "Fee Land," "Trust Land," so that the sheriff or any other law enforcement officer will know when he can prosecute under State law.

The end result is that an officer on one of the partial jurisdiction reservations, such as the Makah Reservation, has got to carry a tract book and he had better have close contact with the BIA realty office and he had better know the definitions of the eight categories of assumed jurisdiction of the State of Washington.

Of course, he does not carry a tract book. If he did, it would not help him. It would take a surveying crew and several days to find where he was out there in those heavy woods. The Bureau of Indian Affairs realty office cannot help him. It is too far away, and he has no idea what the term "domestic relations" means under State law. Does that include community property? The sheriff has no way of knowing that.

If a dispute is over an automobile that a separated man and his wife each claims, what is the sheriff to do? Is that domestic relations or is that personal property law? He has no way of knowing and in the end, Senator, these disputes are simply allowed to drift.

That is all I have to say. I wonder if you have some questions for me.

Senator MELCHER. Yes. I am assuming that in the case of the Makah Tribe they have no tribal police officers. Is that correct?

Mr. PIRTLE. They do. They have a private police force.

Senator MELCHER. Then what is your point?

Mr. PIRTLE. They have a concurrent jurisdiction situation as I outlined earlier. That means that the tribal code applies to all Indians. It does not apply to non-Indians because of the *Oliphant* case.

The tribe is in a situation in which they have no jurisdiction under their law and order code over felonies. Felonies now become a matter for State——

Senator MELCHER. I see what you are referring to there. You are not referring to misdemeanors.

Mr. PIRTLE. I am referring to both. Felonies, of course, are the most serious crimes. As you know, Public Law 83–280 says that sections 1152 and 1153 of title 18, United States Code, no longer apply.

Senator MELCHER. That is right.

Mr. PIRTLE. Hence, the Major Crimes Act does not apply.

Senator MELCHER. However, the misdemeanors do apply as they affect Indians.

Mr. PIRTLE. What do you mean?

Senator MELCHER. I mean that the question of Public Law 83–280 does not affect the Indian jurisdiction over Indians.

Mr. PIRTLE. Yes; it does. It affects them in this way. No Federal court that I know of has recognized concurrent jurisdiction of tribes over felonies.

Senator MELCHER. That is a point, but we are only talking about misdemeanors at this point.

Mr. PIRTLE. With respect to misdemeanors the answer is this. The tribes' law and order codes apply to Indian misdemeanors. Therefore, they are entitled to enforce their law and order code against Indians, which they do.

However, the law and order code referring to misdemeanors does not apply to non-Indians. Therefore, State law is all that does apply and the State is unwilling to do anything about it.

Senator MELCHER. If there were retrocession the Indian police could not arrest a non-Indian anyway.

Mr. PIRTLE. It could be handled in a couple of ways, Senator. First, if there is retrocession jurisdiction with respect to the Makah Reservation at Neah Bay, that means the State no longer has jurisdiction. For this example, let us assume that it is total retrocession. The jurisdiction is now with the Federal Government for major crimes and with the tribal government for misdemeanors which are defined in the tribal law and order code.

Senator MELCHER. None of that would apply to non-Indians.

Mr. PIRTLE. I am not talking about non-Indians.

Actually, I am talking about Indians and non-Indians, but when I say that the tribal law and order code applies to misdemeanors, I am saying it would not apply to non-Indians.

There would only be Federal jurisdiction through the Assimilative Crimes Act or the general Federal Criminal Code against non-Indians. However, there are ways to make the jurisdiction much more palatable to all members of the reservation and all nonmembers.

Those ways are these. You would now have the Federal Government exercising jurisdiction. The Federal Government has agencies—the Bureau of Indian Affairs and others—that are used to Indians, know Indian culture to some extent, know Indian ways, and can understand what they are doing——

Senator MELCHER. I have to follow what you are saying, Mr. Pirtle. We are assuming that there is retrocession.

Mr. PIRTLE. Yes, Senator.

Senator MELCHER. We are using the Makah Reservation as our example. They have their Indian police. On a misdemeanor the Indian police are not going to have any more power than they have today.

Mr. PIRTLE. Yes, Senator, because they can be deputized as Federal officers. They can be made BIA police officers. That would function because they are right there and they know the people.

Senator MELCHER. Under what circumstances would they be deputized as BIA police officers?

Mr. PIRTLE. I would think that it would be a good policy for the Federal Government to do that on a broad-based basis.

Senator MELCHER. That would take an act of Congress, would it not?

Mr. PIRTLE. No, Senator, that is done frequently.

Senator MELCHER. Give me a couple of examples of where it is done. We are struggling here. Where is it done?

Mr. PIRTLE. It is done on the Makah Reservation.

Senator MELCHER. If it is done on the Makah Reservation now, what is the problem? You are saying you want retrocession for bet-

ter enforcement, and here we are only speaking about misdemeanors, and you tell me they have been deputized by the BIA. Therefore, they can arrest a non-Indian.

Mr. PIRTLE. No, Senator. The reason they cannot is because Federal criminal law does not apply. It is a Public Law 83-280 jurisdiction. Therefore, the Federal Criminal Code does not apply. There are no Federal law misdemeanors on the reservation. That is what Public Law 83-280 says.

Senator MELCHER. Then, according to your theory—and I will call it a theory until you show me differently—the *Oliphant* decision would not have become the *Oliphant* decision if that police officer had been deputized by the BIA.

Mr. PIRTLE. No, the *Oliphant* decision would still remain, Senator. What the *Oliphant* decision says is that a tribe member may not exercise jurisdiction over a non-Indian in its criminal courts. If an Indian is a Federal officer and is exercising his jurisdiction in making an arrest as a Federal officer, it is not the tribe acting and the *Oliphant* decision does not apply.

Senator MELCHER. Precisely. You are telling me that if the Indian officer had been deputized by the BIA and was therefore acting for the BIA, the *Oliphant* decision would be different.

Mr. PIRTLE. No, Senator. I am not saying it would be different. I am saying that if you have a Federal officer who makes an arrest on a reservation, the *Oliphant* decision would not apply to him because he is not the tribe. It says the tribe may not do it. If he is a Federal officer, it is the Federal Government that is doing it.

I am saying that the *Oliphant* decision remains exactly the same but that if a Federal officer puts on his Federal hat under a Federal appointment and makes an arrest, it is the United States versus the defendant. It is not a tribal arrest. Therefore, it is legitimate.

Senator MELCHER. We would be very interested, Mr. Pirtle, if you could supply us with the instances where this has occurred. I mean, instances in which the BIA has deputized a tribal police officer. Therefore, the tribal police officer has a dual jurisdiction. He is in effect a Federal employee.

Mr. PIRTLE. Yes; I will supply you with some. I know it is the case on the Makah Reservation and I believe it is the case on the Quinault. Mr. DeLaCruz could answer that question. Mr. DeLaCruz is shaking his head affirmatively, Senator.

Senator MELCHER. Given the example you gave of an incident on the Colville Reservation in which a television set was stolen and the sheriff was not interested in arresting the alleged thief, are we to assume that the thief was a non-Indian?

Mr. PIRTLE. The thief was an Indian.

Senator MELCHER. What was the reason that the Indian police did not have jurisdiction?

Mr. PIRTLE. I believe, at the time the tribes had no effective police agency. That was several years ago.

I will give you some of the history of the matter. In 1965 the Colville Council was a termination council interested in destroying the reservation. They asked Governor Evans to issue a proclamation assuming jurisdiction under the peculiarities of State law and Governor Evans did so.

Once that happened, the business council disbanded the tribal police force except for some game officials and left law enforcement to the State, because they firmly and fervently hoped that State jurisdiction would answer their problem. Later, it turned out that it did not, but at the time of the example there was no effective tribal police force.

That is why the Indian woman went to the sheriff with me and asked him to prosecute. After that the tribes began to realize that State jurisdiction was just not going to work and they were not going to get anything but arrests after they made their per capita payments to the members. They then put together a police force and now have a very strong tribal police force.

Senator MELCHER. Had they had that police force they could have arrested this particular alleged thief.

Mr. PIRTLE. It could have been considered a violation of the tribal code.

Senator MELCHER. As of 161(i), as we read that section which pertains to Indian country—I assume that an Indian village is Indian country——

Mr. PIRTLE. I think an Indian village would be considered Indian country as a matter of title status, but you will notice that section says that a tribe has to request retrocession. I believe there is only one tribe in the State of Alaska, the Metlakatla Indian Community. If the Secretary received a petition from the village of Klawock, I think the Secretary would look at it and say, "This is not from an Indian tribe. It is from an Alaskan Native village, which is not a tribe under section 161(i)'s provisions."

Senator MELCHER. Do you think that also applies to bands in the State of California?

Mr. PIRTLE. I think it includes bands. I think the word "tribe" would include bands. As a matter of fact, in S. 2010, Senator, the language I had which Paul Summit basically borrowed for 161(i) said "Indian tribe, band, or community." I think that is the proper definitional language.

Senator MELCHER. I cannot speak to the intent of this particular section. It would seem to me that if you can read "Indian tribe" to mean Indian band you could also read it to mean Indian community. I am not sure.

Mr. PIRTLE. I think you could, Senator, but I think if you will examine the Federal law you will find that Alaskan Natives are always referred to as Alaskan Natives, not as Indians, unless you are referring to the Athabascans. They are called Indians.

Senator MELCHER. Thank goodness we do not have to bear the responsibility of interpreting that particular section. I think it is a very sketchy section and would require a great deal of interpretation in order to know just what its effects would be.

If the Federal magistrate concept is good, it would seem to me to be good either on the basis of retrocession or not.

Mr. PIRTLE. It would, Senator.

Senator MELCHER. You tie it in with retrocession.

Mr. PIRTLE. I would say that it would be an excellent idea in either event. We do have a lot of States that are not 280 States. Also, in States such as the State of Washington where you have partial jurisdiction there is certainly room for the magistrate to be effective.

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The final point is that even with Public Law 280 jurisdiction in the case of, say, the Colville Reservation where there is total State jurisdiction, those Federal crimes which remain Federal crimes and which were not taken away by Public Law 83-280 are still of a very serious nature and call for some careful, serious, and just prosecution.

Senator MELCHER. Would you agree with the testimony of the Secretary's spokesmen this morning concerning the expense of $160,000 to $180,000 per year, even augmented with 20-percent increases due to inflation, that the amounts would be adequate to provide law enforcement on a reservation of, say, 1,200 or 1,400 people?

Mr. PIRTLE. That is very difficult to answer, Senator. However, I would like to make a few comments about that if I may. I think it is very unlikely that all jurisdictional issues are the same and that all tribes will request retrocession.

Senator MELCHER. I agree.

Mr. PIRTLE. For example, I know that many of the rancherias in California are perfectly happy with certain aspects of State enforcement. I know that a number of tribes in the State of Washington, who have 280 jurisdiction—all tribes do, to an extent, have partial jurisdiction and nine tribes now have total jurisdiction—I think even they would accept some partial jurisdiction as workable, as most efficient, and as the thing they can live with and would in fact like to see. Hence, I think dividing the number of tribes into the $8 million is a mistake.

I think you also have to consider that, with respect to each reservation, especially the large reservations, they have their own attitudes and law and order systems. You find in the State of Washington that the two largest reservations—the Colville and the Yakima—each has a very effective law enforcement program. They have well trained police officers, well trained judges, and they call upon the general counsel for the tribes to help them. They also have their own lawyers to do prosecution and defense in the tribal court.

Their reservations might very well use the Federal magistrates for a number of situations, but mostly to enforce the tribal code. You might find that many of the police officers would act with two hats—as Federal officers and as tribal officers. Therefore, their salaries might continue to be paid primarily by the tribes.

Keeping those factors in mind and the fact that the Secretary of the Interior is required by this statute to examine each reservation and consider the kind of law enforcement available there as well as logistical kinds of things—distance from the sheriff's office, for example, and population distribution—the situation is that the Federal Government can exercise its trust responsibility in the best way and can assume a retrocession of jurisdiction little by little on reservations where it is most needed.

Perhaps you will not want to worry about the State of Alaska because there is a totally different situation up there. You may not want to provide a separate law enforcement system for each little rancheria in California.

The overall answer is that it is a very complex problem, but I think that given the language of the statute as it is presently drafted, with Secretarial discretion, you could count on it working.

Senator MELCHER. Thank you very much, Mr. Pirtle.

Mr. PIRTLE. Thank you, Senator.

Senator MELCHER. We will now hear from Richard Alvarez, tribal council member of the Chemehuevi Indian Tribe.

STATEMENT OF RICHARD ALVAREZ, TRIBAL COUNCIL MEMBER, CHEMEHUEVI INDIAN TRIBE, ACCOMPANIED BY MATTHEW LEIVAS

Mr. ALVAREZ. Mr. Chairman, my name is Richard Alvarez, council member of the Chemehuevi Indian Tribe, Chemehuevi Valley, Havasu Lake, Calif.

We would like to extend our thanks to you for being invited to this session to give testimony on these bills that will be presented to the Senate.

We, of the Chemehuevi tribe, are in favor of the bills S. 1181, S. 1722, and the Federal magistrate concept. The reason we are in favor of them is because at the present time the only law and order we have on our reservation is our chief game warden.

Under Public Law 83-280 we do not actually have any law and order because the sheriff of San Bernardino County is usually absent when we have a criminal offense on the reservation. All the tribal members and the Chemehuevi Council are in favor of these measures.

I will let Mr. Matthew Leivas clarify our position.

Mr. LEIVAS. Thank you.

We are under a 638 contract with the Bureau of Indian Affairs and have been for the past 3 years for our wildlife law enforcement services. We have had an effective wildlife law enforcement service program, and according to our tribal members and nonmembers—I would like to mention that our reservation is predominantly non-Indian—they would rather see the Chemehuevi Tribe take over the law and order on the reservation because of the lack of law enforcement by San Bernardino County.

The Chemehuevi Indian Tribe on many occasions has met with the State of California. Our attorneys have met with the attorney general's office to try to resolve this problem but it has been to no avail.

One issue that arose concerned an agreement between Imperial County, Calif. and another tribe. The terms of this agreement would not be acceptable to the Chemehuevi Tribe due to the financial burden that the tribes would have to bear if the tribes sent their police officers to the State academies.

I have the draft of that agreement here, and according to our attorneys, it is not worth looking at because the tribes would have to face not only liability suits but would have to bear all the overhead costs. The State would simply be putting all the burden on the tribes. That is not what we are working for.

We are working for tribal law and order on the reservation and, if possible, retrocession. However, any avenue we take we are stopped by the State of California. That is our reason for being here.

Under the Chemehuevi constitution, article 6, powers of self-government, section 1—those are the general powers—the Chemehuevi Indian Tribe "may exercise all powers necessary or advisable to pro-

mote the welfare of its people." As long as Public Law 83–280 exists, we cannot do this.

I would like to mention another thing. On our reservation we have a summer and winter resort. Actually, we have two resorts on the reservation. One is non-Indian and is leased from the Chemehuevi Tribe.

In the peak season in summer our resort draws as many as 10,000 people on heavy weekends. There is no law enforcement there. The local sheriff is gone. The Chemehuevi wildlife law enforcement has to pick up the workload, which under contract we are not entitled to do.

However, due to our good record with the community, most of our people would rather see the Chemehuevi wildlife law enforcement service take over all the law enforcement on the reservation.

We have met with the Office of Criminal Justice and Planning in Sacramento, and we also met with Mr. Rudy Carona deputy attorney general, in San Diego. According to Mr. Carona that one article in Public Law 280—the tribe attempted to use the provisions of Public Law 83–280, namely, section 4, article (c), 25 U.S.C. 1322(c):

> Any tribal ordinance or custom heretofore and hereafter adopted by the Indian tribe and the community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

On many occasions, when the sheriff did arrive, nothing was done. All our efforts were in vain. We, of the Chemehuevi people, are more or less fed up with it.

We have asked for help. The cross-deputization plan does not seem to work. What are we to do? I am asking you?

Senator MELCHER. Where is the reservation?

Mr. LEIVAS. We are directly across from Lake Havasu City. That is 30 miles north of Parker, Mr. McCabe's reservation.

Senator MELCHER. How big a reservation is it?

Mr. LEIVAS. There are 28,000 acres and 27 miles of shoreline.

Senator MELCHER. How many members of the tribe live on the reservation?

Mr. LEIVAS. There are approximately [illegible] members at present, but we have HUD housing going in. They will be completed in June. That will be 35 houses. Thereafter, we have another 25 houses coming in.

Senator MELCHER. You said 35 members of the tribe.

Senator LEIVAS. That is right. That is all we have now. We are a newly recognized tribe. We were recognized in 1968.

Senator MELCHER. You said 35 houses.

Mr. LEIVAS. That is right, but we also have the resort area there and we have the nonmembers. Our reservation is predominently non-Indian.

Senator MELCHER. How many non-Indian residents are there on the reservation?

Mr. LEIVAS. I would say there are 800. There is a community just adjacent to the reservation called section 36 which is the school zone. They are expanding quite rapidly, more or less keeping up with us because of our business. We have a new mobile-home park going in, and the resort is growing and growing.

If San Bernardino County is not going to handle it, we will have to handle it ourselves.

Senator MELCHER. Frankly, we do not know whether retrocession would even be conceivable for your tribe without a tribal police system. Do you have a law and order code?

Mr. LEIVAS. No, sir. We are working on one now. We are preparing for retrocession if it comes about. We have borrowed several different law and order codes. One of them was from the Colorado River Indian Tribes, which we may adopt. We have others from the Assiniboine, the Sioux, and the Fort Peck Tribe. We will adopt our own ordinances into the tribal law and order code.

What I am telling you, Senator, is that we are making preparations for the retrocession of Public Law 280 because of the lack of law enforcement on the reservation. We are not authorized to cite people or stop people under our contract. We are authorized under U.S.C. 1164 and 1165 to cite. Those are the only two Federal statutes under which we can cite.

Most of our trouble at the reservation is caused by non-Indians. At first, all we wanted was jurisdiction over our tribal members, but now it looks as if all our problems are caused by nonmembers.

Senator MELCHER. Is there support among the non-Indians for tribal jurisdiction?

Mr. LEIVAS. Yes, sir; we have approximately 300 mobile homes on the resort and a summer and winter hookup area for the "Snow Birds." The people there tell us continuously to get rid of the sheriff, oust him and take over law enforcement ourselves, but under contract we cannot do it.

An incident occurred the other night. Some non-Indians pushed one of our patrol buggies down a hill and it blew up our gas station. I was in training in Parker in an SOS unit. I got back as soon as I could, but by then the whole crime scene was disturbed. All the evidence was tainted.

The San Bernardino sheriff did not respond that night. He responded the next day. The suspects are walking around laughing about it now. We know who they are but we have no evidence with which to prosecute or to file a civil suit against them.

Senator MELCHER. If you will keep the committee advised of your efforts to develop a law and order code for the tribe, we will try to be of assistance to you.

Mr. LEIVAS. I have been conferring with our special officer on our law and order code. He understands it and is in favor of it. I wish he could have been here but he could not.

Senator MELCHER. Is the special officer a BIA officer?

Mr. LEIVAS. Yes, sir; he is our COR.

Senator MELCHER. What is his name?

Mr. LEIVAS. Stanley Schwab.

Senator MELCHER. We will attempt to get in touch with Mr. Schwab.

Mr. LEIVAS. He has assisted us often.

Senator MELCHER. Did you say he is at Parker?

Mr. LEIVAS. That is right, at the Parker Agency.

Senator MELCHER. Thank you both very much.

[The following supplemental statement was subsequently submitted:]

SUPPLEMENTAL TESTIMONY OF MATTHEW LEIVAS RECEIVED SUBSEQUENT TO THE HEARING

Senator Melcher, I would like to clarify a portion of my oral testimony with respect to our tribal membership on the reservation. The reasons for our low membership number residing on the reservation are primarily inadequate housing and lack of employment. It is the desire of the Chemehuevi people to bring back the tribal members by developing our HUD housing tract, having 35 houses, and by developing employment opportunities.

Since the Chemehuevi Tribe reorganized over a decade ago, our tribal membership has increased considerably in view of the conditions mentioned above. Through our economic development and our first HUD housing increment, the Chemehuevi Tribes' membership will increase considerably within this year.

The tribe is presently considering a second increment of 25 HUD homes to attract more tribe members, thus increasing our membership. I am sorry if I left the impression that only a minimum number of tribal members will be living on the reservation.

Senator MELCHER. Is Billy Frank of the Nisqually Indian Tribe here? [No response.]

If he submits written testimony, it will, without objection, be made a part of the record at this point.

[Letter from Bill Frank, Jr., with enclosed statement and related material follows. Testimony resumes on p. 192.]

NISQUALLY INDIAN TRIBE,
Olympia, Wash., April 8, 1980.

Hon. JOHN MELCHER,
Chairman, Senate Select Committee on Indian Affairs,
Washington, D.C.

Dear SENATOR MELCHER: Enclosed please find five copies of my comments on S. 1722 and S. 1181, for your consideration and review.

I understand that you held hearings on these two bills in late March of this year. Although those hearings have been completed I would appreciate any assistance you might be able to provide in including my comments for the Nisqually Indian Tribe in that hearing record.

Your attention to these two bills and your consideration of my comments for the Nisqually Tribe are sincerely appreciated.

Sincerely,

BILL FRANK, Jr.

Enclosure.

PREPARED STATEMENT OF BILL FRANK, JR., NISQUALLY INDIAN TRIBE

Mr. Chairman, Members of the Committee: My name is Bill Frank, Jr. I am a Nisqually Indian, a member of the Nisqually Tribal Council and Vice-Chairman of the Northwest Indian Fisheries Commission.

I wish to submit comments on two bills that you are considering.

S. 1722, Section 161 of which provides for the retrocession of jurisdiction by States over Indian lands, and S. 1181, the "Tribal State Compact Act."

I would first like to address myself to Section 161 of S. 1722.

I consider Section 161 to be very important to Indian Tribes and to state and local governments. The exercise of State jurisdiction over Indians and Indian lands in my State, Washington, under Public Law 83-280 has not worked and we need the Congress to provide the vehicle for us to correct the problems it has caused.

Public Law 83-280 was passed in 1953 during the termination era, with no thought given to the realities that affect its implementation. Local sheriffs, game wardens and other state police forces took advantage of it where they had an itch to go after Indians. They did this, in fact, at my home, using Public Law 83-280 to claim jurisdiction over Frank's Landing and the Nisqually Reservation to come and violently arrest me and my family for exercising our fishing rights under the treaty of Medicine Creek.

Even where the statute has application it expressly does not apply to Indian fishing rights, but that didn't stop the State. That hasn't happened since our

fishing rights were settled by the Supreme Court last July 2. But, in other areas wheret local non-Indian law enforcement officials are not equipped or trained to understand Indian tribes and governments and treaty rights, the hostility has continued and so have the court cases.

Even more serious because it continues is the failure and inability of local law enforcement agents to provide adequate enforcement services where they do have jurisdiction. Most of the time Indian tribes themselves have been denied federal assistance for law enforcement services when States were to provide those services under Public Law 83-280. However, the local sheriff's offices often don't have the manpower or training to provide the protection and services that are needed. Their limited budgets and manpower, as well as their lack of training to understand the differences that exist on Indian reservations, have strained their ability to provide services and the reservations are the ones that come out short. Because they're not equipped to deal with reservation problems, the State and local officers develop frustrations that grow into more hostility, directed at Indians, and we do not need that.

For the Indian, it means that the safety of people and property on the reservation cannot be assured because the local sheriff probably is too busy to get to the problem in time to be much help. Even if there is a tribal police force, under the *Oliphant* decision the tribal police cannot arrest and prosecute non-Indians who commit crimes on the Reservation, so the security of reservation residents is never there. In the past state and local officials have been reluctant to enter into cross deputization agreements both because the State already has some jurisdiction on the reservation and because in the past, tribal enforcement officers have not always been comparably trained. Hostile feelings between tribal governments and reservation Indians on the one hand, and non-Indians residing or owning lands on the reservation, and desiring to use or develop them in a way that conflicts with tribal standards and plans on the other, have contributed to the conflict situation and to the problems of harassment and unresponsiveness of local non-Indian enforcement agencies.

Setting aside our feeling and fears, we have worked hard to improve relations between our Tribal governments in Washington and the State government, to work out these and other problems. Our efforts have frequently been frustrated because the Governor and the Attorney General and the State Legislature are often saying three different things to us; when we've reached an agreement with the Executive branch the Attorney General or the Legislature has intervened to stop it. (This has occurred with many jurisdictional, fisheries, and property ownership negotiations.) Now, however, in the area of law and order, I think that everyone (including the Attorney General) recognizes that what is needed is the freedom to negotiate agreements on the division and sharing of law enforcement responsibilities, including cross-deputization agreements. I think that in many areas we are now ready to proceed on this, if the retrocession mechanisms are made available.

In the past when we have negotiated mutually agreeable law and order arrangements we have been stopped because the Attorney General has said that the Governor does not have the power to retrocede jurisdiction over an Indian reservation without action by the State legislature. This retrocession is a crucial first step, if we are to be able to enter into negotiations that resolve our problems on an equal footing and in good faith. And, the inertia of the State Legislature guarantees that we'll never get them to act in time to solve anything.

What we need is for the Congress to authorize the Secretary of the Interior to accept tribal petitions for retrocession of jurisdiction, without any need for action or consideration by state legislatures. The concept as contained in Section 161 of this bill, I believe, will lead to the development of improved relations between tribal and state law enforcement agencies, and will relieve the burden on local law enforcement agencies by allowing the development of cooperative agreements that are the product of harmony and understanding developed between tribal and state agencies. Through this kind of cooperation we will be able to have law enforcement that protects the people and property on reservations from crimes and criminals. And, we'll have less of the burdensome litigation that has choked us and the courts since Public Law 83-280 was passed. I can think of few things that we need more than Section 161 of this bill.

S. 1181, the "Tribal State Compact Act," also has the concept that States and Tribes should resolve their differences and build their relationships through

mutually acceptable agreements. I also believe that intergovernmental cooperation can only be achieved in this way, but I do not believe this bill is necessary.

I myself have been involved in the negotiation of several agreements with the State of Washington. We have failed to reach agreement in some cases, but what is important is that we have reached agreement on other very important issues. Frequently, Congressional and Administration support for these agreements is all that is necessary to make them real.

Most important to me among the agreements that have been negotiated is the Nisqually Agreement (copy attached). This agreement, signed by the chief executive officers and fishery managers of the Nisqually Tribe and the State of Washington, sets forth a long term relationship between the Nisqually Tribe and the State for the management of the fishery resources that originate in the Nisqually Drainage.

It is unique in many ways. For one thing, before the "Boldt" decision, the Nisqually River and Nisqually fishermen were involved in more direct confrontations with the State of Washington over fisheries and fishing rights than anyone else in the State. In spite of this history, we were able to negotiate an agreement that is concerned with management—the management and protection of the very resource that we fought over so hard. And, our agreement is to manage this resource so that both tribal and State fishermen and citizens get the most benefit from it. For example, we expect some of the fish we're managing and producing to be caught by non-Indian net fisheries from the Juan de Fuca Strait all the way down to southern Puget Sound. Because of our location, these fishery resources can benefit a wider range of fishermen than fish produced just about anywhere else. And, our agreement assures that our tribal share will return to be harvested by tribal fishermen on the Nisqually River, where they will also benefit the Tribal economy.

Another important aspect of our agreement is the way it provides for joint and coordinated fishery enhancement projects. Some of our on-reservation projects will be jointly operated by the Tribe and the State. For both on and off reservation projects, we will be cooperating and coordinating our production so we don't end up hurting the resource by introducing fish stocks that conflict with each other. We anticipate many good things from this agreement, and we expect that cooperation in other areas will grow from the new understanding we develop.

What we need now is Congressional appropriation of the funding, in addition to existing Tribal and State funding, that is needed to implement the far-reaching and widely beneficial programs and management standards to which we have agreed. We don't need new hurdles, someone else's rules and regulations and procedures, or limitations; we just need support for what we work out.

We negotiated this agreement in a way that was best for the Nisqually Tribe and the State. We took 2½ years to do it, but we were comfortable with it—we weren't limited by other federal rules and regulations. Other tribes and states that have negotiated agreements have done it differently—in their own way. We all need the support, however, of the federal government, to make things work.

The idea behind the "Tribal State Compact Act" is great—it is what we need. However, all that is really needed is the encouragement for Tribes and States to cooperate, communicate with each other and, together, to work out solutions that we are both satisfied with. And, when agreements are reached, we need federal support for their implementation. I myself feel that trying to do this within a new federal program or guideline would simply not work because it wouldn't allow us to develop our cooperative arrangements freely and in our own way. Particularly when one of the most important benefits of negotiated agreements is that it gets us out of the costly and polarizing forum of courts and appeals, federal attempts to structure how we negotiate with any sort of guidelines or rules would just take us backwards, fighting in the courts over what the new rules mean.

Each Tribe and State that consider negotiating an agreement or cooperating in other ways will start with a different background and a different type of relationship from each other Tribe or State. Your support and encouragement, without more federal rules and regulations, is what is needed to make Tribal-State agreements work. I hope that you will remember this as you consider S. 1181.

Thank you.

OFFICE OF THE GOVERNOR,
Olympia, Wash., February 6, 1980.

Hon. WARREN G. MAGNUSON,
U.S. Senator, Russell Building, Washington, D.C.

DEAR SENATOR MAGNUSON: The state of Washington and the Nisqually Indian Tribe, recognizing their mutual interests in the fishery resources of the Nisqually River system, have had their fishery managers work together the past two and one-half years to develop a joint, comprehensive management plan for the Nisqually Drainage. The Cooperative Nisqually River Drainage Plan examines the present and potential fishery production of the Nisqually system in light of the state and tribal goals to improve significantly the economic and recreational benefits to both state and tribal fishermen and other elements of our populations interested in the fishery resources of the Nisqually.

This Plan has been agreed upon as a first element of the South Sound portion of a comprehensive Puget Sound enhancement plan to be jointly approved by the tribes and the state. It is consistent with the specific proposals and the underlying cooperative enhancement process suggested in the Administration's proposed legislation before your committee. It embodies the approach that you have so actively encouraged in the resolution of state and tribal differences, particularly in the area of fisheries. Guided by your suggestions, the state and the Nisqually Tribe have achieved a mutually acceptable and beneficial agreement for cooperative fisheries management.

This agreement is a model of state and tribal cooperation in the management of the resources of a major Northwest drainage system. It considers the complex problems that face Nisqually origin salmon as they pass through intercepting fisheries. Stocks from other systems, particularly those with substantial hatchery production, have generally predominated in those fisheries, often resulting in the over harvest of Nisqually stocks long before they approach the South Puget Sound sport and terminal treaty Indian fisheries.

The Plan keeps in mind the harvest management goal of enhancing the resource for the benefit of all state and tribal fishermen and associated industries, giving special consideration to the tribal management policy favoring the strengthening of tribal terminal areas fisheries in southern Puget Sound and to the state policy emphasizing the development of the South Sound area as an important sport fishery. It also calls for the cooperative improvement and maintenance of quality environmental conditions for fishery production in the Nisqually Drainage, and includes the cooperation of the U.S. Army at Fort Lewis as well as the U.S. Fish and Wildlife Service in this endeavor. Cooperative management of Nisqually fishery resources within this framework is expected to go far in relieving the problems that have resulted from heavy Canadian and United States marine harvests in mixed-stock areas as well as other factors that contributed to the general decline of Nisqually salmon runs.

The Nisqually Indian Tribe and the state of Washington are committed to making this Plan work, for the benefit of all users of these fishery resources. Our fishery management agencies, the Northwest Indian Fisheries Commission, and the affected federal agencies, have all allocated time and resources to the successful implementation of this effort. Additional federal funding, however, is essential to solidify and secure the success of both the tribal and state obligations under the plan and to assure that actual benefits are realized by tribal and state fishermen. Your support of this cooperative management effort is sought in the form of your sponsorship of the appropriations necessary to the plan's implementation.

It is our joint belief that this agreement will be consistent with any comprehensive Puget Sound enhancement plan developed by the tribes and the state. Since any delays in funding result in the substantial delay of benefits to the resource and the fishermen, as well as increased project costs due to inflation, we urge that action to fund proposed projects be undertaken immediately, regardless of the progress of proposed legislation. Our staffs are prepared to provide you such additional explanations and justifications as you require or deem appropriate.

We appreciate the support you have given all of us in our struggle to develop a positive relationship for the achievement of cooperative fishery management in the Northwest. We look forward to discussing our goals and achievements

and this request with you, at your coming hearings in Seattle and otherwise, as you are available.

Sincerely,

DIXY LEE RAY,
Governor.
DIXIAN S. SANCHEZ,
Chairman, Nisqually Indian Tribe.
DAL W. JOHNSON,
Chairman, Northwest Indian Fisheries Commission.

NISQUALLY INDIAN TRIBE

BUDGETS: NISQUALLY COOPERATIVE FISHERIES MANAGEMENT FACILITIES

The following funding levels are being requested from the Congress for appropriation by the Appropriations Committees during the next two years:

Fiscal year 1981: $7,475,000.00.

Fiscal year 1982: $8,855,000.00.

Fiscal year 1981 request items:	
1. Nisqually Reservation Salmon Hatchery: (Collard Woods-Cofchen Springs) construction and completion in one phase	$3,450,000.00
2. Muck Creek Station Rearing Ponds: (Nisqually River-Muck Creek mouth) construction and completion in one phase	575,000.00
3. Clear Creek-Hill Creek Hatchery Plans: (Fort Lewis along Nisqually River) studies, master plan, design engineering	690,000.00
4. Fisheries Management Education Center: (on and off-reservation sites) land purchases in Nisqually River Valley; architectural design; first phase construction of facilities program development and plans of operation	2,760,000.00
Total fiscal year 1981 request	7,475,000.00
Fiscal year 1982 request items:	
1. Clear Creek-Hill Creek Hatchery: construction and completion in one phase	5,750,000.00
2. Fisheries Management Education Center: final facilities construction and operation	2,645,000.00
3. Program Operations and Staffing	460,000.00
Total fiscal year 1982 request	8,855,000.00

Notes of budget request items

1. *Source of cost estimates.*—The estimates of total costs for the fish enhancement facilities were formulated jointly by the Tribe and the Washington Department of Fisheries for presentation of proposals to the Federal Task Force on Washington State Fisheries, dated December 7, 1977; revised January 4, 1978; reviewed and adjusted by 15 percent for inflation on January 29, 1980.

2. *Distribution of requested funds.*—The proposed facilities would all be owned by the Nisqually Indian Tribe and located upon its properties. However, the operation and management of the Clear-Hill Creek Hatchery complex would be contracted to the Washington Fisheries Department for the first 10 years or more, and that State agency would be the lead agency in planning development, as well as construction control. Funds for this component ($690,000 in fiscal year 1981; and the $5,750,000 projected for request in fiscal year 1980) would be contracted for administrative control and actual use by the Fisheries Department. The allocations sought for the Tribe under its administrative controls and usage would be $6,785,000 in fiscal year 1981; and with $3,105,000 projected for request in fiscal year 1982.

3. *Federal task force recommendations.*—In its January 16, 1978, "Proposed Settlement", the Regional Team of the Federal Task Force reviewed and endorsed the components and costs of this proposal as part of its package.

4. *Administration proposed enhancement legislation.*—The Nisqually Indian Tribe and the Washington Department of Fisheries, following consultations with

local officials of the U.S. Fish and Wildlife Service and NMFS (Northwest Fisheries Center), have agreed that the Cooperative Nisqually River Drainage Plan is consistent with the development of the Comprehensive Puget Sound enhancement plan called for by the administration in its proposed enhancement legislation. It is the intention of the State and the Tribe that this proposal shall form the first, integral component of the Southern Puget Sound portion of that comprehensive enhancement plan.

5. *Prior program proposals.*—In 1974, the U.S. Fish and Wildlife Service concluded its studies affirming the feasibility of two options for hatchery facilities on the Nisqually Indian Reservation. The more costly option in its report was costed out at $12,500,000. This proposal affords greater production potential and flexibility respecting fish species produced.

6. *Service areas and populations.*—Hatchery feasibility studies and facilities planning by U.S. F&WS was initiated prior to 1972 in response to resolutions and requests from the Nisqually, Puyallup, Muckleshoot, Skokomish and Squaxin Island Indian Tribes. Proposed facilities would provide enhancement activity services directly to the Southern Puget Sound Tribes, and production would contribute to harvests by all Indian and non-Indian users groups in the harvest interception chain or route from American-Canadian coastal waters to the river.

Additionally, these facilities would be tied into a joint facilities utilization and production plan with State projects on Nisqually River tributaries (Schorno Springs) and McAllister Creek.

A JOINT STATEMENT FROM THE STATE OF WASHINGTON AND THE NISQUALLY INDIAN COMMUNITY

To: The United States Congress.

Subject: Cooperative Management Systems for Nisqually River Drainage.

1. *Introduction.*—Representatives of the Washington Department of Fisheries and the Nisqually Indian Community have met in a series of talks concerning development of a comprehensive management program for salmon and steelhead resources of the Nisqually River Drainage. These meetings have progressed toward agreements which would provide for the cooperative management of these resources, their preservation and enhancement and for advancing the interests of tribal and state populations deriving benefit from the productivity in the Nisqually River basin of southern Puget Sound.

The State of Washington and Nisqually Tribe agree that a joint statement and proposal should be presented to the Congress representing views on matters of mutual concern and interest.

2. *Joint proposal.*—The State and Tribe propose that all necessary funding be supplied by the United State Government at the earliest possible time for financing an integrated program of State and Tribal fisheries management and enhanced production for the Nisqually River Basin. Revised cost estimates, representing reductions from cost levels contained in the Nisqually Report to the Task Force (page 3), are supplied as attachments.

Central to this integrated cooperative program would be the establishment of planned or proposed central hatchery facilities and several satellite stations, identified or otherwise to be identified in the future, which would operate under a cooperative Facilities Plan. Two of the central facilities would be within the boundaries of the Fort Lewis Military and Nisqually Indian Reservations, and the third central facility would be the hatchery being developed by the Fisheries Department on McAllister Creek westward of the Nisqually River. Other potential satellite and rearing stations—including any developed in cooperation with the Washington Game Department—would be identified and established to maximize production from the central facilities and to meet species production goals in the overall system.

Status information on the proposed identified facilities to be included in the integrated facilities plan, together with relevant proposals relating to their establishment or operation, follows:

CENTRAL FACILITIES

A. *McAllister Creek Hatchery:* (see page 17, Nisqually Report).

This program is being constructed by WDF under the Capital Construction Budget approved by the 1977 Washington Legislature. Additional production options are afforded by inclusion of the McAllister Creek Hatchery in an inte-

grated production plan and facility plan with additional facilities and stations on the Nisqually River. Extensive coordination of production and harvest plans involving both Nisqually River resources and McAllister Creek production will generally be required in any case. The Nisqually River may well provide favorable release or rearing sites for some level of McAllister production; and, the utility and benefits of the McAllister Hatchery may be increased by use and availability of Nisqually resource production. Introduction into the Nisqually of an earlier-timed (normal) chum stock has been discussed, and the establishment of a late-time Nisqually River chum resource and egg bank has been considered for McAllister.

Land has been acquired for the hatchery at the southeast corner of the Steilacoom Road crossing of McAllister Creek. Construction costs are estimated to be $2.3 million and funds have been appropriated by the State of Washington with a projected completion date of May 1981.

B. *Clear Creek-Hill Creek Hatchery:* (see page 3, item 1).

This is the major new facility being proposed and for which federal funding is being requested (see attached cost estimates, revised from estimates in Nisqually Report). Both the Tribe and the State have made preliminary surveys of the available water sources at these sites for potential hatchery facilities or rearing projects. One evaluation may be summarized by the statement that "if the integrity of the project can be assured, as in protection from flooding, it would be a crime not to use these waters for major new hatchery production." (Salmon Culture Division, WDF)

This site is in that portion of the Fort Lewis Military Reservation originally established as part of the Nisqually Indian Reservation, and to which the Tribe makes claims of possessory and reversionary rights. The Department and Tribe believe that a workable agreement can be achieved for proceeding on development of this facility without prejudice to final resolution of legal issues involving the reserved rights of the Nisqually Indians. The form suggested for proceeding includes the following elements:

(1) The defined use area of Clear Creek-Hill Creek would be transferred to the control of the Nisqually Indian Community for the construction of a federally-funded and tribally-owned salmon hatchery. If, however, future proceedings determine that Nisqually Indian rights have been extinguished at this site, the matter of ultimate facility ownership shall be subject to further review and determination.

(2) The Clear Creek-Hill Creek Hatchery would be contracted and leased to the Washington Fisheries Department for a minimum period of ten (10) years for operation and management after completion of construction, with built-in options to extend contracts for periods of years beyond the initial period.

(3) The Department and Tribe would cooperate in the engineering and design phases for determining the final plan and nature of facilities to be constructed.

(4) This would not be a National Federal hatchery and, at the end of the contracted facility management and operation by Washington Fisheries Department, the hatchery would transfer fully to the operational management jurisdiction of the Nisqually Indian Community. If ownership is confirmed in the Tribe, this would not alter or enlarge any tribal right or claim in or to fish produced from the facilities.

(5) The Tribe would act to develop an institutional professional training center relating to fisheries sciences and technical fields as part of the design for ultimately assuming full management authority over this hatchery, as well as related tribal projects. To the extent feasible and agreeable to the Tribe and Department, the various fish enhancement facilities in the Nisqually River Basin would be utilized from time to time for training or work learning experiences related to the institutional program.

C. *Nisqually Reservation Facilities:* (existing and developing).

Development of this area (approximately 100 acres of tribally owned and leased lands, containing substantial good water sources) has been initiated by the Tribe under Anadromous Fish Act funding through National Marine Fisheries Service, U.S. Fish and Wildlife Service, Bureau of Indian Affairs and Drought Assistance Funds through combined programming through the Tribe, Economic Development Administration (commerce), and the Interior Department. The significant remaining potential for additional enhancement projects has been identified by the Tribe and these agencies in evaluating justifications for prior funding and its contribution to development of ultimate plans for the total use area.

This major facility would be developed under a master plan and full federal funding. It would be under the operational management jurisdiction of the Nisqually Indian Community and its employees. It would be incorporated into the overall cooperative production plan for the Nisqually River Basin.

Interim Cooperation—Tribal facilities (rearing ponds) constructed with Emergency Drought Assistance funds were completed in early 1978. The Fisheries Department is working with tribal biologists to maximize utilization of these facilities with supplies of available salmon stocks needed immediately at that time.

SATELLITE FACILITIES

D. *Muck Creek Station*

A salmon rearing pond at Muck Creek has been the subject of discussions between the Washington Fisheries Department, Nisqually Tribe and Fort Lewis Army authorities for a number of years. Plans and project engineering designs were previously developed by WDF, and a lease for 7+ acres was issued by the Army in 1975 for establishment of a project which, for several reasons, was not implemented. The lease ends in 1980. This site is also located within the original Nisqually Reservation boundaries.

Periodically in 1977, the Tribe sought reassignment of the lease to the Tribe for undertaking salmon rearing projects for which the Nisquallies had potential available funding. The Washington Fisheries Department responded favorably to the ultimate discussions relating to possible cooperative programming, use and operations of the Muck Creek site for common purposes and mutual benefit of the Department and the Tribe. At earlier times, the Department had available funds for project development and, for the past two years, the Army has cooperated with the Tribe, the U.S.F.W.S. and the State by the commitment of various financial, manpower and equipment resources to the project. The Tribe obligated funds to the project in 1978, 1979 and 1980, and is committed to doing the same in the future.

The transfer of control over this site from the U.S. Army should follow the same form as suggested for the Clear Creek-Hill Creek use area. The Department and Tribe will cooperate in the design and development of the project and in programming uses. The Tribe will have management control over this facility, unless it is later agreed that operational control should be contracted or transferred to the Fisheries Department.

E. *Schorno-Yelm Creek Ponds* (see page 18, Nisqually Report).

This project has also been included in the Capital Construction Budget approved by the Washington Legislature. It includes incubation facilities at sites at Schorno Springs and lower Yelm Creek. The Schorno Spring has been used in recent years for making releases of chinook salmon into the Nisqually River. The Department of Fisheries is currently negotiating for land for the Yelm Creek facility. These are the only enhancement facilities (construction) included in the Washington Department of Fisheries proposals for establishment on the Nisqually River and the only identified Nisqually River Projects located outside the Fort Lewis/Nisqually Reservation boundaries.

Steelhead: (Game Department reply to proposals attached).

No comprehensive or cooperative plan for the increased production of steelhead is included in this Statement. The Tribe has initiated conferences and communications with the Washington Game Department and steelhead sportfishery interests. In the further implementation of cooperative management systems for the Nisqually Basin, the Fisheries Department would join in additional meetings to address valid operational interests of the Game Department.

3. *Justifications and general principals.*—The integrated planning incorporated in the preceding proposals for a basic facilities plan would provide strong foundations for the cooperative management systems envisioned for operation in the Nisqually River Basin and for providing maximum benefits to all interests. Presently, the Nisqually River is one of the few major drainages in the state where major enhancement projects have not been undertaken previously. Water sources and quality available to the river system will come to represent an unfortunately significant waste if they continue to go unused for the substantial productive purposes for which there is need. Establishment of the facilities plan will assist considerably in reducing imbalances in harvest impacts upon Puget Sound salmon production systems of varying strengths and vulnerabilities and will reduce the incidence of conservation problems resulting from both the imbalances and variances.

The Tribe and Department have discussed a number of areas of potential cooperative actions or agreements, as well as problems. Several general principals and avenues for action are recited in the following, together with various positions which appear acceptable to both entities with the implementation of the basic proposals:

(1) The salmon resources and production systems should be protected in their own right, and may be enhanced consistently with ecological standards governing increased fish production and utilization within their aquatic ecosystems.

(2) Cooperation and coordination should be sought and effected in the management of all relevant resources' interests, including (a) facilities operation plans; (b) production plans; (c) harvest plans; and (d) habitat rehabilitation plans: among other interests.

(3) The coordinated production plan should incorporate advance planning and scheduling, as well as flexibility for dealing with any emergencies or unforeseen events, for determining egg-taking needs and use; egg and fish distribution for incubation and rearing; and for distribution within facility network or to release sites.

(4) The Fisheries Department recognizes a primary interest of the Nisqually Indian Community to maintain a viable river fishery for its tribal fishermen, from which they may derive an equitable annual livelihood in harvesting the various species in their season and calendar run periods of abundancy.

(5) The Nisqually Tribe intends to manage tribal fisheries on the Nisqually River as an unitary management system in the development of tribal regulations and for determination of harvest sharing levels or formulations. Although fish run presence or transport conditions in the river may justify distinctions for different portions of the river, the distinctions are less material to whether the area is on or off the Nisqually Reservation—which is not considered as constituting two separate management and counting systems.

(6) The Nisqually Indian Commuity will present a draft of proposed changes in its own tribal fisheries management ordinances and regulations by 1982 in order for State agencies, the Nisqually and other South Sound Tribes to judge needs for correction and modification to better serve interests of the resources, the Medicine Creek Tribes and South Sound sport fisheries.

(7) The Department of Fisheries will act by all appropriate means to assure return runs of salmon to the Nisqually River Basin in volume sufficiencies to satisfy enhancement production needs and appropriate needs of tribal fishermen in the Nisqually region, additional to any base escapement needs.

(8) The Nisqually Tribe will adopt harvest limitations upon its members, individual or collective, catch levels consistent with availability of limited return resources on the short-term basis, and consistent with stated tribal economic and harvest income-level objectives previously outlined for long-term planning with increased production. The Tribe has a primary interest in establishing and maintaining a standard of an equitable livelihood for its fishermen, as well as satisfying program needs, from the produce of the Nisqually River Basin and its production systems. However, it cannot accept a condition of deprivation, dispacement, or disparity as a result of any overly extravagant harvest levels by fishing units in any prior interception fishery. The Tribe is interested in contributing the larger share of production from the Nisqually River Basin to a restoration of commercial viability in the salmon fishing industry, and a natural growth in sports fisheries attendant with population increases.

(9) The Department and Tribe agree that substantial new production may justify altered patterns in the location of various Indain and non-Indian fisheries or fishing units, and as well may justify substantial harvest increases by non-Indian fishermen drawing from resources originating in the Nisqually Basin. The Department will seek to maintain the traditional distance, in geography and timing, between the Nisqually River fishery and non-Indian commercial salmon harvests on Nisqually-origin resources as has existed with boundaries of the Nisqually Salmon Preserve and the State Legislature's closure of commercial salmon fisheries after November 30—until increased new production by enhancement may justify a harvest pattern change.

(10) Egg-taking processes will be subject to cooperatively developed plans for pre-planned facilities programming and general agreements regarding facilities' production goals and capacities. While the production capacity of the integrated Nisqually-McAllister facilities system will give priority to meeting the stocking and production needs of the Nisqually River Basin and related production sites.

egg-taking needs and the produce from eggs taken will generally be regarded as part of the Puget Sound egg network under the coordinated management plan. Eggs will be contributed when available for production goals from outside the integrated Nisqually system and, in turn, will be contributed for use from the Nisqually system when needed and suitable for use at other Puget Sound facilities.

(11) Tribal harvest activities will be coordinated, and curtailed in emergencies, to aid in the purposeful achievement of production goals of the integrated facilities system. Advance planning will seek to accommodate the purpose of maintaining regular and routine tribal fisheries without undue disruption. Agreements should also be established in advance to limit the extent to which the Nisqually-McAllister facilities system might be used to accommodate chronic shortfalls or preventable emergencies in production facilities elsewhere when resulting from repeated or preventable overharvest impacts upon such other systems. Simply, this would tend to reduce the incidence of effecting emergency increases in adult salmon return goals for the Nisqually-McAllister system, at sacrifice of planned tribal harvests, in cases where production goals in other facility systems might be ignored or unduly relaxed in favor of allowing excessive harvests upon runs otherwise returning to those facilities.

(12) Although establishment of brood stocks and selective breeding purposes may require periodic high-level returns to facilities, as also may planned production contributions to other systems in the general egg network, reasonable attempts will be made to minimize any massive surplus returns to facilities, particularly when joined with excessive curtailments of tribal fishing activities.

(13) Expansion of enhancement efforts at other locations in the system, including additional development of rearing ponds, selection of programmed release site, or usage of floating pens, and other methods of increasing production potentials will be coordinated between the Department and the Tribe and subject to any cooperative agreements which may be necessary for those purposes and for assuring the compatibility of new developments with existing situations and program purposes.

(14) The Department and the Tribe shall be secure in the administrative integrity and control of the separate facilities over which each has responsibility. To the maximum feasible extent, the Department and Tribe will work to frame agreements providing for appropriate work training or employment opportunities for tribal members at cooperative facilities or projects in the integrated system.

4. *Joint conclusion.*—Inasmuch as the State of Washington and the Nisqually Indian Community have reached essential agreement on the needed enhancement sites and facilities' potential, stocks to be produced, management plans, and facility staffing, it is strongly urged that federal funding be made available as soon as possible for implementing the outlined integrated cooperative management system. Funding needs anticipated are identified in relation to the respective facility proposals outlined on the first Attachment to this Joint Statement.

DIXY LEE RAY,
Governor, State of Washington.
GORDON SANDISER,
Director, Washington Department of Fisheries.
GEORGE MCCLOUD,
Member, Nisqually Tribal Fish Commission.
DIXIAN S. SANCHEZ,
Chairman, Nisqually Indian Community.
BILL FRANK, Jr.,
Manager, Nisqually Tribal Fisheries Division.
DAL W. JOHNSON,
Chairman, Northwest Indian Fisheries Commission.

ATTACHMENT NO. 1

JOINT PRELIMINARY SUMMARY OF ENHANCEMENT PROJECTS AND COST NEEDS ESTIMATE

Potential production for various salmon species can be projected for the hatchery and rearing facilities proposed or identified in this Statement. The production volumes listed below relate to probable species to be produced, but are given

as production capacity examples, while recognizing that these facilities would afford substantial flexibility in selection of production alternatives with respect to species and volumes involved in enhancement production.

A. M'ALLISTER CREEK HATCHERY

Flow: 36 cfs pumped.
Facilities: Incubation and rearing facilities; water supply system; access to site.
Species: Chum; chinook.
Production: 62,500 pounds chum at 400/pound; 40,000 pounds chinook at 101/pound.
Funding need: None.
Existing funding: $2.3 million from Washington Department of Fisheries.

B. CLEAR CREEK-HILL CREEK HATCHERY

Flow: 5 cfs gravity; 15 cfs pumped; 20 cfs total.
Facilities: Incubation and rearing facilities; water supply system; residence; power to site; access to site.
Species: Chum; chinook, coho.
Production: 45,000 pounds chum at 400/pound; 6,250 pounds chinook at 100/pound; 12,500 pounds coho at 20/pound.
Funding need: $5.75 million.
Existing funding: None.

C. NISQUALLY RESERVATION FACILITIES

Flow: 20–25 cfs pumped.
Facilities: Incubation and rearing facilities; water supply system; residence; power to site; access to site.
Species: Coho; late chum.
Production: 11,000 pounds chum at 400/pound; 90,000 pounds coho at 20/pound. Production volume capacity may be converted for inclusion of other species, including steelhead, which the Tribe is considering in plans.
Funding need: $3.45 million.
Existing funding: $750,000 level provided by Nisqually Tribe.

D. MUCK CREEK STATION

Flow: 10 cfs gravity; 10 cfs pumped; 20 cfs total.
Facilities: Incubation and rearing facilities; temporary residence; power to site; access to site.
Species: Coho.
Production: 90,000 pounds coho at 20/pound.
Funding need: $575,000.
Existing funding: None current.

E. SOHORNO-YELM CREEK PONDS (NISQUALLY RIVER PROJECT)

Flow: 15 cfs gravity total.
Facilities: Rearing facilities; water supply system; power to site.
Species: Chinook; chum.
Production: 38,000 pounds chinook at 100/pound; 38,000 pounds chum at 400/pound.
Funding need: None.
Existing funding: $1 million from Washington Department of Fisheries.
Total funding need for estimated construction costs all projects: $9.775 million.
Estimated total engineering and design costs: $1.15 million (at 12 percent of total).
Estimated annual operation and maintenance costs: $300–400,000 (tribal).
The Washington Department of Fisheries has not been given a complete detailed statement of concept and plans for the institutional fisheries management and training center proposed by the Nisqually Indian Community on page 3 of the Nisqually Report. The Department nonetheless agrees that a variety of technical and professional training needs have long been cited by a number of

Indian tribes of the region and that every consideration ought to be given toward establishment of a suitable tribal or inter-tribal institutional facility for aiding the Indian people in meeting these recognized needs.

PRESS RELEASE, OFFICE OF THE GOVERNOR, STATE OF WASHINGTON

[For immediate release—February 11, 1980]

Governor Dixy Lee Ray announced today, the signing of an agreement by the State and the Nisqually Indian Tribe to develop a joint management plan for the Nisqually River drainage area.

"The development of this comprehensive management plan is an important first step to resolve differences between the tribe and the State in the South Puget Sound Region," Governor Ray said. "It is a model of State and tribal cooperation in the management of salmon resources of one of the major estuaries in Puget Sound," she added.

This agreement considers the complex problems that face Nisqually salmon stocks as they pass through intercepting fisheries. The native Nisqually salmon runs have been over harvested in recent years, and as a result, the Nisqually runs have declined.

The agreement signed by the tribe and the State contains a request to the U.S. Senate Appropriations Committee for $16,300,000 for fiscal years 1981 and 1982. If approved by Congress and signed by the President, that appropriation will be used to construct salmon hatcheries on the Nisqually Reservation and at Muck Creek and Clear Creek, as well as rearing ponds at the Muck Creek station. $2,700,000 of the appropriation will be used to construct fisheries management education centers on and off the reservation in the Nisqually River Valley.

"The State of Washington and the Nisqually Indian Tribe are committed to making this plan work," Governor Ray said. "The plan is necessary to the economic and recreational benefits of both non-Indian and tribal fishermen and others in our population who are interested in the fishery resources of the Nisqually River," the Governor concluded.

NISQUALLY INDIAN TRIBE,
Olympia, Wash., February 12, 1980.

HON. NORM DICKS,
U.S. House of Representatives,
Washington, D.C.

DEAR NORM: With your strong encouragement, the Nisqually Tribe and the State of Washington have at last concluded an agreement for the cooperative management of the Nisqually Drainage and its fishery resources. A copy of that agreement, and our letter to Senator Magnuson, is enclosed for your information.

This historic event is a new landmark in our progress toward true cooperative State-Tribal fishery management in Southern Puget Sound. It is a first step, we hope, to the achievement of similar agreements and cooperation throughout Puget Sound. And, this agreement and the others to come, should make life much easier for both the resource managers and users who have suffered from the conservation problems and pressures from intercepting fisheries during the past decade.

The Nisqually Agreement calls for joint and cooperative management and enhancement of Nisqually fishery resources. It includes the management principles and fishery objectives of the State and the Tribe with respect to the utilization of Nisqually-origin fishery resources. We are as excited as the State about the prospects for new cooperation and joint management, and potential fishery production, anticipated by the agreement. We hope to be working closely with you in the future, and we will be seeking your assistance in facilitating our joint efforts to implement its terms.

Your support and encouragement over the past two and one-half years have been instrumental in keeping us working at this agreement. We wanted to take this time to express our deep appreciation for your time and efforts in this regard.

Sincerely,

DIXIAN S. SANCHEZ,
Chairman, Nisqually Indian Tribe.
BILL FRANK, JR.,
Nisqually Tribal Fishery Manager.

CONTINUED

2 OF 5

IRA Tribes and Jurisdiction To Enforce Washington Laws With Respect to Indians and Their Affairs Within Indian Country

PUBLIC LAW 280

Pursuant to express congressional authorization contained in Sec. 7, Public Law 280 (August 15, 1953, 67 Stat. 588), the State of Washington assumed certain jurisdiction to enforce its civil and criminal laws with respect to Indians and their affairs within areas of Indian country in accordance with legislation enacted in 1957 (Chap. 240, Laws of Washington (1957), p. 941), as supplemented in 1963 (Chap. 36, Laws of Washington (1963), p. 346) (RCW Chapter 37.12).

1963 ASSUMPTION OF JURISDICTION TO ENFORCE STATE LAWS

A. General State jurisdiction—fee lands

On unrestricted fee land within all Indian reservations and on all off-reservation trust or restricted allotments, the State of Washington unilaterally, without tribal request or consent, assumed general jurisdiction to enforce its civil and criminal laws with respect to Indians and their affairs on such lands. (RCW 37.12.010.)

B. Partial State jurisdiction—Indian lands

However, on tribal lands or restricted Indian allotments within all Indian reservations, the State of Washington unilaterally assumed only limited jurisdiction, that is jurisdiction to enforce the state's civil and criminal law with respect to the following eight subjects involving Indians and their affairs:

1. Compulsory school attendance.
2. Public assistance.
3. Domestic relations.
4. Mental illness.
5. Juvenile delinquency.
6. Adoption proceedings.
7. Dependent children.
8. Operation of motor vehicles on public streets, roads and highways.

1957 ASSUMPTION OF JURISDICTION TO ENFORCE STATE LAWS WITHIN CERTAIN AREAS OF INDIAN COUNTRY

In a few areas of Indian country, the State of Washington, pursuant to tribal request and in accordance with Chapter 240, Laws of Washington (1957), assumed general jurisdiction to enforce the state's civil and/or criminal laws with respect to Indians and their affairs, except as prohibited by Public Law 280, anywhere within the limits of the Indian reservation. This jurisdiction was acquired by virtue of a tribal resolution (T.R.) requesting, and a gubernatorial proclamation (G.P.) assuming such jurisdiction. Section 1, Chapter 36, Laws of Washington (1963), expressly provided that the state's 1963 legislation did not affect the jurisdiction already assumed by the state under its 1957 legislation (RCW 37.12.010).

Public Law 280, as amended, and RCW 37.12.060 expressly prohibit the State of Washington from enforcing its laws with respect to alienating, encumbering or taxing trust or restricted real or personal property belonging to an Indian or Indian tribe or regulating its possession or use in a manner inconsistent with federal law; or to deprive any Indian or Indian tribe of any right or privilege afforded by federal law to hunt, trap or fish or the control, licensing or regulation thereof (25 U.S.C. § 1322(b)).

INDIAN RIGHTS ACT OF 1968

A. Assumption of further State jurisdiction after 1968

The Indian Rights Act of 1968 (82 Stat. 77), repealed Section 7, Public Law 280 (Sec. 403(b); 25 U.S.C. § 1323(b)), and provides that after April 11, 1968, further assumption of state jurisdiction may be acquired only with the consent of the adult Indians occupying the affected area of Indian country (Sec. 402(a): 25 U.S.C. § 1322(a)) expressed at a special election (Sec. 406; 25 U.S.C. § 1326).

However, this Act also provides that the jurisdiction which Washington previously acquired is not affected by this Act (Sec. 403(b); 25 U.S.C. § 1323(b)).

B. Retrocession of acquired State jurisdiction

Section 403(a), 25 U.S.C. § 1323(a) of the Indian Rights Act authorized the states to retrocede "any measure of . . . jurisdiction" over Indians and their affairs which the state had previously assumed and the United States to accept such retrocession. The retrocession becomes effective when accepted by the United States. Executive Order 11435 issued November 21, 1968 (33 FR 17339 (1968)) authorizes the Secretary of the Interior to accept on behalf of the United States, the jurisdiction retroceded by the state.

	IRA[1]	IRA Federal Charter	Jurisdiction to enforce Washington's laws	How acquired: Tribal request	How acquired: State action
EASTERN WASHINGTON RESERVATIONS					
Colville	No	No	1957 general jurisdiction.	T.R. 196525 dated Jan. 14, 1965.	Ch. 240, Laws of Washington, 1957, as amended in 1963 G.P. Jan. 29, 1965.
Kalispel	Yes	No	1963 general-fee lands, partial-Indian lands.	None required	Ch. 36, Laws of Washington, 1963.
Spokane	No	No	do	do	Do.
Yakima	No	No	do	do	Do.
WESTERN WASHINGTON RESERVATIONS					
Chehalis	No	No	1957 general jurisdiction.	T.R. Sept. 20, 1957	Ch. 240, Laws of Washington, 1957, G.P. Oct. 14, 1957.
Hoh	Yes	No	1963 general-fee lands, partial-Indian lands.	None required	Ch. 36, Laws of Washington, 1963.
Lower Elwha	Yes	No	do.[2]	do	Do.
Lummi	No	No	do	do	Do.
Makah	Yes	Yes	do	do	Do.
Muckleshoot	Yes	Yes	1957 general jurisdiction.	T.R. July 24, 1957	Ch. 240, Laws of Washington, 1957, G.P Aug. 16, 1957.
Nisqually	Yes	No	do	T.R. Oct. 19, 1957	Ch. 240, Laws of Washington 1957, G.P. Dec. 2, 1957.
Nooksack	Yes	No	1963 general-fee lands, partial-Indian lands.	None required	Ch. 36, Laws of Washington, 1963.
Port Gamble	Yes	Yes	do.[2]	do	Do.
Port Madison (Suquamish Tribe).	Yes	No	do.[3,4]	do	Do.
Puyallup	Yes	No	do	do	Do.
Quileute	Yes	Yes	1957 general jurisdiction.	T.R. Sept. 9, 1957	Ch. 240, Laws of Washington, 1957, G.P. Oct. 3, 1957.
Quinault[5]		No	1963 general-fee lands, partial-Indian lands[3,6]	None required	Ch. 36, Laws of Washington, 19.
Shoalwater	No	No	do	do	Do.
Skokomish	Yes	Yes	1957 general jurisdiction.	T.R. May 15, 1956	Ch. 240, Laws of Washington, 1957, G.P. July 13, 1957.
Squaxin Island	Yes	No	do	T.R. June 23, 1959	Ch. 240, Laws of Washington, 1957, G.P. July 27, 1959.
Swinomish	Yes	Yes	1957 criminal jurisdiction—general criminal jurisdiction.	T.R. Mar. 26, 1963	Ch. 240, Laws of Washington, 1957, G.P. June 7, 1963.
			1963 civil jurisdiction—General-fee lands, partial-Indian lands.	None required	Ch. 36, Laws of Washington, 1963.
Tulalip	Yes	Yes	1957 general jurisdiction.	T.R. Apr. 4, 1958	Ch. 240, Laws of Washington, 1957, G.P. May 8, 1958.
Off-reservation allotments.			General civil and criminal jurisdiction.	None required	RCW 37.12.010 and sec. 7, Public Law 280.

See footnotes at end of table.

	IRA [1]	IRA Federal Charter	Jurisdiction to enforce Washington's laws	How acquired: Tribal request	How acquired: State action
NONRESERVATION TRIBES					
Sauk Suiattle	Yes	No			
Upper Skagit	Yes	No			

[1] Indian Reorganization Act of 1934, as amended 48 Stat. 984, 25 U.S.C. 462 et seq. See especially 25 U.S.C. 476 and 477.
[2] Portland regional solicitor's opinion, Sept. 28, 1971. However, the solicitor's listing of Washington's jurisdiction to enforce State laws indicates, without comment or supporting reasons, that Lower Elwha and Port Gamble Reservations are under 1957 general State jurisdiction (78 I.D. 18, 26 (1971)).
[3] On Apr. 17, 1972, Washington's attorney general expressed the opinion the Governor of Washington had no authority to retrocede the State's jurisdiction within Indian country, AGO No. 9, 1972.
[4] Previous general civil and criminal jurisdiction retroceded by Governor except as to ch. 36, Laws of 1963 (G.P. Aug. 26, 1971) and accepted by Secretary Apr. 14, 1972 (37 FR 7353 (1972)).
[5] On Apr. 13, 1935, the Indians on this reservation voted in favor of the application of the IRA but they have never organized under a secretarially approved constitution and bylaws.
[6] Previous general jurisdiction retroceded by Governor except as to ch. 36, Laws of 1963 (G.P. Aug. 15, 1968) and accepted by Secretary Aug. 30, 1969 (34 FR 14288 (1969)).

Senator MELCHER. The committee stands adjourned until tomorrow at 10 a.m. We will be in room 457 of the Russell Building.

[Whereupon, at 1:05 p.m., the hearing was adjourned to reconvene at 10 a.m., Wednesday, March 19, 1980.]

JURISDICTION OF INDIAN RESERVATIONS

WEDNESDAY, MARCH 19, 1980

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The committee met, pursuant to recess, at 10:15 a.m., in room 457, Russell Senate Office Building, Senator John Melcher (chairman of the committee) presiding.

Present: Senators DeConcini and Cohen.

Staff present: Max Richtman, staff director; Peter Taylor, special counsel; Jo Jo Hunt, staff attorney; John Mulkey, professional staff member; and Doris Ballard, secretary.

Senator DECONCINI (acting chairman). The Select Committee on Indian Affairs will come to order.

We are resuming today the hearings on S. 1181, S. 1722, and the Federal magistrates concept.

Our first witness today will be from the Department of Justice, Mr. Roger Pauley, who is the Director of the Office of Legislative Affairs, Criminal Division. We will also hear from Douglas Gow of the Federal Bureau of Investigation and R. E. Thompson, U.S. attorney for New Mexico and chairman of the New Mexico Subcommittee on Indian Affairs.

STATEMENT OF ROGER A. PAULEY, DIRECTOR, OFFICE OF LEGISLATIVE AFFAIRS, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROGER ADAMS, GENERAL LITIGATION SECTION, CRIMINAL DIVISION; LAWRENCE A. HAMMOND, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL; DOUGLAS GOW, FBI; AND R. E. THOMPSON, U.S. ATTORNEY, DISTRICT OF NEW MEXICO

Mr. PAULEY. Thank you, Mr. Chairman. If I may also introduce two of my colleagues who appear with me at the table. On my extreme right is Roger Adams, in the General Litigation Section of the Criminal Division, and on my immediate left is Lawrence A. Hammond, a Deputy Assistant Attorney General in the Office of Legal Counsel.

I am pleased to be here today to discuss matters of concern to the Department of Justice with respect to the administration of justice in Indian country.

Let me outline our statement. After briefly reviewing the law with respect to jurisdiction over Indian country, the statement will first address the provisions of S. 1181, a bill to authorize the States and

the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country.

Second, pursuant to the committee's request, the statement sets forth our views on section 161(i) of S. 1722 as reported, the Criminal Code Reform Act, which would authorize Indian tribes to apply to the United States for resumption of Federal criminal jurisdiction where States have taken over jurisdiction under Public Law 83-280 and similar statutes. Finally, the statement discusses the concept of increased use of Federal magistrates on Indian reservations.

As the committee knows, criminal jurisdiction in Indian country is divided between the Federal, tribal, and State governments depending on the type of crime and the race—Indian or non-Indian—of the perpetrator of the crime and the victim, if any. The scheme for dividing up jurisdiction is based on three foundations.

First, is the wording of 18 U.S.C. 1153 and 18 U.S.C. 1152. Second, is a line of cases commonly referred to as the *McBratney* and *Draper* decisions after the early Supreme Court rulings in *United States* v. *McBratney*, 104 U.S. 621 (1882), and *Draper* v. *United States*, 164 U.S. 240 (1896). Third, is the recent landmark decision of the Supreme Court in *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978).

Taken together, the significant features of these concepts for S. 1181 and S. 1722 are: No. 1, the State never has jurisdiction over an Indian committing a crime in Indian country; No. 2, the State has exclusive jurisdiction over a non-Indian committing a crime against another non-Indian and most victimless crimes by non-Indians; and No. 3, the tribe never has jurisdiction over a crime committed by a non-Indian.

Thus, with the exception of certain cases in which a non-Indian is the perpetrator of a crime, jurisdiction over criminal matters arising in Indian country rests with the Federal Government and the tribe. At various times in the history of Federal-Indian relations the Congress has seen fit to oust tribal and Federal jurisdiction on certain reservations and give it to the States.

The high-water mark of this policy was reached in 1953 with the passage of Public Law 83-280, commonly referred to as Public Law 280. That act gave the States of California, Minnesota, Nebraska, Oregon, Wisconsin—and, by later amendment, Alaska—jurisdiction over offenses committed in Indian country in those States with the exception of one reservation in Minnesota, Oregon, and Wisconsin.

Section 6 of Public Law 280 permitted other States to amend their constitutions to permit them to assume jurisdiction over Indians by means of affirmative legislative actions. No provision was made under sections 6 or 7 for the wishes of the tribes. The States could act unilaterally and several did so prior to 1968 when section 7 was repealed as part of the 1968 Civil Rights Act.

A section of that act, codified as 25 U.S.C. 1326, created an important safeguard that henceforth the tribes must consent to State jurisdiction before being placed under it by a State. Since that time none have so consented to the best of our knowledge.

Nevertheless, State jurisdiction, in the five original Public Law 280 States and Alaska and in States that acted pursuant to section 6 or 7 of that act before 1968, was unaffected and still continues irrespective of the wishes of the tribes in those States.

The 1968 act also provides for the retrocession of State jurisdiction to the Federal Government in the event that a Public Law 280 State no longer desires to exercise all or part of its jurisdiction over tribes within its boundaries. The right to seek retrocession is given to the State not the tribe. Tribes can request the State to seek to retrocede jurisdiction but cannot demand a retrocession.

By Executive order the Secretary of the Interior has the discretion fully or partially to accept or to refuse retrocession but he must consult with the Attorney General before acting. Some States have retroceded varying degrees of jurisdiction to the Federal Government pursuant to the terms of the 1968 act.

In the forties other acts had been passed which gave certain other States jurisdiction over Indian reservations. For example, in 1940, Kansas was given criminal jurisdiction over Indian country in that State. In 1946 North Dakota was given jurisdiction over crimes by or against Indians on the Devil's Lake Reservation. In 1948 Iowa was given jurisdiction over crimes by or against Indians on the Sac and Fox Reservations, and New York State was given similar jurisdiction over all Indian reservations in that State.

Turning now, with that brief background, to the legislative proposals before the committee, S. 1181 is designed to improve the administration of justice in Indian country by permitting tribes to negotiate with State and local governments with respect to the matters over which criminal and civil jurisdiction are exercised by the tribal and State governments. It would apply both to tribes affected by Public Law 280 and similar laws and to tribes that still are under Federal and tribal jurisdiction.

The purpose of S. 1181 is relatively limited. The bill is apparently not intended to allow the tribes and the States to increase or decrease the responsibility of the Federal Government, at least as to criminal law enforcement. This is made clear by the language in section 101(e) of title I providing that nothing in the act shall be construed to:

> Authorize or empower State or tribal governments, either separately or pursuant to agreement or compact, to expand or diminish the jurisdiction presently exercised by the Government of the United States to make criminal laws for, or enforce criminal laws in, the Indian country.

That language—which, as discussed below, we now believe should be extended to civil cases—was added at the request of the Department of Justice when commenting on similar legislation introduced as S. 2502 in the 95th Congress.

So long as the policy of not affecting Federal jurisdiction is reflected in S. 1181, the Department of Justice does not object to the basic thrust of the bill, which appears to have the laudable goal of increasing the ability of the tribes and the States to reallocate jurisdiction between themselves to suit the needs of particular reservations.

In fact, the bill would reaffirm the Federal Government's faith in the capacity of tribal governing bodies as well as States to act responsibly in matters affecting the well-being of tribal members. We, therefore, support the principles of S. 1181. We do, however, have some problems with particular language and suggest some amendments in the paragraphs immediately following.

A basic aspect of the proposal, the degree to which agreements and compacts between the States and Indian tribes is to be permitted, remains unclear. Section 101(a) spells out the kinds of subject matter and scope which such agreements and compacts may encompass. Section 101(e), on the other hand, lists various matters which the legislation is not to be construed as permitting to be altered by State-tribal agreements or compacts.

While generally clear, these provisions are ambiguous in certain important respects. Section 101(a)(2), for example, indicates that agreements or compacts may cover the allocation or determination of governmental responsibility of States and tribes "over specified subject matters or specified geographical areas, or both". The word "specified" is presumably meant as a significant substantive limitation, since section 101(e)(5) indicates that nothing in the bill is to be interpreted as permitting the entry into agreements or compacts "for the transfer of unlimited, unspecified, or general civil and criminal jurisdiction of an Indian tribe", except via the mechanism provided by Congress in the 1968 Civil Rights Act, 25 USC 1326.

The line between permissible "specified" subject matters, on the one hand, and prohibited "unlimited, unspecified, or general" ones, on the other hand, is opaque. For instance, would an agreement under which a tribe and the State agreed to transfer to the latter all civil and criminal jurisdiction on the reservation except for traffic regulation and offenses be valid under the bill?

We are not sure and would suggest therefore that the bill be clarified in this regard. This is especially important since Public Law 280, as amended by the 1968 Civil Rights Act, provides for both general and limited transfers of jurisdiction from the tribe to the State, provided the tribe consents to the State's assumption of jurisdiction.

One can envision a situation whereby a State attempts to assume jurisdiction over most but not all criminal matters on a particular reservation with the consent of the tribe. The tribal council, realizing it is taking a major step, may decide to proceed under the 1968 Civil Rights Act and call for a vote of the enrolled tribal Indians at a special election instead of simply proceeding to enter into a compact as provided for in S. 1181. Should there be some challenge to the way the election was conducted or to the results, one can imagine that the faction of the tribe that favored the transfer of jurisdiction would argue that while the transfer may be ineffective under the 1968 Civil Rights Act, it is, nevertheless, effective under S. 1181.

In addition, section 101(a)(3) allows for the entry into agreements or compacts which provide:

> For the transfer of jurisdiction of individual cases from tribal courts to State courts or State courts to tribal courts in accordance with procedures established by the laws of the tribes and States.

If what is intended is to authorize tribal-State agreements creating a mechanism, like that in rule 21 of the Federal Rules of Criminal Procedure, whereby on various grounds, including the inability of the defendant to obtain a fair trial, a case could be transferred on motion of the defendant or the court from, for example, a tribal to a State court, the provision is probably unobjectionable. However, read liter-

ally, it would seem susceptible to far more than that. We feel this provision should be refined.

In subsection 101(a), page 3, line 15, we suggest that the words "and among" be deleted because the word "among" could be interpreted to mean that the States could enter into jurisdictional compacts with other States, and tribes with other tribes, whereas the bill's purpose is to allow a State and a tribe to enter into agreements only between themselves.

In subsection 101(e), page 5, line 10, we suggest that the phrase "civil or regulatory" be inserted after the word "criminal", the first time it appears, and before the word "laws".

Also on line 10, the word "criminal", the second time it appears, should be deleted and the word "those" should be inserted. Alternatively, the phrase "to make criminal laws for or enforce criminal laws" could be deleted.

The effect in either case is to enlarge the proviso discussed earlier so that it applies to civil as well as criminal jurisdiction of the United States, consistent with what we believe is the limited intent of the legislation. The proviso would then make it clear that Federal jurisdiction over both criminal and civil matters may not be affected by tribal-State agreements or compacts.

We also note that there is no requirement in the bill that compacts entered into by tribes be approved by the Secretary of the Interior. The original draft of S. 2502 in the 95th Congress contained such a requirement. While we defer to the Department of the Interior on the propriety of the deletion of that requirement, we suggest that on major jurisdictional agreements, secretarial review and approval may be appropriate.

Subsection 101(c) of the bill provides that the jurisdictional provisions of any such agreement, compact, or revocation be published in the Federal Register "unless requested otherwise by all parties to the agreement or compact". We believe that providing public notice of the jurisdictional provisions is important to all persons affected thereby to apprise them of the potential consequences of various activities. A provision which limits notice could subject an individual to unknown and unintended consequences. We therefore suggest that the jurisdictional provisions should be published in all instances.

We believe that subsection 101(d), which states that agreements will not affect ongoing cases, does not go far enough. We suggest that it ought to provide that matters which arose prior to the agreement, but which are not yet in litigation, should be handled in accordance with the law as it existed prior to the agreement.

In the civil context, this would preserve the expectations of the parties and seems the fairest approach, while in the criminal context the rule may be necessary to avoid problems involving ex post facto application of law.

Title III states that the Federal district courts shall have original jurisdiction over any civil action brought in equity by a party to enforce the agreement. Legal actions can be maintained only to the extent provided for in the agreement.

It is our understanding that the intent of this provision is to waive, to a limited extent, the immunity from suits possessed by States and

Indian tribes and to allow them, by explicit provisions in the agreement, to consent to further waiver.

We suggest it would be more clear if the act provided that States and Indian tribes, by entering into compacts or agreements, shall be deemed to have consented to litigation relating to the subject matter of those compacts or agreements. In keeping with this comment, we recommend that the following language be inserted at the end of section 301 on page 10:

The States and Indian tribes shall be deemed to have consented to suit relating to the subject matter of those compacts or agreements.

Let me turn now to the relevant portion of S. 1722 as reported by the Senate Judiciary Committee. Section 161(i) of that bill provides a mechanism by which tribes occupying Indian country over which a State has assumed jurisdiction pursuant to Public Law 280, either as originally enacted or amended by the 1968 Civil Rights Act, or pursuant to the special statutes that were enacted giving jurisdiction to Iowa, Kansas, and New York, may oust the State of jurisdiction and place the tribe back under Federal and tribal jurisdiction.

This would come about first by a resolution adopted at a special election of the adult Indians to the effect that they want such a retrocession. Ninety days after the adoption of the resolution the United States shall, with the consent of the Secretary of the Interior, reacquire such measure of criminal jurisdiction granted to or assumed by the State pursuant to Public Law 280 or similar statutes.

Under present law the States have full authority over whether to offer a retrocession, regardless of what the tribe may want. Under this portion of S. 1722 the tribes would have such total control regardless of what the States may wish.

For some time now the Department of Justice has taken the view that tribes which were placed under State jurisdiction, often without their consent, should be given the opportunity to elect between Federal and State jurisdiction. Needless to say, this is also the view of most or all of the Indian community, many of whose spokesmen have long been opposed to Public Law 280 and similar statutes on the ground that they represent an unwarranted loss of tribal independence and status.

Nevertheless, the Department considers that the State should have a voice, but not a veto, over a taking away of jurisdiction over its Indian citizens and that the Department of Justice should be formally consulted by the Interior Department to make sure that our investigative and prosecutive resources are adequate to handle the increased workload, particularly given the short, 90-day period between the tribal resolution and the reacquisition of Federal jurisdiction.

Therefore, we would prefer to see subsection (i) amended to provide that the Secretary of the Interior shall request the views in writing of the Attorney General of the United States and the Governor of the State concerned as to the feasibility of the retrocession plan.

Also, it should be made clear that although the Secretary must decide within 90 days following receipt of the tribal resolution, the Secretary should be allowed to set a date beyond the 90-day period for a retrocession to become effective if more time is needed for an orderly transfer.

Further, if the Secretary disapproves a tribal retrocession resolution, he must state his reasons for so doing in writing. We would be glad to work with the committee in drafting such amending language.

As a point of interest, both the Interior Department and the Justice Department agreed on specific language incorporating all of the above points as long ago as 1976.

Turning finally to the committee's request that we discuss the use of magistrates on Indian reservations, it is my understanding that the committee is concerned about possible gaps in law enforcement following the *Oliphant* decision holding that tribal courts do not have jurisdiction over non-Indians.

Initially, the issue should be put in some perspective. Before *Oliphant* only 33 of 127 courts operating on Indian reservations purported to extend jurisdiction to non-Indians. Nevertheless, the decision in *Oliphant* caused the Department to examine criminal jurisdiction on Indian reservations particularly over non-Indians.

A copy of a memorandum on this subject prepared by the Office of Legal Counsel has been widely disseminated in the Indian community and we would be glad to submit a copy for the record if desired by the committee.

Basically, we have concluded that the States, not the Federal Government, have exclusive jurisdiction over those crimes by non-Indians that do not pose a direct and immediate threat to Indian persons, property, or tribal interests. Additionally, we have concluded that the States have concurrent jurisdiction with the Federal Government over those crimes committed by non-Indians that do involve a threat to Indian interests.

We therefore believe that, as a matter of law, the jurisdiction over all persons on reservations has been sufficiently clarified and that no substantial gaps exist. There is pending at this date in the U.S. District Court for the District of New Mexico a case, styled *Mescalero-Apache Tribe* v. *Civiletti*, in which these jurisdictional issues are being litigated.

However, we are not unmindful of the view of some that there is a de facto gap in law enforcement as U.S. attorneys are alleged to decline an excessive number of cases that perhaps could be prosecuted under 18 U.S.C. 1153 or 1152, on the one hand, and on the other hand, tribes are occasionally alleged to be remiss or reluctant to prosecute tribal members in tribal court. Such generalized allegations are, of course, easily made but hard to discuss meaningfully without specific examples and complete knowledge of all the facts that entered into a prosecutor's decision.

In theory, at least, placing Federal magistrates on reservations would provide another forum in which to prosecute offenders in Indian country. However, 18 U.S.C. 1152 would preclude magistrates from trying offenses committed by one Indian against another and the *Draper-McBratney* line of cases would preclude trying many crimes committed by non-Indians.

Under present 18 U.S.C. 3401, magistrates are limited to hearing cases involving misdemeanors. A misdemeanor is an offense limited to punishment by imprisonment for up to 1 year and a fine. This limitation would preclude magistrates from hearing cases brought under the

Major Crimes Act, 18 U.S.C. 1153. There might be crimes committed by non-Indians that could be prosecuted in magistrates court, but we would expect that a serious crime committed by a non-Indian against an Indian would be prosecuted as a felony in Federal district court if the State did not prosecute.

Under the present Magistrates Act, which is contained in chapter 43 of title 28, magistrates are appointed by the judges of each court in such numbers and serve at such locations as the Judicial Conference of the United States may determine. The Judicial Conference of the United States consists of the chief judge of each judicial circuit, a district judge from each circuit, and other judges from special Federal courts.

The Department of Justice has no control over where magistrates are stationed. The only input the Department has comes from U.S. attorneys who can make suggestions about the number of magistrates and their locations to the Director of the Administrative Office of the United States Courts. The Director's recommendations are in turn considered by the Judicial Conference.

Rather than look to increased use of magistrates, it would appear more productive for Federal, tribal, and State officials to attempt to work out a plan for each reservation whereby any investigative and prosecutive enforcement problems that exist can be rectified. The problems in Indian country are not uniform from one reservation to another. The problems may better be addressed by increased cooperation at the local level rather than the creation of an additional court system that might weaken the power of tribal courts and discourage State officials from prosecuting non-Indians in State court.

In summary, then, the Department of Justice supports the concept behind S. 1181 with our suggested amendments. We would like to work with the committee in preparing a better retrocession plan than that contained in S. 1722, although we strongly endorse its core idea that the tribes ought to be able, even without the concurrence of the State, to request a retrocession.

Finally, we feel that an increased use of magistrates in Indian country is not necessarily the best approach to deal with enforcement problems regarding minor offenses.

Mr. Chairman, that completes my statement. My colleagues and I would be happy to try to respond to your questions.

Senator DECONCINI. Thank you very much Mr. Pauley, for your fine detailed statement. We appreciate the observations and constructive suggestions for improving S. 1181.

Does S. 1181 permit the States or the U.S. Government to do anything that it is not already permitted to do, in your judgment?

Mr. PAULEY. Let me ask Mr. Adams to answer that. I think it does.

Mr. ADAMS. I think, Mr. Chairman, that at least the feeling in both the Indian community and the States is that there are certain impediments to their entering into the types of agreements that are contemplated by S. 1181, and I think that this type of legislation would resolve at least some of those concerns.

Senator DECONCINI. In your opinion, are there any impediments, particularly legal impediments, other than psychological ones? I cannot find any, but perhaps there are some.

Mr. ADAMS. I am not positive. I think we will have to look at that problem.

Senator DECONCINI. Nothing jumps out at you or is extremely obvious?

Mr. ADAMS. I think one problem that is addressed in the bill is the problem of sovereign immunity which might preclude the enforcement of any agreements that might be entered into. This legislation provides for, essentially, a waiver of sovereign immunity.

Senator DECONCINI. Of course, you mean a voluntary waiver.

Mr. ADAMS. Yes.

Senator DECONCINI. Just out of curiosity, in the prosecution of a misdemeanor or a petty offense before a magistrate is it required that the prosecution case be formally presented by the prosecutor, or can the arresting officer present the case as in the justice of the peace court?

Mr. PAULEY. Mr. Chairman, the law on that question is rather sparse. The principal case is a district court case from the State of Maryland entitled *United States* v. *Glover*, in 381 Federal Supplement. The holding of that case is that it is not required that the prosecution be presented by a Department of Justice official or even by an attorney.

The reasoning of the court is that the statutes which do exist and which provide that it is the duty of the U.S. attorney to prosecute for all offenses against the United States are not jurisdictional in character and at the same time are not enacted for the benefit of the defendant. Therefore, the holding of that case was that a park ranger or member of the park police who, under an arrangement with the U.S. attorney's office in Maryland, was customarily allowed to present cases involving minor offenses that occurred on Federal park land was a permissible procedure.

Therefore, so long as the U.S. Attorney's Office is aware of and endorses the arrangement, at least in the holding of this fairly well reasoned case, it would be allowed.

Senator DECONCINI. Does the Department have any rule which would prevent a tribal police officer or an officer of the local police department from presenting a case directly to the U.S. attorney? Is there any requirement that the FBI first investigate the case?

Mr. PAULEY. Let me ask our colleague from the Bureau, Mr. Gow.

Mr. GOW. There is none.

Senator DECONCINI. Is that sometimes the rule on a local level?

Mr. GOW. I think Mr. Adams could best answer that question.

Mr. ADAMS. I think there has been a fairly well-publicized policy of the Department to encourage U.S. attorneys to accept investigatory reports from those tribal and Bureau of Indian Affairs policemen whom the U.S. attorney's office feels—as individuals or as organizations—are capable of investigating a case well enough for prosecution in Federal court.

In some districts around the country there are written guidelines as to the types of cases that will be investigated by the FBI and the types of cases that will be investigated by tribal and BIA police.

Mr. PAULEY. Mr. Chairman, Mr. Thompson would like to comment on this matter.

Senator DECONCINI. Yes, Mr. Thompson?

Mr. THOMPSON. Mr. Chairman, there is no requirement as to who must investigate the case. It is frequently the case that matters are brought to our attention by tribal police.

We do have an informal working arrangement whereby the more serious crimes are investigated by the FBI. Crimes of moderate severity are investigated by the Bureau of Indian Affairs' law enforcement officials, and the minor offenses are investigated by tribal officers and usually handled in tribal court.

Senator DECONCINI. Mr. Thompson, do you make that decision as to whom you will accept?

Mr. THOMPSON. Yes.

Senator DECONCINI. Is that generally the case throughout the U.S. district attorneys' offices?

Mr. THOMPSON. Yes, sir.

Senator DECONCINI. What authority does a tribal or local police officer have to make arrests of persons for Federal offenses committed within an Indian reservation?

Mr. THOMPSON. Mr. Chairman, I do not believe at this time that a tribal officer has any authority to make an arrest for a Federal offense. What happens as a practical matter is that if the tribal officer comes across an offense that is a Federal offense, beyond the tribe's own jurisdiction, either the FBI is called or the Bureau of Indian Affairs' law enforcement officials are called to the scene.

Senator DECONCINI. Yes, sir. Would you care to comment?

Mr. ADAMS. I might add one point to that, Mr. Chairman. I think that what happens in a situation wherein the tribal police arrive at the scene of an ongoing crime and it is clearly a Federal crime, there is usually some provision under the tribal code that would enable the tribal police to make an arrest under the tribal code to stop the criminal conduct at that point.

Senator DECONCINI. You mean they could act.

Mr. ADAMS. Yes, sir.

Senator DECONCINI. I can see some problems arising if they had to go get an FBI agent.

You went into some detail in your statement about retrocession. Could we be supplied a copy of the draft legislation that the Department has prepared on this subject? Have you prepared any?

Mr. PAULEY. We have not looked at the question in any depth since the 1976 language was evolved. As I mentioned, both the Interior and the Justice Departments concurred on some language.

Senator DECONCINI. Do you have any drafts or proposals lying around?

Mr. PAULEY. We do not have them in our pockets, but I do not think it would take us too long to determine whether the former language remains the policy of the administration.

Senator DECONCINI. Would you mind supplying that when you have time? If you will, I think it might be helpful.

Mr. PAULEY. Certainly.

[The Department of Justice declined to submit requested material. See following letter.]

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

23 APR 1980

Honorable John Melcher
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20510

REC'D APR 23 1980

Dear Mr. Chairman:

During the March 19, 1980, hearing on S. 1181, a bill that would authorize the states and Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations, Department of Justice witnesses agreed to provide additional information on certain points to the Committee.

Concerning the question of whether tribes and states already possess the authority to enter into agreements or compacts in the absence of legislation such as S. 1181, two factors should be considered. First, tribes that were placed under state jurisdiction by means of P.L. 83-280 or pursuant to states acting under the authority of P.L. 83-280 have, at the present time, no way to rid themselves of state jurisdiction except through the retrocession procedure in 25 U.S.C. 1323. This requires that the state offer a retrocession of some or all of its jurisdiction and that such an offer be accepted by the Secretary of the Interior. S. 1181 would allow a state and a tribe to agree that the tribe would assume jurisdiction over "specified subject matters," e.g., traffic offenses by tribal members or by tribal members and non-tribal members on all or part of the reservation. No Federal action or approval would be required under the bill. Since for a tribe presently affected by P.L. 280, the above agreement concerning traffic offenses would necessitate the establishment of a tribal court or a Court of Indian Offenses pursuant to 25 C.F.R. §11.1 et. seq., either of which would require action by the Interior Department, we suggested in our testimony that review and approval by the Secretary of the Interior of major jurisdictional agreements would seem appropriate. We would consider any agreement which would necessitate the creation of a new court for reservation crimes to be a "major" agreement.

Second, even for tribes not affected by P.L. 280, recent court decisions have cast doubt on the ability of the tribes

and states to enter into agreements. For example, in White v. Califano, 437 F. Supp. 543 (D. S.D. 1977) aff'd 581 F.2d 697, it was held that the State of South Dakota lacked jurisdiction to involuntarily commit an Indian living on a reservation to a state mental health facility even though a tribal court had found she was mentally ill, was a danger to herself and others, and had ordered her committed to the state facility. The court held that for state authorities to so act would infringe on the tribe's right to govern itself and that the Federal Government had preempted the area of providing Indian social services from the state. Even if the State of South Dakota and the tribe had agreed that the state would provide mental health care for Indians, White v. Califano and similar cases cast serious questions over whether such agreements would be effective. Report No. 95-1178 of the Committee to accompany S. 2502, a bill in the 95th Congress very similar to S. 1181, discusses at pp. 6-7 the important Supreme Court cases of Williams v. Lee, 358 U.S. 217, Kennerly v. District Court, 400 U.S. 423, and McLanahan v. Arizona Tax Commission, 411 U.S. 464 for their development of the infringement and preemption tests that would appear to make invalid many agreements that provided for some sort of state action with respect to tribal members on the reservation, even if the tribe felt that its interests would be better served by such compacts.

The Committee also requested further information about cross-deputization of tribal and state police in South Dakota. The Department of Justice has brought suit against Roberts County, South Dakota for its refusal to permit members of the Sisseton-Wahpeton Sioux Tribe to exercise the powers of a county law enforcement officer. The suit is being handled by the Civil Rights Division, Office of Indian Rights, and is presently in the discovery stage.

The Committee also requested information about cross-deputization on other South Dakota reservations. According to the Aberdeen Area Office of the Bureau of Indian Affairs, one BIA police officer on the Cheyenne River Reservation has been commissioned as a deputy sheriff by Dewey County; five BIA officers on the Lower Brule Reservation have been commissioned by Lyman County; seven BIA officers and two tribal officers on the Crow Creek Reservation have been commissioned by Buffalo County. In addition, the BIA has issued 120 special officer commissions to state, county, and municipal

law enforcement officers. With specific reference to the Pine Ridge Reservation, none of the approximately 35 members of the Pine Ridge Police Department have been issued commissions by Shannon, Bennett, or Washabaugh Counties, the counties making up that reservation.

The Committee also made reference to a 1975 letter sent from the BIA to the Department of Justice concerning duplication of services between the BIA criminal investigators and FBI agents. The Committee staff has identified the letter as written on January 28, 1975. While a related letter from the BIA does have that date it appears that the letter in question was dated March 28, 1975. Both letters and the attachments to the March 28 letter are enclosed for your reference. Neither letter called for a written response. Nevertheless, partly as a result of the concerns that generated these letters in the Fall of 1974, an intradepartmental task force on Indian matters was established. Then Assistant Director of The Office of Policy and Planning, Doris M. Meissner was named chairman. The task force prepared a report in October 1975, a copy of which was also requested by the Committee and is attached. The BIA was provided a copy shortly after it was prepared.

Also in early 1975 a conference was held in Phoenix, Arizona of United States Attorneys with Indian reservations in their districts and Department of Justice officials. Tribal and BIA officials also attended. Shortly thereafter, the Department began its policy of encouraging United States Attorneys to accept investigative reports from those BIA and tribal police who they think are capable of investigating a case well enough to support a Federal prosecution. Also, the Criminal Division instituted a policy whereby it would review cases in which a United States Attorney had declined prosecution where the tribal or BIA police felt the declination was unwarranted. In addition, the FBI instituted a policy of promptly sending the chief law enforcement officer on a reservation a copy of its letter to a United States Attorney confirming a case declination. All of the above procedures were thoroughly discussed with appropriate BIA officials and are still in effect.

Finally, the Committee requested copies of the draft legislation concerning retrocession of state jurisdiction over certain reservations. In our testimony we stated that the Department of Justice and the Department of the Interior agreed on a specific legislative proposal concerning retrocession in 1976. However, we are advised that the proposal

has never received Administration clearance and so cannot be forwarded to the Congress.

If the Committee has further questions, please do not hesitate to call on us.

Sincerely,

Alan A. Parker

ALAN A. PARKER
Assistant Attorney General
Office of Legislative Affairs

Attachments

Senator DECONCINI. In 1975 the Commissioner of Indian Affairs, Mr. Thompson, wrote a letter to Jonathan Rose, the Associate Deputy Attorney General at that time. I will read just one paragraph from it.

Enclosed for your attention and review is a position paper that we have compiled on the issues of duplication of services between the Bureau of Indian Affairs criminal investigators and agents of the Federal Bureau of Investigation.

The paper is about 20 pages long and includes many, many examples of duplications and problems. In it, it asks the Department to review it and consult and work with the BIA to see what might be resolved.

We were unable to secure any written response to the letter. Do you know or can you find out if there was any written response to the inquiry?

Mr. PAULEY. I do not know but I shall endeavor to learn.

Senator DECONCINI. I can supply you with a copy of it if you do not have one. It would be interesting historically for the committee to know what some of the answers were to the specific problems.

[The material follows. Testimony resumes on p. 214.]

WASHINGTON, D.C., *January 28, 1975.*

Hon. JONATHAN ROSE,
Associate Deputy Attorney General, Policy and Planning, Room 2346, Department of Justice, Washington, D.C.

DEAR MR. ROSE: Thank you for taking the time to meet with members of my staff to discuss matters of mutual concern. This type of open and frank dialogue is necessary if both of our agencies are going to meet our responsibilities in providing optimum criminal justice services to Indian reservation communities.

As per your suggestion, we have taken the following steps:

1. Our field offices have been requested to submit copies of their investigative reports on all incidents that were referred to the Office of the United States Attorney that were declined for prosecutive action. We intend to forward only those matters of a most significant nature and of great concern to the Indian community. These reports will be forwarded to your office for review and re-evaluation as to whether or not to proceed in Federal proceedings.

2. We will prepare a position paper setting out the problems of duplication of effort between the Federal Bureau of Investigation and the Bureau of Indian Affairs. The paper will include an analysis of the problems, supporting documentation and our recommendations for procedures to be implemented.

3. We will provide your office with a number of reports of incidents that were declined for prosecution by the various offices of the United States Attorney. Of course we do not expect any action on these matters but only offer these matters so you can provide us with your views as to the validity of the position of the Indian community and ours as to the number of declinations made by United States Attorneys.

We will forward this information to you as early as possible and again, we would like to thank you for your assistance in this vital matter.

Sincerely yours,

MORRIS THOMPSON,
Commissioner of Indian Affairs.

Washington, D.C., March 28, 1975.

Hon. JONATHAN ROSE,
Associate Deputy Attorney General, Policy and Planning, Room 3245, Department of Justice, Washington, D.C.

DEAR MR. ROSE: Enclosed for your attention and review is a position paper that we have compiled on the issue of duplication of services between the Bureau of Indian Affairs criminal investigators and Agents of the Federal Bureau of Investigation.

We are forwarding this document as per your request during our meeting during the month of December 1974.

After you and your staff have had an opportunity to review this paper, we would appreciate an opportunity to meet and discuss this matter.

Thank you for your cooperation and assistance in these matters.

Sincerely yours,

MORRIS THOMPSON,
Commissioner of Indian Affairs.

Enclosure.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
Washington, D.C., March 5, 1975.

MEMORANDUM

To: Commissioner, Bureau of Indian Affairs.
From: Director, Office of Indian Affairs.
Subject: Duplication of services—Bureau of Indian Affairs and the Federal Bureau of Investigation.

A major problem exists in the delivery of services to Indian communities in the area of investigating Federal law violations. In addition to the problem of declinations by the U.S. attorneys, there are the issues involving delays in receiving their prosecutive opinions, lengthy delays in their actual prosecution, and the duplication of investigative efforts between the FBI and the Bureau of Indian Affairs.

This problem is twofold:

(1) Since FBI agents are not residents nor stationed on reservations, they are required to travel to the reservations when requested to investigate violations of the Federal law. Their response time may vary from three hours to four days. This delay does great disservice to the community, inasmuch as Indian communities do not receive the same instant response from the FBI as other communities in the United States.

(2) The fact that the FBI Agent does not live on the reservation makes it difficult for him to obtain, not only all the facts related to the incident itself, but all the other facts which should be known to the United States Attorney. This fact, coupled with a lack of knowledge of reservation customs, mores, and community standards, makes it difficult for the FBI to obtain all the information necessary to present to the appropriate agency—this may, in part, account for the large number of declinations.

In addition to the above, the present system is a waste of time for both agencies—one agency could accomplish the same objective.

We have met with the Deputy Attorney General, U.S. Department of Justice, and discussed these issues. He requested that we provide him with a paper on the subject. The accompanying document, if it meets with your approval, will be forwarded to his office. Also, a copy is being forwarded to the Office of the Solicitor for his review and comment.

At your earliest convenience, we would appreciate discussing this matter with you.

THEODORE C. KRENZKE.

Enclosure.

I. BACKGROUND

Prior to Congress authorizing the establishment of an Indian liquor suppression force in 1906, Indian agents and the Indian police were primarily responsible for the enforcement of Federal laws and investigation of crimes in Indian country. After establishment of the liquor suppression force which had arrest powers the same as Indian agents, they began enforcing Federal laws in Indian country and investigating crimes other than liquor law violations.

Action was first initiated, beginning in 1935, to assign liquor suppression agents, known as special officers, to Indian reservations to assume, in addition to their Federal criminal investigative duties, the duty of chiefs of reservation Indian police. Later, the special officers' responsibilities were further expanded to include responsibility for the overall Bureau and tribal operation and maintenance of criminal justice programs within assigned reservations under the general supervision of Indian agency (reservation) superintendents.

In the early forties, due to reductions in funding and personnel positions for Indian programs, the number of available special officers was reduced. In the

late forties and early fifties, further reductions were made and this situation remained fairly static until 1960.

Starting in the 1930's the tribes had begun to assist in the maintenance of law and order by paying some of the Bureau law and order personnel. By the 1940's, in order to maintain a semblance of law and order in Indian country, the tribes attempted to take up more of the slack by paying the salaries of additional Bureau special officers, policemen and judges. Later during the 1950's and continuing to present, most tribes began employing their own tribal police and judges as well as other categories of criminal justice personnel. Even though they could ill afford such funding, the tribes recognized the urgent need to maintain at least a minimum of law and order services if any type of community stability and Indian cohesiveness was to survive. These persons were employed by the tribes to enforce Code of Federal Regulation Rules and tribal codes, and to administer justice.

Tribes under Federal supervision whose reservations had not been made subject to state law by Public Law 280 of 1953, or other prior Congressional legislation, remained firm in their position that where, through Congressional enactments, the United States had assumed jurisdiction relating to crimes in Indian country, the enforcement, investigative and prosecutive responsibility laid directly with the United States Government, through the Bureau of Indian Affairs. The Bureau of Indian Affairs had and did continue to recognize this responsibility. However, due to the reduction in special officer manpower during the 1940's and continuing to 1960, the Bureau of Indian Affairs was not able to totally provide these Federal services without support. It was during this time that the Federal Bureau of Investigation lent assistance to Bureau special officers in meeting this responsibility. Initially, the assistance was limited to the more serious offenses. Investigative assistance was provided upon request of the responsible special officer, usually after at least a preliminary investigation to determine that a crime had in fact been committed. Where no special officer was assigned, the request was originated by the Indian Agency superintendent. Slowly, over the years, the precedent for reporting alleged violations of most Federal laws in Indian country to the Federal Bureau if Investigation was established. Due to their operating policies, on offenses accepted by them for investigation, the FBI took the part of the primary investigative agency and made prosecutive presentation of the cases to the appropriate United States Attorneys, even though special officers, where available, provided the bulk of the investigative effort. U.S. Attorneys, over a period of time, came to rely solely on Federal Bureau of Investigation case reports and prosecutive presentations. Bureau of Indian Affairs case reports, where available, became supportive to the FBI investigation. Prosecutive presentations by special officers to U.S. Attorneys were rare.

By 1953 and subsequent thereto, apparently because of the FBI leadership, most U.S. Attorneys, and U.S. District Court Judges, recognized the FBI as having primarily investigative jurisdiction for Federal law violations committed in Indian country, notwithstanding the wording of Congressonal appropriation acts since FY 1939 and Opinion M. 29669 dated August 1, 1938, issued by the Solicitor, U.S. Department of the Interior. This Opinion, in effect, stated that there may be included in the prescribed duties of the Bureau of Indian Affairs Chief Special Officer, Special Officers and Deputy Special Officers, the duty of enforcing generally the laws of the United States for the purpose of maintaining law and order on Indian reservations.

II. CURRENT SITUATION

The Bureau of Indian Affairs currently has a staff of approximately 279 Special and Deputy Special Officers involved in providing law enforcement services in Indian country. The vast majority of these Officers are assigned to 8 BIA Area Offices and 48 Indian Agencies situated strategically within or near 122 Indian reservations, with an estimated Indian population of 332,000. These reservations range, in population, from less than 100 to more than 100,000 and, in size, from about +1 to more than 100,000 square miles. The combined land area of these reservations is approximately 356,500 square miles. The Officers supervise and manage law enforcement services, including the prompt investigation and reporting violations of Federal laws. (See Attachment 1—Special Officer Profile)

While persons accused of minor crimes are promptly brought to justice in Indian courts, those who are accused of serious (Federal) crimes frequently remain at liberty pending completion of second investigations by the FBI. Many of them tried on charges that have been drastically reduced to permit the case to be disposed of in Indian courts rather than Federal court.

In 1973, about 8,200 alleged Federal law violations were reported and investigated by Bureau of Indian Affairs Officers. Approximately 7,300 were determined to be offenses within Federal investigative jurisdiction. Only slightly more than 1,600 of these offenses were presented to the U.S. Attorneys who authorized prosecution in less than 1,000 cases. In the majority of the cases presented, it was the Bureau of Indian Affairs Officers who first obtained and secured evidence, contacted and interviewed witnesses, identified subjects and attempted or recovered any property involved.

Comments of the National American Indian Court Judges Association in a recent report underscore the gravity with which Indian leaders view this problem:

"Failure to prosecute in such cases could be interpreted as approving of antisocial behavior and, in effect, as licensing such activity. It fosters, in addition, a communal anger when residents see an individual set free without having been punished for his crime. Reservation residents, as so many other citizens, do not understand the intricacies of the Federal system. Declination particularly on a technicality is painful to community members, especially if the offense was a violent crime or a crime against the community itself.

The chagrin of a community member is only heightened if he should be arrested for a relatively minor offense (such as unlawful possession of liquor, curfew violation, disorderly conduct, or traffic violation) and convicted in tribal court. This anger and frustration often leads to dissatisfaction with the entire law and order system. Many Indians now feel that the authorities in the criminal justice system do not care about crimes committed on the reservation."

The source of many of these problems is the cumbersome machinery which has developed over the years for the prosecution of major crimes involving Indians on reservations.

Although the BIA maintains trained criminal-investigators on most reservations, most U.S. Attorneys will not accept the findings of the BIA investigator as the basis for prosecution. An FBI agent who is frequently stationed in a distant city must be called to conduct a second investigation.

If the FBI agent believes the facts warrant prosecution, the U.S. Attorney is called for permission to proceed. The U.S. Attorney may give authorization over the telephone or request a written report. A decision to proceed will usually be delayed three days if a written report is required.

During this period, the suspect remains at large. Lesser tribal charges could be filed immediately, but this is not usually done because it might influence the U.S. Attorney to decline prosecution on the grounds the matter is being handled at the tribal level.

Clearly, the decision of the U.S. Attorney depends heavily on the manner in which the findings of the investigations are presented by the investigator. The result is that the investigator's own judgment on the seriousness of the alleged crime is often the crucial factor in the decision whether to prosecute.

A legitimate element in such a judgment is the community attitude toward the alleged criminal activity. Most FBI agents do not live in the Indian community and their work takes them there infrequently. Although they are skilled investigators, FBI agents do not know community attitudes concerning the events they investigate.

In most instances, U.S. Attorneys now make their decisions on whether to prosecute, solely on the basis of the FBI agents' prosecutive presentations. Seldom are cases presented to the U.S. Attorney as a joint-coordinated investigation between the FBI and BIA investigators.

Many cases are declined by U.S. Attorneys for lack of sufficient evidence or other reasons. However, in some instances, Bureau Special Officers complain that results of their investigation were not made known to the U.S. Attorney before his decision was made.

No Federal Bureau of Investigation agents live on Indian reservations. Neither do they maintain regular offices in Indian country so that they are readily accessible to Indian law enforcement personnel and the people. A number of FBI agents reside, and their offices are located, over 100 miles away from the Indian reservations they now serve. Most Indian agencies and reservations have Bureau

ATTACHMENT 1

SPECIAL OFFICER PROFILE, PHOENIX AREA, JANUARY 1975

A recent survey of the Special Officers assigned to the Phoenix Area (Arizona, Nevada and Utah) indicates the following:

Thirty-nine years of age; male of Indian descent; GS–11; nearly 15 years of law enforcement experience, a substantial part of which has been in the area of criminal investigation; high school graduate with about 2 years of college; a graduate of the FBI National Academy or the Consolidated Federal Law Enforcement Training Center, coupled with considerable in-service training and specialized training in non-Federal facilities.

It can be assumed that this Phoenix Area Special Officer Profile would be approximately the same for all BIA Special Officers.

ATTACHMENT 2

COMPARATIVE ANALYSIS OF LOCALE, JANUARY 1975

Reservations	BIA investigator location (miles from reservation)	FBI agent location (miles from reservation)
Aberdeen area:		
Omaha, Nebr.	Winnebago, Nebr. (10)	Sioux City, Iowa (36).
Fort Berthold, N. Dak.	On reservation	Minot, N. Dak. (46).
Devil's Lake, N. Dak.	do.	Grand Forks, N. Dak. (96).
Standing Rock, N. Dak.	do.	Bismarck, N. Dak. (63).
Standing Rock, S. Dak.	do.	Aberdeen, S. Dak. (139).
Turtle Mountain, N. Dak.	do.	Minot, N. Dak. (113).
Cheyenne River, S. Dak.	do.	Pierre, S. Dak. (94).
Crow Creek and Lower Brule, S. Dak.	do.	Pierre, S. Dak. (60).
Flandreau, S. Dak.	Lake Traverse, S. Dak. (100)	Sioux Falls, S. Dak. (54).
Pine Ridge, S. Dak.	On reservation	Rapid City, S. Dak. (100).
Rosebud, S. Dak.	do.	Pierre, S. Dak. (113).
Lake Traverse, S. Dak.	do.	Aberdeen, S. Dak. (88).
Yankton, S. Dak.	Crow Creek, S. Dak. (154)	Sioux City, Iowa (131).
Albuquerque area:		
Southern Ute, Colo.	Ute Mountain, Colo (93)	Durango, Colo. (93).
Ute Mountain, Colo.	On reservation	Durango, Colo. (58).
Jicarilla, N. Mex.	do.	Farmington, N. Mex. (91).
Mescalero, N. Mex.	do.	Alamogordo, N. Mex. (27).
North Pueblos, N. Mex. (8 reservation areas).	Espanola, N. Mex. (from 15 to 20)	Los Alamos, N. Mex. (15/16/20), Santa Fe, N. Mex. (10/42/75).
Ramah, N. Mex.	On reservation	Gallup, N. Mex. (70).
South Pueblos, N. Mex. (10 reservation areas).	Albuquerque, N. Mex. (from 13 to 70)	Albuquerque, N. Mex. (from 13 to 70).
Zuni, N. Mex.	On reservation	Gallup, N. Mex. (40)
Billings area:		
Blackfeet, Mont.	do.	Great Falls, Mont. (126).
Crow, Mont.	do.	Billings, Mont. (65).
Flathead, Mont.	do.	Missoula, Mont. (60).
Fort Belknap, Mont.	do.	Glasgow, Mont. (105).
Fort Peck, Mont.	do.	Glasgow, Mont. (70).
North Cheyenne, Mont.	do.	Miles City, Mont. (120).
Rocky Boy's Mont.	Fort Belknap, Mont. (70)	Great Falls, Mont. (90).
Wind River, Wyo.	On reservation	Riverton, Wyo. (35).
Eastern area:		
Chitimacha, La.	Pearl River, Miss. (350)	New Orleans, La. (70).
Choctaw, Miss. (7 reservation areas)	Pearl River, Miss. (from 0 to 90)	Meridian, Miss. (from 38 to 70).
Qualla, N.C.	Washington, D.C. (500)	Asheville, N.C. (60).
Joint use area: Hopi/Navajo, Ariz.	Flagstaff, Ariz. (100)	Flagstaff, Ariz. (100).
Minneapolis area:		
Sac and Fox, Iowa	Minneapolis, Minn. (300)	Des Moines, Iowa (75).
Bay Mills, Mich.	L'Anse, Mich. (240)	Sioux St. Marie, Mich. (159).
Hannahville, Mich.	L'Anse, Mich. (148)	Marquette, Mich. (79).
Isabelle, Mich.	L'Anse, Mich. (420)	Saginaw, Mich. (45).
L'Anse, Mich.	On reservation	Marquette, Mich. (79).
Bad River, Wis.	Ashland, Wis. (7)	Superior, Wis. (70).
LaCourte Oreilles, Wis.	Ashlan, Wis. (60)	Superior, Wis. (110).
Grand Portage, Minn.	Minneapolis, Minn. (320)	Duluth, Minn. (160).
Leach Lake, Minn.	Redlake, Minn. (45)	St. Cloud, Minn. (120).
Greater Nett Lake, Minn.	Minneapolis, Minn. (100)	Bemidji, Minn. (100).
Red Lake, Minn.	On reservation	Bemidji, Minn. (35).
Navajo area:		
Chinle, Ariz.	do.	Flagstaff, Ariz. (221).
Fort Defiance, Ariz.	do.	Flagstaff, Ariz. (220).
Kayenta, Ariz.	do.	Flagstaff, Ariz. (151).
Tuba City, Ariz.	do.	Flagstaff, Ariz. (75).
Window Rock, Ariz.	do.	Flagstaff, Ariz. (214).
Eastern Navajo, N. Mex.	do.	Gallup, N. Mex. (57).
Shiprock, N. Mex.	do.	Farmington, N. Mex. (30).

Special Officers assigned who live on or near the reservations which generally makes for better rapport, and understanding with tribal officials, Indian police, and general public and the Indian community they serve. (See Attachment No. 2—Comparative Analysis of Locale.)

The FBI frequently cannot, due to their locations and other investigative duties, respond to reported Federal crimes as quickly as special officers. It is not unusual, even after a serious Federal Indian crime has been committed, verified and reported to the nearest FBI field office, that an agent is on the scene twenty-four hours later to assume investigation responsibility.

There is also a duplication of effort in nearly every investigative step in each criminal investigation in that the FBI agents normally re-interview all persons involved, visit the crime scene, review and examine evidence, etc. (See Attachment No. 3—Approximate Time (Hours) of FBI Response to Reported Crimes.)

III. CONCLUSIONS

A. The source of many problems related to Federal criminal investigative procedures and prosecution of crimes in Indian country has developed over a span of many years.

B. Although the BIA maintains trained criminal investigators on most reservations, most U.S. Attorneys will not accept the findings of the BIA investigator as the basis for prosecution.

C. FBI agents who are frequently stationed in distant localities must be called to conduct a second investigation. If the FBI agent believes the case warrants prosecution, the U.S. Attorney is called for permission to proceed.

D. The U.S. Attorney may give authorization over the telephone upon presentation of the case by the FBI agent—or he may first request a written report, delay action pending presentment of the case to a grand jury, refer to another agency for informal disposition, or outright decline prosecution for many and varied reasons.

E. Suspects, during the investigatory phase and pending a decision of the U.S. Attorney for violations of Federal law, remain free. Lesser tribal charges could be filed immediately, but this is not usually done because it might influence the U.S. Attorney to decline prosecution on the grounds the matter is being handled at the tribal level.

F. The BIA investigator (Special Officer), normally due to his background, knowledge and understanding of Indian community mores and the people, is in a better position to bring to a successful conclusion criminal investigations and make a presentation that would more likely bring about authorizations for prosecution.

IV. OPTIONS

Option 1—A. That the Bureau of Indian Affairs, through the Chief Special Officer and Special Officers assigned to work under his supervision, reassume the primary responsibility for the investigation and presentation to appropriate United States Attorneys violation of laws of the United States which are dependent upon Indians and Indian country.

B. That the Federal Bureau of Investigation and other Federal investigative agencies provide investigative support services, the same as provided other Federal, State and local agencies, as requested by the Bureau of Indian Affairs Chief Special Officer and Special Officers.

C. Other Federal investigative agencies exercise primary responsibility for the investigation and presentation to appropriate United States Attorneys all those laws designated by statute, or that are not dependent upon Indians or Indian country.

Option 2—A. That the Bureau of Indian Affairs investigators (Special Officers) discontinue investigation of reported Federal crimes in Indian country, leaving the total investigation of such crimes to the FBI and other responsible Federal agencies.

B. That the Bureau of Indian Affairs Special Officers be reassigned to other responsible management and training duties related to Indian police operations and service.

Option 3. Continue present procedure in conducting investigation of Federal law violations in Indian country, thereby perpetuating and condoning an unsatisfactory situation.

ATTACHMENT 2

COMPARATIVE ANALYSIS OF LOCALE, JANUARY 1975

Reservations	BIA investigator location (miles from reservation)	FBI agent location (miles from reservation)
Phoenix area:		
Colorado River, Ariz.	do	Yuma, Ariz. (120).
Chemehuevi, Ariz.	Colorado River, Ariz. (80)	Barstow, Calif. (200).
Cocopah, Ariz.	Colorado River, Ariz. (140)	Yuma, Ariz. (15).
Fort Mohave, Ariz.	Colorado River, Ariz. (75)	Kingman, Ariz. (65).
Fort Yuma, Ariz.	Colorado River, Ariz. (125)	El Centro, Calif. (60).
White Mountain, Ariz.	On reservation	Safford, Ariz. (185).
Kaibab, Ariz.	Hopi, Ariz. (250)	Flagstaff, Ariz. (234).
Hopi, Ariz.	On reservation	Flagstaff, Ariz. (158).
Papago, Ariz.	do	Phoenix, Ariz. (130) and Tucson, Ariz. (65).
AK Chin and Gila River, Ariz.	do	Mesa, Ariz. (50).
Salt River, Ariz.	Phoenix, Ariz. (36)	Mesa, Ariz. (20).
Fort McDowell, Ariz.	Phoenix, Ariz. (38)	Phoenix, Ariz. (25).
San Carlos, Ariz.	On reservation	Safford, Ariz. (74).
Camp Verde, Ariz.	Hualapai, Ariz. (170)	Flagstaff, Ariz. (55).
Havasupai, Ariz.	Hualapai, Ariz. (70)	Kingman, Ariz. (125).
Hualapai, Ariz.	On reservation	Kingman, Ariz. (50).
Yavapai-Prescott, Ariz.	Hualapai, Ariz. (115)	Prescott, Ariz. (5).
Battle Mountain, Nev.	Owyhee, Nev. (175)	Elko, Nev. (75)
Duck Valley, Nev.	On reservation	Elko, Nev. (100).
Fallon, Nev.	Stewart, Nev. (80)	Reno, Nev. (70).
Fallon Colony, Nev.	Stewart, Nev. (65)	Reno, Nev. (55).
Fort McDermitt, Nev.	Stewart, Nev. (225)	Reno, Nev. (215).
Goshute, Nev./Utah	Duck Valley, Nev. (415)	Salt Lake City, Utah (190).
Las Vegas Colony, Nev.	Stewart, Nev. (450)	Las Vegas, Nev. (2).
Lovelock, Nev.	Owyhee, Nev. (110)	Reno, Nev. (100).
Moapa, Nev.	Stewart, Nev. (500)	Las Vegas, Nev. (55).
Pyramid Lake, Nev.	Stewart, Nev. (75)	Reno, Nev. (50).
Reno-Sparks, Nev.	Owyhee, Nev. (35)	Reno, Nev. (2).
Ruby Valley, Nev.	Owyhee, Nev. (225)	Elko, Nev. (125).
South Fork, Nev. (also includes Elko and Odgers Ranch).	Colony/Owyhee, Nev. (225)	Elko, Nev. (51).
Summit Lake, Nev.	Stewart, Nev. (290)	Reno, Nev. (75).
Walker River Paiute, Nev.	Stewart, Nev. (95)	Do.
Washoe (includes Carson and Dresserville Colonies), Nev.	Stewart, Nev. (20)	Carson City, Nev. (21).
Winnemucca, Nev.	Owyhee, Nev. (150)	Reno, Nev. (140).
Yerington (and Campbell Ranch), Nev.	Stewart, Nev. (67)	Carson City, Nev. (68).
Yumba, Nev.	Owyhee, Nev. (185)	Carson City, Nev. (71).
Skull Valley, Utah	U & O, Utah (195)	Salt Lake City, Utah (45).
U & O, Utah	On reservation	Salt Lake City, Utah (150).
Portland area:		
Fort Hall, Idaho	do	Pocatello, Idaho (14).
Coeur d'Alene, Idaho	do	Spokane, Wash. (40).
Nez Perce, Idaho	do	Spokane, Wash. (100).
Warm Springs, Oreg.	do	Bend, Oreg. (60).
Kalispel, Wash.	do	Spokane, Wash. (50).
Spokane Reservation, Wash.	do	Spokane, Wash. (45).
Huh, Wash.	Port Angeles, Wash. (100)	Tacoma, Wash. (130).
Lower, Elwah, Wash.	Port Angeles, Wash. (6)	Tacoma, Wash. (125).
Lummi, Wash.	On reservation	Bellingham, Wash. (9).
Makah, Wash.	Port Angeles, Wash (70)	Seattle, Wash. (120).
Nooksack, Wash.	Everett, Wash. (35)	Bellingham, Wash. (35).
Ozette, Wash.	Port Angeles, Wash. (75)	Seattle, Wash. (135).
Port Gamble, Wash.	Port Angeles, Wash. (40)	Seattle, Wash. (50).
Port Madison, Wash.	do	Do.
Quinault, Wash.	Hoquiam, Wash. (40)	Tacoma, Wash. (105).
Shoalwater, Wash.	Hoquiam, Wash. (25)	Tacoma, Wash. (100).
Yakima Reservation	On reservation	Yakima, Wash. (20).

ATTACHMENT 3

Approximate time (hours) of FBI response to reported crimes

	Hours
Aberdeen area:	
Violent	2–24
Nonviolent	8–72
Albuquerque area:	
Violent	1– 6
Nonviolent	1–48
Billings area:	
Violent	8–12
Nonviolent	8–72

Eastern area (Choctaw, MS, only):	
Violent	3–16
Nonviolent	8–24
Joint use area:	
Violent	4– 8
Nonviolent	4–72
Minneapolis area:	
Violent	1– 6
Nonviolent	8–48
Navajo area:	
Violent	8–36
Nonviolent	8–144
Phoenix area:	
Violent	1– 8
Nonviolent	24–168
Portland area:	
Violent	1– 4
Nonviolent	8–144

Senator DECONCINI. In 1975—and it might have been the result of this letter—the Justice Department conducted a major study of jurisdiction in Indian country under the leadership of Doris M. Meissner. Do you have a copy of that that we might have?

Mr. PAULEY. Yes; we do.

Senator DECONCINI. Good, we will make that a part of the record at this point.

[The requested material follows immediately after the prepared statement of Doris Meissner. See p. 217. Testimony resumes on p. 323.]

STATEMENT OF DORIS MEISSNER, ASSISTANT DIRECTOR, OFFICE OF JUSTICE POLICY AND PLANNING

My name is Doris Meissner, and I am Assistant Director of the Office of Justice Policy and Planning for the Department of Justice. I am pleased to be here today and to have the opportunity to share with you some of our concerns and ideas about the problem of reservation law enforcement. This hearing is indeed timely for while we sense a growing recognition of the problem, there is by no means a ready solution. Discussion and debate within the government and among the people who are affected is important and welcome.

The Office of Justice Policy and Planning of the Department of Justice serves as a staff arm to the Attorney General and the Deputy Attorney General. We undertake not only the kinds of long range studies and analyses generally associated with a policy and planning operation but we also provide policy coordination and direction on those matters which tend to fall between the cracks in large institutions because they cross a number of bureaucratic boundary lines. They are everybody's problem and therefore nobody's problem. The Department of Justice policy on Indian matters has been, until recently, an example of the kind of issue which has suffered inattention because it crosses so many boundary lines.

About 6 months ago a Departmental task force was formed to review our handling of Indian matters and to make recommendations for changes when necessary. I serve to co-chair that task force. It is currently grappling with the reservation law enforcement question after having spent several months dealing with another very important subject—Indian natural resource litigation.

A quick look at the crime statistics makes it dramatically clear that we have a serious problem. The major crimes rate is about 50 percent higher on Indian reservations than it is in rural America as a whole. The violent crime rate on Indian reservations is eight times the rural rate while the property crime rate is about half of the rural rate. The murder rate among Indians is three times the rural rate while the assault rate is nearly 10 times as high.

The Federal government has jurisdiction over approximately 90 Indian reservations in which approximately 500,000 Indians reside. Large numbers of non-Indians also reside within these reservations. Law enforcement responsibilities are divided between the Department of the Interior and the Department of

Justice. Within Interior, the Bureau of Indian Affairs, through its division of Law Enforcement Services, provides police and other law enforcement personnel for most of the Indian reservations which are within the Federal jurisdiction. A number of tribes provide their own tribal police. In addition to the Federal government and the tribes, states have limited jurisdiction, which varies from reservation to reservation.

It is particularly embarrassing that the present law enforcement problem exists in an area of primarily federal responsibility. This is not an example of the situation where the Federal government serves as a model for other law enforcement agencies.

The United States Attorneys are responsible for prosecuting cases where a violation of federal law has occurred on the reservation. The United States Attorneys in the Western states are very concerned that the law enforcement problem receive appropriate attention with the executive branch and in Congress. They were particularly anxious that their views, which are based on day-to-day experience, be heard. We therefore organized a three day U.S. Attorneys conference to discuss these and related questions. That conference was held on January 27–29, in Phoenix, Arizona. It was attended by approximately 50 U.S. Attorneys and Assistant U.S. Attorneys from 24 federal judicial districts which have substantial Indian populations. It was also attended by representatives of most of the units of the Department which have responsibilities in Indian matters. These include the Criminal division, the Lands division, the Civil Rights division, the FBI, the U.S. Marshals and the Community Relations Service. Representatives of the Indian community, the Department of Interior, and the BIA were in attendance as well in order to provide for a thorough exchange of views and ideas.

We are presently directing our efforts to the agenda of issues which emerged from that conference. Since I am sure that most of these issues are of concern to the Committee, I would like to share this agenda with you.

DECLINATION OF CASES

The BIA and many Indian communities have complained that Indian cases receive low priority attention by U.S. Attorneys and that many cases which are presented to the U.S. Attorney for prosecution are declined. Although there may be justification for failure to prosecute many of these cases in federal court, such a high rate of declination has an adverse affect on the communities involved. It has resulted in anger and frustration and lack of confidence in the law and order system.

Communication problems exist with respect to declination by the United States Attorneys with criminal cases which arise on Indian reservations. Often the BIA or tribal law enforcement authorities are not advised of declination nor the reason for it. In some cases, the U.S. Attorney has declined the prosecution not because he feels the case is weak, but merely because he feels the case can more appropriately be prosecuted in tribal court. Yet the tribal officials are sometimes not advised that there has been a declination in favor of their jurisdiction. A case in effect falls between the cracks and is not prosecuted. Procedures for preventing this situation have been developed. In addition we are reviewing, with the help of the Department of Interior, the whole subject of declinations.

RESERVATION POLICE PROTECTION

Many people have suggested that federal law enforcement responsibility for Indian reservations be centralized in the Department of Justice. In our view this would be wholly inconsistent with Administration and Congressional policy on Indian matters which is, as we all know, one of self-determination. BIA policy has been to move toward contracting with tribes for police services rather than providing such services directly. In working to achieve the goal of self-determination we are concerned not with how to increase our role but with what we can do to improve the BIA and tribal police situation. Training assistance seems to be the most likely avenue. We are currently exploring ways to have the FBI with its training capability, and the Law Enforcement Assistant Administration, through funding, develop an aggressive program to augment programs currently available for reservation police officers.

FBI RESOURCES AND RESPONSIBILITIES

Recognizing that the primary responsibility for reservation policing lies with the Department of Interior, we also recognize that the FBI has significant respon-

sibilities as well. Reservations often cover extremely large, sparsely populated areas remote from major cities or even towns. The nearest FBI office is, not atypically, hundreds of miles from the scene of a crime. This makes it very difficult for FBI agents to respond to crimes committed on the reservation as quickly as might be desirable. Nonetheless, the FBI is conducting a comprehensive review of its resource allocations and the manner in which it fulfills its responsibility for investigating crimes which occur in Indian country. We are prepared to make shifts in resources and to develop plans for adjusting resources over time as the situation demands.

THE RELATIONSHIP BETWEEN FBI AGENTS AND BIA SPECIAL OFFICERS

The BIA has trained criminal investigators on most reservations. These investigators, or special officers, conduct the initial investigations for the majority of serious crimes which occur on Indian reservations. Most U.S. Attorneys, however, are accustomed to using FBI investigations as a basis for making decisions on whether to prosecute. Thus, the FBI conducts an independent investigation which often duplicates the BIA investigation. The result is that until the FBI investigation is completed, the offender typically remains at large. This causes physical safety problems within Indian communities and also fuels a generalized disrespect and cynicism toward the processes of law. This response is fortified by the fact that persons who commit minor crimes which are within jurisdiction of tribal courts are, typically, arrested and prosecuted immediately by tribal authorities. Thus the minor offender is arrested and the major offender remains at large. That fact, coupled with the high declination rate, makes it appear to the community that the Federal government is not doing a very good job in handling the crimes which fall within its jurisdiction. This is a particularly difficult problem but one we are finding ways to solve.

LEAA FUNDING OF RESERVATION LAW ENFORCEMENT PROGRAMS

LEAA has played a major role in funding tribal law enforcement programs. LEAA's funding priorities have induced corrections, training of tribal court judges, police manpower and equipment, and juvenile delinquency programs.

LEAA has recently re-established an Indian desk in order to ensure the best coordinaiton of its funding efforts in relation to tribal programs.

LEGAL PROBLEMS

Many tribes are beginning to assert jurisdiction over non-Indians who reside or who are presently within the boundaries of their reservations. The issue is an explosive one because many reservations possess very substantial non-Indian populations which will vigorously resist tribal court jurisdiction. The legal and historical factors involved in the issue of tribal jurisdiction over non-Indians are exceedingly complex. A more complete history and analysis of this aspect of the reservation law enforcement problem will be provided in other testimony at this hearing. I would simply say that the Department of Justice is in agreement with the general feeling that the confusion which surrounds the current state of the law on Indian jurisdiction questions is serious and merits attention.

INDIAN JUVENILES

Indian juvenile cases present serious problems. Most reservations lack facilities to handle delinquent juveniles and reservation jails are often substandard or nonexistent. On some reservations police refuse to arrest persons, particularly juveniles, because of the lack of any humane facility in which to detain them. Only a few reservations have special facilities for juveniles.

Our task force is addressing this juvenile problem.

This, then, is our internal agenda for attacking the reservation law enforcement problem. However, we are convinced that the issue is larger than any single department or committee. It must be a cooperative effort which includes the Indian people, the Congress, and the relevant departments of the executive branch. We recognize the seriousness of the problem and are committed to doing whatever is possible to improve a situation which in many areas has reached crisis proportions. We appreciate the opportunity to have presented our views at this hearing and look forward to cooperating with this Committee.

I or my colleagues would be happy to answer any questions you might have. Thank you.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

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REPORT OF THE TASK FORCE ON INDIAN MATTERS

Prepared by:

Doris M. Meissner,
Acting Chairman
Jere M. Webb
Office of Policy and Planning
October, 1975

REPORT OF THE TASK FORCE ON INDIAN MATTERS

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

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October, 1975

REPORT OF THE TASK FORCE ON INDIAN MATTERS

INTRODUCTION

In fall, 1974, Deputy Attorney General Laurence H. Silberman requested that an intra-Departmental task force be organized to conduct a broad review of the way in which the Department discharges its responsibilities toward American Indians. The task force consists of representatives of the eleven units of the Department concerned about Indian-related matters (Civil Rights, Land and Natural Resources, Criminal, and Tax divisions; FBI, U.S. Marshals Service, Community Relations Service, LEAA, Office of the Solicitor General, Executive Office for United States Attorneys, and Office of Management and Finance). The task force is chaired by the Office of Policy and Planning. This report summarizes the work of the task force to date, makes recommendations on a number of issues considered up to this point, and identifies other areas requiring further examination.

In addition to conducting a review of the Justice Department's responsibilities involving Indians, the task force has provided a forum to coordinate a Departmental response to the increasing number of Indian issues which come before the Attorney General or Deputy Attorney General for policy decisions. In this capacity, the task force has proved to be a helpful vehicle to permit various units of the Department to resolve the many Indian issues which cross divisional lines. The task force has also represented the Department on Indian issues with other agencies as well as in Congressional hearings.

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This is the first such review undertaken by the Justice Department. It coincides with an increasing national recognition of the particular problems and unique legal status of American Indians. We are in the midst of a virtual revolution in Indian law as courts re-examine and expand legal doctrines which have been quiescent for decades. The volume of cases raising Indian issues is increasing at a dramatic rate. In the Congress, legislation having far-reaching effects on Indians has been recently passed, or is under active consideration. The Congress has a National Indian Policy Review Commission which is charged with conducting the first comprehensive review of federal policy toward Indians since the Meriam Commission report in 1928. In the Executive Branch, the White House is considering a proposal to create an inter-Agency task force which would review a number of issues relating to fulfillment of the federal government's special responsibilities toward Indians. OMB is launching a more informal but similar effort in response to recent legislative proposals. Indian units have been set up in many federal agencies to insure proper recognition of the special needs and rights of Indians.

Justice Department responsibilities involving Indians, though limited, are nonetheless significant. The task force up to this point has concentrated on the three primary areas: (1) Indian natural resource litigation, (2) jurisdictional questions arising in Indian country, and (3) law enforcement on Indian reservations. In addition, it has examined the problem of coordination under the current divisions of labor in the Department.

BACKGROUND

A. Economic and Legal Status of Indians

1. Economic

The 1970 National Census showed a total of 800,000 American Indians in the United States. 1/ This group of citizens experiences greater economic and social privation than any other identifiable minority group. Indian unemployment averages 40%; average per capita annual income is less than 50% of the national average. Indians rank at the bottom of all minority groups in life expectancy (64.9 years) and average years of school (8.4). Indians rank high on almost all indices of social pathology: alcoholism, marital instability, juvenile delinquency and crime.

2. Legal

In view of the fact that Indians stand on the bottom of the ladder in terms of enjoying the benefits of American life, it is ironic that they are also the only minority group which has a "special relationship" with the federal government entitling them to protection and support which has been likened to the responsibility owed by a guardian to his ward. 2/ Numerous cases, treaties and statutes have described this special relationship and the obligations which accompany it. In Seminole Nation v. United States, 316 U.S. 286 (1942), the Supreme Court characterized the fiduciary duties owed by the United States to Indians as "of the highest responsibility" and stated that the government's conduct in representing Indians should be "judged by the most exacting fiduciary standards."

1/ Indians have historically been undercounted in the federal census. The problem is serious enough that the Office of Management and Budget has under consideration a proposal for a special census of American Indians.

2/ The legal authorities which establish this relationship are summarized in Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians" 27 Stanford L. Rev. 1213 (1975).

In their relationship with the United States government Indians are unique; their legal status is sui generis. Chief Justice Marshall has stated that "the relation of the Indian to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17.

Indian land and natural resource rights are held in trust by the federal government.3/ Responsibility for protecting Indian land and natural resource rights and other rights secured by treaty and federal statutes is shared by the Department of Interior and the Department of Justice. The Department of Justice serves as lawyer for the Department of Interior and frequently represents Indian tribes in asserting rights afforded them or protected by the federal government.

With respect to internal self-government, tribes are sovereign nations not limited by any of the provisions of the Constitution which are

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3/ In some instances, such as part of the New York Indians, although they are under the protective arm of the federal government, title to their reservations is held by the State of New York. Other tribes, such as the Five Civilized Tribes in Oklahoma, and the Pueblos in New Mexico, hold fee title to a part of their lands, although they too are under the protective arm of the federal government. Other tribes, such as the Navajo in Utah, Arizona, and New Mexico, hold fee title to substantial acreages without any supervision or restriction whatever by the federal government. In addition, there are a substantial number of Indians in states along the east coast which have never been under the protective arm of the federal government.

applicable to the states and the federal government.4/ The power of self-government derives not from Congressional delegation but from the inherent power of sovereignty. This "quasi-sovereignty" affects all aspects of the federal government's relationship with Indians and makes Indian law exceedingly complex, particularly with respect to Indian rights in relation to state governments and private parties.

B. Federal Policy Toward Indians

In order to understand the special legal status of American Indians and consequent obligations owed by the federal government, it is necessary to review briefly the history of Congressional policy toward Indians.5/ There has been no long term consensus

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4/ Talton v. Mayes 163 U.S. 376 (1896). However, in 1968 Congress passed the Indian Civil Rights Act, 25 U.S.C. Section 1301 et seq. (1970) which extended to Indian tribes some of the protections contained in the BIll of Rights of the U.S. Constitution. The application of these provisions in the Indian context remains an area of intense dispute. See e.g. "The Indian Bill of Rights and the Constitutional Status of Tribal Governments" 82 Harvard Law Review, 1343 (1969); Ziontz, "In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act," 20 S.Dak. L.Rev. 1 (1975); Raismes, "The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government" 20 S.Dak.L.Rev. 59 (1975).

5/ "Federal courts have traditionally viewed the tribe as the dependent or 'tributary' nation possessed of limited elements of sovereignty and requiring federal protection; the Congress has alternatively viewed the tribe as a substantially independent political unit, or as an anachronism which must be phased out consequent to a policy of Indian assimilation." Comment, "The Indian Battle for Self-Determination," 58 California Law Review 445, (197).

on whether Indians should be assimilated into the mainstream of American life or allowed to maintain separate governments and cultures. Over the years, Congress has "followed a vascillating path between separation and assimilation."6/

These policy changes have not only been detrimental to Indians they have made the legal status of Indians, particularly jurisdictional issues, unnecessarily complex and in many cases, unclear.7/ The course of Congressional policy toward Indians is usually divided into five periods which are summarized below:

1. Removal: The Treaty Period

From 1830, when the Westward Removal Act 8/ was adopted, through the 1870's, when the majority of tribes were "settled" on reservations, the guiding purpose of federal Indian policy was largely that of opening lands to westward expansion. To the extent that Indian tribes impeded the settlement process, they were removed to reserved lands in less populated areas. During this period of time, treaties were negotiated with most of the major tribes and promises were made in return for which the tribes gave up their land. The federal government acknowledged the dependent status of Indian tribes and undertook the obligation

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6/ Ibid., p. 463.

7/ "Indians have been enmeshed in a net of ever-widening legal complexities. One needs only to read a sampling of court decisions to realize that the Indian lives in a legal no-man's-land. In many instances, he is subject to three sovereigns -- the federal government, state government, and tribal law -- which present conflicting claims on the Indian life." Senate Report No. 721, 1968 U.S. Code Cong., Admin. News, p. 1864.

8/ Act of May 28, 1830 Ch. 148, 4 Stat. 411.

to protect them and their assets. On the reservation, Indians were to be civilized, Christianized, and provided with the implements and skills of farmers. It was thought that eventually tribes would cease to exist as separate entities and their members would be absorbed into the dominant culture. In the meantime, the federal government dealt with tribes much as it did with sovereign nations. The treaty period ended in 1871 when Congress passed a law prohibiting further treaties with Indian tribes.9/

2. Assimilation: The Allotment Act

In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, which provided for reservations to be broken up into farm size allotments and conveyed to individual Indians.10/ Land left over after all Indians had received allotments was opened to settlement by whites. Congress intended within a period of years to abolish the reservation system and the special obligations owed to Indian tribes. Federal policy therefore "shifted from that of removal, confinement, and isolation of the Indians on reservations to a policy of 'civilization' and assimilation of the Indian into the mainstream of American life."11/ The assimilation policy was largely a failure; on the whole it was also a disaster for Indians. It did not put an end to reservations or to tribal governments but it did cost the Indian people two-thirds of their land. From 1887, when the General Allotment Act was passed, to 1934, when the allotment process was halted by federal statute, Indian land was reduced from 140 million acres to 50 million acres.

9/ Appropriation Act of May 3, 1871, Ch. 120, Section 1, 16 Stat. 566, (codified at 25 U.S.C. Section 71 (1970)).

10/ Not all allotments were made under the General Allotment Act. Many of the reservations were allotted pursuant to treaties, agreements or statutes relating to particular reservations. Some of these special acts provided for the disposition of surplus lands while others provided for their retention as tribal lands.

11/ "Evolution of Jurisdiction of Indian in Indian Country," 22 Kansas Law Review, 341 (1974).

3. Reorganization: The Indian Reorganization Act of 1934

In the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, Congress abandoned the policy of assimilation, put an end to the allotment process, and attempted to re-invigorate the reservation system by fostering self-government. The Act was intended to preserve tribal institutions and the Indian land base.

The stated purpose of the Act was to "conserve and develop Indian lands and resources" and "to extend to Indians the right to form business and other organizations" and "rights of home rule." The IRA represented a return to recognition of the special relationship between Indians and the federal government and the concomitant obligation to protect and assist Indians until such time as they should be capable of either effective integration into the dominant culture or successful self-government. The reorganization period "saw the first official [modern] awareness of the need to preserve and develop tribal structure, rather than destroy it."12/

4. Termination

In the early 1950's, Congress briefly returned to the policy of ending the special relationship between the federal government and Indians. In a series of termination acts, Congress abolished several Indian reservations. It also provided certain designated states with a considerable measure of civil and criminal jurisdiction over Indian reservations.13/ Other states were authorized to assume this jurisdiction by constitutional amendment or statute. Congress declared it to be the policy of the United States Government to make Indians as rapidly as possible "subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status of wards of the United States and to grant them all the rights and prerogatives pertaining to American citizenship."

12/ Kennedy, "Introduction, Indian Law Forum," 22 Kansas Law Review 337, 338 (1974).

13/ P.L. 83-280, Act of August 15, 1953, 67 Stat. 588, codified in part, as amended, 18 U.S.C. Section 1162 (1970), 28 U.S.C. Section 1360 (1970).

14/ House Concurrent Resolution 108, 83d Cong., 67 Stat. B 132 (1953).

The termination policy of the 1950's like the assimilation policy of the late 19th century has been widely discredited. Termination has been considered a failure with the two largest tribes whose reservations were abolished by acts of Congress: Congress has recently restored the Menominee tribe in Wisconsin15/ and there is a movement to seek restoration for the Klamath reservation in Oregon.16/ In addition, legislation has been introduced in the current session of Congress which would repeal Public Law 280, the termination policy law under which states exercise jurisdiction over Indian reservations.

5. Self-Determination

The policy of termination was abandoned in the late 1950's and once again policy shifted back toward recognition of the need for special protection of Indians by the federal government, the desirability of preserving (or establishing) viable tribal governments and the value of maintaining and protecting Indian culture and traditions. Current policy is one of "self-determination without termination." President Nixon, in his address to Congress on July 8, 1970, described the new policy as follows:

> "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indians' sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of federal control without being cut-off from federal concern and federal support." 17/

15/ Menominee Restoration Act, Act of December 22, 1973, P.L. 93-197, 87 Stat. 770.

16/ See S. 1328.

17/ R. Nixon, Message from the President, H.Doc.No. 363, 91st Cong., 2nd Sess., Section 10797 (1970).

Congress adopted the self-determination policy urged by President Nixon. In the Indian Self-Determination Act of 1975 18/ Congress summarized current policy toward Indians:

> "The Congress declares its commitment to the maintenance of the federal government's unique and continuing relationship and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 19/

The challenge inherent in the policy of self-determination has caused the Indian people to organize themselves in order to obtain a greater role in the management of their own affairs. They have also become more aggressive in demanding that the federal government protect their land, natural resources, and other special rights to which they are entitled under law.

18/ Act of January 4, 1975, P.L. 93-638, 88 Stat. 2203, codified at 25 U.S.C. Section 450.

19/ P.L. 93-638, Section 3(b).

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INDIAN NATURAL RESOURCE LITIGATION

A. Introduction

The task force initiated its review by examining the way the Department handles litigation involving the federal government's trust responsibility to protect Indian land and natural resources. This review resulted in recommendations for certain organizational and policy changes within the Land and Natural Resources Division. These recommendations were accepted by Deputy Attorney General Silberman in November, 1974, and final implementation was directed by Attorney General Levi in April, 1975. The task force's findings and recommendations on this subject are summarized briefly below. The original option memorandum is attached at Tab A.

B. Conflict of Interest

There are reserved for federally recognized tribes some 55 million acres of land in the United States. This land is held in trust by the United States for the benefit of Indian people. As fiduciary for the Indian people, the federal government is charged with protecting and preserving Indian land and natural resources and other related rights deriving from treaty, federal statute, or case law.

The trust responsibility has been delegated to the Department of Interior and Justice. In no other area is the government charged with the fiduciary duty of representing the private interests of a particular group. In all other areas, the government is charged with advancing the national public interest.

In representing Indian tribes, the Justice Department often finds itself in an inherent conflict of interest. It must also represent numerous federal agencies, notably the Bureau of Reclamation and the Corps of Engineers, whose interests are often adverse to those of Indian tribes. The conflict of interest problem has been described as follows:

> "The United States Government acts as a trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute.. In many of these legal confrontations,

the Federal Government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must, at the same time, advance both the national interest in the use of land and water rights and the private interest of Indians in land which the government holds as trustee. Every trustee has a legal obligation to advance the interest of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal Government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal Government is damaged whenever it appears that such a conflict of interest exists."20/

President Nixon proposed legislation establishing and Indian Trust Counsel Authority to provide independent legal representation to Indians. This legislation has been introduced in several sessions of Congress but has not passed. Short of such legislation, the Justice Department cannot fully eliminate the conflict. However, steps can be taken to minimize the problem.

C. Trust Section

Indian trust cases have traditionally been handled by the General Litigation section of the Lands Division. There has not been a separate section to litigate these cases even though they represent a very distinct obligation of the U.S. completely separate from its duty to further the interests of the federal government. Furthermore, attorneys in the General Litigation section also represented federal agencies with interests conflicting with those of Indian tribes. On the other hand, there is a separate section in the Lands Division, the Indians Claims section, whose exclusive mission is to defend the United States against claims by Indians.

20/ President Richard M. Nixon, "Message to Congress," July 8, 1970.

The task force concluded that such a structural arrangement "raises the serious question of whether, in the day-to-day handling of cases, the United States as trustee is adequately fulfilling its fiduciary obligation to vigorously assert every reasonable argument in favor of private Indian rights. This structure creates a strong likelihood that the argument of the trustee will be diluted or seriously compromised as other competing considerations are presented."

The task force recommended that there be created in the Lands Division a new section which would be responsible for trial and appellate litigation for the United States in its role as trustee for the private rights of Indian people.

The task force felt that the private trust responsibility should be separated from other governmental interest responsibilities of the General Litigation section. This would put representation of Indian interests on an equal footing with defense against Indian claims. It would work to eliminate the potential for a casual trade-off of Indian interests within the General Litigation section while cases are still in the research and development stage. A separate section would also encourage recruitment of attorneys with special expertise in Indian law, enhance aggressive representation of the Indian position, and improve client relationships with the Department of Interior and the Indian tribes. While it would not eliminate the conflict of interest, it would assure that conflicting issues would be brought to the Assistant Attorney General, i.e. a policy level position, for resolution.

Deputy Attorney General Silberman adopted the recommendation for creation of a new Indian trust section in the Lands Division. The proposal was not implemented immediately because the Office of Management and Budget did not approve the Department's request for positions for the new section.

Attorney General Levi reviewed the Indian trust section matter with Indian tribal leaders and their attorneys and with attorneys in the Department and determined that the matter was of sufficient importance to warrant immediate action pending a more comprehensive legislative solution. Accordingly, he approved a recommendation which transferred the necessary positions from elsewhere within the Department in order to create the new section. Known as the Indian Resources

section, it has an initial staffing of nine attorneys, including a section chief, and six clerks. The Land and Natural Resources Division is currently transferring cases to the new section. The section will not handle appellate work on its cases and no plans for it to assume this responsibility presently exist

D. Indian Claims Section

The Indian Claims section of the Land and Natural Resources Division, which consists of approximately 20 attorneys, defends the United States against Indian claims within the jurisdiction of the Indian Claims Commission. The Commission was established by Congress in 1946 and is charged with determining the validity of all tribal claims against the United States for breach of its fiduciary duties prior to August 13, 1946. The Commission is scheduled to expire in the spring of 1977.

The task force reviewed the Lands Division handling of Indian claims cases and made certain recommendations, namely, that the Indian Claims section actively seek and consider settlement of Indian claims at all stages of the adjudication process and that Commission decisions be appealed only in the presence of obvious error. A full discussion of the section and the task force's recommendations is contained in the memorandum attached at Tab A. Deputy Attorney General Silberman agreed with the task force that every effort must be made to dispose of Indian claims cases prior to the expiration of the Commission in the spring of 1977 and directed the Assistant Attorney General for the Land and Natural Resources Division to pursue a vigorous settlement policy and to screen appeals closely.

JURISDICTION IN INDIAN COUNTRY

At the present time, the law defining civil and criminal jurisdiction in Indian country between the United States, the state, and the tribe is chaotic. Among the unsettled questions are the following: (1) extent of tribal court jurisdiction over non-Indians; (2) extent of concurrent tribal/federal jurisdiction over the thirteen major crimes set forth in 18 U.S.C. §1153; (3) authority for law enforcement in "checkerboard" areas where Indian and non-Indian land is juxtaposed; (4) extent of tribal jurisdiction in those states subject to Public Law 280; (5) whether a non-Indian has the right to sue in tribal court; (6) which government may regulate hunting and fishing rights guaranteed by treaty on and off the reservation; (7) who has jurisdiction over Indian reservations which were created by treaty but later opened to settlement by non-Indians; (8) whether federal jurisdiction extends to crimes committed by one non-Indian against another non-Indian within the boundaries of an Indian reservation; (9) whether the state has the concurrent jurisdiction with the federal government over crimes committed in Indian country by a non-Indian against an Indian; (10) whether federal constitutional doctrines are the measuring standard in 1968 Indian Bill of Rights cases.

In the coming months, the Department will be faced with these issues both in court cases and in hearings on proposed legislation. These issues are legally complex and diverse views on them exist within the Department. The task force has initiated the lengthy process of developing a Departmental position on Indian jurisdiction issues by soliciting papers from the concerned units of the Department on the law as it exists today and recommendations for changes in it. A full discussion of jurisdiction in Indian country and proposals for an administrative and legislative position will be presented at a later date. The sections which follow review the setting in which the jurisdictional questions must be considered.

A. Tribal Court Jurisdiction Over Non-Indians

Many Indian tribes are beginning to assert jurisdiction over non-Indians who reside or who are present within the boundaries of their reservations.

Although the Supreme Court has never reached the issue, the traditional view has been that tribal courts cannot exercise jurisdiction over non-Indians. The issue is an important one because many reservations contain very substantial non-Indian populations who are opposed to tribal court jurisdiction over them. The Solicitor for the Department of Interior has recently withdrawn a Solicitor's opinion which said that tribes were precluded from exercising such jurisdiction. He now has under consideration an opinion stating that the former opinion was in error and that tribes may exercise jurisdiction over non-Indians with respect to conduct within reservation boundaries. A federal district court judge in Washington has made a similar ruling, at least regarding crimes committed on trust land in a P.L. 83-280 state. See Oliphant v. Schlie ____ F. Supp. _____ (W.D. Wash. 1974). This case is presently on appeal to the Ninth Circuit and the Department of Interior as well as the Civil Rights Division has requested the Solicitor General to file a brief supporting the position of the tribe. The Criminal Division is opposed to this position because it believes that a tribal court cannot exercise jurisdiction over a non-Indian in criminal matters under any circumstances.

The legal and historical factors involved in the issue of tribal court jurisdiction over non-Indians are exceedingly complex. The Department can expect to be faced with this issue in a variety of contexts in cases which are in progress in a number of districts. Lengthy discussion of this issue at the U.S. Attorneys Conference in Phoenix revealed that there is no consensus within the Department either on the extent of tribal court jurisdiction or the constitutional limitations applicable to it. The present jurisdictional uncertainties have added significantly to reservation law enforcement problems.

B. Federal Criminal Code Revision -- S. 1

The comprehensive revision of the Federal Criminal Code, S.1, contained provisions with respect to jurisdiction in Indian country. The bill made significant changes in existing law, both as to federal and tribal jurisdiction over crimes occurring in Indian country by removing all reference to Indians as a distinct group and including them under the category special territorial

At the request of Senator Abourezk, S.1 has been amended to delete the proposed changes in Indian country jurisdiction and to return to what is essentially existing law. It was agreed that significant changes in Indian country jurisdiction should not be included in S.1 but should be treated in separate legislation. Senator Abourezk has announced his intention to hold hearings on this issue and the Department will be asked to present its position. This approach to answering jurisdictional questions seems to be the most significant, serious legislative effort in this regard currently underway. It has attracted a great deal of attention in the Indian bar and among the tribes and will very likely continue to grow as a major Indian issue.

C. Other Proposed Legislation

The task force has served as a clearinghouse for development of Departmental positions on other proposed legislation regarding jurisdiction in Indian country.

1. H.R. 2470

This bill, introduced by Mr. Rhodes would repeal 18 U.S.C. § 1153 (the Major Crimes Act) and amend 18 U.S.C. § 1152 so as to eliminate the exemption from federal jurisdiction of intra-Indian offenses. The approach taken in H.R. 2470 is essentially that contained in the proposed revision of the Federal Criminal Code, S.1. The bill was introduced in order to correct a constitutional defect in the Major Crimes Act under which Indians and non-Indians receive different punishment for certain offenses. See United States v. Cleveland, 503 Fed. 2nd 1067 (1974), declaring portions of the Major Crimes Act unconstitutional on equal protection grounds. The task force has

supported the Department of Justice Bill, discussed below, as the preferable method of solving the equal protection problem, pending a more comprehensive revision of Indian country jurisdiction.

2. Department of Justice Bill -- H. R. 7592.

18 U.S.C. §1153, the Major Crimes Act, extends federal jurisdiction to certain "major crimes" committed on Indian reservations by one Indian against another. Similar offenses committed by non-Indians are covered by 18 U.S.C. §1152, which extends federal enclave law to Indian reservations but exempts from its coverage intra-Indian offenses. Prior to 1966, the aggravated assault crimes listed in §1153 were defined and punished according to federal enclave law. In 1966 Congress amended the Act to require that the crime of assault with a dangerous weapon be defined and punished according to state law. In 1968, Congress further amended the Act by adding the offense of assault resulting in serious bodily injury and requiring that this new offense be defined and punished according to state law.

The uniqueness of the state laws has created a situation where the state definition and punishment for aggravated assaults may differ from the federal statute. District courts in the Eighth, Ninth and Tenth Circuits have recently held that these differences in treatment for Indians (as opposed to non-Indian defendants who are punished with reference to federal law) constitute a denial of equal protection and due process under the Fifth Amendment. Under these decisions, the federal government is without authority to prosecute Indians who commit aggravated assault offenses on Indian reservations in states where the local law is more severe than federal enclave law applicable within Indian country. See e.g. United States v. Cleveland, 503 F. 2nd 1067 (Ninth Cir 1974); United States v. Boone, 347 F. Supp. 1031 (D.N. Mexico 1972). This has created a serious law enforcement problem on several Indian reservations.

To remedy this situation, the Department has drafted legislation, H. R. 7592 amending the Major Crimes Act to insure equal treatment for Indian and

non-Indian defendants accused of committing aggravated assaults within Indian country. The task force, in conjunction with the Office of Legislative Affairs, has obtained support for this bill from other Departments in the Executive Branch and has expedited clearance by the Office of Management and Budget. The bill has just been introduced in the House by Representative Rodino and in the Senate by Senators Fannin and Hruska. Speedy passage is very important.

3. Retrocession Bill -- S. 1328

In 1953 Congress passed P.L. 280, a statute which grants specified states broad criminal and civil jurisdiction over certain reservations within their boundaries. These states are listed in the codified portions of Public Law 280. 21/ Public Law 280 also contains two provisions, subsections 6 and 7, which grant all other states permission to assume jurisdiction over tribes within their boundaries. Several states took advantage of this offer prior to 1968 when section 7 was repealed and section 6 was amended.

Public Law 280 is still in effect. Those states which properly acquired jurisdiction pursuant to subsections 6 and 7 prior to changes in the law may still exercise that jurisdiction. However, the 1968 Civil Rights Act dictates that henceforth tribal governments must consent to state jurisdiction as a precondition to other non-280 states asserting criminal or civil jurisdiction on reservations. 22/

The 1968 Act also provides for the "retrocession" of state jurisdiction to the federal government in the event that a Public Law 280 state no longer wishes to exercise all or part of its jurisdiction over tribes within its boundaries. Tribes are not given the power to decide whether an offer of retrocession will be made to the federal government; however, they can request the state to retrocede jurisdiction. The Secretary of Interior has the discretion to accept or refuse retrocession. At the request of Indian tribes, several states have retroceded varying degrees of jurisdiction to the federal government pursuant to the terms of the 1968 Act.

21/ See 18 U.S.C. §1162; 28 U.S.C. §1360.

22/ See 25 U.S.C. §1321-26.

Most Indian organizations and tribes abhor P.L. 280. The tribes wish to decide whether the state or federal government will exercise jurisdiction on Indian reservations. S. 1328, introduced by Senator Abourezk, reflects the view that the tribes, not the state or federal government, should be the final authority on whether Public Law 280 jurisdiction continues to exist. The Act authorizes tribes in all Public Law 280 states to adopt resolutions declaring their desire to have the United States and the tribe re-acquire jurisdiction from the states. Upon adoption of such a resolution, the Secretary of Interior is required to proclaim the re-acquisition of jurisdiction. Neither the consent of the state nor the federal government is required.

Title I of S. 1328 deals with retrocession of jurisdiction. Title II is captioned "Improvement of Law Enforcement on Indian Reservations." Title II would establish a pilot program within each of the states of South Dakota, North Dakota, Montana, Nebraska, and Wyoming, to improve law enforcement and the administration of justice within Indian reservations in those states. The bill would authorize grants, totaling $10 million, to Indian tribes to improve tribal police, courts, and corrections, programs and facilities. Members of the task force, at the request of the Senate Interior Subcommittee on Indian Affairs, have participated in several informal discussion sessions to provide the Committee with background information on reservation law enforcement problems. The task force also represented the Department in formal hearings before the Subcommittee. (See Tab B.)

Actions Taken

1. The process of developing a Departmental position on jurisdiction issues has been initiated.

2. Legislation restoring the government's ability to charge Indians with aggravated assault crimes in accordance with equal protection guarantees has been drafted and proposed in both the House of Representatives and Senate.

3. Assistance has been given to legislative drafting committees on law enforcement issues and Departmental testimony has been drafted and presented.

Recommendation

The chaotic state of the law regarding a wide range of Indian jurisdiction issues is the source of many of the law enforcement problems Indians face. The Department should, through the task force or some other coordinating mechanism, aggressively pursue the task of developing a coherent position and approach to the jurisdiction issue and provide leadership in the national debate on jurisdiction which is underway in both the Congress and the courts.

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LAW ENFORCEMENT ON INDIAN RESERVATIONS

A. Overview

The federal government has jurisdiction over approximately 90 Indian reservations in which approximately 500,000 Indians reside. Large numbers of non-Indians also reside within these reservations. Law enforcement responsibilities are divided between the Department of the Interior and the Department of Justice. Within Interior, the Bureau of Indian Affairs, through its division of Law Enforcement Services, provides police and other law enforcement personnel for most of the Indian reservations which are within federal jurisdiction. A number of tribes provide their own tribal police. Within Justice, the FBI investigates major crimes and other federal crimes which occur on Indian reservations, and the U.S. attorneys prosecute those crimes. In addition to the federal government and the tribes, states have limited jurisdiction, on reservations subject to P.L. 83-280, which varies from reservation to reservation and state to state.

The Department's criminal responsibilities on Indian reservations are broad and varied. 18 U.S.C. Section 1152 extends federal enclave law to Indian reservations and includes the Assimilative Crimes Act, 18 U.S.C. Section 13 which assimilates state law and applies it to federal enclaves in cases where there is no similar federally defined offense. The Major Crimes Act, 18 U.S.C. Section 1153, grants jurisdiction to the federal government for the enforcement of 13 major felonies. The United States must also enforce laws protecting Indian hunting and fishing rights as well as laws prohibiting fraud and embezzlement by tribal officials. In addition, certain alcohol prohibition statutes are to be enforced by the United States.

A brief discussion of the Department's responsibilities in law enforcement was held at the annual U.S. Attorneys Conference in October, 1974. As a result of the broad range of questions, comments, and problems which surfaced at that meeting, the task force organized a conference for those U.S. attorneys who have significant Indian populations in their districts to discuss issues of

reservation law enforcement. The three day conference was held in Phoenix in January, 1975, and was attended by approximately 25% of the U.S. attorneys (23) and select assistant U.S. attorneys. In addition, representatives of relevant units of the Department of Justice, the Department of the Interior, Indian tribal leadership, and reservation police attended. The law enforcement section of this report is based on that conference (see agenda and questionnaires attached at Tab C) as well as on extensive follow-up with the BIA, FBI, U.S. attorneys, Solicitor and Secretary of the Interior, tribal leaders, OMB, LEAA, Civil Rights and Criminal divisions, and national Indian organizations.

Law enforcement on most Indian reservations is in serious trouble. Reservation crime statistics are an indication of the severity of the problem. The major crimes rate is 50% higher on Indian reservations than it is in rural America as a whole. The violent crime rate on Indian reservations is eight times the rural rate although the property crime rate is about half of the rural rate. The murder rate among Indians is three times that in rural areas while the assault rate is nine times as high. The number of cases brought under the Major Crimes Act, has risen nearly 30% in the past year.23/ The percentage of unreported crime is higher on reservations than elsewhere suggesting that the actual situation is worse than the statistics portray.

Citizen lack of confidence in the reservation law enforcement system is widespread. Residents of several reservations believe there has been a complete breakdown of law and order. They are cynical about the willingness and ability of the government to protect persons and property. In many cases, no effort is made to report crime because of the feeling that nothing would be done. Self-help is common among both Indians and non-Indians. Indian self-help receives

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23/ During FY 73, the number of defendants against whom federal court actions were initiated under 18 U.S.C. §1153 totaled 404. During FY 74, the number of defendants against whom court actions were initiated under U.S.C. §1153 was 520, an increase of 28.7%.

support from Indian traditions. Relatives of crime victims often take retributive action which merely precipitates further violence.

The reservation law enforcement issue has suffered inattention and neglect. The problem is one of major proportion crossing many bureaucratic and jurisdictional boundaries. It is particularly embarrassing that the present problem exists in an area of primarily federal responsibility. This is not a situation where the federal government serves as a model for other law enforcement efforts.

Two factors are fundamental to understanding the difficulties involved in meeting the problem of crime on reservations. First is the isolation of the reservation areas in which Indians live, and the great distances involved. Second is the prevalence of alcoholism on reservations and the central role it plays in the incidence of violent crime.

Indian reservations encompass enormous geographic areas where the population is sparse and scattered rather than conveniently gathered in cities or towns. The Navajo reservation, for instance, spreads into four states containing roughly 16 million acres in total area and 136,000 people. More common, however, are reservations of 1-2 million acres supporting a population of 500 - 2,000 people. It is not uncommon for several hours to elapse between the time a crime is committed and the time a law enforcement officer arrives at the scene by car. Providing effective law enforcement services under these circumstances is very difficult.

Criminal conduct on Indian reservations is almost always alcohol related.24/ Prosecutors and investigators alike find it difficult to remember a case wherein the

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24/ Alcohol was not permitted on reservations prior to 1953. In that year the statute was changed to provide a local option system. See 18 U.S.C. §1161. While public drunkenness is punishable by most tribal law and order codes, possession of alcohol carries greater penalties, a vestige of the pre-1953 era. Thus there is an incentive to consume the supply at hand quickly. While alcoholism is recognized by most Indians to be a serious problem which they would like to erase, drinking and drunkenness is also a mark of bravado and manliness among peer groups and is therefore socially reinforced.

facts do not include heavy drinking as a contributing circumstance.25/ Eliminating the problem of alcoholism on the reservation would, according to those most familiar with reservation life, eliminate the extraordinary crime rate. However, the abuse of alcohol is a symptom of other problems such as social maladjustment, low self-esteem, and economic deprivation resulting from inadequate education and employment. It is a classic example of the vicious cycle which afflicts the impoverished community.26/

It is not within the mission or the potential of the criminal justice system on Indian reservations to solve these serious social problems. What the system should provide, however, is the atmosphere of safety, stability, and fairness which is a necessary prerequisite for dealing with the more fundamental problems which confront American Indians. It is to that end we have attempted to examine the areas of Justice Department responsibility concerning the Indian criminal justice system and to assess our performance of those responsibilities.

B. Policing the Reservation

1. Background

Four law enforcement agencies provide services to Indian reservations: FBI, BIA police, tribal police, and state police. 27/ The law enforcement component of the reservation criminal justice system mirrors the generally confused and complex status of jurisdiction over Indian reservations.

25/ It has been estimated that about 90% of Indian reservation crimes are alcohol related as compared with a national average of 60% for non-reservation crimes.

26/ The 1970 census showed the average per capita income of American Indians to be $1,573 with rural Indians at $1,140. 1973 unemployment figures set reservation unemployment at 37% with an additional 18% in seasonal or temporary jobs. The school drop-out rate for Indian students is high. The most recent studies, completed in the 1960's, showed a high school drop-out rate of 42

27/ U.S. National Park Service provides police service on one Indian reservation, i.e., Miccosukee tribe of Flori

Most Indian reservations receive totally inadequate police services given their size and extraordinarily high rate of crime.28/ Criticism of reservation law enforcement is particularly acute with respect to the role of the federal government. Responsibility for providing law enforcement services to Indian reservations exists by virtue of the federal "trust" responsibility29/, and the general duty to enforce federal law.

a. Role of State Police

State police play a nominal role in law enforcement on most reservations. Except in states which have acquired jurisdiction pursuant to Public Law 280 30/, state jurisdiction is limited to reservation crimes where both the offender and the victim are non-Indian 31/. Tribes have traditionally been hostile to state jurisdiction, which they regard as an encroachment on tribal sovereignty. Consequently, most tribes have opposed any effort to provide a state law enforcement presence on the reservation.

A number of tribes have arrangements with state police to patrol state highways crossing the reservation. The normal practice is to cite Indians into tribal courts and non-Indians into state courts.

28/ Unlike the crime profile elsewhere, the great majority of crimes committed on Indian reservations are violent in nature, are alcohol related, and are "solved" through arrest or identification of the offender. The FBI reports that nationally 20 percent of reported crimes are cleared by arrest or identification of the offender. On Indian reservations, the figure is in excess of 80 percent.

29/ See generally, Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians," 27 Stanford L. Rev. 1213 (1975).

30/ Act of August 15, 1953, Ch. 505, 67 Stat. 588 codified in part at 18 U.S.C. Section 1162 (1970) and 28 U.S.C. Section 1360 (1970).

31/ See U.S. v McBratney, 104 U.S. 621 (1882); New York ex rel Ray v. Martin, 326 U.S. 496 (1946).

Absent an express commission from the tribe, state police have no authority to arrest an Indian for a crime occurring in Indian country.32/

b. Role of the FBI

The FBI does not "police" Indian reservations. Except in unusual situations (such as the Wounded Knee episode in 1973) its role is to investigate violations of federal law, primarily under the Major Crimes Act, 18 U.S.C. Section 1153. The FBI does not have any agents stationed on Indian reservations. In many cases the nearest resident agency is several hundred miles away. In non-crisis times FBI presence on Indian reservations is minimal, and the community's perception of federal law enforcement is confined to the activities of BIA police.

c. BIA and Tribal Police

The day-to-day responsibility for reservation law enforcement rests with BIA and tribal police. Most reservations have tribal police forces under the direction of a police chief appointed by the tribal government. The tribal police are paid either through tribal funds or with BIA money which has been awarded to the tribe on a contract basis for law enforcement purposes. The current trend is for the BIA to provide police services through awarding contract monies to the tribes. This is an expression of the principle of self-determination which has been federal policy for several years.

In addition to the tribal police, there are BIA police on most reservations. BIA provides law enforcement services to 500,000 Indians on approximately 90 reservations in 17 states, and has responsibility for approximately 100,000 square miles of land.

While the BIA police presence is diminishing due to the trend in contracting, at present a mixture of tribal and BIA police make up the local law enforcement force on most Indian reservations. BIA employs approximately 350 law enforcement personnel, the tribes approximately 450. (230 of these are Navajo).

32/ "Cross-deputization" is practiced on a number of reservations but often on a very informal basis.

BIA and tribal police are presently inadequate to fill reservation law enforcement needs. Both suffer from inadequate funding and lack of training. In the case of BIA police bureaucratic impediments exist. In the case of tribal police political involvement is a serious problem.

In addition, both tribal and BIA police often exist on one reservation under separate command causing coordination and organizational difficulties.

2. Problems of Policing the Reservation

The challenge presented to the federal government of providing effective police services under the geographical, crime rate and social circumstances characterizing Indian reservations is considerable even for the most sophisticated police professionals. The difficulties have been compounded by the factors which are discussed below.

a. Inadequate Funding

Law enforcement has been a low priority program in the BIA. The services which are provided have come about on a stop-gap basis ancillary to other programs considered more central to BIA's overall mission, such as education, housing and social services. Express statutory authority for BIA police does not exist. Neither is there statutory authority to make arrests nor to carry firearms. Such authority as does exist is implied from Department of Interior appropriation acts which authorize expenditure of funds for "maintaining law and order on Indian reservations." 33/

Salaries for BIA and tribal police are low. Most reservation police do not have a high school education. Entry level for BIA police recruits has been GS-3; this year it was raised to GS-4. Tribal police are generally paid less than BIA. In either case they earn only a fraction of the salaries paid to police in other jurisdictions. Turnover is very high, up to 75% annually on some reservations. Low salaries coupled with poor working conditions and lack

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33/ The solicitor for the Department of Interior in Opinion No. M2969 has concluded that this language is sufficient authority for the law enforcement activities of the BIA.

criminal investigators either to the Consolidated Federal Law Enforcement Training Center (CFLETC) or the FBI Academy. The FBI Academy usually takes one Indian officer per session and has four sessions per year. The CFLETC usually has several Indian officers per session and has nine sessions per year.

There are certain training areas which need to be supplemented. Firearms training is currently very weak. Additional training in a number of specialized, technical areas is needed. The basic training course is very general and, unlike police in large police departments, BIA and tribal police have little in the way of resources to draw upon for on-the-job training. If Indian police are to learn the more refined aspects of police work, they must be taught in organized training sessions.

Although the BIA has minimum training requirements for all its police, there are no similar requirements for tribal police. Tribes are free to manage their police forces in whatever manner they see fit. Many tribes employ policemen with no formal training at all. Where the BIA provides funds for police services, it can impose conditions in the contract with the tribe. These conditions should include a minimum basic and in-service training requirement. In the current fiscal year, the BIA will be expending substantial amounts of money in "buying Indian" contracts for law enforcement services. It is therefore important that the BIA make a significant shift from operational law enforcement work to contract administration, an area in which it has been very weak, in order that these additional monies meet the needs and yield the improvements for which they were appropriated.

Because the Justice Department shares reservation law enforcement responsibility with the Department of Interior, it is appropriate for Justice to assist in improving the quality of reservation police forces. Training assistance is one avenue which can be pursued.

Through LEAA funding and the training capability of the FBI, U.S. Marshals and Community Relations Service, the Department can play a significant role in upgrading the quality of BIA and tribal police. The FBI already provides training assistance,

in the form of instructors to the Indian Police Academy and has participated in several field training programs. As part of the Wounded Knee effort, the U.S. Marshals Service supervised a training program for the police force at the Pine Ridge reservation in South Dakota. LEAA has allocated funds to assist tribes (LEAA cannot fund BIA police programs) in developing law enforcement programs. So far, very little of this money has gone into training. Most has gone into hardware and facilities, such as police cars and jails. LEAA money which has gone into law enforcement training has been allocated primarily to the tribal judiciary rather than tribal police.

The task force has met with the chief of BIA's Division of Law Enforcement Services to review training needs and explore increased DOJ support of BIA and tribal police training. A subcommittee of the task force, consisting of representatives from OPP, LEAA, FBI, CRS, and the Criminal Division, in cooperation with the BIA and Indian leaders, has designed an LEAA-funded training program for tribal police. The curriculum includes both a basic and an advanced course and will be conducted at the Indian Police Academy in Brigham City, Utah. The program will be available to any federally recognized Indian tribe. It will make use of instructors, in addition to the regular police academy staff, from the FBI, state and local police. The Community Relations Service will provide instructors for courses in police-community relations and conflict resolution.

In the past, one of the principle impediments to tribal participation in law enforcement training programs has been the unwillingness of tribes to do without the services of tribal employees during the period of time they are away from the reservation in a training status. To alleviate this problem, members of the task force have met with the Department of Labor's Manpower Administration and have arranged to authorize tribes to spend funds made available to the tribes under the Comprehensive Employment Training Act (CETA), for salaries of replacement officers for tribal police who are away from the reservation to attend the training program. After the task force has an opportunity to

review the results of the LEAA-funded tribal police training program, consideration will be given to organizing in-service training programs on a selected regional or reservation-by-reservation basis. However, the substantial increase in the BIA law enforcement budget for FY 76 may make Justice Department training assistance a less pressing need.

c. Lack of Line Authority

In addition to inadequate training and underfunding, the BIA police are under severe administrative handicaps. The BIA is a decentralized agency in which law enforcement personnel have no unified command structure. The Chief of the Division of Law Enforcement Services is an adviser on law enforcement matters to the Commissioner of the BIA. He has no direct operational control over BIA police. The agency special officer and police under him answer to the reservation superintendent who typically has no law enforcement training or experience. Instead of having one law enforcement program, in practice, the BIA has numerous different programs, one for each reservation.

Although such a decentralized system may be an efficient mechanism for the delivery of social services which must be geared to community needs 38/, there is a strong feeling among many in Interior and Justice that it is inappropriate for law enforcement, which has historically been thought to require a centralized, autonomous command structure. Furthermore, law enforcement, unlike other BIA services, is not purely an internal operation. It is part of a criminal justice system which requires coordination with other agencies such as the FBI and the U.S. Attorneys. Many people in the law enforcement field (including the FBI and U.S. Marshals Service) believe that BIA will never develop a strong law enforcement program as long as there is no centralized command structure. The Department of Justice, as part of a joint Interior-Justice effort to respond to crisis conditions on the Pine Ridge reservation (see p. 61), formally requested DOI to reconsider its present decentralized organization of law enforcement programs. To date no changes have been made.

38/ Decentralization is a natural outgrowth of the policy of self-determination; each tribe is given a voice in how programs set up for its benefit are operated. Central control from Washington is minimal, uniform standards few.

d. FBI - BIA Duplication of Services

The BIA has trained criminal investigators (special officers) on most reservations. These special officers conduct the initial investigation for the majority of serious crimes which occur on Indian reservations. Most U.S. Attorneys, however, will not normally accept the findings of a BIA special officer as a basis for making a decision on whether to prosecute. Instead, most U.S. Attorneys require that the FBI conduct an independent investigation, often duplicative of the BIA investigation, prior to authorizing prosecution. The result is that an FBI agent must travel to the reservation, often a considerable distance away, and retrace the investigation which has been conducted by the BIA. FBI agents normally reinterview all persons involved, visit the crime scene, and review and examine all evidence. Until the FBI investigation is completed, the offender typically remains at large.

There is no clear division of labor between FBI and BIA with respect to investigation of crimes occurring in Indian country. In order to understand the current situation, it is necessary to review some of the history of federal law enforcement on Indian reservations. At one time BIA special officers did all of the investigations of federal violations occurring in Indian country. However, the status of BIA special officers has always been clouded due to their having been created by Congress in 1907 exclusively to enforce federal liquor laws. For this reason, they were called "special" officers. Other than general language in appropriation acts, the authority of BIA special officers to engage in general law enforcement work has remained unclear and the numbers of special officers has varied widely due to the funding whims of Congress.

In the 1940's and 1950's, special officer manpower was reduced and the BIA was not able to provide the investigative services it had historically provided. During this period the FBI assisted the BIA in meeting its responsibility. Initially, the FBI participated only in the more serious offenses upon the request of the agency special officer, often after a preliminary investigation. Over the years, the precedent for reporting to the FBI all violations of federal law in Indian country was established. Due to the operating policies and general leadership role in the federal law enforcement field of the FBI, it assumed the role of the primary investigative

agency on offenses accepted for investigation and made prosecutive presentation of the cases to the appropriate U.S. Attorney although BIA special officers generally provided the bulk of the investigative effort. Accordingly, U.S. Attorneys came to rely solely on FBI investigative reports and prosecutive presentations. BIA has assumed a de facto supportive role in spite of the fact that it is regarded as having primary general responsibility for reservation law enforcement.

The BIA has submitted to the task force a paper (Tab E) on the role of BIA special officers and FBI agents in investigating crimes occurring in Indian country. This paper sets forth three options:

1. That the BIA reassume primary responsibility for investigation of crimes occurring in Indian country;

2. That the BIA discontinue investigation of federal crimes occurring in Indian country leaving total investigative responsibilities with the FBI; and

3. That the present dual responsibilities be continued.

The BIA favors the first option.

The task force has discussed this issue with the FBI and with U.S. Attorneys who have substantial Indian populations within their districts.

Agents in the field state that (1) the quality of BIA special officers' investigations is generally very good; (2) the investigative role of the FBI is indeed duplicative; (3) they could not independently conduct an investigation on a reservation because the special officers provide a central language and credibility link with a community which is generally suspicious of and uncooperative to outsiders; and (4) BIA special officers could handle the investigation and presentment of cases to the U.S. Attorney in most routine matters. They believe that the FBI role could be limited to one of assistance with difficult cases, cases involving

certain areas of technical expertise not available to the special officers, or cases which require investigation beyond the borders of the reservation. Relationships between BIA special officers and FBI agents in the field are generally good. Each is satisfied with the assistance which the other provides. Such differences as do exist are largely at the headquarters level and relate to the somewhat academic question of who has "primary" jurisdiction for investigating crimes in Indian country. The only specific complaint from the BIA is that some U.S. Attorneys refuse to accept cases directly from BIA special officers.

Most U.S. Attorneys are willing to make greater use of BIA special officers and to accept cases directly from them or in joint presentations with the FBI. They are not willing, however, to dispense with the FBI. Even in situations where FBI agents do little or no primary investigation, U.S. Attorneys believe the FBI serves an important coordination or liaison function between the BIA special officers, who are located on the reservations, and the U.S. Attorney's office, which is often some distance from the reservation but in close proximity (often the same building) to the FBI office.

The task force is opposed to any system which involves duplication of investigations on a routine, systematic basis. The duplication only serves to lengthen the time, often by days, between the occurrence of a criminal act and prosecutive action. The U.S. Attorneys deal directly, on a regular basis, with investigative units other than the FBI, e.g. Customs, Immigration and Naturalization Service, DEA, U.S. Postal Service. While BIA has severe problems in its ability to provide adequate police services to reservations, its criminal investigative capacity is not inferior to that of other agencies which the Department, through the U.S. Attorneys, deals with regularly. The task force believes that the Department should treat the Law Enforcement Services branch of the BIA as it would any other federal investigative agency. The FBI, because of its special expertise and cross-jurisdiction capability, should be available to handle cases when requested but their involvement should be the exception rather than the rule.

implementation of such a policy would naturally have to proceed gradually and in stages which would vary among districts given the current levels and experience of BIA special officers.

A period of joint FBI-BIA investigation and presentation of cases to the U.S. Attorney as well as special training by prosecutors would be a necessary first step.

While such a change could be eclipsed by events which will be discussed in the next section, nothing currently being proposed would eliminate the need for criminal investigators on Indian reservations. Maintaining an unnecessary layer between these investigators and the prosecutors is, except under special circumstances, an undermining of the reservation law enforcement effort and should be eliminated.39/

3. Future Directions in Policing the Reservation

In accordance with the policy of Indian self-determination, the trend is for the BIA to contract with the tribes for delivery of specified services. Thus the BIA as an agency stands to be transformed, over time, from a service delivery organization to a contract administering agency. In the area of law enforcement services, if the process of contracting with tribes proceeds to its logical conclusion, the BIA will soon be out of the law enforcement business, with all operational responsibility transferred to the tribes. While it is unlikely that this will happen quickly, it is currently underway in the allocation to the BIA of an additional $10.5 million for law enforcement. These funds represent almost a doubling of the law enforcement budget with no new positions provided. Instead these monies will be disbursed to the tribes.

39/ Note should be made of the fact that in several districts, the system which is proposed here is already substantially in effect. In these districts although theory prescribes that the FBI conduct an independent investigation, in practice the investigative work is left to the BIA. In many cases, the FBI agent does not even travel to the reservation but rather merely accumulates the evidence developed by the BIA special officer and eventually presents the case to the U.S. Attorney. In some cases, the BIA officer presents the case directly to the U.S. Attorney.

It appears that the long term results of this policy will be the gradual phasing out of BIA police. The BIA role would then be limited to that of training, technical assistance and criminal investigations in serious cases through a small, coordinating network of special officers.40/

In the shorter term, it is legitimate to ask whether the BIA will ever develop a satisfactory police capability. It seems apparent that a predominantly social service organization, such as BIA, will have continuing difficulty operating in the law enforcement field. Many people, both in the Justice and Interior Departments, believe that the BIA is institutionally incapable of developing and maintaining an effective professional law enforcement organization, and that the responsibility for reservation law enforcement should be transferred to the Department of Justice. The Department of Interior has expressed the desire to conduct a joint study with the Department of Justice to explore this issue. Indian reservations deserve the services of a high quality, professionalized police organization. The goal of the joint study would be to determine the best administrative and procedural means of achieving this goal. LEAA has indicated its willingness to fund a comparative study of reservations policed by a state government pursuant to P.L. 280, tribal police, BIA police, and a mixture as part of this effort. The task force believes that it is important to pursue such a study and present findings and recommendations to the Attorney General and the Secretary of Interior.

Actions Taken

1. A U.S. Attorneys Conference was held to review reservation law enforcement problems and discuss Indian related issues.

40/ It remains to be seen whether tribes will hire their own criminal investigators (as well as police) or will continue to use BIA special officers. The BIA will probably need at least one law enforcement person assigned to each major reservation in order to administer BIA funding of reservation law enforcement programs and provide assistance to the tribes. Presumably the existing cadre of BIA special officers will fill this role.

2. The Department of Justice strongly supported in OMB and Congress increased FY 76 funding for BIA law enforcement purposes.

3. An LEAA-funded reservation police training program beginning in January, 1976, has been developed.

4. The Department testified before Congress on reservation law enforcement.

Recommendations

The federal government must take steps to improve the quality of reservation police forces. The Department of Justice's role in this effort is necessarily limited as primary responsibility for reservation law enforcement rests with the Department of Interior.

However, the Justice Department shares some responsibility for reservation law enforcement and should assist the Interior Department and Indian tribes in dealing with the problems of policing reservations. It should:

1. Further increase the level and quality of training assistance to BIA and tribal police through the resources of the FBI, U.S. Marshals Service and LEAA;

2. Develop specialized training in reservation investigations and Indian law for FBI agents assigned to reservation areas;

3. Direct the FBI to confine its investigative activities to those reservation cases requiring their special expertise or cross-jurisdiction capability or those investigations requested by the BIA or U.S. Attorney; and to assist the BIA special officers in assuming the responsibility of direct presentment of cases to the U.S. Attorney;

4. Direct the U.S. Attorneys to begin accepting investigative reports directly from BIA special officers and to work with the BIA as it would any other federal investigative agency both in the field and at the headquarters level; and

5. Participate in a joint study with the Department of Interior to make recommendations on the issue of where the federal responsibility for reservation law enforcement should be placed.

C. Prosecution of Crimes Occurring in Indian Country

The federal government is primarily responsible for prosecution of crimes which occur in Indian country. Pursuant to 18 U.S.C. Section 1153, the federal government has jurisdiction over 13 "major crimes" 41/ committed by an Indian in Indian country. Intra-Indian offenses not covered by 18 U.S.C. Section 1153 fall within the exclusive jurisdiction of tribal courts. The federal government also has jurisdiction over crimes committed in Indian country pursuant to 18 U.S.C. Section 1152, which extends federal enclave law to Indian reservations and includes the Assimilative Crimes Act, which assimilates state law for those offenses not federally defined. 18 U.S.C. Section 1152 specifically exempts certain intra-Indian offenses.

This statutory scheme means that, in addition to its normal duties, for Indian reservations the federal government must also fill the role of local prosecutor. This is because states have no jurisdiction over most Indian reservations and tribal court jurisdiction is extremely limited. 42/ Furthermore, tribal courts are often either non-existent or incapable of handling cases in conformance with the Constitutional limitations imposed on them by the 1968 Indian Bill of Rights.

There is a wide gap between the recipients and the providers of prosecutive services. Indians feel the U.S. Attorneys are doing an inadequate job. U.S. Attorneys feel the Indians do not understand the limitations under which they operate. The atmosphere is one in which criticism and dissatisfaction are abundant and communication and

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41/ The thirteen crimes are murder, manslaughter, rape, carnal knowledge, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny.

42/ Six months in jail and/or a $500 fine is the limitation imposed on tribal court action by the 1968 Indian Bill of Rights. 25 U.S.C. §1302(7).

of opportunity for advancement makes it difficult to recruit and retain good people. As long as these conditions exist neither the BIA nor the tribes can hire and retain the caliber of people necessary for effective law enforcement.

The BIA spends approximately $5 million each year for police. Tribes spend about $4.5 million.34/ Funds which are available are not allocated on the basis of any formula. Distribution is based almost entirely on historical factors. Funding varies from $1.18 per capita for the Navajo reservation (which provides almost all its own funding for law enforcement) to $70.22 per capita for the Red Lake reservation in Minnesota (which provides no tribal funds).

LEAA has played a very important role in the Indian law enforcement funding picture. In FY 1975, approximately 2/3 of its Indian criminal justice grants went to law enforcement for a total of $2,130,749. This figure represents about 40% of total BIA expenditures for police programs. An itemized breakdown of LEAA's 1975 Indian criminal justice awards appears as an appendix to this report. (See Tab D.) LEAA funds have been a major resource which the Department of Justice can use to support improvements in reservation law enforcement and to set priorities for the kinds of improvements which are made.

Recently the BIA has obtained funds for an expanded law enforcement program.35/ Beginning July 1, 1975, the law enforcement budget has been raised from approximately $12 million to $22 million. The Department of Justice actively supported this budget increase before OMB and the Congress. Most of the additional money will go to tribes in the form of contracts for law enforcement services rather than being expended directly by the BIA. This substantial additional funding is an acknowledgement by the Executive Branch and Congress of the law enforcement crisis which exists on most reservations. Additional funds should

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34/ BIA, Indian Reservation Criminal Justice Task Force Analysis, 1974-75, page 30.

35/ The appropriation bill has passed the House and should also pass in the Senate.

make it possible to substantially upgrade the quality of reservation law enforcement programs. It remains to be seen what effect this will have on the crime rate. At a minimum, it should afford some relief from crisis conditions which have existed on several reservations.

b. Inadequate Training

Reservation police forces, whether tribal or BIA, are inadequately trained. The lack of an effective, professional law enforcement presence on Indian reservations probably contributes to the high crime rate and certainly accounts for citizen lack of confidence in the system. It also leads to more specific problems, some of which are discussed elsewhere in this report, such as the unwillingness of the U.S. attorneys to accept BIA investigations as a basis for making decisions on whether to prosecute.

BIA police (as opposed to tribal police) are required to satisfy mandatory minimum training requirements. Training is provided through the BIA-operated Indian Police Academy. The Academy gives a 500-hour basic recruit training course.36/ There are three sessions per year and approximately 40 officers are trained each session. The training program is available to tribal as well as BIA police and the Academy enrollment usually runs about 60% BIA police and 40% tribal police.37/

In addition to training offered at the police academy, the BIA, and some tribes, send their

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36/ This exceeds the minimum standard of 400 hours suggested by the President's Commission on Law Enforcement and the Administration of Justice and more recently by the National Advisory Commission on Criminal Justice Standards and Goals.

37/ Not all officers receive this training. Many work for several years without training before getting the opportunity to attend the academy. In part this is due to BIA position classifications. BIA police consist of career, temporary and Comprehensive Employment Training Act (CETA) categories. The latter two account for a significant proportion of the total positions. Only the career category of BIA police receive the special training opportunity.

mutual understanding are at a minimum. 43/ Statements such as the following are not uncommon:

> "The entire environment of overlapping jurisdiction, duplicated services, and inaccessible criminal justice resources at the federal level is the most significant contributing factor to the level of crime on the reservation.
>
> In summary, there is no criminal justice on the Navajo reservation except what the tribe administers at its own level." 44/

The Indian community makes two principal complaints regarding federal performance in the prosecution of Indian cases: (1) it takes the federal government too long to respond when a felony has been committed and even after response the offender is usually not arrested; and (2) U.S. Attorneys decline such an inappropriately high percentage of Indian cases that serious crime on the reservation goes virtually unpunished.

U.S. Attorneys acknowledge that Indian cases pose difficult problems. Most of the cases are minor in nature and do not belong in the federal court system. Those cases which should be prosecuted are difficult to prove because of the high incidence of alcohol involvement, language problems, unwillingness of witnesses to testify, and other factors. The sections which follow discuss, both from the point of view of Indian tribes and the federal government, the problems involved in prosecuting crimes which occur on Indian reservations.

43/ The relationship of Indians to the federal government in the law enforcement area is similar to the relationship in many other areas. One observer has characterized it as a loveless embrace: Indians dislike their dependence on the federal government but see no other alternatives short of extinction.

44/ "Tribal Law Enforcement on the Navajo Reservation and its Relationship with Federal Agencies," testimony prepared by Roland C. Dart, II for the Subcommittee on Interior and Related Agencies, House of Representatives May 1975.

1. Response Times; Failure to Arrest

A great disparity exists between tribal and federal government response to crimes which occur on Indian reservations. Tribal prosecution is generally swift and sure. Federal prosecution is usually slow and uncertain. This results in an anomalous reversal of normal prosecutive priorities: minor crimes receive immediate attention; major crimes languish. This anomaly is very apparent to residents of most Indian reservations who live in communities which are small and close knit. When a crime is committed, everyone hears about it and usually knows the parties involved. When the crime falls within the tribal law and order code (usually a misdemeanor type offense), the tribal police arrest the offender and bring him before tribal court. Upon a finding of guilt, he is punished, usually with a fine or short jail term. While there are many serious problems which plague the tribal courts (see discussion on tribal courts, infra.), entry of offenders into the tribal criminal justice system is immediate and processing is speedy.

If, on the other hand, the crime falls within federal jurisdiction (usually a major felony), a much more dilatory process begins. The tribal police, usually first on the scene, notify the BIA criminal investigator who initiates an investigation and notifies the FBI. The FBI agent, whose resident office is located off the reservation, arrives on the scene several hours to several days later, depending upon the seriousness of the crime 45/ and the press of

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45/ Aggravated assaults are so common on Indian reservations that they do not receive very high priority attention. Indians often complain that if a person sticks a knife into his neighbor in Peoria, Illinois, a major effort would be made to bring criminal justice sanctions to bear on the offender. They contend that a similar crime occurring in Pine Ridge, South Dakota, would go almost unnoticed. Indians feel that some federal prosecutors have the attitude that offenders and victims of reservation crimes are "just a bunch of Indians." This

(continued on next page)

other business. The FBI agent conducts an investigation, often duplicative of work already done by the BIA special officer, 46/ and then presents the case to the United States Attorney, either in the form of a written report or by telephone. This period of time usually amounts to several days during which the offender remains at large. More important is the fact that in most districts, even after the U.S. Attorney authorizes prosecution, the offender will not be arrested until after the case has been presented to a grand jury. This involves an additional delay of several weeks, if not months. Most U.S. Attorneys prefer waiting for a grand jury indictment to immediately arresting the defendant. If a complaint is filed and an arrest warrant is issued; an assistant U.S. Attorney must appear at the preliminary hearing which may be held at great distance from the U.S. Attorney's office, whereever the federal magistrate closest to the reservation sits. Most U.S. Attorneys prefer to eliminate this step in order to save time.47/

45/ (continued) view is reinforced by the fact that often there is a significant difference in the mobilization of criminal justice resources when the victim of a reservation crime is a non-Indian. Perhaps the premier example of this disparity in treatment occurred recently on the Pine Ridge reservation, the scene of widespread violence and several dozen murders in the last year. Federal response to these crimes has been fairly routine. However, when two FBI agents were killed on the reservation, the FBI mobilized more than 175 agents complete with helicopters and armored personnel carriers. Yet when Indians complain about the lack of investigation and prosecution of reservation crimes, they are usually told that the federal government does not have sufficient resources to handle the work.

46/ See page 34 - 37, supra.

47/ A notable exception is the district of Utah which makes very little use of grand juries. Indian defendants are arrested immediately pursuant to filing of a criminal complaint and issuance of a magistrate's warrant. The U.S. Attorney reports few problems with this system. Most defendants waive preliminary hearing.

Furthermore, under the provisions of the 1969 Bail Reform Act arrest of the defendant merely launches him into a revolving turnstyle. Release is almost immediate, particularly for Indian defendants who have strong community ties, tend not to leave their reservation residences, and are known to be faithful in meeting court dates. They are almost always eligible for low bail or release on recognizance. U.S. Attorneys point out that complaints by Indians about criminal defendants running at large in the community would be true even if the pre-indictment arrest procedure were followed. At most, the defendant would be removed for a day or two days prior to return.

The task force has carefully examined the question of response time prior to indictment and has made recommendations to streamline the process. We do not recommend that agents be based on Indian reservations because of the present division of duties between the FBI and the BIA which results in the bulk of investigative work being carried out by the BIA criminal investigator. Instead, the task force has recommended that the FBI no longer be required to investigate every major crime but assist the BIA on a "special case request" basis. (See discussion and recommendations in Policing the Reservation, infra.) This change would not only eliminate an unproductive duplication of effort, it would also reduce the time which elapses prior to presentment of the case to the U.S. Attorney by avoiding, except in special cases, the additional time required for FBI involvement.

In addition to the investigative aspect of the response time issue, there is the problem of time lag involved in obtaining an indictment. U.S. Attorneys tend to seriously underestimate the importance of an arrest to the community, particularly Indian communities. A visible sign of the federal criminal justice system taking action to protect the community from a criminal offender is very important. Even if the defendant returns to the reservation, there is a significant difference in community perception and deterrent effect between a defendant who is out on bail awaiting trial and one who has not even had a charge lodged against him.

The task force recognizes that the special characteristics of the federal system make it impossible to provide the speedy handling of federal felony cases that Indians witness in the functioning of the tribal court system. However, we recommend that U.S. Attorneys make greater use of the arrest alternative available to them in Indian cases. Such a change will require

additional resources and will be complicated by the time requirements of the Speedy Trial Act of 1974. The more important consideration, however, is that it will serve to impress upon the Indian community the determination of the federal government to respond decisively to serious violations of law.

2. High Declination Rate

Far more widespread and serious than concern about response time is the belief among Indians that the federal government simply declines to prosecute Indian cases because it is unwilling to devote federal prosecutive resources to anything but the most unusually serious offenses. The high percentage of declined cases was one of the principal concerns voiced by the National American Indian Court Judges Association in its study, "Federal Prosecution of Crimes Committed on Indian Reservations", Justice and the American Indian, Vol. 5, 1974. In addition the Secretary of the Interior formally requested Attorney General Saxbe to look into the problem and the Solicitor's Office of the Department as well as the BIA has in correspondence and meetings repeatedly expressed concern and criticism about the high declination rate and its effects on reservation life.

The Justice Department's performance of its prosecutive responsibilities with respect to Indian reservations has received close scrutiny by the task force. We have examined the statistics which are available regarding the prosecution of offenses under 18 U.S.C. 1152 and 1153. In conjunction with the Criminal division and the Civil Rights division we have reviewed a sampling of investigative reports supplied by the BIA of cases which were presented to various U.S. Attorneys and declined. We have also talked with people in the field, as well as at headquarters, from the BIA, U.S. Attorneys, FBI, and Indian tribes. It is our conclusion that U.S. Attorneys treat Indian country cases in the same manner as they treat other types of criminal cases. It is also our conclusion that to treat these cases in the same manner as other federal cases overlooks the role of state/local prosecutor which, in addition to being the federal prosecutor, the federal government, through the U.S. Attorney, must play.

In the cases submitted [illegible] by the BIA the reasons given by the U.S. Attorneys for declination were generally sound. In some cases where conduct was covered by its law and order code, declination was in favor of handling by the tribal court. Often there was insufficient evidence to prove guilt according to the applicable standard, i.e., beyond a reasonable doubt. In many cases the presence of alcohol raised serious doubts about the existence of the requisite element of criminal intent. In some cases there were legal problems with jurisdiction or with the criminal code, 48/ beyond the control of the investigative agency or the U.S. Attorney.

Statistical analysis on the subject of declinations is extremely difficult and unreliable. The U.S. Attorneys' Reporting and Docketing System maintained by the Justice Department includes figures on the numbers of matters filed by U.S. Attorneys under 18 U.S.C. §1152 and 1153, and their disposition. However, it does not include the number of matters presented to U.S. Attorneys under these statutes. The BIA maintains records on crime in Indian country, but they are maintained on a Uniform Crime Report index format. Their records do not reflect the statutory areas under which charges are presented to the U.S. Attorneys. The same is true for the FBI. Its records do not distinguish between crimes on Indian reservations (CIR) and crimes on other government reservations (CGR). Therefore, statistical analysis is imprecise at best. From what data are available, however, it appears that the declination rate for Indian cases is no higher than for other cases handled by U.S. Attorneys. In all categories of cases, Indian as well as non-Indian, U.S. Attorneys decline about 75% of the cases presented to them by investigative agencies.

Successful prosecution of Indian cases is extremely difficult. Victims are often unwilling to testify either because of alcohol related lack of memory of the details of the incident or because of reconciliation with the defendant. Communication

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48/ The most common criminal code problem is the unconstitutionality of certain sections of the Major Crimes Act dealing with aggravated assault offenses, due to disparity in punishment between Indians and non-Indians. See discussion at page ____, infra. There are also other problems with the Major Crimes Act, e.g. it does not include many common felonies, notably sodomy and kidnapping.

is difficult due to language and cultural differences. Indians usually regard federal court as a distant and foreign institution and may seek to avoid having anything to do with it. U.S. Attorneys are committed to bringing cases they can win. Regardless of the seriousness of the offense, Indian cases present a range of problems any one of which often defeats successful prosecution. Against these odds, it is difficult for a U.S. Attorney to justify great expenditures of time given the competing demands on his resources.

The concept of prosecutorial discretion is little understood by the populace at large; it is not surprising that it is not understood in Indian communities. Federal prosecutive resources are limited and a selection process must be employed in order to reduce the number of cases presented by investigative agencies. There are numerous factors involved in the determination of whether or not to prosecute a given criminal case. An experienced prosecutor makes these determinations based upon a combination of factors. One U.S. Attorney, in discussing prosecution of Indian cases, listed the following to indicate the range of factors involved in determining whether or not to bring a case:

(a) Time and expense of prosecution compared to the seriousness of the offense, given the fact that an indigent defendant can force the expenditure of practically unlimited amounts of government funds for his defense.

(b) Can a jury be pursuaded to convict?

(c) Will a trial court dismiss the case at some stage for legal reasons?

(d) Will the appellate court system affirm the conviction?

(e) Quality of the investigation involved.

(f) Ability of the witnesses accurately to relate the events.

(g) The criminal record of the defendant.

(h) The seriousness of the offense.

(i) Can the case be better handled by another court or administratively?

(j) Is the dispute one which should be handled in the criminal courts at all?

(k) Appearance and attitude of the defendant.

(l) Will the impact of the prosecution be lost because of the need for an interpreter?

Prior to the U.S. Attorneys Conference on Indian matters in January, 1975, BIA or tribal law enforcement authorities were not advised of declinations. As a result of the discussions at that meeting, the FBI was requested to issue instructions to the appropriate field offices directing that in all declined CIR (crime on Indian reservations) cases, a copy of the FBI's declination confirmed letter, which it sends to the USA, be also sent to the BIA superintendent for the reservation involved and the BIA special officer where one exists. Since many federal declinations are made in favor of tribal prosecution, this procedure has eliminated one aspect of the communication problem between U.S. Attorneys and tribes.

In addition, increased discussion within the Department of prosecution of Indian cases has caused greater sensitivity among U.S. Attorneys to their Indian constituents. Several U.S. Attorneys have recently met with tribal leaders in their districts in an effort to increase communication and contact.

However, these efforts notwithstanding, what we face in the prosecution of crimes occurring in Indian country is a fundamental difference in goals and objectives on the part of the managers of the federal system, the prosecutors, and the consumers of that system, the Indians. The managers are faced with heavy competing demands against which they must weigh Indian cases. As a general rule they prosecute cases in which the government has a good chance to win. Indian cases by their very nature are extremely difficult to win and are atypical of the kinds of cases usually brought in federal court. The consumers, on the other hand, look to the federal government to take action against those who threaten the community's safety and well being. The lack of reliability in prosecutorial

decision making is a matter of ongoing bitterness and lack of trust. One tribal judge commented, "The U.S. Attorney in this district has never brought a proseuction against a felony crime committed on this reservation that I can remember." A BIA special officer commented that, "Last year there were 220 serious criminal cases on this reservation presented to the U.S. Attorney. He prosecuted four of them."

While a review of the available evidence demonstrates that there is no conscious or systematic discriminatory handling of Indian cases, it appears that current federal practices and standards applied in determining declinations in Indian cases have created a serious problem for the overall maintenance of law and order on reservations and have undermined the respect and confidence which the Indian people feel in the federal government's efforts to respond to the growing crime rate. Stated succinctly, Indian communities feel that the federal government is doing little or nothing to solve the crime problem. This fact alone should be of serious concern. At a minimum there has been a breakdown in communication between the Justice Department and Indian communities. At a maximum, the federal government is exacerbating the reservation crime problem and undermining Indian confidence in a system of laws by prosecuting so few offenders.

3. Improved Prosecution of Indian Cases

Solutions are elusive, long-term and unreliable. Many people who have had extensive day-to-day experience with these problems feel that the only long-term answer is for state criminal jurisdiction to be extended to Indian reservations. It is the state which by tradition and resources has the ability to respond most effectively to the types of criminal cases and problems which confront Indian people. The federal government is not in the business of handling "local crime" or "street crime" situations.

The historical, political, and philosophical imperatives which motivate the Indian people and federal Indian policy today do not lead toward a greater role for the states in Indian affairs. To Indians, state governments are the traditional enemy. States are regarded as not only a practical but an ideological threat to tribal sovereignty and to the status of tribal governments as "domestic dependent nations".

During the foreseeable future, solutions other than those which involve turning to the states must be sought.

Improvements require changes and cooperation on the part both of the federal government and Indian tribes. The Indian community must face the reality that commission of a crime is not the only important consideration which must be presented in order to prosecute. Furthermore, prosecuting cases federally will not erase the crime problem.

The primary challenge of reservation law enforcement is for tribal governments to perform the role played by state and local governments in other areas. To do so will require vast improvements in tribal police and court capabilities. If tribes do not do the job, either the federal government or, with federal approval, state governments will. Either alternative is, and should be, unacceptable to Indian tribes, if self-determination is a serious, viable goal.

. . . . . There is much to be done. Updated, comprehensive law and order codes must be drafted, enacted, and enforced. Tribes must take steps to comply with the Indian Bill of Rights of 1968 which is presently either widely overlooked or systematically disregarded. This is particularly important if tribes are to have a realistic chance of exercising any jurisdiction over non-Indians. Tribes must place a high priority on good quality appointments to tribal judgeships. Turnover of tribal judges and police is too high. An increase in salaries and additional training is needed in both fields. Checks and balances within tribal governments must be developed so as to insulate the tribal judicial branch from political influence. With the passage of the Indian Self-Determination Act of 1975 large amounts of money will be available to tribes on a contract basis for law enforcement purposes. The BIA must develop incentives and guarantees which will insure that the tribes spend this money wisely while at the same time allowing latitude for tribes to develop programs suited to their particular needs.

To such a massive effort the federal government must offer cooperation, assistance and support. Although the Department of Justice is not systematically treating Indian cases differently from other cases, the effect of that treatment within Indian communities is different and far more negative from the effect of

declinations in other areas where cases not prosecuted by the federal government are usually prosecuted by the state. Whenever a reservation crime is anything more than a petty offense appropriate for disposition in tribal court, prosecution in federal court is the only recourse. Failure of the federal government to prosecute means that the case is not prosecuted at all.

To continue to handle Indian cases in the same manner as other cases is to overlook the dual role of federal as well as state/local prosecutor which the federal government must play in relation to Indian tribes. The situation has its closest analogy in the relationship of the federal government to the District of Columbia. The District of Columbia is also a federal enclave in which the federal government must play a state government role in the criminal justice area in a manner similar to that required of it with respect to Indian communities. The effort exerted in the 1960's to reform and revamp D.C.'s court system is an excellent example of the level of commitment required of the federal government in regard to the Indian criminal justice system.

Actions Taken

Through the FBI, a system has been initiated whereby U.S. Attorneys inform the BIA agency superintendent and special officer of declinations in Indian cases. Often the tribal court will institute prosecution under these circumstances.

Recommendations

The Department of Justice's performance in the prosecution of Indian cases, while not discriminatory, fails to incorporate the dual responsibility of state as well as federal prosecutor to Indian tribes. Tribal court systems must be vastly improved and strengthened in order to achieve the kind of criminal justice system which Indian people need. However, improved prosecution of Indian cases federally can be of major assistance in that effort. Since the bulk of Indian reservations are located in less than ten federal districts, the problem is of manageable size. The task force recommends that at least one additional assistant U.S. Attorney be assigned to each of the districts which have a

significant number of Indian cases. The sole responsibility of these assistants would be to work with the Indian cases and communities in the district toward the goal of more effective federal prosecution of Indian cases. In addition it is recommended that an Indian desk in the Criminal Division or a similar headquarters coordinating staff (see "Coordination of DOJ Indian Matters," infra.) be created to provide Departmental support and liaison to the assistants in the field. Responsibilities would include:

(a) Establishing better communication and coordination among all elements of the federal criminal justice system and Indian tribes;

(b) Working with FBI agents and FBI training personnel to develop a greater degree of specialized expertise on Indian law and reservation investigations among agents assigned to reservation areas;

(c) Working with BIA and FBI investigators to insure effective, thorough presentment of cases to U.S. Attorneys;

(d) Developing standards of prosecution for Indian cases which reflect the Department's role as state as well as federal prosecutor;

(e) Developing ways to gain greater cooperation from Indian people in the prosecution of cases including the assignment of a representative of the tribal government to work with the U.S. Attorney's office in overcoming language and cultural barriers, and to keep the tribe advised of the status of cases; 49/

(f) Institute methods for using the magistrate system more effectively so as to favor making arrests over seeking indictments and for diverting federal misdemeanor cases to magistrate court for disposition.

49/ The U.S. Attorney for the District of Utah has initiated such a system.

(g) Involving the federal courts in the effort to make justice less remote to Indians by periodically sitting in areas near reservations and increasing the numbers of Indians on juries;

(h) Reviewing and updating Departmental directives for FBI intelligence gathering activities on Indian reservations;

(i) Assisting tribes in their codification of tribal law so as to create a coherent scheme of federal tribal offenses; and

(j) Assisting the Department in developing reasonable legal and legislative approaches to Indian jurisdiction and related issues.

D. Tribal Courts

Tribal courts are the least developed, yet potentially the most important component of jurisdiction over Indian reservations. The great bulk of offenses occurring in Indian country are handled by the tribal courts. Where a defendant can be charged in either federal or tribal court, the U.S. Attorney will often decline prosecution in favor of tribal court action. Tribal courts play an important role in the Indian criminal justice system and understanding their development, problems, and potential is central to an assessment of where the system should be going.

Tribal courts exist by virtue of the inherent sovereignty of Indian tribes. They do not derive their power from the federal government, though they are limited by it. At one time, most tribal courts were created and operated pursuant to regulations promulgated by the Bureau of Indian Affairs. These courts, 50/ with judges appointed and paid by the BIA, have declined in numbers in recent years as most tribes, in the move for tribal sovereignty, have acted to set up their own courts free from BIA control. Today, of the approximately 110 tribal courts, only about twenty are Courts of Indian Offenses.

50/ The reference is to Title 25 of the Code of Federal Regulations.

Tribal court criminal jurisdiction is limited by federal statute to crimes punishable by a maximum of six months in prison and $500 fine.51/ Review in federal court is limited to that available by the writ of habeas corpus. Civil jurisdiction is unlimited, and there is no provision for review. Most tribes limit criminal jurisdiction to cases involving tribal members or other Indians. Increasingly, however, tribes are amending their tribal codes to assert jurisdiction over all persons, including non-Indians, on the reservation. This trend is becoming a source of additional strength for tribal court systems but it is also increasing tension between Indians and the states in which they reside in some instances.

Tribal courts share jurisdiction with federal and state courts. Jurisdiction is overlapping and often ambiguous leaving each of the components of the system uncertain as to the extent of its authority. It is unclear, for instance, whether tribal courts may exercise jurisdiction over non-Indians. It is also unclear whether tribal courts have concurrent jurisdiction with the federal government over the 13 felonies set forth in the Major Crimes Act, 18 U.S.C. §1153. With the exception of the 1968 Civil Rights Act, which limits punishment and requires certain procedural protections, there is no federal statute which defines the jurisdiction of tribal courts. As a general rule, tribal courts handle only minor or misdemeanor-type offenses and federal courts handle only major crimes and those misdemeanors which involve non-Indians. Except in those states where partial or complete jurisdiction has been acquired pursuant to Public Law 280, state court jurisdiction exists only over reservation crimes in which both the offender and the victim are non-Indian.

With federal jurisdiction limited to 13 major crimes and state jurisdiction remaining, with few exceptions, of negligible scope, tribal governments have found themselves vested with all remaining authority for the maintenance of law and order on

51/ 1968 Civil Rights Act, 25 U.S.C., Sec. 1302. S.1, the proposed comprehensive revision of the Federal Criminal Code, stipulated an increase in the fine portion of tribal court jurisdiction to $10,000. The Indian jurisdiction portion of S.1 has recently been removed and will be considered by the Congress as separate legislation. (See discussion on jurisdiction, supra.)

the reservation. Over time, this system has brought before tribal courts a complex case burden which exceeds the training and facilities available to tribal judges. Compounding the problem is the enormous increase in numbers of cases brought before the Indian judiciary in recent years. Over a hundred thousand cases are currently handled by tribal courts annually.

Tribal courts operate in a manner similar to Justice of the Peace courts or other courts of limited jurisdiction which exist in state systems. As a rule the judges have no formal legal background. Procedures are rudimentary. The appearance of attorneys is unusual and jury trials are rare. Tribal courts are often enmeshed in the internal politics of the tribe. Separation of powers is often a foreign concept. Tribal judges are usually appointed by the tribal chairman and often serve at his pleasure. In some cases, the tribal judge is under the control of the chief of police. Pay is poor and turnover is high. Courtroom facilities and record keeping systems are usually inadequate or non-existent. With a few notable exceptions, tribal courts are not capable of complying with the 1968 Civil Rights Act which extended to Indian tribes most of the criminal procedural guarantees mandated by the Bill of Rights.

Tribal court needs include: (1) improved training for tribal court judges; (2) increased salaries; (3) mechanisms to insure separation of powers and reduced political interference; (4) modernized criminal codes; (5) improved record keeping systems; (6) improved courtroom and detention facilities; and (7) access to legal expertise.

These deficiencies notwithstanding, it is important to emphasize that tribal courts are, in many cases, no different from Justice of the Peace courts, municipal courts, or other courts of limited jurisdiction which exist in state systems. Indian leaders are rightfully sensitive to criticisms of tribal courts which presume that their problems are unique to Indian communities.

Special mention needs to be made of the role of the BIA special officer vis-a-vis the tribal judicial system. Almost all Indian reservations which are within federal law enforcement jurisdiction have assigned to them a criminal investigator or special officer employed by the BIA. The special officer, in addition to his duties as criminal investigator, acts as administrator or overseer

of reservation law enforcement activities. Often he is the de facto chief of police and may even have the formal title of police commissioner or director of law enforcement. Although the BIA is aware of the need to maintain a separation between police and courts, as a practical matter the special officer is often the chief legal adviser to the tribal judge. When the tribal judge has a problem, typically he asks the special officer what to do. This is not surprising as most tribes do not have a full-time tribal attorney on the reservation and the BIA special officer is the person on the scene with the most legal or at least law enforcement experience. Some BIA special officers serve on the tribal committee which chooses the tribal judge.

Even more important is the fact that on some reservations, the agency special officer, in effect, pays the salary of the tribal judge. The special officer wears two hats: he is a criminal investigator and an administrator. In his capacity as administrator, he is in charge of all BIA services and funding to tribes which relate to law enforcement, including the court system. On those reservations where the BIA funds the court, either directly or through contract with the tribe, the special officer develops and administers the budget. Thus in a very real sense, the most important figure in the reservation police system also controls the purse strings for the tribal judiciary. The special officer bridges the gap between police and courts in a fashion which seriously undermines the traditionally desired separation of powers.

The BIA is aware of the separation of powers problem. It has cautioned its special officers on the need to exercise restraint in providing legal advice to or discussing particular cases with tribal judges. In addition, the BIA has recently transferred tribal courts out of the Division of Law Enforcement Services and placed it under the Division of Tribal Government Services. However, this transfer is a paper transfer only. The tribal courts function in the division to which it has been transferred is not staffed or funded. Neither has the transfer had an effect in the field where special officers continue to have tribal courts as part of their budgetary responsibilities.

Tribal courts have been a low priority item in the reservation law enforcement system.52/ Both the tribes

52/ Law enforcement itself as mentioned earlier, has been a low priority item within the BIA.

and the BIA have tended to think of law enforcement in terms of police and jails. Tribal courts are in an embryonic stage of development and have a long way to go before they will be fully capable of satisfying the needs of their communities and complying with federal law. However, the situation is not devoid of encouraging signs. A number of factors point toward the improvement of tribal courts:

(1) Tribes are beginning to understand the central role that courts play in self-government. The movement for Indian sovereignty has focused attention on tribal courts as the principal mechanism for asserting that sovereignty.

(2) Congressional and administrative policy of self-determination has encouraged tribes to develop institutions to handle their own affairs at all levels, including adjudication of disputes.

(3) The BIA is beginning to accord some priority to judicial services and has allocated funds from its FY 1976 appropriation to each tribe on a contract basis to pay the salaries of tribal judges and attendant personnel.

(4) LEAA has provided funds in support of the Indian judiciary; most significantly, it has funded a tribal judge's training program sponsored by the National American Indian Court Judges Association and a National Tribal Court Reform project in conjunction with the BIA to assist in the transfer of tribal court programs from the BIA's Division of Law Enforcement Services to its Division of Tribal Government Services.

(5) Through a variety of sources, tribes have obtained the benefit of legal services attorneys to advise them on the various problems involved in setting up and operating tribal courts, revising tribal codes and constitutions, and other features of a viable judicial branch of government.53/

53/ Law schools are beginning to turn out significant numbers of Indian attorneys who are either returning to the reservation or are available to tribes through Indian law centers. Ten years ago Indian lawyers were almost non-existent. See generally Strickland, "Educating Indian Lawyers is Not Enough," 1972 Student Lawyer 4; Strickland, "Take Us by the Hand: Challenges of Becoming an Indian Lawyer" 2 Am. Ind. L. Rev. 47 (1974).

Actions Taken

LEAA has funded some important training and assistance efforts toward strengthening tribal court systems.

Recommendations

A strong, competent tribal court system is an essential element in attaining effective reservation law enforcement. While federal performance in the prosecution of crimes in Indian country must be improved, the effects would not be significant absent a greater emphasis on improvements in tribal court systems. While most of the problems associated with tribal courts are beyond the control or responsibility of the Justice Department and must be resolved by the tribes and the BIA, the Department is highly dependent on progress in this component of the Indian criminal justice system in order to carry out its own responsibilities effectively. Therefore the Department should fully develop the avenues available to it in support of an improved tribal court system including the following:

1. Expand the proportion of its total law enforcement funds for Indian tribes which LEAA grants to court programs;

2. Support legislation to increase fines which can be imposed by tribal courts;

3. Propose legislation which would revise and clarify the jurisdiction of federal, state, and tribal courts over criminal and civil matters arising on Indian reservations; and

4. Cooperate with the Department of Interior in providing technical advice to tribes on the design and operation of the judicial branch of tribal governments.

E. Civil Disturbances on Indian Reservations

The frustration, bitterness and militancy which exists on many Indian reservations today has been the cause of serious civil disturbance situations in recent years. Most notable is the Wounded Knee takeover in 1973 which resulted in the longest civil disturbance in our history. However, the factors which spawned Wounded Knee have not disappeared and exist on several reservations today.

Many observers believe civil disturbances will increase as the Indians develop a greater sense of political strength in the face of government lethargy. Recent occupations, e.g. Shiprock, New Mexico; Yankton, South Dakota; Eagle Bay, New York; and Gresham, Wisconsin, suggest that Indian civil disturbances will continue to pose a problem. Since the Department of Justice is vested with authority to coordinate all civilian activities in response to civil disturbances", 54/ the task force wished to insure that the Department is prepared to deal with reservation disturbances.

Currently the Department's civil disturbance procedures concentrate on domestic disorder in areas where primary law enforcement responsibility rests with state and local government. With the exception of the District of Columbia, the plan does not cover federal enclave disturbances at all.

The Department was subjected to severe criticism by the local press in South Dakota for its handling of the Yankton incident which occurred in early May and involved occupation of a meat packing plant on the Yankton reservation. "Federal indecision" was said to have prompted the state law enforcement authorities to take the matter into their own hands although the reservation is a federal enclave and not within the state's jurisdiction. Shortly after the Department decided to mobilize FBI-SWAT teams, the state police tear-gassed the plant and arrested the occupants. Internally the matter was handled without a clear sense of the respective roles of various units of the Department or of necessary lines of communication. The incident highlighted the need for guidelines directed toward the special legal and tactical problems posed by disturbances on Indian reservations.

Any civil disturbance on an Indian reservation brings into play a number of units of the Department; FBI; U.S. Marshals; Community Relations Service; Civil Rights and Criminal divisions; and U.S. Attorneys. Members of the task force have conducted a series of meetings with concerned units of the Department and have prepared recommended guidelines which will insure a speedy, coordinated response to future Indian disturbances. A draft of the guidelines, entitled "Special Procedures

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54/ Department of Justice memorandum "Revised Civil Disturbance Procedures," May, 1974.

to be Implemented for Civil Disturbances Occurring on Federal Indian Reservations", has been circulated and approved by the relevant units of the Department and are ready to be issued by the Attorney General pending whatever decision is made regarding coordination of Indian matters in the Department. This subject is treated later in the report.

Actions Taken

Guidelines for DOJ handling of future civil disturbances have been prepared by the task force and approved by relevant units of the Department.

Recommendation

Although federal reservation disturbances have elements in common with other civil disturbance situations, they are unique to the extent that (a) in addition to the general laws of the United States, special laws are involved which depend for their applicability both on the race of the offender and the victim; (b) jurisdiction between federal, state, and tribal governments is complicated and often uncertain; (c) concerns and capabilities of tribal governments must be considered; (d) the reservation setting often involves a non-Anglo culture with attendant communication and community relations problems; (e) it is often not possible to rely upon local (tribal or BIA) police; (f) there are special units of the Department which need to be consulted where Indian matters are concerned, e.g., the Office of Indian Rights; and (g) the Indian community is making increased use of confrontation tactics to voice political views and create public awareness of grievances. The task force recommends that the Attorney General issue guidelines which pertain specifically to Indian reservations and which reflect the special circumstances they present.

F. Law Enforcement Crisis on Pine Ridge Reservation

The Pine Ridge reservation is located in the southwestern part of South Dakota and has a population of approximately 11,500 56/ spread over 2.7 million acres. It is the home of the Oglala Sioux tribe which is among the poorest of the Indian tribes in the United States.

55/ The Office of Management and Finance is currently updating and revising the DOJ Civil Distrubance Manual which is to cover all forms of civil disturbance. The Indian reservation guidelines would presumably be incorporated in the general manual.

56/ March, 1973, BIA figures.

It is also the home of some of the most militant Indian leaders and people in the nation, and it became, in spring, 1973, the scene of the longest civil disturbance situation in American history, which took place at the village of Wounded Knee, South Dakota.

Conditions at Pine Ridge have deteriorated since occupation of Wounded Knee so that today there is a total breakdown of law and order on that reservation. Murders and other incidents of violence and violations of civil rights occur regularly. A special grand jury has issued a number of indictments including charges against the current tribal chairman. The grand jury also issued a preliminary report severely criticizing the federal government's handling of reservation law enforcement and suggesting that law enforcement responsibilities be consolidated in the Department of Justice. The reservation is highly politicized and factionalism has created an atmosphere that frequently erupts into violence. Many reservation residents are armed and few have the courage to travel the roads at night. Vigilante groups have appeared and the last vestiges of community confidence in a system of laws has vanished.

Citing the joint responsibility of the Interior and Justice Departments for law enforcement on Indian reservations, then Interior Secretary Morton wrote to the Attorney General on March 21, 1975 stating that "this continued breakdown of law and order on this Reservation and the seeds of the precipitating factors require our immediate attention to avoid the continued erosion of justice on Indian reservations." He suggested that the two Departments meet to discuss ways to resolve existing difficulties. The Attorney General requested the Office of Policy and Planning in its capacity as chair of the Department of Justice Task Force on Indian Matters to coordinate a Departmental response to the Pine Ridge situation.

On April 9, 1975, the Director of the Office of Policy and Planning; the Assistant Attorneys General of the Civil Rights and Criminal divisions; the U.S. Attorney for the District of South Dakota; and representatives from the FBI; U.S. Marshals Service; and Executive Office for U.S. Attorneys, met with Interior Department officials to discuss the crisis at Pine Ridge. The proposals developed at this meeting are outlined in Attorney General Levi's letter of April 21, 1975 to Secretary Morton (Tab G).

Some of the recommendations have been implemented. Others have not. Progress to date is as follows:

-- At the Department's urging, the federal judiciary has assigned an additional judge to the district for a period of 10 weeks in order to clear the backlog of Indian criminal cases.

-- Additional Assistant U.S. Attorneys have been assigned to the district. In addition, the staff of AUSAs has been temporarily supplemented in order to clear the backlog of criminal cases which the additional judge will hear.

-- Because of inadequate facilities and general lack of security, the federal judge for the Central Division of the district of South Dakota has refused the U.S. Attorney's request to have a Magistrate schedule preliminary criminal proceedings one day a week on the Pine Ridge reservation.

-- The FBI has established a temporary office in Chadron, Nebraska, a short distance from Pine Ridge and has increased the number of special agents assigned to the area.

-- The Department of Interior declined the Justice Department's offer to send U.S. Marshals Service personnel to the reservation.

In addition, the Department of Interior has taken a number of steps to improve the law enforcement situation at Pine Ridge. A special commission appointed by the Secretary was sent to the reservation to determine the causes of the current crisis and to develop recommendations. The commission submitted its final report in June, 1975. Based on information developed by the commission and the Bureau of Indian Affairs, the Interior Department increased the number of BIA police on the reservation, provided new police cars, uniforms, and other equipment to the BIA police force, and replaced the BIA superintendent for the reservation as well as the chief of police. Interior also increased funding to the tribal court and has attempted to imporve the delivery of social services to the reservation.

However, the law enforcement situation at Pine Ridge has not improved. Rather, conditions continue to deteriorate. On June 26, 1975, two FBI agents were shot and killed on the reservation while attempting to serve arrest warrants. An

Indian was also killed in the shoot-out which followed the death of the FBI agents. The FBI has launched a massive investigation, which is still continuing. The large number of FBI agents on the reservation has increased tensions and has resulted in numerous complaints of harrassment, illegal searches, and general disruption of the reservation. The extreme factionalization of the reservation community persists as does the high crime rate.

As a result, South Dakota Senator James Abourezk met with Attorney General Levi and Interior Secretary Hathaway in early July, 1975, and requested that the U.S. Marshals Service (USMS) be placed in charge of criminal law enforcement activities and crime prevention programs at Pine Ridge. In response to that request, the Justice Department prepared and forwarded to the Interior Department for consideration a plan detailing how the Abourezk proposal could be implemented. The Interior Department's response was: (1) U.S. Marshals shall be utilized in a law enforcement capacity at Pine Ridge at this time; (2) additional steps will be taken by Interior to upgrade and improve the law enforcement capability on the reservation. The Justice Department has advised Interior that it does not believe that this is a sufficient response to meet the immediate and critical law enforcement needs of the reservation and that the Justice Department remains willing to assume responsibility for restoration of order at Pine Ridge in accordance with the plan prepared by the Marshals Service.

Actions Taken

1. An additional judge has been assigned to the district of South Dakota at the request of the Department to clear the backlog of criminal cases. The Department has assigned additional prosecutors to the district to assist in this effort.

2. The Department has offered the assistance of the U.S. Marshals Service to the Department of Interior as a means of restoring law and order to the reservation.

Recommendation

The Pine Ridge situation is not an isolated case. Rather it is an example of a more advanced state of the alarming disarray that exists on many reservations today. The conditions which exist at Pine Ridge, Wounded Knee

notwithstanding, exist elsewhere. If decisive action is not taken to rebuild confidence in the Indian criminal justice system, the Pine Ridge story could cease to be unusual. The task force recommends that the Department continue to monitor developments at Pine Ridge and participate in further efforts to develop a joint program with the Department of Interior.

COORDINATION OF INDIAN MATTERS IN DOJ

Although the mission of the task force was to review and make recommendations on substantive issues relating to Indian work, we found that a considerable share of our effort was expended in acting as a coordinator and focal point within the Department for an unanticipated stream of Indian matters and problems which arose.

Among the ad hoc functions we handled are the following:

1. Membership on an inter-agency task force on the Indian census. The census is to provide a more accurate data base for disbursal of federal revenue sharing funds and for program planning in education, health and other services.

2. Assisted in drafting legislation on Freedom of Information Act amendments seeking to exempt the Department of Interior, in its capacity as trustee, from requirements to divulge informa- about tribal assets and resources.

3. Testified before the Congress on matters of Indian law enforcement and jurisdiction and worked with representatives of the Department of Interior and the Congress on Indian Trust Counsel Authority legislation.

4. Coordinated a series of meetings and statements between DOJ and the Department of Interior regarding law enforcement on the Pine Ridge reservation.

5. Assisted the Office of the Deputy Attorney General in monitoring and responding to several Indian civil disturbance situations.

6. Frequently met with national Indian organization representatives, tribal leaders, tribal attorneys, and Indian experts concerning (a) complaints of FBI harrassment and improper intelligence activities, and (b) improved legal representation and law enforcement, as well as on specific cases or problems.

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Therefore, in addition to presenting findings and recommendations on the substantive areas of review, the task force wishes to call attention to the need for improved coordination of Indian matters in the Department and to make recommendations on how to meet that need.

Currently, every division, except Antitrust, has some litigative responsibilities concerning Indians. In addition, the Solicitor General's Office processes a significant number of appeals concerning Indian related issues. The Land and Natural Resources division handles the greatest volume of Indian litigation.

Division	Approximate Man-Years
Civil	*
Civil Rights	
Office of Indian Rights	15 1/2
Criminal	
General Crimes	2 1/4
Land and Natural Resources	
General Litigation	6
Indian Claims	30
Indian Resources	15
Tax	*
Solicitor General	1
	69 3/4

*Negligible

Neither the Civil division nor the Tax division have sections which devote any significant portion of their time or resources to Indian matters.

The Lands division's responsibilities toward Indians are stated at 28 C.F.R. §0.65 which generally places all civil litigation responsibility in that division, except for that delegated to the Civil Rights.

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division. Responsibility is currently apportioned among the General Litigation, Indian Resources, and Indian Claims sections.

The Criminal division's responsibilities toward Indians are implied at 28 C.F.R. §.55 which notes that the division is responsible for all prosecutions of federal crimes not otherwise specifically assigned. Currently, this responsibility is primarily handled by the General Crimes section which deals with the Indian country crimes enumerated at 18 U.S.C. §§ 1151-1165.

The Civil Rights division's responsibilities toward Indians are set forth at 28 C.F.R. §.50 which requires the division to enforce the general civil rights statutes as they affect Indians and to enforce the Indian Bill of Rights. Such enforcement includes the use of criminal and civil statutes. This division has the Office of Indian Rights as its principal enforcer.

The various offices of the United States Attorney also handle Indian litigation. The volume of Indian related litigation conducted by these offices as a whole is unknown. About 1/3 of the U. S. Attorneys have some Indian cases in their districts but the volume constitutes a significant portion of the case load in approximately 10 districts. 57/

In addition, the non-litigating units of the Department have important responsibilities in Indian matters. The FBI is involved in major crimes investigations on Indian reservations and maintains supervisory personnel for CIR (Crime on Indian Reservations) matters at headquarters. It also provides training assistance to the BIA in the field and through the National Police Academy at Quantico, Virginia.

57/ For example, in FY 74 eleven districts brought more than 10 cases under 18 U.S.C. §1153. They were: Arizona - 220; Minnesota - 11; Montana - 107; Nebraska - 44; New Mexico - 75; North Carolina, Western - 21; North Dakota - 72; Oregon - 15; South Dakota - 338; Washington, Eastern - 12; and Wyoming - 22.

LEAA has a national Indian desk and personnel in several regional offices who grant and administer a multi-million dollar program of assistance to individual tribes and Indian organizations in the criminal justice area. LEAA has been a resource of major significance and influence. Its mission is extraordinarily well suited to meet the needs of Indian tribes and the most common point of contact with the Department for most Indians will have been through LEAA and its programs. LEAA has developed an excellent Indian program and positive contacts and communication with Indian people. It is a source of expertise which should be far more extensively utilized by other units of the Department.

The United States Marshals Service has played a major role in past Indian civil disturbances and in reservation police training.

The Community Relations Service has been heavily involved in Indian civil disturbance situations and will be providing expertise on conflict resolution and negotiation in future police and tribal government training programs.

This fragmented arrangement has drawn a good deal of criticism from within the Department and without. The criticism falls mainly into two categories:

- Each Departmental unit and United States Attorney has differing policy views on how Indian matters should be handled. Instead of reflecting one view as the Department strives to do in most other areas, such as with tax or antitrust matters, we consistently treat Indian affairs differently depending on where the matter falls in the Department and who handles it. Our performance is inconsistent and not guided by a commonly understood philosophy or overall position.

- Representatives of other federal agencies, the legislative branch, Indian tribes and organizations, and members of the public commonly complain of fragmentation in the Department and the confusion it causes when

information or assistance is sought. There is no principal policy level point in the Department where Indian issues are addressed on behalf of the Attorney General or through which the Department speaks to other parts of the government or the public.

The present structure has proven its lack of effectiveness in several recent circumstances. A serious example was the Wounded Knee takeover in which many parts of the Department were involved and in which the Department was clearly without an Indian policy or policy maker with background in Indian matters. The subsequent prosecutions suffered largely due to a lack of informed Departmental leadership and coordination.

Litigation also suffers due to inconsistent position being taken in different parts of the Department. For example the position that the United States Attorney in Montana took in United States v. Blackfeet Tribe, (Montana) was diametrically opposed to the position being taken by the Solicitor General in United States v. Mazurie, (Wyoming) in the Supreme Court. In United States v. Blackfeet Tribe, the United States Attorney was arguing that tribes were similar to social organizations while the Solicitor General was arguing in Mazurie that such a notion was specifically repudiated in a long line of federal cases which recognized Indian tribes as governmental entities.

More serious, however, is the example of Oliphant v. Schlie, a case now before the Ninth Circuit Court of Appeals in which we have been asked to file an amicus brief and in which we represented the Department of Interior as a party at the district court level. The case presents issues of tribal jurisdiction over non-Indians which are fundamental questions of law and policy and which have not been litigated to date. The U. S. Attorney in the district wrote the Lands division requesting guidance. This was appropriate since Lands has traditionally handled matters of treaty and reservation land status. Because the issues were raised in the context of a habeas corpus petition, Lands passed the matter to the Criminal division. The U.S. Attorney was advised by the Criminal division to proceed with the case on the habeas corpus issue but was given no guidance on the jurisdiction questions. The facts and arguments were poorly developed at the district court level largely due to a lack of guidance from the Department.

Subsequently the case was appealed to the Ninth Circuit Court of Appeals. The Department of Interior, which earlier had identified the broad issues and asked that they be carefully considered at the district court level, requested that the Civil Rights division review the case and develop a government position on the jurisdiction questions for amicus purposes at the appeals level. Oliphant is not a civil rights case but rather a criminal case which presents jurisdictional issues evolving from questions of treaty and reservation land status, matters handled by the Lands division. However, the Civil Rights division developed the arguments from within the Department for Solicitor General consideration. The Solicitor General is currently faced with the decision of whether or not to file an amicus brief on important legal and policy issues in a case in which the government was a party at the district level but in which the record makes it extremely difficult to present a well crafted position.

Unfortunately, there is a case involving a major crimes violation on the Choctaw reservation in Mississippi running a similar circuit in the Department at this time. It involves similar issues which should be carefully analyzed at the outset and instead it is being passed from one division to another because no one is charged with overall responsibility to handle such matters. The situation is complicated by the fact that there are a list of statutes relating to Indians over which supervision is a subject of disagreement among the litigating divisions at this time.

The task force's experience in being called upon to play a line coordinating role combined with a record of deficiencies in past and present performance by the Department in handling Indian litigation and policy form the basis for the task force recommendation on improved coordination of Indian matters in the Department. Options for improving coordination are presented and discussed below. The task force has not made a recommendation on which option it believes to be most suitable.

Option A - Task Force and Deputy Attorney General Coordinat:

Under this option, the current organizational structur would be maintained with additional personnel assigned to certain U. S. Attorney offices and the Criminal division

as outlined in this report, see supra, to strengthen their efforts. The task force would be charged to develop recommendations on jurisdiction and administrative placement of reservation police responsibility and would, in addition, continue to provide coordination within the Department for Indian matters. Once the task force has finished its substantive work, the coordinating function would revert to the Office of the Deputy Attorney General as a permanent responsibility. The Deputy Attorney General would draw on the units of the Department with substantial Indian responsibilities and expertise to carry out this responsibility.

Discussion.

The strength of this approach lies in creating a focal point at a policy level (the Office of the Deputy Attorney General) within the Department for handling Indian issues. It would improve communication both within and outside the Department without the disadvantages of creating a new bureaucracy. Since the coordination function is necessary but does not present a heavy workload, this loose arrangement is suitable. It places decision making at an authoritative point in the Department and provides an overseer level of review to all parts of the Department, litigative and non-litigative. The Executive Office for U. S. Attorneys and the Lands and Criminal divisions support this option. The Civil Rights division and the Office of Policy and Planning oppose it. The other members of the task force have not taken a position.

The weakness of the option lies in discharging what are essentially line responsibilities through a committee and subsequently an office within the Department which is removed from daily involvement with the issues. The rightful role of the task force is to review the subjects before it, develop recommendations and disband. It should not be diverted into other areas. Responsibility for coordination should be brought to the Deputy Attorney General level only under unusual circumstances and in difficult situations. The Office of the Deputy Attorney General is an inappropriate place from which to carry out ongoing operational responsibilities and coordination would suffer from a lack of continuity and institutional memory inherent in the Office of the Deputy Attorney General. In addition, it is unlikely that any but the most pressing matters would reach the Deputy Attorney

General with the result that no one would be in charge on a daily basis much as at present.

Option B - Consolidation of major litigative functions into one division under a Deputy Assistant Attorney General

Under this option the Indian work currently performed by the Office of Indian Rights - Civil Rights division; General Crimes section - Criminal division; and Indian Resources section - Land and Natural Resources division would be consolidated to create a new unit in the Lands division under the leadership of a Deputy Assistant Attorney General. Section chiefs would be designated for each of the unit's areas of responsibility (civil rights, Indian resources, criminal) and the division would be renamed to reflect Indian work as an area of major responsibility, e.g., Natural Resources and Indian Affairs division.

Discussion

The strength of this option lies in providing a structure through which a continuing institutional responsibility can be discharged. It merges our major legal duties under one policy level head in the division which currently has the greatest share of those duties. It thereby makes clear that someone is charged with speaking on behalf of the Department in Indian matters and that problems and deficiencies relating to our Indian responsibilities will be brought to the attention of an Assistant Attorney General, Deputy Attorney General and Attorney General as necessary. Although it does not combine all Indian functions, it would provide a platform from which to significantly strengthen the level and depth of communication and coordination with other operating Indian programs in the Department and would handle all but the most serious matters at an appropriate line level in the Department. The Civil Rights division and the Office of Policy and Planning support this option. The Executive Office for U. S. Attorneys, Lands and Criminal divisions oppose it. The other members of the task force have not taken a position.

The weakness in this option lies in the problems and disadvantages of creating a new bureaucracy. Some fragmentation would continue to exist. Principally, LEAA

and FBI Indian work would still be handled by those units and Supreme Court Litigation would necessarily remain with the Solicitor General. Combining civil and criminal work under the Lands division might result in a lessening of quality and expertise on civil rights and criminal matters since they would no longer be in the divisions charged with primary responsibility in those areas. Better performance should be achieved not by consolidating but by strengthening the respective units of the Department with Indian responsibilities as has recently been done by creation of a new Indian resources section in the Lands division and as has been recommended, see supra., regarding the Criminal division and U. S. Attorneys. The serious need for coordination in the Department involves other units of the Department at least as much as the litigating units. Thus improved coordination would be only partially assured through this option. The Office of the Deputy Attorney General and the Attorney General would still be required to be involved with issues of major policy such as Indian civil disturbances, reservation crime, and inter-agency problems.

SUMMARY AND RECOMMENDATIONS

This report has outlined the work of the DOJ task force on Indian matters to date, made recommendations for change, and identified two areas which require further examination. This chapter summarizes the report and presents a restatement of the recommendations for action made by the task force.

Summary

Indians have a unique and special legal relationship with the federal government entitling them to protection and support. The relationship has been likened to the responsibility owed by a guardian to his ward. 58/ Numerous cases, treaties and statutes have described this special relationship and the obligations which accompany it. Tribes are sovereign nations with respect to internal self-government and are not limited by any of the provisions of the Constitution which are applicable to the states and the federal government. 59/ The power of self-government derives not from Congressional delegation but from the inherent power of sovereignty. This quasi-sovereignty affects all aspects of the federal government's relationship with Indians and makes Indian law exceedingly complex, particularly with respect to Indian rights vis-a-vis state governments and private parties.

58/ The legal authorities which establish this relationship are summarized in, Chambers, "Judicial Enforcement of the Federal Trust Responsibilities to Indians" 27 Standard L. Rev. 1213 (1975).

59/ Talton v. Mayes, 163 U.S. 376 (1896). However, in 1968 Congress passed the Indian Civil Rights Act, 25 U.S.C. Section 1301 et seq. (1970) which extended to Indian tribes some of the protections contained in the Bill of Rights of the U.S. Constitution. The application of these provisions in the Indian context remains an area of intense dispute. See e.g., "The Indian Bill of Rights and the Constitutional Status of Tribal Governments" 82 Harvard Law Review, 1343 (1969); Zion "In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act," 20 S. Dak. L. Rev. 1 (1975); Raismes, "The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government" 20 S. Dak. L. Rev. 59 (1975).

The role of trustee for Indian property and welfare is carried out primarily by the Department of Interior. The Department of Justice is the attorney for the trustee and, by statute, for the tribes themselves. In this capacity it should, insofar as possible, aid the Department of Interior in its obligation to foster the legitimate aspirations of Indian tribes.

Our direct responsibility involving Indians falls into three areas: (1) Indian natural resource litigation; (2) jurisdiction in Indian country; and (3) law enforcement on Indian reservations.

A. Indian Natural Resource Litigation

There are reserved for federally recognized tribes some 55 million acres of land in the United States. This land is held in trust by the United States for the benefit of Indian people. In no other area is the government charged with the fiduciary duty of representing the private interests of a particular group. In all other areas, the government is charged with advancing the national public interest.

In representing Indian tribes, the Justice Department finds itself in an inherent conflict of interest. It must also represent numerous federal agencies, notably the Bureau of Reclamation and the Corps of Engineers, whose interests are often adverse to those of Indian tribes.

The conflict of interest issue involved in Indian natural resource litigation was the first subject of review by the task force.

The task force recommended that there be created in the Lands Division a new section which would be responsible for trial and appellate litigation for the United States in its role as trustee for the private rights of Indian people. In April, 1975, the Attorney General authorized implementation of that recommendation. Known as the Indian Resources section of the Land and Natural Resources Division, it has since been staffed with nine attorneys, including a section chief, and six clerks. Cases are currently being transferred to the section from other sections in the division. The section does not have responsibility for appellate work on its cases.

B. Jurisdiction in Indian Country

Federal policy toward Indians has vascillated widely over the years. The lack of a long term consensus on whether Indians should be assimilated or remain culturally distinct has made the legal status of Indians complex and uncertain. The law defining civil and criminal jurisdiction in Indian country between the United States, the state, and the tribe is particularly confused and the source of many of the law enforcement problems Indians face.

In the coming months, the Department will be faced with jurisdiction issues both in court cases and in hearings on proposed legislation. The questions are difficult legally and diverse views on them exist within the Department. The task force has initiated the lengthy process of developing a Departmental position on Indian jurisdiction issues. However a full discussion of jurisdiction in Indian country and proposals for an administrative or legislative position have not yet been formulated. It is important that the concerned units of the Department develop a coherent approach to Indian jurisdiction issues so that the Department can provide leadership in the national debate on this issue which is now underway.

C. Law Enforcement on Indian Reservations

The federal government has jurisdiction over approximately 90 Indian reservations in which approximately 500,000 Indian reside. Large numbers of non-Indians also reside on these reservations. Law enforcement responsibilities are divided between the Department of the Interior and the Department of Justice. Within Interior, the Bureau of Indian Affairs, through its division of Law Enforcement Services, provides police and other law enforcement personnel for most of the Indian reservations which are within federal jurisdiction. A number of tribes provide their own tribal police. Within Justice, the FBI investigates major crimes which occur on Indian reservations and the U. S. Attorneys prosecute those crimes. In addition to the federal government and the tribes, states have limited law enforcement jurisdiction, pursuant to P.L. 280, which varies from reservation to reservation.

While recommendations for improving police service on the reservation will not be available until the joint study is completed, the task force has completed its review of the Department's direct reservation law enforcement responsibilities: (1) FBI investigation of major crimes, and (2) U.S. Attorney prosecution of Indian cases.

Pursuant to 18 U.S.C. section 1153, the federal government has jurisdiction over 13 "major crimes" 61/ committed by an Indian in Indian country. Intra-Indian offenses not covered by 18 U.S.C. section 1153 fall within the exclusive jurisdiction of tribal courts. The federal government also has jurisdiction over crimes committed in Indian country pursuant to 18 U.S.C. section 1152, which extends federal enclave law to Indian reservations and includes the Assimilative Crimes Act, which assimilates state law for those offenses not federally defined. 18 U.S.C. section 1152 specifically exempts intra-Indian offenses.

There is no clear division of labor between the FBI and the BIA with respect to investigation of crimes occurring in Indian country. The BIA has trained criminal investigators (special officers) on most reservations. These special officers conduct the initial investigation for the majority of serious crimes which occur on Indian reservations. Most U.S. Attorneys, however, will not accept the findings of a BIA special officer as a basis for making a decision on whether to prosecute. Instead, they require the FBI to conduct an independent investigation, often duplicatory of the BIA investigation, prior to authorizing prosecution. Until the FBI investigation is completed, offenders, typically, remain at large.

The BIA has submitted a formal request to the Department recommending that the BIA reassume primary responsibility for investigation of crimes occurring in Indian country as had been their tradition prior to the FBI's assumption of that role in the 1940's.

61/ The thirteen crimes are murder, manslaughter, rape, carnal knowledge, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny.

Law enforcement on Indian reservations is in serious trouble. The major crimes rate is 50% higher on Indian reservations than it is in rural America as a whole. The violent crime rate on Indian reservations is eight times the rural rate although the property crime rate is about half of the rural rate. The murder rate among Indians is three times that in rural areas while the assault rate is nine times as high. The number of cases brought under the Major Crimes Act, has risen nearly 30% in the past year. 60/ The percentage of unreported crime is higher on reservations than elsewhere suggesting that the actual situation is worse than the statistics portray.

Most Indian reservations receive totally inadequate police services given their size and extraordinarily high rate of crime. It is particularly embarrassing that this exists in an area of primarily federal responsibility. This is not a situation where the federal government serves as a model for other law enforcement efforts.

The day-to-day responsibility for reservation law enforcement rests with BIA and tribal police. BIA and tribal police are presently inadequately trained, paid or organized to meet reservation law enforcement needs. Although their budget has almost doubled for FY 76, there are many in both the Department of Justice and Interior as well as the Indian community who do not believe that the BIA, because of its predominant social service emphasis and tradition, will ever provide adequate law enforcement services to Indian reservations. The Departments of Justice and Interior, through the task force, have agreed to jointly examine the issue of where in the federal government the Indian law enforcement function ought to be placed. This study is the second major area requiring further attention by the Department.

60/ During FY 73, the number of defendants against whom federal court actions were initiated under 18 U.S.C. §1153 totaled 404. During FY 74, the number of defendants against whom court actions were initiated under 18 U.S.C. §1153 was 520, an increase of 28.7%.

Most U. S. Attorneys are willing to make greater use of BIA special officers and to accept cases directly from them or in joint presentations with the FBI. They are not willing, however, to dispense with the FBI. FBI agents in the field state that the quality of BIA special officers' investigations is generally very good and that their investigative activities are indeed duplicative. They believe that the FBI role could be limited to one of assistance with difficult cases, cases involving certain areas of technical expertise not available to the special officers, or cases which require investigation beyond the borders of the reservation.

Our second direct law enforcement responsibility, prosecution of cases, is one about which a wide gap exists between the expectations of Indian recipients and the goals of the government providers of the service. Indians believe the government, through the U. S. Attorneys, is doing an inadequate job. They believe the U. S. Attorneys decline such a disproportionately high percentage of Indian cases that serious crime on the reservation goes unpunished. U. S. Attorneys believe the Indians do not understand the limitations under which they operate. The atmosphere is one in which criticism and dissatisfaction are abundant and communication and mutual understanding are at a minimum.

Successful prosecution of Indian cases is extremely difficult. Victims are often unwilling to testify. Communication is hindered by language and cultural differences. Alcohol is involved in most cases. Indians usually regard federal court as a distant and foreign institution and often seek to avoid having anything to do with it. U. S. Attorneys are committed to bringing cases they can win. Regardless of the seriousness of the offense, Indian cases present a range of problems any one of which often defeats successful prosecution. Against these odds, it is difficult for a U. S. Attorney to justify great expenditures of time given competing demands on his resources.

From what data are available it appears that the declination rate for Indian cases is no higher than for other categories of cases and that conscious or systematic discriminatory handling of Indian cases does not exist. In all categories of cases, Indian as well as non-Indian, U.S. Attorneys decline about 75% of the cases presented to them by investigative agencies.

However, the statutory scheme governing crime committed on Indian reservations requires that, in addition to its role as federal prosecutor, the federal government must also fill the role of state and local prosecutor. This is because states have no jurisdiction over most Indian reservations and tribal court jurisdiction is extremely limited. 62/

By treating Indian country cases in the same manner as other federal criminal cases, U. S. Attorneys overlook the role of state/local prosecutor which they must play. In failing to adapt prosecutive standards and practices to meet this responsibility, the government has contributed to the reservation crime problem and undermined the confidence of Indian people in a system of laws.

In the long term, tribal courts have the potential to perform the state and local government role in the Indian criminal justice system which is now largely unfilled and which the federal government is ill equipped to provide. However, at the present time tribal courts are the least developed component of tribal government systems. We should actively encourage and assist tribal courts to become strong, effective institutions; at the same time we cannot continue to overlook our responsibility as state/local in addition to federal prosecutor in Indian cases.

Recommendations

Current federal policy toward Indians, as outlined by President Nixon in 1970 and by Congress through recent statutes, is based on a philosophy of self-determination for Indian people.

The task force recommends that in accord with the general philosophy of self-determination, the Department of Justice adopt a policy of affirmatively advancing, through our investigative and prosecutive responsibilities,

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62/ Six months in jail and/or a $500 fine is the limitation imposed on tribal court action by the 1968 Indian Bill of Rights, 25 U.S.C. §1302(7).

an Indian criminal justice system which creates the atmosphere of safety, stability and fairness necessary for Indian people to achieve their rightful aspirations and goals. The following are essential components of this policy:

1. Develop a Departmental position on issues of jurisdiction on Indian reservations.

2. Examine, in a joint Department of Justice-Interior effort, the appropriate administrative placement of reservation police services in the federal government including the possibility of assigning reservation police responsibility to the Department of Justice.

3. Urge LEAA to increase the proportion of discretionary funds granted to Indian criminal justice programs.

4. Increase the current DOJ level of training assistance, including LEAA funding, to BIA and tribal police programs.

5. Direct the U. S. Attorneys to deal directly with the BIA as an investigative agency comparable to other federal agencies, such as the U. S. Customs Service or Postal Service, whose agents routinely present cases to the U. S. Attorney. This change would be gradual and on a district-by-district basis with FBI assistance and support.

6. Direct the FBI to (a) limit its investigative activities on Indian reservations to those investigations requested by the BIA or the U.S. Attorney and to those cases requiring their special expertise or cross jurisdictional capability; (b) assist BIA special officers in assuming responsibility for presentment of cases to U. S. Attorneys; and (c) increase specialized training capability in reservation investigations and Indian law for FBI agents assigned to reservation areas and for BIA and tribal police training programs.

7. Develop prosecutive guidelines and procedures which recognize the government's responsibility to act both as federal and state/local prosecutor for Indian reservation crimes; improve communication, contact and cooperation with the tribes on matters of law enforcement and criminal activity; involve the federal district and magistrate courts in an effort to make justice less remote.

8. Support the development of a strong, vastly expanded tribal court system as an essential element in an effective Indian criminal justice system.

9. Issue civil disturbance guidelines which incorporate the special characteristics of Indian reservations.

10. Improve coordination of work relating to Indians and Indian litigation within the Department of Justice.

11. Request the President to authorize an interagency effort or commission to evaluate and reorganize the federal relationship with Indian tribes to better carry out the trust obligation. Criminal activity on reservations, as in the society as a whole, relates to factors such as employment, education, health and social values. The absence of a coordinated federal approach to these basic issues renders improvements in the Indian criminal justice system of limited value.

Implementation

At the present time it would be impossible to implement such a policy absent (1) additional resources; and (2) a plan for improved coordination of Indian matters within the Department.

1. Additional resources

Since the bulk of Indian reservations are located in less than ten federal districts, the problem of additional resources is of manageable size. The task force recommends that an additional assistant U. S. Attorney be assigned to each of the districts which have a large Indian reservation population to serve. The

full-time responsibility of this assistant would be to work with the Indian cases and communities in the district toward more effective federal prosecution as described in the task force report and recommendations. In addition there should be established an Indian desk in the Criminal division to provide Departmental support and liaison to the assistants in the field. (This would not be necessary if option B, infra, is adopted.)

U. S. Attorneys support the addition of Indian specialists to those offices which require assistance. The Criminal division currently handles Indian work in its General Crimes section. It does not feel a need for more attention to prosecution of Indian cases exists. It also holds that there are not criminal lawyers available who would be interested in full-time assignment to Indian desk responsibilities. Unless sufficient additional personnel and priority in the Criminal division are directed toward the goal of improved prosecution, the Department will never overcome the purely reactive stance it now takes with regard to Indian prosecution.

2. A plan for improved coordination

The final section of the task force report entitled "Coordination of Indian Matters in the Department of Justice" proposes two ways to provide better coordination of Indian work in the Department. The task force has not made a recommendation on these options. In summary, they are as follows:

Task Force and Deputy Attorney General Coordination

This option provides for loose coordination by the task force and, when its work is finished, by the Office of the Deputy Attorney General. The option meets the need for a focal point in the Department for decision making and communication. Its weakness lies in handling ongoing operational work through a committee and in assigning coordination responsibilities to a group which has minimal authority to speak for the Department. It is favored by the Criminal and Lands divisions and the Executive Office for U. S. Attorneys.

Consolidation of Indian Work in One Division under a Deputy Assistant Attorney General

This plan calls for combining the Indian litigative responsibilities of the Civil Rights, Criminal, and Lands divisions under a newly created Deputy Assistant Attorney General in the Land and Natural Resources division. With this plan the Department would institutionalize responsibility for a duty it is required to discharge at a policy level in the Department. The major drawback rests with creating a new bureaucracy and the opposition of two of the three units involved. This option is favored by the Civil Rights division and the Office of Policy and Planning.

Bibliography

Bean, Jerry L., The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers, North Dakota Law Review, p. 303-331, n.d.

Birkett, Peter W., Notes: Indian Tribal Courts and Procedural Due Process: A Different Standard? Indiana Law Journal, p. 721-739

Canby, Jr., William C., Civil Jurisdiction and the Indian Reservation, Utah Law Review, Summer, 1973, p. 206-232

Chambers, Reid Peyton, A Report to the Committee on Claims Adjudications of the Administrative Conference of the United States, Appendix C, Conflicts of Interest in the Administration of the Federal Trust Responsibility, January 3, 1972

Chambers, Reid Peyton, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stanford Law Review, p. 1213, May, 1975

Christoffel, Gregory J., Indian Tribal Courts - Jurisdiction - Navajo Tribal Court Jurisdiction Over Non-Indian Defendants. Navajo Tribe v. Orlando Helicopter Airways, Inc. Navajo Ct. App. (Jan. 12, 1972), Saint Louis University Law Journal, Vol. 18, p. 461-473

Cohen, Felix, Handbook of Federal Indian Law, 1942

Cree, Linda, The Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit: Indian Law - Public Law 280, The Hastings Law Journal, Vol. 25, May, 1974, p. 1451-1506

Crosse, Murray L., Criminal and Civil Jurisdiction in Indian Country, Arizona Law Review, Vol. 4, p. 57-64 (1962-1963)

Danforth, Sandra C., Note:Repaying Historical Debts: The Indian Claims Commission, North Dakota Law Review, p. 359-403

Davis, Laurence, Criminal Jurisdiction Over Indian Country in Arizona, Arizona Law Review, Vol. 1, p. 62-101 (1959)

Ericson, Robert and Crow, D. Rebecca, Comment: The Indian Battle for Self-Determination, California Law Review, Vol. 58, No. 2, p. 445-490

Evolution of Jurisdiction of Indian in Indian Country, 22 Kansas Law Review, p. 341 (1974)

Hacker, Patrick E., and others, Comments:State Jurisdiction over Indian Land Use:An Interpretation of the "Encumbrance" Savings Clause of Public Law 280, Land and Water Law Review, Vol. IX, p. 422-456, University of Wyoming, 1974

Hamlin, Thomas, Notes:State Taxation on Sales to Reservation Indians:A Comment on the North Dakota Attorney General's Position, North Dakota Law Review, p. 343-358, n.d.

Israel, Daniel H. and Smithson, Thomas L., Indian Taxation, Tribal Sovereignty, and Economic Development: Tribal Sovereignty, North Dakota Law Review, p. 267-301

Kane, Albert E., Jurisdiction over Indians and Indian Reservations, Arizona Law Review, Vol. 6, p. 237-255 1965

Kennedy, Introduction, Indian Law Forum, 22 Kansas Law Review, p. 337-338, 1974

LaFontaine, Frank S., Criminal Jurisdiction over Non-Trust Lands Within the Limits of Indian Reservations, Willamette Law Journal, Vol. 9, p. 288-310

National American Indian Court Judges Association, Inc., Justice and the American Indian, Volumes 1 thru 5, 1974

Nixon, R., Message from the President, H. Doc. No. 363, 91st Cong., 2nd Sess., Section 10797 (1970)

Notes:Toward a New System for the Resolution of Indian Resource Claims, New York University Law Review, Vol. 47, p. 1107, Sept. 1972

Price, Monroe E., Law and the American Indian, D. Bobbs-Merrill Co., Inc., Indianapolis, Indiana 1973

Reynolds, Osborne M., Notes:Indians - Reservations - Federal Jurisdiction Ended Only By Express Provision of Congress, Arizona Law Review, Vol. 5, p. 131-135, 1963-1964

Sonosky, Marvin J., [illegible] Jurisdiction Over Indians in Indian Country, North Dakota Law Review, p. 551-559 n.d.

United States Department of the Interior, Bureau of Indian Affairs, Indian Reservation Criminal Justice Task Force Analysis, 1974-75, p. 30

United States Department of the Interior, Indian Criminal Justice Program Display, July 1974, Bureau of Indian Affairs, Division of Law Enforcement Services, Washington, D. C.

United States Department of the Interior, Indian Law Enforcement History, Bureau of Indian Affairs, Division of Law Enforcement Services, Washington, D. C., February 1, 1975

United States Department of the Interior, The Combined Tribal and Bureau Law Enforcement Services Annual Report 1973, Bureau of Indian Affairs, Division of Law Enforcement Services, Washington, D. C.

United States Senate Report No. 721, 1968, U.S. Code Cong., Admin. News, p. 1864

Veeder, William H., Indian Water Rights in the Upper Missouri River Basin, North Dakota Law Review, p. 617-637

Young, Ronald T.L., Interagency Conflicts of Interests: The Peril to Indian Water Rights Law and the Social Order, p. 313-328, 1972

United States Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

21 MAR 1979

MEMORANDUM FOR BENJAMIN R. CIVILETTI
Deputy Attorney General

Re: Jurisdiction over "victimless" crimes committed by non-Indians on Indian reservations

This responds to your request for our opinion whether so-called "victimless" crimes committed by non-Indians on Indian reservations fall within the exclusive jurisdiction of the state or federal courts, or whether jurisdiction is concurrent. The question posed is a difficult one 1/ whose importance is far from theoretical. We understand that in the wake of Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), serious concern exists as to the adequacy of law enforcement on a number of reservations. While many questions of policy may be involved in allocating law enforcement resources, you have asked -- as an initial step -- for our legal analysis of the jurisdictional limitations.

In an opinion to you dated June 19, 1978, we expressed the view that, although the question is not free from doubt, as a general matter existing law appears to require that the states have exclusive jurisdiction with regard to victimless offenses committed by non-Indians. At your request, we have

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1/ The few writers who have touched obliquely on this question have expressed varying views. See, e.g., Clinton, Criminal Jurisdiction Over Indian Lands, 18 Ariz. L. Rev. 503, 529-30 (1976); Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U.C.L.A. L. Rev. 535, 541 n. 25 (1975); Davis, Criminal Jurisdiction Over Indian Country in Arizona, 1 Ariz. L. Rev. 62, 73-74 (1959).

concerned. 15/ Square holdings to this effect are, however, rare. The Supreme Court of North Dakota has held that state jurisdiction is ousted where federal jurisdiction under § 1152 is seen to exist in cases where non-Indians have committed

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15/ See State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 47 U.S.L.W. 4111, 4113 (Jan. 16, 1979) ("State law reaches within the exterior boundaries of an Indian reservation only if it would not infringe on the right of reservation Indians to make their own laws and be ruled by them.' Williams v. Lee, 358 U.S. 217, 219-20. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws . . . except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that state laws shall apply'"); Williams v. Lee, 358 U.S. at 220 ("if crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other [than state] courts has remained exclusive"); id. at n.5 ("Congress has granted to the federal courts exclusive jurisdiction over all major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts . . . ."); Williams v. United States, 327 U.S. 711, 714 (1946) ("the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed on the reservation by one who is not an Indian against one who is an Indian"). See also Bartkus v. Illinois, 359 U.S. 121, 161 (1959) (Black, J., dissenting); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1975) (federal law applies to assault by non-Indian against an Indian).

offenses against Indians on the reservation. 16/ At least, three other earlier cases suggest a contrary result, however, recognizing that, as in McBratney, the states have a continuing interest in the prosecution of offenders against state law even while federal prosecution may at the same time be warranted. 17/

Although it would mean that § 1152 could not be uniformly applied to provide for exclusive federal jurisdiction in all cases of interracial crimes, a conclusion that both federal and state jurisdiction may lie where conduct on a reservation by a non-Indian which presents a direct and immediate threat to an Indian person or property constitutes an offense against the laws of each sovereign could not be criticized as inconsistent or anomalous. Section 1153 was enacted many years after § 1152 had been introduced as part of the early Trade and Intercourse Acts; its clear purpose was to provide a federal forum for the prosecution of Indians charged with major crimes, a forum necessary precisely because no state jurisdiction over such crimes was contemplated. Consistent with this purpose, § 1152 may properly be read to preempt state attempts to prosecute Indian defendants for crimes against non-Indians as well.

In cases involving a direct and immediate threat by a non-Indian defendant against an Indian person or property, however, a different result may be required. The state interest in such cases, as recognized by McBratney, is strong. Section 1152 itself recognizes that where an Indian is charged with an interracial crime against a non-Indian,

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16/ State v. Kuntz, 66 N.W. 2d 53 (N.D. 1954) (state prosecution of non-Indian for unlawful killing of livestock of Indian on Indian reservation dismissed on grounds that federal jurisdiction of the offense was exclusive).

17/ See State v. McAlhaney, 220 N.C. 387, 17 S.E. 352 (1941) (state jurisdiction upheld as to non-Indian charged with kidnapping Indian on Indian reservation); Oregon v. Coleman, 1 Oreg. 191 (1855) (territorial jurisdiction upheld as to non-Indian charged with sale of liquor to Indian on reservation notwithstanding existence of comparable offense under federal law). See also United States v. Barnhart, 22 F. 285, 291 (D. Oreg. 1884) (federal jurisdiction would exist as to non-Indian charged with manslaughter of Indian on reservation even if state court had jurisdiction of offense under State law) (dicta).

such an offense would cause direct injury to the Tribe and cannot therefore be regarded as truly "victimless." A second group of offenses that may directly implicate the Indian community are consensual crimes committed by non-Indian offenders in conjunction with Indian participants, where the Indian participant, although willing, is within the class of persons which a particular state statute is specifically designed to protect. Thus, federal jurisdiction will lie under 18 U.S. § 2032 for the statutory rape of an Indian girl, as would a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. § 13. A third group of offenses which may be punishable under the law of individual states and assimilated into federal law pursuant to the Assimilative Crimes Act would also seem intrinsically to involve the sort of threat that would cause federal jurisdiction to attach where an Indian victim may in fact be identified. Such crimes would include reckless endangerment, criminal trespass, riot or rout, and disruption of a public meeting or a worship service conducted by the Tribe.

In certain other cases, conduct which is generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific individuals may nevertheless so specifically threaten or endanger Indian persons or property that federal jurisdiction may be asserted. Thus, speeding in the vicinity of an Indian school or in an obvious attempt to scatter Indians collected at a tribal gathering, and a breach of the peace that borders on an assault may in unusual circumstances be seen to constitute a federal offense.

III.

Whatever the contours of the area in which federal jurisdiction may be asserted, a final critical question remains to be considered: whether state authorities may also legally charge a non-Indian offender with commission of an offense against state law or whether federal jurisdiction, insofar as it attaches, is exclusive. This issue is an exceedingly difficult one and many courts, without carefully considering the question, have assumed that federal jurisdictions whenever it obtains is exclusive. We nevertheless

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believe that it is a matter which should not be regarded as settled before it has been fully explored by the courts. Although McBratney firmly establishes that state jurisdiction, where it attaches because of the absence of a clear Indian victim, is exclusive, we believe that, despite Supreme Court dicta to the contrary, it does not necessarily follow that, where an offense is stated against a non-Indian defendant under federal law, state jurisdiction must be ousted.

The exclusivity of federal jurisdiction vis-a-vis the states with regard to 18 U.S.C. § 1153, the Major Crimes Act, has been recognized, see, e.g., Seymour v. Superintendent, 368 U.S. 351 (1962), but has only formally been addressed and decided in the last year. See United States v. John, 98 S. Ct. 2547, 2550 (1978). The Court in John relied on notions of preemption and the slight evidence provided by the legislative history of this provision to reach a result that had long been assumed by the lower courts. 13/

Section 1152 has likewise been viewed as ousting state jurisdiction where Indian defendants are involved. 14/ Supreme Court dicta, moreover, suggests that federal jurisdiction may similarly be exclusive where offenses by non-Indians against Indians within the terms of § 1152 are

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13/ See, e.g., Application of Kinaha, 131 F.2d 737 (7th Cir. 1942); In re Carmen's Petition, 165 F. Supp. 942, 948 (N.D. Cal. 1958), aff'd sub nom. Dickson v. Carmen, 207 F.2d 809 (9th Cir. 1959), cert. denied, 361 U.S. 934 (1960).

14/ See, e.g., United States ex rel. Lynn v. Hamilton, 233 F. 685 (W.D.N.Y. 1915); In re Blackbird, 109 F. 139 (W.D. Wis. 1901); Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958); State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893); Arquette v. Schneckloth, 56 Wash. 2d 178, 351 P.2d 92 (1960).

carefully re-examined that opinion. We have discussed the legal issue raised with others in the Department, and with representatives of the Department of the Interior. We have also had the opportunity to discuss this question with Indian representatives, and have carefully considered the thoughtful submission prepared by the Native American Rights Fund on behalf of the Litigation Committee of the National Congress of American Indians.

Our further consideration of the question has led us to conclude that our earlier advice fairly summarizes the essential principles. There are, however, several significant respects in which we wish to expand upon that analysis. There are also several caveats that should be highlighted in view of the large number of factual settings in which these jurisdictional issues might arise. We also note, prefatorily, that there are now several cases pending in courts around the country in which aspects of these jurisdictional issues are being, or are likely to be, litigated, 2/ and we may therefore anticipate further guidance in the near term in applying the central principles discussed in this memorandum.

I.

INTRODUCTION

Two distinct competing approaches to the legal question you have posed are apparent. First, it may be contended that pursuant to 18 U.S.C. § 1152, with only limited exceptions, offenses committed on Indian reservations fall within the jurisdiction of the federal courts. The Supreme Court's determination in United States v. McBratney, 104 U.S. 621 (1882), that the states possess exclusive jurisdiction over crimes by non-Indians against non-Indians committed on such enclaves, it is said, was based on an erroneous premise that § 1152 does not control; at best, the argument goes, McBratney creates a narrow exception to the plain command of the statute; this decision should therefore be given only limited application

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2/ Mescalero Apache Tribe v. Griffin Bell et al., No. 78-926C (D.N.M. filed Dec. 14, 1978) (jurisdiction over traffic offenses by non-Indians on Indian reservations); State v. Herber, No. 2CA-CR 1259 (Ariz. Ct. App. April 27, 1978) pending on motion to reconsider (authority of State police authorities to arrest non-Indian on Indian reservation).

and should not be deemed to govern the handling of other crimes which have no non-Indian victim. A related argument might also be advanced: with rare exceptions "victimless" crimes are crimes against the whole of the populace; unlike offenses directed at particular non-Indian victims which implicate the Indian community only incidentally, or accidentally, on-reservation offenses without a particular target necessarily affect Indians and therefore fall outside of the limited McBratney exception and squarely within the terms of § 1152.

On the other hand, it may be argued that McBratney was premised on a view of the states' right to control the conduct of their citizenry generally anywhere within their territory; the presence or absence of a non-Indian victim is thus irrelevant. Although continuing federal jurisdiction has been recognized with regard to offenses committed by or against Indians on a reservation, victimless crimes, by definition, involve no particularized injury to Indian persons or property and therefore, under the McBratney rationale, exclusive jurisdiction remains in the states.

We have carefully considered both of these theses and, in our opinion, the correct view of the law falls somewhere between them. The McBratney rationale seems clearly to apply to victimless crimes so as, in the majority of cases, to oust federal jurisdiction. Where, however, a particular offense poses a direct and immediate threat to Indian persons, property or specific tribal interests, federal jurisdiction continues to exist, just as is the case with regard to offenses traditionally regarded as having as their victim an Indian person or property. While it has heretofore been assumed that as between the states and the United States, jurisdiction is either exclusively state or exclusively federal, we also believe that a good argument may be made for the proposition that even where federal jurisdiction is thus implicated, the states may nevertheless be regarded as retaining the power as independent sovereigns to punish non-Indian offenders charged with "victimless" offenses of this sort.

II.

Section 1152 of title 18 provides in pertinent part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country 3/

Given its full sweep, this provision would require that federal law generally applicable on federal enclaves of various sorts would be equally applicable on Indian reservations. Thus, federal law with regard to certain defined crimes such as assault, 18 U.S.C. § 113, and arson, 18 U.S.C. § 81, would govern, as would the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13, which renders acts or omissions occurring in areas within federal jurisdiction federal offenses where they would otherwise be punishable under state law. 4/

Notwithstanding the provision's broad terms, the Supreme Court has significantly narrowed § 1152's application. Thus, where a crime is committed on a reservation by a non-Indian against another non-Indian exclusive jurisdiction lies in the state absent treaty provisions to the contrary. United States v. McBratney, supra; Draper v. United States, 164 U.S. 240 (1896). Subsequent cases have, for the most part, carefully repeated the precise McBratney formula -- non-Indian perpetrator and non-Indian victim -- and have not elaborated on

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3/ The current version of § 1152 is not of recent vintage, but has roots in the early nineteenth century. See Act of March 3, 1817, 3 Stat. 383; Act of June 30, 1834, 4 Stat. 733, as amended by Act of March 27, 1854, 10 Stat. 269. See also Trade and Intercourse Act of 1790, 1 Stat. 137 (offenses by non-Indians against Indians).

4/ The Assimilative Crimes Act has been regarded as establishing federal jurisdiction over "victimless" offenses occurring within a federal enclave. See, e.g., United States v. Barner, 195 F. Supp. 103 (N.D. Cal. 1961)(reckless driving on air force base); United States v. Chapman, 321 F. Supp. 767 (E.D. Va. 1971)(possession of marijuana).

whether the status of the defendant alone or his status in conjunction with the presence of a non-Indian victim is critical. 5/ However, the McBratney rule was given an added gloss by New York ex rel. Ray v. Martin, 326 U.S. 496 (1946). The Supreme Court in that case characterized its prior decisions as "stand[ing] for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding [18 U.S.C. § 1152]." 326 U.S. at 500. 6/ Similarly, in Surplus Trading Co. v. Cook,

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5/ See, e.g., United States v. Wheeler, 435 U.S. 313, 325 n. 21 (1978)("crimes committed by non-Indians against non-Indians"); United States v. Antelope, 430 U.S. 641, 643 n. 2 ("non-Indians charged with committing crimes against other non-Indians"), 644 n. 4 ("crimes by non-Indians against other non-Indians"); Village of Kake v. Egan, 369 U.S. 60, 73 (1962)("murder of one non-Indian by another"); Williams v. United States, 327 U.S. 711, 714 (1946) ("offenses committed on this reservation between persons who are not Indians"); Donnelly v. United States, 228 U.S. 243, 271 (1913)("offenses committed by white people against whites"). But see United States v. Sutton, 215 U.S. 291, 295 (1909)(characterizing Draper as holding that the state enabling act "did not deprive the State of jurisdiction over crimes committed by others [except] Indians or against Indians").

6/ That the Martin discussion is more than a post hoc explanation for the McBratney Court's failure to give sufficient weight to the plain language of § 1152 is suggested by the careful language of United States v. Rogers, 45 U.S. (4 How) 567, 572 (1846), recognizing federal jurisdiction under the early version of § 1152 with regard to a crime committed by a non-Indian against a non-Indian victim on a territorial reservation ("where the country occupied by [the Indian tribes] is not within the limits of one of the States, Congress may by law punish any offence [sic] committed there, no matter whether the offender be a white man or an Indian)." See also In re Mayfield, 141 U.S. 107, 112 (1891).

281 U.S. 647, 651 (1930), the Court spoke in the following broad terms: "[Indian] reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." The Court's rationale thus appears to be rooted at least to some extent in basic notions of federalism.

It is, moreover, significant that the historical practice --insofar as we have found evidence on this matter -- has been to regard McBratney as authority for the states' assertion of jurisdiction with regard to a variety of "victimless" offenses committed by non-Indians on Indian reservations. Examination of the limited available precedent provided by turn of the century state appellate court decisions reveals that state jurisdiction was upheld with regard to non-Indian offenders charged with violating state fish and game laws while on an Indian reservation. See Ex parte Crosby, 38 Nev. 389, 149 P. 989 (1915). 7/ An early Washington state case held that a non-Indian charged with the "victimless" crime of manufacturing liquor on an Indian reservation was also held to be properly within the jurisdiction of the state's courts. See State v. Lindsey, 133 Wash. 140, 233 P. 327 (1925). 8/

7/ More recently, in State ex rel Nepstad v. Danielson, 149 Mont. 438, 427 P. 2d 689 (1967), the Montana Supreme Court expressed a similar view after determining that the application of state law had not been preempted by the passage of 18 U.S.C. § 1165, making unlawful the unauthorized entry onto Indian land for purposes of hunting, fishing, or trapping. In 1971, relying on Danielson, Crosby, and opinions of the Attorney Generals of Nevada, New Mexico, and Oregon, the Solicitor of Interior opined that a state would have both the power and the right to exercise jurisdiction over non-Indians alleged to have violated state game laws on an Indian reservation. 78 I.D. 101, 104.

8/ Where the identical acts that constitute a violation of state law would also constitute a violation of a federal statute expressly prohibiting conduct such as unauthorized hunting and fishing or manufacture or sale of liquor on a reservation without attempting to preempt state jurisdiction, a separate prosecution under federal law would of course remain a possibility. See, e.g., United States v. Lanza, 260 U.S. 377, 382 (1922).

State jurisdiction has also been upheld at least as to a woman regarded by the court as a non-Indian who had been charged with adultery; the charge against the other alleged participant in this consensual offense, an Indian man, was dismissed as falling outside the court's jurisdiction. See State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893). 9/ More recent decisions, while not examining the question in depth, have upheld state jurisdiction as to possessory drug offenses, State v. Jones, 92 Nev. 116, 546 P. 2d 235 (1976), and as to traffic offenses by non-Indians on Indian reservations, State v. Warner, 71 N.M. 418, 379 P. 2d 66 (1963). 10/

At the same time as McBratney has been given such broad application, however, the courts have carefully recognized that federal jurisdiction is retained with regard to offenses against Indians. The Court in both McBratney and Draper was careful to limit its holdings to the precise facts presented, reserving the question whether state jurisdiction would also be found with regard to the "punishment of crimes committed by or against Indians, [and] the protection of the Indians in their improvements." See 104 U.S. at 624. Subsequent decisions have expressly recognized that where a crime is committed in Indian country by a non-Indian against the person or property of an Indian victim, federal jurisdiction will lie. United States v. Chavez, 290 U.S. 357 (1933)(theft); United States v. Ramsey, 271 U.S. 467, (1926)(murder); Donnelly v. United States, 228 U.S. 243 (1913)(murder). Insight concerning the significance of and reasoning behind this exception to McBratney's broad sweep is provided by United States v. Bridleman, 7 F. 894 (1881), a decision of the federal district court for Oregon. The case involved the theft, on the Umatilla

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9/ The only other early case with which we are familiar upheld state jurisdiction with regard to one who appeared to be a non-Indian charged with obstructing the use of Indian lands. See State v. Adams, 213 N.C. 243, 195 S.E. 822 (1938). The statement of the case in the appellate court's opinion is extremely obscure; we therefore regard the apparent holding as having limited significance.

10/ See also Op. Az. Att'y Gen. No. 58-71 (1958).

reservation, of an Indian's blanket by a white man. Judge Deady, writing without the benefit of the McBratney decision decided the same year, upheld federal jurisdiction, reasoning that while the admission of Oregon into the Union in 1859 ousted general territorially-based jurisdiction previously asserted by the federal government, "the jurisdiction which arises out of the subject -- the intercourse between the inhabitants of the state and the Indian tribes therein -- remained as if no change had taken place in the relation of the territory to the general government." Id. at 899. He therefore concluded that to the extent that § 1152 provided for punishment of persons "for wrong or injury done to the person or property of an Indian, and vice versa," it remained in force. Id.

Bridleman and the numerous subsequent cases thus support the view that federal jurisdiction exists with regard to offenses committed by non-Indians on the reservation against the person or property of Indians.

The principle that tangible Indian interests -- in the preservation of person and property -- should be protected dates from the earliest days of the Republic when it was embodied in the Trade and Intercourse Acts. 11/ To say that these tangible interests should be protected is not, however, necessarily to say that a generalized interest in peace and tranquility is sufficient to trigger continuing federal jurisdiction. McBratney itself belies that view since the commission of a murder on the reservation -- a much more significant breach of the peace than simple vagrancy, drug possession, speeding, or public drunkenness -- provided no basis for an assertion of federal jurisdiction. Indeed, as the reasoning of Bridleman suggests, it is necessary that a clear distinction be made between threats to an Indian person or property and mere

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11/ See, e.g., § 5, Act of July 22, 1790, 1 Stat. 137 ("crimes upon, or trespass against, the person or property of any friendly Indian or Indians"). See also Donnelly v. United States, supra, 228 U.S. at 272 ("crimes committed by white men against the persons or property of the Indian tribes"); United States v. Chavez, 290 U.S. at 365 ("where the offenses is against an Indian or his property").

disruption of a reservation's territorial space.

We therefore believe that a concrete and particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) is necessary before federal jurisdiction can be said to attach. In the absence of a true victim, unless it can be said that the offense peculiarly affects an Indian or the Tribe itself, McBratney would control, leaving in the states the exclusive jurisdiction to punish offenders charged with "victimless" crimes. Thus, in our view, most traffic violations, most routine cases of disorderly conduct, and most offenses against morals such as gambling which are not designed for the protection of a particular vulnerable class, should be viewed as having no real "victim," and therefore to fall exclusively within state competence.

In certain other cases, however, a sufficiently direct threat to Indian persons or property may be stated to bring an ordinarily "victimless" crime within federal jurisdiction. Certain categories of offenses may be identified that routinely involve this sort of threat to Indian interests. One such category would be crimes calculated to obstruct or corrupt the functioning of tribal government. Included in this category would be bribery of tribal officials in a situation where state law in broad terms prohibits bribery of public officials; 12/

12/ The effect of the Assimilative Crimes Act is to make punishable under federal law minor offenses as defined and punished under state law. See Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965). Whether bribery of tribal officials would constitute an offense punishable under federal law would therefore depend on the precise terms of the applicable state statute and whether it applied to public officials generally or only to enumerated officers of the state and city or municipal governments.

federal jurisdiction is to be exercised only where the offender is not prosecuted in his own tribal courts. But in no event would the state courts have jurisdiction in such a case absent a separate grant of jurisdiction such as that provided by Public Law No. 280. An analogous situation is presented where a non-Indian defendant is charged with a crime against an Indian victim; the federal interest is not to preempt the state courts, but only to retain authority to prosecute to the extent that state proceedings do not serve the federal interest.

This result follows from the preemption analysis set forth in Williams v. Lee, where the Court recognized that, in the absence of express federal legislation, the authority of the states should be seen to be circumscribed only to the extent necessary to protect Indian interests in making their own laws and being ruled by them. While significant damage might be done to Indian interests if Indian defendants could be prosecuted under state law for conduct occurring on the reservation, no equivalent damage would be done if state as well as federal prosecutions of non-Indian offenders against Indian victims could be sustained.

Finally, it might be argued that such a result is consistent with principles governing the administration of other federal enclaves. It is generally recognized that a state may condition its consent to a cession of land involving government purchase or condemnation by reserving jurisdiction to the extent consistent with the federal use. Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); Paul v. United States, 371 U.S. 245, 265 (1963). Although Indian reservations are in many respects unique insofar as they in most cases existed prior to statehood rather than arising as a result of a cession agreement or condemnation proceedings, an analogy may nevertheless serve.

Since, in most cases, states may retain concurrent jurisdiction except to the extent that that would interfere with the federal use, they may do so here as well by prosecuting non-Indian offenders while federal jurisdiction at the same time remains as needed to protect Indian victims in the event that a state prosecution is not undertaken or is not prosecuted in good faith. For these reasons, therefore, we believe that a strong possibility exists that prosecution may be commenced under state law against a non-Indian even in cases where, as a result of conduct on the reservation which represents a direct and immediate threat against an Indian person or property, federal jurisdiction may also attach.

IV.

CONCLUSION

In sum, although we understand that in many cases commission by non-Indians of crimes traditionally regarded as victimless touches in a significant way upon the peace and tranquility of Indian communities, as a general rule we believe that such offenders fall within the exclusive jurisdiction of state courts. A more limited class of crimes involving direct injury to Indian interests should, however, be recognized as having Indian victims -- whether the Tribe itself, an Indian who falls within the class of persons to whom certain statutes are particularly designed to afford protection, or an individual Indian or group of Indians who are victimized by conduct which either as a matter of law or as a matter of fact constitutes a direct and immediate threat to their safety. In such cases, federal law enforcement officers may properly prosecute non-Indian offenders in the federal courts. We also believe that despite the common understanding that jurisdiction over crimes on Indian reservations is either exclusively state or exclusively federal, a substantial case can be made for the proposition that the states are not ousted from jurisdiction with regard to offenses committed by non-Indian offenders which pose a direct and substantial threat to Indian victims, but in their separate sovereign capacities may prosecute non-Indian offenders for violations of applicable state law as well.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Senator DECONCINI. Have you had a chance to read that?

Mr. PAULEY. No; I have not.

Senator DECONCINI. I have no further questions, Mr. Chairman.

Senator MELCHER. May I inquire how many homicides there have been in the Blackfeet Reservation within the last 4 or 5 years?

Mr. Gow. Mr. Chairman, my name is Doug Gow. I am with the FBI.

Insofar as the homicides on the Blackfeet Reservation are concerned, the figures I have from the middle of 1975 to the present show that there have been seven homicides.

There have been 31 cases involving death but only 7 homicides. Of those seven cases, four have been brought to the conviction stage. There has been one acquittal, and two cases were—what we call—closed administratively after exhaustive investigation where no suspects were developed.

Senator MELCHER. What were the causes of the other 24 deaths?

Mr. Gow. The other 24 deaths consisted of 18 manslaughters, approximately 6 cases where death occurred under unusual circumstances. Three of the deaths which occurred under unusual circumstances were by natural causes; two by suicide and one accidental.

Senator MELCHER. How did you decide that the 18 manslaughters were manslaughters instead of homicides? Did that come out in court or was that your assessment?

Mr. Gow. I do not have the full background on all those cases, sir. I would assume that was based on the facts of the situations as they came out in court. Of those 18 cases, I can tell you, 9 convictions were returned. In one there was a no bill. Two cases were closed administratively. Six cases were declined by the U.S. attorney.

Senator MELCHER. Six manslaughters were declined by the U.S. attorney. Did I understand you correctly?

Mr. Gow. I was told that these manslaughters all involved vehicular type accidents or deaths.

Senator MELCHER. What is the status of the most recent death of the young girl?

Mr. Gow. Are you referring to the girl, Monica Lynn Still Smoking, sir?

Senator MELCHER. Yes; unless you know of one more recent than that.

Mr. Gow. That case is still under investigation at the present time. I think it is a pending case. You understand, I have to limit my comments with regard to it.

I can say that it is under investigation. The agents are working closely with the tribal authorities and BIA police.

Senator MELCHER. In those cases involving an Indian against a non-Indian, in those crimes against Indians, does the U.S. attorney decline to prosecute, or are States likely to prosecute?

Mr. PAULEY. We have no experience which would really enable us to answer that question, Senator. That is what I am learning from my colleagues.

Senator MELCHER. What communications have you had with the States subsequent to advising them that the Department has determined that the States have concurrent jurisdiction with the Federal Government in non-Indian against Indian crimes?

Mr. ADAMS. It is my understanding that that view has been communicated by individual U.S. attorney's offices through appropriate State officials.

Senator MELCHER. Such as, the State's attorney general?

Mr. ADAMS. It would either be him or to a county prosecutor.

Senator MELCHER. What is the best method to deal with enforcement problems on an Indian reservation regarding minor offenses?

Mr. THOMPSON. Mr. Chairman, in New Mexico we have reached an informal agreement between the tribes and the U.S. Attorney's Office whereby the minor offenses involving members of the tribes are handled in the tribal court system. We approached the legislature with regard to the problem of a non-Indian violator on the reservation and obtained legislation through the New Mexico Legislature authorizing BIA law enforcement officers and tribal officers to become cross-deputized as State officers, thereby empowering them to make arrests for violations of State offenses.

What occurs at the present time is that, for a non-Indian offender who commits a minor crime, all tribal and BIA officers are cross-deputized to make arrests for those State offenses and cite the non-Indian violator through the State court system.

Senator MELCHER. Does the cross-deputization apply to sheriff's officers of the counties?

Mr. THOMPSON. Some sheriff's officers—if I understand your question—are cross-deputized as members of the tribal police force as well as some members of the tribal police force being cross-deputized as deputy sheriffs.

Senator MELCHER. Is that your recommendation?

Mr. THOMPSON. It has worked well in New Mexico.

Senator MELCHER. Would you have it that a non-Indian on a Cheyenne Reservation could go to the county seat to be hailed before the justice of the peace? Is that it?

Mr. THOMPSON. Yes; that is correct. The tribal officer occupies the same status as a deputy sheriff with regard to the non-Indian violator.

Senator MELCHER. Would the tribal officer then go to the county seat?

Mr. THOMPSON. Yes, sir.

Senator MELCHER. The Northern Cheyenne Reservation is 65 miles from the county seat. Is that a practical approach, for instance, on a speeding ticket?

Mr. THOMPSON. Senator, I guess in the West we encounter long distances. We certainly encounter that type of problem in New Mexico.

Senator MELCHER. Is that true from your own knowledge?

Mr. THOMPSON. Yes, sir. It is from my experience.

Senator MELCHER. What is the experience on cross-deputization in South Dakota?

Mr. ADAMS. Sir, I am not aware of what it is statewide. I know that it has been a problem in one county. I am not familiar with the status of the case, but in late 1979 the Justice Department did bring suit under a civil rights theory to—I am not sure whether it was one or two counties that had refused to cross-deputize Indian policemen. The Justice Department attempted to make the county cross-deputize.

Senator MELCHER. The experience in South Dakota is that it does not work.

Mr. ADAMS. That is my understanding, at least with respect to this one- or two-county area.

Senator MELCHER. Are there any areas in South Dakota that have been cross-deputized?

Mr. ADAMS. It is my understanding that there are a number of areas where they have been cross-deputized in South Dakota.

Senator MELCHER. What areas are those?

Mr. ADAMS. I am not sure but I would be glad to provide the committee with a list, if you would like.

Senator MELCHER. What are the two counties where you think it is not working?

Mr. ADAMS. I believe one of them is Roberts County. Again, I would be happy to provide the exact information if the committee desires.

That case is being handled by the Civil Rights Division. I am with the Criminal Division.

Senator MELCHER. What Indian reservation is involved?

Mr. ADAMS. I am not sure of that either, sir.

Senator MELCHER. Is there cross-deputization on the Oglala Sioux Reservation?

Mr. ADAMS. I do not know the answer to that either.

Senator MELCHER. I would think, after the Justice Department's experience at Wounded Knee, they would know.

Is the Rosebud Reservation involved?

Mr. ADAMS. I do not know the answer to that, Senator. As we discussed with the committee staff previously, it is being handled by another division of the Department--other than mine. Those persons responsible for the suit are available to answer those questions and would have the answers readily available. We would be glad to provide them.

Senator MELCHER. Yes; will you please provide them for the record. We would like to know whatever your experience has been in South Dakota and where, if anywhere, there is cross-deputization.

Without objection, the written statement submitted by Mr. Thompson and the other material be submitted will be included in the hearing record at this point.

Thank you all very much.

[The prepared statement and attachments follow. Testimony resumes on p. 334.]

PREPARED STATEMENT OF R. E. THOMPSON, U.S. ATTORNEY, DISTRICT OF NEW MEXICO

Mr. Chairman and members of the Senate Select Committee on Indian Affairs. I am pleased to be here today to discuss the administration of justice in Indian country as proposed in S. 1181 (State and Indian Compacts), S. 1722 section 161(i) (retrocession of jurisdiction to United States) and increased usage of magistrates in Indian country. Having served several years in the New Mexico Senate and now as United States Attorney for the District of New Mexico, I am familiar with some of the issues presented by these bills.

S. 1181—STATE AND INDIAN COMPACTS

Some areas of agreement between Indian tribes, local governmental units and state governments are presently operational. Some, such as incarceration of tribal prisoners in a county jail, and cross-deputization of law enforcement officers perform essential functions. The lack of more agreements such as these

is due in large part to a reticence by both the states and the Indians. The Indian tribes fear that agreements such as are contemplated would give either tacit or express approval to increased state authority over the Indian tribes and Indian tribal properties. The states fear that agreements such as these would ultimately cause them to lose revenues and authority that would otherwise have been theirs. Both sides are aggressively seeking to establish and retain their jurisdiction and authority in taxation and natural resource production matters.

Important competing interests need to be openly discussed and weighed for possible agreement in areas such as (1) extradition, (2) taxation of non-Indians on Indian lands, (3) water and air quality, and (4) hunting and fishing. However, these compacts should be subject to approval by the Secretary of the Interior because they may involve commitment of federally appropriated funds.

This bill would serve as a basis upon which agreements such as these, and many others, can be assured of legitimacy and enforceability in a setting of mutual agreement between Indian and non-Indian governments.

MAGISTRATES

The *Oliphant* decision caused re-examination of law enforcement responsibilities in Indian country. As indicated by the attached Department of Justice memorandum, the current jurisdictional principles for crimes in Indian country are (1) the state never has jurisdiction over an Indian committing a crime in Indian country, (2) the state has jurisdiction over a non-Indian committing a crime against another non-Indian and over a non-Indian committing most victimless crimes, and (3) the tribe never has jurisdiction over a crime committed by a non-Indian.

There were and are adequate laws by both the United States and the States to make objectionable conduct a law violation. However, following *Oliphant*, there was, in New Mexico, a period of confusion and inadequate enforcement for some offenses by non-Indians. Our office worked through the New Mexico legislature to enact a provision in 1979 that permits Indian tribal officers and Bureau of Indian Affairs law enforcement officers to be deputized to enforce state laws on an Indian reservation when non-Indians commit state offenses, such as motor vehicle speeding or assault on another non-Indian. A copy of this cross-deputization act is attached.

Tribes, representing over 50 percent of New Mexico's Indian population, as well as the Bureau of Indian Affairs law enforcement officers in New Mexico have elected to become cross-deputized under the act. This has, with reasonable satisfaction, dealt with the problem in New Mexico though similar legislation may be needed for Indian tribes in other states.

Our office has a working agreement dividing investigatory and prosecutive priorities for crimes by or against Indians as indicated in the attached memorandum. Basically, the Federal Bureau of Investigation investigates the more serious crimes, the Bureau of Indian Affairs law enforcement officers investigate the moderately serious crimes and the tribal police investigate the minor offenses. The United States prosecutes all but the minor offenses, which are prosecuted through the tribal courts. This working agreement between the tribes and the United States is also utilized in Arizona and is under review in other states. It has worked well.

The physical location of federal magistrates in New Mexico has been workable. They are located in New Mexico as shown on the attached map, and are reasonably near the Indian reservations, which is clearly desirable. The committee may wish to review their location in other states with Indian reservations.

S. 1722

None of the 23 Indian tribes and pueblos in New Mexico have come under the jurisdiction of the state through Public Law 280. The state has never begun the Public Law 280 method for assuming jurisdiction and insofar as I know, few if any of the tribes have any interest in ceding the state jurisdiction because of their fear of state taxation and state control over Indian tribal members, lands and resources.

This bill may be of benefit to them in their deliberations on this question because a decision to seek state jurisdiction would not be irreversible.

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY, DISTRICT OF NEW MEXICO,
Albuquerque, N. Mex., April 11, 1979.

To: All Indian Tribes and Pueblos in New Mexico; Federal Bureau of Investigation; Bureau of Indian Affairs.

GENTLEMEN: On July 19, 1978, I issued a memorandum concerning law enforcement on the portion of the Navajo nation within New Mexico. This memorandum coordinated law enforcement for the New Mexico portion of the Navajo nation with that of Arizona and Utah.

The memorandum gave the tribe more responsibility over tribal members. It also gave the Bureau of Indian Affairs (BIA) responsibility for investigation of offenses of moderate severity. The Federal Bureau of Investigation (FBI) continued to investigate the most serious offenses and upon request acts to support the tribal police and BIA law enforcement officers.

This arrangement has worked well and because of its success it has found increasing use with regard to the other Indian tribes and pueblos in New Mexico. We believe that this arrangement should be now implemented on a formal basis for all of the tribes and pueblos. A copy of the July 19 memorandum is enclosed and you should consider it effective for all of you.

For those tribes or pueblos that do not have tribal police, the BIA officers will be responsible for all of the functions set forth for BIA officers and tribal officers.

House Bill 132 of the recent New Mexico legislature has now been signed into law. A copy of the new statute is enclosed. This statute will, in cooperation with the New Mexico State Police, permit you to enforce the New Mexico Motor Vehicle Code against non-Indians on the reservation by actions in the local New Mexico magistrate court. Bob Gardenshire of the New Mexico State Police, phone 827-5141 in Santa Fe, should be consulted for the form agreement and requirements you will first need to meet.

The question of whether jurisdiction for acts committed on the reservation will be in the United States courts or New Mexico courts depends on (1) whether the defendant is Indian or non-Indian; (2) whether the victim was an Indian or Indian property and (3) the federal statute involved. The following should be generally kept in mind for offenses, except where a specific statute grants jurisdiction in federal court.

(1) An offense on the reservation by a non-Indian against another non-Indian is a matter for the New Mexico courts;

(2) An offense on the reservation by a non-Indian against an Indian or Indian property is a matter for the United States courts;

(3) An offense on the reservation by an Indian, whether against an Indian or a non-Indian, is a matter for the United States courts or tribal court;

(4) A victimless offense (one which has not focused particularly threatening behavior on the person or property of an Indian) on the reservation by a non-Indian, such as motor vehicle speeding violations, is a matter for the New Mexico courts;

(5) Indian tribal courts do not have criminal jurisdiction over non-Indians.

I am temporarily authorizing the Bureau of Indian Affairs' law enforcement officers to file and follow certain petty misdemeanor complaints before the various federal magistrates. The crimes to which this authorization extends are:

1. Hunting, trapping, or fishing on Indian land—18 U.S.C. 1165

2. Simple assault upon an Indian, except when committed upon a federal officer, and not resulting in serious bodily injury—18 U.S.C. 113(e) and 18 U.S.C. 1152

3. Larceny when the property stolen is Indian property and has a value of $100 or less— 18 U.S.C. 13, 18 U.S.C. 1152, and 40A-16-1 NMSA, 1953 Comp.

The above paragraph does not cover matters handled by federal Magistrates in Albuquerque. My office will continue to handle matters in Albuquerque as we have in the past. Please use this new authority carefully and judiciously. Abuse of the new authority will result in its loss to you.

Should you have any problems with the action I am announcing by this letter, please feel free to contact my office.

R. E. THOMPSON, *U.S. Attorney.*

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY, DISTRICT OF NEW MEXICO,
Albuquerque, N. Mex., July 19, 1978.

Memorandum for: All law enforcement agencies having responsibility and jurisdiction over Federal criminal violations occurring within the Navajo Nation and the Federal District of New Mexico.

From: R. E. Thompson, U.S. Attorney, District of New Mexico.

Subject: Guidelines for presentation of criminal investigations and rendering of prosecutive opinions.

1. General

These guidelines apply to all investigations of Federal criminal matters occurring within that portion of the Navajo Nation within the federal District of New Mexico. No report of a criminal investigation will be accepted for the rendering of a prosecutive determination, except in accordance with these guidelines.

A. *Scope.*—These guidelines apply to all federal criminal violations over which the United States District Court for the District of New Mexico (under present statutory and case Law) would have jurisdiction, *i.e.*, offenses occurring within the confines of the Navajo Reservation, constituting a violation of a specific provision of the United States Code, and where the proposed defendant is an Indian.

B. *Return to initiating agency.*—In all matters where the United States Attorney declines prosecution, the report of the investigation concerning the offense shall be returned to the originating agency, with a view towards reference to tribal officials for processing. In any case where an Assistant United States Attorney has declined prosecution, the initiating agency is free to consult the United States Attorney regarding the matter.

C. *Matters not covered.*—All specific federal criminal violations (*e.g.*, drug offenses) not specifically covered by this memorandum shall be investigated and forwarded for prosecutive determination in accordance with existing standards.

D. *Aggravating circumstances.*—"Aggravating circumstances" as used in this memorandum includes, but is not limited to, the following:

1. Repeat offenders;
2. Use of firearms;
3. Pattern of, or connection to, repeated offenses;
4. Proposed defendant a public figure.

2. Navajo Police Department (NPD)

Absent aggravating circumstances, the following matters will be routinely and standardly declined by the United States Attorney, and, accordingly, may be investigated by the NPD for reference to tribal authorities:

A. *Alcohol (liquor) violations.*—Absent indications of an ongoing commercial enterprise (*e.g.*, manufacturer of alcohol on Reservation) or criminal conspiracy, all federal liquor violations.

B. *Larceny, unarmed robbery, housebreaking, burglary, and theft (including auto theft).*—All cases involving less than $2,000 in property loss.[1]

C. *Assault.*—Any assault, except that upon a federal officer, and not resulting in serious bodily harm.

3. Bureau of Indian Affairs Law Enforcement Services (BIA)

The following matters may be investigated and reports forwarded directly to the United States Attorney for prosecutive opinion:

A. *Rape (including carnal knowledge) or incest.*

B. *Larceny, burglary, housebreaking, unarmed robbery, and theft (including auto theft).*—All cases in excess of the above NPD guidelines, except those cases requiring scientific investigation.

C. *Public assistance violations.*—All cases involving welfare fraud or the like, except those requiring accounting expertise in preparation or presentation. (Note: all such cases involving loss to the government of less than

[1] Nothing in these guidelines shall be construed to remove or otherwise affect the responsibility of BIA to conduct appropriate civil or administrative investigations into matters over which they have such responsibility (i.e., property loss from government quarters). NPD is encouraged to provide BIA with copies of all reports on such matters and to otherwise cooperate with BIA in such matters.

$1,000 may be routinely declined and a memorandum report confirming such declination forwarded to the United States Attorney via the FBI.)

D. *Arson.*—All cases except those where death or serious bodily harm results.

4. Federal Bureau of Investigation (FBI)

The FBI shall be primarily responsible for the investigation and presentation to the United States Attorney of the following matters:

A. Murder.

B. Manslaughter.

C. Assault.

All cases involving assault on a federal officer, or assault resulting in serious bodily injury.

D. Arson.

In such cases where death or serious bodily harm results.

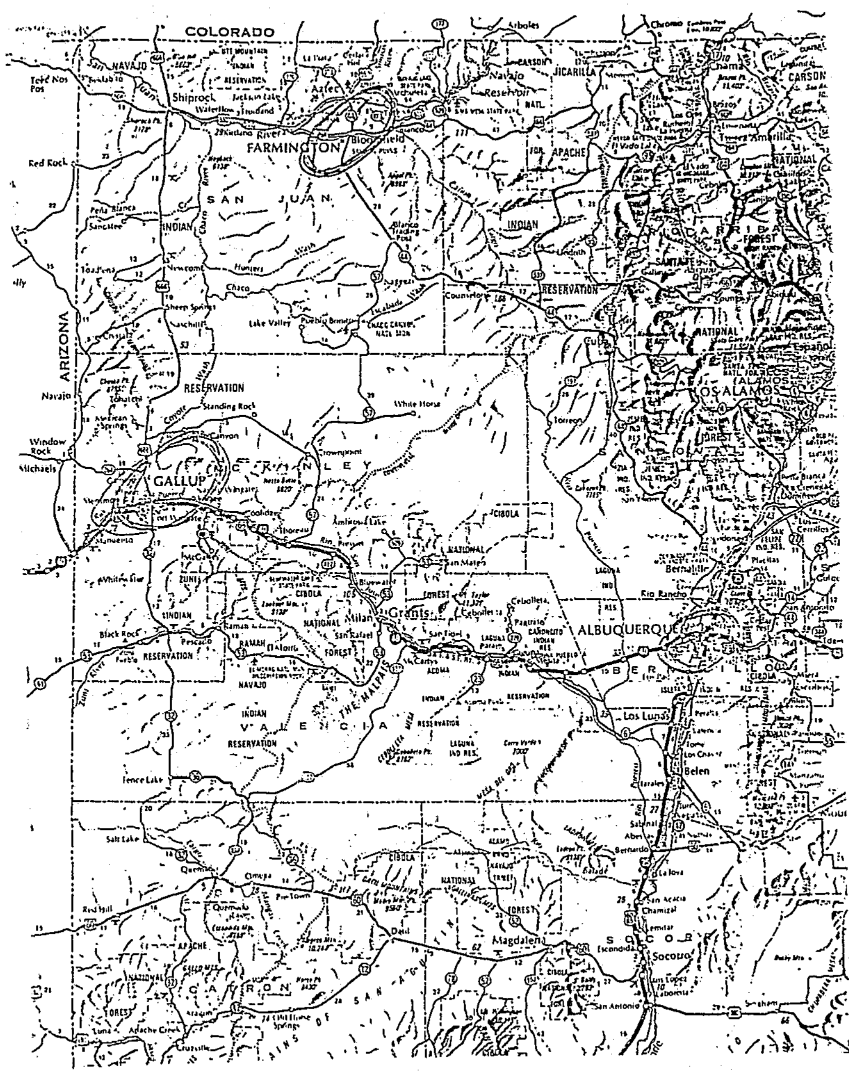
E. Bank or Other Armed Robbery.

F. Embezzlement.

G. Kidnapping.

H. Public Assistance Violations.

All cases involving over $1,000 in loss to the government and where accounting expertise is involved in the preparation or presentation of the matter.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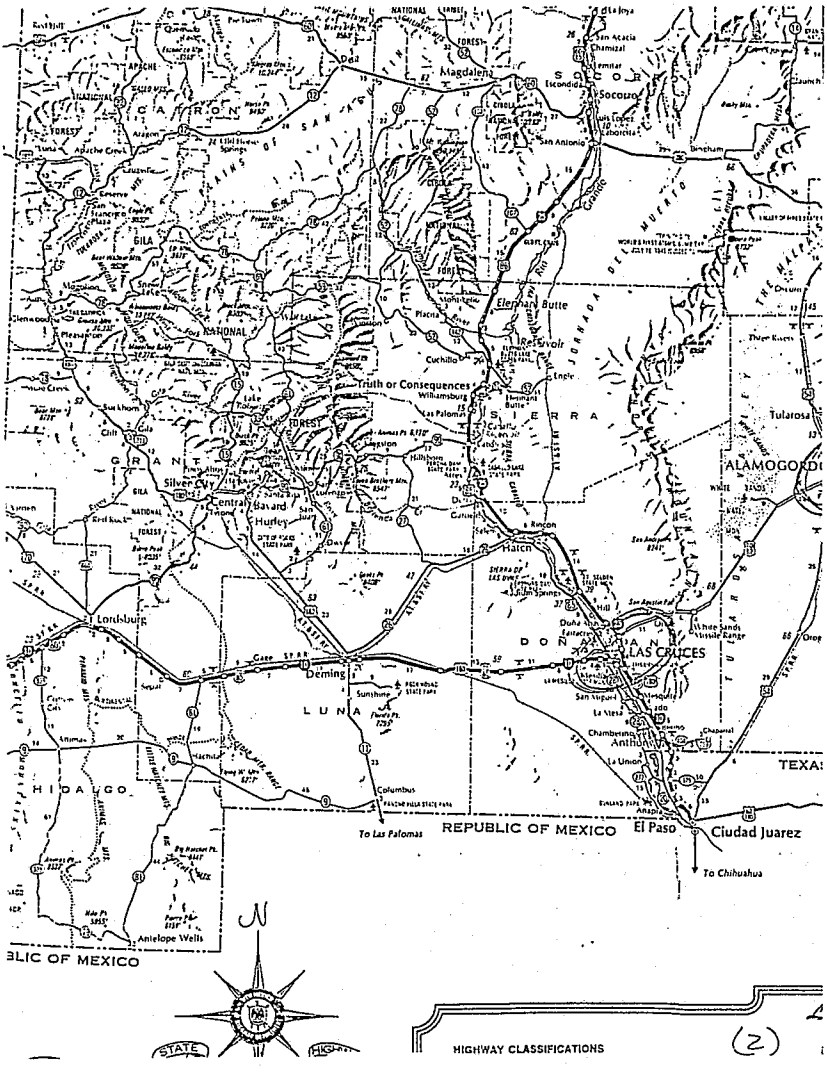
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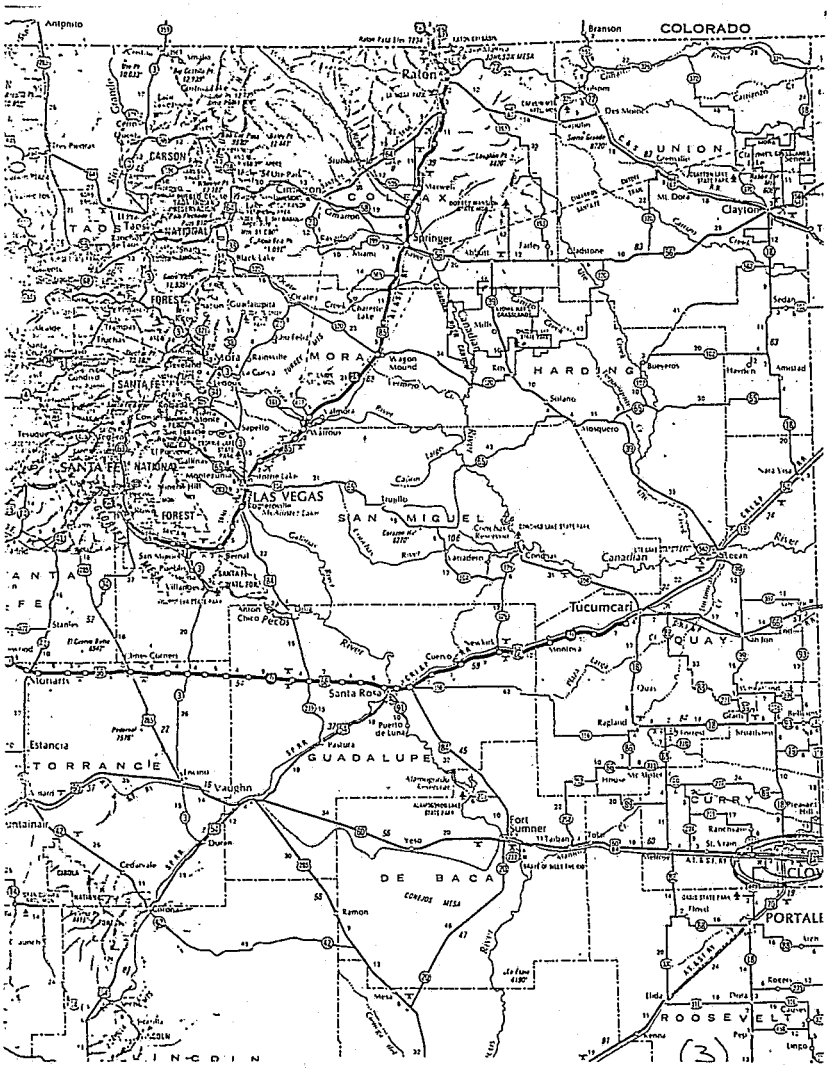
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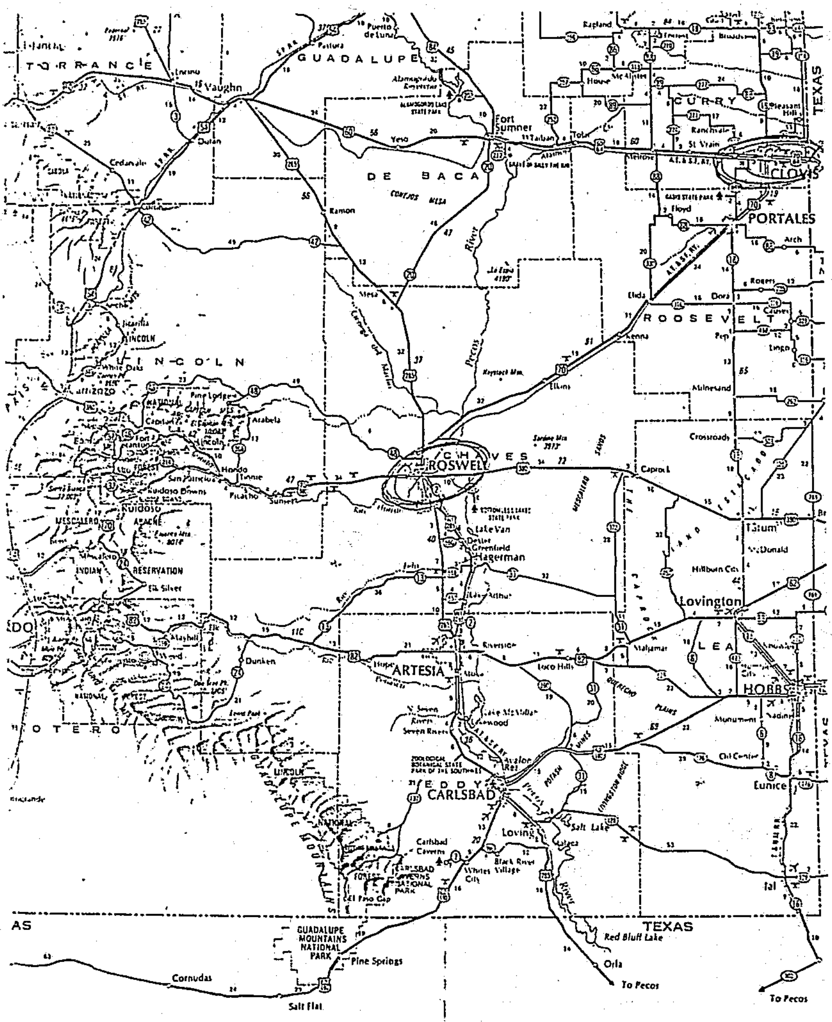
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Lingo
Elkins
Milnesand
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LINCOLN
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Carrizozo
Pine Lodge
Capitan
Arabela
Lincoln
Hondo
Tinnie
Picacho
Sunset
Ruidoso
Ruidoso Downs
San Patricio
MESCALERO
APACHE
INDIAN
RESERVATION
Elk Silver
CHAVES
ROSWELL
Caprock
Tatum
McDonald
Lake Van
Dexter
Greenfield
Hagerman
Lake Arthur
Hillburn City
Lovington
Mayhill
Elk
Dunken
Hope
ARTESIA
Riverside
Loco Hills
Maljamar
LEA
HOBBS
Monument
Nadine
OTERO
Seven Rivers
Lakewood
Oil Center
Avalon Res.
EDDY
CARLSBAD
Eunice
Loving
Salt Lake
Malaga
Carlsbad Caverns
Black River Village
Whites City
CARLSBAD CAVERNS NATIONAL PARK
El Paso Gap
Jal
TEXAS
Red Bluff Lake
Orla
To Pecos
GUADALUPE MOUNTAINS NATIONAL PARK
Pine Springs
Cornudas
Salt Flat
To Pecos

Senator MELCHER. Our next witness is Randy Scott, special assistant on Indian affairs with the office of the Governor of the State of Washington.

STATEMENT OF RANDY SCOTT, SPECIAL ASSISTANT ON INDIAN AFFAIRS, OFFICE OF THE GOVERNOR, STATE OF WASHINGTON

Mr. SCOTT. Mr. Chairman, thank you for the opportunity to appear before you today. My name is Randy Scott and I am the special assistant on Indian affairs to Governor Dixy Lee Ray, Governor of the great State of Washington.

First, let me offer my appreciation for the efforts of this committee and your colleagues on the Judiciary Committee in addressing the difficult issues relating to Public Law 83–280. I also communicate the appreciation of the Governor and our commitment to provide whatever assistance is necessary to the United States and to the tribes of Washington State, to work with and implement the solution that you and your colleagues of the Senate deem appropriate.

I am here on behalf of the Governor to support the passage of section 161 in S. 1722. The questions and issues relating to States assuming jurisdiction began in 1953 with the passage of Public Law 83–280. In the State of Washington the law enacted in 1957 and amended in 1963 became chapter 37.12 of the Revised Code of Washington. A copy of that chapter is attached to my written submission.

Senator MELCHER. Without objection, a copy of that material will be included in the hearing record at this point.

[The material follows. Testimony resumes on p. 343.]

TESTIMONY BEFORE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS CONCERNING S. 1722 AND TRIBAL/STATE COMPACT ACT, BY RANDY SCOTT, SPECIAL ASSISTANT ON INDIAN AFFAIRS

Mr. Chairman, members of the committee, thank you for the opportunity to appear before you today.

My name is Randy Scott, and I am the Special Assistant on Indian Affairs to Governor Dixy Lee Ray, Governor of the State of Washington.

First, let me offer my appreciation for the efforts of this committee and your colleagues on the Judiciary Committee to address the difficult issues relating to Public Law 83–280. I also communicate the appreciation of the Governor and her commitment to provide whatever assistance necessary to the United States and the tribes of Washington State to work with and implement the solution that you and your colleagues of the Senate deem appropriate.

The questions and issues relating to States assuming jurisdiction began in 1953 with the passage of Public Law 83–280.

In the state of Washington, the law, enacted in 1957 and amended in 1963, became Chapter 37.12 of the Revised Code of Washington. A copy of that Chapter is attached.

Needless to say, after the enactment of legislation by the state—the conflicts began. As the Governor stated in her letter to Senator Kennedy (a copy of which is attached).

"The state of Washington has spent numerous man hours and dollars to litigate issues that have been associated with Public Law 83–280. The vagueness of that statute seems to lend itself to the litigation process of which there seems to be no end. The non-Public Law 83–280 tribes in this state do not appear to be embroiled in the courtroom conflicts associated with Public Law 83–280."

I am sure that you have been told a number of times throughout these proceedings that the philosophy of Public Law 83–280 comes from the termination era of United States Indian Policy. Therefore, with the present policy, that

emerged in the 1970's, of encouraging self-determination and strengthening of tribal governments, A change in methods of dealing with jurisdictional conflicts should be developed.

The policy of the United States government was most forcefully expressed by President Nixon in his speech of July 8, 1970. In it the President asserts, ". . . this policy of forced termination is wrong . . ." and he said ". . . I hereby affirm for the Executive Branch that the historic relationship between the federal government and the Indian communities cannot be abridged without the consent of the Indians."

So now the wheel has turned full circle. In 1953, the federal government invited states to take over jurisdiction on Indian reservations. In 1957 Washington did so. When Washington extended this jurisdiction in 1963, the federal government had not yet indicated any change in its termination philosophy. But in 1970, it expressly did so. The concept of the retrocession now seems to be entirely appropriate. The state of Washington through the Governor's Office supports this concept as contained in S. 1722, Section 161.

The inadequacies that have resulted from assumption of jurisdictions by the state are many. The biggest complaint that we hear is that most local non-Indian law enforcement agencies lack sufficient manpower and revenue to provide for equal and adequate law enforcement. The burden of states assuming jurisdiction falls most directly on local enforcement agencies such as county sheriffs and court systems.

It is our estimation that retrocession can begin a process whereby the federal government, Washington State, Indian tribes and local law enforcement agencies can work out agreements of law enforcement responsibilities, cross deputization programs, etc., plus multi-jurisdictional harmony in other areas of government service delivery would seem to be a natural development.

The only thing that we recommend that you add to Section 161 would be some language that would include the Governor of the state affected as having approval authority over a tribal retrocession petitions prior to submission to the Secretary of Interior.

Again, thank you for this opportunity to present our viewpoints on S. 1722. If I may, I would like to make a brief comment on S. 1181, "Tribal-State Compact Act."

The state of Washington has been involved in many conflicts with various tribes within our boundaries. Issues such as jurisdiction, human service delivery, treaty rights, fishing rights, taxation, have all been discussed, researched and litigated extensively. In fact, a number of these court cases have received national attention and United States Supreme Court review.

Tribal-state conflicts are not new to Washington State. The present administration under Governor Ray is planning some new and innovative methods of intergovernmental cooperation with tribal governments. Attached is a brief outline of the proposal to develop what we call the Washington State Study Group on State-Tribal Relations. To assist in this area, the Governor has by Executive Order 80–02 created an Office of Indian Affairs. A copy of that Executive Order is attached also.

The Washington State Legislature is a member of the Commission on State-Tribal Relations sponsored by the National Conference of State Legislatures, the National Congress of American Indians, and the National Tribal Chairman's Association.

These endeavors on the part of state officials shows that Washington State is beginning to show some much needed leadership in intergovernmental cooperation with tribal governments.

Two recent agreements between tribes, local government and state government are examples of this new effort. They are:

1. Portage Island agreement—between the Lumni Tribe and Whatcom County settling a dispute over a small island in the Lumni Indian Reservation.

2. Nisqually Agreement—between the Nisqually Tribe and Washington State, particularly the Washington Department of Fisheries over the fishery management and enhancement of the Nisqually River drainage basin.

I will, if the committee desires, forward copies of both agreements within the next few days.

The state of Washington has within its code the Interlocal Cooperation Act which permits actions of agreement between local governmental units, special

purpose districts, state agencies, federal agencies and Indian tribes. I will not expound further upon this act, but will allow for its inclusion into the record to suffice for its intent and clarification.

To sum up what I am trying to point out is that Washington State without any federal legislation is embarking on a program of working out problems of conflict between the state and tribes. These conflicts are local in nature and need to be solved on a local level. The legislation does not address, nor do I think any legislation is capable of addressing the political, historical, or attitudinal barriers that must be overcome for success in this area.

The state of Washington would prefer if the legislation would be limited to encouraging cooperation between states and tribes and allowing us to work out the solutions and mechanisms on the local level with no strong federal guidelines, but with federal involvement in a manner such as the study group or tripartite method as proposed in one of the attachments. (Memo to Governor Ray dated November 16, 1979.)

We welcome the process of cooperation, but shy away from the bureaucratic guidelines that traditionally come with federal programs.

Thank you again.

CHAPTER 37.12, REVISED CODE OF WASHINGTON INDIANS AND INDIAN LANDS—JURISDICTION

(Retained in committee files)

LETTER FROM GOVERNOR RAY TO SENATOR EDWARD M. KENNEDY, DATED NOVEMBER 21, 1979

STATE OF WASHINGTON,
OFFICE OF THE GOVERNOR,
Olympia, Wash., November 21, 1979.

Hon. EDWARD M. KENNEDY,
Senate Judiciary Committee, U.S. Senate,
Russell Building, Washington, D.C.

DEAR SENATOR KENNEDY: The Senate Judiciary Committee has under consideration S. 1722, a comprehensive revision of the federal criminal code, "The Criminal Code Reform Act of 1979." I wish to comment specifically on Section 161 relating to retrocession of state jurisdiction over certain Indian lands.

I know that jurisdictional issues have been studied and litigated many times since Public Law 83-280 has been signed into law. Indeed, even studies done by the state of Washington have detailed the problems and inconsistencies of this jurisdictional conflict.

I, on behalf of Washington State, wish to go on record supporting the retrocession provision as contained in S. 1722. The following points should serve as my reasons for supporting your efforts in this area:

1. County governments. The level of government most directly burdened with the effects of implementing Public Law 83-280 simply cannot afford to administer the law. Most counties in Washington State receive little or no remuneration for providing law enforcement service to Indian lands.

This creates a situation where counties provide or are able to provide very limited service. In fact some counties have absolutely no desire to provide any service to Indian reservation situations. For instance, Clallam County (northwest tip of Washington State) provides very little service to the Makah Tribe. Ferry County has 87 percent of its land in either the National Forest or the Colville Indian Rservation (both nontaxable) and as a result has limited capabilities or desire to provide service to the latter. Counties in general feel that this should be a federal responsibility in conjunction with other areas of trust responsibility for Indian reservations.

2. Indian tribes (who are affected by Public Law 83-280) in Washington State are unhappy with the present jurisdictional situation. Thy cite numerous areas of inconsistency and conflict with state laws under the present situation. An example is that resulting from recent court decisions there is the opinion of concurrent jurisdiction by the state and tribes on Indian lands. By law, the state of Washington is a community property state. Tribes by their ordinances and laws are not and, therefore, the possibility of additional litigation exists.

The state of Washington has spent numerous man-hours and dollars to litigate issues that have been associated with Public Law 83-280. The vagueness of that

statute seems to lend itself to the litigation process on which there seems to be no end. The non-Public Law 83–280 tribes in the state do not appear to be embroiled in the courtroom conflicts associated with Public Law 83–280.

My greatest concern is that once S. 1722 becomes law, how can I be assured that states would be granted input into the rules and regulations that would be adopted by the Secretary of Interior as called for in Section (i)? I would hope that legislation of this nature would be followed up so that the various jurisdictions would be able to enter into multilateral agreements for enforcement responsibilities. It is important that delineation result in a comprehenive and coordinated program for defined geographical area.

The state of Washington is entering into a new phase of relations with Indian tribes. It is my desire to create an atmosphere of cooperation and understanding between the state and the tribes. Our efforts include resolving problems such as jurisdictional conflicts, so I welcome such efforts as S. 1722, Section 161.

Thank you for this opportunity to comment on the efforts of your Committee.

Sincerely,

DIXY LEE RAY,
Governor.

MEMORANDUM TO GOVERNOR RAY FROM RANDY SCOTT, REGARDING WASHINGTON STATE STUDY GROUP ON STATE-TRIBAL RELATIONS, DATED NOVEMBER 16, 1979

STATE OF WASHINGTON,
OFFICE OF THE GOVERNOR,
Olympia, Wash., November 16, 1979.

To: Governor Ray.
From: Randy Scott.
Re Washington State Study Group on State-Tribal Relations.

The purpose of this memo is to outline for you my proposal for a new program designed to create an atmosphere of cooperation, respect and understanding between the state of Washington and the federally recognized tribal governments within the state.

The relationship between states and tribes is fast becoming a closely scrutinized aspect of governmental function by many different groups and parties. States are more assertive about their rights, while tribes are beginning to establish the expertise and capability of self-government and exerting their governing rights, also. All too often this leads to points of conflict between these two areas of government. In most instances, this conflict leads to court action; suits filed, counter suits filed, federal intervention with a suit of their own and a situation that fast becomes exacerbated and very political.

I would like to propose a plan for handling state-tribal relations by establishing a method of intergovernmental cooperation and study of the overall situation that would result in the development of mechanisms for agreements between the governments to resolve existing conflicts and future conflicts. This is congruent with our talks of establishing government-to-government relations with the tribes in our state.

The state of Washington would create, from its executive and legislative branches, a group of people to study the state's posture and philosophy in state-tribal relations. While this is going on, the tribes of Washington State would establish their own study group and the federal government (under the leadership of our congressional delegation) would do likewise.

The Washington State Indian Study Group would undertake, as areas of study, the following:

1. Indian self-determination policy (federal) and what that means to the state.
2. Political status of tribal governments.
3. Civil and criminal jurisdiction on reservations.
4. Environmental regulation (protection).
5. Natural resource preservation, regulation and management.
6. Human services delivery.
7. Development of an intergovernmental mechanism created to resolve ongoing disputes between Washington State and Indian tribes.

Purpose

This approach to State/Indian relations is intended to prepare a foundation for the establishment of a state policy and mechanism to promote a greater under-

standing of present and future interaction between the participating parties. Effective coordination and understanding between the state, tribal and federal governments is a must in this area, if governments are to provide quality leadership to their respective constituencies.

Goal

To establish an ongoing intergovernmental relationship that will actively search for solutions to conflicts and disputes that arise between Washington State and Indian tribal governments.

Objectives of the Study Group

1. Study the federal policy of Indian self-determination and determine the suitability of incorporating a like policy into Washington State programs interactions with Indian tribes.
2. Study the present and potential arrangements for the political status of Indian tribal governments in relation to the federal and state governments with references, citations and recommendations.
3. Study present and potential areas of conflict between Washington State and Indian tribal governments in the areas of:
   (*a*) Natural resource regulation and management.
   (*b*) Environmental protection and regulation.
   (*c*) Human service delivery.
   (*d*) Civil and criminal jurisdiction.

Emphasize the nature of the conflict, brief background, and the specific tribal and state officials involved.

4. Study the alternative mechanisms for intergovernmental conflict resolution (as applicable to No. 3 above) with citation of existing authorities and recommendations.
5. Propose specific issues for negotiation between Washington State and Indian tribal governments that potentially have indications of being successfully resolved.

EXECUTIVE ORDER 80-02, GOVERNOR'S OFFICE OF INDIAN AFFAIRS, DATED JANUARY 9, 1980

STATE OF WASHINGTON,
OFFICE OF THE GOVERNOR,
Olympia, Wash.

EXECUTIVE ORDER 80-02

ESTABLISHING GOVERNOR'S OFFICE ON INDIAN AFFAIRS

Whereas, the state of Washington recognizes its responsibility toward our state's first citizens, the American Indians; and

Whereas, the state of Washington recognizes a need to work with tribal governments and carry out its responsibilities for and on behalf of Indian citizens; and

Whereas, disputes both legal and moral, have existed for years regarding questions of legal jurisdiction over Indians and Indian lands in the state of Washington; and

Whereas, it is the desire of this administration to work with Indian tribes to establish a relationship involving tribal, local, state and federal governments that will be conducive to improving communications and facilitating joint problem solving efforts; and

Whereas, because of the complexity of today's issues, the Governor's Indian Advisory Council, previously assigned responsibility for dealing with Indian areas of concern, no longer is the most effective method of addressing Indian interests.

Now, therefore, I, Dixy Lee Ray, Governor of the State of Washington, by virtue of the power vested in me, hereby direct as follows:

1. There shall be established a Governor's Office of Indian Affairs, which shall replace the Governor's Indian Advisory Council.
2. The Office of Indian Affairs shall have the following responsibilities:
   a. Assist the Governor in the development of effective policies and recommend legislation which will guide the state of Washington, Indian tribal governments and Indian organizations.

b. Advise state agencies and departments concerning issues relative to the Indian tribes and organizations of Washington State.

c. Act as the Governor's liaison between the state of Washington, Indian tribal governments and Indian organizations.

d. Act as liaison and advisor to the Governor and state agencies on federal legislation and policies in Indian affairs.

e. Provide assistance to Indian citizens in their efforts to work with state government to resolve mutual problems and concerns.

f. Advise the Governor on the appropriate and effective role of state government in inter-governmental mechanisms that involve the participation of Indian tribal governments to better federal, local, state and tribal relations.

All of the provisions of Executive Order 72-11 (signed October 30, 1974) are hereby rescinded and revoked.

In witness whereof, I have hereunto set my hand and caused the seal of the state of Washington to be affixed at Olympia this 9th day of January, A.D. nineteen hundred and eighty.

DIXY LEE RAY, *Governor of Washington.*

By the Governor:
R. K. CHAPMAN,
Secretary of State.

CHAPTER 39.34, REVISED CODE OF WASHINGTON INTERLOCAL COOPERATION ACT

Sections

Joint actions by local governmental entities regarding insurance: RCW 48.62.040 through 48.62.120.

School district associations, right to mortgage or convey money security interest in association property—Limitations: RCW 28A.58.0401.

School districts, intermediate school districts, agreements with other governmental entities for transportation of students, the public or other noncommon school purposes—Limitations: RCW 28A.24.180.

39.34.010 Declaration of purpose. It is the purpose of this chapter to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities. [1967 c 239 § 1.]

Joint operations by municipal corporations and political subdivisions, deposit and control of funds: RCW 43.09.285.

39.34.020 Definitions. For the purposes of this chapter, the term "public agency" shall mean any agency, political subdivision, or unit of local government of this state including, but no limited to, special purpose and local service districts; any agency of the state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any political subdivision of another state.

The term "state" shall mean a state of the United States. [1979 c 36 § 1; 1977 ex.s. c 283 § 13; 1975 1st ex.s. c 115 § 1; 1973 c 34 § 1; 1971 c 33 § 1; 1969 c 88 § 1; 1969 c 40 § 1; 1967 c 239 § 3.]

Severability—1977 ex.s c 283: See notes following RCW 28A.21.010.

39.34.030 Joint powers—Agreements for joint or cooperative action, requisites, effect on responsibilities of component agencies—Financing of joint projects. (1) Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having the power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

(2) Any two or more public agencies may enter into agreements with one another for joint or cooperative action pursuant to the provisions of this chapter. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public shall be necessary before any such agreement may enter into force.

(3) Any such agreement shall specify the following:

(a) Its duration;

(b) The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created. Such entity may include a nonprofit corporation whose membership is limited solely to the participating public agencies and the funds of any such corporation shall be subject to audit in the manner provided by law for the auditing of public funds;

(c) Its purpose or purposes;

(d) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor;

(e) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination;

(f) Any other necessary and proper matters.

(4) In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall, in addition to items (a), (c), (d), (e) and (f) enumerated in subdivision (3) hereof, contain the following:

(a) Provision for an administrator or a joint board responsible for administering the joint or cooperative undertaking. In the case of a joint board, public agencies party to the agreement shall be represented;

(b) The manner of acquiring, holding and disposing of real and personal property used in the joint or cooperative undertaking. Any joint board is authorized to establish a special fund with a state, county, city, or district treasurer servicing an involved public agency designated "Operating fund of _____ joint board".

(5) No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, said performance may be offered in satisfaction of the obligation or responsibility.

(6) Financing of joint projects by agreement shall be as provided by law. [1972 ex.s. c 81 § 1; 1967 c 239 § 4.]

Joint operations by municipal corporations or political subdivisions, deposit and control of funds: RCW 43.09.285.

39.34.040 Agreements to be filed—Status of interstate agreements—Real party in interest—Actions. Prior to its entry into force, an agreement made pursuant to this chapter shall be filed with the city clerk and county auditor and with the secretary of state. In the event that an agreement entered into pursuant to this chapter is between or among one or more public agencies of this state and one or more public agencies of another state or of the United States said agreement shall have the status of an interstate compact, but in any case or controversy involving performance or interpretation thereof or liability thereunder, the public agencies party thereto shall be real parties in interest and the state may maintain an action to recoup or otherwise make itself whole for any damages or liability which it may incur by reason of being joined as a party therein. Such action shall be maintainable against any public agency or agencies whose default, failure of performance, or other conduct caused or contributed to the incurring of damage or liability by the state. [1967 c 239 § 5.]

39.34.050 Duty to submit agreement to jurisdictional state officer or agency. In the event that an agreement made pursuant to this chapter shall deal in whole or in part with the provision of services or facilities with regard to which an officer or agency of the state government has constitutional or statutory powers of control, the agreement shall, as a condition precedent to its entry into force, be submitted to the state officer or agency having such power of control and shall be approved or disapproved by him or it as to all matters within his or its jurisdiction [1967 c 239 § 6.]

Duty to submit certain agreements to the office of community affairs: RCW 39.34.120.

39.34.060 Participating agencies may appropriate funds and provide personnel and services. Any public agency entering into an agreement pursuant to this chapter may appropriate funds and may sell, lease, give, or otherwise supply the administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking by providing such personnel or services therefor as may be within its legal power to furnish. [1967 c 239 § 7.]

39.34.070 Authority of joint boards to receive loans or grants. Any joint board created pursuant to the provisions of this chapter is hereby authorized to accept loans or grants of federal, state or private funds in order to accomplish the purposes of this chapter provided each of the participating public agencies is authorized by law to receive such funds. [1967 c 239 § 8.]

39.34.080 Contracts to perform governmental activities with each contracting agency is authorized to perform. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which each public agency entering into the contract is authorized by law to perform: *Provided*, That such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties. [1967 c 239 § 9.]

39.34.085 Agreements for operation of bus services. In addition to the other powers granted by chapter 39.34 RCW, one or more cities or towns or a county, or any combination thereof, may enter into agreements with each other or with a public transportation agency of a contiguous state, or contiguous Canadian province, to allow a city or such other transportation agency to operate bus service for the transportation of the general public within the territorial boundaries of such city and/or county or to allow such city and/or county to operate such bus service within the jurisdiction of such other public agency when no such existing bus certificate of public convenience and necessity has been authorized by the Washington utilities and transportation commission: *Provided, however*, That such transportation may extend beyond the territorial boundaries of either party to the agreement if the agreement so provides, and if such service is not in conflict with existing bus service authorized by the Washington utilities and transportation commission. The provisions of this section shall be cumulative and nonexclusive and shall not affect any other right granted by this chapter or any other provision of law. [1977 c 46 § 1; 1969 ex.s. c 139 § 1.]

39.34.090 Agencies' contracting authority regarding electricity, utilities' powers, preserved. Nothing in this chapter shall be construed to increase or decrease existing authority of any public agency of this state to enter into agreements or contracts with any other public agency of this state or of any other

state or the United States with regard to the generation, transmission, or distribution of electricity or the existing powers of any private or public utilities. [1967 c 239 § 10.]

39.34.100 Powers conferred by chapter are supplemental. The powers and authority conferred by this chapter shall be construed as in addition and supplemental to powers or authority conferred by any other law, and nothing contained herein shall be construed as limiting any other powers or authority of any public agency. [1967 c 239 § 11.]

39.34.110 Powers otherwise prohibited by Constitutions or federal laws. No power, privilege, or other authority shall be exercised under this chapter where prohibited by the state Constitution or the Constitution or laws of the federal government. [1967 c 239 § 12.]

39.34.120 Duty to submit certain agreements to the office of community affairs—Comments. In the event that an agreement made pursuant to this chapter shall deal in whole or in part with matters of land-use planning, air or water pollution, zoning, building or housing codes, or any other matter for which specific responsibility has been assigned to the office of community affairs by legislative action, then such agreement shall be submitted to the office of community affairs at least sixty days prior to the effective date of the agreement. The office of community affairs may file written comments with the parties to the proposed agreement not less than fifteen days prior to the effective date of the proposed agreement. Such comments shall not be binding upon the parties to the proposed agreement but may be used by the parties to determine the advisability of adopting, rejecting or amending the proposed agreement. [1967 c 239 § 13.]

Duty to submit agreement to jurisdictional state officer or agency: RCW 39.34.050.

39.34.130 Transactions between state agencies—Charging of costs—Regulation by director of financial management. Except as otherwise provided by law, the full costs of a state agency incurred in providing services or furnishing materials to or for another agency under chapter 39.34 RCW or any other statute shall be charged to the agency contracting for such services or materials and shall be repaid and credited to the fund or appropriation against which the expenditure originally was charged. Amounts representing a return of expenditures from an appropriation shall be considered as returned loans of services or of goods, supplies or other materials furnished, and may be expended as part of the original appropriation to which they belong without further or additional appropriation. Such interagency transactions shall be subject to regulation by the director of financial management, including but not limited to provisions for the determination of costs, prevention of interagency contract costs beyond those which are fully reimbursable, disclosure of reimbursements in the governor's budget and such other requirements and restrictions as will promote more economical and efficient operations of state agencies.

Except as otherwise provided by law, this section shall not apply to the furnishing of materials or services by one agency to another when other funds have been provided specifically for that purpose pursuant to law. [1979 c 151 § 45; 1969 ex.s. c 61 § 1.]

Duty to submit agreement of jurisdictional state officer or agency: RCW 39.34.050.

39.34.140 Transactions between state agencies—Procedures for payments through transfers upon accounts. The director of financial management may establish procedures whereby some or all payments between state agencies may be made by transfers upon the accounts of the state treasurer in lieu of making such payments by warrant or check. Such procedures, when established, shall include provision for corresponding entries to be made in the accounts of the affected agencies. [1979 c 151 § 46; 1969 ex.s. c 61 § 2.]

39.34.150 Transactions between state agencies—Advancements. State agencies are authorized to advance funds to defray charges for materials to be furnished or services to be rendered by other state agencies. Such advances shall be made only upon the approval of the director of financial management, or his order made pursuant to an appropriate regulation requiring advances in certain cases. An advance shall be made from the fund or appropriation available for the procuring of such services or materials, to the state agency which is to perform the services or furnish the materials, in an amount no greater than the estimated charges therefor. [1979 c 151 § 47; 1969 ex.s. c 61 § 3.]

39.34.160 Transactions between state agencies—Time limitation for expenditure of advance—Unexpended balance. An advance made under RCW 39.34.130

through 39.34.150 from appropriated funds shall be available for expenditure for no longer than the period of the appropriation from which it was made. When the actual costs of materials and services have been finally determined, and in no event later than the lapsing of the appropriation, any unexpended balance of the advance shall be returned to the agency for credit to the fund or account from which it was made. [1969 ex.s. c 61 § 4.]

39.34.170 Transactions between state agencies—Powers and authority cumulative. The powers and authority conferred by RCW 39.34.130 through 39.34.160 shall be construed as in addition and supplemental to powers or authority conferred by any other law, and not to limit any other powers or authority of any public agency expressly granted by any other statute. [1969 ex.s. c 61 § 5.]

39.34.900 Short title. This chapter may be cited as the "Interlocal Cooperation Act." [1967 c 239 § 2.]

39.34.910 Severability—1967 c 239. If any provision of this chapter, or its application to any person or circumstance is held invalid, the remainder of the chapter, or the application of the provision to other persons or circumstances is not affected. [1967 c 239 § 14.]

39.34.920 Effective date—1967 c 239. The effective date of this chapter is July 1, 1967. [1967 c 239 § 15.]

Mr. SCOTT. Needless to say, after the enactment of legislation by the State the conflicts began. As the Governor stated in her letter to Senator Kennedy, a copy of which is attached, the Sate of Washington has spent numerous man hours and dollars to litigate the issues that have been associated with Public Law 83–280. The vagueness of that statute seemed to lend itself to the litigation process, to which there seems to be no end.

The non-Public Law 83–280 tribes in this State do not appear to be embroiled in the courtroom conflicts associated with Public Law 83–280.

I am sure that you have been told a number of times throughout these proceedings that the philosophy of Public Law 83–280 comes from the old U.S. Indian policy of termination of relations with the Indian tribes. Therefore, with the present policy that emerged in the 1970's of encouraging self-determination and strengthening of tribal government a change in methods of dealing with jurisdictional conflicts should be developed.

The policy of the U.S. Government was most forcefully and lastly expressed by President Nixon in his speech of July 8, 1970. In it the President asserts that the policy of forced termination is wrong. He said:

> I hereby affirm for the executive branch that the historic relationship between the Federal Government and the Indian community cannot be abridged without the consent of the Indians.

Now the wheel has turned full circle. In 1953 the Federal Government invited States to take over jurisdiction on Indian reservations. In 1957 Washington did so.

When Washington extended its jurisdiction in 1963, the Federal Government had not yet indicated any change in its termination philosophy, but in 1970 it expressly did so.

The concept of retrocession now seems to be entirely appropriate. The State of Washington, through the Governor's office, supports this concept as contained in S. 1722, section 161.

The inadequacies that have resulted from the assumption of jurisdiction by the State are many. The biggest complaint that we hear is that most local Indian law enforcement agencies lack sufficient manpower and revenue to provide for equal and adequate law enforcement on Indian reservations.

The burden of States assuming jurisdiction falls most directly on local law enforcement agencies, such as county sheriffs, and on the county district court systems. It is our estimation that retrocession can begin a process whereby the Federal Government, Washington State, Indian tribes, and local law enforcement agencies can work out agreements of law enforcement responsibilities, cross-deputization programs, et cetera, plus multijurisdictional harmony in other areas of government service which seem to be a natural follow-on development.

The only thing that we recommend that you add to section 161 would be some language that would include the Governor of the State affected as having approval authority over any tribal retrocession petition prior to submission to the Secretary of the Interior.

Senator MELCHER. Mr. Scott, I want to interrupt you here because you are going to go on to another bill in your testimony.

Are you speaking as the representative of the State or just as the representative of the Governor?

Mr. SCOTT. I am speaking for the Governor's office, of the State of Washington.

Senator MELCHER. If you are speaking for the State of Washington, what would impede retrocession in the State of Washington under existing law without any revision of law?

Mr. SCOTT. It would require taking the law off the books of chapter 37.12—amending that by a legislative process. I would see that as being the only impediment.

Senator MELCHER. Has the State legislature addressed this point?

Mr. SCOTT. They have not done so recently. I think that with some executive branch leadership and with some other things that the legislature is involved in and working with the tribal governments in our State, that it would be a distinct possibility.

Senator MELCHER. The point is that if it is the will of the State of Washington to have retrocession, present law permits it. Is that correct?

Mr. SCOTT. Yes, sir.

Senator MELCHER. Is it simply an area that the State of Washington has not addressed?

Mr. SCOTT. That is right. It has not addressed it. It has been a point of contention between the tribes and the attorney general's office for some time.

Senator MELCHER. It is the will of the State of Washington, and there should be no problem. Is that it?

Mr. SCOTT. That is right.

Senator MELCHER. We are talking about existing law.

Mr. SCOTT. I think the attorney general's office says there is a problem under existing law. That is the opinion of late.

Senator MELCHER. Do they say it is a problem with the State legislature not having acted?

Mr. SCOTT. No, sir, they say that the executive branch does not have the authority to approve retrocession without changing—I believe—the law as it is written.

Senator MELCHER. The State of Washington's attorney general does not argue that the legislature, by a vote and by a bill signed by the Governor of the State, could not retrocede, do they?

Mr. SCOTT. They do not argue that point.

Senator MELCHER. Perhaps, then, it is not the will of the State of Washington to act on it.

Mr. SCOTT. I think it is the will of the State of Washington to begin the process.

Senator MELCHER. Is there a bill before the State legislature?

Mr. SCOTT. No, sir. Our legislative session just ended.

Senator MELCHER. Did the Governor have a bill before the State legislature?

Mr. SCOTT. No, sir.

Senator MELCHER. Is it a question of inaction?

Mr. SCOTT. Up to this point it is.

Senator MELCHER. Is there any impediment to retrocession by the State of Washington under State law, if it so chooses?

Mr. SCOTT. I do not believe there is.

Senator MELCHER. Thank you.

Mr. SCOTT. If I may, I would like to make a brief comment on S. 1181, the Tribal-State Compact Act. Again, the State of Washington has been involved in many conflicts with various tribes within our boundaries. Issues such as jurisdiction, human service delivery, treaty rights, fishing rights, and taxation have all been discussed, researched, and litigated extensively.

In fact, a number of the court cases have received national attention in the U.S. Supreme Court Review.

Tribal-State conflicts are not new to Washington State. The present administration under Governor Ray is planning some new and innovative methods of intergovernmental cooperation with tribal governments. Attached is a brief outline of the proposal to develop what we call the Washington State Study Group on State-Tribal Relations. To assist in this area the Governor has, by Executive Order 8002, created an Office of Indian Affairs. A copy of the executive order is attached as well.

The Washington State Legislature is a member of the Commission on State-Tribal Relations sponsored by the National Conference of State Legislatures, the National Congress of American Indians, and the National Tribal Chairmen's Association. The Commission is addressing and encouraging the agreement process in many areas of governmental service and functions between tribes and States.

These endeavors on the part of State officials shows that Washington State is beginning to show some much needed leadership in intergovernmental cooperation with tribal governments.

Two recent agreements between tribes, local government, and State government are examples of the new effort. They are: No. 1, the Portage Island agreement between the Lummi Tribe in Wahkiakum County settling a dispute over a small island in the Lummi Indian Reservation; and, No. 2, the Nisqually agreement between the Nisqually Tribe in Washington State, particularly the Washington Department of Fisheries, over the fishery management enhancement of the Nisqually River drainage basin.

I will, if the committee desires, forward copies of both agreements within the next few days.

The State of Washington has, within its code, the Interlocal Cooperation Act which permits actions of agreement between local governmental units, special purpose districts, State agencies, Federal agencies, and Indian tribes. I will not expound further upon this act but will allow for its inclusion into the record to suffice for its intent and clarification.

To sum up what I am trying to point out, Washington State without any Federal legislation is embarking on a program of working out problems of conflict between the State and tribes. The conflicts are local in nature and need to be resolved on the local level.

The legislation does not address, nor do I think that any legislation is capable of addressing, the political, historical, or attitudinal barriers that must be overcome for success in this area. The State of Washington would prefer that the legislation be limited to encouraging cooperation between the States and tribes and allowing us to work out the solutions and mechanisms on the local level with no strong Federal guidelines, but with Federal involvement such as the study group or tripartite method as proposed in attachment No. 3, memo to Governor Ray, dated November 16, 1979.

We welcome the process of cooperation but shy away from the bureaucratic guidelines that traditionally come with Federal programs.

Thank you.

Senator DECONCINI [acting chairman]. Mr. Scott, I am a little unclear on your testimony regarding S. 1181. Are you suggesting that the legislation is unnecessary? Are you suggesting that it might be interpreted as imposing some kind of regulatory involvement on the Federal level?

Mr. SCOTT. I meant the latter.

Senator DECONCINI. With regard to the latter, if there is no application for Federal funds, I do not see anything in the legislation that would require or necessitate any Federal Government approval of an agreement entered into between the State or local government and an Indian tribe. The intent I hoped to express was that if the Indian tribe and the local government wanted to enter into a compact on a voluntary basis, there would be no interference on the part of the Federal Government unless it made application for money. Because of any Federal funding that might be requested, there would have to be some criteria.

Do you interpret the bill differently?

Mr. SCOTT. No; I do not specifically interpret it differently.

Senator DECONCINI. Then, your concern is that if the Federal Government is involved in the area of money applied for and possibly expended, there might be some interference that the State of Washington would prefer not to have.

Mr. SCOTT. Yes.

Senator DECONCINI. Do any of the agreements you have now involve Federal funding that you know of?

Mr. SCOTT. The Nisqually agreement does. That has been submitted to the Interior Appropriations Committee for their consideration.

Senator DECONCINI. That has to be approved by the Congress for the expenditure of the money to occur. Did that agreement have to be approved by the Interior Department or the BIA?

Mr. SCOTT. We sent them copies for their information.

Senator DECONCINI. You did not ask for approval?

Mr. SCOTT. No; we did not ask for their approval.

Senator DECONCINI. The way it operates now is that if there is money involved, you must first have the authorizations for appropriations but not approval, so there are no standards or rules set up unless the Appropriations Committee decides to tack some on.

Mr. SCOTT. Right.

Senator DECONCINI. Thank you very much.

Mr. SCOTT. Thank you.

Senator DECONCINI. The next witness is Ronald Andrade, executive director of the National Congress of American Indians. He is accompanied by Anthony Rogers and David Dunbar.

Welcome, gentlemen, we are pleased to have you. Your full testimony will be printed in the record if you care to summarize it.

STATEMENT OF RONALD P. ANDRADE, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS, ACCOMPANIED BY ANTHONY ROGERS AND DAVID DUNBAR

Mr. ANDRADE. Mr. Chairman, my name is Ron Andrade, executive director of the National Congress of American Indians.

This statement has been prepared by our law firm, Wilkinson, Cragun, & Barker, and by the Native American Rights Fund on behalf of the National Congress of American Indians; the Arapahoe Tribe of the Wind River Reservation, Wyo.; the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Mont.; the Three Affiliated Tribes of the Fort Berthold Reservation, N. Dak.; and the Hoopa Valley Tribe of the Hoopa Valley Reservation, Calif.

The statement is addressed to the three jurisdictional proposals and bills pending before the Senate Select Committee on Indian Affairs. The first of these is S. 1181, a bill to authorize the States and Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country. The second proposal concerns certain provisions of S. 1722, the Federal Criminal Code reform bill, part C, subsections 161 (i) and (j), which sets forth a means for Indian tribes to obtain retrocession of Federal jurisdiction now assumed by certain States pursuant to Public Law 83-280.

The third proposal has not yet taken the form of a bill but it is discussed in a letter from the chairman of this committee inviting comment on the delegation of authority to Federal magistrates with respect to crimes on Indian reservations.

I will consider the proposals in the order in which I just mentioned them.

S. 1181 has been introduced in the same form that S. 2502 was reported by the Senate Select Committee on Indian Affairs and passed by the Senate during the 95th Congress.

Title I of S. 1181 would authorize States and tribes to enter into compacts or agreements relating to the enforcement or application of civil, criminal, and regulatory laws of each within their respective jurisdictions; to allocate or determine governmental responsibility of the States or tribes over specified jurisdictional matters or specified geographical areas including concurrent jurisdiction; and, to agree to

transfer jurisdiction of individual cases either from tribal to State courts or State to tribal courts.

The bill further provides that such agreements or compacts would be subject to revocation by either party upon 6 months' notice or such different time periods as they may agree upon. The bill states that no agreement could establish a period for revocation in excess of 5 years without the approval by referendum of the adult members of the affected tribe, as is now required by section 406 of the 1968 Indian Civil Rights Act, 25 U.S.C. 1326.

S. 1181 would require that any tribal-State agreements reached must be filed with the Secretary of the Interior within 30 days of consummation or become subject to immediate revocation by either party.

The Secretary would be required to publish the jurisdictional provisions of any such agreement or revocation in the Federal Register unless requested otherwise by the parties to the agreement. There is a proviso that no agreement could affect any pending action or proceeding over which a State or tribal court had already assumed jurisdiction.

Title I of the bill goes on to indicate that it should not be construed to enlarge or diminish civil or criminal jurisdiction exercised by States or tribes, except as provided in the bill; to empower States or tribes to expand or diminish jurisdiction exercised by the United States for the making and enforcement of criminal laws in Indian country; to empower States or tribes to make agreements on the exercise of jurisdiction except as authorized by their own organizational documents or enabling laws; to authorize agreements which alienate, financially encumber, or tax any real or personal property, including water rights, belonging to individual Indians or tribes in trust or restricted status; or to agree on the transfer of unlimited, unspecified, or general civil and criminal jurisdiction, except as provided by the 1968 Indian Civil Rights Act, 25 U.S.C. 1326—the tribal referendum requirement.

The bill goes on to provide for funding of administration of agreements and Federal court jurisdiction to enforce them.

We commend the committee and sponsors of S. 1181 for your continuing attention to the need for cooperation in practical matters involving tribal, State, and local jurisdictions. We recognize the need for improved relations among neighboring governments and support the concept contained in S. 1181, as we generally supported a similar effort in the 95th Congress.

Many NCAI member tribes are actively engaged in particular local efforts to arrive at agreements in a variety of cross-jurisdictional areas through Indian country. NCAI is one of the chartering organizations of the Tribal-State Relations Commission, which was established for the purpose of exploring existing cooperative agreements and developing models for such efforts in the future.

Much support for S. 1181 is support for this type of cooperative effort and spirit. Our support is similarly offered.

However, we question the need for this legislation at this stage of exploration. In fact, the very existence of the legislation has led some State officials to conclude that tribes and States cannot enter into cooperative agreements without legislation being enacted. This is not the case. Tribes and States have the powers now to enter into

most agreements and do not need broad-based congressional authorization for this purpose.

Further, we question whether there is sufficient protection to insure that jurisdictional agreements are approved by the adult members of tribes that will be affected by the agreements. S. 1181 would not require a referendum of adult tribal members with respect to any agreement that dealt with a limited shift of jurisdiction to the States and that could be revoked by the tribe in a period of less than 5 years from consummation.

Many Indians, Indian tribes, and their attorneys are therefore concerned that the 1968 Indian Civil Rights Act would be, to that extent, repealed by this bill. To that same extent, the decision of the U.S. Supreme Court in *Kennerly* v. *District Court*, 400 U. S. 423 (1971), would be overruled.

If this committee and the Senate are to move forward on this proposed legislation, you would be well advised to require that there be a tribal referendum with respect to any agreement that caused the shift of jurisdiction to a State, in order to leave intact both *Kennerly* and 25 U.S.C. 1326.

On the other hand, those in Indian country who favor, at least to some degree, the enactment of this bill contend that present law, particularly Public Law 280, as amended, may not conveniently permit the execution of agreements that shift jurisdiction to States on a temporary or experimental basis, unless the Public Law 280 requirements are met. However, this is not necessarily so.

Public Law 280 really deals with an assumption of jurisdiction by a State in criminal or civil matters, meaning that the State would exercise authority in such matters from the time they were initiated until they were judicially concluded. However, many agreements between States and tribes cover less comprehensive but important matters, such as cross-deputization and the sharing of jail facilities. Many do not involve a shift of jurisdiction to the States to prosecute and punish offenders. These less comprehensive agreements need not meet the requirements of Public Law 280.

If, in fact, there is a shift to the States of prosecutorial and punitive jurisdiction over Indians in criminal matters, then those agreements should be subject to tribal referendum as required by the 1968 Indian Civil Rights Act, even if they are only a temporary or experimental effort designed by the States and the tribes involved.

Those for whom I speak today, therefore, continue to feel that tribes and States should be encouraged to move in the direction of resolving their jurisdiction problems. At the same time we do not feel that this particular bill is necessary at the present time.

The cooperative efforts between States and tribes should be allowed to continue without a new Federal statute even if it means working toward agreements of a less dramatic or broad nature than S. 1181 seems to contemplate. As we have all been reminded in the past, "a journey of a thousand miles must begin with but a single step."

Expansive jurisdictional agreements may well be too large a first step for tribes and States to be taking after years of disagreement over jurisdiction. When, and if, relations between the two levels of government make broader agreements more likely possibilities, then tribal-

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State compact legislation such as this may be more advisable. Until that time we believe that the Congress should not disturb the law on jurisdictional agreements, pending an expanded analysis based on the direction the tribes and States will take in this area.

We support the retrocession provisions of part C, subsections 161(i) and 161(j) of S. 1722. S. 1722 is a bill to codify, revise, and reform title 18 of the United States Code and the bill has been reported favorably by the Senate Judiciary Committee.

S. 1722 would authorize the United States to reassume criminal jurisdiction over an area of Indian country 90 days after the adoption of a resolution to that effect by the Indian tribe occupying the particular territory. Before it becomes effective, the tribal resolution must be approved by a majority vote of the adult Indians voting at a special election supervised by the Secretary of the Interior.

If adopted, S. 1722 would go far toward removing much of the jurisdictional constraints and harm to tribal self-government resulting from the enactment of Public Law 83–280, August 15, 1953, 67 Stat. 588.

Public Law 83–280 unilaterally gave five States—California, Minnesota, Nebraska, Oregon, and Wisconsin, and Alaska was subsequently added—criminal and many types of civil jurisdiction over most Indian country within their borders. Section 7 of the act, 67 Stat. 588, 590, authorized any other State unilaterally to assume criminal or civil jurisdiction over Indian country as provided by the act.

Adopted during the termination era of Indian affairs, Public Law 83–280 is in obvious conflict with the current Indian policy of self-determination because it granted or permitted States to assume broad jurisdiction over Indian country whether the Indians wanted State jurisdiction or not. Public Law 83–280 contributed to a serious breakdown of law and order in Indian country because State governments soon showed that they were either unable or unwilling to assume the jurisdictional responsibilities which had been given to them under the statute.

Where some States did assume and attempt to exercise criminal jurisdiction under Public Law 280, they frequently did so in a discriminatory fashion at the request of non-Indians living on a reservation rather than in response to the needs of the particular tribe for adequate law enforcement. See the final report of the American Indian Policy Review Commission submitted to Congress on May 17, 1977, at pages 204 through 208.

By the Indian Civil Rights Act of April 11, 1968, 82 Stat. 78, Congress partly changed this malfunctioning situation by requiring the consent of a tribe before a State could assume any jurisdiction it did not already have over Indian country, 82 Stat. 78, 25 U.S.C. 1324, 1326. No tribe of which we are aware has consented to any State assumption of jurisdiction pursuant to the 1968 act. Consequently, no more shift of jurisdiction to States has occurred since then.

The Indian Civil Rights Act also allowed State governments to retrocede to the United States any manner of jurisdiction which the State had acquired under Public Law 280, 82 Stat. 79, U.S.C. 1323. We are aware of five such retrocessions. However, 25 U.S.C. 1323 shares certain of the defects of Public Law 280 in that section 1323 makes

retrocession dependent upon the wishes of the State government rather than upon the desires of the major affected parties—the Indian tribes.

Moreover, 25 U.S.C. 1323 has engendered litigation regarding whether a State action retroceding jurisdiction was sufficient under State law. It seems clear, however, that under the law retrocession is effective if it is accepted by the United States. For reference, see for example, *Omaha Tribe* v. *Walthill*, 460 F. 2d 1327 (1972), cert. denied, 409 U.S. 1107.

S. 1722 would allow for retrocession of State criminal jurisdiction to the Federal Government upon a resolution to that effect approved by the adult members of an Indian tribe voting at a special election. This bill, unlike current law, would make retrocession dependent upon the will of persons to be affected rather than upon the actions of the State government.

To leave retrocession in the control of the State government is not only inconsistent with the tribal right to self-determination but also subjects retrocession to the uncertainties of State politics in which Indians have historically enjoyed almost no power. S. 1722 requires the holding of an election supervised by the Secretary of the Interior prior to retrocession and this election requirement will insure that any retrocession which occurs will be in accordance with the desires of the entire tribe. For reference, see *Kennerly* v. *District Court*, 400 U.S. 423 (1971).

We note that the final report of the American Indian Policy Review Commission submitted to Congress on May 17, 1977, discussed the problem of Public Law 280 jurisdiction at length and recommended that retrocession be allowed at tribal option. For reference see final report at pages 199 through 209.

Some have suggested that tribal retrocession could give tribes criminal jurisdiction over non-Indians and thus legislatively repeal the Supreme Court's decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). Retrocession, however, would only transfer criminal jurisdiction from the State to the Federal Government and would neither enlarge upon nor contract tribal criminal jurisdiction.

Tribal governments do, of course, possess current criminal jurisdiction over their own members where the Federal Government has criminal jurisdiction. *United States* v. *Wheeler*, 435 U.S. 313 (1978), and a November 17, 1978, Interior Solicitor's decision, and decisions of lower courts—for example, *Confederated Tribes of the Colville Reservation* v. *Beck*, E.D. Wash., December 21, 1978—indicate that tribes have concurrent criminal jurisdiction over their own members even where the State has assumed criminal jurisdiction under Public Law 280.

To the extent that the effective prosecution of exclusively Federal offenses requires increased designation of magistrates to hear cases on the Indian reservations from which they arise, sufficient statutory authority exists under the Magistrates Act, 18 U.S.C. 3401, for district courts to make such appointments. Current law vests the decision on whether to appoint a magistrate and on what terms with the judges of each Federal district court. Specific legislation directing that such magistrates be appointed to Indian reservations would be unnecessary

and inappropriate in light of the discretion presently lodged in the district courts.

However, this committee could serve a worthwhile function through oversight hearings which would relay to the Judicial Conference specific requests from tribes for additional magistrate assistance in dealing with exclusively Federal crimes committed by non-Indians against Indians.

In the past district courts have cited an insufficient caseload as the reason for not appointing magistrates on Indian reservations. As the chairman's letter of January 18, 1980, regarding these hearings recognized, this continuing situation stems from the trend of decisions of U.S. attorney's not to prosecute most cases arising on reservations.

A 1974 study by the National American Indian Court Judges Association of Federal prosecution of crimes committed on Indian reservations included a survey of U.S. attorney offices which revealed inadequate experience, training, and expertise on Indians and Indian problems. Cultural and language differences interfered with interviewing witnesses and preparing them for trial.

Only one office assigned an assistant attorney to handle exclusively offenses committed on Indian reservations. None reported having any Indian employees. The location of most offices in major cities far from rural reservations amplified the failure of the attorneys to comprehend tribal culture and to learn about developments and attitudes affecting law enforcement in Indian communities.

These problems persist. Oversight hearings on the lack of magistrates on reservations would also confront the related issues involving U.S. attorneys. Legislation could provide for an additional experienced assistant attorney in each district embracing Indian reservations to be assigned primary responsibility for all Federal cases arising on such reservations. The assignments should be full time if the number of actual and potential cases justifies it.

Currently, U.S. attorneys frequently assign their most junior attorney to handle such cases. For reference, see Indian Court Judges report, page 15. This results in an unacceptably high rate of turnover, inconsistent handling of decisions involving whether and how to prosecute, an inability to develop knowledge and expertise involving Indians and reservation crime, and handling of Indian cases by extremely inexperienced prosecutors.

Centralization of Indian cases under a clearly designated assistant attorney or attorneys in each office can help to improve relations with Indian communities, develop ongoing coordination with reservation law enforcement personnel, increase prosecutorial understanding of complex and changing areas of Indian law, and provide more effective processing of criminal cases.

This proposal has been repeatedly endorsed by a variety of groups. The 1974 Indian Court Judges study recommended that one or more assistant U.S. attorneys have primary responsibility for reservation cases. The 1975 Department of Justice "Report of the Task Force on Indian Matters" recommended that work with Indian cases and communities be the sole responsibility of at least one additional assistant in each district with a significant number of Indian cases. The Amer-

ican Indian Policy Review Commission's Task Force on Federal, State, and Tribal Jurisdiction's final report also included a recommendation for specific designation of responsibility for Indian matters to one or more staff attorneys. For reference, see page 43 of the final report.

Ultimately, U.S. attorneys must rely on the results of the investigative work of the FBI, the State, BIA, and tribal cross-deputized officers. Both the 1974 Indian court judges study and the 1975 Department of Justice task force report documented the duplication of effort between FBI and reservation-based investigators, and the unwillingness of some U.S. attorneys to accept cases directly from BIA officers.

As far as we know, there is no good reason for such reluctance in the vast majority of cases. In fact, the FBI has only been involved in reservation law enforcement since the 1940's. Oversight hearings pointing out the efficiency of direct referrals might help to alleviate the situation.

Shortcomings in the present activities of Federal magistrates and U.S. attorneys regarding law and order on Indian reservations present problems in areas involving non-Indian violation of tribal or other criminal laws protecting the person and property of Indians. The U.S. Supreme Court decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), precludes tribal courts from exercising criminal jurisdiction over non-Indians absent delegation of such power by Congress.

Therefore, tribes are forced to rely upon Federal prosecution of non-Indians who criminally violate tribal laws by, for example, trespassing upon tribal lands or assaulting a tribal member. Unfamiliarity with tribal concerns on the part of Federal judges, magistrates, and U.S. attorneys frequently leads them to fail to recognize the importance to the community of enforcing tribal laws and arresting and prosecuting non-Indians who commit violent street crimes. As a result, crimes by non-Indians against Indians are not prosecuted as vigorously as they deserve, leading to perceived and actual inequities in reservation law enforcement.

An additional problem exists with regard to enforcing violations of tribal law by non-Indians. Omission of tribal law from the Assimilative Crimes Act's coverage has meant that Federal courts do not generally enforce such violations. In light of *Oliphant*, this means that non-Indians can freely violate tribal criminal laws when their conduct does not constitute a violation of State or local law.

This impunity creates an unacceptable vacuum, particularly since tribal laws may be the only law able to protect matters of utmost importance to Indian people and their culture. Although there is clearly a need to solicit further comment and discussion on this idea from tribes, Indian organizations, and Indian communities, proposed congressional legislation to strengthen reservation law enforcement in this area would seem likely to generate broad support.

With regard to crimes committed by Indians against other Indians on reservations, the most needed reform is the strengthening and expansion of the role of tribal courts.

In 1968 the Federal Magistrates Act increased the criminal penalties available to magistrates to enable them to levy penal sanctions of up to 1 year in jail and a $1,000 fine. The Indian Civil Rights Act, 25 U.S.C.

1302, however, which was drafted to give tribal courts the same sanctions as magistrates, continues to limit the criminal penalties of tribal courts to 6 months in jail and a $500 fine.

It is essential that any legislation expanding the use of magistrates on reservations include a simple, long-overdue provision eliminating the disparity by increasing the authority of tribal courts. In conjunction with this augmented power, tribal courts must be provided with additional legal training and the funds and equipment necessary to become courts of record, as are magistrate courts, to facilitate appeals of sentences.

Hiring of additional U.S. attorneys to handle Indian cases, preferably as a full-time assignment including coordination with reservation inhabitants and enforcement personnel, would involve modest additional resources.

As the Department of Justice's Task Force report indicated "since the bulk of Indian reservations are located in less than 10 Federal districts, the problem is of manageable size." For reference, see page 15 of the report. The task force recommended addition of at least one assistant U.S. attorney for each district having a significant number of Indian cases, which would be his or her sole responsibility, therefore seems quite reasonable.

In conclusion, oversight hearings directed toward the Judicial Conference with regard to magistrates, and toward the Department of Justice and the Attorney General, which oversee the FBI and U.S. attorneys, can serve a useful function.

Specific legislation should be limited to corrections of the anomalies between the sanctions available to tribal and magistrate courts, general support for the upgrading of tribal courts, and assimilating tribal law into Federal law, thereby filling the void created by *Oliphant*.

Mr. Chairman, thank you for the opportunity to present this statement.

Senator DECONCINI. Mr. Andrade, I take it from your statement regarding S. 1181 that NCAI supports the legislation but does not think it is necessary. Is that a fair summary?

Mr. ANDRADE. Yes, sir, that would be pretty close to it.

Senator DECONCINI. Based on that summary and extending it a little further, you mentioned in your statement that just the existence of this legislation pending has led some State officials to conclude that tribes and States cannot enter into cooperative agreements. As you also point out, that is not the case.

Do you have some specific examples in which States have said, on the record or even off the record, that they will not enter into an agreement until something is passed which gives them authority?

Mr. ROGERS. Senator DeConcini, possibly one example is a recent experience in the State of Montana with regard to water rights. The State legislature enacted a new water use bill in 1979 and included in it what is basically a requirement.

Incidently, it included within its ambit the fact that, clearly, Indian water rights cases were subject to State court proceedings and it included the creation of a tribal-State water compact commission to deal with tribes. It is required within the legislation that any compact reached with the tribes will have to be ratified by Congress.

I was not there for the entire debate on the bill in the legislature, but I believe there was a question of whether without congressional authorization such agreements could be entered into between tribes and States.

Senator DECONCINI. The bill S. 1181 goes to jurisdiction, not to the quantification of Indian rights. Do you disagree with that?

Mr. ROGERS. As I understand your bill, Senator, it appears that it might exempt from its coverage negotiations of water rights agreements to the extent that they could be said to alienate water rights.

I was giving the example I did as one in which there are State concerns about the ability of tribes and States to negotiate agreements. I think States do regard water rights compacts as, to some extent, jurisdictional.

Senator DECONCINI. If your example holds up, without this legislation no agreement would be made. Is that right?

Mr. ROGERS. Not unless it was ratified by Congress, assuming that Montana's view holds up. In the area of water rights, it is my own personal view that probably such agreements should be specifically ratified by Congress simply because of their interstate nature. I just gave that as an example of the State's attitude. I am sure there are others.

Senator DECONCINI. I think S. 1181 clarifies that it does not cover other than jurisdictional matters. Indian water rights are different. I could be mistaken.

I also understand, Mr. Andrade, that the NCAI has conducted field studies and workshops on tribal-State relations and possible tribal-State agreements. What kind of feedback have you had on those workshops and how long ago were they conducted?

Mr. DUNBAR. Mr. Chairman, my name is David Dunbar. I am conducting the hearings or meetings about which you are asking. We have set up a schedule of regional meetings which will explore the current situation of Indian law in light of existing agreements as well as what might be worked out under the bill before us now, S. 1181.

We have noted that there are in existence many agreements that are authorized by current law. We have also noted that there are areas in which agreements have potential under this bill.

Some specific examples I might cite are the following: During a recent meeting in Oklahoma City, a number of tribes requested that I provide them with an analysis of whether this bill could be used to cure some of the problems created by the *Little Chief* decision, in which Oklahoma gave up jurisdiction which they had obtained illegally. The question asked was, Under this bill could the tribes negotiate an agreement with the State to reassume the jurisdiction? I answered them, "Of course, it could."

Another area I am addressing is in the State of Wisconsin. The Menominees now hold full retrocession of jurisdiction on their reservations and they have encountered some problems involving resources. They do not have the resources to effectively manage a full retrocession. One of the questions that was put to me was: Is it possible for the Menominees to initiate an agreement with the State to take back a portion of jurisdiction which the tribe cannot handle.

Also in that State, the Lac Courte Oreilles Tribe has asked me to provide them with an analysis of retrocession in light of tribal re-

sources as well as functional capability. I anticipated that the Lac Courte Oreilles Tribes are not in a position to assume full retrocession at this point. Partial retrocession is a possibility. However, I suggested that under pending legislation an interim agreement may be possible under this bill which would allow the tribe to assume a measured portion of jurisdiction for a period and at the end of the period to take another look at and see if they could handle the whole thing.

I talked to the attorney general's office in Wisconsin. They said they would support a concept like that as long as the law enforcement services were provided effectively.

Under the auspices of the National Tribal Chairmen's Association, I am going to be conducting two more regional meetings which will continue to explore this area.

Senator DECONCINI. Without S. 1181, you can advise them that they can still enter into such agreements.

Mr. DUNBAR. Yes. I believe that the survey that came out of the Survey on Tribal-State Relations has determined that there are in existence any number of agreements covering various areas, such as taxation, road maintenance, and social services. They were all reached under existing law. Whether there is an expanded authority to enact agreements in the area of criminal jurisdiction is another question.

This is what I have been exploring during the last year and a half. I know that there are agreements which would benefit tribes in the criminal jurisdiction area under this concept.

Senator DECONCINI. How much longer will you be conducting these hearings, workshops, or whatever you want to call them?

Mr. DUNBAR. They will be concluded at the end of this year.

Ms. HUNT. The Justice Department indicated in its testimony that they have circulated a memo to the effect that States have concurrent jurisdiction over non-Indian crimes. If the U.S. attorney declines prosecution, have the tribes that you represent found that the States move forward with prosecution of non-Indians?

Mr. DUNBAR. In the area of concurrent jurisdiction, I have found that it often depends on the attitudes of the people involved. The recent experience in California has indicated that the State is of the opinion that there is no concurrent jurisdiction possessed by the tribes under Public Law 280 in California.

Of course, the Washington tribes are asserting concurrent jurisdiction. The answer to your question depends on what the attitudes of the people are to allowing concurrent jurisdiction. As a practical maxim, I would assert that tribes do have concurrent jurisdiction under 280 until such time as a court decision proves otherwise.

Ms. HUNT. This particular matter does not deal with 280 States in particular. The Justice Department said that it has usually been understood in the past that there is Federal jurisdiction when a non-Indian commits an act against the property of an Indian. The Justice Department now says that there is concurrent State jurisdiction along with the Federal jurisdiction.

What I am asking is this. If the Federal authorities fail to prosecute non-Indians, has it been your experience that the State then prosecutes the non-Indian who has committed a crime against an Indian in Indian country?

Mr. DUNBAR. The experience in which I have been involved has indicated that often the States do not prosecute, even though they may have a responsibility to do so. Of course, that has been demonstrated through the hearings you have conducted over the past 3 days.

There have been instances mentioned in which the States have not prosecuted non-Indians for violation of Federal law. Whether they have the legal right to do so is, I guess, another question.

Ms. HUNT. Would you say that what the Justice Department said may be theoretically workable but in the practical world it is not workable? If Federal authorities do not prosecute non-Indians, States do not prosecute.

Mr. DUNBAR. I would say that is a good summation.

Mr. ROGERS. Mr. Chairman, may I augment that answer briefly. I see Mr. Ernstoff in the back of the room. He is another tribal attorney who is well aware of the situation. He was the attorney for the Suquamish Tribe and could relate to the committee some of the problems they have had in just this area as a result of lack of enforcement.

There is also the additional problem that we pointed out in our written statement. Actually there is no concurrent jurisdiction in the instance where there are tribal laws that non-Indians violate. There may not be a commensurate crime under State law. In those instances, States are obviously not prosecuting at all.

Mr. TAYLOR. I would like to address a couple of situations to which I think the Tribal-State Compact Act might have application. I would question whether under some circumstances a State and a tribe could presently enter into an agreement that would resolve the problem.

We had a situation in the last Congress wherein a parcel of land was set aside for the Papago Reservation called Florence Village. It is my understanding that the parcel consists of about 20 acres of land. There are a number of Papago people living there. It is a community.

It is located a substantial distance away from the main reservation. It is in Arizona and thus a non-Public Law 280 situation. The State has no criminal jurisdiction over this 20-acre parcel of land that lies a substantial distance from the Papago Reservation.

Would not S. 1181 provide a vehicle for the Papago Tribe to negotiate with the State of Arizona to provide police protection on that 20-acre parcel? And in the absence of the bill what can the tribe do?

Mr. DUNBAR. As a practical matter, I suppose that an agreement could be reached in which the jurisdictional problems of law enforcement could be worked out.

I would also like to state that any such agreement must be at the prodding of the tribes themselves. That is the position of the National Tribal Chairmen's Association, with whom I also work. In their view, tribes maintain the inherent sovereignity to make their own decisions, so these agreements must be up to the tribes whether or not the practical application of the bill would help them.

Mr. TAYLOR. I think under the *Kennerly* decision it was held that a tribe cannot give jurisdiction to a State without complying with the requirements of Public Law 280. I grant you that the tribe has full sovereignty, but there is an overlay of Federal law.

Mr. DUNBAR. I would agree, but there may be a position through which the tribe could work out an agreement with the State to cure the problem to which you are referring, under existing law as well as under S. 1181.

Mr. TAYLOR. I will just give one other example. I think the answer will probably be the same. In fact, I think the same answer is even more likely in this case.

I am thinking of the case of the *Santa Rosa Band* v. *Kings County* in California. There is housing construction underway on the rancheria—I think it is a rancheria—and the county attempted to impose county building codes. The tribe contested the action and it was held that the county had no right to apply their building codes. I think it was a very correct decision.

However, we now have the situation that, assuming the tribe wanted the county to have their qualified engineers and inspector to come in and help them enforce their own building code, is there an impediment to the State and the tribe entering into such an agreement?

Mr. DUNBAR. I believe the *Santa Rosa* case involved the application of civil regulatory laws in a 280 State. Once again, unless the particular situation were brought into a judicial setting, the agreement could be possible. However, I would lean to accepting legislation which would firm up those agreements and allow the tribes a measure of control, perhaps some sort of renegotiation procedures as are built into the bill.

Mr. ROGERS. Mr. Chairman, concerning the two examples given, I am not sure why they could not both be accomplished even under present law. In the Papago situation, I believe that if there were a proper tribal referendum, as provided by 280, they could, by agreement, do the same thing that the State and the tribe, somewhat separately, are contemplating doing under the 1968 Indian Civil Rights Act.

They would simply lay the groundwork for doing so by an agreement beforehand. I believe it is Indian country in the location you are talking about, as defined under the Federal Criminal Code. It would seem to be subject to the 1968 Indian Civil Rights Act unless there is some fact here that I am not aware of.

In the Santa Rosa situation, I am not familiar with all the facts, but it would seem to me that an agreement could be accomplished without the bill. Considering the particular requirements of that tribe, it would seem to me to have to be an agreement that was approved by the Secretary of the Interior in the same way as some tribes have to get leases approved.

I might point to one example at the Wind River Reservation in Wyoming, where the Shoshone and Arapahoe Tribes are negotiating at the present time with the State of Wyoming over a possible agreement on concurrent jurisdiction to zone fee lands within the reservation. They may reach agreement on an area within the reservation that is considered of joint interest—most to the reservation—to the State and the tribe. Within that agreement, fee land would be regulated by both the State and the tribe.

The United States has not been faced with the situation of approving such an agreement yet, but they have been faced—rather, the Solicitor's Office at the Interior Department has been faced—with the question of whether or not to approve the tribe's 2-year-old—or almost 2-year-old—zoning ordinance. They have taken the position that because neither of those tribes has a written constitution and neither

is organized under the Indian Reorganization Act, the Interior Department need not approve tribal zoning ordinances for them to take effect, so they consider that it is in effect without Interior's approval.

I would think the same logic would apply to the situation of an agreement between a State and a tribe if they are consistent in their interpretation. It seems to me too, in the two instances you cite, both are accomplishable within present law.

Mr. TAYLOR. That might require an act by the legislature. Do you not agree?

Mr. ROGERS. In order to be joint, in this instance, it would. I think the way the State is doing it now, to carry out the agreement fully, would take an act, in this instance, of the county because that is the relevant legislative body that passes on zoning. It would be a county ordinance amendment commensurate with the tribal zoning ordinance amendment.

Senator DECONCINI. In the case of the zoning, I think it would take the State legislature to do it.

Mr. ROGERS. That is probably the case. I wonder if, even under your bill, whether or not States would not consider it necessary to do that in some instances anyway.

Senator DECONCINI. Thank you very much.

The next witness will be Melvin Sampson who is accompanied by three gentlemen. Gentlemen, please come forward.

Mr. Taylor will continue to conduct the hearing. I have to go to another meeting for which I am already late, but we will continue the hearings this morning.

Please proceed with your statement. You may summarize if you wish.

STATEMENT OF MELVIN SAMPSON, LEGISLATIVE COMMITTEE CHAIRMAN, YAKIMA INDIAN TRIBE OF WASHINGTON, ACCOMPANIED BY JOHNSON MENINICK, CHAIRMAN, TRIBAL COUNCIL; BILL HOPTOWIT, LAW AND ORDER COMMITTEE, YAKIMA INDIAN TRIBE; AND JAMES B. HOVIS, TRIBAL COUNSEL

Mr. SAMPSON. I am sorry you have to leave, Senator DeConcini.

My name is Mel Sampson, chairman of the legislative committee of the Yakima Tribal Council. I have with me Johnson Meninick, chairman of the tribal council, Bill Hoptowit from the law and order committee, and James B. Hovis, our tribal attorney. We have already presented lengthy written statements regarding S. 1181 and S. 1722. I ask that these statements be inserted as part of the record.

I am presuming that members of this committee or staff have had an opportunity to read the statement and will therefore use our limited time to make a short statement. Then all four of us will be available for questions.

We want to thank the committee for its obvious concern about peace and security on Indian reservations and for permitting us to testify today. We are hopeful that our testimony will assist you in getting Congress to take action soon.

For a considerable period of time the problem of peace and security on Indian reservations has needed immediate attention. The Federal Government has sought political answers rather than solutions that might rock the boat.

The attention of the Federal Government has been directed to expensive and disruptive crisis rather than to helping those tribal governments that are working hard to provide peace and security under adverse circumstances. We are asking the committee to reverse this trend and to get Congress to devote its attention to this problem. Indians have too long asked for help only to have legislation die in a committee of either House.

If history has taught us anything, it is that if you want peace and security you must face problems responsibly and that the preservation of peace and security has its cost. I have the honor of representing an Indian nation which has a long history of responsible concern for peace and security and whose people have shown their willingness to pay the price.

We believe that the record is clear not only as to our responsibility but also as to these following points: No. 1, peace and security on Indian reservations are in need of substantial improvement; No. 2, not everyone is willing to accept the responsibility and to pay the price for improvement of peace and security on Indian reservations; No. 3, that it will improve law and order on Indian reservations if a system can be devised that will foster better peace and security without interference with sovereign rights of any governmental unit or group; No. 4, that all of us should believe that nations, States, and tribes, like responsible people, must keep their word; No. 5, that there is no band-aid answer to what legislation is required by Congress; No. 6, that under our system of government the Federal Government has primary responsibility for Indian-non-Indian law and order relationships; and, No. 7, that where responsibility for adequate peace and security is accepted, it is better law enforcement to have offenders judged by their peers.

Based on these seven premises, we believe that Congress can pass legislation that will provide for better peace and security on Indian reservations. We suggest that your legislation package provide: No. 1, that all major and minor breaches of peace within Indian country should be a Federal crime; No. 2, that the Attorney General may turn any offender committing reservation crimes over to any government exercising its jurisdictional responsibility for peace and security and may forgo prosecution; No. 3, that the promises of the United States and the disclaimers of States regarding exclusive Federal and tribal control over reservation Indians should be honored and unilateral State assumption of jurisdiction over reservation Indians should be retroceded to the Federal Government and tribes upon tribal request; No. 4, that tribes under their tribal codes shall have jurisdiction, concurrent with the Federal Government, over all on-reservation breaches of peace and security by Indians; No. 5, that the States shall have jurisdiction concurrent with the Federal Government over all on-reservation breaches of peace and security by non-Indian offenders; and No. 6, that tribes, under their tribal codes, shall have jurisdiction, concurrent with Federal and State governments, for on-reservation

breaches of peace and security where the Federal and State governments have failed to prosecute.

If these six objectives can be legislated by Congress, peace and security for all persons—Indian and non-Indian—will surely be accomplished. We believe that the requests are reasonable and should have early action by the committee.

We stand ready for any questions you may have.

Senator MELCHER. I have no questions.

Mr. HOVIS. Mr. Chairman, I am Jim Hovis. I would like to take a few moments to give testimony on some matters that were raised in Senator DeConcini's questions.

I would like to ask that the statement of Doris Meissner be made part of the record immediately following our written statements.

Senator MELCHER. It has previously been made part of the record.[1] Without objection, your written statements will be made a part of the record at this point.

[The statements follow. Testimony resumes on p. 368.]

STATEMENT OF THE YAKIMA INDIAN NATION ON S. 1181

(A Bill to authorize the States and the Indian Tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operation in Indian country).

At first reading, S. 1181 would appear to fall "four square" within what has been the general policy of the Yakima Indian Nation, i.e., to sit down and negotiate problems with its neighbors. It has been, and is now, the policy of the Yakima Indian Nation to settle differences wherever possible by negotiation without relying on litigation. We have been driven to litigation. It has not been our choice. We have never been able to figure out how to agree with people who are not agreeable. If that were possible, then not only would our problems be resolved; but our Nation would have peace and harmony domestically and internationally. One needs only to look at the current situation in Iran to see that agreements are not always possible even when the failure to reach a reasonable solution is harmful to every party. Mutual advantage does not always dictate agreement.

A question that this bill and the cases presented by your staff contains, is whether the Yakima Nation and other Indian groups are able to enter into agreements with other governments. Tribal power to make agreements with states probably already exists under our sovereign authority, but has been seldom exercised. It is true that there is some question as to whether the Yakima Nation is able to negotiate agreements and compacts respecting jurisdiction and governmental operations because of the question of federal preemption. This question of federal pre-emption has arisen from the 83rd Congress' unwise delegation of jurisdiction over Indian country to states without the consent of the Indian people involved. However, just as serious are restrictions in the ability of states and their subdivisions to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country. State officers, cities, counties, municipalities, or other public subdivisions of the state of Washington, have submitted that they cannot enter into an agreement with Indian tribes unless the State Legislature authorizes such compacts.

Likewise, where there is constitutional disclaimer over jurisdiction existing in a state the state may not have power to assume jurisdiction without the amendment of those state constitutions. For example, in the State of Washington. Article I, Section 29, Washington State Constitution provides that the provisions of the Washington State Constitution shall be mandatory. Article XXVI of the Washington State Constitution provides that jurisdiction over Indian country shall remain exclusively within the federal government. Washington State and its political subdivisions may not be able to meet Constitutional

[1] See p. 214.

requirements of due process of law and assume jurisdiction without amending Washington's Constitution and passing affirmative legislation allowing the States to enter into mutual agreements with Indian tribes respecting jurisdiction and government operations in Indian country. State courts are the exclusive forum to determine state powers, subject only to the overriding control of the Constitution of the United States. In Washington state where the judiciary must regularly stand for election, one must be concerned with the State court's determination of state authority to deal with a minority sovereign. Whatever other limitations state judges have, most all can count.

The desire of the States, and political subdivisions thereof, to have power to deal with Indian tribes is a question in the minds of the Yakima Indian Nation. The Attorney General of the State of Washington has announced that Indian tribes have no sovereignty and that the State of Washington will never negotiate with the Tribes as sovereign equals.

Our experience has clearly shown that the State of Washington is unwilling or unable to provide good law and order in Indian country. We have experienced that federal authorities are likewise unwilling to diligently pursue Assimulative Crimes jurisdiction where an Indian is the victim and the state has failed to act.

The greatest frustration of this last year was when the Supreme Court upheld unilateral assumption of state jurisdiction in Indian country by the State of Washington in breach of our treaty with the United States and in breach of the promised disclaimer of state jurisdiction contained in both the Washington Enabling Act and the unamended Washington State Constitution. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 58 L.Ed. 2d 740, 99 S. Ct. 740 (1979). We were soon faced with two more frustrating experiences. After the opinion was filed, in an effort to provide better law enforcement for non-Indians and Indians alike on the Yakima Indian Reservation, we immediately drew up a plan that would provide for a coordinated plan using all area law enforcement agencies. A request for federal funding assistance to help us finance such a plan was rejected on the reasoning that the State of Washington had assumed responsibility to finance adequate law and order on Indian Reservations. We then approached the State for financing through state agencies. Even though our request for a state appropriation was contingent on federal matching monies, our request was rejected. It is indeed frustrating to have these two supposedly responsible governments strip us of promised rights of sovereignty and then as a further insult, leave us with the tab to finance fulfillment of their unilaterally acquired responsibility. Even though the unilaterally imposed system is a real burden, we will continue to be responsible and work for good law and order on the Yakima Reservation for all persons within the exterior boundaries. Your assistance is requested.

Also, we made an agreement with the State of Washington regarding fishery management on the Columbia River. However, we found that rather than settling problems, that the problems still exist. It is very difficult to deal with people who do not consider themselves bound by agreements and also to deal with people who seem to be unduly controlled by special interest pressure. The United States has no monopoly on breaking promises made to the Indian people.

However, probably the biggest concern we have regarding S 1181 is that legislation permitting states and Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country will be unilaterally used to force the Indians to execute agreements before they can obtain federal assistance to fund their necessary governmental programs. To forestall this fear on the part of the Yakima Indian Nation and other Indian Nations, we would suggest that Section 102 of S 1181 contain a provision that provides that the execution of agreements respecting jurisdiction and governmental operations in Indian country shall never be a requirement for the availability of federal funding for either the states or Indian tribes.

Likewise, we suggest to forestall the states from using this legislation to unilaterally force agreements with tribes, that the bill provide that after the passage of this legislation that all federal funding for law and order purposes go directly to Indian tribes without the requirement of state approval or review.

While we applaud the concern this Committee has toward better law and order within Indian Reservations, we suggest that the basic problem is being ignored. The basic problem within the Yakima Reservation is the failure of state and federal authorities to provide protection for the Indian people within

Indian Reservations or to permit Indian tribes, that are willing and able to provide this protection, to have this power. One of our basic problems on the Yakima Indian Reservation is that of trespass. This problem has been recognized by the Departments of Interior and Justice and by Committees of Congress. Yet in spite of this recognized need, this need has not been legislatively satisfied. Bills that have been introduced die.

Your Committee is familiar with a failure of either state or federal authorities to prosecute non-Indian offenders where either an Indian or the Indian society is the victim. It is either naivety or a failure to accept responsibility for adequate law and order on Indian reservations, that would lead this Committee to believe that all states, or their subdivisions, will readily agree to tribal jurisdiction over non-Indians. The more the need exists to provide for the prosecution of non-Indians on a reservation, the more certain it is that the State will not agree to tribal jurisdiction. You can easily see that a state which has a poor attitude or record regarding prosecution of non-Indians for offenses against Indian victims, is a state that will not agree to the prosecution of its non-Indian constituency by tribal courts.

We have a solution to this problem. We suggest that it is a necessity that Congress give Indian tribes some jurisdiction over non-Indian offenders. You already realize that the federal or state authorities either lack the will or the ability to provide the necessary protection. We recognize the reluctance of this Committee to grant this power. However, it is not as big a step as you might think. First, the amount of fines and confinement by tribal courts are strictly limited by the Indian Civil Rights Act of 1968. Second, due process and the right of appeal to federal courts exists under the Indian Civil Rights Act of 1968. Third, history shows that it is the Indian who has been discriminated against by the white man, not the other way around.

We know that this Committee, with its knowledge in this area, has these matters clearly in mind. However, to secure passage of such necessary legislation, it may be politically necessary that the powers of tribal courts over non-Indians be further limited. We have a suggestion in this regard. Legislation providing for tribal jurisdiction over non-Indians could provide for federal and state prosecution priority. By this we mean legislation that provides that the Tribes shall have jurisdiction if the offender is not convicted within a certain period by a state or federal court. Then if the federal and state authorities do not act, the tribes can fill the void.

The Yakima Nation has no desire to prosecute non-Indians if the state and federal authorities are doing the job. Unfortunately, as the Committee must recognize, this is not what is happening. We feel it is better law enforcement for non-Indians to go to non-Indian courts just as we feel that it is better law enforcement for Indians to go to Indian courts. It is always a better system to have an offender tried and punished by his peers. However, something must be done to punish offenders where federal or state authorities lack either the will or ability to provide good law and order on Indian Reservations. We ask you to directly address the question of tribal jurisdiction over non-Indians and not just dodge the problem.

We have just such a provision for state and federal prosecuting priority over non-Indians in our Law and Order Code. However, as this Committee realizes, *Oliphant* has placed our jurisdiction over non-Indians in question. This problem can be resolved by this Committee, by addressing the main problem. Authorizing compacts between tribes, state governments and subdivisions only serves Congress. If S. 1181 passes, you can say that it is now up to the states and the Tribes to handle the matter. If either horse fails to drink the recognized problem remains. If you fail to deal with the question of tribal jurisdiction over non-Indians, you may dodge blame for the recognized lack of adequate law and order, but the problem will remain unsolved.

Let us conclude by saying that we cannot disagree with the general import of S. 1181. It would be unreasonable for us to resist legislation that intends to authorize interested parties to reach mutual agreement on a local level. However, we know and your experience must tell you, that it does not firmly address the problem of the failure of state and federal authorities to provide good law and order on Indian Reservations. We would hope that you would amend S. 1181 to contain our suggestions so that proposed legislation will not only authorize mutual agreements, but also provide a vehicle for the solution of the recognized failure of state and federal protection where no agreement is forthcoming. At

the treaty Council in 1855, Governor Stevens was the chief negotiator for the United States. After relating how it would be necessary for members of the Yakima Nation to cede vast holdings on which they made their living to go to a small reservation so they could be protected from the "bad white man," Governor Stevens said:

> "The Great Father therefore desires to make arrangements so you can be protected from these bad men and so they can be punished for their misdeeds." (official minutes, Folio 104).

It was the understanding of negotiators from both sides that arrangements should be made so that the children from both sides could live in harmony. Help us make that understanding a reality with your legislative powers.

STATEMENT OF YAKIMA NATION ON EXCLUSION OF NON-INDIAN FROM FEDERAL JURISDICTION IN SECTION 161, PART C, AMENDMENT TO S. 1722, RELATED MATTERS AND PROPOSED MAGISTRATE PROVISION

Senate Report 96–553 to accompany S. 1722 recites that in enacting 18 U.S.C. 1152 Congress clearly intended to include on reservation offenses by non-Indians against non-Indians. The Senate Report correctly indicates that any breach of the peace and security of the reservation enclave is sufficint to invoke the exercise of federal jurisdiction. However, in spite of the original intent of Congress to include non-Indian major breaches of peace and security within major crimes legislation, the Senate proposes to continue judicial legislative exclusion of on-reservation breaches of the peace and security by non-Indians with no Indian victim from S. 1722. We take issue with that exclusion. Not only do we believe that on-reservation non-Indian breaches of the peace should be included, within 18 U.S.C. 1152 and S. 1722, but that all non-Indian offenders should be included within the purview of the major crimes listed in Section (2) of Section 161.

In order to have a secure community, it is necessary that all breaches of peace and security receive prompt governmental attention. Your record conclusively shows that this is not happening.

The Federal Government has a primary duty to provide security within Indian Reservations. That is doubly true in Washington where both the Washington Enabling Act and the Washington State Constitution provides for exclusive federal jurisdiction within Indian Reservations. It is not a fulfillment of that responsibility to merely provide for federal attention to breaches of peace and security involving an Indian victim and a non-Indian offender or a non-Indian victim and a Indian offender. The entire reservation society—Indian and non-Indian alike—is entitled to federal concern about all breaches of peace and security within the exterior boundaries of an Indian Reservation.

In taking this position, we do not wish to exclude states from jurisdiction over breaches of the peace and security involving non-Indians or Indian tribes from breaches of peace and security involving Indians. These two sovereigns have a legitimate interest in the conduct of their citizens—Tribes over Indians and States over non-Indians. Likewise, tribes have a legitimate interest in the conduct of all persons who are within the territorial limits of their reservations. Concurrent jurisdiction to allow these two sovereigns to exercise this power should be provided. However, the Federal Government having a responsibility for all violations of the peace and security within Indian Reservations must provide prompt governmental attention to all violations within the exterior boundaries of these Indian Reservations.

You may decide to exclude from prosecution persons convicted of the same crime by either state or tribal governments. Subsection (d)(1) provides that offenses involving only Indians be excluded from the purview of the general laws of the United States if they are convicted by tribal courts. As a policy matter, this Committee may wish to consider the same policy exclusion for offenses involving only a non-Indian victim and a non-Indian offender punished by state or tribal courts and modify subsection (d)(1) to include this exclusion. As a policy matter, our tribal code contains such an exclusion for non-Indians where they have been punished either by state or federal courts.

Regardless of whether or not Congress makes this policy exclusion, the Federal Government has a duty to see that peace and security to person and property prevails throughout Indian Reservations. We, therefore, recommend that the first two sentences of Subsection (d)(2), contained on page 352, lines

34 and 35 be amended to read: "Any person who commits any of the following offenses as defined in Title 18, united"; and further that subsections (e), (f), (g) and (h) be stricken from S–1722.

The Bill should also contain the amendment at the end of section 161 that provides:

"Notwithstanding the other provisions of this section, any federally recognized Indian Nations or Tribes shall have concurrent jurisdiction over all offenses not contained in (d) (2) above, committed by any person within Indian country and states shall have concurrent jurisdiction over all offenses committed by non-Indians within the exterior boundaries of their states.

"Where the tribes or states are exercising this concurrent jurisdiction in a satisfactory manner, the Attorney General may forego prosecution and surrender the person to the jurisdiction of said sovereigns."

These amendments will provide a responsible way for all sovereigns to exercise their legitimate interests.

STATEMENT OF YAKIMA NATION ON SUBSECTION (I), SECTION 161, PART C, AMENDMENT TO S. 1722

(Provision to authorize Indian Tribes to petition the United States to reassume federal jurisdiction where states have assumed jurisdiction pursuant to Public Law 83–280.

The Yakima Indian Nation supports the enactment of Subsection (i), Section 161 of S. 1722.

This subsection fulfills some desires of the Indian people and should not be found to be objectionable by other interests. This subsection's basic provision provides that those tribes placed under State jurisdiction, by a now discredited termination policy, will be returned to the same status as Indian tribes that missed the consequences of this termination federal policy. This subsection is firmly within the present policy of Congress and the Administration.

The place of Indian tribes and nations in our federal scheme of things is a special area. They are dependent sovereigns who were to have, as regards their internal affairs, exclusive control of their destiny and their territorial reserved areas.

The reading of Chancellor Kent's opinion in *Godell* v. *Jackson*, 20 John 693 (N.Y. 1823) and Chief Justice Marshall's opinions in *Johnson* v. *McIntoch*, 8 Wheat 543, 5 L. Ed. 681 (1823), *Cherokee Nation* v. *Georgia*, 5 Pet. 1 8 L. Ed 25 (1831) and *Worcester* v. *Georgia*, 6 Pet. 515, 8 L. Ed. 483 (1823) together with the discussion of the status of Indian justice in "Story's Commentaries on the Constitution," Vol. III, Sec. 1101, and in "Chancellor Kent's Commentaries on American Law" (Vol. III, p. 382, 386), cannot lead anyone to other than the conclusion that at the time of the formation of our Union, Indian nations or tribes took their place in our scheme of government as dependent sovereigns, and as regards their internal affairs, were to have the exclusive control of their destiny. We recognize that the Supreme Court has authorized Congress to break this promise, but it is uncontroverted that this promise of exclusive control over internal affairs was made to the Indian people.

Absent promise breaking Acts of Congress, the Supreme Court continues to acknowledge this promised rule of law. (For example, see *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 36 L.Ed. 2d 129, 93 Sup. Sup. Ct. 1257 (1973), *United States* v. *Wheeler*, 435 U.S. 313, 55 L.Ed 2d 303, 98 S. Ct. 1079 (1979).

The Yakima Nation's Treaty explicitly and implicitly provides for these promises and guarantees of exclusive internal control. Article II "Treaty with the Yakimas" (12 Stat. 951) provides that the Yakima Reservation shall be "for the exclusive benefit of said confederated tribes and bands of Indians, as an Indian Reservation; nor shall any white man, excepting those in the employment of the Indian department be permitted to reside upon said reservation without permission of the tribe and the superintendent or agent."

The Yakima Nation has not given its consent to be subject to Federal laws except as to matters within the Commerce Clause (Article I, sec. 8, Cl. 3 The Constitution), matters regarding the Administration of resources held in trust by the United States, or matters based on the dependency of the Yakima Nation on the United States. (See *United States* v. *Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1803) cited with approval in *McClanahan*, and *Wheeler*, supra.)

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Article 8 of the Treaty with the Yakimas, as compared with other concurrently executed treaties (See for example, Article 6 of the Treaty with the Tribes of Middle Oregon 12 Stat. 963) implicitly promised that the Yakima Nation was not subject to federal laws as regards its internal matters. Likewise, the State of Washington, at the time of its formation as required by Congress, disclaimed all jurisdiction over Indian lands in the State of Washington. (Washington Constitution, Article XXVI). This article is mandatory. (Washington Constitution, Article I, sec. 29). Article XXVI, Washington Constitution has not been amended by the means provided in Washington's Constitution (Article XXIII).

It is the contention of the Yakima Indian Nation that State jurisdiction should not, under treaties like the Treaty with the Yakimas, be impressed upon Indian tribes or nations without their consent. However, the 83rd Congress in pursuing a now discredited termination policy, broke the promises of this Nation and allowed such unilateral state assumption over Indian country. Everyone knows that this unilateral assumption of state jurisdiction over the Yakimas did not work. Congress created the problem and Congress should correct it without further delay and procrastination.

Apart from Public Law 83-280 and a few similar statutes, States do not have jurisdiction over reservation Indians, or over transactions between Indians and non-Indians except with the consent of the Indian, on Indian Reservations. Out of all the 50 states, only 13, Alaska, Arizona, California, Florida, Idaho, Minnesota, Montana, Nebraska, Nevada, Oklahoma, Oregon, Washington and Wisconsin, have assumed any jurisdiction under Public Law 83-280. Some of these thirteen state assumptions have been partial and some states have on their own motion provided for retrocession.

Under Washington statutes (R.C.W. Chapter 37.12), provision is made for assumption of State jurisdiction by the tribes petitioning the Governor. The same chapter imposes, without Indian consent, State criminal and civil jurisdiction over all reservation lands for eight subject matter areas, and State criminal and civil jurisdiction over all non-trust lands. We have information regarding 22 tribes in Washington. Eleven have petitioned for State jurisdiction and eleven have not. Three of these eleven petitioning tribes have obtained a Governor's proclamation retroceeding jurisdiction in whole or part. Many of the Washington tribes under full or partial jurisdiction wish to remove themselves from State juridsiction because of the resulting breakdown of law and order on their reservations under State jurisdiction. Some of these wishing to remove themselves from state jurisdiction were those who originally petitioned for State jurisdiction. They gave it a fair trial and State jurisdiction failed to provide adequate law and order.

The Yakima Nation has experienced such a breakdown since the State's unilateral assumption that it is quite often said that the Yakima Reservation has "law without order."

This breakdown is directly caused by the Congressionally permitted State assumption under authority of Public Law 83-280. The present system of a partial, checkerboarded system of justice could not be worse no matter what system is devised. Congress owes the people, Indian and non-Indian on the Yakima Reservation, action to bring order out of this mess. The foundation of this mess is passage by the 83rd Congress of Public Law 83-280.

As our reservation is checkerboarded with trust and non-trust (patented) lands, jurisdiction is presently dependent not only upon the status of the accused (Indian or non-Indian, juvenile or adult) but also upon who holds title to the land.

If the land is not trust, the State has assumed jurisdiction over almost all crimes. If it is trust, the State has jurisdiction over eight underlined categories (that is, compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways).

Law enforcement officers must use a tract book and determine land titles to see if they have jurisdiction. Then, if the offense is on trust lands, they must make a field determination of the status of the accused and then whether the crime fits into one of the eight indefinite categories.

You lawyers on the committee would have a most difficult time in determining, if you could, what fits into the category of domestic relations. "Domestic relations" is not defined even in a law dictionary. How can one expect a trained law

officer not educated in the law, to make this type of determination? It is even more difficult for a victim to determine where offenses should be reported. Do they call the sheriff, the FBI, or the tribal police? How would this committee like to be constantly getting the runaround when you do report a crime? This is the result as no one can be sure in whose jurisdiction the problem lies. Certainly not the victim. The whole system looks like it was put together by a drunk in a dark basement. The entire system was established unilaterally by Congress and the Washington legislature over the protest of the Yakima Nation.

The Washington assumption statutes, and the resulting system is so indefinite that it fails to give a person of ordinary intelligence information where he can get protection of his person and property and fails to give a person of ordinary intelligence notice of what conduct is forbidden by statute. Also, title of land where an offender is standing, determines whether or not he is entitled to certain civil rights.

For example, if he is on trust property and not within the eight categories, he is entitled to a grand jury, Federal Bail Act and many federal protections. If he is not, then he is not entitled to these protections in State court. We believe this unworkable system fostered by the enactment of Public Law 83-280 does not meet adequate standards of a satisfactory law and order system even if the state authorities were willing or able to provide protection for our people or other residents of the Yakima Reservation.

This breakdown of law and order may be statistically demonstrated with an increase of crime and decrease of state arrests since State assumption in 1963 on the Yakima Reservation. Offenses on the Yakima Reservation have increased many times in excess of an increase in neighboring off-reservation areas. State authorities have acknowledged the breakdown of law and order on Indian Reservations under this unilateral state assumption of jurisdiction permitted by Public Law 83-280.

The report of a joint task force of the Governor's Advisory Council on Urban Affairs and the Governor's Indian Advisory Committee of the State of Washington, seriously criticized State law and order on Indian Reservations and recommended that the State legislature enact legislation that would have a similar effect as Subsection (i), Section 161.

"We recommend that: The State Legislature pass a bill outlining the procedure for retrocession. Retrocession would return to the State's Indian Tribes whatever degree of law and order authority over their reservations that the individual tribes agree they can assume. This type of legislation would include provision for the tribes to assume full jurisdiction over law and order, or would provide for the tribe to assume with the State concurrent jurisdiction if the tribe preferred, or would permit the tribe to assume just those areas of jurisdiction which the Tribe whose to pay for and administer." (Page 22 of the report).

By executive request, Governor Evans proposed such legislation, but the Washington State legislature failed to agree.

In the State of Washington's comprehensive plan for law enforcement (1972) the conclusion was that:

"Although the State assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension and investigation of offenses committed on reservations."

The Office of Program Research of the House of Representatives, State of Washington, has documented the failure of the State to provide adequate services for juvenile dependents and delinquents and the resultant destruction of Indian cultural integrity in the foster care situation. Thanks to the action of Congress in the passage of Public Law 95-608, Indian Child Welfare Act, at least some relief is possible in this important area. We have petitioned under this Act for return of jurisdiction over our dependent children. However, the problem still remains regarding delinquent children.

The Yakima Nation wants to accept its responsibility to provide law and order on its reservation. Even now the Yakima Nation appropriating its own funds for law and order in an amount that exceeds the per capita cost of any community in the Nation. This is in an attempt to do the best we can under the present unworkable system of justice. However, to be effective we must have authority to deal with crime on our reservation returned to us. We request the return of the same authority that is possessed by other Indian tribes not within Public Law 83-280 or similar statutes. Give us this chance. Allow us to systematically

take ourselves out from under Public Law 83-280. This statute had as its basis the discredited termination policy of the 1950's. The basis having been discredited and the effect having been demonstrated as disastrous, it would seem to us that there can be no reason why the Indian wishes cannot be granted and Subsection (i), Section 161 of S-1722 be speedily enacted. The responsibility clearly rests with Congress.

Mr. HOVIS. Mr. Chairman, I would like to take a moment and say that the testimony today shows very clearly, not only from Indian testimony but from that of the Department of Justice, that there is a genuine problem on Indian reservations.

It also shows that there is a genuine problem of the number of cases that the U.S. attorneys have failed to prosecute. It is the Department of Justice's own records that indicate it.

I might say, Mr. Chairman, that I have had the honor of representing the Yakima Indian Nation for 27 years. I am a country lawyer from the city of Yakima, close to the reservation, and I represent people throughout the entire economic structure within the Yakima Indian Reservation.

The Yakima Nation is not having any difficulty with its residents on the reservation. It has a sincere respect for the people who reside there. They are making a better contribution toward law and order than any other community, and more financial sacrifice than any other community, in the United States of America. They are spending, if you please, almost $500 of their own money per capita for law and order on their reservation.

They are having some good results. To be practical about the matter, yesterday the attorney general from the State of Washington was talking about concepts and the like. I want to say to you that we are doing a job there, and we need some help. In a 1-year period, of class I crimes we had 225 crimes reported to our tribal police and we had 61 clearings, which is a much better record than any other police department is having.

However, out of the 50 people who were charged with the crimes, 47 were not within our jurisdiction. Consequently, 94 percent of the people we are processing through our police department are not the responsibility of the Yakima Tribe.

The problem that we have is that we need some assistance, and when we come to the Federal Government to ask for assistance they talk to us about it being a State problem. When we go to the State and ask them for some assistance, they talk about it being a Federal Government problem. They would not even pass our bill in the State legislature which called for matching Federal funds.

We have 56 or 60 people in our police department. There are more non-Indians on the reservation than there are Indians, but the State has only six people in their department in the county who are detailed to the reservation.

One of the problems with regard to agreements is that the attorney general of the State has said publicly that he would try to work out an agreement with the Yakima Nation and other tribes regarding juveniles provided we gave something in return. He was, in other words, using our children as hostages in the making of agreements. This is one of the problems we have with the agreements under discussion.

I think your interest, sir, in law and order for everybody on the reservation is joined by the Yakima Nation. What we need to have is some provision—in a magistrates bill or an amendment of the justice bill—that all crimes within the reservation are Federal crimes, so that where the State will not act, there can be some prosecution of the offenders.

There must also be for responsible tribes—like the Yakima Tribe—some return of their jurisdiction because they are doing the job. The Governor of the State of Washington has been in favor of it. We have had past Governors who were in favor of it who have asked for executive legislation and have been turned down by the legislature. They get into a committee and get pigeonholed.

We have been coming here testifying on S. 2010. We are back here today. We have been terribly interested in this problem, but we are getting no relief, or at least no answer.

I think you saw today the kind of thing from the Department of Justice that we are constantly up against. Their answer to us and their help to us is not very worthwhile.

On the other side of the fence, the BIA testified yesterday that if there were a retrocession back to the tribes, it would cost another $8 million. They spend that much money playing Tom Mix in some areas where crime breaks out into total disruption rather than coming in to try to do the job with responsible people who are trying to carry their own responsibility.

Mr. Chairman, the thing that my people asked me, as their representative, was: What more can we do? What can we do to get some relief for this very important problem we have? We come to the Bureau of Indian Affairs. We come to the Department of Justice. We come to Congress. We go to the State legislature. We go to the Governor. What more can we do to get some relief for what is already admitted by everyone to be a serious problem?

I am sorry, but it is an emotional thing with me, Mr. Chairman. It is also an emotional thing for Indians and non-Indians on the Yakima Reservation because we are getting so little help from the State and Federal Governments. The only help we are getting is from the tribal government.

It is a real question how much longer these people, who are tribal members in a low-income group, can spend $500 or $600 per capita for law and order on their reservation. How long can they continue to do that when they are handling someone else's responsibility? They are getting no response from anyone with regard to their problems.

Senator MELCHER. Thank you very much.

Mr. MENINICK. Mr. Chairman, I would just comment briefly on the magistrate's concept. We have been faced with this problem for quite some time. I believe we also had an amendment proposed 2 or 3 years ago which failed.

The problem we had with S. 1152, S. 1164, and S. 1165 was that we do the enforcement from the tribe. We spend approximately $2 million directly on enforcement and $2 million on enforcement-related situations. What happens is that any time we arrest a violator, we have to go through the assistant U.S. attorney and then through the magistrate's court system. The revenue derived from that goes directly to the Government.

Our problem with the amendment of the bill is that when we make the arrest, we have to go through the entire process but we often get no prosecution of the case. Also the assimilative crimes situation is very vague and we cannot totally use the magistrate's system until all these questions are corrected.

We hope your committee will take a look at those situations. It would be worthwhile to look into some of the testimony presented by other tribes.

I stand ready to answer any questions you may have. If you care to ask any in the future you may give us a call. We have our number on our testimony. If there is any further information you need we will make ourselves available to you.

Senator MELCHER. Thank you very much.

Does that conclude your testimony? Thank you all very much.

The committee will have to stand adjourned now. We have no time between now and 12 to hear from another witness.

We have yet to hear from Mr. Manuelito, Phillip Martin, and Barry Ernstoff. I have two committees in which bills are to be voted upon, so I will have to leave.

The committee will stand adjourned subject to the call of the Chair. The committee is endeavoring to set a continuation of the hearing. It will endeavor to have a committee member here between 1 and 1:15 to hear the additional testimony.

The committee is adjourned.

[Whereupon, at 12 noon, the committee stood in recess until 1:15 p.m.]

Senator COHEN [acting chairman]. The committee will come to order.

I hope you will accept my apologies on behalf of the committee for detaining you well past the 1 o'clock meeting time.

We have three witnesses remaining this afternoon. I believe we can complete the testimony prior to 2 o'clock when I must be at another hearing and this room has to be vacated.

I assume we will have a minimum of questions from the Chair.

I will call Henry Manuelito, the Director of Planning, Division of Public Safety, Navajo Nation, Arizona.

STATEMENT OF HENRY C. MANUELITO, PUBLIC SAFETY PLANNER, DIVISION OF PUBLIC SAFETY, NAVAJO NATION

Mr. MANUELITO. Mr. Chairman, my name is Henry C. Manuelito. I am the public safety planner for the Navajo Tribe's division of public safety which is headquartered in Window Rock, Ariz. Thank you for giving me the opportunity to testify before the committee today.

I am from the Navajo Indian Reservation which is situated in three States—Arizona, New Mexico and Utah—and is approximately 24,000 square miles in size or approximately the size of the State of West Virginia. The population of the area consists of approximately 150,000 Navajo people and 20,000 non-Indians working and residing within the exterior boundaries of the Navajo Indian Reservation.

The Navajo Tribe's division of public safety is a function of the tribal government consisting of police services, highway safety services, and a proposed fire prevention services program. I represent the police services function of the Navajo Tribe.

The Navajo Division of Public Safety's police services program presently has a compliment of 286 police officers and 143 civilian employees. Our main function is to enforce various criminal and traffic regulations as mandated by the Navajo Tribal Council, plus provide other nonenforcement functions as deemed necessary.

In addition, the Navajo Division of Public Safety has a working agreement with the U.S. attorneys of Arizona and New Mexico, the Federal Bureau of Investigation, and the Bureau of Indian Affairs in handling various Federal crimes committed on the Navajo Indian Reservation.

In an effort to provide adequate training for Navajo police officers the Navajo Division of Public Safety has instituted its own basic police academy. The police academy is currently certified by the Arizona Law Enforcement Officers Advisory Council and the New Mexico State Law Enforcement Academy for Police Officer Certification. We are currently negotiating with the State of Utah for similar certification.

What this means is this. When a Navajo police recruit attends and completes our basic recruit police academy for a prescribed 440 hours of basic recruit training, he is not only a certified Navajo police officer but also a commissioned peace officer throughout the State of Arizona. A Navajo police officer assigned to the New Mexico portion of the Navajo reservation is also commissioned a New Mexico State Police officer but his authority is only limited to within the exterior boundaries of the Navajo Indian Reservation. This represents the extent of what the Navajo tribe has accomplished to date.

The Navajo Tribe has already gone on record during the Phoenix, Ariz., field hearings in September of last year supporting the concept of the Tribal-State Compact Act. As we informed the select committee then, we do have working agreements already established with respective States in which the Navajo Indian Reservation lies.

In addition, when the agreements were negotiated and established, no Federal funds were used for operating costs, et cetera. However, we presently receive Federal appropriations but the funds are received under the auspices of Public Law 93-638, the Indian Self-Determination Act.

I mentioned earlier in this testimony an agreement the Navajo Tribe had with respective Federal law enforcement agencies. The agreement was established by the U.S. attorney of Arizona for the purpose of clearly defining which law enforcement agency had investigative responsibility over certain Federal crimes committed on the Navajo Indian Reservation.

The U.S. attorney of New Mexico also uses the same agreement. I want to point out that in all cases the primary and most visible responding law enforcement agency to any situation is the Navajo police officer. Once a determination is made as to the type of crime that has been committed, the law enforcement agency responsible for followup investigation is called but we continue with our own followup investigation.

The agreement seems to be working. However, the Navajo Tribe wants to continue to assume additional Federal law enforcement investigative responsibilities.

This is the extent of my testimony today. I want to thank you again for giving me the opportunity to testify. I will answer any questions you may have.

Senator COHEN. We have just a couple. You mentioned on page 3 an agreement that the Navajo Tribe has with Federal law enforcement agencies. Will you supply the committee with copies of the agreements? Do you have them available?

Mr. MANUELITO. I do not have them with me now, but they can be supplied to you.[1]

Senator COHEN. The record will remain open until such time as we receive them. They will be helpful for our records.

My second question is this. As I understand your testimony, once you have a Navajo police officer, he is certified as being, in essence, a State police officer. Is that correct with respect to Arizona? Is he the equivalent of a State police officer?

Mr. MANUELITO. No, sir. He is the equivalent of a peace officer.

[1] The material requested begins on p. 426.

Senator COHEN. What are his responsibilities, or authority, or powers as a peace officer? Does he have the power to make arrests for any kind of crime?

Mr. MANUELITO. He can make arrests for the State of Arizona for any kind of crime.

Senator COHEN. To what extent has that contributed to a better cooperative relationship with the State of Arizona police?

Mr. MANUELITO. We have an excellent working relationship with the police agencies of Arizona, consisting of the Arizona Highway Patrol and the county sheriffs. There are no problems with them at all.

Senator COHEN. I assume that if you had a situation wherein a non-Navajo made an arrest on Indian territory, it would create certain problems, would it not?

Mr. MANUELITO. If a non-Indian police agency is to make an arrest on the Navajo Indian Reservation, he must first come to the Navajo police and ask for assistance in seeking the person he is going to arrest.

Senator COHEN. If that is the case. I assume that if he failed to do that there would certainly be a confrontational atmosphere.

Mr. MANUELITO. Yes, sir. It is common courtesy to come by and inform us.

Senator COHEN. Does the converse work as well?

Mr. MANUELITO. Yes, sir.

Senator COHEN. Is that the relationship you have with the Arizona State Police?

Mr. MANUELITO. Yes; with the Arizona Highway Patrol.

Senator COHEN. What was the distinction you drew between New Mexico and Arizona? As far as Arizona is concerned you are certified to be peace officers with statewide jurisdiction. With New Mexico there is the prescribed limitation of going only to the extent of Navajo territory. Is that right?

Mr. MANUELITO. Right.

Senator COHEN. Are you working to expand that?

Mr. MANUELITO. Let me backtrack a bit. In 1973 the Navajo police and New Mexico State Police entered an agreement whereby the Navajo Tribe had certain law enforcement responsibilities in an area called the checkerboard area. That was limited to the Navajo Reservation, some BLM land, and county land that is within the Navajo Reservation.

During that time we were only limited to that area. In 1979 New Mexico's Legislature changed the law again to include all Indian tribes and Pueblos in the State of New Mexico such that agreements should be made with the State police, but it narrowed the jurisdiction to within Indian tribal lands. Hence, by legislative enactment in the State of New Mexico we are limited to what is prescribed by law.

Senator COHEN. That is all I have to ask. Thank you very much for your testimony.

I call now Mr. Phillip Martin.

STATEMENT OF PHILLIP MARTIN, TRIBAL CHIEF, MISSISSIPPI BAND OF CHOCTAW INDIANS, ACCOMPANIED BY ED SMITH, ATTORNEY

Mr. MARTIN. Thank you, Mr. Chairman. I am Phillip Martin, tribal chief of the Mississippi Band of Choctaw Indians from Philadelphia, Miss.

With me today is Mr. Ed Smith who is employed by the tribe as a research specialist. He is also an attorney. Ed has worked with the Choctaws for over 7 years in dealing with Indian law and Indian rights. He has firsthand experience with problems relative to the proposals before you.

I think, if it were not for Ed, we might not be in the position we are in now. We had to struggle for many years to try to establish who has jurisdiction over Federal lands, what we call the Choctaw Reservation. Ed was very instrumental, after several years of litigation, in bringing our problem before the U.S. Supreme Court. There, a decision was made in our favor, saying that the Federal Government had jurisdiction over the Choctaw Reservation in Mississippi. That brought on other problems of relationship to local and State officials.

Ed is very qualified to talk on these subjects. I am going to turn the microphone over to him and let him present our statement.

Senator COHEN. We would be very happy to have his testimony.

Mr. SMITH. Thank you, Senator Cohen, and thank you, Phillip.

The June 28, 1978, ruling of the U.S. Supreme Court in the case styled *United States* v. *John*, 437 U.S. 634, 1978, finally ended, or so we thought, a jurisdictional tug of war which had been going on since the Mississippi Band of Choctaw Indians was organized under the provisions of the Indian Reorganization Act (Sec. 16, 48 Stat. 987, 25 U.S.C. 476) in May 1945.

By that decision the Mississippi Band of Choctaw Indians was recognized as a lawfully constituted and duly reorganized Indian tribe and the lands designated as the Choctaw Indian Reservation were recognized as being Indian country under the definition found at 18 U.S.C. 1151(a), thereby making the Federal-tribal-State alinements of jurisdiction of other non-Public Law 280 States with reservations appropriate to Mississippi as well.

The peace imposed has not been one that has necessarily been accepted gracefully by local State authorities, the general consensus being that "We have made our bed hard—now let us sleep in it." The consequence has been that the tribe through its tribal members has been subjected to coercion ranging from the subtle to the most overt.

When the tribe enacted an extradition ordinance patterned closely after the National American Indian Court Judges Association's model uniform extradition ordinance, local sheriffs retaliated by refusing to permit reservation Indians to be released from county jails on other than the posting of cash bonds. One sheriff has even mentioned the possibility of stopping law and order patrol cars en route across State lands from one Indian community to another with Indian arrestees and taking custody of their prisoners. Cross-deputization agreements in some counties are simply not feasible.

Yet the experience of the tribe with the State's exercises of jurisdiction for the enforcement of laws for the benefit of Indians has been, at best, disappointing. Over the past decade there were 11 homicides involving Indians as either perpetrator or victim. In eight of these, Mississippi Choctaws were victims.

In the case of the three non-Indians killed in a vehicular homicide, two Choctaws were prosecuted by the State utilizing contradictory theories of prosecution and asserting jurisdiction, notwithstanding

that the incident occurred within reservation boundaries. Only one of the four non-Indians identified as perpetrators of homicides involving Indian victims has been required to serve time by the State and only for a relatively short prison term.

One non-Indian was indicted for malicious mischief and another for disturbing the peace in the killing of one Indian and the maiming of several others, and they were not even prosecuted on those charges. In a vehicular homicide case, a $4,000 fine was levied against the non-Indian driver for leaving the scene of an accident. The manslaughter charges were never pursued.

The Federal track record on prosecutions has been inconsistent. The local U.S. attorneys have wholly deferred from prosecuting non-Indians for major crimes involving Indian victims, relegating responsibility, if any, to the State authorities. Two prosecutions of Indians for voluntary manslaughter resulted in two convictions and the imposition of maximum sentences, while a third, wherein the victim was one of the party defendants in *United States* v. *John*, has never been investigated or presented to a Federal grand jury.

Currently the tribe is experiencing a great deal of community dissatisfaction with the responsiveness of our law and order operations as the result of an incident at one of our elementary schools this past month wherein some 14 fourth grade students and several of the adult school staff were, for approximately 25 minutes, held hostage while extortionistic demands were made for $1,000, a car, and a gun.

Students and staff were threatened and generally terrorized. Eventually, the assailant left the schoolgrounds, taking two elementary school girls as hostages until his safe getaway was insured. Despite repeated communications, we are still awaiting action by the U.S. attorney's office and in the interim have to deal with growing community dissatisfaction.

I have provided this background information in order that you might better understand our position on the three pieces of legislation currently under consideration by the Senate Select Committee on Indian Affairs.

On S. 1181, the Tribal-State Compact Act, the *Blackwolf* and *Califano* decisions make it clear that some sort of Federal legislative authorization does need to be provided.

Yet the statement of the Yakima Indian Nation on the earlier S. 2502 hearings best reflects the concerns of the Mississippi Band of Choctaw Indians, wherein they said:

> Probably the biggest concern we have regarding S. 2502 is that legislation permitting States and Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country will be used to force the Indians into executing agreements before they can obtain Federal assistance to fund their governmental programs.

Of equal importance, we are concerned that in opening this avenue for potential funding of necessary services, the Federal Government may increasingly regard utilization of State programs as the only viable option and coerce tribes through the available funding into accepting undesirable State services on terms which primarily benefit the States. In short, the legislation could encourage the State of Mississippi to continue its resistance to tribal exercises of jurisdiction in order to force tribal contracts for State support services.

The available State services in many areas are clearly undesirable. In Mississippi the prison system is, and for almost a decade has been, under Federal court suit. Its mental hospital system is similarly situated. Voluntary commitments would undoubtedly, with the promise of Federal dollars, no longer be regarded as voluntary by the State as regards Indian patients. The potential for abuses seems endless.

It would seem more ideal that with the substantial infusions of Federal moneys for many of these State operations that conditions be attached to all programs so that full faith and credit would be accorded tribal court orders.

However, if this proposed avenue is to be developed we would again stress to this committee that there are tribes, such as the Mississippi Band of Choctaw Indians, who are for the most part left with unattractive options through State agreements and care in execution would be necessary to insure that this legislation would not displace tribal provision of services whenever feasible.

On the question of the application of a magistrate concept on Indian reservations, it is felt that this is a measure urgently needed and one which would be of even greater need if S. 1181 were to be enacted into law. As evidenced by my earlier statements concerning the dispositions of homicide cases, the lack of Federal involvement poses a crucial weakness in the enforcement of law and order on the Choctaw Reservation.

I would encourage, however, that any legislation prepared in this respect make some provision for tribal input into the selection process. The insensitivities and even open hostilities toward Indians of any magistrate placed in such a key operative role could otherwise easily disserve the overall interests of both the Indian community and the criminal justice system at large.

On S. 1722, the part C amendment, we would simply go on record as encouraging that provision. For a brief period of time while the *John* case was pending Supreme Court review, our law and order program was shut down and the State enforced both felony and misdemeanor jurisdiction on the reservation. During that time our people were wholesalely incarcerated. Local county jails were packed and there were many instances of Indian prisoners being severely beaten, robbed, and sodomized by other inmates with little or no intervention by their custodians.

If the Choctaw experience is indicative of the treatment afforded by other States to their Indian tribes, retrocession must be made available on a tribal option basis.

Senator COHEN. Is what you are saying, that the Federal Government has refused to exercise any jurisdiction as long as the State insists upon exercising jurisdiction over criminal matters?

Mr. SMITH. It did during the period prior to the ruling in *United States* v. *John*.

Senator COHEN. What was the exact holding in that case?

Mr. SMITH. *United States* v. *John* held that the Mississippi Band of Choctaw Indians is a lawfully reorganized Indian tribe under the provisions of the Indian Reorganization Act, section 16, having one-half or more degree Indian blood members.

It also held that the Federal Government and the tribe exercise jurisdiction to the exclusion of the State over felonies and misdemeanors, respectively, involving Indians on reservation lands. Prior to that time, the fifth district court of appeals, in about four rulings, and the Mississippi Supreme Court in three others had ruled—in essence, they were States rights rulings—that the State had jurisdiction to the exclusion of any Federal arrangements that might be worked out.

The Justice Department took the position earlier this morning that any differences that need to be worked out should be worked out with them, but the tribe has found it totally futile to try to get the Justice Department to come in to carry out prosecutions in the various cases.

Senator COHEN. In view of our time limitation, may I just understand the nature of your testimony? In summary, it would be that you favor the creation of the magistrates jurisdiction. You feel that would help——

Mr. SMITH. We feel that the magistrates system would be of benefit to the tribe because we think we might be able to get a little better response. The one point that is in the written statement is that there should be some provision for the tribe to have some input into the selection of the magistrates.

We had one instance recently that showed a very indifferent attitude on the part of one Federal magistrate. He imposed a 60-day sentence on an Indian for having shot his wife through both legs. The magistrate's view on it was that he gave him 60 days, 30 days for each leg.

Senator COHEN. Thank you very much, Mr. Smith. We appreciate your testimony and yours, Mr. Martin.

We have one final witness, Mr. Barry Ernstoff.

STATEMENT OF BARRY ERNSTOFF ON BEHALF OF THE COLVILLE FEDERATED TRIBES, THE MAKAH INDIAN TRIBE, THE METLAKATLA INDIAN COMMUNITY, THE SUQUAMISH INDIAN TRIBE, THE QUILEUTE INDIAN TRIBE, THE NORTHERN CHEYENNE INDIAN TRIBE, AND THE DEVILS LAKE SIOUX TRIBE

Mr. ERNSTOFF. Thank you, Senator. I am Barry Ernstoff of the law firm of Ziontz, Pirtle, Morisset, Ernstoff & Chestnut in Seattle, Wash. I am here today to testify specifically on the magistrates proposal.

We appreciate this opportunity to submit testimony concerning the proposed legislation which would delegate special authority to Federal magistrates on Indian reservations.

We believe that a delegation of authority to cover ordinary law enforcement problems would go far in reducing the serious difficulties faced by residents of Indian reservations and tribal governments now hamstrung by adverse court decisions in their efforts to provide an acceptable level of police protection.

We must do more than lament the unfortunate decision in *Oliphant* v. *Suquamish Indian Tribe*, wherein the U.S. Supreme Court held that Indian tribes do not have jurisdiction to try and punish non-Indians who commit offenses within reservations.

The decision disturbed what had been a legal touchstone—that Indian tribes retain those inherent powers of self-government which have not been given up by treaty or taken away by express congressional action. The circuitous reasoning of the unprecedented exception created by the *Oliphant* decision—that tribes do not have those powers that are somehow "inconsistent with their status"—was shocking to Indian people who believed their tribes possessed authority ample to maintain the public peace and security.

Again, the decision is regretted bitterly but the imperatives of public safety demand that we do what is necessary to restore a measure of sanity to the nearly unfathomable division of criminal jurisdiction on Indian reservations.

The illogic of the present situation, which denies complete power to act to the government most interested in acting, while vesting uncertain measures of power in governments demonstrably lacking in interest or commitment, compels congressional action. On reservations across the country non-Indians have committed crimes and neither the State nor the Federal authorities have exercised jurisdiction to maintain law and order. Tribes are now without power to try them. Is this not a breach of trust responsibility?

We propose that the committee consider two alternative forms of legislation. The first, and the one which we prefer, would be a bill restoring jurisdiction to tribal courts to try non-Indians for criminal offenses committed within reservations. We envision a tightly structured bill which would contain strong assurances for those who would doubt that such courts would protect the constitutional and statutory rights of defendants.

The second alternative is a more limited proposal calling for rather slight adjustments to the current magistrates statutes which would result in greater use of magistrates courts in hearing Federal criminal cases arising on reservations.

The restoration of tribal court jurisdiction would not be a delegation of Federal judicial power at all. Rather, it would be a reaffirmation or restoration of inherent tribal judicial powers taken away by a Federal course of action which led to the status which the Supreme Court has declared to be inconsistent with the continued exercise of such powers.

The key to such a bill would be its procedural safeguards. Presumably, the only nonracist, legitimate objection which a non-Indian could have to being tried in an Indian court, where the alleged offense was committed in Indian country, would be the concern that he would not enjoy the same due process protections which would be available in Federal court. The bill would therefore contain tightly drafted requirements similar to the retrocession provisions of the Indian Child Welfare Act.

The committee may well wish to consider requirements which are even stronger than those contained in the Indian Child Welfare Act. A tribe wishing to have its tribal court obtain such jurisdiction would need to make a showing, perhaps in the form of a petition to the Secretary of the Interior, that certain conditions are met.

There might be a requirement that the tribal judge be an attorney. The criminal code would be approved by the Secretary of the Interior.

Habeas corpus relief would lie to test claimed deprivations of rights. Jury panels would be required to be representative of the entire reservation population.

Penalties which could be imposed by the court would be limited to $1,000 or 1 year, giving the court full misdemeanor jurisdiction. The bill would create some means for the provision of counsel to indigent defendants. The overall thrust of these provisions would be to provide statutory requirements which would fulfill the Anglo-American conceptions of due process.

An advantage of this plan is its economy. It is probably the least expensive of all methods for adequately filling the law enforcement void in Indian country, for it would rely on a proven system—the tribal courts established by Indian tribes across the country which, until the *Oliphant* decision, were exercising criminal jurisdiction over non-Indian offenders.

Existing tribal court and confinement facilities would be used. Local attorneys might be employed on a part-time basis and paid on a per case basis. The part-time court clerk could be someone from the attorney's regular office staff. No expansion of the caseloads of the U.S. attorneys would be required because the cases would be tribal and would therefore be prosecuted by the tribes.

Of all the possible methods that might be selected in dealing with law enforcement problems created by the *Oliphant* decision, this one would do most to recognize the strides made by tribal law enforcement in recent years. The proposal would go the farthest in fostering tribal self-government, a necessary goal if Indian culture is to be preserved.

Such a bill would effectuate Congress' announced self-determination policy. Such a law would be one proud achievement in the long history of congressional control over the fate of Indian people.

If tribal court criminal jurisdiction over non-Indians is not considered feasible at the present time, we urge the select committee to consider a very limited, modest proposal involving the increased use of Federal magistrates. This would be implemented with only slight departure from existing statutes and, we predict, with a relatively small increase in expense.

Many law enforcement problems could be solved if only the Federal jurisdiction which now exists were to be exercised. A major source of such jurisdiction is found in 18 U.S.C. 1152. A particularly important source of Federal jurisdiction on many reservations is 18 U.S.C. 1165, which makes it a crime to trespass on Indian lands for the purpose of hunting or fishing.

Here, Congress enacted a special statute to insure that non-Indians would hunt and fish within Indian reservations only with the consent and under conditions imposed by Indian tribes. The congressional intent has been largely thwarted by the failure of the executive and judicial branches to effectuate it.

Little statutory change would be required to reverse this. There have not been enough Federal magistrates who are located near enough to Indian reservations to hear many cases arising there. Those magistrates that have been appointed have been hampered by a lack of clear authority or direction to exercise jurisdiction. The U.S. attorneys, perhaps too few in number or too far away, have failed to prosecute cases.

A procedure is already utilized in many magistrates courts for offenses occurring within national parks. Our proposal is that this procedure be formalized in a bill which would pertain to special Indian magistrates.

When an offense occurs in many national parks, the park police act in almost every respect as prosecutors, making out affidavits for search warrants and arrest warrants, swearing out complaints, and presenting cases before the magistrate.

Court documents and investigative reports are routed to the nearest criminal division of the U.S. attorneys office, who then exercise a minimal oversight of the proceedings. This provides the recognized check provided by prosecutors in assuring that any due process deprivations result in early dismissals.

We see no reason why a procedure found suitable and successful for the national parks would not meet with equal success for offenses committed within Indian reservations.

Utilization of the national park procedure for Indian reservations would entail the appointment of additional part-time magistrates. A major current problem is that there is no magistrate within any reasonable distance from most reservations. The huge distances involved make it difficult to secure the attendance of witnesses, take the accused far from the community where the offense is alleged to have occurred, and generally make it unlikely that prosecutors will pursue the evidence and establish a case with the vigor and preparation which would be brought to bear on cases arising in their own communities.

We would propose funding of part-time magistrates who would be local attorneys to act as the Indian magistrates for the reservations of a contiguous region. Appointment of Indian magistrates would be made by the chief judge of the Federal district court from a list of recommended candidates submitted by a panel of tribal leaders from the affected reservations. The Indian magistrate would be administratively subject to the chief judge or the chief magistrate of the district.

We do not see this proposal as requiring major new expenditures of Federal dollars. The part-time magistrate would be a local attorney paid on a per-case basis, served by a part-time court clerk, who would be part of the attorney's regular office staff. Existing tribal court facilities could be used by the Indian magistrates. Tribal facilities might also be used for pretrial detention and post-trial confinement.

Tribal police officers could be commissioned as Federal law enforcement officers. The bill would define the role and manner of appointment of the officers and would grant them clear authority to enforce Federal law on Indian reservations. The officers would, as they do now, undergo rigorous Federal training.

In the vast majority of cases these officers would act as prosecutors. They would present affidavits for search or arrest warrants to the magistrate. They would initiate the criminal process through the use of uniform complaint forms. Copies of these documents and other materials such as investigative reports, would be sent to the U.S. attorney's office as a matter of daily routine. The officer would present the case to the magistrate at trial.

The U.S. attorneys would become involved only in cases of unusual complexity or where the nature of the alleged offense demands special prosecutorial attention.

The transmission of paper work to the U.S. attorney's office would serve another important function. Tribal police officers are trained in criminal due process law, as are presumably all modern police officers. The check provided by the U.S. attorney's office, where review would be by lawyers with independence and distance from the complaining officers, professional prosecutors having an ethical obligation to dismiss an unjustified case, would equal or surpass the safeguards provided by other law enforcement systems.

A provision that the U.S. attorney's office could dismiss cases only upon providing written reasons to the Indian magistrate would be advisable.

Under the present magistrate statutes, the magistrate may hear the case only if the defendant specifically waives his right to trial in district court. In most instances, of course, the defendant will prefer to have his case heard locally rather than by a distant, and more imposing, Federal district court.

Presumably, however, the statute contains these waiver provisions because article III of the Constitution is thought to require them. We believe that the Constitution does not require the trial of Federal offenses by an article III court and that the Indian magistrate legislation need not contain such an option.

Article III says that the Federal judicial power shall be vested in judges with lifetime tenure appointed by the President with the advice and consent of the Senate. This has not been read to unduly restrict the power of Congress to delegate Federal judicial power to nonarticle III courts.

Today the Federal judicial power is exercised by such judicial bodies as the Tax Court and the Court of Military Appeals, neither of which is considered an article III court. The district court judges of Guam, the Virgin Islands, and the Canal Zone do not enjoy lifetime tenure, yet they routinely try violations of Federal criminal laws.

It is therefore clear that Federal judicial power can be delegated by Congress to nonarticle III courts consistent with the Constitution and that the defendant's option of trial in the Federal district court now contained in the magistrate statute can be eliminated.

Finally, we urge the committee to consider a variation on this theme of a bill containing limited alterations to the present magistrates statute. The variation would assimilate provisions of tribal law into Federal law, much as the Assimilative Crimes Act incorporates State law for Federal areas.

Tribal laws approved by the Secretary of the Interior would be incorporated into Federal law for this purpose. Law enforcement, for the most part, is a local function carried on within constitutional parameters. The assimilation of tribal law would allow this function to reflect changing local conditions and attitudes as is the case in the non-Indian community.

We cannot emphasize too strongly the urgency and absolute need attendant upon this matter. The tribal courts are now without jurisdiction to try non-Indians for offenses committed within reservations.

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State and Federal authorities have failed to exercise the jurisdiction which they possess. Who will deny that this failure will continue unless Congress acts?

Who will deny that next month, this very week, violations of law which would be answered with prosecution in any non-Indian community will go unpunished because the offense occurred within a Federal Indian reservation and the perpetrator was not an Indian? Congress must address this notorious void in law enforcement and so silence those who would say that the trust responsibility is a shameful farce.

Senator COHEN. You say that there might be a requirement that the tribal judge be an attorney. Why do you make that conditional? Would you want to enter a court in which the judge hearing the evidence was not an attorney?

Mr. ERNSTOFF. I have appeared in a number of courts in which the judge was not an attorney, including State courts in the State of Washington where the justices of the peace are not attorneys. Not intending to be glib, I can assure you——

Senator COHEN. It was not to try a Federal offense that you appeared before them, was it?

Mr. ERNSTOFF. They are mostly minor offenses, misdemeanors. The justices of the peace are being phased out.

However, my answer is that the idea that a person must be an attorney, particularly where the fact situation is not complex and where the sentence that could be imposed is not strenuous, is not one which horrifies myself.

I appear very often in tribal courts in a number of States and a number of tribes and I have never appeared before a tribal court in which the judge was an attorney. I have been satisfied with the justice that has been——

Senator COHEN. Let me stop you. You did suggest that the offense would be minor, not a very important matter. Here you are talking about a $1,000 fine or a year in jail. That does not sound too minor to me.

Mr. ERNSTOFF. That is misdemeanor jurisdiction. I am suggesting that it not necessarily be required that he be an attorney. However, I think that a requirement that the judge be an attorney would not be an unacceptable one. There are a number of young Indian lawyers graduating from law school and coming to the reservations to work.

Even if not, at least as to non-Indians, there is no reason why a tribe could not designate a local attorney, perhaps not an Indian, to at least sit as tribal judge as to matters dealing with non-Indians. I have no problem with that.

I use the word "might" because I think arguments can be raised on both sides, but I have no problem with that.

Senator COHEN. What are the natures of the crimes, in your experience, that have been committeed on reservations and have gone uninvestigated?

Mr. ERNSTOFF. They involve assaults——

Senator COHEN. What kinds of assaults are they?

Mr. ERNSTOFF. I would venture to say that murders and rapes are definitely investigated and prosecuted. But, barroom-brawl kinds of

things, family assaults, things which in a non-Indian community would be investigated—even if there were no prosecution they would be of concern to law enforcement agencies—are not of concern on Indian reservations.

Where the State does not have jurisdiction—and that includes crimes by non-Indian against Indians or Indian interests—I can tell you that Federal investigation is basically nonexistent. The tribal police on any of these reservations will call the FBI, call the U.S. attorney, call the Federal law enforcement officer and they will not respond for a number of reasons. Usually the reservations are remote. It is expensive and there are budget cuts. Something which seems to be minor in the FBI's eyes will not bring a high-priced FBI agent who is 3½ to 4 hours away coming from Seattle, Spokane, or one of the other major cities in order to investigate, even though it may be very important to the tribe.

Senator COHEN. Thank you very much, Mr. Ernstoff, for your testimony. I particularly appreciated a unique case of pleading in the alternative. It gives us a two-track system, at least, to follow.

Mr. ERNSTOFF. Thank you, Senator.

Senator COHEN. This hearing will now stand adjourned.

[Whereupon, at 2 p.m., the hearing was adjourned.]

CONTINUED

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APPENDIX

STATEMENTS RECEIVED SUBSEQUENT TO THE HEARING

TESTIMONY OF RONALD HALFMOON, CHAIRMAN OF THE BOARD OF TRUSTEES OF THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

Mr. Chairman, members of the Committee, ladies and gentlemen. My name is Ron Halfmoon. I am Chairman of the Board of Trustees of the Confederated Tribes of the Umatilla Indian Reservation in Oregon and I am very happy for the opportunity to present our views on these three major legislative concepts that will directly affect the quality of life in Indian Country.

Because of our tribal history, I submit that we, the Confederated Tribes of the Umatilla Indian Reservation, are in a unique position to provide comments on these measures relating to criminal jurisdiction in Indian Country. The Umatilla Indian Reservation is located in northeastern Oregon, primarily within Umatilla County. It was established by the Treaty of June 9, 1855. Unfortunately, the reservation was situated such that it was bisected by the Oregon Trail which was a major route of travel at that time. It also encompassed many acres of prime farmland which was coveted by non-Indians in the area. As a result of these factors and other federal policies and enactments over the years, much of the reservation was lost to Indian ownership. Of the original reservation consisting of 245,699 tribally owned acres, there are today only approximately 100,000 acres of trust land, a majority of which are individual allotments. The resulting checkerboard pattern of land ownership tends to complicate jurisdictional matters.

A further complication occurred in 1953 when the Umatilla Indian Reservation was among those made subject to the infamous Public Law 83-280 which transferred criminal and civil jurisdiction over the reservation to the State of Oregon.

In light of the fact that we have been without criminal jurisdiction for some 27 years, it might seem strange to say that we are in a unique position to offer testimony on legislative proposals that directly relate to criminal jurisdiction on Indian reservations. However, our position *is* unique, because the return of criminal jurisdiction over our reservation has been a high priority for many years now. In our attempts to achieve retrocession of criminal jurisdiction we have pursued a measure through the state legislature, which ultimately failed. For several years we worked on a measure to be presented to the United States Congress. Most recently we have requested the Governor of the State of Oregon to issue an executive order returning criminal jurisdiction to us and the federal government. I am happy to report that it now appears that the Governor of Oregon, the Honorable Victor Atiyeh, agrees with our request and will eventually restore criminal jurisdiction to us.

Thus, although we have not had criminal jurisdiction for 27 years, we have studied it thoroughly, undertaken extensive planning, evaluated problems and reviewed both the statutes and case law affecting jurisdiction matters on Indian reservations.

If I may, I would like to offer our comments on each of the three measures.

S. 1722

We have two specific comments on Section 161 of this Bill.

First, and perhaps obviously, we support Section 161(i) which would authorize tribes under Public Law 280 to seek retrocession by tribal action.

The entire history of Public Law 280 and the results occasioned by it are so inherently unfair, from a tribal standpoint, that some type of remedial action is long overdue. Without belaboring this point which the Committee has undoubtedly heard about at length during these hearings, we would like to point out a few of the factors that support the change in the law that would result in the enactment of Section 161(i).

Public Law 280 was supposedly enacted to combat "lawlessness" on Indian reservations. Without any attempt to establish or strengthen tribal or federal enforcement or judicial systems operating on Indian reservations at that time, it was passed into law. It was passed, significantly, at a time when termination of Indian tribes was a federal policy and its true, ultimate goal could only have been termination as opposed to combating lawlessness. No other reason can explain why civil, as well as criminal, jurisdiction was removed from certain tribes.

As enacted, Public Law 280 was mandatory for certain named tribes. Tribal consent was not a factor in the transfer of jurisdiction. Not until amendments were made in 1968 was tribal consent required and then only for the removal of jurisdiction. No provision was made for a tribe to request the return of jurisdiction.

The effect of Public Law 280 has not been to combat lawlessness but rather to enhance it to a large degree and to foster ill-feelings between tribal people and state law enforcement authorities. Perhaps some examples will illustrate these statements.

We are fortunate on the Umatilla Reservation that we are not plagued with numerous major criminal problems. Crimes do occur. The problem usually is that the perpetrators are rarely apprehended and brought to justice. Within this month, we have had three tribal buildings burglarized within a 2-week period and no suspects have been identified. Last year the Indian Health Service Clinic was broken into and numerous drugs were taken. Because we are under Public Law 280, federal authorities could not participate in the investigation and to date no suspects have ever been identified. Within the last year our tribally owned grocery store was being burglarized at a rate so frequent that it almost came to be expected. That series of crimes was not terminated until a BIA game officer apprehended a suspect who was ultimately convicted.

The unilateral application of state laws and enforcement by state authorities naturally generates a feeling of resentment by Indian people. They view it as being akin to making one state's laws and enforcement applicable to another state. Criticism is frequently aimed at state and county enforcement agencies for not responding to calls for assistance on the reservation. Antagonistic feelings exist when they do appear on the reservation. The net result is ill-feeling, a serious lack of cooperation due to a lack of any rapport and an ineffective enforcement situation. Only a tribal enforcement program whose sole focus is the reservation, will have the interest and ability to establish the rapport with reservation residents that will lead to an effective, efficient relationship between the community and the police.

These problems could be effectively resolved if the administration of a criminal justice system were a tribal and federal matter. Thus, although it now appears to us that we will not be required to use Section 161(i) if it is enacted, we strongly support it based upon our background, research and experience.

The second portion of Section 161 of concern to us is 161(d)(2). This section would modify the Major Crimes Act by redefining certain crimes and expanding the number of crimes formerly included. We cannot disagree with the need for uniformity in the definition of federal crimes. We do question the need for increasing the number of crimes specified in this section.

Historically, the Major Crimes Act vested in the federal government jurisdiction over those major offenses which, it was felt, were inappropriate for prosecution within tribal courts. At the present time there are, within the Major Crimes Act, 14 enumerated crimes. This obviously leaves some types of felony activity to tribal courts even though the Indian Civil Rights Act limits tribal courts to the imposition of a maximum sentence of 6 months imprisonment or a $500 fine or both. 25 U.S.C. § 1302(7). Obviously, some adjustment is needed somewhere.

If specific crimes are to be enumerated in the section, they should be restricted to "major" crimes. Although we have not yet seen the specific definitions, we wonder whether offenses such as aggravated property destruction, criminal entry, certain thefts and trafficking and receiving stolen property fall within that category.

One alternative might be to specify federal jurisdiction over all major felonies generally and increase the limitations upon punishment by tribal courts to realistic levels. This avoids leaving any major felony to tribal courts, avoids prosecuting an enumerated, but minor, offense on a local level to decide who takes minor felony cases and allows tribal courts to impose sanctions commensurate with the offense.

In either event, we would suggest that this opportunity be taken to clarify a point of some disagreement and concern by specifying that tribal courts have concurrent jurisdiction with the federal government over crimes covered by the Major Crimes Act in order to allow tribal action where the circumstances of a particular case are not sufficiently aggravated to justify prosecution before a federal court. Alternatively, tribal jurisdiction over lesser included offenses might be legislatively confirmed.

S. 1181

The Tribal/State Compact Act is a measure which we fully support. At the present time tribes and states can enter into cooperative agreements covering a variety of topics and we have done so ourselves on several occasions. However, these agreements cannot effect a change in jurisdictional authority. This Act would allow such transfer of jurisdiction. The practical utility of this Act stems from the fact that it would allow tribes and states to define, by mutual agreement, jurisdictional responsibilities over the multitudes of "gray areas" that exist. In addition, the Act is mandatory so that while it provides the necessary authority to enter into compacts or agreements, no tribe or state is compelled to do so.

Again, I would like to describe some examples of situations on the Umatilla Indian Reservation where we consider this Act as having potential application.

Although we have been under Public Law 280, our authority over hunting and fishing have continued undiminished. We have a fish and game code, an enforcement program, a court of fish and game offenses and a big game management plan that is in its second year. By treaty and federal court decision, we have an exclusive right to fish and game within our reservation. Jurisdictionally, all Indians are handled within the tribal system. Non-Indian violators on trust land are cited into federal court pursuant to 18 U.S.C. § 1165. However, a large gap exists where a non-Indian on deeded land violates our regulations. Neither tribal nor federal authorities extend to this situation. Thus, if a season is closed and a non-Indian violates that closure on deeded land, we have no enforcement mechanism available to protect our exclusive right. The *Oliphant* decision removed the only source of protection that existed which was the regulation of non-Indian hunting and fishing under our tribal code. In order to establish some type of enforcement for non-Indians on deeded land, we have agreed with the State of Oregon that they will provide enforcement in those situations as an interim measure until the jurisdiction picture changes. The problem is that they can only enforce state law and our attempt to protect and regulate our established exclusive right is for naught.

A second example occurs in a non-criminal context—that of land use regulations on the reservation. It is our view that even under Public Law 280, county zoning ordinances do not apply to deeded lands on the reservation because they are not state laws of general application. At the same time, a question exists as to whether our tribal zoning ordinance applies to deeded land within the reservation. At the present time, we do not foresee any viable method of resolving this important issue.

These are but two examples which illustrate a potential use for this Bill. With the authority provided by this Bill, I am confident that we, and appropriate state and local authorities, can discuss the issues and reach an agreement that will effectively resolve these problems.

For these reasons, we strongly urge the passage of S. 1181.

FEDERAL MAGISTRATES ACT

One of the reasons espoused for the development of this measure is the lack of prosecution by the United States Attorney's Office in some instances. At the outset, I wish to express to this committee our extreme satisfaction with the performance of the U.S. Attorney's office in Oregon. While we have not had criminal jurisdiction on our reservation, we have had frequent contact with that office on fish and game matters and our efforts to obtain retrocession of criminal juris-

diction. Mr. Sidney Lezak, the U.S. Attorney in Oregon and Mr. Bill Youngman, Assistant U.S. Attorney, have been most cooperative and helpful at every turn and we fully expect that this relationship will continue upon the return of criminal jurisdiction.

At the present time there is a part-time U.S. Magistrate situated in Pendleton, which is adjacent to the Umatilla Indian Reservation. Citations to non-Indian violators of 18 U.S.C. § 1165 are regularly handled in this court.

Although we have not yet seen the proposed legislation, it is our view at this time that the descriptions we have heard of the measure would be of any practical benefit or value. We do have some suggestions that might be incorporated into the measure which would address certain problems.

One problem has been the tribal prosecution of lesser included offenses in lieu of federal prosecution under the Major Crimes Act when tribal courts are limited to imposing sentences of six months imprisonment, or a fine of $500.00 or both. The most realistic method of addressing this problem would be to amend the Indian Civil Rights Act and increase those limitations to a level reasonably consistent with the type of offenses that could be prosecuted before the tribal court given the scope of the Major Crimes Act.

Second, the single most pressing problem on reservations, given the *Oliphant* decision is that of non-Indian violators on the reservation. We have described for you the problem we currently have in fish and game regulation and enforcement. The current state of the law regarding criminal jurisdiction dictates that two separate law enforcement authorities operate on a reservation or that a tribal enforcement program, with appropriate cross deputization, apply tribal or state laws as the situation requires. One potential approach might be the inclusion of a tribal assimilative crimes provision within the Magistrates Act under which tribal law could be adopted as federal law for the purpose of prosecuting non-Indians before a magistrate. This could be along the lines of the existing Assimilative Crimes Act found in 18 U.S.C. § 13.

We will anxiously await the publication of a draft of the Magistrates Act at which time we can offer more specific comments on it.

Mr. Chairman, this concludes our testimony and on behalf of the Confederated Tribes of the Umatilla Indian Reservation, I wish to express our appreciation for the opportunity to comment on these measures.

Thank you.

STATEMENT OF REID PEYTON CHAMBERS, SONOSKY, CHAMBERS & SACHSE, COUNSEL

My name is Reid Chambers and I am a partner in the law firm of Sonosky, Chambers & Sachse with offices at 2030 M Street, NW., Washington, D.C. 20036. On behalf of our tribal clients including the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, the Shoshone Indian Tribe of the Wind River Indian Reservation, Wyoming, and the Standing Rock Sioux Tribe of North and South Dakota we support expansion of the role of U.S. magistrates in federal law enforcement on Indian reservations.

As you are no doubt aware, on many Indian reservations federal law enforcement has been seriously deficient. In cases where a non-Indian commits a crime against an Indian on a reservation, neither the state nor the tribe has jurisdiction to prosecute. Only the United States has jurisdiction over such offenses, see 18 U.S.C. 13, 1152. However, except for the 13 major crimes (18 U.S.C. 1153), jurisdiction is not generally exercised over offenses committed by non-Indians against Indians. The most common crimes—such as assaults or small burglaries—simply are not prosecuted in the vast majority of instances. In large part, this is because the necessary federal resources have not been allocated to meet the law enforcement needs of Indian reservations. Existing federal law enforcement is generally too distant from reservations—United States Attorneys, federal courts and FBI agents are frequently several hundred miles away. In addition, United States Attorneys often have more work than they can handle and typically assign a very low priority to the prosecution of offenses of Indian reservations. As a consequence the crimes with which we are concerned are committed virtually without fear of prosecution or punishment. This is an intolerable situation.

We wholeheartedly support Senator Melcher's suggestion that an expanded role for United States magistrates would help ameliorate this problem. Under existing laws, United States magistrates are already authorized to try minor offenses committed by non-Indians upon the person or property of an Indian on an Indian reservation. 18 U.S.C. 3401. But because most magistrates are part-

time only, are limited in their assignments and seldom devote time to Indian reservation matters, and because their jurisdiction depends on the consent of each defendant, magistrates have not been an effective law enforcement presence on reservations.

We recommend that legislation be introduced and enacted which incorporates the following points.

First, a full-time United States magistrate should be assigned to each major Indian reservation which desires and needs such a full-time magistrate. The Judicial Conference of the United States should be directed to determine which reservations have a sufficient federal caseload to warrant a full-time magistrate. For reservations with a smaller caseload, a part-time United States magistrate should be assigned to the reservation, or full-time magistrates could be assigned to "ride circuit" between two or more reservations in an area. Another possibility is that tribal court judges could be assigned as part-time United States magistrates. Many tribes have highly qualified lawyers serving as their judges. In any event, Congress should make clear its intention that United States magistrates be assigned to Indian reservations in sufficient numbers to handle the federal criminal caseload, and should authorize the necessary funds.

Second, the legislation should expand the scope of the magistrate's jurisdiction on Indian reservations. Currently, magistrates can only hear "minor" criminal cases with a maximum penalty of one year in jail or a $1,000.00 fine, or both. 18 U.S.C. 3401. On isolated Indian reservations, where magistrates would provide the only readily available federal forum for law enforcement, this limitation would allow more serious crimes to go unprosecuted. We believe that power should be delegated to magistrates on Indian reservations to try all crimes other than those covered by the Major Crimes Act, 18 U.S.C. 1153. With such jurisdiction the magistrate could be a significant federal law enforcement mechanism on Indian reservations.

Third, the magistrate's jurisdiction should be made mandatory for crimes committed on Indian reservations. Under existing law, for a magistrate to be able to hear a case, a criminal defendant must waive in writing his right to be tried before a federal judge and before a jury. This should be amended to enable a magistrate without the defendant's consent to hear any case—before a jury or not—over which he has jurisdiction and where the penalty is less than six months' imprisonment.

Fourth, since a magistrate cannot operate without a prosecutor, a federal prosecuting attorney should be assigned full-time to work with each magistrate. If possible the prosecuting attorney should not be an additional Assistant United States Attorney, since such an assistant would soon find himself delegated to other work. By law, his duties should be limited to prosecutions on Indian reservations. Again, tribes could be authorized to recommend that qualified tribal court prosecutors serve in this capacity, or full-time federal prosecutors could ride circuit along with the magistrates.

Finally, funds should be made available for attorneys for indigents and for court reporters and transcripts.

Legislation along these lines would benefit both Indians and non-Indians living on reservations. For too long there has been a major vacuum instead of effective federal law enforcement on Indian reservations. We—and our tribal clients—welcome the Committee's efforts to seek to change this deplorable situation, and urge the Committee to give this matter priority consideration.

CORRESPONDENCE AND OTHER RELATED MATERIALS RECEIVED SUBSEQUENT TO THE HEARING

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN,
Washington, D.C., April 16, 1980.

Hon. JOHN MELCHER,
Chairman,
Select Committee on Indian Affairs,
The U.S. Senate,
Washington, D.C.

DEAR SENATOR MELCHER: One of the most serious legal problems which currently affects the effectiveness of law enforcement programs on Indian reservations is the uncertain legal status of police officers employed by Indian tribes and duly commissioned as officers of the Indian Service by the Bureau of Indian

Affairs. The practice of commissioning Indian tribal police as federal officers to assist in the enforcement of federal laws and the maintenance of peace in the Indian country is of very long standing and is provided for in the published procedures of the Bureau of Indian Affairs. (Bureau of Indian Affairs Manual 68.215.)

According to the Bureau 325 tribal officers have been cross-deputized by the Bureau on Indian reservations throughout the United States under the authority of 18 U.S.C. § 3055. Congress has sanctioned this practice through its annual appropriations for law enforcement on Indian reservations since 1939 and, more recently, through express directions to the Bureau in annual appropriations to contract its law enforcement functions on Indian reservations to Indian tribes at their request. See Public Law 95–74.

However, attorneys within the Department of Justice have recently questioned the effectiveness of the practice, suggesting that tribal officers performing law enforcement functions under tribal contract with the Bureau of Indian Affairs and commissioned as deputy special officers by the Bureau may not be federal officers under the laws which protect such officers from assault. See enclosed memorandum dated August 8, 1978.

In this regard one of the issues which has been raised is the absence of explicit statutory authority for the entire range of law enforcement activities which has been carried on for many years by the Bureau, including the practice of commissioning tribal (as well as state and county officers) to assist in the performance of federal law enforcement functions in the Indian country.

A number of our tribal clients, including the Miccosukee Tribe of Indians of Florida, the Metlakatla Indian Community, the Oglala Sioux Tribe of the Pine Ridge Reservation, and the Makah Indian Tribe of the Makah Reservation, have contracted with the Bureau for the performance of law enforcement functions and, in so doing, have relied on the established Bureau policy of commissioning tribal officers as federal officers and the position of the Interior Department attorneys that the practice is valid and effectively constitutes such officers as federal officers. While this position has recently been upheld by a decision of the Federal District Court for the Western District of North Carolina, we are informed that the Justice Department has still not concurred with the Interior Department position and is urging the Bureau of Indian Affairs to require more direct supervision by federal employees of federally-deputized tribal officers in the performance of their daily duties as a condition of accepting the Interior Department's legal position.

Such a request by Justice, if it has been made, would be directly contrary to the federal policy of encouraging Indian tribes to manage law enforcement on their own reservations expressed in Public Law 93–638 and in annual Bureau of Indian Affairs appropriation acts.

Consequently, we request on behalf of the tribes identified above that you introduce and obtain the enactment of the enclosed proposed legislation which has been prepared by the Bureau of Indian Affairs. Not only would this bill settle the status of tribal officers commissioned by the Bureau, but it would explicitly authorize the range of law enforcement activities which have been carried on for many years by the Bureau with implied Congressional sanction through the annual appropriations. The enclosed memorandum, dated December 20, 1978, by former Acting Commissioner Martin Seneca, ably explains the need for the enactment of this proposal.

I respectfully request that a copy of this letter be included in the record of the hearing recently concluded by the Senate Select Committee on Indian Affairs on matters affecting law enforcement in the Indian country.

Sincerely,

S. Bobo Dean.

Enclosures.

MEMORANDUM

To: Legislative Counsel.
Through: Assistant Secretary—Indian Affairs.
From: Acting Deputy Commissioner.
Subject: Int. Prop. 96–65, clarifying BIA law enforcement authorities.

There is attached a draft bill "To clarify and strengthen the authority for certain Department of the Interior law enforcement services, activities, and officers in Indian country, and for other purposes.".

This proposal is similar to one submitted by the Interior Department to OMB for the 95th Congress except that it has been revised as the result of comments received from the Justice Department on that earlier proposal. The clarification of authorities provided in the attached draft bill are essential and long overdue. We recommend that this proposal be given the highest priority by the Department and OMB so that it may be promptly submitted to the 96th Congress.

The Bureau of Indian Affairs employs some 280 law enforcement officers providing law enforcement services on over 120 Indian reservations or areas in 23 States. In addition, various Indian tribes employ approximately 500 law enforcement officers, 325 of whom are commissioned as BIA Deputy Special Officers.

The attached draft bill would provide explicit authority for BIA commissioned law enforcement officers to carry firearms and to conduct searches and make arrests. The draft bill would also expressly authorize the issuing of BIA law enforcement officer commissions to tribal, State, and local law enforcement officers.

One of the most important provisions in section 1 of the attached draft bill is that provision providing specific statutory authority for BIA commissioned law enforcement officers to carry firearms. All BIA law enforcement officers go through an extensive training program at the BIA police academy in Brigham City, Utah. Tribal officers must also attend an extensive training program at the BIA Police Academy. All other law enforcement officers that are issued BIA commissions must have attended and successfully complete State certified law enforcement training programs. After completing such a program, the law enforcement officers are permitted to carry firearms in the performance and execution of their duties, which include the arrest of Federal law offenders. The carrying of firearms is necessary for the effective performance of their duties and for self-defense.

The current authority for BIA law enforcement officers to carry firearms is based on an interpretation of the provisions in the Snyder Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13); 18 U.S.C. 3055; section 1 of the Act of August 1, 1914 (38 Stat. 585; 25 U.S.C. 200); and Interior Department Appropriations Act which since 1939 have contained the following or similar language: "For maintaining law and order on Indian reservations . . ."

While these Acts clearly provide statutory recognition of the BIA's law enforcement functions, they do not provide clearly stated and adequate authorities for those functions including the carrying of firearms.

It should be noted that traditionally American law enforcement officers, including BIA law enforcement officers, have carried firearms while on duty. Indeed such officers often even carry firearms while off duty since most are subject to possible recall to duty without advance notice and without regard to where they may be located.

A second important provision in section 1 of the attached bill is the provision providing clear authority for BIA law enforcement officers to conduct searches and make arrests. At present, such authority is clearly provided only for liquor law violations and such necessary authority in all other cases is dependent upon the aforementioned interpretation of the Acts cited above.

It should be noted that under the current circumstances, Bureau of Indian Affairs law enforcement officers are running the risk that their authority might be successfully challenged in court and they or the Federal Government found liable for their "unauthorized" law enforcement actions. A successful challenge might be possible because the statutes in title 18 that delineate the powers of other Federal law enforcement officers such as the FBI (18 U.S.C. 3052), the U.S. Marshalls (18 U.S.C. 3053), and the U.S. Secret Service (18 U.S.C. 3056) all provide explicit authority to carry firearms as well as arrest authorities which clearly reflect the scope of the authority of the officers involved. Similar authority was recently provided for the National Park Service in Public Law 94–458.

Law enforcement personnel commissioned by the BIA should not be forced to bear the financial burden for good faith errors committed in the performance of their assigned duty. Neither should a person wrongfully arrested be prevented from making a full recovery because the officer's resources are inadequate and the government can deny liability.

A third important provision of the bill is the provision in section 2(a) providing express authority for the issuing of BIA law enforcement officer commissions to tribal law enforcement officers and to State and local law enforcement officers as well. Such use of non-Federal law enforcement services is essential in Indian country. Indeed, without such assistance, the BIA could not provide anywhere near a level of adequate services without a significant increase in BIA employed law enforcement personnel.

Section 2(b) of the bill extends to the tribal, State, and local law enforcement officers who are commissioned by the BIA certain of the statutory protections, benefits, and restrictions which would be applicable to a Federal employee who would otherwise be performing the law enforcement function involved. The extension of such provisions is appropriate because of the Federal functions which such officers perform.

Section 1(b) of the bill would authorize an annual uniform allowance of up to $400 for BIA police. The amount is the same as that authorized for the National Park Service by Public Law 94-458. The current $125 amount authorized under the general provisions in 5 U.S.C. 5901 and 5902 have been in effect since 1967 and are woefully inadequate. The $275 increase for the 280 BIA law enforcement officers would cost $77,000 per year.

Section 3 of the bill provides authority for the issuance of rules and regulations governing law enforcement activities of persons commissioned by him.

Section 4 of the bill preserves the validity of existing delegations of authority and commissions and specifies that the bill does not alter existing authorities other than those of the Interior Department.

MARTIN E. SENECA, Jr.

Attachment.

A BILL To clarify and strengthen the authority for certain Department of the Interior law enforcement services, activities, and officers in Indian country, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) for the purpose of maintaining law and order and of protecting persons and property within Indian country as defined in section 1151 of title 18, United States Code, the Secretary of the Interior (hereinafter referred to as the "Secretary") may charge any officer or employee of the Department of the Interior with law enforcement responsibilities and authorize such officer or employee to exercise such of the following authorities as the Secretary may deem appropriate:

(1) Carry firearms within Indian country and while transporting prisoners or on other official duties outside Indian country.

(2) Secure and execute or serve within Indian country any order, warrant, subpoena, or other process which is issued under the authority of the United States or of an Indian tribe.

(3) Make an arrest within Indian country without a warrant:

(A) For any offense against the United States committed in the presence of the officer or employee;

(B) For any offense against the United States constituting a felony if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing a felony; or

(C) For any offense against an Indian tribe that has commissioned the officer to enforce its laws if the officer or employee has reasonable grounds to believe that the person to be arrested is committing the offense in the officer's or employee's presence or view.

(4) Offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense within Indian country or in the apprehension of an offender.

(5) Make inquiries, and administer to, or take from, any person an oath, affirmation, or affidavit, concerning any matter which is material or relevant to the enforcement within Indian country of the laws of the United States or of any Indian tribe that has commissioned the officer to enforce its laws.

(6) Perform any other law enforcement duty that the Secretary may designate.

(7) Upon request, assist (with or without reimbursement) any Federal, tribal, State, or local law enforcement agency in the enforcement within Indian country of the laws, ordinances, or regulations which they administer or enforce: *Provided,* That no Indian tribe, State, or political subdivision shall be deprived, by this section, or by any such request, of any civil or criminal jurisdiction it may have.

(b) Notwithstanding section 5901(a) of title 5, United States Code, the uniform allowance for uniformed officers or employees of the Department of the Interior charged with law enforcement responsibilities pursuant to this section shall not exceed $400 a year: *Provided,* That the Secretary of the Interior may increase such amount annually to reflect increased costs of acquiring and maintaining such uniforms.

SEC. 2. (a) The Secretary may utilize by agreements, with or without reimbursement, the personnel services and facilities of any Federal, tribal, State, or local governmental agency to the extent he deems is necessary and appropriate for effective enforcement of any Federal or tribal laws or regulations in Indian country. The Secretary may commission law enforcement personnel of such agencies to exercise such of the authorities set out in the first section of this Act as the Secretary deems appropriate.

(b) While acting in the capacity of a person commissioned by the Secretary pursuant to this section, any person who is not otherwise a Federal employee, shall be deemed a Federal employee for purposes of (1) the provisions set out in section 3374(c)(2) of title 5, United States Code, and (2) sections 111 and 1114 of title 18, United States Code. For purposes of Subchapter III of Chapter 81 of title 5, United States Code, an employee of a tribal, State, or local governmental agency shall be considered as an "eligible officer" while acting in the capacity of an officer commissioned pursuant to this section.

SEC. 3. The Secretary of the Interior may make and publish such rules and regulations as the Secretary deems necessary or proper for officers or employees of the Department of the Interior charged with law enforcement responsibilities and for employees of any Federal, tribal, State or local governmental agency whose services are being utilized pursuant to Section 2 of this Act.

SEC. 4. (a) Nothing in this Act shall be construed to invalidate any delegations of authority or law enforcement commissions issued by the Secretary, or the Secretary's designates, prior to enactment of this Act.

(b) The authorities provided by this Act are in addition to and not in derogation of any existing authorities. Nothing in this Act shall be construed to alter in any way the law enforcement, or investigative, or judicial authorities of any Indian tribe, State, or political subdivision thereof, or of any department, agency, court, or official of the United States other than the Department of the Interior and agencies or officials thereof.

U.S. GOVERNMENT MEMORANDUM

AUGUST 8, 1978.

To: Benjamin R. Civiletti, Deputy Attorney General.
From: Philip B. Heymann, Assistant Attorney General, Criminal Division.
Subject: Indian Contract Police Officers; Oglala Sioux Tribe; Assaulting Federal Officers; 18 U.S.C. §§ 111, 1114.

By letter dated February 2, 1978 to the Criminal Division, the Office of the Solicitor, Department of the Interior, has attempted to persuade us that Indian police officers "commissioned" and paid by Interior as deputy special police officers, but in fact employed by contracts with the tribes on whose reservation they work, fall within the definition of "any officer or employee of the Indian field service of the United States" as that term is used in 18 U.S.C. 1114 (killing a Federal officer) and incorporated by reference into 18 U.S.C. 111 (assaulting a Federal officer).

After researching the legislative history of 18 U.S.C. 111 and 1114, we have determined that an assault on a contract "deputy special officer" is not within the coverage of the assaulting Federal officers statute, 18 U.S.C. 111, as such an individual is not an employee or officer of the Bureau of Indian Affairs (BIA).

I. The Interior Department has advised us that the legal issue presented here arises in the following factual context: the Oglala Sioux Tribe of Indians, located in the State of South Dakota, is one of many tribes that conduct law enforcement programs for the BIA under the provisions of the Indian Self-Determination Act of 1976, P.L. 93-638, codified at 25 U.S.C. § 450. Interior further indicates that:

"The purpose of this Act is to permit Indian tribes to manage programs that were previously operated for them by federal civil servants. The funding levels and goals of BIA programs remain the same regardless of whether they are operated by civil servants or by the tribe under contract with the BIA. *See* 25 U.S.C. § 450k. When a BIA law enforcement program is contracted, individual officers who meet certain specified training and qualification requirements are commissioned as deputy special officers. The requirements for persons commissioned as BIA deputy special officers are the same regardless of whether the officer is a federal civil servant or an employee under a BIA contract with a tribe. *See* 25 C.F.R. § 11.304 (1977)."

II. As with any issue of statutory interpretation, our analysis commences with a review of the applicable statutory provisions, to see if the statutes on

their face provide an answer to the issue presented. Here the applicable provisions are 18 U.S.C. 111 and 1114.

Section 111, in pertinent part, provides:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

* * * * * * *

Section 1114, in pertinent part, provides:

Whoever kills any * * * officer or employee of the Indian field service of the United States * * * assigned to perform investigative, inspection, or law enforcement functions while engaged in the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title.

In our view, the deputy special officers which Interior describes do not fall within the provisions of 18 U.S.C. 1114, fairly interpreted on its face, as they are not "officer[s] or employee[s] of the Indian field service,[1] but are rather more akin to independent contractors who are hired by the individual tribes, and are responsible to the tribes, and not to the Bureau of Indian Affairs." The fact that they are paid with BIA money through a contractual arrangement with the tribe does not change this interpretation. They are not Federal civil servants, as are regularly employed BIA personnel.

III. Although, as previously indicated, the language of 18 U.S.C. 1114 is clear on its face, resort to the legislative history of sections 111 and 1114 similarly establishes that contract deputy special officers were not meant to be included within the coverage of 18 U.S.C. 111.

The legislative history of section 111 has been thoroughly canvassed in two Supreme Court decisions, *Ladner* v. *United States*, 358 U.S. 169, 173–176 (1958) and *United States* v. *Feola*, 420 U.S. 671, 676–686 (1975). In 1934 Congress enacted the Act of May 18, 1934 (48 Stat. 780), entitled "An Act to Provide Punishment for Killing or Assaulting Federal Officers." This legislation provided (in Section 1, 18 U.S.C. (1934 ed.) 253, recodified as 18 U.S.C. 1114) for punishment for anyone who killed any specified officer of the United States "while engaged in the performance of his official duties, or on account of the performance of his official duties," and (in Section 2, 18 U.S.C. (1934 ed.) 254, recodified as 18 U.S.C. 111)[2] for punishment of persons who "shall forcibly resist, oppose, impede, intimidate, or interfere" with such officer "while engaged in the performance of his official duties" or "shall assault him on account of the performance of his official duties."[3]

The Act of May 18, 1934, originated in the Senate as S. 2080 in the 73rd Congress, 2d Session. This bill was introduced into Congress at the request of the Department of Justice. The pertinent committee reports[4] consist, almost in their

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[1] The term Indian field service is synonymous with Bureau of Indian Affairs.

"The term 'Indian field service' refers to the BIA operations outside of Washington, D.C. It was first included in the statutes in 1936. 49 Stat. 1105 [footnote omitted]. At that time, the term 'The Indian Service' was regularly substituted for the official title 'Bureau of Indian Affairs' when referring to the Washington, D.C., offices of the BIA. Federal Indian Law [U.S. Department of the Interior (1958)] at 221. Congress, when referring to the BIA offices outside of Washington, D.C., used such terms as 'field operations' and 'field projects.' The word 'field' was the distinguishing adjective. See, 80 Cong. Rec. 1300, 1315 (1936). The statutory language expresses the intention of Congress to include within the class of persons protected the employees of the BIA stationed outside of Washington, D.C."

Stone v. *United States*, 506 F.2d 561, 564 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975).

[2] Section 111 was enacted in its present form as part of the revision of Title 18 accomplished by the Act of June 25, 1948, c. 645, 62 Stat. 683, 688. It replaced both § 118 and § 254 of 18 U.S.C. (1940 ed.). The Reviser's Note states that this was done "with changes in phraseology and substance necessary to effect the consolidation." H.R. Rep. No. 304, 80th Cong., 1st Sess. A12 (1947). See *United States* v. *Feola, supra*, 420 U.S. at 677–678, n.13. Section 1114 was enacted as part of the same revision of Title 18 (62 Stat. 683, 756), and was amended in immaterial respects by the Act of May 24, 1949, c. 139, § 24, 63 Stat. 89, 93.

[3] Prior to the passage of this act, there was no general law punishing assaults upon federal officers. Aside from the pre-existing obstruction of justice statute, federal law punished only resistance to specified officers in the discharge of their duties (18 U.S.C. (1934 ed.) 118, 33 Stat. 1265, 35 Stat. 1100).

[4] S. Rep. No. 535, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1455, 73rd Cong., 2d Sess. (1934); H.R. Conf. Rep. No. 1593, 73d Cong., 2d Sess. (1934); 78 *Cong. Rec.* 8126–8217 (1934).

entirety, of virtually identical letters, addressed to the respective chairmen of the Senate and House Committees on the Judiciary by Attorney General Homer Cummings, in which letters the Attorney General stated the purposes of, and need for, the legislation. In pertinent part the Department's letter [5] stated

"[that there is a] need for general legislation * * * for the protection of *Federal* officers and employees * * * becomes increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States * * * for the protection of *its* investigative and law-enforcement personnel * * *." (emphasis added)

Senate bill 2080, as originally drafted, made an assault on "any civil official, inspector, agent, or other officer or employee of the United States" a Federal crime. However, the House Committee on the Judiciary recommended (H.R. Rep. No. 1455, 73d Cong., 2d Sess. 1 (1934)), and the Senate eventually concurred in, an amendment to the bill which provided for the removal of the above phrase, replacing it with the listing of specified categories of Federal officers who would be covered by the legislation.[6] See *United States* v *Feola, supra*, 420 U.S. at 681–682. This backhanded practice of piecemeal amendment of 18 U.S.C. 1114 to include new Federal officials and employees has continued to this day. See *United States* v. *Reid*, 517 F.2d 953, 958 (2d Cir. 1975) (Friendly, J.); 18 U.S.C. (1976 ed.) 1114, Hiscorical and Revision Notes.

Based on the above historical analysis, there can be no doubt but that section 1114 was meant to apply to only Federal officers and employees who needed protection to insure the integrity of Federal law enforcement pursuits:

"[W]e think it plain that Congress intended to protect both federal officers and federal functions, and that, indeed, furtherance of the one policy advances the other." *United States* v. *Feola, supra*, 420 U.S. at 671.

"We conclude * * * that in order to effectuate the congressional purpose of according maximum protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts, § 111 cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer. *Id.*, 420 U.S. at 684.[7]

IV. The legislative history of the Act of February 8, 1936, which amended 18 U.S.C. (1934 ed.) 253, now recodified as 18 U.S.C. 1114, to include the phrase "officer or employee of the Indian field service of the United States" sheds no light on the meaning to be given the above phrase, other than to indicate that the same considerations that led to the passage of sections 253 and 254 in 1934 led to expanding the category of Federal officers and employees covered by the prior statutes to include, *inter alia*, personnel of the Indian field service.

A review of Department of Justice records indicates that the initiative for the above Act was promoted in large part by a letter dated February 6, 1935 to the Department from the United States Attorney for the District of South Dakota. The letter indicated, in part,[8] that the "problem of some protection to officers in the Indian Service and Indian Policemen in the discharge of their duties has arisen."

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[5] This letter is quoted in full in *Ladner* v. *United States, supra*, 358 U.S. at 174–175, n. 3 and *United States* v. *Feola, supra*, 420 U.S. at 680–681, n.16.

[6] During open debate on the House floor this amendment was justified on the following grounds: (78 *Cong. Rec.* S126–S127 (1934))

Mr. COCHRAN of Missouri: The committee has stricken out the Senate language in reference to Government employees and has substituted the language certain officials enumerated in the bill.

Mr. SUMNERS of Texas: Yes.

Mr. COCHRAN of Missouri: The language of the House amendment leaves out a great many Government employees engaged in duties that are extremely dangerous * * *

Mr. SUMNERS of Texas: * * * the Committee on the Judiciary went thoroughly into this matter. Considering existing law and what is the purpose of this bill, the committee felt that this was as far as the Federal Government should go in undertaking to withdraw exclusive jurisdiction from the state courts.

The House floor debates are also replete with references to *Federal* officers (Remarks of Reps. Montague, Doell, Sumners; 78 Cong. Rec. S127 (1934)).

[7] Also see the court's statement (420 U.S. at 676, n.9) that "here Congress seeks to protect the integrity of federal functions and the safety of federal officers * * *;" and its statement in *Lander* v. *United States, supra*, 358 at 175–176, that "[T]he congressional aim was to prevent hindrance to the execution of official duty, and thus to assure the carrying out of federal purposes and interests, and was not to protect federal officers except as incident to that aim."

[8] The full letter is attached as Appendix A.

The act approved May 18, 1934 entitled "To Provide Punishment for Killing or Assaulting Federal Officers" seems to cover every type of Federal Officer except special officers in the Indian Service and Indian Policemen.

Shortly after receipt of the above letter, a February 19, 1935 internal Department of Justice memorandum from the Assistant Attorney General, Criminal Division, to Mr. Holtzoff suggested that if the Act of May 18, 1934 was amended, it should include officers in the Indian Service and Indian Policemen among the enumerated officers.

On March 6, 1935 a bill (H.R. 6476) which would expand the enumerated officers covered by the 1934 Act was introduced in the 74th Congress, 1st Session (79 *Cong. Rec.* 3066) and referred to the House Committee on the Judiciary.

On April 12, 1935, Mr. Felix S. Cohen, Assistant Solicitor in the Department of the Interior, commented, in a memorandum to the Department of Justice,[9] that

"After discussing with the appropriate authorities in this Department the extent to which H. R. 6476 might properly be extended so as to protect *proper officials of the Interior Department*, I would make two suggestions:

1. In order to protect the *special officers, Indian policy, and other employees of the Indian Service empowered* to make arrests, searches and seizures and otherwise to enforce laws applicable to Indian reservations, I would suggest that there be added at the end of the pending bill the words: 'or any properly accredited officer or employee of the United States authorized to enforce any act of Congress for the protection of Indians.'" (emphasis added)

Although H.R. 6476 died in the House Committee on the Judiciary, a similar bill, H.R. 7680, was introduced in the 74th Congress, 1st Session, in the House on April 23, 1935 (79 *Cong. Rec.* 6257) and in the Senate on June 4, 1935 (79 *Cong. Rec.* 8610). In identical reports both the House (on May 4, 1935; H.R. Rep. No. 827, 74th Cong., 1st Sess. (1935); 79 *Cong. Rec.* 8575–8576) and the Senate (on July 9, 1935; S. Rep. No. 1033, 74th Cong., 1st Sess. (1935); 79 *Cong. Rec.* 10815) Judiciary Committees favorably reported H.R. 7680. The committee reports indicate that the sole basis for the new legislation is contained in a letter sent on April 17, 1935 from Attorney General Cummings to the Chairman of the House Judiciary Committee, in which it was stated that

"* * * I have carefully considered the bill (H.R. 6476) to amend the act of May 18, 1935, which made it a Federal offense to kill or assault certain Federal officers * * *.

"My attention has also been called to the necessity of affording similar protection to the personnel of several other groups, such as * * * officers and employees of the Indian Field Service.

"I have prepared a new draft of the bill * * * embodying the above-mentioned suggestions * * * and I recommend the enactment of the bill as so amended. * * *

S. Rep. No. 1033, 74th Cong., 1st Sess. 2 (1935); H.R. Rep. No. 827, 74th Cong., 1st Sess. 2 (1935).

The draft to which the Attorney General refers in the above letter was introduced in the House as H.R. 7680, which was the bill reported by the House and Senate.

H.R. 7680 subsequently passed both the full House and Senate without debate, (79 *Cong. Rec.* 8575–8576; 80 *Cong. Rec.* 1449, 1639, 1640), and was signed into law by the President on February 8, 1936 (80 *Cong. Rec.* 1801). The act of February 8, 1936 (49 Stat. 1105), known as an "Act to amend the Act of May 18, 1934, providing punishment for killing or assaulting Federal officers," has not been amended since its passage.

As can be seen by reviewing the above background materials that led to the passage of the Act of February 8, 1936, there is nothing that would lend any support for including contract deputy special officers within the definition of "any officer or employee of the Indian field service of the United States" for purposes of 18 U.S.C. 111 and 1114.

V. In reliance upon the above analysis of the legislative history of 18 U.S.C. 111 and 1114, we are confident of our conclusion that duly "commissioned" contract deputy special officers who are assaulted in Indian country (18 U.S.C. 1151) while engaged in or on account of the performance of their official duties

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[9] The full memorandum is attached as Appendix B.

are not included within the term "any officer or employee of the Indian field service," 18 U.S.C. 1114. Indeed, no case holding to the contrary has been found.[10]

Virtually all serious assaults on "contract deputy special officers" could be prosecuted in Federal court even though such officers have no status as Federal officers under 18 U.S.C. 1114. 18 U.S.C. 1153, the Major Crimes Act, provides that any Indian who commits one of fourteen listed major crimes against an Indian or any other person shall be "subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." Included within the fourteen crimes are murder, manslaughter, assault with intent to commit murder, assault with a dangerous weapon, and assault resulting in serious bodily injury.

It is our understanding that the vast majority of assaults on law enforcement officers in Indian country are committed by Indians. Thus, if an Indian assaulted a "contract deputy special officer" in Indian country, the United States Attorney always has the option of proceeding under 18 U.S.C. 1153. If the assault were deemed too minor for Federal prosecution (e.g., a simple pushing and shoving not resulting in serious injury) the tribe could prosecute an Indian defendant in tribal court, where he could be subjected to punishment of up to six months in jail and a $500 fine. See 25 U.S.C. 1302(7).

If the person who attacked the "contract officer" was not an Indian there is still Federal jurisdiction provided the officer assaulted or killed is an Indian. The prosecution in such a case would be under 18 U.S.C. 1152, which provides, with exceptions applicable only to Indian defendants, that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country." Although tribal court prosecution of a non-Indian is not possible, see *Oliphant* v. *Suquamish Indian Tribe*, 98 S.Ct. 1011 (1978), United States Attorneys are being instructed, in light of *Oliphant*, to be particularly sensitive to the need for law and order on Indian reservations before declining a case involving a non-Indian defendant and Indian victim. Federal declination in such a case results in no prosecution in any forum since the state lacks jurisdiction. The only situation in which there would be no Federal jurisdiction would be if both the "contract officer" victim and his assailant were non-Indians. Several Supreme Court decisions have held that crimes involving only non-Indians as victims and perpetrators are matters of exclusive state jurisdiction.[11]

APPENDIX A

DEPARTMENT OF JUSTICE,
U.S. ATTORNEY,
DISTRICT OF SOUTH DAKOTA,
Sioux Falls, S. Dak., February 6, 1935.

THE ATTORNEY GENERAL,
Washington, D.C.

SIR: I have the honor to advise that the problem of some protection to officers in the Indian Service and Indian Policemen in the discharge of their duties has arisen.

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[10] See, e.g., *Armstrong* v. *United States*, 306 F.2d 520 (10th Cir. 1962) (soil scientist and criminal investigator employed by BIA); *Walks on Top* v. *United States*, 372 F.2d 422 (9th Cir. 1967) (chief policeman for BIA); *United States* v. *Long Soldier*, 562 F.2d 601 (8th Cir. 1977) (policeman in BIA patrol car; *Stone* v. *United States*, 506 F.2d 561 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975) (BIA employed police officer).

United States v. *Smith*, 562 F.2d 453 (7th Cir. 1977), cert. denied, ——— U.S. ——— (1978), is not to the contrary. In *Smith* an indictment was returned charging that the defendant "wilfully did forcibly assault Alexander Askenette, Jr., a Special Officer of the Bureau of Indians Affairs, Menominee Tribal Police, an officer of the federal government as defined in 18 U.S.C. § 1114 while said officer was engaged in the performance of his official duties, in violation of 18 U.S.C. § 111," 562 F.2d at 454.

Interior has advised us in its February 2, 1978 letter (p. 2, ¶ 4) that officer Askenette was employed by the Menominee Tribe under a Public Law 93-638, contract (and therefore he was not a regular BIA police officer). However, by letter to us dated Feb. 21, 1978 from David V. Vrooman, United States Attorney for the District of South Dakota, we were advised that Mr. Vrooman talked to the Assistant United States Attorney who prosecuted the *Smith* case, and that he was advised that at trial the tribal policeman was asked whether he was an employee of BIA, and he said "yes." This testimony went in without objection. It was unrefuted in the record that Mr. Askenette was an employee of the Indian Field Service, and the facts surrounding whether or not he, in fact, was an employee of the BIA was not brought out in the trial transcript. Given this factual situation, the case hardly has any precedential value.

[11] See *United States* v. *McBratney*, 104 U.S. 621 (1881); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946).

The Act approved May 18, 1934 entitled "To Provide Punishment for Killing or Assaulting Federal Officers" seems to cover every type of Federal Officer except special officers in the Indian Service and Indian Policemen. This office is of the opinion that this Act is not broad enough to protect such officers unless as stated in Neagle, 135 U.S., 63: 'The ministerial officers through whom its commands must be executed are marshals of the United States and belong emphatically to the executive department of the Government. They are appointed by the President with the advice and consent of the Senate. They are removable at his pleasure from office." Could it be stretched far enough to include special officers appointed by the head of the Department such as the Department of the Interior?

Section 245, Title 18, United States Code, would seem to cover special officers and Indian Policemen when in the performance of their duties executing a written order or process, but the practical difficulty is that these special officers are in effect policemen with authority to keep the peace and ordinarily arrest for crimes committed in their presence without any written authority such as a warrant.

The foregoing leaves us in the situation where if an assault is made on a special officer in the Indian Service or an Indan Policeman who is attempting to make an arrest without a warrant, about the only possible redress under the Federal jurisdiction is a charge of assault under Section 549, Title 18, United States Code. There is no such crime as simple assault mentioned in said section and if it is not possible to charge simple assault under the section the writer is at a loss to know under what section such offenders could be prosecuted, and will appreciate the suggestion of the Department in that regard.

Respectfully,

For the U.S. Attorney,
(S) Frank Wickhem
FRANK WICKHEM,
Assistant U.S. Attorney.

APPENDIX B

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, April 12, 1935.

Re H.R. 6476.

MEMORANDUM FOR MR. GARDINER, DEPARTMENT OF JUSTICE.

After discussing with the appropriate authorities in this Department the extent to which H.R. 6476 might properly be extended so as to protect proper officials of the Interior Department, I would make two suggestions:

1. In order to protect the special officers, Indian police, and other employees of the Indian Service empowered to make arrests, searches and seizures and otherwise to enforce laws applicable to Indian reservations, I would suggest that there be added at the end of the pending bill the words: "or any properly accredited officer or employee of the United Sates authorized to enforce any act of Congress for the protection of Indians."

2. In view of the fact that the rangers of the National Park Service under the Department of the Interior and the graziers of the Grazing Administration, under the joint control of the Department of the Interior and the Department of Agriculture, are charged with duties similar to those performed by Department of Agriculture employees in enforcing game laws, it is suggested that the words "Department of Agriculture" be stricken from the pending bill and that there be substituted therefor the words "United States".

If both of the suggested amendments are acceptable, the final words of H.R. 6476 would be: "Or any properly accredited officer or employee of the United States authorized to enforce any act of Congress for the protection, preservation or restoration of game and other wild birds and animals, or any properly accredited officer or employee of the United States authorized to enforce any act of Congress for the protection of Indians."

I return herewith the copy of the act of May 18, 1934, which you loaned me. I shall be glad to render any further assistance within my power in this matter.

FELIX S. COHEN,
Assistant Solicitor.

INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, INC.,
Washington, D.C., May 6, 1980.

Re Testimony on S. 1722

To: Senator John Melcher, Chairman, U.S. Senate Select Committee on Indian Affairs.

From: Kirke Kickingbird, Executive Director.

The enclosed testimony briefly summarizes a recently concluded one year study by this Institute prepared for the National Institute of Law Enforcement Assistance Administration, U.S. Department of Justice. It analyzes the effects upon tribal criminal justice systems of the Supreme Court's decision in *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978). As you know, *Oliphant* held that tribes have no criminal misdemeanor jurisdiction to punish non-Indians for offenses committed on Indian reservations. Consequently, the resultant gap in on-reservation criminal law enforcement has created a dangerous and chaotic situation in Indian Country.

The study's principal authors, Alex Tallchief Skibine and Melanie Beth Oliviero, first analyze the Court's holding, and then proceed to offer alternatives to remedy the situation as it presently exists. It is the Institute's position that successful resolution of such problems requires affirmative federal legislation according criminal misdemeanor jurisdiction to tribal courts for offenses by non-Indians against the persons or property of Indians when such offenses are committed within Indian Country. S. 1622 provides the vehicle for both an affirmation of the inherent sovereign power of Indian nations and the most efficient and economical route toward filling the jurisdictional void which presently exists regarding criminal activity by non-Indians in Indian Country. To this end, we propose to include an amendment to the bill which would eventually allow the tribal courts to prosecute non-Indians. Non-Indians would, however, have a right to appeal to either a Federal Magistrates Court and Federal District Court or an Indian Court of Appeals.

SUMMARY OF STUDY OF JURISDICTION IN INDIAN COUNTRY BY THE DEVELOPMENT OF INDIAN LAW, INC.

For the last year and a half, the Institute for Development of Indian Law has examined the problem of criminal jurisdiction over non-Indians on Indian reservations. The problem became overwhelmingly apparent on March 6, 1978 when the Supreme Court, in a 6–2 decision, held in the case of *Oliphant* v. *Suquamish Indian Tribe* (435 U.S. 191 (1978)) that Indian tribes or nations did not have the inherent sovereign power to assume criminal jurisdiction over non-Indians committing crimes while on an Indian reservation.

It was felt that the decision created a jurisdictional void on Indian reservations. Who would now enforce the jurisdiction that previously had been exercised by the tribe? The ultimate goal of our project was to devise problem-solving models and propose legislation which could be implemented at either the local or national level.

Our study was conducted in three separate steps. During the first three months of the project, we did a literature search and legal analysis on the subject of criminal jurisdiction over non-Indians. We came to the conclusion that the Supreme Court in *Oliphant* should never have held that Indian tribes could not exercise criminal jurisdiction over non-Indians. In doing so, the Court was making a completely political decision without any legal basis.

The Court did say that "we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh . . ." *Oliphant*, 435 U.S. 191, 212). We concluded that Congress should take the Court's directive seriously and enact legislation along the lines of our recommended models (discussion to follow).

In the second phase of the project, we traveled to 12 different reservations which were representative of the various problems tribes encounter in coping with non-Indian crime on their reservations. Our field studies, which were later supplemented by survey questionnaires sent to all federally recognized tribes, confirmed that the tribes need criminal jurisdiction over non-Indians.

Some tribes have coped by entering into cross-deputization agreements with

federal, state, or local governments but, by doing so, their jurisdictional problems can only be temporarily alleviated. Unless Congress enacts legislation allowing tribes to assert criminal jurisdiction over non-Indians the problems will never be resolved.

Devising problem-solving models and proposing legislative resolutions at the national level constituted the third and last phase of the project. Our overall recommendation, explained in the last section of this report, is that Congress enact legislation which will authorize the Secretary of Interior to recognize tribal jurisdiction over non-Indians on the basis of individual tribal petition. The Secretary would not recognize such powers unless the tribe consented to have its decisions involving non-Indians subject to federal review.

LITERATURE SEARCH/LEGAL ANALYSIS

Our literature search attempted to explain why, from a legal point of view, the Court decided to deny Indian tribes the power to try non-Indians for crimes committed on Indian reservations.

Simply stated, at issue in *Oliphant* was whether an Indian nation can assert criminal jurisdiction over non-Indians who have committed crimes and were arrested on the reservations. The specific question was whether Indian nations have such jurisdiction pursuant to their powers of inherent sovereignty.

The Court ruled that Indian nations are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status." The Court reasoned that because tribes are dependent on the United States and because they are incorporated into the territory of the United States, they cannot exercise sovereign powers that conflict with the interest of the overriding sovereignty of the United States. Somehow, the Court concluded that tribal assertion of criminal jurisdiction must conflict with the interest of United States sovereignty.

In its decision, the Court engaged in an historical analysis of treaties signed between the Indian nations and the United States and concluded that, "From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a Congressional statute or treaty provisions to the effect." (*Oliphant* at 197).

Although the Treaty of Point Elliott, signed in 1855 by, among others, the Suquamish Tribe and the United States, does not mention tribal criminal jurisdiction, the Court stated that, ". . . the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction." (*Oliphant* at 206).

Justice Rehnquist, after analyzing several executive documents, lower court decisions and congressional acts, concluded that throughout history the three branches of the government all shared a presumption that Indian tribes were without jurisdiction to try non-Indians. "While not conclusive on the issue before us, the commonly shared presumption of Congress, the executive branch and the lower federal courts, that tribal courts do not have the power to try non-Indians carries considerable weight." (*Oliphant* at 206).

Although the Court recognized that the tribes do retain certain inherent sovereign powers, it concluded that Indian tribes cannot exercise those powers which are "inconsistent with their status." In thus holding, the Court reversed one of the most venerable doctrines of Indian law, which states that tribes retain all of their original sovereign powers, unless such powers have been given up in treaties or taken away by acts of Congress.

Taking the Court's approach step by step, we tried to provide an answer to the three questions the Court responded to positively in denying tribal jurisdiction:

(1) Does the history of Indian treaties show a presumption that tribes have no criminal jurisdiction over non-Indians?

(2) Was there a commonly shared presumption by all three branches of government that Indian nations had no such criminal jurisdiction?

(3) Is the power to try non-Indians inconsistent with the tribes' status as domestic, dependent nations?

We conclude that:

(1) *The history of Indian treaties does not reflect a presumption against tribal criminal jurisdiction over non-Indians. There is no evidence to support such a presumption*

The most consistent language of the early treaties is contained in explicit provisions recognizing the power of Indian tribes to expel and punish white intruders.

The treaties were silent on the question of who had criminal jurisdiction over whom. But before the treaty-making process was terminated by the House of Representatives in 1871, specific treaty agreements had delineated criminal jurisdiction between citizens of both Indians and non-Indian nations.

The Court reasoned that since treaties with the Indians did not consistently recognize the power of tribal governments to exercise criminal jurisdiction over non-Indians, the tribes did not possess such authority. Unfortunately, the Court predicated this finding on a fallacious belief that Indian nations did not have native criminal justice systems at the time of contact with white culture.

The facts of Indian history contradict such an assumption. Tribes did indeed operate under formal, defined and effective systems of justice. The act of treaty-making itself was a tacit recognition by the European nations that Indian tribes were sovereign nations in their own right. Absence of specific reference to jurisdiction cannot be interpreted to mean the Indians lacked such power.

Treaties served to identify and restrict preexisting powers of Indian tribes. They never granted rights that were not already possessed.

To the extent that treaties did not address the jurisdictional issue, it must be assumed that the right were an active aspect of Indian tribal government that remained unaffected by the provisions of the treaty.

As the jurisdictional issue became more problematic in dealings between the Indian tribes and the United States, it was addressed specifically in the treaties. In case after case, Indian nations were acknowledged to retain the power to punish persons other than Indians. The treaties never established exclusive jurisdiction for either the United States or for Indian governments. Tribal governments never relinquished their powers of sovereignty, nor the right to impose criminal sanctions within their domain.

The Court was well aware of this as it built its argument on the basis of only a *presumed* understanding that Indian tribes did not possess the right to exercise criminal jurisdiction over non-Indians. The evidence to support this presumption is inconclusive.

(2) *The presumption was not shared by the three branches of the government.*

Legislative Branch: A close scrutiny of the legislative policy of Congress clearly shows that tribal criminal jurisdiction over non-Indians was never expressly denied. In fact, the debates surrounding legislation, cited as denying criminal jurisdiction, reveals congressional understanding that tribes did possess an original jurisdiction because of their sovereign nature.

Congress felt a need to establish concurrent jurisdiction because of the unsophisticated nature of tribal governments at that time. But the legislation and history point to a belief that this concurrent jurisdiction should be of a temporary nature.

Because tribes have necessarily evolved in sophistication to a much more Anglo mode, one cannot logically argue that the exercise of criminal jurisdiction over non-Indians is any longer "inconsistent with their status." Determination of what is or is not "inconsistent with tribal status" cannot be based on a congressional presumption that tribes never had jurisdiction over non-Indians since Congress never shared such a presumption.

Executive Branch: The "presumption" of the executive branch can only be drawn from a handful of attorney general and solicitors' opinions that do not register consistency over time. In the final analysis, these do not carry the weight on federal Indian policy that acts of Congress and treaties do. It is important to note, however, that four years before *Oliphant*, a lengthy opinion was drafted and concluded that,

"Since Indian tribes originally had the power to exercise criminal jurisdiction over non-Indians and since that power has not been diminished either by treaty or by federal statute, it continues to exist today." (Solicitor Draft Memo, Oct. 29, 1974 at 126).

Judicial Branch: The Court attempted to prove that there was a general presumption by the lower courts that Indian nations do not have the right to try non-Indians. The Court based this finding on the holding of one case, *Ex Parte Kenyon*, decided in 1878 by Judge Parker of the District Court for the Western District of Arkansas. (14 Fed Cases 356 (W.D. Ark. 1878)).

Judge Parker decided two cases involving the issue of criminal jurisdiction over non-Indians, *Ex Parte Kenyon* and *Ex Parte Morgan*. (14 Fed Cases 356, and 20 Fed 298 (W.D. Ark. 1883)). An examination of these two cases shows that Judge Parker did not rest his opinion on the fact that it was inconsistent

with tribal status to try non-Indians, but on the conclusion that assertion of tribal jurisdiction over non-Indians pursuant to inherent sovereign power was prempted or forbidden by acts of Congress, which reserved exclusive jurisdiction over such crimes to federal courts.

The Court also referred to the case *In Re Mayfield* (141 U.S. 107 (1831)) to prove its presumption theory in *Oliphant*. But in *Mayfield*, the Supreme Court *did* recognize tribal jurisdiction over non-Indians, provided they were adopted members of the Indian nation prosecuting them. (141 US 107, 114).

The Court in this case commented that the general object of the various acts of Congress was to give jurisdiction to federal courts in cases where non-tribal members were involved. Yet the Court indicated that Congress allowed tribes to assume powers of self-government, if such powers were "consistent with the safety of the white population." (*Mayfield* at 115).

According to this criterion, the Court in *Oliphant* should have had no difficulty in deciding that assumption of tribal jurisdiction over non-Indians on reservations today not only does not endanger the white population, but adds another measure of law and order protection.

There was no general presumption on behalf of the federal courts that Indians lost the inherent sovereign power to assume criminal jurisdiction over non-Indians. The only evidence to the contrary is the opinion of Judge Parker, who believed that the 1834 Trade and Intercourse Act reserved exclusive jurisdiction to the federal court. Fortunately, many of Judge Parker's opinions and presumptions have been overruled by subsequent cases.

(3) The power to try non-Indians is not inconsistent with the tribes' status.

Justice Rehnquist's impression that Indian criminal jurisdiction over non-Indians must be delegated by Congress led him to the conclusion that such power is inconsistent with tribal status. He found that Indian tribes are proscribed from exercising powers inconsistent with their status.

But not one of the Justice Rehnquist's precedents actually held that Indian tribes could not exercise powers inconsistent with their status. In early cases, the Supreme Court specified only *one* restriction on inherent sovereignty: that Indian nations could not form alliances or perform transactions with foreign countries, other than the United States. Justice Rehnquist's finding—that there is more than one inherent limitation of Indian sovereign powers—directly contradicts the dicta and holdings of both *Cherokee Nation v. Georgia* (30 US (5 Pet) 1,17 (1831)) and *Worcester v. Georgia* (31 US (6 Pet) 515,546,559 (1832)).

Furthermore, Justice Marshall in these cases did not view full and exclusive territorial jurisdiction of the tribes as being inconsistent with their status or conflicting with the sovereignty of the United States. In *Worcester* v. *Georgia*, Justice Marshall reviewed the various acts of Congress dealing with Indian nations and decided,

"All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged but guaranteed by the United States." (*Worcester* at 556).

From this, we must conclude that Justice Marshall thought Indian nations had exclusive territorial jurisdiction over their country.

Deciding a Political Question: It seems that what does or does not conflict with the sovereignty of the United States should be a matter for Congress or the executive branch to decide. Yet the Court in *Oliphant* put itself in a position of deciding for itself a political issue for which it had no factual basis. Why deny tribes jurisdiction over non-Indians? How can the Court bluntly assert that tribal jurisdiction over non-Indians conflicts with the sovereignty of the United States?

Maybe the *Oliphant* Court agreed with Justice Marshall's definition of Indians as "fierce savages whose occupation is war," and therefore the United States needs to protect the personal liberty of its citizens from the Indian nations. Perhaps that is why Justice Rehnquist concluded that.

"This principle would have been obvious a century ago when most Indians were characterized by a want of fixed laws and competent tribunals of justice. It should be no less obvious today." (*Oliphant* at 210).

Justice Rehnquist's principle is not a legal principle at all. It is a political finding rooted in racist assumptions about Indian nations. The legal principle involved is that tribes cannot exercise any powers inconsistent with their status.

Justice Rehnquist should not have made the political decision that tribal exercise of criminal jurisdiction over non-Indians conflicts with the sovereignty of the United States.

In making the decision, the Court unfortunately inherited the same racist assumption, used by Justice Marshall 150 years ago, that Indian nations were "uncivilized, fierce savages whose occupation is war" and silently applied it to deny Indian nations criminal jurisdiction over non-Indians.

The Court in *Worcester* v. *Georgia* said that, "The settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection." (*Worcester* at 560).

The court in *Oliphant* failed to explain how a loss of criminal jurisdiction over non-members can be considered anything but an interference with self-government and a loss of independence. Nor is it explained how the Court can find jurisdiction of nonmembers inconsistent with tribal status or in conflict with the sovereignty of the United States.

The crucial mistake in *Oliphant* is that the denial of tribal jurisdiction over non-Indians is a political question which the Court decided in violation of the United States Constitution. Our constitutional doctrine of separation of powers preempts the judiciary from making such a political decision.

As pointed out earlier, the fact that Indian nations are weaker and under the protection of the United States or are located within the territorial boundaries of the United States does not make tribal assertion of criminal jurisdiction over non-members inconsistent with tribal status as a matter of law.

What is or is not inconsistent with their status is still a political issue for Congress to resolve.

ON THE RESERVATIONS

What effect has *Oliphant* had on reservation law enforcement?

Numerous sources of data were examined to determine the immediate impact of the Supreme Court's ruling that Indian tribes do not have the inherent sovereign right to exercise criminal jurisdiction over non-Indians, for crimes committed on the reservation. The principal problem areas that emerged from the collective data highlight four aspects of non-Indian criminal jurisdiction: *Enforcement*, who is currently exercising jurisdiction over non-Indian crimes on the reservation; *Remedies*, what actions have tribes and surrounding authorities attempted to fill this vacuum; *Judicial Jurisdiction*, which courts now handle non-Indian misdemeanors offenses, and what is the role of tribal courts regarding non-Indians in non-criminal judicial proceedings; and *Attitude*, how have the attitudes of police officers and both Indian and non-Indian reservation residents affected the performance of law enforcement in the wake of *Oliphant*? Our analysis of the data leads to the conclusion that:

Oliphant has created a serious gap in the enforcement and prosecution of non-Indian crime on the reservation.

1. The Problems

The data which leads us to the conclusion that justice is not being served was acquired through field research, survey questionnaires and participation in a variety of congressional hearings and national meetings.

For all tribes with an on-reservation non-Indian population and an active tribal police force, the *Oliphant* decision resulted in an increase in non-Indian crimes going unenforced. Only those reservations closed to non-Indians experienced little immediate impact, although they express fears of future developments bringing an influx of non-Indians onto the reservation without adequate enforcement safeguards.

Prior to *Oliphant*, a number of tribes exercised criminal jurisdiction over non-Indian offenses. For the most part, these reservations ceased all criminal enforcement activities after the decision, and neither the county, state or federal government has assumed responsibility for these crimes.

Misinterpretations of the *Oliphant* decision were widespread. Some counties withdrew their cross-deputization agreements with tribes, claiming the decision no longer authorized tribal officers to arrest non-Indians under any circumstances. But the decision referred only to tribal agencies, not to officers acting under another jurisdiction's supervision.

The tribes that had not been exercising criminal jurisdiction over non-Indians found they were forced to scrap proposed revisions of their tribal law and order codes, assuming such jurisdiction.

Although the lapse in effective law enforcement remains the most severe problem resulting from *Oliphant*, the decision has been responsible for other breakdowns in justice. The power of tribal officers and tribal courts to enforce *civil* jurisdiction over non-Indians has been wrongly denied by misapplication of the *Oliphant* ruling.

Federal district courts in Washington State and Montana (see footnote 3, *infra*) have held that tribal justice systems are powerless to enforce civil law against non-Indians for actions occurring on the reservation. The *Oliphant* decision *expressly* states that the Court is addressing criminal and not civil Indian jurisdiction over non-Indians. This is a dangerous and categorically unprincipled interpretation of the Supreme Court's finding in *Oliphant*.

The morale of tribal police officers was immediately impacted by the decision. They felt stymied in the performance of their duty. The problem was exacerbated by the resident Indian population, which blamed them for the inequity that now places non-Indians beyond the law. These tensions remain although most sources indicate that the problem has lessened over time.

The economic impact of *Oliphant* also proved to be an area of concern for most tribes. For those that were exercising non-Indian criminal jurisdiction, the loss in fines has been significant. For most, the financial repercussions have been felt with a reduction in federal subsidies.

Law Enforcement Assistance Administration (LEAA) funds to tribal police departments were cut back, under the theory that they would be reducing their services. This has not been the case. Tribal law enforcement and court systems are doing progessively more business as they become further developed. The tribes are dependent on continuing financial support from the federal government to enhance the development of their tribal justice systems.

The confusion deriving from the *Oliphant* decision is at the root of most of the problems. All persons concerned have called for a clear interpretation of the *Oliphant* decision and its legal concepts. The tribes request it for vindication of their retained rights. The county and state clearly need clarification as is indicated by their serious misunderstanding of the case.

2. Attempted Remedies

A number of stop-gap remedies have been attempted by tribal and local government in response to the jurisdictional confusion spawned by *Oliphant*.

Cross-deputization of tribal police as county and/or state officers emerges as one of the most immediate remedies to the gap in enforcement of non-Indian crimes. These agreements take the form of mutual aid compacts as well as the formal cross-commissioning of officers.

Although this attempt to resolve the problem has the advantage of certifying tribal officers to arrest non-Indians as well as Indian offenders, the tribes have expressed concern over the long-range implications of such arrangements. There are fears that the need for a district tribal police force may be eliminated if tribal police serve as officers of the state.

The evidence indicates that cross-deputization is a temporary measure at best. It is highly contingent upon a favorable political climate. The cooperation of the local county sheriff is intrinsic to the success of these agreements.

We found state and county personnel have often refused to enter into cross-deputization agreements with tribes on the grounds that tribal officers do not have the necessary training. We concluded that this claim is an unfounded impediment to tribal/state agreements.

Tribal officers are almost exclusively trained at the Indian Academy at Bingham City, Utah. In addition, many tribal officers have attended state police academies, and states have increasingly heightened the accessibility of their training facilities to tribal officers. The evidence shows tribal officers are comparably trained to state and county personnel. But cross-deputization remains a questionable, ultimately unreliable, remedy.

Some tribes have reacted to the *Oliphant* decision by recodifying certain offenses as civil infractions. Civil jurisdiction over non-Indians has allowed the tribes the authority to regulate non-Indian offenses particularly in the area of hunting and fishing.

Tribes have also found potential remedies in their treaty rights. Most tribes have the power, if not the obligation, to "detain and deliver up" non-Indian offenders to the United States for prosecution under treaties signed with the federal government. Put into operation, this empowers tribal police to arrest non-Indians and turn them over to state or federal authorities.

Many treaties and, subsequently, tribal law and order codes contain exclusion provisions. Tribes have exercised this provision to exclude troublesome non-Indians from the reservation.

Ultimately, the answer to the problem lies with the recognition and extension of tribal powers to assert total jurisdiction over *all* offenses occurring within tribal boundaries. Both Indian and non-Indian sources have agreed that if an Indian community is endangered it should have the right to protect itself.

As the Supreme Court itself noted in *Oliphant*, it is the responsibility of the federal government to protect the rights and property of Indians. The obligation to definitively resolve the problem of non-Indian jurisdiction in Indian Country rests with congressional recognition of the tribes' powers to exercise some form of control over non-Indian offenses.

Summary of Field Research: In an attempt to identify the nature of the vacuum in jurisdiction on Indian reservations created by *Oliphant*, we surveyed a sample of 12 reservation sites. The sites chosen were representative of a cross-section of specific variables, which determine the manner of law enforcement on the reservation.

The criteria included whether or not:

the on-reservation Indian population exceeded the non-Indian.

the state in which the tribe was located exercised jurisdiction under P.L. 280.

the tribe asserted non-Indian criminal jurisdiction prior to *Oliphant*.

the Indian police were tribal or Bureau of Indian Affairs officers.

The methodology employed was to visit each reservation site and conduct extensive interviews of tribal law enforcement personnel, and state and county officials. These persons included tribal police chiefs, line officers, tribal judges and prosecutors, members of tribal law and justice committees, tribal attorneys, county sheriffs, county prosecutors, state attorney generals, and United States attorneys. Each individual was questioned on the same issues regarding non-Indian criminal procedures on the reservation.[1]

A total of 48 complete interviews were conducted at the 12 selected sites.[2] Eight major topics emerge, which exemplify the effect the *Oliphant* decision has had on reservation law enforcement.

Non-Indian Jurisdiction: One of the primary inquiries of the research has been to determine who is exercising jurisdiction over crimes committed by non-Indians in Indian country after *Oliphant*. County officials and reservation representatives frequently differ in their understanding of where the jurisdiction lies.

Cross-deputization: One immediate response to the jurisdictional vacuum created by the decision has been cross-deputization of tribal police with local and state authorities. It is a remedy that has generated mixed feelings. The account of its feasibility varies from state to state, and often county to county, as demonstrated by the range of responses from the data herein analyzed.

Training: One of the criteria for determining the competence of tribal personnel to maintain law and order on the reservation, particularly in regard to non-Indian offenses, is the degree of training the officers have had. And the purported discrepancies between types of training can present a serious impediment to cooperation, depending on the state.

Morale: When asked what the immediate impact of *Oliphant* was, a frequent response was "morale." Police frustration and community resentment manifested themselves as critical obstacles to maintaining effective law enforcement.

Economy: The adverse economic impact of the ruling was a reoccurring complaint at most sites surveyed. The problem was felt either in a loss of revenue for tribal courts, which had previously exercised non-Indian jurisdiction, or in a withdrawal of federal funds under the impression that the tribal police force would be phasing down its activities.

Court: The decision had an effect on the judicial end of the legal system as well. In some cases, non-Indian cases were dropped from the docket completely. In others, the tribal courts continued to assert civil jurisdiction over non-Indians. The unwillingness of the state and federal courts to assume the displaced non-Indian offenses was another major problem.

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[1] The questions were determined through pilot testing at four reservation sites. The pilot studies produced a series of questions that captured the major concerns of people instrumental in effecting law and order on the reservation.

[2] A list of the sample sites is provided at the end of the article. Although the number of informants significantly exceeded 48, in some instances the interviews were incomplete. These data were then either eliminated, or combined to produce a composite survey.

Problems: All the tribes cited specific problems, which they could trace directly to *Oliphant*. In certain areas, the repercussions overlapped; in others they were specific to the communities involved. These case-by-case examples demonstrate the breadth of the fallout from *Oliphant*.

Recommendations: The response to suggestions for remedies ran the gamut from hopelessness, to highly detailed resolutions. These recommended courses of action included both long and short term remedies of local, regional and national perspectives.

These are primary topical areas which frame an analysis of the effects of the *Oliphant* decision on law enforcement in Indian Country. They delineate the directions for problem-solving.

Non-Indian crimes go unregulated on many reservations due to a general state of confusion over the parameters of the *Oliphant* ruling. This calls for a concise interpretation of the decision for all parties involved with Indian law enforcement.

The jurisdictional situation is compounded by a lack of cooperation from local and state authorities. Tribal-state dialogue must be encouraged.

Cross-deputization is an immediate remedy with stop-gap effectiveness. But over the long term, it does not sufficiently guarantee protection for the reservation community. It should be used as the measure of limited utility that it is.

Training must be standardized. Tribal police do not necessarily have access to all the training facilities that non-Indian officers have at their disposal. Such inequities need to be evaluated. Removal of these barriers would contribute significantly to the morale of the tribal police and increase their effectiveness as officers of the law.

The federal responsibility to subsidize tribal law enforcement programs is not diminished by the *Oliphant* decision. Quite the contrary is true; the government is obligated to support tribal self-determination, which includes aiding tribes in the improvement of their justice systems.

Beneath all these practical problems, an underlying cultural conflict exists. The *Oliphant* decision itself, as well as the suggested remedies, are all products of an Anglo justice system. The tribes have adopted many of these principles, but they have also preserved elements of native perceptions of law and order. These perceptions are often misunderstood by the non-Indian population at large and racial conflicts continue to generate hostility.

Because the punishments determined by the tribes do not always correspond to the non-Indian response, non-Indians resent the verdict served on Indians. They feel the Indians are getting away with something. There just is not complete comparability between the two justice systems. Any potential remedy must be sensitive to this critical point.

The ultimate resolution to the jurisdictional confusion generated by *Oliphant* lies in the halls of Congress. The Supreme Court itself directed Congress to device a legislative remedy. Acts of Congress such as the Tribal/State Compact Act, the Criminal Code Reform Bill or the expansion of the Federal Magistrate System may hold the key to resolving the vacuum of effective law enforcement, now being experienced on Indian reservations in the wake of the *Oliphant* decision.

The answer to the problem may be as one non-tribal official (a state district court judge) put it: if no one else is going to provide the enforcement, it should be left to the tribe. As another non-Indian (a tribal attorney) pointed out, there is no such thing as a victimless crime. If the Indian community is endangered, it should have the right to protect itself.

Summary of Survey Data: To supplement the field research of the 12 sample reservation sites, we administered a survey by mail to 270 tribal officers. The survey, a 10-page questionnaire, highlighted four essential issues characterizing the effect of the *Oliphant* decision on reservation law enforcement:

Enforcement—Who currently exercises jurisdiction over non-Indian crimes on the reservation?

Remedies—What steps have tribes and surrounding authorities taken to fill this vacuum in jurisdiction?

Judicial Jurisdiction—Which courts now handle non-Indian misdemeanor offenses?

Attitude—How have the attitudes of police officers, and Indian and non-Indian reservation residents affected the performance of law enforcement in the wake of *Oliphant*?

The mail-survey questions were designed to produce quantitative and nonquantifiable data. Each question was worded to generate either a YES or NO response but space was provided for fuller descriptions or comments. The data do not reflect a comprehensive accounting of all Indian tribes; the overall response rate to the survey was 24 percent. But they do indicate a significant sampling.

To gleen the maximum amount of information from the mail survey it was necessary to review the results from both the quantitative and nonquantifiable perspective.

Enforcement: Since the majority of the respondents resided within the boundaries of states exercising jurisdiction on the reservation, enforcement of non-Indians rests in the hands of the state. To a certain degree, these county and state enforcement agencies have met their responsibilities. But 40 percent of the respondents answered that non-Indian crime has gone increasingly unenforced since *Oliphant*. BIA and FBI law enforcers are characterized as responding to major crimes only. Tribes repeatedly report, "No one will pay attention to non-Indian crime," particularly misdemeanor offenses. And tribes with active police forces, who do not rely solely on federal agents, continue to seek ways of enforcing the law on their reservations, without relying on unstable state and county cooperation.

Remedies: The remedies tribes have adopted to protect their reservations from disorderly non-Indian crime in the wake of *Oliphant* have proven only moderately effective. It is too soon to tell what success most solutions may have; the recodifying of certain offenses from criminal to civil, for example, must pass the test of time. The political instability of tribal-county relations makes the long-term efficacy of cross-deputization unreliable. And the potential threat of tribal officers having to serve elsewhere in the county or state, other than on the reservation, make cross-deputization an undesirable remedy for some tribes.

Judicial Jurisdiction: These data indicate that not only law enforcement has suffered as a result of *Oliphant*, but the whole criminal justice system has experienced the after shocks. The survey results are clear: There must be coordination of tribal, state and federal judiciaries to thoroughly compensate for the tremendous gaps presently apparent in regulating non-Indian crime in Indian Country. It is imperative that the rightful powers of tribal courts are respected as such.[3] And it is equally important, judging from these data, that the federal courts must assume their responsibility to administer justice where the tribes are unable to do so themselves.

Attitude: One of the most immediate effects of the *Oliphant* case was a negative impact on the morale of tribal police officers, as well as the community at large. The emotional and pragmatic reactions to the decision are crucial in any evaluation of the effect of *Oliphant*. The data clearly show the degree to which attitudinal problems, even on reservations that had not been asserting non-Indian jurisdiction, have intensified the breakdown in law enforcement in Indian Country.

CONCLUSION

The data collected from the mail survey corroborate the conclusions drawn from an analysis of the field data. *Oliphant* has had a negative impact on law enforcement throughout Indian Country. For those tribes exercising criminal jurisdiction over non-Indians prior to *Oliphant*, the decision has created serious gaps in enforcement services.

Most of the responses to the survey came from tribes within P.L. 280 states, and tribes that had not been exercising non-Indian jurisdiction. Yet the data indicate that severe problems, stemming from the Supreme Court decision on *Oliphant*, threaten the law and order on these reservations as well. The few remedies that have arisen are largely untested, and generally of a temporary

[3] There have been two instances where federal district courts have misinterpreted *Oliphant* to deny tribes civil jurisdiction over non-Indians. The Court explicitly restricts its holding to criminal non-Indian jurisdiction. Tribes unequivocally retain the power to assert non-Indian jurisdiction. The first case to apply *Oliphant* to restrict tribal jurisdiction over non-Indians in a civil matter is *Trans Canada Enterprises Ltd.* v. *Muckleshoot Indian Tribe*, No. C77–882M (W.D. Wash. July 27, 1978). This has subsequently been used as precedent in denying the Flathead Reservation the right to impose tribal land use laws on non-Indians. see *Confederated Salish and Kootenai Tribes, et al.*, v. *Namen, et al.* Civ. No. 2343; *City of Polson* v. *Confederated Salish and Kootenai Tribes*, Civ. No. 75–143–M., *U.S.* v. *City of Polson, et al.*, Civ. No. 77–70–M (D. Mont., Sept. 20, 1979).

nature. The need for a more permanent resolution to the problems is painfully clear.

It is equally clear that the ramifications do not stop with the enforcement systems. Most tribes have had to cease all activities involving non-Indians in their courts. Neither the federal system, nor the state or local courts have assumed responsibility for prosecuting these offenses. Tribal courts, in rare cases, have continued to prosecute crimes committed by non-Indians in Indian Country, but only with the individual non-Indian's consent.

Ultimately, the laws point to the obligation of the federal government to protect the rights and property of Indian tribes. As the Supreme Court itself realized in its ruling on *Oliphant*, the power to definitely resolve the problem of jurisdiction in Indian Country rests in the hands of Congress. It is imperative that Congress affirms the power of tribes to protect themselves.

SAMPLE SITES

1. *Colville*, Okanogan and Ferry Counties, Washington.
2. *Swinomish*, Skagit County, Washington.
3. *Suquamish*, Kitsap County, Washington.
4. *Quinault*, Grays Harbor and Jefferson Counties, Washington.
5. *Muckleshoot*, King County, Washington.
6. *Colorado River*, Yuma County, Arizona, San Bernardino and Riverside Counties, California.
7. *Fort Mojave*, Clark County, Nevada, San Bernardino County, California: Mohave County, Arizona.
8. *White Mountain Apache*, Apache, Gila and Navajo Counties, Arizona.
9. *Laguna Pueblo*, Valencia, Bernalillo and Sandoval Counties, New Mexico.
10. *Isleta Pueblo*, Bernalillo and Valencia Counties, New Mexico.
11. *Papago*, Maricopa, Pima and Pinal Counties, Arizona.
12. *Mescalero Apache*, Otero County, New Mexico.

MONTANA LEGISLATIVE COUNCIL,
Helena, April 24, 1980.

Hon. JOHN MELCHER,
Select Committee on Indian Affairs,
Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR MELCHER: As Chairman of the Montana Select Committee on Indian Affairs, I would like to express this Committee's support for and approval of S. 1181.

Our state Committee has recently finalized a similar piece of legislation which will be submitted to the 1981 legislature. It is patterned after S. 1181 and has received the endorsement of the Montana Inter-Tribal Policy Board. We will be holding public hearings on or near the reservations in June and July in order to receive input from interested persons regarding the bill. For your information, I have enclosed a copy of the bill, entitled the "State-Tribal Cooperative Agreements Act."

I would appreciate your keeping the Montana Committee informed of the status of S. 1181 and other related issues. Thank you.

Sincerely,

Senator WILLIAM LOWE,
Chairman, Select Committee on Indian Affairs.

STATE OF SOUTH DAKOTA,
OFFICE OF ATTORNEY GENERAL,
Pierre, S. Dak., November 1, 1979.

Re Senate Bill 1181.

Hon. GEORGE MCGOVERN,
The United States Senate,
Washington, D.C.

DEAR SENATOR: Enclosed you will find a letter dated October 19, 1979, to me from the Office of General Counsel for the United States General Accounting Office. Previously I sent you copies of an opinion concerning state liability to the federal government for subcontracts made with Indian tribes with federal

LEAA monies. You will note in the General Accounting Office's letter to me that states might be subject to liability for misspent monies under subcontracts with Indian tribes that originated from EPA grant monies.

Recently Congressman Abdnor sent me a copy of Senate Bill 1181 which you are sponsoring. This Bill might provide an opportunity to remedy the inequitable situation of requiring states to sub-contract with Indian tribes when they must assume liability for federal monies misspent under such subcontracts without authority to enforce the contracts in any court of jurisdiction.

At first glance, the Bill as presently constructed however, does not address the issue of Indian tribes liability and responsibilities for monies awarded to them by the state under contracts or grants. I understand Senate Bill 1181 to authorize tribes to enter into agreements with states relating to (1) the application of each others laws within their respective jurisdiction, (2) the allocation of responsibilities between the states and tribes over specified subject matters or geographical areas, and (3) the transfer of jurisdiction of individual cases from tribal court to state court, or from state court to tribal court. Any agreements entered into under Senate Bill 1181 would be subject to a six month notice revocation clause unless otherwise specified in writing up to a period of five years. Also, any agreements would have to be filed with the Secretary in thirty days and published in the Federal Register unless otherwise agreed to by the parties or be subject to revocation.

The Act as I read it does not (1) authorize the enlargement or diminishment of the tribe or state's civil or criminal jurisdiction except as expressly provided in the act; (2) authorize agreements between the parties that diminish or expend the U.S. Criminal jurisdiction; (3) authorize the parties to enter into agreements except as authorized by their own enabling laws or organizational documents; (4) authorize alienation, financial encumberance or taxation of tribal property held in trust or subject to restriction by United States law; and (5) authorize the transfer of unlimited, unspecified or general jurisdiction of an Indian tribe except as provided under 26 U.S.C. 1326.

In sum, this Bill seems to be intended to address primarily the sharing and cooperative implementation of one another's laws. The Act does not seem to address the situation when an Indian tribe and a state or political subdivision of a state desires to enter into an arms-length agreement which obligates one or both parties to fiscal obligations.

State-tribal subcontracts derived from federal grant monies have been an important element in governmental relations between the tribes and states. These agreements have been actively encouraged by federal agencies with grant monies which dispense grant monies to the states under their respective programs. However, the grants given by these federal agencies have been conditioned upon state liability for misuse of such monies. Thus, the state has been in a rather unfair position of being accountable for misspent monies under tribal contracts for which it has no court of jurisdiction for redress. I would suggest that some amendments could be incorporated into Senate Bill 1181 to take care of this major sore point. Although I am not well acquainted with all state contracts with Indian tribes which are derived from federal monies, I am sure it includes more than LEAA grant monies and Section 208 of the Clean Water Act grant monies. Other examples could include commodity programs administered by the Department of Agriculture.

I am enclosing a suggestion for a possible amendment to Senate Bill 1181 which addresses this issue. By this letter, I do not wish to infer any comments or opinions by this office as to the Bill as a whole.

This draft suggestion is forwarded with the caveat of limited research and draftsmanship. I do not know if its language adequately addresses all situations where the state government is a conduit to pass through federal monies to the tribes. Also, the last sentence is put in as a red flag. An award of damages against a judgment proof party is of small value. Maybe there are other measures which can be taken to insure that a state can recover damages or misspent funds which the courts may find due it. Anyway, this draft hopefully may give committee staff a takeoff point.

Thank you for your time and interest in this matter, and if I can be of any assistance to you, please feel free to contact me.

Respectfully submitted,

LAWRENCE W. KYTE,
Assistant Attorney General,
State of South Dakota.

Enclosure.

Place at end of Sec. 101(a):

States and Indian tribes are hereby authorized to enter into contracts with one another in which either party may award a financial grant to the other party. Such an agreement includes contracts under federal grants or allotments awarded to either party with conditions deemed necessary or desirable by the parties to assure compliance with the conditions imposed on the federal grantee by the subcontractor or subgrantee or suballottee. Such agreement shall be subject to enforcement and action for damages, in case of breach, pursuant to § 301. Not withstanding any other provision of this act, including § 101(e)(4) such agreements may provide for encumberance of alienation of tribal property for damages caused by a breach of contract for which the grant was awarded.

ARIZONA STATE SENATE,
Phoenix, Ariz., September 5, 1979.

Senator DENNIS DECONCINI,
U.S. Senate,
Washington, D.C.

DEAR SENATOR DECONCINI: I was unable to attend the hearing conducted September 1, 1979 in Phoenix on S. 1181.

I do not have a copy of S. 1181, but I have the information that the bill would provide legislative authority for Indian tribes and States, Counties, and municipalities to enter into compacts and agreements allocating civil and criminal jurisdiction and other regulatory authority.

To me this would be a great step towards bringing the various authorities in a state like Arizona together to discuss and resolve the issues that generally brings about confrontations that in the past have brought great expense, in time and money, to all concerned by being taken to court.

I commend your efforts in sponsoring this bill, and look forward to the bill passing both houses and finally being signed by the President for implementation. I am not sure of all the other provisions of the bill and will probably be writing to you at a later date, after I have had a chance to read and digest S. 1181.

There is one thought I have which I feel would be very helpful, however, I'm not sure how it can be stated in the bill. Indian people would be more at ease if the discussions and negotiations of the issues concerned are conducted on their reservation. Indian people are on the defensive when they are called to the Governor's office, the Senate or House hearings, or any other location outside the reservation area. As a result, some issues which might not take long to resolve in their home offices, are not resolved or are long drawn out affairs.

If there is some way that wording can be inserted to conduct such negotiations on the reservations, that would certainly provide the atmosphere for amiable and quick resolution of problems between state and reservations.

Sincerely,

ARTHUR J. HUBBARD, Sr.

U.S. DISTRICT COURT,
Denver, Colo., Feb. 11, 1980.

Hon. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
Senate Office Building, Washington, D.C.

DEAR SENATOR MELCHER: The Tribal Chairman and attorneys for the Southern Ute Tribe and the Ute Mountain Ute Tribe have all sent me copies of your letter of January 18, 1980, and the Executive Director of the Colorado Commission of Indian Affairs has done the same. She has asked that I comment to you, and I do so by this letter.

We on this court know full well how serious the problem is, and we have been working closely with tribal representatives to try to solve the very problems you outline in your letter. Additionally, since I happen to be the Tenth Circuit representative on the Magistrates Committee, I have worked with that committee and with the Magistrates Division of the Administrative Office to face up to the problems existing under the present state of the law.

For what I believe is the first time in history, there has just been approved by the Magistrates Committee to be presented to the Judicial Conference a recommendation for creation of a magistrate's position with authority to sit in two districts—Colorado and New Mexico. The intent of this recommendation is to meet

the very problems you discuss, and fortunately Chief Judge Bratton in New Mexico and I get along famously and we will have no problem in selecting individuals who can serve in both districts and whose primary job will be to take care of cases arising on Indian Reservations. We hope that a New Mexico magistrate will soon be authorized to help out in Colorado.

One problem we face on which we would appreciate any help you can give us is that of court facilities. There just aren't any federal courtrooms close to the reservations, but there is an abandoned postoffice in Durango which could be remodeled to take care of the space needs. Our relationships with the state courts are excellent, but they are short of space too. I have asked GSA to check out the Durango Postoffice for structural integrity, and I have been told that at a relatively low cost we could get a decent courtroom. We have full community support for this.

I assure you that the judges of this court know of the problem which concerns you and I assure you that we have been working on a local level to do that which we can to meet that which is rapidly becoming a crisis. I also assure you that the committee on which I serve is also aware of that which must be done, and if I can help you in any way, please let me know.

Sincerely,

FRED M. WINNER.

MAYNES, BRADFORD & DUNCAN,
Durango, Colo., February 13, 1980.

Hon. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
Senate Office Building, Washington, D.C.

DEAR SENATOR MELCHER: I have been asked by the Tribal Council for the Southern Ute Indian Tribe to respond to your informative letter of January 18, 1980, in which you discussed your work on a bill would mitigate the present problems of federal law enforcement on Indian reservations. The following is a brief statement which explains the Southern Ute Indian Tribe's position concerning the expansion of powers of federal magistrates in Indian country.

The enforcement of law and the preservation of order on Indian reservations is a subject that reflects the varied policies which the United States Government has applied to native Americans throughout our nation's history. The Federal Government has moved from policies of isolation of Indians, as evidenced by the passport laws of the early 19th century, to those of assimilation and termination found in the 1950's. Despite the policy, however, both the Congress and the federal judicial system have justified their respective decisions concerning law enforcement on Indian reservations in terms of the federal government's legal and moral obligations to protect the Indian peoples of the United States. The need for Congress to pass legislation which will preserve the safety and welfare of Indians on reservation lands has perhaps never been more acute in modern times than as it now exists in the wake of the Supreme Court's decision of *Oliphant* v. *Suquamish Indian Tribe.*

In *Oliphant* the Supreme Court of the United States ruled that Indian tribes do not possess inherent authority to prosecute non-Indians for violations of tribal law within Indian country. The Court's decision placed the burden of protecting Indian persons and property from the unlawful actions of non-Indians firmly and exclusively in the hands of the federal government. The preservation of peace and order on Indian reservations must, therefore, be accomplished by federal prosecution of both felony and misdemeanor crimes under federal law in the United States judicial system.

Though the Supreme Court's decision may have alleviated the need to resolve several due process issues, the practical result of the landmark ruling has been to substantially dilute the forces of law and order on Indian reservations. The geographical isolation of many reservations from urban centers and from United States Attorneys' offices necessarily means that the prosecutorial viligence needed for preventative law enforcement is essentiallly eliminated. When non-Indians are apprehended by trial or federal authorities, the seriousness of the offense in terms of the United States Attorney's priorities may appear insubstantial; yet the repeated lack of prosecution of simple assaults or other relatively minor offenses destroys concepts of deterrence and community protection.

The credibility of tribal law enforcement personnel may be further undermined by situations which require the release of non-Indian violators yet result in incarceration and tribal prosecution of tribal members who commit identical offenses.

Under the present system, the appointment of a federal magistrate with jurisdiction over Indian country can certainly improve the appearance of federal judicial efficacy on reservations. The limited powers possessed by federal magistrates, however, reveal the cosmetic nature of magistrate protection to tribal members and tribal property. There is no question that increasing the judicial functions performed by federal magistrates on Indian reservation lands will facilitate the fulfillment of tribal needs which so often seem to be ignored.

In reference to the Southern Ute Indian Tribe, the documents which I have enclosed demonstrate the recent efforts of the tribe to secure the appointment of a United States magistrate for Southwestern Colorado whose duties would include overseeing the enforcement of federal law on the Southern Ute Indian reservation. The reservation is approximately 400 miles from the United States Attorney's office and from the United States District Court in Denver. Because the reservation is in close proximity to several non-Indian communities, the enforcement of federal law on reservation lands is vital to the continued safeguarding of the Ute people and their culture.

Upon learning of the pending movement to expand the magistrate powers in relation to Indian reservation land, the Tribal Council for the Southern Ute Indian Tribe expressed its willingness, not only to submit any comments desired, but also to send representatives to testify before the Senate Select Committee on Indian Affairs about the serious need for expediting federal prosecution of non-Indian violators of tribal personal and property rights. In keeping with the Tribal Council's wishes, we would greatly appreciate being kept abreast of all pending bills regarding federal magistrates and their relation to Indian tribal law enforcement, and if hearings are to be held concerning this legislation, we would appreciate the opportunity to testify on behalf of the Southern Ute Indian Tribe.

If I can be of any further assistance or if more detailed comments are desired, please do not hesitate to contact me.

Sincerely,

THOMAS H. SHIPPS.

MAYNES, BRADFORD & DUNCAN,
Durango, Colo., October 30, 1979.

HON. FRED WINNER,
U.S. Courthouse,
Denver, Colo.

DEAR JUDGE WINNER: On June 12, 1979, the Southern Ute Tribal Chairman, pursuant to a letter, requested the appointment of a United States Magistrate with jurisdiction over crimes committed by non-Indians against Indian persons and property on the Southern Ute Indian reservation. That letter recounted the jurisdictional difficulties facing Indian tribes which attempt to protect themselves from non-Indian violators through tribal law enforcement mechanisms. The tribal chairman referred to an Opinion of the Solicitor of the Department of the Interior of April 10, 1978, which provided that the federal government possesses exclusive jurisdiction over non-Indians who violate federal enclave law by commiting crimes against Indians and their property on reservation lands.

Since that time a memorandum filed by the Department of Justice in the United States District Court for New Mexico in a case styled *Mescalero Apache Tribe* v. *Bell*, has been published in 6 Indian Law Reporter K–1 (August 12, 1979). The memorandum alleges that states have jurisdiction over "victimless" crimes committed by non-Indians on Indian lands. The memorandum further suggests that where Indian victims are the object of non-Indian unlawful activity, the federal government's jurisdiction is no longer exclusive, but rather concurrent with state jurisdiction. There is little dispute, however, that the federal government possesses jurisdiction, albeit concurrent, over offenses committed by non-Indians against Indian persons or property. The conclusion of the jurisdictional debate concerning Indian reservation lands will apparently be some time arriving.

In the meantime, the Southern Ute Indian Tribe is sorely in need of an effective law enforcement system as it relates to non-Indians. The town of Ignacio, which

is inhabited primarily by non-Indians, is located almost in the middle of the reservation. Offenses against Indians and their property committed by non-Indians occur frequently. In the wake of *Oliphant* v. *Suquamish Tribe* the tribe is helpless and vulnerable to such occurrences. The present federal mechanisms are inadequate to protect the tribe, primarily because of the substantial distance between the Southern Ute Indian Reservation and the nearest federal district court. In addition, the state lacks the resources to prevent "victimless" crimes on reservation lands, and even assuming the state's wherewithal to assume such commitment, the Southern Ute Indian Tribe would be reluctant to concede such jurisdiction because of the ultimate implications for erosion of tribal and federal power over Indian lands. The present situation is one in which the Indian wards are sincerely in need of the protection of their federal guardians. I respectfully request that the Court appoint a United States Magistrate with jurisdiction over the Southern Ute Indian Reservation, and neighboring reservations, so that the peace and safety of this proud people will continue to be protected.

If I can be of any assistance to you in this matter, please contact me. Tribal representatives have renewed their offer to assist in any way desired to accomplish their request.

Sincerely,

FRANK E. (SAM) MAYNES.

LAKE COUNTY, MONT., *March 10, 1980.*

Re S. 1181.

Hon. JOHN MELCHER,
Russell Senate Office Building,
Washington, D.C.

HON. SENATOR: This commission has studied the above-referenced legislation with great interest. Although it has shortcomings of ommission due mostly to brevity we must endorse this as an approach in the proper direction. We share a good deal of services and discourse with the Confederated Salish and Kootenai Tribes and, in the past, have patched together some fairly workable agreements. Proper authority to enter into further compacts and agreements could mean a more efficiently functioning jurisdiction especially if federal funding assistance is made available to reel in the slack.

One criticism of this bill lies mainly in the funding strategy (Sec. 102). Our situation is unique to many in that we have, for some time, provided uncompensated services to our Native American population that are not otherwise locally available to them from federal sources. We have managed this with no small amount of fiscal duress, and we have every intention of continuing to do so. We are concerned that the guidelines for implementation and funding of these compacts as presently written may penalize our operations because we assumed these "obligations" before funding was available.

As an example we cite the case of our county-wide refuse disposal program. This program is funded by a $12.00 per year special assessment on dwellings in the county (businesses are assessed on a per case basis). Needless to say Indian housing, including H.U.D., Individual Trust & Tribal Trust Homesites are exempt from this assessment, but the occupants are free to use our collection and disposal facilities. There are in the neighborhood of 1100 such units in our jurisdiction plus a number of Tribally owned businesses.

The loss of some $14,000.00 of revenue a year may seem an insignificant amount but a few thousand here and there in other similar programs over a sustained period can add up to some real money! We have conferred with the Tribal Council on this and they have agreed to support efforts to adequately compensate Lake County for our loss. Hence, our concern that our ability to meet service demands in the past on short funding not jeopardize our chances of obtaining future appropriations.

Thank you for the opportunity to comment and for your effort on behalf of all citizens in our area.

Sincerely,

WESLEY LEISHMAN,
Chairman, Board of County Commissioners.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL,
Washington, D.C., March 11, 1980.

HON. JOHN MELCHER,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MELCHER: It has come to our attention that the Senate Select Committee on Indian Affairs will be holding hearings on several items affecting Indians on March 17–19, 1980. Since one of the questions being considered is the propriety of the retrocession provision in S. 1722, I thought you should be aware of the position taken by the National Association of Attorneys General in relation to that issue. Attached is the section of our Final Report on the Criminal Code relating to Indian Jurisdiction. The complete Report was mailed to your office two weeks ago.

While the Association is primarily concerned about the wisdom of retrocession without the consent of all affected parties, we believe that other inequities could result under such a system. It is our hope that your Committee will recommend changes to allevate the deficiencies in the current language prior to consideration of S. 1722 by the full Senate. Additionally, may I request that the Association's statement on Indian Jurisdiction be made a part of the permanent hearing record so that it is available to other Members and interested individuals.

If you should have any questions or comments, please do not hesitate to let me know.

Respectfully yours,

C. RAYMOND MARVIN.

Enclosure.

INDIAN JURISDICTION

The Association opposes two provisions in the Senate bill which would radically alter existing law. The first would permit an Indian tribe, without the consent of the affected state, to require that the federal government reacquire criminal jurisdiction over certain Indian reservations. Under current law, such a retrocession of state jurisdiction or, conversely, an extension of state jurisdiction, would require both the consent of the state and the affected tribe. In our view, this state of the law should persist. We believe jurisdiction in this area ought not to be removed from the states until Congress had demonstrated a compelling federal interest in such a change. We know of no justification provided for diminishing or altering state jurisdiction in direct contradiction with previous decisons of the Congress and the Supreme Court. Further, such a change would result in unequal treatment being applied to Indians and non-Indians on Indian reservations. This is true because the state's citizens living outside the reservation would be subject only to state jurisdiction while non-Indians living in Indian country could be subject to federal jurisdiction. This means that two people committing the same offense may receive different sentences based solely on the geographical location of their homes. The principles of consistency that Congress seeks to achieve through codification would be demeaned if it were possible for two citizens to be prosecuted, tried, and sentenced under different laws solely because one happened to buy a home in Indian country. We are also concerned about the way in which all of this will be accomplished. Currently 18 U.S.C Sec. 1152 provides for federal jurisdiction in situations where a crime is committed in Indian country by a non-Indian against another non-Indian. The Supreme Court, however, in the *McBratney* decision has held that the states have jurisdiction over such offenses. While Section 144(b) of the Senate bill provides that nothing in the legislation is intended to diminish, expand, or otherwise alter state or local jurisdiction over offenses within Indian country, this rather clearly stated intention not to reduce state jurisdiction is undercut by the Senate Report which indicates that the bill is intended to overturn *McBratney*. Since many reservations include a non-Indian population which greatly exceeds that of the Indian population, this decision would have the effect of permitting a minority to determine for the majority who will have jurisdiction over criminal activity in the area. Such a system is neither fair nor appropriate and the Association therefore urges the Congress to adopt the House formulations in this area which reflect the jurisdictional framework in place in current law.

COUNTY OF ROOSEVELT,
OFFICE OF COUNTY COMMISSIONERS,
Wolf Point, Mont., March 14, 1980.

Senator JOHN MELCHER,
Chairman, Senate Select Committee on Indian Affairs,
Senate Office Building, Washington, D.C.

SIRS: Due to the excessive cost of travel etc., to attend hearings scheduled March 17, 18 and 19, 1980, and due to the lateness of the Notice of Hearings, dated February 29, 1980 and received by the Board of Commissioners March 7, 1980, we will be unable to attend in person. We question why the State, County and City Officials were not notified as soon as were the Tribes (letter dated January 18, 1980 asking for comments or suggestions by February 15, 1980.)

We, the elected officials basically approve the concept of having a Federal Magistrate to provide the processing of criminal cases arising on the Indian Reservations. We favor all having the same laws and being controlled by the same laws. We feel that a Federal Magistrate will serve the purpose of some jurisdictional disputes today and until such time as all of the people of this country are governed by the same laws, and have the same equal rights and benefits and responsibilities of society as we know it today in these United States.

JAMES R. HALVERSON,
Chairman, Board of County Commissioners,
Roosevelt County, Mont.

BOARD OF COUNTY COMMISSIONERS,
Chouteau County, Mont., March 10, 1980.

Re Tribal jurisdictional problems.

Senator JOHN MELCHER,
Senate Office Building,
Washington, D.C.

DEAR SENATOR: Thank you for taking the time to meet with our County Commissioner group this past week. Our group certainly concurs in the idea that we do not need more regulations in the implementation of General Revenue Sharing Funds, in fact when we call for bids in our respective counties the regulations of the Davis-Bacon Act are counter productive to the actual bid, because of the increased cost of complying with those specific regulations . . . We concur in the idea of working towards balancing the Federal Budget—and in order to do so, it would appear to us that the $82 billion Categorical Aid funding is the most logical place to cut—in order to continue G.R.S.

The other issue that was discussed of "Jurisdictional problems on Indian Reservations" affects many tribes and states across the nation. The matter of a "Special Federal Magistrate" to cope with law and order problems is not definitive enough for some of us to understand how it will improve—over the present system. It would appear to me that there should be a uniform code of law for all reservations, so that all law enforcement agencies (state & county) would know where they stand. Is it possible that a "Federal Magistrate" is trying to work with the various tribal police officers will find themselves in an adversary position—so that the crimes on the reservation would go unchallenged? The problem of cross-deputization has not been acceptable (generally speaking), because the tribal leaders are not in agreement, and many county sheriffs feel that the liability for false arrest is untenable. Although it may not seem to be politically acceptable at this time; it appears to many of us that—the Indian tribes should be paid off once and for all, and that the reservation boundaries be dissolved. We should in fact ALL BE AMERICANS subject to the same laws. This matter of a dual citizenship should be abandoned, if the Civil Rights Act is proper for citizen me—it should also be proper for the citizen on the reservation. If any of us have the right to vote in local—state and federal elections we should also be accountable to the tax, and to those offices so elected. We are aware that there is no easy answer to this most volatile problem; however the fact that our Nation's policy on Indian Affairs is tending to build "ghettos" on some of our Indian reservations—which in turn are going to present more problems.

Respectfully,

DALE L. SKAALURE.

NORTHERN CHEYENNE TRIBE, INC.,
Lame Deer, Mont., March 4, 1980.

Senator JOHN MELCHER,
U.S. Senate, Select Committee on Indian Affairs, Washington, D.C.

DEAR JOHN: Thanks for your letter of January 18, 1980 concerning a more effective law enforcement system in Indian country. We support your efforts and have pushed the same idea since the problem surfaced after *Oliphant*.

Two months after the *Oliphant* decision the Northern Cheyenne Tribal Council requested that the federal magistrates handle all non-Indian crime committed on our reservation. A copy was sent to your office. Since we cannot try non-Indians criminally through our reservation courts, our only alternative is a strengthened federal system. If magistrates and the U.S. Attorneys office would prosecute non-Indians for misdemeanor or victimless crimes the void created by the Supreme Court in *Oliphant* would be filled.

We're glad you are pushing this John. Giving the U.S. Attorneys and magistrates more power and more funding to adequately handle non-Indian crime is urgently needed by federal legislation.

Very truly yours,

ALLEN ROWLAND,
President, Northern Cheyenne Tribal Council.

HOVIS, COCKRILL & ROY,
Yakima, Wash., January 28, 1980.

Hon. JOHN MECHER,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Responding to your letter of January 18, 1980 regarding criminal jurisdiction over non-Indians on Indian Reservations. I have served the Yakima Indian Nation in the State of Washington as a attorney for twenty-five years and write you from that aspect. My client, the Yakima Indian Nation, may wish to write you, but these views are mine.

I respectfully submit that there is little remedial legislation that can be effective until jurisdiction over crimes committed by non-Indians on the reservations is placed within the sovereignty of Indian tribes by Congress. Congress will not legislate regarding need and federal prosecutors or police agencies will not give this need appropriate attention. For example, a trespass bill is one of the crying needs on Indian reservations. This need is recognized, but Justice and Interior have failed to present legislation and the Indian's previous efforts to insure passage have not been successful.

Likewise, did you know that the Federal Bureau of Investigation rates investigations on Indian Reservations below investigations off Indian reservations? Likewise, did you know that the office of Legal Counsel, Department of Justice, has given instructions to United States attorneys that limit prosecutions on Indian Reservations? I would suggest that you request that the Department of Justice and the Federal Bureau of Investigation furnish you forthwith all written instructions regarding investigation and prosecution of criminal matters within Indian reservations.

The Indian Civil Rights Act will protect against abuse by tribes. However, if you feel that there is a further need for protection provided that the tribes can prosecute only after a certain period has passed without the United States or state authorities filing charges. This will give these officials first opportunity and should provide impetus for prosecution. It will also give such legislation a political chance of passing.

It seems to me that this is a practical solution and one that should be free from legitimate objection. If the United States and States have first opportunity to charge under existing jurisdiction and the tribes chance comes later as the only way of punishing the wrongdoing, it would seem that no one should object.

Sincerely yours,

JAMES B. HOVIS.

THE HOPI TRIBE,
Oraibi, Ariz., February 19, 1980.

Senator JOHN MELCHER,
Chairman, Senate Select Committee on Indian Affairs, U.S. Senate, Washington, D.C.

DEAR SENATOR MELCHER: On behalf of the Law and Order Committee of the Hopi Tribal Council I am responding to your letter of January 18, 1980 regarding the proposed Bill to amend the Federal Magistrates Act.

In the past few months I have attended hearings on jurisdictional issues affecting Indian reservations and have been simultaneously alarmed and dismayed at the testimonies I have heard. Some tribes have such poor cooperation with county and state law enforcement, the FBI, federal magistrates and Assistant U.S. Attorneys as to cause the "potential for lawlessness" about which you write.

Perhaps due to its extreme isolation but also due to good working relationships that have been developed between the Bureau of Indian Affairs (BIA) Hopi police and local sheriffs, the Hopi Tribe does not presently have the serious problems faced by other tribes. However, there are many questions about jurisdiction over non-Indians that have been raised since the Oliphant Decision.

For example, under federal statutes the BIA police may cite non-Indians into federal court for violations of wildlife provisions. The Tribe cannot prosecute non-Indians for such offenses (if the offenses are designated as criminal) and there is a good probability that the U.S. Attorney's office might not find such cases serious enough to merit federal prosecution. In the meantime, wildlife on the Hopi reservation continues to be unlawfully hunted.

At the present time, the Hopi Tribal Prosecutor, following guidelines set forth by the Assistant U.S. Attorney in Phoenix, Arizona, is able to prosecute Indians for violations of the Major Crimes Act whose case are tranferred back to the Tribe. The Tribe's Ordinance 21 includes most offenses listed in the Major Crimes Act, but as you noted, the maximum sentence is $500 and/or six (6) months in jail. If multiple or lesser included offenses are involved, a defendant if found guilty could receive a six-month sentence and/or $500 fine for each offense, which sentence would probably be more severe than if the individual had been convicted and sentenced in federal court.

This is not the perfect solution it might appear to be though, due to the inadequate correctional facilities available to the Hopi Tribe and due to the possibility of there only being one offense involved which then limits the court's sentencing range.

There are other breakdowns in the system with which the Tribe is currently faced. Though "carnal knowledge of any female, not his wife, who has not attained the age of sixteen" is an offense under the Major Crimes Act, carnal knowledge of a male minor is not. The Hopi Tribe does have an offense involving sexual contact with any minor however, again, the mximum sentence would be six months and/or $500. Six months in the Hopi detention facility will not in any way rehabilitate such an offender.

We are concerned as to how you propose to delegate authority to magistrates on reservations. Would the position be full-time or on a circuit? Could a Tribal Judge be appointed as a federal magistrate? Would sentences be served in tribal or federal institutions? Would federal or state rehabilitative programs be used as alternative sentences?

Your question to us as to how much authority should be delegated to federal magistrates appears to already legitimize the presence of a magistrate on a reservation, a question which should more appropriately be addressed in testimonies at public hearings. It is possible that delegating authority over non-Indians to federal magistrates might make a reversal of the Oliphant Decision unlikely. It is the Hopi Tribe's position that the jurisdiction over all persons within its boundaries belongs to the Tribe.

Please keep us informed as to the dates and sites of hearings on the Bill. We look forward to further correspondence with you on these matters.

Sincerely yours,

STANLEY HONANIE,
Vice Chairman, Hopi Tribal Council.

THE HOPI TRIBE,
Oraibi. Ariz., February 20, 1980.

Hon. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR MELCHER: Please find enclosed a copy of the comments offered by Mr. Gary Thomas, Tribal Prosecutor.

The Hopi Tribal Law & Order Committee supports the comments offered by Mr. Thomas and hopes that full consideration be given to his comments.

The Law and Order Committee feels that given certain powers or jurisdiction by the Federal Government to the Hopi Tribe will give our people a larger sense towards tribal sovereignty as well as self-determination.

The committee supports your efforts to work towards the goals which your committee has set and wishes that you accomplish those goals.

I apologize for the late submission of the comments, but hope due consideration is given them.

Sincerely,

HERMAN G. HONANIE,
Committee Staff Director for
Hopi Tribal Law and Order Committee.

Enclosure.

OSBORN, THOMAS & VARBEL,
Phoenix, Ariz., February 11, 1980.

MEMORANDUM

Re Senator Melcher's letter.
To Law and Order Committee.
From Gary L. Thomas, Prosecutor.

I offer the following comments on Senator Melcher's letter of January 18, 1980:

The simplest approach to prosecuting non-Indians who commit misdemeanors within the Indian reservations, is to delegate federal jurisdiction to Tribal Courts to adjudicate these misdemeanants. The offenses are generally against the peace and dignity of the reservation occupants and not against the interests of the federal government. But for the *Oliphant* decision, the offenses would naturally fall within the police powers of the tribe.

Tribal prosecution and punishment for misdemeanors committed by non-Indians would be treated in the same fashions as misdemeanors are handled for Indian offenders. Review of Tribal Court decisions would be undertaken pursuant to 25 U.S.C. Section 1303. Punishments would fall within the limited range of sentencing now permitted under 25 U.S.C. Section 1302. Most tribes are willing to exercise such jurisdiction without hesitation. Certainly, the Hopi Tribe is prepared to entertain such prosecutions.

As to the matter of lack of prosecution of Indians for Major Crime Act violations, I suggest that closer cooperation between the U.S. Attorney and the Tribal prosecution officers would close the gap between non-prosecution by federal authorities and tribal court prosecutions. Some offenses may not require federal prosecution; in other cases, federal prosecutions may be desireable because of the longer sentences that may be imposed by the federal courts. Nevertheless, the decision to prosecute or decline to prosecute should be a joint decision or, at least, be the subject of guidelines agreed upon by both the tribe and the federal authorities.

The U.S. Attorney for Arizona has promulgated guidelines on the subject of prosecutions in Indian Country. Unfortunately, the guidelines were not drafted with input from the Hopi Prosecutors office, but they do represent an example of the guidelines suggested herein.

The goal of closer cooperation is to make the decision to prosecute a joint federal/tribal decision particularly where the defendant is an Indian. Again, except where purely federal interests are at issue e.g. interstate transportation of stolen goods, narcotics traffic, etc., the prosecution is entertained in the interest of the reservation residents i.e. for their health and welfare, not for federal interests.

Even assuming federal prosecution is declined in a joint decision, the cooperation should further extend to assistance in prosecution through access to evidence and investigation results.

With respect to the proposed amendments to the Federal Magistrates Act, I believe they miss the point. The jurisdictional problems and non-prosecutions are not caused by lack of federal forums; they stem from federal failures to exercise the jurisdiction outlined in the *Oliphant* decision. Providing additional federal forums does not address the issue of failure to prosecute. The answer lies in exercising the jurisdiction that is already there.

To that end, I would suggest the appointment of Special Prosecutors to act where the U.S. Attorney has not acted or cannot act. I do not know why the U.S. Attorney would decline to prosecute except for lack of manpower or lack of interest. Where the Dedendant is an Indian, the tribes have the option of pressing tribal prosecutions, but where the Defendant is non-Indian and declination or non-aggressive prosecution result, the tribe has no further option, even though the victim or property may have been Indian.

Special Prosecutors would pursue the Tribal interest in seeing justice done and, at the same time, exercise the jurisdiction possessed by the United States. Further, Special Prosecutors would make up for manpower shortages for reservation cases by being called only when required. In short, they would act where the tribes cannot act (prosecution of non-Indians on the reservation) and act where the U.S. Attorney does not care to act (Indians and non-Indians committing serious crimes within the reservations).

The comments and suggestions have not been set forth with specific detail on their operation, but they do set forth viable alternatives to remedying the shortcomings in the present scheme. What is particularly *not* desired is any extension of State criminal and civil jurisdiction over the Indian reservations. The tribes, in cooperation with the federal government, can protect those interests they both share—the health, safety and welfare of the reservation residents. This can be accomplished through directing federal authority where it can be best applied.

Respectfully submitted,

GARY L. THOMAS,
Chief Prosecutor.

THE BLACKFEET TRIBAL COURT,
Browning, Mont., February 18, 1980.

U.S. SENATE,
Select Committee on Indian Affairs,
Washington, D.C.

DEAR SENATOR MELCHER: This letter is in response to the issue of a Federal Magistrate on Indian Reservations.

Since the United States Supreme Court decided the Oliphant v. Suquamish Indian Tribe, and the refusal of the Glacier County Attorney as well as the U.S. Attorney to act on matters arising on the Reservation involving non-Indians only adds to the frustration of non-Indians and Indians alike.

Prior to this decision there wasn't that big of a problem on the Blackfeet Indian Reservation, because Indians and non-Indians alike almost always came to the Tribal Court since it was the most convenient effective forum for the affected parties.

Realizing that Tribal Courts are limited to a six month Imprisonment and/or $500.00 fine, and in many instances where the U.S. Attorney referred cases back to the Tribal Court, this was felt to be a just sentence by the victims since the few cases that the U.S. Attorney handled the defendants were usually given probation or suspended sentences.

The Blackfeet Tribal Court and the Blackfeet Tribal Government, in exercising its Sovereign Powers, plays an important role in distributing Justice to all its members and residents alike.

This is supported by the fact the Tribal Court in 1979 handled a total of 5,285 cases of various types.

As you can see, Tribal Courts are more than adequate to handle their problems and a Federal Magistrate with its limited authority would only be an added burden rather than a deterrent to crime.

However, to develop effective Justice Systems a strategy must be drawn: Tribal, State, and Federal Governments must understand and recognize their respective roles; Jurisdictional vacuums must be eliminated; and Tribes must be equipped with the resources necessary to provide for the General Welfare of Indians and non-Indians alike residing on or near reservations.

If you have any further questions in regard to the Federal Magistrate or roles of the Blackfeet Tribal Court, please do not hesitate to contact me at the Blackfeet Court, P.O. Box T, Browning, Montana 59417.

Sincerely,

JACK AFTER BUFFALO,
Judge, Blackfeet Tribal Court,
Blackfeet Indian Reservation.

STATE OF COLORADO,
COLORADO COMMISSION OF INDIAN AFFAIRS,
Denver, Colo., February 20, 1980.

HON. JOHN MELCHER,
Chairman, Senate Select Committee on Indian Affairs, Senate Office Building,
Washington, D.C.

DEAR SENATOR MELCHER: Thank you for giving the Indian Nations, Indian organizations and other interested parties the opportunity to voice their opinion and make recommendations in the area of criminal jurisdiction.

The Colorado Commission on Indian Affairs was created in July of 1976 by the Colorado General Assembly and is mandated to provide liaison between the State-Federal and Tribal Governments of this state. In carrying out the mandate of the law, the Commission is involved, to date, in trying to alleviate some of the very criminal jurisdictional debates you discussed, on the Southern Ute and Ute Mountain Ute Indian Nations whose reservations are largely within the boundaries of the State of Colorado.

The Ute Nations as well as the Chief Judge of the United States District Court, District of Colorado have submitted their comments and recommendations to you. The Commission on Indian Affairs is in full support of their responses and are delighted that the issues facing the Indian Nations are going to be addressed.

Enclosed for your consideration are comments and recommendations from George Armstrong, Tribal Judge of the Ute Mountain Ute Nation.

If we can be of further assistance to you, please do not hesitate to contact this office.

Best wishes on your endeavors.

Sincerely yours,

MARILYN YOUNGBIRD,
Executive Director.

Attachment.

UTE MOUNTAIN TRIBE,
Towaoc, Colo.

MS. MARILYN YOUNGBIRD,
Executive Director, Colorado Commission on Indian Affairs, State of Colorado Executive Chambers, Denver, Colo.

DEAR MS. YOUNGBIRD: Thank you for your letter of February 1, 1980 with the enclosures from Senator Melcher of Montana concerning possible legislation in the Congress. I would like to pass on to you several observations which you may feel worthy of forwarding on to Senator Melcher.

The U.S. Supreme Court decision in *Oliphant* v. *Suquamish Indian Tribe*, in my opinion, only affects criminal jurisdiction of non-Indians on the reservations and does not affect civil jurisdiction or juvenile court jurisdiction. In the last ten years, Tribal Judges all over the western United States, through the assistance of the LEAA, have been receiving continuous and proper education concerning the operation of their Courts and the laws of the Federal Government and the Tribes. Many Courts have become quite sophisticated and are, at least in this Judge's opinion, on a par with many State Courts of limited jurisdiction. As is stated in Senator Melcher's letter great difficulty has been experienced in obtaining the assistance of the U.S. Attorney's office in prosecuting even the violations of the Major Crimes Act, and at least in Colorado about the only cases which are being prosecuted are murder and assault upon a Federal Officer.

I believe it important that the Congress of the United States grant to Indian Tribes who have courts of record and have legal counsel available, either as the Judge or as Prosecutor, territorial jurisdiction of all matters on a status of a misdemeanor occurring within the out-boundaries of a reservation except in organized cities and towns which may have grown up during periods when land was open to patent within the out-boudaries of the reservation. Two examples of this are the Town of Ignacio, Colorado and the Town of Roosevelt, Utah.

Congress should also resolve the problem of the limitations on Tribal jurisdiction being limited to six month's imprisonment and $1,000 fine in Tribal Courts, especially in the fields of embezzlement by Indians of funds of a Tribe. Example: On the Navajo Reservation there have been many cases involving the embezzlement of Tribal Court funds by Tribal Court Clerks which were the property of the Tribe itself. This has also occurred on the Ute Mountain Ute Reservation, but no prosecutions ever are had. Aggravated assault involving members of a Tribe are very, very seldom prosecuted in Federal Court.

Senator Melcher is a strong favorite of using the Federal Magistrates Act and where there are Tribal Judges who are attorneys and licensed to practice before a District or Circuit Court of Appeals, I believe it would be advisable that such a judge could wear two hats, namely, the Tribal hat and a Federal Magistrate's hat.

Because of the fact that I just received your letter of February 1, 1980, and I note that you need some input immediately so that you can respond to Senator Melcher before February 15th, I would greatly appreciate it if I could be advised as to where he might intend to hold hearings as I certainly would like to be pres-

ent and offer testimony concerning any Act covering the question of criminal jurisdication or the handling of non-Indian violators on the reservations.

Very truly yours,

_____, _____,
Ute Mountain Ute,
Tribal Court Judge.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
DEPARTMENT OF PUBLIC SAFETY,
Miami, Fla., February 1, 1980.

HON. JOHN MELCHER,
U.S. Senate, Select Committee on Indian Affairs,
Washington, D.C.

DEAR SIR: In response to your letter dated January 18, 1980, I offer you the following information that I hope will shed some light on a very complex matter.

The Permit Area of the Miccosukee Tribe of Florida lies within the boundaries of the Everglades National Park. This strip of land is home for approximately 500 members of the Miccosukee Coummunity.

The Miccosukee Police Department provides law enforcement services to the community as well as the non-Indian Tribal employees and approximately 250,000 non-Indian visitors per year to the Tribal commercial enterprises, and the adjacent recreational facilities in the Everglades National Park, and surrounding areas.

To effectively deal with the multitude of problems concerning State and Federal jurisdiction, the following actions were taken:

1. Through the cooperation of the Department of the Interior, National Park Service, Officers of this Department, after completing a background investigation and meeting the training requirements, were commissioned Deputy National Park Rangers with law enforcement authority.

2. Members of the Department received commissions as Deputy Special Officers of the Bureau of Indian Affairs.

3. A contract for concurrent jurisdiction was negotiated between the Tribe and Dade County, Florida. This gave law enforcement authority to officers of the Department on a tract of land which parallels the Tribal Permit Area.

4. An agreement was reached with the office of the United States Attorney, Southern District, in which they agreed to prosecute misdemeanor and felony complaints which occur within the boundaries of the Tribal Permit Area. (see enclosure)

Within the past year several arrests of Indians and non-Indians were made by this Department which were processed through the Federal and State Court systems. This was accomplished without experiencing any serious problems.

I attribute this success to two reasons:

(*a*) The high professional standards set by the Tribe in that all offiecrs must be Certified by the Florida Police Standards and Training Commission.

(*b*) The high level of cooperation the Tribe has received from the Office of the U.S. Attorney in responding to the problem.

I hope I have given you some insight into how the Tribe has attempted to overcome some of the obstacles which presented themselves.

If further information is required to clarify any of the above facts please contact me.

Sincerely,

ANTHONY G. ZECCA,
Chief of Police.

Enclosure.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
DEPARTMENT OF PUBLIC SAFETY,
Miami, Fla.

SPECIAL INSTRUCTIONS NO. 5

(Amended December 4, 1978)

As a result of telephone calls with U.S. Attorney Alan Weisberg on June 21, 1978 and December 4, 1978, it has been mutually agreed upon that the Assimilative Crimes Act as embodied in Title 18 Section 13 of the U.S. Code will be utilized for any act or omission occurring within the Miccosukee Permit Area which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State of Florida.

The procedure to be followed in such an instance will be:

1. A violation of law, not punishable by any enactment of Congress but which is punishable under Florida Statutes, must have occurred within the Miccosukee Permit Area of the Everglades National Park.

2. Sufficient cause for effecting the arrest must be established i.e.—a prima facie case.

3. The violation of law must not be in conflict with federal policy or laws.

4. The U.S. Attorney on duty will be contacted by telephone and the facts explained to him in accordance with the attached format. In addition, the officer should have the following information available for the U.S. Attorney:

(*a*) Telephone number of M.P.S.D. (223–1600),
(*b*) Subject's last, first, and middle names,
(*c*) Subject's address,
(*d*) Subject's age,
(*e*) Subject's marital status,
(*f*) Subject's family status (children, brothers, sisters, parents),
(*g*) Subject's places of residences for last 3 years (if possible),
(*h*) Subject's employment record for last 2 years (if possible),
(*i*) Prior arrest record (if available),
(*j*) Details of the offense committed.

5. If the U.S. Attorney on duty declines to prosecute and/or refuses to contact U.S. Attorney Weisberg, the Police Officer concerned will contact U.S. Attorney Weisberg at his home by telephone.

6. The Police Officer concerned, after acceptance of the case for prosecution by the U.S. Attorney, will recommend to the U.S. Attorney whether the person arrested should be admitted to bail on his own recognizance, be permitted to post surety bond or be incarcerated. In the event the Police Officer recommends a release on surety bond rather than a personal recognizance, or no bond, he should justify his reasons therefore. (i.e.—Prisoner is unreliable or unkonwn or is creating a disturbance or acting in such a manner as to endanger the life, health or property of the community and should be removed from the area.) The Police Officer, if he recommends a surety bond, will also recommend the amount of bond. (i.e.—$50, $100, $250, etc.)

7. The Police Officer will then await a return telephone call from the U.S. Attorney who, after consultation with Judge Palermo of the U.S. Magistrates' Court, will either authorize the Police Officer to release the prisoner on his own recognizance, or on a surety bond in a specific amount, or to incarcerate the individual if so ordered or the prisoner is unable to post a surety bond.

8. If the prisoner is to be incarcerated, he will be delivered to the U.S. Marshal's lockup at 300 N.E. 1st Avenue (Post Office Building), 2nd Floor if delivery can be effected between 9:00 A.M.–1:00 P.M. or to the Dade County Jail at 1321 N.W. 13th Street where he will be lodged as a federal prisoner for pick-up and delivery to U.S. Magistrates' Court the following morning.

9. If the prisoner is to be incarcerated, the U.S. Attorney should be told where he is to be incarcerated and should be asked to notify the U.S. Marshal to pick the prisoner up and deliver him to U.S. Magistrates Court.

10. Whenever possible, the Police Officer should endeavor to have the Dade County Public Safety Department assist by picking up the prisoner and delivering him to the lock-up. When this is not possible, the Police Officer concerned will deliver the prisoner himself.

11. The Police Officer must report to U.S. Attorney Weisberg at 9:00 A.M. the following morning at 14 N.E. 1st Avenue, Miami, to draw up the complaint prior to court appearance and bring a copy of the incident report with him.

ANTHONY G. ZECCA,
Chief of Police.

FORMAT—TO BE USED WHEN CONTACTING THE U.S. ATTORNEY ON DUTY IN REFERENCE AN ARREST

This is Police Officer ———— of the Miccosukee Public Safety Department, Miccosukee Tribe of Indians, Miccosukee Permit Area, Everglades National Park. I have authority under federal law by virtue of being commissioned

as a Deputy Special Officer of the Bureau of Indian Affairs, Department of th Interior and also as a Law Enforcement Officer of the National Park Servic Department of the Interior.[1] I wish to charge a person under the Assimilativ Crimes Act, Title 18 Section 13 U.S. Code utilizing Florida Statute ———— which is not in conflict with federal policy or law and reads as follows:

(Read statute concerned directly from the book of Florida Statutes.) The subject did in fact engage in the following act(s) or omission(s) within the Miccosukee Permit area: (Describe in detail what the subject did).

Assistant U.S. Attorney Alan Weisberg has been assigned to cases originating within the Miccosukee Permit Area. He has instructed us to ask you not to decline to prosecute on the basis of this being a minor violation but only if, in your opinion, a violation has not occurred and that he will accept responsibility for prosecution.[2]

THE SAN CARLOS APACHE TRIBE,
San Carlos, Ariz., February 14, 1980.

Re Your Letter Dated January 18, 1980—Federal Magistrates on Indian Reservations.

Senator JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MELCHER: Thank you for your continuing interest in achieving proper law enforcement on Indian Reservations. As you noted in your letter, after the United States Supreme Court decision in Oliphant v. Suquamish Indian Tribe, there has been little law enforcement effort concerning the crimes of non-Indians on Indian Reservations.

We support the idea of federal Magistrates for offenses committed by persons within federally recognized Indian Reservations. The Tribe's support of specific legislative proposals and procedures and authorities of such a Magistrate would, of necessity, await the development of material for our review by your Committee. We would be happy to participate in the development and review of such materials.

Of great concern to the San Carlos Apache Tribe and other Indian Tribes in the Southwest are the crimes which currently go unenforced on Indian Reservations which are committed by non-Indians. As you know, the lack of adequate law enforcement personnel and adequate budgets of the Federal Government and the lack of jurisdiction over non-Indian criminal matters by Tribal Governments has resulted in a substantial increase in unprosecuted crimes by non-Indians on the Reservation.

The increase primarily relates to minor crimes in the area of traffic, petty theft, vandalism, fish & game violations, damage of Tribal property, theft and damage of livestock, and theft and damage of cultural materials valuable to the Tribe. In this regard, the San Carlos Apache Tribe suggests that Congress authorize the Tribes to prosecute all persons for crimes for which the punishment does not exceed six (6) months in jail or a fine of Five Hundred Dollars ($500.00). This is consistent with the Tribe's authority over its own membership.

As you are no doubt aware, Indians must obey all non-Indian laws outside the Reservation and there is no limitation on the power of a city, county or state to prosecute Indians for crimes outside the Reservation. Even with the establishment of a federal Magistrate for those crimes which would constitute violation of federal laws on the Reservation, will not serve to stem the rapidly rising wave of minor offenses committed by non-Indians on southwestern Indian Reservations.

Your consideration in this regard would be greatly appreciated.

Yours truly,

DR. NED ANDERSON,
Chairman, San Carlos Apache Tribe, Arizona.

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[1] If applicable.
[2] If the U.S. Attorney on duty has any doubt, the Police Officer should ask him to call U.S. Attorney Weisberg or should call U.S. Attorney Weisberg himself.

VLASSIS & RUZOW,
Phoenix, Ariz., February 13, 1980.

Re Criminal Jurisdiction on Indian Reservations.

HON. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MELCHER: As General Counsel for the Navajo Nation, we are pleased to respond to your letter of January 18, 1980 soliciting comments on the criminal justice system as it affects Indian nations.

You are absolutely correct in pointing to the problem of failure of United States attorneys to prosecute crimes arising on Indian Reservations. Unfortunately, State criminal authorities, in those areas in which they have jurisdiction over offenses committed by non-Indians within Indian country, also regularly fail to prosecute such offenses.

Because of the *Oliphant* case, Indian nations may not prosecute such offenses. The net result is that there is a near complete breakdown in law and order, and serious crimes go unpunished, much to the detriment of the law abiding citizens of Indian country.

In our judgment, the long term solution to this problem is to permit those Indian nations which are qualified to handle criminal matters, to be authorized to take criminal jurisdictions over non-Indians, and to be able to impose sentences in excess of the $500 fine and six months in jail allowed under the Indian Civil Rights Act. We certainly acknowledge that not all Indian nations are capable of administering complete criminal jurisdiction over all persons and all crimes, but I think that reality dictates that we recognize that there are significant differences among Indian nations, and there is not reason that those Indian nations with competent criminal justice systems should be deprived of the opportunity to restore law and order to their lands.

In the interim, any expansion of the authority of Federal Magistrates which would provide a temporary solution to this terribly serious problem would be in order.

It is our understanding that the Director of the Navajo Division of Public Safety, Colonel Leroy Bedonie, will be furnishing a more specific letter—from the standpoint of a law enforcement officer, on the problems raised in your letter of January 18, 1980.

Please be advised that the Navajo Tribal Council has specifically gone on record requesting that Indian nations who are capable of handling their own criminal affairs, be allowed to do so.

If the General Counsel's Office of the Navajo Nation can provide any additional information which be of assistance to you and your Committee, please do not hesitate to ask.

Very truly yours,

LAWRENCE A. RUZOW.

COLORADO RIVER INDIAN TRIBES,
COLORADO RIVER INDIAN RESERVATION,
Parker, Ariz., February 15, 1980.

Hon. JOHN MELCHER,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR MELCHER: Thank you for your letter of January 18, 1980 regarding law enforcement problems on the reservation. This is indeed an area which deserves the critical attention of Congress if the difficulties are to be resolved.

We note that your letter moves in the direction of delegation of special authority to federal authorities to address these problems. The Colorado River Indian Tribes firmly believe that initial efforts in this area should explore the potential for extension of tribal criminal jurisdiction over the non-Indian on the reservation as a fair and workable basis for controlling non-Indian criminal activity, particularly on those reservations that have developed law and order and judicial systems to a level of sophistication comparable to state and local agencies. This

type of authorization could perhaps be premised upon a program of certification of individual tribes by appropriate federal authority that adequate procedural safeguards exist in the tribal system.

We further believe that the problem of major crimes committed by Indians on the reservation, and the sporadic enforcement thereof by U.S. attorneys, should also be first addressed by looking into the feasibility of expansion of the present limited penal authority of tribes, i.e., six-months imprisonment and/or $500 fine. Certainly the mandate of the Indian Civil Rights Act provides adequate protection for the individual rights of the accused, essentially the same as in non-Indian forums, except perhaps for the absence of the right to court-appointed counsel for the indigent. We do not see the logical or legal distinction for limiting tribal authority in this area, especially since a system of certification could be established, as mentioned earlier, providing for such additional requirements as necessary to support broader penal authority by tribes.

In order to foster the goal of tribal self-determination and preservation of tribes' status as viable sovereign entities, we propose a detailed and sincere review of potential solutions to the problems outlined in your letter, first by way of clarification and extension of tribal authority consistent with protection of individual rights. We certainly prefer this approach before pursuing the potentially stifling, limiting, and often inefficient imposition of additional federal authority on the reservation and on tribes. We recognize that the magistrate approach may be appropriate for those tribes who desire that resolution; however, if other tribes are or will be capable of doing the job and are willing to assume the responsibilities, then they should be allowed to do it.

We appreciate the opportunity to comment on these issues. Our remarks are necessarily of a general nature at this point, but certainly the Colorado River Indian Tribes are interested in and concerned about any developments in this field and request that your office keep us posted in this regard.

We wish to thank you and your committee for your attention to these problems.

Sincerely yours,

FRANKLIN MCCABE, Jr.,
Chairman, Tribal Council.

THE NAVAJO NATION,
Window Rock, Navajo Nation Ariz., February 8, 1980.

MS. JO JO HUNT,
Staff Attorney, Senate Select Committee on Indian Affairs,
Dirksen, Senate Office Building,
Washington, D.C.

DEAR MS. HUNT: This correspondence is a follow-up to our telephone conversation on February 6, 1980. I have the following information enclosed for your review; The 1973 Agreement between the Navajo Police and New Mexico State Police, The 1979 Legislation, Chapter 39, Section 20–1–11C(8), which now questions the authority of Navajo-New Mexico State Police Jurisdiction in the checkerboard area of the Navajo Indian Reservation, and other correspondence.

Briefly, the situation stands as I explained to you over the telephone. The 1979 Legislation, Chapter 39 has given the New Mexico State Police the authority to commission Tribal and Peublo Police Officers as New Mexico State Police Officers to enforce laws on Indian Reservations against Non-Indians. But, the 1973 Agreement between Navajo Police and New Mexico State Police gave the Navajo authority to arrest and cite Non-Indians in specific areas known as the checkerboard area. The 1979 Legislation, Chapter 39, Section 29–1–11C(8) has eliminated this authority except in hot pursuit situations.

Presently, the Non-Indians in the checkerboard area understand that Navajo Police has no authority over them and have challenged our Officers verbally to fights, etc. In addition to this, we have cited Non-Indians into State Magistrate Courts for various traffic violations, but the cases have been dismissed. The Magistrates are citing the 1979 Legislation as grounds for dismissal. Matters could develop into real physical confrontations.

The Navajo Police Department has a District Station in Crownpoint, New Mexico with a strength of 41 Police Officers who patrol the area on a 24 hour basis. We are the most visible law enforcement agency in the area. The New Mexico State Police District Station is located in Gallup, New Mexico and their strength is unknown at this writing. They mainly patrol Interstate 40 between Gallup and Grants, New Mexico and State Route 264 from Gallup to the Arizona/New Mexico border. None are stationed in Crownpoint or in the checkerboard area.

I would like for you to review what I have sent you and list some possible solutions to our problem from the Federal level. I am not sure if "Indian Country" is clearly defined. If it is, then the State of New Mexico, Navajo Nation and the Federal Government all have different definitions to suit their needs. And ideas or suggestions would be helpful.

I have been assigned to the Eastern Navajo Law Enforcement Jurisdiction Task Force, and one of our objectives is to amend the 1979 Legislation to include and address Law Enforcement Jurisdiction in the Navajo checkerboard area. We are meeting with the New Mexico Council on Criminal Justice Planning to discuss strategy on how to attack this problem next week in Santa Fe, New Mexico. I have taken the liberty of enclosing correspondence to Charlene Marcus of New Mexico State Planning Agency for your information. Please review the topics of discussion and add to the list where appropriate.

In closing, I want to thank you for your concern and interest in Navajo-New Mexcio Law Enforcement Jurisdiction Issues. If you have any questions, please call my office at your convenience (602) 871–4212 or 4228.

Sincerely,

HENRY C. MANUELITO,
Division of Public Safety.

Enclosures.

LAWS OF NEW MEXICO, 1972, CHAPTER 8 (N.M.S.A. 39–1–12)

39–1–12. Authorization of Navajo police officers to act as New Mexico peace officers—Authority and procedure for commissioning. A. All persons that are duly commissioned officers of the police department of the Navajo Indian tribe and are assigned in New Mexico are, when commissioned under subsection B of this section, recognized and authorized to act as New Mexico peace officers. These officers have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including but not limited to the power to make arrests for violation of state laws.

B. The chief of the New Mexico state police is granted authority to issue commissions as New Mexico peace officers to members of the police department of the Navajo tribe to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments shall be set forth in a written agreement to be executed between the chief of the New Mexico state police and the superintendent of the Navajo police department.

C. Nothing in this section impairs or affects the existing status and sovereignty of the Navajo tribe of Indians as established under the laws of the United States.

Agreement entered into this 1st day of October 1973, between the New Mexico State Police and the Navajo Police Department (sometimes collectively referred to herein as "the parties").

Witnesseth:

Whereas the Legislature of the State of New Mexico has granted authority to the Chief of the New Mexico State Police to issue New Mexico Peace Officer commissions to Navajo Police Officers, Laws of New Mexico, 1972, Chapter 8 (N.M.S.A. 39–1–12); and

Whereas the parties desire to effectuate such legislative intent by virtue of the terms and conditions contained herein;

Now, therefore, in consideration of the premises and the mutual promises hereinafter set forth, the parties hereto agree as follows:

Section 1. Commissions

A. The Chief of the New Mexico State Police shall supply to the Superintendent of the Navajo Police Department applications for commissions for Navajo police officers to act as New Mexico peace officers pursuant to this agreement. These applications shall be completed by the Superintendent of the Navajo Police Department and the applicant for a commission and returned to the Chief of the New Mexico State Police who shall grant or deny such application within a reasonable period of time. "Commission", as hereinafter used in this agreement, shall mean a commission issued by the Chief of the New Mexico State Police to a Navajo police officer to act as a New Mexico peace officer.

B. The Chief of the New Mexico State Police has established standards for each applicant for a commission, which standards are attached hereto as Exhibit "A" and are incorporated herein by reference as if set forth in full. The

standards set forth in Exhibit "A" may be amended from time to time solely upon the prior written consent of the parties. Any such amendment shall be attached by the parties to this agreement or to their respective copies of this agreement.

C. No application for a commission shall be approved prior to certification by the person in charge of the New Mexico Law Enforcement Academy that the individual has completed sufficient basic police education to be a New Mexico peace officer.

D. After receipt of such certification that a Navajo police officer has received sufficient basic police education to be commissioned as a New Mexico peace officer, the Chief of the New Mexico State Police shall issue a commission hereunder unless he determines, in his discretion, that reasonable grounds exist for denying the applicant a commission.

E. The Chief of the New Mexico State Police may at any time revoke a commission issued pursaunt to this agreement for, and upon, the grounds set forth herein. Upon receipt of notice of such revocation, the Superintendent of the Navajo Police Department shall return the commission to the Chief of the New Mexico State Police. The grounds for revoking the commission of a Navajo police officer are as follows:

(1) Determination, at the discretion of the Chief of the New Mexico State Police, that the Navajo police officer is unqualified to act as a New Mexico peace officer; or

(2) Violation of any provision of this agreement by a Navajo police officer.

F. A commission of a Navajo police officer to act as a New Mexico peace officer shall be terminated upon receipt of notice by the Chief of the New Mexico State Police of the occurrence of any of the following:

(1) Termination, voluntarily or involuntarily, from the Navajo Police Department;

(2) Transfer or reassignment out of the State of New Mexico; or

(3) Conviction of a felony or of a serious misdemeanor.

G. The Superintendent of the Navajo Police Department shall receive immediate written notice from the Chief of the New Mexico State Police that a Navajo police officer's commission has been denied, revoked or terminated pursuant to this agreement, which notice shall set forth the grounds therefor. The Superintendent of the Navajo Police Department shall have the right to a review of the denial, termination or revocation of any commission by the Chief of the New Mexico State Police. After consideration by the Chief of the New Mexico State Police of the evidence presented to him upon review, he shall either sustain or rescind his decision by a written letter to the Superintendent of the Navajo Police Department setting forth the grounds for his decision. The decision of the Chief of the New Mexico State Police shall be final.

Navajo police officers, who are commissioned hereunder (hereinafter referred to as "commissioned Navajo police officers") may exercise the powers granted by this agreement in McKinley, San Juan and Valencia Counties, the Alamo Navajo Indian Reservation in Socorro County, the Canoncito Navajo Indian Reservation in Bernalillo County and the Torreon area in Sandoval County, except (1) on the right-of-way of any interstate highway within such counties: (2) on State Highways 17, 47, 53 (east of the Ice Caves), 511 and 544 within such counties and (3) within the boundaries of lands under the control of the Zuni, Acoma or Laguna Tribes within such counties. Commissioned Navajo police officers may also exercise certain powers in the remaining portions of New Mexico, but only as specifically provided hereinbelow.

Section 3. Scope of Powers Granted

Commissioned Navajo police officers shall have the power:

(1) To enforce any provision of the New Mexico Motor Vehicle Code, a violation of which subjects one to a criminal penalty;

(2) To make arrests for the commission of any crime under the New Mexico Criminal Code;

(3) To make arrests for the commission of any misdemeanor or felony within the presence of the arresting officer; and

(4) To arrest a person in any part of New Mexico when:

(a) There is probable cause to believe that such person has committed a felony or committe either the crime of reckless driving or driving while under the influence of intoxicating liquor or drugs

within the geographical limitations of this agreement and the officer is in close pursuit of such person; or

(b) The officer holds a warrant of arrest issued pursuant to the New Mexico Rules of Criminal Procedure for the arrest of such person.

Section 4. Responsibilities of the Navajo Police Department

A. The Superintendent of the Navajo Police Department shall inform the Chief of the New Mexico State Police of the existence of any grounds under Section 1, paragraph F herein for terminating a commission of a Navajo police officer issued pursuant to this agreement and shall forthwith return the commission of any Navajo police officer terminated pursuant to this agreement to the Chief of the New Mexico State Police.

B. Commissioned Navajo police officers shall use traffic citation forms, as are furnished by the New Mexico State Police, when issuing traffic citations for violations of the New Mexico Motor Vehicle Code. The Superintendent of the Navajo Police Department shall issue, keep a record of, and require a receipt for, each serially numbered citation issued to individual Navajo police officers. The Superintendent of the Navajo Police Department shall be responsible for submitting the goldenrod-colored officer's second copy of the citation to the Chief of the New Mexico State Police, and the other copies to the parties indicated thereon within five (5) days from the issuance of the citation. Specific distribution and control procedures relating to these citations shall be prescribed by the Chief of the New Mexico State Police, which procedures shall become a part of this agreement when annexed hereto as Exhibit "B".

C. The Navajo Police Department hereby agrees to purchase public liability and property damage insurance for vehicles operated by commissioned Navajo police officers and police professional liability insurance from a company licensed to sell insurance in the State of New Mexico. Such policies shall be in the amount and shall contain such terms and conditions as may be approved by the Chief of the New Mexico State Police. Such insurance policies shall contain provisions requiring the companies to give notice to the Chief of the New Mexico State Police of any cancellation or termination of the policies.

D. No person shall be detained pursuant to this agreement by a commissioned Navajo police officer for a period of in excess of two (2) hours without oral notification to a member of the New Mexico State Police. Any person arrested by a commissioned Navajo police officer pursuant to this agreement shall be immediately taken to the nearest State Magistrate, State police officer or County Sheriff for further proceedings in accordance with the law.

E. Any person taken into custody pursuant to this agreement shall be immediately informed of his Constitutional rights by the arresting officer in accordance with a written form to be supplied by the Chief of the New Mexico State Police.

F. The Navajo Tribe agrees to indemnify the State of New Mexico, the New Mexico State Police Board, its officers and employees, against liability for any damages or other losses arising out of the activities of commissioned Navajo police officers for which liability the commissioned Navajo police officer is responsible while acting within the scope of his employment or authority.

Section 5. Status of New Mexico Peace Officers

It is understood and agreed that commissioned Navajo police officers are not employees of the State of New Mexico and that no insurance coverage, retirement benefits or any other benefits shall be provided by the State of New Mexico for commissioned Navajo police officers.

Section 6. Amendments to and Enforcement of Agreement

The general laws of the State of New Mexico shall apply to amendment and construction of this agreement.

Section 7. Status of Navajo Tribe

Nothing contained herein impairs or affects the existing legal status of the Navajo Tribe of Indians as established under the laws of the United States of America.

Section 8. Termination of Agreement

Either the Superintendent of the Navajo Police Department or the Chief of the New Mexico State Police may terminate this agreement at any time by

giving written notice to the other of such termination which shall be effective thirty (30) days after the date thereof. Upon such termination, the Superintendent of the Navajo Police Department shall forthwith return all traffic citation forms received, and commissions issued, pursuant to this agreement to the Chief of the New Mexico State Police.

Section 9. Effective Date

The effective date of this agreement between the New Mexico State Police and the Navajo Police Department shall be the day of , 197 .

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

———— ————,
Chief, New Mexico State Police.

———— ————,
Chairman, New Mexico State Police Board.

———— ————,
Superintendent, Navajo Police Department.

———— ————,
Chairman, Navajo Tribal Council, Police Committee.

This agreement has been approved by the Navajo Tribal Council.

By ———— ————.

This agreement has been approved by the Area Director, Bureau of Indian Affairs, ———— ————, June 29, 1973.

This agreement has been approved by the Attorney-General of the State of New Mexico, By ———— ————, August 12, 1973.

EXHIBIT "A"

The following standards are established by the Chief of the New Mexico State Police and are attached to the Agreement as Exhibit "A":

1. Each applicant for a commission shall have successfully completed the Navajo Police Course prescribed for officers of the Navajo Police Department, consisting of approximately a total of 346 hours of training.

2. Each applicant for a commission shall have successfully completed the New Mexico State Police Course for applicants for said commission, consisting of approximately 40 hours of training. This training shall include instructions in the New Mexico Court system, New Mexico Motor Vehicle Code, New Mexico criminal Code, New Mexico traffic and criminal procedures and other related matters.

NEW MEXICO STATE POLICE DEPARTMENT

INTER-DEPARTMENTAL CORRESPONDENCE

January 18, 1974.

Subject New Mexico Peace Officer Agreement Between the New Mexico State Police Department and the Navajo Police Department.

From Captain Don Moberly.

To Miss Joyce Blalock, Attorney, Administrative Legal Advisor, New Mexico State Police.

Attention of Martin E. Vigil, Chief, S. F. Lagomarsino, Deputy Chief.

DEAR MS. BLALOCK: Pursuant to our Window Rock meeting in December 1973 with certain Navajo Police Department officials and their Legal Advisor, I have reviewed the agreement which was drawn between the State Police and the Navajo Police. As you are aware, paragraph number 1 of the "Exhibit" attached to the agreement reads:

1. Each applicant for a commission shall have successfully completed the Navajo Police Course prescribed for officers of the Navajo Police Department, consisting of approximately a total of 346 hours of training.

Although the 346 hours training figure used in this Exhibit was obtained from the Navajo Police in a meeting here at Headquarters when they indicated that all officers had or would have completed this amount of training, it appears to me to be set a little high. I find by talking to the Navajo Police Officers and by reviewing their files, that many have not completed this amount of training.

I, therefore, recommend that the Exhibit be changed to a more realistic figure. I recommend that it be set at 192 hours—the current level of the Basic Police

Officers Training Course being conducted at the New Mexico Law Enforcement Academy. I recommend the language be changed as follows:

1. Each applicant for a commission shall have successfully completed the Navajo Police Course prescribed for officers of the Navajo Police Department, which shall consist of at least 192 hours of training.

Please discuss this matter with Chief Vigil and if approved, draw up a new Exhibit "A" to replace the existing Exhibit "A" by whatever means is necessary.

Very truly yours,

CAPTAIN DON MOBERLY,
Commander, Personnel and Training Division.

Attachments.

NEW MEXICO STATE POLICE,
Santa Fe, N. Mex., January 21, 1974.

Re Agreement between the New Mexico State Police and the Navajo Police Department.

Chief ALFRED W. YAZZIE,
Acting Superintendent, Navajo Police Department, Headquarters Drawer J, Window Rock, Ariz.

DEAR CHIEF YAZZIE: Pursuant to Section 1, Paragraph B, of the above listed Agreement, I as Chief of the New Mexico State Police, have established standards for each applicant for a commission for a Navajo Police Officer to act as a New Mexico Peace Officer. These standards are set out in the enclosed Exhibit "A". The enclosed Exhibit "A" is an amendment to the Exhibit "A" which was previously sent to you.

As stated in Section 1, Paragraph B, of the Agreement, Exhibit "A", may be amended upon prior written consent of the parties to the Agreement. Therefore, this letter is sent to submit the new Exhibit "A" to you and to seek your written consent of this new Exhibit "A".

I shall look forward to hearing from you, at your earliest convenience, as to whether you will give your written consent to the new Exhibit "A".

Very truly yours,

MARTIN E. VIGIL, CHIEF,
New Mexico State Police.

Enclosure.

EXHIBIT "A"

The following standards are established by the Chief of the New Mexico State Police and are attached to the Agreement as Exhibit "A":

1. Each applicant for a commission shall have successfully completed approximately 120 hours of basic police training. In calculating the number of hours of basic police training completed by an applicant, the training listed in paragraph 2, of Exhibit "A", may be considered to be a part of the 120 hours.

2. Each applicant for a commission shall have successfully completed the New Mexico State Police Course for applicants for said commission, consisting of approximately 40 hours of training. This training shall include instruction in the New Mexico Court system, New Mexico Motor Vehicle Code, New Mexico Criminal Code, New Mexico traffic and criminal procedures and other related matters.

DANIEL S. PRESS
ATTORNEY AT LAW
918 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

(202) 466-5550

OF COUNSEL TO
GOLDFARB, SINGER & AUSTERN

February 14, 1980

The Honorable John Melcher
Chairman
Senate Select Committee
on Indian Affairs
United States Senate
Washington, D. C. 20510

Dear Chairman Melcher:

The Blackfeet Tribe was pleased to review your proposal for using the Federal Magistrate's Act to improve the judicial system serving Indian reservations. The Blackfeet Tribe wishes to express to you strong support for this proposal. We also believe that the proposal ties in closely with an issue a Blackfeet tribal delegation had raised with you in January of 1979. At that time, we expressed our concern that when a Blackfeet Indian is arrested for one of the eleven major crimes on the Blackfeet Reservation, he or she is tried before the Federal Court in Great Falls, Montana. Because Great Falls is 110 miles from the Reservation and there are not that many Indians living in Great Falls, the Indian almost is always tried by a jury which has no Indians on it. We expressed to you our concern that this does not represent trial by a jury of ones peers.

Proposed use of the Federal Magistrate's Act could begin to correct this problem, though it does not represent a total solution to it. Under your proposal, misdemeanor crimes would be tried by a magistrate on the reservation. If your proposed amendments made it clear that, for jury trials, the jury must be drawn from the reservation area, it could be the first time that Indians charged with Federal crimes on reservations such as Blackfeet could be assured that their peers would be sitting on the jury.

The holding of misdemeanor jury trials on the reservation would promote the establishment of the infrastructure needed to hold Federal felony jury trials on the reservations; such as the

development of the jury rolls, the identification of appropriate space for jury trials, etc. Once this occurs, we would hope that Phase II of your program would be to ask Federal judges to hold their felony trials on the reservation, when the defendant is from the reservation area. Perhaps your legislation on the magistrates could mandate a study of the feasibility of doing this.

We hope our suggestions are useful to you and can be incorporated into the legislative proposal you are considering. If you have any questions, please feel free to contact me.

Sincerely yours,

Daniel S. Press

Daniel S. Press
Washington Counsel
The Blackfeet Tribe

DSP/mm

FCNL
FRIENDS COMMITTEE ON NATIONAL LEGISLATION

245 Second Street, N.E.
Washington, D.C. 20002
(202) 547-4343

February 15, 1980

Senator John Melcher
Russell Senate Office Bldg. #440
Washington, D.C. 20510

Dear Senator Melcher:

I write in response to your request for comments on the need for legislation authorizing federal magistrates "to cover ordinary law enforcement where big gaps now exist" on Indian reservations. Having lived for more than ten years on the Rosebud and Pine Ridge Indian Reservation in South Dakota, I understand the complication in adequate law enforcement that concern you.

I am inclined to suggest that the judicial code for Indian reservations be entirely rewritten. The various parts of the code were written over a long period of time under the influence of popular attitudes which changed considerably over that time. Thus the code lacks legal consistency. However, I shall respond to the specific considerations you have indicated.

I understand your analysis of the problem to include:

1. Federal and state law authorities on Indian reservations often fail to exercise jurisdiction over criminal offenses by persons who *are not members of the tribe* on whose reservation the crime was committed. I believe the wording "not a member of the tribe" is more correct than "non-Indian" because one tribe does not have jurisdiction over members of other tribes; i.e., a Navajo would not be subject to Cheyenne jurisdiction.

2. United States attorneys frequently fail to prosecute Indians for Major Crime Act violations against non-members of the tribe.

3. Federal magistrates tend not to process cases on Indian reservations although persons charged with a misdemeanor may choose, if the district court allows, to be tried before a federal magistrate. Appointments of federal magistrates to serve on Indian reservations consequently are very rare.

I suspect that the first aspect of this law enforcement problem is the level of arrests. Law enforcement officials on reservations, whether under the direction of the local tribe or the Bureau of Indian Affairs, should have jurisdiction and responsibility to make all arrests on the reservation, regardless of whether the person being arrested is a member of the tribe or not. Members of the reservation police force should always have

delegation to act as federal and also as state law enforcement officers. Legislation that would grant such delegation should provide flexibility and respect for local circumstances.

Apprehension of the criminal suspect at the earliest possible time is vital to effective law enforcement. Off the reservation, a local law enforcement officer is always authorized to arrest an offender. Prosecution follows in the appropriate court of the area.

Because of treaties and subsequent federal legislation, tribal governments on Indian reservations have jurisdiction only over tribal members. The recent decision of the U.S. Supreme Court in *Oliphant vs. Suquamish Indian Tribe* is the latest statement on the limits of tribal jurisdiction. This is the law of the land, but the Friends Committee on National Legislation and the National Office of Jesuit Social Ministries believe Congress should implement legislation so that all who are not members of the tribe are also subject to arrest by reservation police.

Historically, western Indian tribes were isolated from the rest of the country, so there was reason to recognize their responsibility for law and order within their areas of jurisdiction. In the period since the last treaty, a reluctance, which I suspect is at root prejudicial, to recognize reservation police as the equal of county and city law enforcement units has persisted. Moreover, a tribe's jurisdiction over its members exists only on its own reservation.

Why shouldn't reservation police forces have jurisdiction to handle all arrests for all criminal offenses on their own reservations? Why shouldn't all local law enforcement units be recognized as responsible for all arrests within their respective areas of jurisdiction? All Indians are recognized as citizens of the United States. Why should there be discrimination against the authority of reservation police forces in making arrests for all offenses on reservations?

Once an arrest of a non-tribal member has been made on a reservation, prosecution can follow either in federal district court for a felony or by a federal magistrate if that is so decided in the case of misdemeanors, or in a state court if conditions and circumstances so require.

The fact that a person who is not a tribal member has been arrested will urge and demand judicial attention. Today action for an unspectacular offense by a non-member of the tribe easily becomes tedious because of the long distances to be traveled before action can be undertaken. The conflict among federal, state and tribal jurisdictions causes hesitancy when there is any danger that a writ of *habeus corpus* may free the arrested person. Fear of frustration in having all efforts washed away because of an action having been declared technically wrong does not encourage arrests of the guilty, much less their trials.

Expanding the authority of federal magistrates to hear cases of persons charged with misdemeanors may correct some of the problem under consideration. However, the immediate need, I suspect, is to have local reservation police enable to make arrests when a crime has been committed.

In this regard I believe that S. 1181, the Tribal-State Compact Act, has significance. Limitations on relationships between tribal, federal and state police officers cause law enforcement to suffer. More effective relationships can be established through enactment of S. 1181 which would enable tribes to sign agreements extending beyond the limits of criminal jurisdiction, with governments of or within individual states.

Congressional action directing federal magistrates to process offenses of non-tribal members on reservations may provide for the handling of some cases that are now ignored, but I doubt that it is the essential action required for solving the problem.

If you should find it convenient, I would welcome an opportunity to join you and your staff in further discussion of this problem and its possible solutions.

Sincerely,

Ted Zuern, S.J.

Ted Zuern, S.J.
Friends Committee on National Legislation
National Office of Jesuit Social Ministries

TZ:jl
L-7

PUEBLO OF ZUNI
P. O. BOX 339
ZUNI, NEW MEXICO 87327

ROBERT E. LEWIS
Governor
THEODORE EDAAKIE
Lt. Governor
SEFFERINO ERIACHO, SR.
Head Councilman
PESANCIO LASILOO
Councilman

MILO OWALEON
Councilman
ROGER TSABETSAYE
Councilman
FRED BOWANNIE, SR.
Councilman
ALEX BOONE
Councilman

In reply refer to:
Office of the
Governor

February 4, 1980

Honorable John Melcher
Chairman, Select Committee
on Indian Affairs
United States Senate
Washington, D. C. 20510

RE: Federal Magistrate Act

Dear Senator Melcher:

Thank you for your letter of January 18, 1980 in regard to the Federal Magistrates Act. The Zuni Tribal Council express their appreciation to you for what you are trying to do in regards to Indian jurisdictional problems.

For now, we are submitting several points of concern in this area which we thought should be brought to your attention.

First Concern: Any changes in the present magistrate system to make it more useful on Indian reservations should not establish a new overlaying of jurisdiction on the reservation which would make the situation even more confusing and alien to Indian people. In other words, a change should integrate the magistrate system as closely as possible with the present tribal court structure. The persons who are most interested in good law enforcement on the reservations are the people who live there. Their needs and talents should not be ignored at this time.

Second Concern: It would be preferable at this time to delegate responsibilities for trying non-Indians for misdemeanor offenses to the Tribal Court. This could be done under the Mazurie Supreme Court case. Many tribes now have attorneys and graduates of law schools as judges or as advisors to the Court. Many tribal courts also draw juries from reservation residents which include non-Indian residents. Under the Indian Civil Rights Act, the tribal courts

have the right to come into the federal courts for the Writ of Habeas Corpus. The rights of non-Indians to a fair trial are now protected.

Under the holding of the Mazurie case, it would be lawful for Congress to delegate to the tribal courts misdemeanor jurisdiction over non-Indians. Congress could put conditions on such a delegation. For example:

a. All tribal misdemeanor statutes could be approved by the Secretary of the Interior.
b. Jury panels could be made up of all residents of the reservation.
c. A judge who is a member of the state bar as well as the tribal bar should try all non-Indian cases.
d. A procedure by which a tribe has its court certified by the Secretary of the Interior to try non-Indian cases could be established.

Third Concern: Tribal Courts should be allowed to increase their penalties for criminal or misdemeanor offenses above the present six month imprisonment and/or the $500.00 fine. We suggest that the maximum sentence in the tribal court be one year and/or a $5,000.00 fine.

We will submit a more lengthy analysis of this situation at your request.

Sincerely,

PUEBLO OF ZUNI

Robert E. Lewis
Governor

Wagner, D'Onofrio, Waller & Stouffer

DAVID J. WAGNER
JOHN J. D'ONOFRIO
WILLIAM C. WALLER, JR.
JAMES P. STOUFFER
DENIS H. MARK
JAMES E. HEISER
CECIL A. CUNDY*

* ADMITTED IN WYOMING AND NEBRASKA ONLY

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1000 UNIVERSITY BUILDING
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DENVER, COLORADO 80202

TELEPHONE 303-534-6465

JOSEPH M. EPSTEIN
OF COUNSEL

January 30, 1980

Senator John Melcher, Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: Prosecution of Crimes by Non-Indians on Reservations

Dear Senator Melcher:

Thank you for your letter of January 18, 1980, which expresses the problem and concern of those concerned with effective law enforcement on Indian Reservations. We are in full agreement with your analysis of the failure of the U.S. attorney's office and the Federal Court system to respond to the needs of the Tribes in the post-Oliphant era.

While we do not wish to go beyond the thrust of your legislative proposal, we would suggest that the most effective means of resolving the problems created by Oliphant is to grant authority to the Tribes to maintain complete law and order on the reservations, including jurisdiction over non-Indians. Certainly, the progress of Indian Courts over the last few years indicates that they are capable of providing a fair judicial forum for all. In addition, the most logical place to handle a violation of a Tribal Code is on the Reservation in the Tribal Court. However, if such legislation would not be practical at this time, other temporary solutions would be helpful.

Enclosed is a copy of a resolution approved by the Ute Mountain Council on January 3, 1980. It sets forth the concerns of the Tribal Council for the protection of the Tribe, its members, and their property. We are attempting to have a U.S. Magistrate appointed to serve three Tribes in the same geographical area. While Chief Judge Fred Winner of the District Court for Colorado has been cooperative, I am sure that financial limitations make such an appointment difficult.

Even if a Magistrate should be appointed, it seems that there are many questions which are yet unanswered regarding the extent of his authority. We would be happy to work with your staff on

developing a comprehensive plan for law enforcement and the jurisdiction of Tribal and Federal Courts on Indian Reservations. We would also suggest that there be an opportunity for all Tribes to comment on proposed legislation. Certainly, all Tribes can learn from their mutual and unique experiences in this area.

We thank you for the opportunity to comment on your proposal for legislation and appreciate your efforts to resolve the problems which exist in this area of Indian law.

Very truly yours,

WAGNER, D'ONOFRIO, WALLER & STOUFFER
Ute Mountain Tribal Attorneys

By John J. D'Onofrio
John J. D'Onofrio

JJD/jh
Enclosure
cc: Judy Pinnecoose, Chairperson
Ute Mountain Tribe

Garfield W. Hood
Attorney and Counselor

5 E. Baraga Avenue
L'Anse, MI 49946

Area Code 906
524-6227

January 21, 1980

Senator John Melcher, Chairman
Committee on Indian Affairs
United States Senate
Washington D.C. 20510

Dear Senator Melcher:

I am in receipt of your letter of January 18, 1980, concerning some of the effects brought about by the United States Supreme Court decision in Oliphant v Suquamish Indian Tribe and I appreciate the opportunity which you have given me to comment on your Committee's plans. For your information, I serve as Tribal Attorney for the Keweenaw Bay Indian Community and I have represented that Tribe since January of 1972.

As a brief background, the L'Anse Federal Indian Reservation is situated in the western portion of Michigan's Upper Peninsula in Baraga County. The Reservation, as originally created by the Treaty of 1854, was originally comprised of approximately five or six sections of land however, as was not unusual, much of the Reservation passed into non-Indian ownership subsequent to the allottment acts. Perhaps 20% of the original Reservation area is now held in either Tribal or allotted status.

Although there are several areas where the Indian population of the Reservation (approximately 1100 people) is concentrated, there are also many areas where Indian and non-Indian persons live side by side. Prior to approximately 1973, the State of Michigan had somehow "forgotten" the special jurisdictional characteristics of a Federal Indian Reservation and the State therefore exercised criminal jurisdiction over Indian persons and non-Indian persons alike. Around 1973 or 1974, a Tribal Criminal Code was developed, a Tribal Court created, and a Tribal Police Force initiated. In my estimation, all have performed quite well over the past few years. As you can imagine, however, the local populace and law enforcement agencies, learning abruptly of the law with respect to Tribal jurisdiction over criminal offenses committed by Indian persons within the reservation boundaries, were not terribly receptive to that "infringement" upon power and authority previously exercised by the State and its political subdivisions.

At the outset of the Tribal Criminal Justice Program development, cross-deputization with non-Indian law enforcement agencies was tried but for various reasons was eventually terminated. Because two state trunk lines pass through the Reservation and because two villages inhabited mainly by non-Indian persons are on the Reservation, it is not always easy for a police officer, either Indian or non-Indian, to be able to tell beforehand whether or not a particular driver, committing a motor vehicle violation, or in fact any person committing a crime, is Indian or non-Indian. Situations often arise, therefore, and particularly because of the rural nature of this area, and small police forces where non-Indian police arrest Indian persons on the Reservation and Tribal police arrest non-Indian persons. Prior to Oliphant, the Tribe processed non-Indian persons through the Tribal Court however subsequently to Oliphant, a rather difficult situation has been created since when the Tribal police are placed in the position of arresting or detaining a non-Indian, simply because they are the only ones present to take law enforcement action, non-Indian police agencies are reluctant to take the individuals from their custody and process them through the State court system. However, efforts to process the individuals through the Tribal Court system have been blocked by Oliphant. Consequently, and although the L'Anse Federal Indian Reservation is far from being a "bed of lawlessness", significant law enforcement problems have occurred.

To get to the point of this letter, the situation on the L'Anse Reservation is not one where the Federal magistrate's legislation which you have proposed would solve the problem although it admittedly might help in that direction. I believe that much greater benefits would be derived, however, from legislation granting Tribal Police the authority to arrest non-Indian persons who commit offenses within the boundaries of Federal Indian Reservations. Of course, both my clients and I would prefer that such legislation also provide that the offenders be processed through Tribal Courts but even if it were required that such individuals were to be turned over to Federal or State authorities for trial the situation on this Reservation at least, would be far better.

I hope this letter will be of some benefit to you in considering the legislation discussed in your letter of January 18, 1980, and I would be pleased to share my thoughts with you further if you should desire.

Very truly yours,

Garfield W. Hood
Attorney & Counselor

GWH/bap
cc: Hon. Theodore Holapaa, Tribal Judge
Mr. Frederick Dakota, Chmn., Keweenaw Bay Indian Community
Michigan Agency Office, Bureau of Indian Affairs

PUEBLO OF LAGUNA
BRANCH OF JUDICIAL, PREVENTION AND ENFORCEMENT SERVICES
BOX 194
OLD LAGUNA, NEW MEXICO 87026

Area Code (505) 552-6616 or 552-6617

February 3, 1980

TO: John Melcher, United States Senator
United States Senate
Select Committee On Indian Affairs
Washington, D.C. 20510

FROM: Clyde Giroux, Chief of Police
P.O. Box 194
Laguna, New Mexico 87026

Dear Sir:

In rely to your inquiry regarding the Oliphant vs Suquamish decision and all Ramifications, Law Enforcement and Judicial. I would like to first apologize for the fact that my short tenure as Chief of Police of the Laguna Police Department, gives me very little background from which to draw my opinions.

Regarding the matter of Police Jurisdiction. Last year the New Mexico Legislature passed a Bill, which in effect states: "Tribal Police Officers in this state, can go to the New Mexico Law Enforcement Academy and with successful completion, be certified as Peace Officers. After certification, an Officer can go to the State Police's Academy and with a successful completion, receive a commission as a New Mexico State Police Officer with state wide Jurisdiction." It is to this end, we have committed ourselves. This can only be accomplished if the Tribe signs an agreement with the state. Laguna Pueblo as of this date has not signed such an agreement. There is a Bill before this year's Legislature, which will make all of the above training free to any Officer, Tribal or otherwise. I was assured last week this Bill will become Law.

With the Laguna Pueblo signing the agreement with the state, and with my people commissioned by the State Police, I can foresee no Jurisdictional problems.

Regarding the matter of Judicial Jurusdiction. I have even less to go on regarding actions of the courts. The Laguna Judicial problems are mostly misdemeanors and as such are handled by the Tribal Courts, unless in the case of a Non-Indian, the Local District Court, having Jurisdiction, will handle. We have not had enough Felony Cases to develope a Criterion or set a precedent. I have discussed this matter with the Tribal Judge and several Attorneys and

the Co-Census of opinion is, there is a certain amount of watering down, but nothing of consequence.

I realize you are probably more interested in complaints. Something to develope a background. Since I have none, I thought you might be interested in the situation that applies to us.

If I can be of any assistance, feel free to request.

Sincerely,

Clyde Giroux, Chief of Police
Pueblo of Laguna Police Department

CG/gc

SAN JUAN TRIBAL POLICE

P.O. BOX 42
SAN JUAN PUEBLO, NEW MEXICO 87566

ANDY CASIAS
Chief of Police

TELEPHONE
852-4257

January 30, 1980

John Melcher, Chairman
United States Senate
Select Committee on Indian Affairs
Washington, D. C. 20510

Dear Mr. Melcher,

Thank you for your letter of January 18, 1980, concerning a very important issue. I am also extremely moved by your efforts to bring about legislation vital to our interests.

I have to agree with you on the problems that exist and something has to develop soon in order for us to function properly as a Law & Order Agency within our Indian Reservation.

In your letter you have identified sources detrimental to Law Enforcement on Indian Territory when arresting Non-Indian Criminals.

Where is the Federal Magistrate System?

In our area, our Magistrate Judge is a Lawyer in Private Practice available to Tribal or B.I.A. Criminal Investigators with Criminal Cases on a part-time basis only. I guess one could say a Federal Magistrate to us in Northern New Mexico is almost certainly non-existant. On the other hand the U.S. Attorney's Office is becoming less interested on Indian Cases. What do we do next?

One cannot imagine the frustrations felt by Indian Law Enforcement Officers.

Just recently two of my men were attacked by young criminals while enforcing the Law. Both Officers suffered bruises about the head and face. Our case is being referred to the U.S. Attorney for prosecution, 2 to 1 it will be declined to Tribal Court. Why are we not receiving proper re-cognition from the U.S. Attorney's Office according to the Major Crime Act?

The problem is not only with the prosecution of Non-Indians but also Indians.

Recently the State of New Mexico is asking us to participate in their Cross-Commission Plan, where Indian Officers can be made Full Pledge New Mexico Peace Officers so long as they are within Indian Jurisdictions and meet a series of regulations and stiff requirements. My personal opinion to all this Hog-Wash about Peace Officers Cross Deputized by New Mexico is a waste of valueable Indian time and the whole situation stinks.

I suggest the extreme need for a Magistrate Judge on the Indian Reservation is here. That this Judge make himself available on full-time basis and willing to work for the good of the people and for justice.

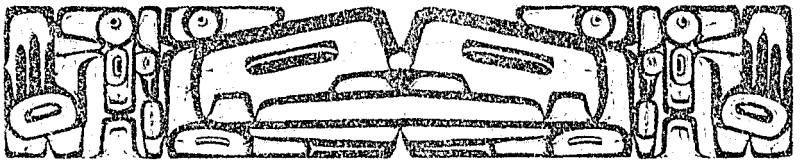
I suggest that Tribes participating on PL 93-638 in Law & Order be more recognized, certainly the Tribal Officers are capable of conducting Criminal Investigations on the Reservations and that said prepared cases be handled directly to the Federal Magistrate instead of duplicating work through the use of B.I.A. personnel.

Besides the Tribal Police Commissions I feel a Tribal Police Officer should also possess a Federal Commission. Up to this point Tribal Police Officers work totally on Federal Lands, using Federal Vehicles, constantly subject to Federal Law and Federally Trained and Oriented. I am asking where do we fit with the B.I.A. no longer on this Reservation, we are the B.I.A. in a sense.

Indeed, I share your concerns and we need help before we go Wackey.

Respectfully,

Andy Casias, Chief
San Juan Tribal Police



MUCKLESHOOT INDIAN TRIBE
39015 172ND AVENUE S.E. - AUBURN, WASHINGTON 98002 - (206) 939-3311

February 6, 1980

Senator John Melcher
Chairman
United States Senate
Senate Select Committee On Indian Affairs
Washington, D.C. 20510

Dear Senator Melcher:

Thank you for inviting our comments on law enforcement problems on Indian reservations.

The Muckleshoot Indian Tribal Council agrees that enlarging the authority of federal magistrates on Indian reservations is appropriate, particularly for the more serious crimes. At the same time, the Council urges you to consider legislation delegating authority to tribal courts to hear at least misdemeanor offences committed by non-Indians. We have experienced a number of petty thefts, break-ins, and other minor offenses by non-Indians which resulted in damage or loss to tribal property. Because we are a so-called "Public Law 280 tribe", federal enforcement agencies will not handle these cases. State enforcement agencies have shown little interest in investigating and prosecuting such matters. And because of Oliphant, the tribe cannot act.

We believe that a delegation of criminal authority over non-Indians to tribal courts would be the most effective approach. A federal certification process could be developed to ensure qualified tribal court judges, representative juries, and procedures consistent with due process. Because there are so many small and scattered reservations in Washington state, the most efficient criminal justice system would be one which allows each tribe to handle at least minor reservation offenses.

In connection with these procedures, we also urge your support for legislation to permit tribes to obtain retrocession of state jurisdiction under Public Law 280, with consent of the Secretary of the Interior. Possibly because Public Law 280 did not provide funds for additional state enforcement responsibilities, the state has been

MUCKLESHOOT INDIAN TRIBE
39015 172ND AVENUE S.E. - AUBURN, WASHINGTON 98002 - (206) 939-3311

unresponsive to reservation law and order problems. These problems are more appropriately handled by the federal and tribal governments themselves. Public Law 280 has resulted in a great deal of litigation and disappointment. The Washington State Governor supports retrocession of at least state criminal jurisdiction and we hope you will also strongly consider retrocession as one means of simplifying the complex issues facing effective law enforcement on Indian reservations.

Yours truly,

Marie Starr

Marie Starr
Vice-Chairperson

cc: Senator Edward Kennedy

LAW OFFICES

DELLWO, RUDOLF & SCHROEDER, P.S.

ROBERT D. DELLWO
KERMIT M. RUDOLF
RICHARD J. SCHROEDER
TERRY W. MARTIN
HEDLEY W. GREENE
ROBERT J. ROBERTS

1016 OLD NATIONAL BANK BUILDING
SPOKANE, WASHINGTON 99201
(509) 624-4291

January 30, 1980

REC'D FEB 4 1980

The Honorable John Melcher
Chairman
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510

Dear Senator Melcher:

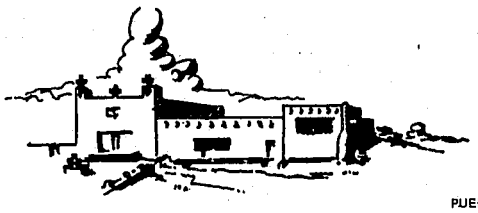
The tribes I represent, the Spokane, Coeur d'Alene and Kalispel all received your letter of January 18, 1980, which outlined your plans for legislation upgrading the utilization of federal magistrates in the enforcement of Tribal and Federal Indian law. Your observations of how the Federal Magistrates Act has worked out on Reservations are quite accurate. Actually in many areas, the availability of magistrates has been almost non existent. The combination of reluctance of United States Attorneys and Federal Magistrates to act or prosecute becomes almost total. I have seen excellent cases languish for years and eventually die for lack of prosecutorial action. Legislation making the magistrate system more readily available to tribes is badly needed.

The tribes I represent would like to respond to your letter in more detail but would first like to have drafts of your proposed legislation to consider. Would your office kindly send me copies of this draft legislation.

Sincerely yours,

Robert D. Dellwo

RDD/lv
xc: Spokane Tribal Council
Coeur d'Alene Tribal Council
Kalispel Business Committee
James Stevens, Superintendent
Dr. Jerry Jaeger, Superintendent
Dale Itschner



PUEBLO OF ACOMA
JUDICIAL DEPARTMENT

P.O. BOX 347
PUEBLO OF ACOMA, N.M. 87034
(505)552-6632

February 4, 1980

Mr. John Melcher, Chairman
United States Senate
Select Committee on Indian Affairs
Washington, D. C. 20510

Dear Mr. Melcher:

In response to your letter of January 18, 1980 regarding criminal jurisdiction over non-Indians on Indian reservations. There is only one solution that will resolve this problem and that is for a bill granting criminal jurisdiction over all crimes committed on Indian reservations to the Indian tribe, with concurrent jurisdiction granted to the Federal Government for some major crimes. Increase the sentencing authority to $10,000.00 and 10 years imprisonment with Tribal access to state or federal penitentiaries with such confinement at the expense of the Federal Government.

If you want more specific information on my recommendations, I am at your disposal and will do all in my power to help resolve this most serious situation.

Sincerely,

PUEBLO OF ACOMA

Dwain Clark

Dwain Clark, Chief Judge
Acoma Tribal Courts

DC/bm

Office of the Reservation Attorney
QUINAULT INDIAN NATION
Post Office Box 1118
Taholah, Washington 98587
(206) 276-8211

February 11, 1980

Senator John Melcher
Senate Select Committee on Indian Affairs
6313 DSOB
Washington, D.C. 20510

Dear Senator Melcher:

We appreciate receiving your recent letter considering expansion of the role of Magistrates in the criminal justice systems on Indian reservations. We urge you to continue work on the matter and we offer these comments and thoughts.

A proposal to improve law enforcement on reservations should be mindful of the existing jurisdictional complexities and should strive to avoid adding further layers of authority to the area. From this standpoint an enhanced federal presence could be most desirable, especially if it were coupled with the greatest possible reliance on existing tribal institutions. For example, the federal judiciary could make use of tribal court mechanisms already in place, including judges, courthouses and court personnel. If there were concern that these institutions meet federal standards, a certification process could be established to assure that the judges are trained members of a state or federal bar and that record keeping and procedural mechanisms met federal specifications. Such a process would place a Magistrate's court where it is most effective, convenient and necessary — on the reservation -- and would solve the problem of providing judicial services to quite a number of reservations at minimal cost to the United States.

An expanded role for Magistrates, either through the method described above or another process, is entirely consistent with the proposed retrocession of criminal jurisdiction from the states to the United States. Retrocession, as you know, is presently provided for in S. 1722, the reformed federal criminal code. This criminal jurisdiction was initially turned over to some states, through Pub. L. 83-280 in 1953, in hopes of providing better law enforcement through local authorities. In practice the idea has simply not worked. Reservation crime has generally gotten worse because of state authorities' indifference to reservation problems, states' reluctance to bear the added cost of policing reservations, and the distance of reservations from established state courts and police agencies. Many tribes who welcomed Pub. L. 83-280 have learned to repent of that decision and are advocates of its repeal, and states' reluctance to yield their acquired jurisdiction is not based on their provision of good law enforcement. Retrocession coupled with an amplified federal presence in criminal justice matters on the reservations would do a great deal to overcome

the difficulties experienced with the existing allocation of responsibility. It would have the added virtue of addressing the matter by simplifying, rather than complicating, the existing situation.

Thank you for your concern in matters of reservation law enforcement. We hope you will continue work on the proposals now under consideration. We will be pleased to discuss any of the above in more detail with you or your staff.

Very truly yours,

Carl V. Ullman

CARL V. ULLMAN
Reservation Attorney

SOUTH DAKOTA LEGAL SERVICES

MEMORANDUM

DATE: February 11, 1980

TO: United States Senate, Select Committee On Indian Affairs
Attn: Hon. John Melcher, Chairman

FROM: Anita Remerowski

SUBJECT: Amendment of Federal Magistrates Act

These comments are made in response to the invitation set forth in your letter of January 18, 1980, where you have informed people that you are anticipating submitting a bill to Congress which will delegate to United States Magistrates authority to hear certain matters on Indian Reservations across the United States.

At the onset you recognize in your letter that felonies committed by an Indian against a non-Indian or by a non-Indian against an Indian on an Indian reservation are properly matters of federal jurisdiction. Moreover, jurisdiction lays in federal court for a misdeamnor committed by an Indian against a non-Indian or by a non-Indian against an Indian person.

I think that it is important to note also that any crime involving an Indian against an Indian that arises on an Indian reservation, whether the same be a felony or misdemeanor, could be tried as a matter of proper jurisdiction in federal court.

Oliphant v. Suquamish Indian Tribe held that the particular tribal court there involved had no jurisdiction to try a non-Indian for a criminal offense against an Indian. The Department of Justice subsequent to the decision has adopted a policy holding basically that it will not prosecute non-Indians for victimless crimes such as traffic violations and other such offenses. Please take note that the Department of Justice policy does not preclude federal court jurisdiction over non-Indians for crimes committed against Indians.

The Oliphant decision does present some problems. Obviously if the Department of Justice position is that the federal government is not going to prosecute non-Indians for victimless crimes, the burden then rests on the particular state involved to prosecute. It must be kept in mind that at least in South Dakota the State has not historically taken much of an interest in enforcing

state laws on Indian reservations. Consequently state law enforcement officers are spread very thin over a large geographical area. A very big bone of contention is whether tribal police officers can ever arrest a non-Indian and turn the subject over to the local state government for prosecution. The result is as follows: (1) local state governments do not, in the opinion of many reservation residents do a very good job of policing non-Indians. This creates hard feelings along racial lines since Indians are arrested and convicted for the same conduct by their tribal government. (2) Local state governmental units in many instances will not accept an arrest of a non-Indian by a tribal officer. Since the State does not have the manpower available to make the particular arrest and since it will not accept the arrest by a tribal officer, the non-Indian is seen as being above the law. The above situation is very real and it needs to be addressed by Congress. Certainly one solution is for Congress to indicate its intent, by passage of the Act that you make reference, that victimless crimes committed by non-Indians in Indian Country should be tried in federal court by a United States Magistrate. Another solution is for Congress to indicate its intent that non-Indians can be tried in tribal courts.

You indicate in your letter that another area of concern is the lack of prosecution by United States attorneys of Indians for Major Crimes Act violations or violations against non-Indians. As you know, under 18 USC 1153 it matters not whether the victim is an Indian or non-Indian. Federal courts still have jurisdiction over that particular Indian defendant charged under that statute. If your Committee really has a genuine concern about crimes by Indians going unprosecuted generally, and specifically when they commit a crime against a non-Indian, then I dare say that an immediate congressional inquiry ought to be launched into the policies of the Department of Justice with reference to its duty to enforce federal laws on Indian reservations. If any particular United States attorney refuses to prosecute an Indian because the victim is a non-Indian, then that person ought to be immediately removed from his office. My point is, Senator, that there are statutes on the books that provide the necessary tools for Indians to be prosecuted for felonies whether the victim be Indian or non-Indian or whether the crime be victimless. It is difficult to make any rational connection between the problem addressed in this paragraph and your proposed solution, i.e., the amendment of the Federal Magistrate Act to allow Federal Magistrates to hear certain types of cases that arise on Indian reservations.

You further state that its unlikely that a federal magistrate could be justified on an Indian reservation. Your point is that because United States attorneys refuse to prosecute, federal magistrates have not been appointed to serve on or near Indian reservations since the caseload does not justify such an appointment. It is difficult to ascertain just exactly what you mean. If you mean that the Department of Justice refuses to prosecute non-Indians for victimless crimes, as that term is defined in

their policy statement addressing the issue, and that refusal in turn has resulted in an insufficient caseload to justify the appointment of Federal Magistrates, then your statement has surface validity. However Oliphant was only decided in March of 1978, barely two years ago. Certainly Congress cannot justify a refusal to appoint Federal Magistrates on Indian reservations on a mere two years of statistics, especially when the two years are those directly following the decision that gave rise to the problem and the paucity of cases during those two years is directly related to a policy of the Department of Justice not to prosecute non-Indians for victimless crimes.

If you mean, in addition to the above, that since other types of cases are not prosecuted before Federal Magistrates, such as those involving non-Indians who commit crimes against Indians or Indians against non-Indians, hence further resulting in a small caselaod and therefore negating any justification for the further appointment of Federal Magistrates on or near Indian reservations, this erroneous understanding must be corrected and must not be allowed to justify a decision not to appoint further Magistrates. Non-Indians who commit crimes against Indians can be tried and have been tried in federal court, whether the act be a felony or misdeamnor. Since there has always been a forum for the prosecution of those types of cases, and especially misdeamnors, there has been traditionally little need to have these matters heard by a Federal Magistrate because they are heard by a federal district court judge. With respect to Indian persons who commit misdeamnors, at the present time they probably could be charged either in federal district court or the matter could be heard by a particular tribal court. In either case, again there is and has not been any need to try these matters before a Federal Magistrate. The small caseload before Federal Magistrates involving the types of cases set forth in this paragraph cannot be used to justify the appointment of Magistrates on or near Indian reservations because traditionally these types of cases are heard in either United States District Courts or tribal courts if Indian defendants are involved.

I feel constrained to address another statement set forth in your letter. You indicate that tribal courts oftem prosecute lesser included offenses when the U.S. attorneys fail to prosecute them but yet tribal courts only have certain penal powers. Again I must state that it is a little difficult for me to understand what point you are making or the relevance that this statement has to the amendment of the Federal Magistrate Act. First of all, it would seem that if an Indian commits a crime that is in fact a misdeamnor it ought to be tried as a matter of policy in tribal court and not before either a United States District Judge or a Federal Magistrate, although the latter possibilities could also be grounded on a firm legal footing. If this were not to be the case, then there would be little need for tribal courts to have any criminal jurisdiction at all. A six month period of

incarceration and/or a $500 fine certainly seems to be appropriate penal authority to punish .

There has been some discussion, at least in South Dakota, about the implementation of prosecution guidelines where certain types of cases which might otherwise be tried in federal court as a felony will be referred to tribal court for disposition. For example larcenies and/or burglaries resulting in property loss less than $250 or certain types of assaults. This undoubtedly reflects in part a judgment decision by a prosecutor that the case could not be won as a felony. In addition, implicit in these guidelines is the recognition that tribal and Bureau of Indian Affairs can more economically investigate and prosecute these types of cases than can the FBI and the United States Attorneys. The current United States Attorney in South Dakota, who is a member of the Rosebud Sioux Tribe of Indians, has publicly stated that he is in favor of deferring cases to the tribal courts, but only if he can be assured that the cases deferred will be adequately investigated, prosecuted, and punished. It would seem that the above position is commendable since it assures Indian defendants of being tried before Indian courts, recognizes the sovereignty of tribal courts, and fosters improvement in the tribal court system.

In conclusion, Senator, I think that there is definitely a need for Federal Magistrates on or near Indian Reservations to handle victimless crimes committed by non-Indians in Indian Country. Moreover, they could also handle other misdeamnors that are committed by non-Indians in Indian Country even though there is a forum in federal courts for those offenses. Indian defendants charged with misdeamnors ought to be tried before their particular tribal court. Tribal courts are in need of much improvement before they could constitutionally handle felony cases.

LAW OFFICES
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2030 M STREET, N.W.
WASHINGTON, D.C. 20036

MARVIN J. SONOSKY
HARRY R. SACHSE
REID PEYTON CHAMBERS
WILLIAM R. PERRY

TELEPHONE
(202) 331-7780

February 13, 1980

Honorable John Melcher
Chairman
Senate Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: United States magistrates - enforcement of federal law on Indian reservations (107.22)

Dear Senator Melcher:

Thank you for your letter of January 18, 1980 inviting our views with respect to the lack of protection for Indians that are the victims of offenses by non-Indians on Indian reservations.

The Assiniboine and Sioux Tribes of the Fort Peck Reservation, for whom we serve as general counsel, share your concern with the lack of effective federal law enforcement on Indian reservations. In the last few years the Tribes have brought the problem to the attention of Judge Battin, the Bureau of Indian Affairs and the Administrative Office of the United States Courts. All agree that something should be done. You may be sure that the Fort Peck and other Indian tribes are delighted that you have assumed the task of producing a legislative solution to this problem.

As you know, there exists a serious vacuum in law enforcement where a non-Indian commits a crime against an Indian on an Indian reservation. In such cases, neither the state nor the tribe has jurisdiction to prosecute. The United States clearly has jurisdiction to prosecute such offenses. See 18 U.S.C. 13, 1152. However, except for the 13 major crimes (18 U.S.C. 1153), jurisdiction is not generally exercised over offenses committed by non-Indians against Indians. United States Attorneys and federal courts are frequently several hundred miles from the reservation, as in the case of Fort Peck. United States Attorneys have more work than they can handle and typically assign a very low priority to the prosecution of offenses on Indian reservations. As a consequence the crimes with which we are concerned are committed virtually without fear of prosecution or punishment.

An expanded role for United States magistrates would help ameliorate this problem. We believe that under existing laws, United States magistrates are authorized to try minor offenses committed by non-Indians upon the person or property of an Indian on an Indian reservation. 18 U.S.C. 3401. The Administrative Office of the United States Courts concurs with this interpretation. But because magistrates are part-time only, are limited in their assignments and seldom devote time to Indian reservation matters, and because their jurisdiction depends on the option of each defendant, magistrates have not been an effective law enforcement presence on reservations.

We recommend the following:

First, a full-time magistrate should be assigned to Fort Peck and to each other major Indian reservation which desires and needs a full-time magistrate. If it is determined that there is not a sufficient caseload, magistrates could "ride circuit" between two or more reservations in an area.

Second, the scope of the magistrate's jurisdiction should be expanded, at least as to Indian reservations. Currently, magistrates can only hear "minor" criminal cases with a maximum penalty of one year in jail or a $1,000.00 fine, or both. 18 U.S.C. 3401. We believe that power should be delegated to magistrates on Indian reservations to try all crimes other than those covered by the Major Crimes Act, 18 U.S.C. 1153. With such jurisdiction the magistrate could be a significant federal law enforcement mechanism on Indian reservations.

Third, the magistrate's jurisdiction should be made mandatory. Under existing law, a criminal defendant may insist upon being tried in federal court before a federal judge even for a trivial offense. This must be amended if the magistrate is to have an effective role on reservations.

Fourth, since a magistrate cannot operate without a prosecutor, a prosecuting attorney should be assigned full-time to work with the magistrate. If possible the prosecuting attorney should not be an additional Assistant United States Attorney, since such an assistant would soon find himself delegated to other work. By law, his duties must be limited to prosecutions on Indian reservations.

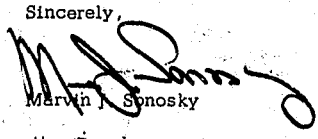
Fifth, funds must be made available for attorneys for indigents and for court reporters and transcripts.

If hearings are held we are sure citizens of Wolf Point and Poplar, both Indian and non-Indian will wish to testify. Too many crimes, particularly assaults go unattended because of the Federal Government's failure to provide a system that meets the needs of all people living on Indian reservations.

Please call on us if we can be of further help.

Kind personal regards,

Sincerely,



MJS/jbc

Marvin J. Sonosky

cc: Each member of the Fort Peck Tribal Executive Board
Mrs. Lillian Hertz, Tribal Secretary

RESOLUTION #1170-76-12

TRIBAL GOVERNMENT
Law and Order

WHEREAS; the Fort Peck Tribal Executive Board is the duly elected body representing the Assiniboine and Sioux Tribes of the Fort Peck Reservation and is empowered to act in behalf of the Tribes. All actions shall be adherent to provisions set forth in the 1960 Constitution and By-Laws and Public Law #449, and

WHEREAS; Under Article VII, Section 5, of the Constitution of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, the criminal jurisdiction of the Tribes is limited to offenses committed by Indians within the reservation; and

WHEREAS; the State of Montana has no jurisdiction over offenses by nonIndians against Indians on the reservation; and

WHEREAS; the United States does have jurisdiction over offenses by nonIndians against Indians on the reservation but such Federal jurisdiction is not effectively exercised because the United States District Court and the United States Attorney are over 500 miles from the reservation, the United States Attorney is understaffed and generally Indian matters of this nature do not hold high priority in the office of the United Stattes Attorney; and

WHEREAS; as a consequence, for all practical purposes, no jurisdiction is exercised over numerous offenses by nonIndians against Indians, and nonIndians attack, assault and commit other offenses against the person and property of Indians without fear of prosecution or punishment; and

WHEREAS; the State prosecuting attorney for Roosevelt County, where the reservation is located, has publicly expressed the need for appropriate action to insure the peace among all people residing on the reservation and has publicly expressed his discouragement with the administration of Federal justice that permits crimes by nonIndians against Indians without impediment;

NOW THEREFORE BE IT RESOLVED; That the Tribe support legislation creating additional offices of United States magistrates empowered to hear and adjudicate offenses by nonIndians against Indians on reservations and providing for the employment of Federal prosecutors under the supervision of the Attorney General of the United States, but not the United States Attorney, to prosecute such offenses;

BE IT FURTHER RESOLVED; That the tribal attorneys are hereby authorized to seek the enactment of appropirate legislation to accomplish the Tribes' objective and to enlist the aid, cooperation and support of national Indian organizations and other Indian tribes.

C E R T I F I C A T I O N

I, the undersigned Secretary-Accountant of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereby certify that the Tribal Executive Board is composed of 12 voting members of whom 12 constituting a quorum were present at a Recessed Special meeting duly called and convened this 15th day of December, 1976; that the foregoing resolution was duly adopted at such meeting by the affirmative vote of 11.

Lillian S. Hertz, Secretary-Accountant

APPROVED:

Norman Hollow, Tribal Chairman
Fort Peck Tribal Executive Board

Superintendent, Fort Peck Agency

March 24, 1977

Honorable James Battin
United States District Judge
Federal Building
Billings, Montana 59103

Re: Fort Peck Tribes - Magistrate and prosecutor
(107.22)

Dear Judge Battin:

You may recall the meeting in your chambers last year with members of the Fort Peck Tribal Executive Board, when we discussed the possibility of trying minor offenses before the United States Magistrate at Wolf Point.

Encouraged by your viewpoint, we wrote to the Director of the Administrative Office of the United States Courts proposing that a full-time magistrate be appointed to try misdemeanor offenses on the Fort Peck Reservation committed by non-Indians upon Indians. You may have received a copy of that letter but we enclose another.

Since the Tribes have not assumed law enforcement jurisdiction over non-Indians committing crimes on the reservation, and since the State has no jurisdiction over such crimes, where an Indian is the victim, federal prosecution is the only possible law enforcement avenue. But, as you know, your Court is distant from the reservation and these cases generally do not find their way into federal court. Consequently, offenses by non-Indians against Indians, particularly assaults, for the most part go unprosecuted and unpunished.

As our letter to the Director of the Administrative Office of the United States Courts indicates, we believe that United States Magistrates are authorized under present law to try minor offenses committed by a non-Indian upon the person or property of an Indian on the reservation. (See 18 U.S.C. 3401.)

In conversations with the Administrative Office, we have learned that the Administrative Office concurs in our interpretation of the law. We have also recently been informed that the United States Attorney has requested federal magistrates in Montana to try all such offenses. This is an excellent step forward and is very much appreciated by the Fort Peck Tribes.

We remain concerned, however, that the present part-time magistrate at Fort Peck may not justifiably be expected indefinitely to conduct all the trials that will be necessary. Also, he may not have adequate courtroom facilities, although we believe the Tribes would offer the use of the tribal courtroom. In addition, while we understand that the United States Attorney has promised to make federal prosecutors available for these trials, we are well aware of the serious staffing constraints in his office. We believe that a full-time magistrate should be assigned to the Fort Peck Reservation area (Roosevelt County). If the case load at Fort Peck is insufficient to occupy all of the magistrate's time, we suggest that the magistrate "ride circuit" and conduct trials on other reservations in the State. Similarly, a prosecuting attorney should be assigned full-time to these cases to travel with the magistrate.

We are advised by Mr. McCabe of the Administrative Office of the United States Courts that such a proposal would be considered by that Office and possibly by the Judicial Conference when it meets next in September, if the necessary request is made by the judges of the federal district court in Montana. We strongly commend the action already taken, and respectfully urge that you recommend to the Administrative Office, that a full-time prosecutor be assigned primarily to this class of case. While we recognize that the matter of an additional prosecuting attorney is within the cognizance of the Department of Justice, our preliminary conversations with the staff in the Deputy Attorney General's Office leave us hopeful that the Department would support the assignment of a prosecutor if a full-time magistrate were appointed.

This is a matter of great significance to the Tribes, and both the Tribal Executive Board, and we as General Counsel, greatly appreciate your efforts in this matter.

Please give us your suggestions and let us know if there is anything further that we can do.

Kind personal regards,

Sincerely,

/s/ Marvin J. Sonosky

MJS/jbo
Enclosure

Marvin J. Sonosky

cc: Mr. Norman Hollow, Chairman
Mrs. Lillian Hertz, Tribal Secretary
Mr. Stanley Yellowrobe

bc: Ms. Doris Meissner
Gerald Schuster, Esquire

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

TELEPHONE 245-6711 EXT. 6240
AREA CODE 406
FTS 245-6240
AREA CODE 406

UNITED STATES ATTORNEY
DISTRICT OF MONTANA
P. O. Box 1478
BILLINGS, MONTANA 59103

March 8, 1977

Mr. Gerald M. Schuster
U. S. Magistrate
P. O. Box 607
Wolf Point, Montana 59201

RE: Trials of minor offenses

Dear Mr. Schuster:

After assuming this office a year ago, I have learned that some minor offenses committed in this district are not prosecuted in federal or state courts. The most noteworthy example is a misdemeanor assault committed by a white against an Indian person, on the reservation.

I have also observed that we are filing some misdemeanors directly in the district court.

After checking, I find that you have been authorized to try minor cases, that is, offenses where the maximum sentence does not exceed one year and/or $1000 fine.

I have discussed this matter with Chief Judge Russell E. Smith. He is willing to consider a more extensive use of the U. S. Magistrates in the District of Montana.

It would appear that the magistrates on or near Indian reservations would have the most trials. I cannot estimate the number of cases involved.

I am also informed that additional compensation for such duties depends on the number of cases processed. Thus, you must work the first year at your present salary.

Considering all of this, would you please advise this office of your views or suggestions. I would hope to undertake this use of magistrates at the earliest possible time. Though understaffed, I will make an Assistant United States Attorney available for all contested trials.

Very truly yours,

Thomas A Olson

THOMAS A. OLSON
United States Attorney

TAO:dlb

cc: Chief Judge Russell E. Smith

March 17, 1977

Thomas A. Olson
U.S. Attorney
P.O. Box 1470
Billings, Montana 59103

Re: Trials of Minor Offenses

Dear Tom:

I have received and carefully considered your letter of March 8 regarding trials of minor offenses committed within the exterior boundaries of the Fort Peck Indian Reservation.

It is my general feeling that by handling these cases in this matter, we will help to relieve much of the tension presently existing on the reservation.

However, there are several questions I have in regard to trials of these matters. First, I would assume that as in our felony cases, these complaints would be brought by special agents of the FBI or other qualified law enforcement officers. If a citizen complainant appears on a particular matter, am I to refer this person to the FBI before accepting a complaint? If so, the FBI should alert their agents as to the investigation of these matters.

Second, in regard to appointment of legal counsel for these matters, if I determine that a defendant is unable to obtain private legal assistance, am I to appoint legal counsel for these misdemeanor matters? What monetary limitations do we have in this regard?

Third, on the misdemeanor trials, am I to make arrangements for a transcript of the proceedings or some type of record of proceedings in the magistrate's court? If so, to what extent? The matter of a court room is also in question. I assume that most non-contested cases could be handled in our office, however, I can forsee if there are many of these cases, this would be a real problem for our private clients.

In regard to sentencing, if a person were convicted of an offense and sentenced to some time in jail, could that sentence be served at the Roosevelt County jail or would it be necessary to transport this person to another facility?

In regard to the compensation of the magistrates for such duties, it is difficult at this time to even estimate the number of cases we might be handling in this area. However, if the complaints are numerous, it would be necessary for me to consider other alternatives as I would simply not have enough time to hear many of these matters. It would seem to me also that some adjustment in compensation could be made to the magistrates if it appears that there is a steady case load in their courts without waiting a full year to determine the actual number of cases processed. Other than the actual time of trial itself, we will be spending considerable time in discussing cases with the attorneys and in related paper work as far as forms and reports on the matters. I know you are aware of our reliance on private practice for income, and we have always considered the magistrate position to be a public service to assist the people in the community. Although I would like to continue with the magistrate's position for this reason, if the cases become numerous enough to affect our service to clients, we would have to receive an increase in compensation for the position.

I hope that some of the above is useful to you in resolving some of the problems which will be incurred in the use of magistrates to try the minor cases. Your comments or suggestions will be appreciated.

Thanking you and with my best personal regards,

Very truly yours,

Gerard Schuster
U.S. Magistrate

GS:jh

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END