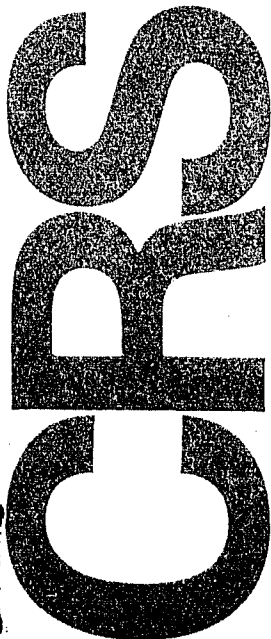


**ANALYSIS OF AMERICAN INDIAN AFFAIRS:  
BACKGROUND, NATURE, HISTORY, CURRENT ISSUES, FUTURE TRENDS**

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May 7, 1985

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## ABSTRACT

This report analyzes the relationship between the United States Government and the Indian tribes, with emphasis on the nature and extent of Indian tribal sovereignty, the Federal trust relationship with Indians and Indian tribes, and the history of Federal policy toward Indians, their legislative implications, and potential future trends. There are three appendices to the report. The first is a history of committee jurisdiction over Indian affairs in both Houses of Congress; the second is a compendium of major Indian affairs legislation enacted by Congress from 1789 to the present; the third is a bibliography of selected references.

CONTENTS

ABSTRACT.....	111
I. FEDERALISM AND TRIBAL SOVEREIGNTY: A UNIQUE CASE.....	1
II. CONGRESSIONAL POWER OVER INDIAN TRIBES AND THE FEDERAL TRUST RELATIONSHIP.....	9
III. FEDERAL POLICY VARIATIONS TOWARD INDIANS.....	15
IV. SELECTED CURRENT POLICY ISSUES .....	35
APPENDIX A: HISTORY OF HOUSE AND SENATE COMMITTEE JURISDICTION OVER INDIAN AFFAIRS.....	65
APPENDIX B: SELECTED MAJOR LAWS CONCERNING AMERICAN INDIANS, 1789 TO PRESENT.....	72
APPENDIX C: SELECTED BIBLIOGRAPHY.....	87

The author wishes to express appreciation to Elizabeth Bazan, Maureen Murphy and Richard Ehlke, of the American Law Division, for advice and suggestions in preparing this report, particularly with regard to Chapters I and II, and portions of Chapter IV.

## I. FEDERALISM AND TRIBAL SOVEREIGNTY: A UNIQUE CASE

The Supreme Court has, throughout our history, sought to balance the powers of the States with those of the Federal government, allowing for the development of our Federal system of shared Federal and State authority under the aegis of Federal sovereignty. Indian tribes however, have always occupied an anomalous position vis-a-vis this Federal system. They are acknowledged to possess certain governmental powers, but are neither States nor foreign nations--rather, they lie somewhere between the two. Thus, though they are located within State boundaries, tribes that are recognized by the Federal government are generally considered as not subject to State authority, unless specifically rendered so by Act of Congress. Though Indian tribes are endowed with certain aspects of "sovereign" status, they are subject nonetheless to the ultimate authority of Congress.

The concept of Indian tribal sovereignty derives from the Indians' original ownership of their aboriginal lands; such title was the basis for subsequent treaties through which the United States acquired Indian lands, and which in turn confirmed the concept of tribal sovereignty. The evolution of the Indians' status within (and without) the Federal framework was initially explicated, as were so many aspects of federalism, by Chief Justice John Marshall. Thus, in 1832, the landmark case Worcester v. Georgia contained an affirmation of the validity of original Indian title and a definition of tribal sovereignty deriving therefrom. Felix Cohen notes Chief Justice Marshall's assertion that

the principle of "sovereign title by discovery"--i.e., title to land accorded the discovering European power--was not inconsistent with original Indian title:

[The principle of discovery] acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. 1/

Cohen further observes that--

. . . [A]n important step in the process by which the Supreme Court came to its decision in Worcester v. Georgia was the conclusion that when the Crown gave to the Colony of Georgia whatever rights and powers the Crown had in Cherokee lands, this did not terminate or alter the Cherokee Nation's original title, which survived the Crown grant and later became the basis of Cherokee treaties with the Federal Government. The case thus stands squarely for the proposition. . . . That a grant by the sovereign of land in Indian occupancy does not abrogate original Indian title. 2/

Worcester v. Georgia continued:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed . . . The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.

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1/ Worcester v. Georgia, 6 Pet. 515 (1832). Quoted in Felix S. Cohen, Original Indian Title. Minnesota Law Review, Vol. 32, No. 1, December 1947. p. 49. Other pertinent cases are discussed by Cohen.

2/ Cohen, p. 49-50.

It follows, therefore, that

[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by government of the union. 3/

This view was complemented by a similar case—Cherokee Nation v. Georgia, 5. Pet. 1—which was handed down the year before (1831), in which the Court defined the Indian tribes as "domestic, dependent nations." The view set forth in Cherokee Nation v. Georgia—that the Indian tribes are "domestic, dependent nations" subject to Congressional authority—went hand in hand with the view of tribal sovereignty independent of State control. This dual concept was reiterated some fifty years later in U.S. v. Kagama, 118 U.S. 375 (1886), when the Supreme Court found that protection of the Indians required withholding the power of such protection from the States. At the same time, this decision is often cited as delineating the "plenary," or absolute, power of Congress over the affairs of Indian tribes (within the bounds of Constitutional restraints). 4/

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3/ Worcester v. Georgia, 6 Pet. 515 (1832). There are, nonetheless, certain tribes, primarily on the east coast, which did conclude treaties with States either in the eighteenth or early nineteenth centuries. This was because the original colonies had been accustomed to dealing with the Indians from the earliest times, and the doctrines set forth by Marshall either had not been established or had not been thoroughly entrenched. (See Chap. IV of this report.)

4/ Authority for this power is contained in the "commerce clause" of the Constitution (Art. 1, Sec. 8, Cl. 3), wherein it is obvious that the Founding Fathers considered Indian tribes as distinct from either foreign nations or States of the U.S.

For a fuller discussion of "plenary power" see Felix S. Cohen's Handbook of Federal Indian Law. 1982 ed. Charlottesville, Va., Michie, Bobbs-Merrill. 1982. p. 217-220. For a Supreme Court decision delineating a limitation to the authority which Congress may exercise in its dealings with Indian tribes, see United States v. Sioux Nation of Indians, et. al., No. 79-638 (U.S., June 30, 1980).

Thus, while clarification of the precise extent of tribal sovereignty has occupied the courts and Congress since John Marshall's time, the basic concept of Indian tribes as essentially outside the purview of State control (except where placed there by Congress), and subject directly to the power and authority of Congress, has remained constant. The view of John Marshall set forth in 1832 is still a guiding point of reference:

The [Indian tribes are] distinct communit[ies] occupying [their own territory]. . . in which the laws of [States] can have no force . . . . The whole intercourse between the United States and [these tribes] is, by our constitution and laws, vested in the government of the United States. . . .

That instrument [the Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. 5/

Three recent decisions of the Supreme Court demonstrate the continued effort of the high court to refine the definition of tribal sovereignty. 6/

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5/ Worcester v. Georgia, 6 Pet. 515 (1832).

6/ Throughout American history the Court may be seen as continuing to evolve a definition of tribal sovereignty anchored within the parameters established by Cherokee Nation v. Georgia and Worcester v. Georgia. Such a definition may be seen as holding a middle way between more extreme views on either end of the spectrum. For example, the Final Report of the American Indian Policy Review Commission (May 1977) suggested that Indian tribal sovereignty is limited only by specific acts of Congress or treaty: i.e., that all rights of tribal government not specifically extinguished by treaty or limited by act of Congress are reserved to tribal Indians, such rights having existed before ratification of the U.S. Constitution. On the other hand, the Final Report contained a dissenting opinion of the Vice Chairman, Congressman Lloyd Meeds, who stated his view that tribal sovereignty is granted only by specific statutory authority of Congress--a view fundamentally opposed to the Commission's proposition that tribal sovereignty is limited only by specific acts of Congress or by treaties.

See also CRS Issue Brief No. IB 77083, entitled American Indian Policy Review Commission: Recommendations.

The first of these decisions, United States v. Wheeler, 435 U.S. 313 (1978), expressed the view that a tribe under Federal jurisdiction exercises tribal jurisdiction over minor intra-Indian offenses. This has been the generally accepted interpretation of 18 U.S.C. 1152, which states—

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses. . . shall extend to Indian country [tribes under Federal jurisdiction, as defined in 18 U.S.C. 1151]. This section shall not extend to offenses committed by one Indian against the person or property of another Indian. . . . (Italics added). 7/

The ramifications of this case are significant. The Court held that the defendant could be prosecuted in Federal court under the Major Crimes Act (18 U.S.C. 1153) on a charge arising from an incident which had led to his previous conviction in a tribal court on a lesser included offense. The Court held that

. . . when an Indian tribe criminally punishes a tribal member for violating tribal law, the tribe acts as an independent sovereign, and not as an arm of the Federal Government. . . and since tribal and federal prosecutions are brought by separate sovereigns, they are not "for the same offense" and the Double Jeopardy Clause thus does not bar one when the other has occurred.

Moreover,

The controlling question is the source of an Indian tribe's power to punish tribal offenders, i.e., whether it is a part of inherent tribal sovereignty or an aspect of the sovereignty of the Federal Government that has been delegated to the tribes by Congress. . . .

Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Here it is evident from the treaties between the Navajo Tribe and the United States and from the various statutes establishing federal criminal jurisdiction over crimes involving Indians, that the Navajo Tribe has never given up its sovereign power to punish tribal offenders, nor has that power implicitly been lost by virtue of the Indians' dependent status; thus, tribal exercise of that power is presently the continued exercise of retained tribal sovereignty.

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7/ However, sixteen "major crimes" are, if committed by one Indian against another Indian within Indian country, subject to Federal jurisdiction ("Major Crimes Act," 18 U.S.C. 1153).



Wheeler demonstrates the existence of tribal sovereignty beyond the purview of State jurisdiction. It also has the effect of placing tribal courts outside the Federal judicial system except where Congress has specifically provided otherwise.

This leads to the opinion handed down by the Supreme Court in 1978 in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), whereby the Court held that the Indian Civil Rights Act of 1968 (25 U.S.C. 1301-3) does not authorize the bringing of civil actions for declaratory or injunctive relief against a tribe or its members in Federal court to enforce the substantive provisions of the Act.

The Indian Civil Rights Act comprises Title II-VII of the Civil Rights Act of 1968 (82 Stat. 73), Title II of which makes tribal governments under Federal jurisdiction subject to certain provisions of the Bill of Rights and the 14th Amendment with respect to individual rights. Senator Ervin of North Carolina explained that such legislation was necessary because:

The Federal courts generally have refused to impose constitutional standards on Indian tribal governments, on the theory that such standards apply only to State or Federal governmental actions, and that Indian tribes are not States within the meaning of the 14th Amendment. 8/

Under the provisions of Title II (25 U.S.C. 1302) tribal governments under Federal jurisdiction prohibited from denying "to any person within [their] jurisdiction the equal protection of [their] laws."

In the Martinez case, the Court was presented with a challenge to a tribal membership ordinance that barred children of "mixed marriages" where the father was not a tribal member, but allowed membership where the mother was not

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8/ Ervin, Sam. Additional Views of Mr. Ervin. In U.S. Congress. Senate. Committee on the Judiciary. Interference with Civil Rights. Senate Rept. No. 90-721, to accompany H.R. 2516, 90th Cong., 1st Sess., Nov. 2, 1967. Washington, Govt. Print. Off., 1967. p. 31.

a tribal member. The plaintiff argued that this ordinance violated the equal protection clause contained in the Indian Civil Right Act. The Supreme Court held that the Federal courts do not have jurisdiction to review the alleged violation, since the Indian Civil Rights Act explicitly authorizes review of tribal ordinances by Federal courts only in the context of habeas corpus. (Sec. 203). Thus, even if a controversy involving such an ordinance should arise under the "Constitution and laws of the United States," it is non-reviewable by the Federal courts in the absence of congressional provision to the contrary.

The court concluded that:

Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that §1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.

No clearer confirmation of the authority of Congress over Indian affairs could be cited; and no more striking example of the unique status of Indian tribes within (or should we say, outside) the Federal system can be found.

It remains to be said, however, that the Court has consistently held Indian tribes to be subject to the ultimate Federal authority.

Once more, a recent Court decision has reiterated and expanded this view. In Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), the Court held that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians on Federal reservations, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. (See Chap. IV of this report).

This decision arose out of a lower court judgment that tribes under Federal jurisdiction do have such authority, a prerogative that tribes had increasingly

been asserting. This had led, in turn, to considerable discord between Indians and non-Indians and to controversy in several western States. The Court held that "by submitting to the overriding sovereignty of the United States, Indian tribes necessarily yield to the power to try non-Indians except in a manner acceptable to Congress . . . ." (Italics added). Thus, the Court reasoned that Indian tribes can exercise jurisdiction over non-Indians only when Congress has specifically granted such authority. <sup>9/</sup> It was because the Court held that for the tribe to exercise such jurisdiction would restrict the personal liberty of non-Indian citizens that the Court refused to infer an inherent tribal jurisdiction:

. . . from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested [a] great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty . . . . <sup>10/</sup>

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<sup>9/</sup> But see U.S. v. Mazurie, 419 U.S. 544 (1975), where in this instance the Court held that the civil authority of the tribal court could extend to non-Indians for transactions with Indians taking place within the reservation.

<sup>10/</sup> Though beyond the scope of this paper to treat in detail, the issue of taxation as related to Indian tribal sovereignty is pertinent to the above discussion.

Thus, Indian tribes have been seen to have certain powers related to those of governmental entities, such as the power of taxation, while at the same time being exempt in most instances from taxation by States (unless, of course, Congress has provided otherwise).

For example, in the case Washington et. al., v. Confederated Tribes of Colville Indian Reservation, et. al (No. 78-630)(U.S., June 10, 1980), the U.S. Supreme Court held that the Colville Tribes have the power to impose their cigarette taxes on non-tribal purchasers. At the same time, however, the Court held that tribal taxation does not exempt such transactions from State taxation. (See 7 Indian Law Reporter 10, June 1980).

The Supreme Court has also upheld imposition by a tribe of a severance tax on oil and gas that is produced by oil companies on reservation land under leases approved by the Secretary of the Interior, even though the tax falls on non-members. (Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 [1982]). (See also p. 47 of this report, below).

## II. CONGRESSIONAL POWER OVER INDIAN TRIBES AND THE FEDERAL TRUST RELATIONSHIP

Congressional authority over Indian affairs is derived from the Constitution, which assigns to Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Art. 1, sec. 3). Congressional authority over Indian affairs has been interpreted by the Supreme Court as unrestricted except where subject to Constitutional strictures: i.e., such power is "plenary":

[The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions, the shackles imposed on this power, in the confederation, are discarded. 11/

Such Congressional authority, and the concomitant exclusion of Indian tribes from State authority (except where authorized by Congress), as set forth in Worcester v. Georgia, has been the basis for development of the foundation-stone of relations between the United States and the Indian tribes: i.e., the concept of Federal trust responsibility for such tribes, a responsibility having its origin in treaties signed with the Indian tribes and confirmed in subsequent statutes and case law:

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11/ Worcester v. Georgia. See also U.S. v. Kamaga, 118 U.S. 375 (1886) discussed at p. 3 and Lone Wolf v. Hitchcock, 187 U.S. 565 (1903).

See, further, Felix S. Cohen's Handbook of Federal Indian Law. 1982 ed. p. 217-220; and Chambers, Reid Peyton. Judicial Enforcement of Federal Trust Responsibility to Indians. Stanford Law Review, Vol. 27, May 1979. p. 1225. [Hereafter cited as Chambers, Judicial Enforcement.]

The true origin of this relationship lies in the course of dealings between the discovering European nations and the Indians who occupied the continent. Through the course of history, Indians concluded treaties of alliance or--after military conquest--peace and reconciliation with the United States. In virtually all of these treaties, the United States promised to extend its protection to the tribes. Consequently, the trust responsibility by this government to the Indians has its roots for the most part in these early contracts and agreements with the tribes. The tribes ceded vast acreages of land and concluded conflicts on the basis of the agreement of the United States to protect them from persons who might try to take advantage of their weak position. 12/

Numerous statutes passed by Congress served to expand this concept.

Thus, for example, Article 3 of the Northwest Ordinance of 1789 provided that--

the utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them. (1 Stat. 50).

Another example is the 1790 Indian Trade and Intercourse Act, subsequently amended and codified at 25 U.S.C. 177, which established the United States as protector of Indian lands. Specifically, this act forbade the alienation of any Indian lands, by purchase, grant, lease or other method of conveyance, "unless the same be made by treaty or convention entered into pursuant to the Constitution"--that is, unless consent of the U.S. Government is given. This statute remains in effect and is the basis for claims of various Indian tribes on the east coast to lands allegedly taken without such consent by States, municipalities or other third parties (see Chap. IV of this report).

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12/ U.S. Congress. House of Representatives. Committee on the Judiciary. Extending the Time for Commencing Actions on Behalf of an Indian Tribe, Band, or Group, or on Behalf of an Individual Indian Whose Land Is Held in Trust or Restricted Status. House Rept. No. 96-807, to accompany S. 2222, 96th Cong., 2nd Sess., Mar. 6, 1980. Washington, U.S. Govt. Print. Off., 1980. p. 2.

The concept of the trust relationship has, further, been repeatedly affirmed by the courts through judicial interpretation of statutes and treaties, as far back as 1831:

The classic discussion of the government's fiduciary duty to Indian tribes is found in Chief Justice Marshall's landmark decision of Cherokee Nation v. Georgia (30 U.S. (5 Pet.) 1, 17) (1831). In holding that Indian tribes are not "foreign states" entitled to invoke the original jurisdiction of the Supreme Court, the Chief Justice stated that "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." 13/

In this decision the Chief Justice defined the Indian tribes as "domestic dependent nations," and as "wards of the [United States]," toward whom the U.S. had assumed a fiduciary duty much like that of a guardian toward a ward.

This judicial explication of the trust responsibility has continued throughout:

Later Supreme Court decisions have reaffirmed the special guardianship of the Federal Government over Indians. In United States v. Kagama, 118 U.S. 375 (1886), the Court analyzed the fiduciary duty as growing out an "exclusive sovereignty. . . which must exist in the National Government; and the fact that Indian tribes are "communities dependent on the United States." (Emphasis in original). Accord: United States v. Sandoval, 231 U.S. 28, 45-46 (1913). Most recently, in Seminole v. United States, 316 U.S. 286, 296-97 (1942), the Supreme Court held that the United States "has charged itself with moral obligations of the highest responsibility and trust." This guardianship was referred to as in part "a human and self-imposed policy." 14/

In sum,

The Marshallian guardianship or trust responsibility can. . . be viewed as an expansive protection of the tribe's status as a self-governing entity, as well as its property rights. The federal

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13/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources. Committee Print, by Reid Peyton Chambers, 91st Cong., 2nd Sess. Washington, U.S. Govt. Print. Off., 1971. p. 1.

14/ Ibid.

guarantee recognizes a sort of "protectorate" status in the tribes, securing to them the power of managing their internal affairs in an autonomous manner except for a congressional power to regulate trade. Moreover, tribal autonomy is supported by a federal duty to protect the tribe's land and resource base." <sup>15/</sup>

There are differing interpretations of the precise scope and extent of the trust relationship. <sup>16/</sup> Thus, recent court decisions have been directed toward interpreting, in specific instances, the degree of trust responsibility which the law implies. Certain decisions may indicate a narrowing of the concept, while others suggest an expanded applicability or scope. <sup>17/</sup>

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<sup>15/</sup> Chambers, Judicial Enforcement, p. 1213.

<sup>16/</sup> In its Final Report (May 1977. Washington, U.S. Govt. Print. Off., 1977), the U.S. American Indian Policy Review Commission takes a broad view of the Federal trust responsibility towards Indians, holding that the responsibility "extends from the protection of Indian trust resources and tribal self-government to the provision of economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society:" that it "extends through the tribe to the Indian member, whether on or off the reservation;" and that it "applies to all United States agencies and instrumentalities, not just those charged specifically with administration of Indian affairs."

On the other hand, Rep. Meeds, in his dissenting report, states that "the legal duties of the United States [regarding trust responsibility] are created by Congressional treaty and statute, and are refined and defined by Supreme Court decision. Beyond those duties undertaken by treaty or statute. . . the United States is subject to no 'legal' duties to Indian tribes. What Congress does in the area of Indian affairs it does by voluntary choice, not under the constraints of any legal obligation. . . . Legal duties, therefore, arise only as they are undertaken in treaties and statutes of the U.S."

See also, in this regard, the discussion of Federal recognition on p. 61ff., below; and U.S. Congress. Senate. Select Committee on Indian Affairs. Federal Programs of Assistance to American Indians. Committee Print, by Richard S. Jones, 97th Cong., 2nd Sess., Washington, U.S. Govt. Print. Off., 1982.

<sup>17/</sup> See U.S. v. Mitchell, et. al., U.S. Supreme Court, 445 U.S. 535 (1980); Joint Tribal Council of Passamaquoddy v. Morton, 528 F. 2d 370 (1st Cir. 1975); Menominee Tribe of Indians, et. al., v. United States, No. 134-67-B (Ct. Cl., April 4, 1980).

These decisions, it should be noted, involve different treaties and statutes and do not necessarily imply any impact beyond the individual situations from which they derive.

In U.S. v. Mitchell, the Supreme Court held that the General Allotment Act of 1887 cannot be read as imposing a fiduciary responsibility on the United States for management of allotted Indian forest lands, held in trust by the U.S. Government. Thus, a suit by the Quinault Tribe of Washington State to recover damages from the Government for alleged mismanagement of timber resources was denied. 18/

On the other hand, the U.S. Court of Claims held in 1980 that the Menominee Tribe in Wisconsin is "entitled to compensation for the Federal Government's mismanagement of the Menominee Forest between the years 1952 and 1961."

(Menominee Tribe v. U.S.). 19/

Finally, in the case of Passamaquoddy v. Morton, an appeals court in 1975 determined that the U.S. could not refuse to sue on behalf of the Passamaquoddy Indians' land claim under the Indian Trade and Intercourse Act (See Chap. IV of this report) on the ground that there is no trust relationship with that tribe, since the Act implies there is such a relationship (even though the tribe had never been recognized by the Federal Government). This would seem, implicitly at least, to broaden the applicability of the trust responsibility to encompass all Indian tribes, though this case applied only to the Passamaquoddies and by extension, to the Penobscot Nation, which shared in the land claim. Since the case did not go beyond the Appeals Court (the claim was settled by negotiation and Federal legislation), the applicability of the court's decision is limited to the particulars of this one case. 20/

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18/ Mitchell concerned a trust duty flowing from a statute and the amenability of the United States to suit for monetary damages.

19/ 7 Indian Law Reporter 11. June 1980.

20/ The court did not purport to define the scope of the duty under the Nonintercourse Act, i.e., whether it required the United States to bring suit. It merely held that suit could not be refused on the sole basis that there was no duty, the Passamaquoddy being an unrecognized tribe.



### III. FEDERAL POLICY VARIATIONS TOWARD INDIANS

The history of relations between the Indian and the United States may be seen as a series of various policy attitudes carried out in successive stages but sometimes overlapping. For the sake of organization, we have divided this history into the following roughly chronological categories: (1) trading; (2) treaty-making; (3) creation of an administrative structure to effect Federal policy;; (4) removal and concentration westward; (5) establishment of the reservation system; (6) allotment and citizenship; (7) reform and tribal reorganization; (8) termination; (9) self-determination; and (10) Reagan Administration initiatives.

It should be reiterated that various policies have occurred intermittently throughout the history of U.S.-Indian relations, and that no single policy has ever exclusively prevailed:

One proposition might be stressed more strongly in a given period than another, or might be thought of as policy for a time, but the existence of the other facets of Indian relations continued and were brought back into use from time to time. 21/

#### 1. Trading

One of the first Congressional acts following adoption of the Constitution placed all Indian matters relative to Indian affairs under the aegis of the

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21/ U.S. Dept. of the Interior. Bureau of Indian Affairs. A History of Indian Policy. By Lyman Tyler. Washington, U.S. Govt. Print. Off., 1973. p. 5. [Hereafter cited as Tyler, Indian Policy.]

Department of War (Aug. 7, 1789, 1 Stat. 49). Appropriation of funds for "negotiating and treating with the Indian tribes" followed soon after (Aug. 20, 1789, 1 Stat. 54); and passage of the first act "to regulate trade and intercourse with the Indian tribes" occurred in 1790 (July 22, 1790, 1 Stat. 137). (The 1790 Act, which was temporary, was renewed with modifications until 1802, when the first permanent Intercourse Act was passed (March 30, 1802, 2 Stat. 139)). 22/

Trading was an important aspect of Federal Indian policy during this early period, as manifested by the maintenance of trading houses under Government ownership from 1796 to 1822. 23/ The function of these trading houses was to supply the Indians with necessary goods at a fair price and to offer a fair price in return for Indian furs. Accordingly, the Office of Superintendent of Indian Trade was established in 1806 (April 21, 1806, 2 Stat. 402) (later abolished in 1822) (May 6, 1822, 3 Stat. 679). 24/

## 2. Treatymaking

The signing of the treaty between the United States and the Delaware Tribe in 1778 established treaties as the primary legal basis for Federal policies toward the American Indian. This practice continued until 1871, when Congress prohibited further treatymaking by means of a proviso attached to an appropriations

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22/ U.S. Department of the Interior. Federal Indian Law. Washington, U.S. Govt. Print. Off., 1958. p. 216-7.

23/ Ibid. Act of April 18, 1796, 1 Stat. 452. This act was a temporary measure reenacted over two or three years until abolition of government trading houses in 1822.

24/ After abolition of the office of Superintendent of Indian Trade, the Secretary of War created the Bureau of Indian Affairs by order of March 11, 1824 (House Doc. 146, 19th Cong., 1st Sess. p. 6).

Act (16 Stat. 566). 25/ Between 1778 and 1871, the Senate ratified 370 treaties with Indian tribes; since 1871, agreements with Indian groups have been made by Acts of Congress, Executive Orders, or Executive agreements. 26/

The end of treaty-making was indirectly occasioned by the establishment of reservations for Indian areas surrounded by white-occupied lands. Tensions inevitably were exacerbated by this practice, and during the latter half of the nineteenth century the problem became so severe that an "Indian Peace Commission" was established in 1867 to determine the reasons for hostile acts by Indians and to make treaties to remove the causes of complaint:

[T]he treaties negotiated by the Indian Peace Commission were ratified by the Senate but were not acceptable to the House of Representatives, because that body was not given an opportunity to express its views until the appropriation bills were submitted some time later. It was the negative reaction of the House to this process in reference to treaties with Indians, and to the administration of Indian affairs generally, that brought an end to such treaty-making in 1871. 27/

### 3. Administration of Indian Affairs

In 1824 the Secretary of War, John C. Calhoun, created a Bureau of Indian Affairs within the Department of War, but without Congressional authorization.

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25/ Act of March 3, 1871: "Provided, that thereafter no Indian action or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; Provided further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

26/ U.S. Congress. House of Representatives. Committee on Interior and Insular Affairs. List of Indian Treaties, A Memorandum and Accompanying Information from the Chairman of the Committee on Interior and Insular Affairs. Committee Print No. 33, 88th Cong., 2nd Sess. Washington, U.S. Govt. Print. Off., 1964. p. 1-6.

27/ Tyler, Indian Policy, p. 77-79.

This was followed in 1832 by an Act of Congress which authorized the President to appoint, with the consent of the Senate, a Commissioner of Indian Affairs who was to have ". . . the direction and management of all Indian affairs, and of all matters existing out of Indian relations." (July 9, 1832, 4 Stat. 564). The Commissioner was under the direction of the Secretary of War and subject to regulations prescribed by the President. 28/

On June 30, 1834, two important pieces of legislation were approved by Congress which together formed the basis for future government dealings with Indian tribes. One of these was the last in a series of acts regulating "trade and intercourse with the Indian tribes" (4 Stat. 729). The other provided for the organization of the Department of Indian Affairs within the Department of War (4 Stat. 735).

These statutes are still relevant today for an understanding of Indian policy, for although they were designed to implement treaties of the time, their effect was to establish future policy in numerous ways:

They incorporate provisions from earlier laws with amendments that broadly express the power the Constitution bestows on the Congress to deal with Indian tribes. They define Indian country, prescribe methods of making contracts with Indians, and empower the Commissioners to appoint traders and to regulate the kind, quantity and prices of trade goods to be sold to the Indians with whom they trade. They provide that interest in Indian lands, by lease or purchase, can be acquired only by treaty or other agreement formalized therein. Penalties are provided for trespassers on Indian holdings. 29/

In 1849 control of Indian affairs was transferred from the Department of War to the Department of the Interior (9 Stat. 586). This was important

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28/ For a complete history of the Bureau of Indian Affairs, see Schmeckebier, Lawrence F. The Office of Indian Affairs. Its History, Activities and Organization. Baltimore, the John Hopkins Press, 1927.

29/ Tyler, Indian Policy, p. 61. See also, House Report No. 474 (23rd Cong., 1st Sess., May 20, 1834), which analyzes these statutes in relation to Indian policy.

in that it signaled a transfer of responsibility for Indian affairs from military to civilian authority. 30/

4. Removal and Concentration of Indians in the West

One of the most important Acts of Congress reflecting Federal policy during this period was the Indian Removal Act of May 28, 1830 (4 Stat. 411). This established in general terms the policy (already put into practice by some treaties) of exchanging Federal lands west of the Mississippi for other lands occupied by Indian tribes in the eastern portion of the United States:

The Removal Act of 1830 was a discretionary act, authorizing the President (not directing him) to negotiate treaties with the eastern Indians, the treaties to provide the following: lands would be offered west of the Mississippi; payment would be made for lands and improvements relinquished in the east; title to the new lands would be guaranteed in perpetuity, or so long as the tribe should exist; the right of self-government would be respected . . . . 31/

Among the tribes removed to Indian Territory from their homes in the east were the southeastern tribes later known as the Five Civilized Tribes--Cherokees,

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30/ Ibid., p. 65. Later, in 1869, Congress authorized the President to organize a Board of Indian Commissioners, composed of not more than ten persons, to exercise joint control with the Secretary of the Interior in overseeing Indian affairs. (Executive Order of June 3, 1869). The Board continued in existence until it was eliminated by Executive Order in 1933. (See also Ibid., p. 77).

31/ McNickle, D'Arcy. Indian-White Relations from Discovery to 1887. Annals of the American Academy of Political and Social Science, May 1957. p. 10.

Chickasaws, Choctaws, Creeks, and Seminoles—as well as Delawares, Kickapoos, Quapaws, Winnebegos, Sacs and Foxes, Ottawas, Potawatamies, Otoes and Missouriias, Pawnees, Menominees, Miamis, Wyandots, Ioways, Yankton Sioux, Sioux and Osage. 32/

#### 5. Establishment of the Reservation System

The policy of removing Indians to the general area of "the West" gave way after 1850 to one of placing tribes on specific "reservations." This occurred as white settlers inexorably moved west and found themselves in conflict with Indians living in the western "Indian country" (established by various removal treaties and defined in the Act of 1834 (4 Stat. 729)):

The old "permanent Indian frontier" broke down before the westward march of our population. The Indian Country was organized as the territories of Kansas and Nebraska. With their organization the old policy of maintaining a large, unorganized, and "permanent" Indian Country came to an end. But a new policy was at hand. The system of establishing reservations, of relatively small geographical extent, in the midst of the white man's country, had been tried in California. From there it spread ultimately over the entire country. 33/

Or, as Lyman Tyler notes:

In the colonies that became the original 13 States of the United States, it had at first been assumed that the Indians would gradually be absorbed into the general population. When this did not occur, lands were set aside within the various colonies for the exclusive use of the eastern tribes.

The idea of a separate "Indian Country" was first promulgated after the French and Indian War. Removal to the western lands was suggested by Thomas Jefferson in the first decade of the 19th century, and became policy after 1830. The new reservation policy after 1850 would again see the Indians placed on isolated lands entirely surrounded by other lands controlled by private landholders,

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32/ Federal Indian Law. p. 196-9.

33/ Hoopes, A. W. Indian Affairs and Their Administration. Philadelphia, 1932. p. 1. Quoted in Tyler, p. 70.

by the States and territories, or by the United States. Within these reservations, legally, the tribes continued to be self-governing bodies. 34/

## 6. Allotment and Citizenship

An important aspect of Federal Indian policy during this period was the policy of "assimilation," whereby the government attempted to minimize tribal life and encourage the Indian to pursue farming as a means of livelihood. The Dawes Act, or General Allotment Act of 1887 (24 Stat. 388), authorized the individual allotment of reservation lands to tribal members and conveyed citizenship upon the allottee upon termination of the trust status of the land or to any Indian who voluntarily established residence apart from his tribe and adopted "the habits of civilized life." The rationale behind this policy was that by encouraging individual Indians to farm, instead of following the old communal ways of the tribe, they would more easily assimilate into American society.

According to provisions of the General Allotment Act, the head of the household was to be allotted 80 acres of agricultural land or 160 acres of grazing land. A single person over 18 or an orphan under 18 was to receive half of this amount. The Federal Government was to retain title to allotted lands until the a trust period of 25 years had expired, or longer, in the President's discretion. After that period, the allottee was to receive a patent in fee, could dispose of the land as he deemed desirable, and

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34/ Tyler, Indian Policy, p. 71. In 1867 the Indian Peace Commission (see p. 17 above) was created by Congress (15 Stat. 17) to investigate the cause of wide-ranging hostilities with Indians in the Great Plains and to arrange for peace. The resulting treaties were the last ones made by the United States with Indian tribes. In 1869 President Grant adopted his so-called "Peace Policy" by delegating the nomination of Indian agents to religious organizations concerned with mission work among Indians.

was to become subject to the laws of the State or territory in which he lived. In addition, the Act authorized the Secretary of the Interior to negotiate with tribes for purchase by the United States of remaining portions of reservations not allotted, to be opened for non-Indian settlement "on such terms as Congress shall provide." The result of this policy was a drastic reduction in Indian-held lands; by 1933, 91 million acres or two-thirds of the Indian land base of 1887 had been lost. <sup>35/</sup> (The Dawes Act did not apply to some tribes, but most of these were later brought under its provisions or those of similar statutes.)

During the late nineteenth and early twentieth centuries allotment and assimilation continued to be the basic government policy toward the Indian. Thus, the so-called "Dawes Commission" was appointed by the President in conformity with the Act of March 3, 1893 (27 Stat. 612). This, and the Curtis Act of 1898 (30 Stat. 495) extended the allotment policy to the Five Civilized Tribes in Indian Territory. <sup>36/</sup> The Curtis Act also provided for the incorporation of towns, the abolition of tribal courts and the enlargement of the U.S. courts in the Indian Territory. In 1903 Congress removed restrictions from much of the allotted lands held by the Five Civilized Tribes, thus opening the door to alienation of Indian land. This legislation effectively curtailed the tribal systems of these five tribes--Cherokee, Choctaw,

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<sup>35/</sup> Haas, T.H. The Legal Aspects of Indian Affairs from 1887 to 1957. Annals of the American Academy of Social and Political Science, May 1957. p. 13-15. [Hereafter cited as Haas, Legal Aspects.]

See also Otis, D.S. History of the Allotment Policy. In U.S. Congress. House of Representatives. Committee on Indian Affairs. Hearings on H.R. 7902. 73rd Cong., 2nd Sess. Washington, U.S. Govt. Print. Off., 1934. Passim.

<sup>36/</sup> The Dawes Commission was abolished by the Act of March 3, 1905 (33 Stat. 1060), and its work placed under the direction of the Secretary of the Interior. The Chairman of the defunct Commission was appointed Commissioner to the Five Civilized Tribes. The position of Commissioner was in turn abolished by the Act of August 1, 1914 (38 Stat. 598) and replaced by a Superintendent for the Five Civilized Tribes. This positions existed until 1920.



Chickasaw, Creek and Seminole. 37/

In 1906 Congress passed the Burke Act (34 Stat. 182) which amended the General Allotment Act by giving the Secretary of the Interior the discretionary power to shorten the 25-year trust period on allotted lands upon declaring the competency of the owner. 38/ This likewise was a continuation of the policy of assimilation, by which Indian tribal life was weakened and Indian lands alienated from Indian ownership.

In 1924 Congress passed the Citizenship Act (43 Stat. 252), which granted citizenship to non-citizen Indians born within the territorial limits of the United States. This may be seen as both a continuation of the assimilation policy and at least partial abandonment of that policy. Tyler states that "this act sought to merge the Indian people into the general citizenship of the country." 39/ On the other hand, the Citizenship Act signalled discontinuation of the Dawes Act requirement that an Indian must leave the tribe and adopt the "habits of civilized life" as one means of gaining citizenship. 40/

#### 7. Reform: Tribal Reorganization; Abandonment of Allotment and Assimilation

Following the Senate reorganization in 1921, though not necessarily directly related, ensued a period of Indian policy reform culminating in 1928

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37/ Tyler, Indian Policy, p. 97.

38/ Ibid., p. 104. Tyler states that total Indian landholdings in the United States were reduced from 155,632,312 acres in 1881 to 77,865,373 acres in 1900 (p. 97). The Bureau of Indian Affairs indicates that in 1981 there were 52,021,911.92 acres of Indian trust lands under B.I.A. jurisdiction.

39/ Ibid., p. 110.

40/ Since two-thirds of the Indians were already citizens when this legislation was enacted, it is apparent that most were not affected by it

in the publication of two important documents: the so-called Meriam Report, submitted to the Secretary of the Interior in 1928 and conducted by the Institute for Government Research; 41/ and the so-called Preston-Engle Irrigation Report, also completed in 1928. 42/ In addition, a resolution was passed on Feb. 2, 1928 (S. Res. 77) providing for an exhaustive survey of conditions prevalent among Indians, to be conducted by the Senate Committee on Indian Affairs. 43/

Theodore Haas has summarized the impact of the Meriam Report on the reform movement of the 1930's:

The report . . . helped to inaugurate a new era in Indian administration. On December 4, 1929, President Herbert Hoover took steps to implement the report by stating in his first message to Congress that the government had an obligation to raise the standard of living of Indians, to provide adequately for their health and education and to advance their opportunity for profitable employment. There soon followed a substantial increase in appropriations for the Indian Bureau. 44/

This in turn led to passage of the Indian Reorganization Act in 1934 (48 Stat. 984), known as the Wheeler-Howard Act, and related legislation, such as the Johnson-Malley Act (1934) (48 Stat. 596), the Oklahoma Indian Welfare Act (1936) (49 Stat. 1967), and the Alaska Reorganization Act (1936) (49 Stat. 1250).

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41/ Meriam, Lewis and Associates. The Problem of Indian Administration. Baltimore, Johns Hopkins Press, 1928.

42/ U.S. Congress. Senate. Committee on Indian Affairs. Review of Conditions of the Indians in the United States. Hearings on S. Res. 78 and 308. 71st Cong., 2nd Sess. Washington, U.S. Govt. Print. Off., 1930.

43/ The first hearings were held by a subcommittee of the Senate Committee on Indian Affairs in Yakima, Washington, and Klamath Falls, Oregon, on November 12, 13, and 16, 1928. The continued until August 1943 and were published in 41 parts. A supplemental report was made on May 2, 1944. (U.S. Congress. Senate. Committee on Indian Affairs. Survey of Conditions of the Indian in the United States. Hearings, 70th Cong. to 78th Cong. Washington, U.S. Govt. Print. Off., 1928-1943; and U.S. Congress. Senate. Committee on Indian Affairs. Survey of Conditions Among Indians in the United States. Supplemental Report No. 210, 78th Cong., 2nd Sess., May 2, 1944. Washington, U.S. Govt. Print. Off., 1944).

44/ Haas, Legal Aspects, p. 19.

The Indian Reorganization Act (IRA) laid the foundation of a new policy toward Indians, much of which is still in effect. Perhaps most significantly, it officially rendered the General Allotment Act obsolete by prohibiting further allotment of Indian lands to individuals, while providing the means of consolidating reservation life and developing tribal government. To achieve this end, tribes were given the option to establish tribal governments under written constitutions, to incorporate by means of charters for the purpose of conducting business, or both.

In addition, the IRA extended indefinitely existing trust periods and restrictions on alienability of Indian lands, thereby halting the termination after a period of years of the trust and restricted status of such lands. The Act sought to augment the tribal land base by a variety of provisions, including authorization of an annual appropriation of two million dollars for acquisition of lands by the Secretary of the Interior for tribes; directed the Secretary of Interior to issue conservation regulations to prevent erosion, deforestation and overgrazing on Indian lands; authorized establishment of a revolving credit fund; authorized annual appropriations not to exceed \$250,000 for education loans; and provided that qualified Indians be accorded employment preference in the Bureau of Indian Affairs. 45/

The Johnson-O'Mally Act (as amended 1936) was important in that it provided for Federal-State cooperation in Indian affairs (education in particular) by means of Federal contracts with State governments, or political subdivisions thereof, for the operation of Federal Indian programs, while the Oklahoma Indian Welfare Act led to the reorganization of many Oklahoma tribes and the restoration

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45/ Haas, Legal Aspects. p. 20-2. A related law, the Act of August 27, 1935 (49 Stat. 891), established the Indian Arts and Crafts Board, composed of five Commissioners appointed by the Secretary of the Interior, the main function of which was to promote the economic welfare of Indians by the development of native arts and crafts.

of their tribal identity (Oklahoma was not covered by much of the IRA). The Alaska Reorganization Act extended to Alaska certain provisions of the IRA which the IRA had not initially made applicable in the territory.

Another major policy milestone was passage in 1946 of the Indian Claims Commission Act (60 Stat. 1049), which established a special commission before which Indian tribes who felt that they had received unfair treatment in past land transactions with the Federal Government could file claims for monetary compensation. 45A/ It was originally anticipated that all such claims could be processed within ten years, but the life of the Commission repeatedly had to be extended owing to the volume and magnitude of the claims. The Commission expired in 1978 and pending cases were transferred to the U.S. Court of Claims (by provision of 90 Stat. 1990).

#### 8. Termination

In 1944 the House adopted a resolution authorizing its own investigation of Indian affairs. 46/ The findings of this study, together with those of the Senate investigation begun in 1928 and concluded in 1944, were basically an expression of dissatisfaction with the Indian Reorganization Act and the Bureau of Indian Affairs and of sentiment against prolongation of the "special status" of Indians. 47/ Following these reports, moreover, the Hoover Commission

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45A/ The Commission was authorized to hear only those claims filed before August 13, 1951, and having accrued prior to enactment of the Indian Claims Commission Act. Claims arising after the date of enactment of this Act were placed under jurisdiction of the Court of Claims.

46/ U.S. Congress. House of Representatives. Committee on Indian Affairs. A Bill to Authorize and Direct and Conduct an Investigation to Determine Whether the Changed Status of the Indian Requires a Revision of the Laws and Regulations Affecting the American Indian: Hearings in the Field Pursuant to H. Res. 166. Washington, U.S. Govt. Print. Off., 1947.

47/ See Tyler, Indian Policy, p. 141-2.

stated that "a program for the Indian people must include progressive measures for their complete integration into the mass of the population." 48/

Thus, it is not surprising that in 1952, under authority of House Res. 698, the 92nd Congress requested from the Commissioner of Indian Affairs a complete report on the manner in which the Bureau was determining which tribes, bands and groups of Indians were qualified to manage their own affairs without further supervision of the Federal Government. The response to this and related questions appeared in House Report No. 2503 (1953), 49/ which was followed by House Report No. 2680, in 1954, containing the results of a detailed questionnaire on the subject. 50/

On August 1, 1953, Congress officially stated that it was the intent of Congress to free from "Federal supervision and control" specified Indian tribes in accord with the policy of making, "as rapidly as possible," Indians "within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." (H. Con. Res. 108) (83rd Congress, 1st Session). This became known as the policy of "termination,"

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48/ U.S. Commission on Organization of the Executive Branch of the Government Social Security, Education and Indian Affairs. Washington, U.S. Govt. Print. Off., 1949. p. 65.

49/ U.S. Congress. House of Representatives. Report with Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of the Indian Affairs. Report No. 2503, 83rd Cong., 2nd Sess., Dec. 15, 1952. Washington, U.S. Govt. Print. Off., 1953.

50/ U.S. Congress. House of Representatives. Report with Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs. Report No. 2680, 83rd Cong., 2nd Sess., Sept. 20, 1954. Washington, U.S. Govt. Print. Off., 1954.

the ultimate conclusion of which, many thought, meant the abolition of special Federal services to all Indians and the dissolution of the tribes' federally recognized status (see p. 61ff, below). In actuality, about 20 termination statutes affecting 50 Indian groups, tribes or bands were enacted between 1954 and 1964. 51/

Directly related to the policy of termination was Public Law 83-280, approved August 15, 1953 (67 Stat. 588). This Act delegated to five States 52/ jurisdiction over most crimes and many civil matters and gave others the option of assuming such jurisdiction over Federal Indian reservations within their borders. (Prior to that time, State jurisdiction over Federal reservations had been limited to that conferred by special Acts of Congress, or judicially recognized (regarding crimes between non-Indians). Otherwise, jurisdiction over civil and criminal matters between Indians on Federal reservations had rested with either the tribal governments or the Federal Government.)

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51/ Also in this connection, transfer of Indian health services in 1954 from the BIA to the Department of Health, Education and Welfare (68 Stat. 674) might be interpreted as part of a general move at that time to disseminate BIA services.

See U.S. Congress. Senate. Committee on Interior and Insular Affairs. Subcommittee on Indian Affairs. Transfer of Indian Hospitals and Health Facilities to Public Health Services. Hearings on H.R. 303, 63rd Cong., 2nd Sess., May 28 and 29, 1954. Washington, U.S. Govt. Print. off., 1954.

52/ California; Minnesota (except Red Lake Reservation); Nebraska; Oregon (except Warm Springs Reservation); Wisconsin (except Menominee Reservation). P.L. 280 was amended in 1954 to bring the Menominee Tribe within the civil and criminal jurisdiction of Wisconsin (68 Stat. 795) and in 1958 to give the territory of Alaska civil and criminal jurisdiction over Indian tribes within its boundaries (72 Stat. 545). (In 1970, however, criminal jurisdiction was returned to the Metlakatla Indian Community in Alaska (84 Stat. 1358)).

There was no requirement that the consent of the Indian tribes affected be obtained.

The impetus toward termination ceased in the 1960's in the face of strong resistance from Indian tribes and organizations. No more termination statutes were enacted after 1964, and P.L. 280 was significantly amended by the Indian Civil Rights Act of 1968 so as to require the consent of affected Indian tribes to a State's assuming civil and/or criminal jurisdiction. (In addition, any State having such jurisdiction was permitted to retrocede all or part of it to the United States. (82 Stat. 79, Title IV)). 52A/

#### 9. Self Determination

"Self-determination without termination" was declared as Federal policy by President Nixon in 1970, 53/ and much Indian affairs legislation enacted by Congress thereafter may be seen in this context. Self-determination was conceived as the keystone of a new Federal policy aimed at augmenting the concept of tribal self-government while reiterating the special trust relationship between the Federal Government and Indian tribes.

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52A/ In addition to amending Public Law 280, the Indian Civil Rights Act (25 U.S.C. 1301-1341) made tribal governments under Federal jurisdiction subject to certain provisions of the Bill of Rights which guarantee individual rights. (See Federal Indian Law, 1982 ed., p. 202ff. and p. 666ff.)

53/ U.S. Congress. House of Representatives. Message from the President of the United States Transmitting Recommendations for Indian Policy. Document No. 91-363. 91st Cong., 2nd Sess., July 8, 1970. Washington, U.S. Govt. Print. Off., 1970.

Also, in 1973 Congress enacted the Menominee Restoration Act (87 Stat. 770), which repealed the Menominee Termination Act of 1954 and reinstated all rights and privileges of the Menominee Tribe or its members under Federal treaty, statute or otherwise. This was, in effect, an implicit repudiation of termination as National policy. Subsequently, legislation to grant recognition to other Indian tribes whose status was terminated has been enacted (See p. 64, below).

Aspects of the Alaska Native Claims Settlement Act of 1971 (85 Stat. 688) may be seen as related to the goal of self-determination, inasmuch as this legislation, which settled the aboriginal land claims of Alaska's Native population, also organized the Natives into corporate entities for the purpose of conducting business, thereby giving them increased opportunities to manage their own affairs. (This Act created no new trust responsibility, however.)

The concept of self-determination was given explicit Congressional expression and direction by passage in 1975 of the Indian Self-Determination and Education Assistance Act (January 4, 1975, 88 Stat. 2203). This statute authorizes the Secretary of the Interior and the Secretary of Health and Human Services (regarding the Indian Health Service, under its aegis) to contract with Indian tribal organizations as defined under the Act for tribal operation and administration of specified federally funded programs administered by these agencies.

Passage by the 93rd Congress of the Indian Financing Act (88 Stat. 77) also embodies the concept of Indian self-determination. This Act seeks to provide Indians with the opportunity for economic self-sufficiency based on the full utilization of Indian resources. Included in its provisions are expansion of the Indian Revolving Loan Fund, creation of an Indian Loan Guaranty and Insurance Fund, and establishment within the Department of the Interior of an Indian Business Development Program. The Act authorizes the Secretary of the Interior to guarantee up to 90 percent of the unpaid principal and interest due on any loan made to any organization of Indians or to individual Indians, or, in lieu of such guaranty, to insure such loans. (The 98th Congress amended the Indian Financing Act to raise the ceiling placed on Indian business development grants to individual Indians and Indian tribes, and to raise the ceiling on guaranteed loans made to individual Indians under provisions of the Act



(P.L. 98-449, 98 Stat. 1725)).

In addition, the 93rd Congress enacted the Indian Judgment Funds Distribution Act (87 Stat. 466), which permits the distribution of funds awarded by the Indian Claims Commission without the necessity for prior Congressional approval of the distribution plan for each separate award.

Finally, the 93rd Congress enacted legislation (88 Stat. 1910) establishing the American Indian Policy Review Commission, the purpose of which was to reassess the direction of Federal Indian policy and to provide legislative recommendations thereon. Congress mandated the Commission to conduct a "comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." The Commission reported its findings and recommendations to Congress on May 17, 1977, and expired on June 30, 1977.

(See Chaps. I and II of this report.) 54/

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54/ The 94th Congress saw passage of the Indian Submarginal Lands Transfer Act (89 Stat. 577), which conveyed specified submarginal lands in use by Indian tribes to tribal ownership; and the Indian Health Care Improvement Act (90 Stat. 1400), aimed at rectifying deficiencies in Indian health and improving the quality of Indian health care.

Among the important legislation of the 95th Congress was the Rhode Island Indian Claims Settlement Act (92 Stat. 813), embodying the first settlement of so-called "Non-Intercourse Act" land claims on the east coast, and P.L. 95-328 (92 Stat. 409), comprising ratification of a negotiated settlement of the water rights claims of the Ak-Chin Indian Community in Arizona (see Chap. IV of this report).

The 96th Congress enacted H.R. 39, the Alaska National Interest Lands Conservation Act (94 Stat. 2371), after intensive consideration of the measure in both the 95th and 96th Congresses. This legislation is of importance to Alaska Natives, especially Title VIII, which provides specified means of preserving Alaska Native subsistence uses on public lands; Title IX, which implements specific aspects of the Alaska Native Claims Settlement Act (85 Stat. 688) (ANCSA); Title XIII, which includes authority for the Secretary of the

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# 10. Reagan Administration Initiatives

In January 1983, the Reagan Administration set forth a detailed policy statement regarding Indian affairs in which the twin goals of tribal economic self-efficiency and tribal governmental self-reliance were emphasized.

The Indian Policy Statement, released on January 14, 1983, emphasized the Administration's commitment to encourage and strengthen tribal government as called for by President Nixon in 1970 and by Congress in the Indian Self-Determination and Education Assistance Act of 1975. In this statement, the Administration called for development of "healthy reservation economies, and the strengthening of tribal governments."

To achieve the former goal, the Administration indicated it had taken the following steps:

- . Establishment of Presidential Advisory Committee on Indian Reservation Economies to identify obstacles to economic growth in the public and private sector at all levels; examine and recommend changes in Federal laws, regulations and procedures to remove such obstacles; identify actions States, local and tribal governments could take to rectify identified problems; and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies.

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(continued) Interior to exchange lands or interests in lands with specified Native groups and corporations as defined in ANCSA; and Title XIV, which contains specified amendments to ANSCA.

Also enacted by the 96th Congress was P.L. 96-420, the Maine Indian Land Claims Settlement Act (94 Stat. 1785), the largest settlement to date of claims under the Non-Intercourse Act (see Chap. IV of this report); and P.L. 96-565 (94 Stat. 3321), which contains a title establishing a Native Hawaiians Study Commission to conduct a study of the culture, needs and concerns of Native Hawaiians.

Title II of Public Law 97-459, the Indian Land Consolidation Act, authorized (with consent of the Secretary of the Interior) tribes to exchange or sell tribal lands and to purchase, under specified conditions, restricted land within their jurisdiction, in order to consolidate tribal land bases and to eliminate undivided fractional interests in Indian trust or restricted land.

- . Pledging to work with the tribes to implement recently passed legislation allowing tribes to enter into joint venture contracts for the development of natural resources on reservations. (P.L. 97-382).

- . Requesting funds in the FY83 budget to provide seed money to attract private funding for economic development ventures on reservations.

- . Initiation of legislation which Congress passed to provide \$375 million for building new roads on Indian reservations. (P.L. 97-424).

The Administration indicated that it hoped to strengthen tribal governments through the following actions:

- . Signing of H.R. 5470, the Indian Tribal Governmental Tax Status Act (P.L. 97-473), which provides tribes with essentially the same treatment under Federal tax laws as applies to States, for certain tax purposes.

- . Encouragement for tribes to assume responsibility for services such as the enforcement of tribal law, developing and managing tribal resources, providing health and social services, and education.

- . Designation of the White House Office of Intergovernmental Affairs as liaison for tribes.

- . Requesting that Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations to include a representative of Indian tribal governments.

- . Requesting that Congress repudiate House Concurrent Resolution 108 of the 83rd Congress which called for termination of the Federal-tribal relationship.

- . Support for direct funding to Indian tribes under Title XX social services block grants to States.

The Presidential Commission on Reservation Economies issued its report in December 1984, stressing the need for development of reservation economies through private sector investment. The report made numerous recommendations

for improving Indian economic development and for reorganization of Federal Government support systems, as well as for modernization of tribal governments.

#### IV. SELECTED CURRENT POLICY ISSUES

##### Criminal Jurisdiction and Law Enforcement in Indian Country

Law enforcement jurisdiction on Federal Indian reservations is one of the most intricate of Indian affairs issues. The complexity of the matter results primarily from a confusing tangle of jurisdictions--Federal, State and tribal--which govern law enforcement in Indian country:

Law enforcement in Indian Country [see 18 U.S.C. 1151] [ 55/] is a complicated matter. On most Indian reservations federal, state, and tribal governments all have a certain amount of authority to prosecute and try criminal offenses. This jurisdictional maze results from a combination of congressional enactment, judge-made law, and the principle of inherent tribal sovereignty. Thus a determination of who has authority to try a particular offense depends upon a multitude of factors: the magnitude of the crime, whether there are any statutes ceding jurisdiction over certain portions of Indian Country from one sovereign to another.

Because of this divisive jurisdictional schema, law enforcement in Indian Country is not always the most efficient. Federal and state prosecutors and courts are often many miles from a reservation, and, as a result, crimes within their jurisdictions, especially misdemeanors, sometimes go unprosecuted. Tribal governments often

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<sup>55/</sup> "Except as otherwise provided . . . the term 'Indian country,' as used in this chapter, means (a) all land within the limits 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."

find themselves without the necessary resources to punish the crimes over which they have jurisdiction. 56/

The basic statutory authority governing crimes committed in Indian country is 18 U.S.C. 1152:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses . . . shall extend to 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.

This statute thus provides for Federal jurisdiction over crimes committed by Indians against non-Indians, generally with the exception of offenses which have been punished by the tribe (the Indian Civil Rights Act (25 U.S.C. 1302(7)) limits punishment by tribes to six months' imprisonment or a \$500 fine or both; major crimes committed by Indians as defined by 18 U.S.C. 1153 are subject to Federal jurisdiction) (See next paragraph below)). Offenses committed by non-Indians against Indians lie within Federal jurisdiction.

Regarding crimes committed by Indians against Indians, this statute implies tribal jurisdiction except for those offenses enumerated in the Major Crimes Act (18 U.S.C. 1153), which fall under Federal jurisdiction. 57/

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56/ Vollmann, Tim. Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict. University of Kansas Law Review, Spring 1974. p. 387.

57/ 18 U.S.C. 1153 provides that "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 kill, 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."

Public Law 98-473 amended 18 U.S.C. 1153 to include, in addition, the crimes of maiming and sodomy.

See also the discussion of U.S. v. Wheeler, in Chap. I of this report.

A notable exception to 18 U.S.C. 1152 is "Public Law 280":

In 1953 Congress enacted Public Law 83-280 [Act of August 15, 1953, 67 Stat. 588, codified as amended at 18 U.S.C. 1162; 25 U.S.C. 1321-1326; 28 U.S.C. 1360], a statute delegating to five, later six, states jurisdiction over most crimes and many civil matters throughout most of the Indian country within their borders. The Act offered any other state the option of accepting the same jurisdiction. . . . An amendment to Public Law 280 in 1968 made subsequent assumptions of jurisdiction subject to Indian consent. . . . The 1968 amendment also expressly allows partial assumptions by states of jurisdiction limited to some geographic or subject areas and permits states to retrocede to the federal government all or part of the jurisdiction they had previously assumed under Public Law 280. 58/

States, therefore, are precluded by 18 U.S.C. 1152 from exercising jurisdiction over crimes committed in Indian country unless they have been granted jurisdiction by Public Law 280 or other Federal statute. 59/

Nevertheless, the Supreme Court ruled in the 19th century that offenses committed within Indian country by non-Indians against non-Indians are the jurisdictional concern of the State within which the offense is committed (U.S. v. McBratney, 104 U.S. 621 (1882)). This ruling "has been consistently followed in other cases involving crimes by non-Indians against personal victims who are also non-Indian." 60/

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58/ Felix S. Cohen's Handbook of Federal Indian Law. 1982 Edition. Charlottesville, Va., Michie, Bobbs-Merrill, 1982. p. 362-363. See also U.S. Congress. Senate. Committee on Interior and Insular Affairs. Background Report on Public Law 280. Committee Print. 94th Congress, 1st sess. Washington, U.S. Govt. Print. Off., 1975. 49 p.

59/ For a discussion of the application of the Assimilative Crimes Act (18 U.S.C. 13) to Indian country, see Felix Cohen's Handbook, 1982 Edition, p. 290-295.

60/ Felix Cohen's Handbook, 1982 Edition, p. 298. This volume contains a thorough discussion of jurisdiction in Indian Country, at p. 281-380.

Problems arose when, prior to 1978, certain Indian tribes began to assert a degree of jurisdiction over non-Indians for criminal offenses committed within reservation boundaries. This led to litigation, and the Supreme Court held in 1978 that Indian tribes do not possess inherent power to try and punish non-Indians for crimes committed within Indian reservations (Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978)).

The Court viewed Indian tribal criminal jurisdiction over non-Indians as inconsistent with the dependent status of Indian tribes, entities which are subject to the overriding sovereignty of the United States. Thus, tribes have no power to try and punish non-Indian criminal offenders absent an affirmative delegation of such power by Congress.

The result has been a perceived vacuum in law enforcement. Even though Federal jurisdiction prevails in matters concerning crimes committed by non-Indians against Indians in Indian country, the fact is that Federal law enforcement personnel are not always available in sufficient numbers to police infractions, especially misdemeanors. Solutions are being sought to correct this perceived deficiency.

Some Members of Congress have sought in various ways to ameliorate law enforcement problems which have resulted from the Oliphant decision. For example, there have been proposals to authorize States and Indian tribes to enter into mutual agreements and compacts with respect to the application and enforcement of civil law, criminal law, or both, including the allocation of governmental responsibility with respect to law enforcement.

Alternatively there have been proposals to establish a special magistrate with jurisdiction over Federal offenses within Indian country and authorize tribal and local police officers to enforce Federal laws within their respective jurisdictions.



Indian Treaty Fishing Rights

Important to both Indians and non-Indians is the volatile issue of treaty fishing rights. In 1979, the U.S. Supreme Court agreed in large part with the basic provisions of an earlier District Court ruling (the so-called "Boldt Decision"). In brief, the Supreme Court held that certain Indian tribes in Washington State were accorded by treaties signed in the 1850's the right to the opportunity to take up to one half the salmon and steelhead trout passing their traditional off-reservation fishing grounds. (Washington v. Fishing Vessel Association, 443 U.S. 658 (1979)).

This has resulted in a complex implementation plan involving State, tribes, and the Federal Government. Legislation regarding conservation and enhancement of affected runs was enacted by the 96th Congress (P.L. 96-561), and a recent court decision held "that hatchery fish are included in the fish that Indians have the right to take 'in common with' non-Indian fishermen in Washington," and that the State and the tribes have reciprocal obligations to preserve and enhance the fishery. (U.S. v. Washington, 694 F.2d 1374, 1375, 1389 (9th Cir. 1983)).

Indian fishing rights are an issue of concern in other areas as well, notably in California, Oregon, and the Great Lakes region.

As noted above, the decision in Washington applied to Indian treaty fishing rights in Washington State. Prior to Washington, a district court decision affecting specified Columbia River Tribes resulted in a similar decision in the State of Oregon: 61/

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61/ Sohappy v. Smith, 384 F. Supp. 312 (W.D. Wash. (1974), affirmed, 520 F. 2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976); 302 F. Supp. 899 (D. Cr. 1969), affirmed, 529 F.2d 570 (9th Cir. 1976)). See also discussion in "Sohappy v. Smith: Eight Years of Litigation over Indian Fishing Rights," 56 Oregon Law Review 680 (1977).

The district court in Sohappy found that the State does have limited authority to regulate Indian fishing . . . . The State may use its power to regulate treaty fishing only to the extent necessary to prevent the exercise of the fishing right in a manner that will imperil the continued existence of the fishery resource. Significantly, the district court also found that the Columbia River tribes are entitled to a "fair share" of the fish produced in the Columbia River system. The reference to the Indians [''] "fair share" of the harvestable salmon and steelhead is the earliest reference to a traditional quantification of the treaty fishing right. 62/

Extensive litigation followed this decision and in 1974 the court held that the Indians were entitled to the opportunity to take 50 percent of the harvestable fish destined to reach their usual and accustomed fishing grounds. (Order Desolving Temporary Restraining Order, May 8, 1974.) In 1977 the tribes and the State adopted a management plan which established allocations to treaty and non-treaty users for each harvestable fish run destined to return to spawning grounds on the Columbia River. Upon joint motion of all parties, the plan was adopted by the district court as a consent decree (CR Order, February 28, 1977). 63/ On September 1, 1983, the district court ordered relevant affected parties to negotiate to formulate a new plan. The deadline for compliance with this order was May 1, 1984. (In 1982 the Umatilla and Yakima tribes withdrew from the management plan). 64/

Indian fishing rights in California have been concentrated on the Klamath River system in northern California. These are not rights derived from treaties, but rather are pursuant to establishment of the Hoopa Valley Reservation, by

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62/ U.S. Congress. House of Representatives. Committee on Merchant Marine and Fisheries. Salmon and Steelhead Management and Enhancement. House Report No. 96-1243, Part I, to accompany H.R. 6959, 96th Cong., 2nd Sess., Aug. 21, 1980. Washington, U.S. Govt. Print. Off., 1980. p. 27-8.

63/ Ibid. See also U.S. and Confederated Tribes, et.al. v. Oregon and Washington, 718 F.2d 299 (9th Cir. 1983).

64/ Court cases dealing with allocation include U.S. v. Oregon, 657 F.2d 1009 (9th Cir. 1982); and U.S. v. Oregon, 718 F.2d (9th Cir. 1983).

Act of Congress in 1864 (13 Stat. 40). In 1975 the State of California Court of Appeals affirmed a lower court decision that the State cannot regulate Indian fishing on the Hoopa Valley Reservation since the Indians' fishing rights are derived from Congress. (Arnett v. Five Gill Nets, 48 Cal. App. 3d 454 (1975)). This and subsequent decisions have not resolved all legal uncertainties, however. 65/

Indian fishing rights in Michigan are of perhaps most pressing concern at the present time, the matter having yet to be resolved, and affecting millions of people. A 1979 district court opinion held that the Chippewa and Ottawa tribes, under treaties entered into with the United States in 1836 and 1855, have "unique exclusive off-reservation rights to engage in gill-net fishing in waters of Lake Michigan despite Michigan laws to the contrary," and that such Indian fishing rights are free of any regulation by the State of Michigan generally applicable to other citizens (U.S. v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979)). On May 28, 1980, the Sixth Circuit Court of Appeals stayed this decision, pending final disposition of the case on appeal, and the case was remanded to the district court for a determination of whether State regulation of off-reservation Indian fishing was preempted

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65/ Ibid., p. 29-30. In two more recent cases, People v. McCovey, No. A012716 (Cal. Ct. App., July 21, 1983), 10 ILR 5093, and Frank v. California, No. A018345 (Cal. Ct. App., July 21, 1983), 10 ILR 5096, the California Court of Appeals rejected arguments that State prosecutions of Yurok Indian fishermen for violations of State laws (1) unlawfully interfered with federally protected rights; (2) were precluded by Federal preemption of the State's power to regulate Indian fishery rights through promulgation of Interior Department regulations; and (3) were impermissibly discriminatory against Indians and Indian commerce. McCovey distinguished Arnett on the ground that Arnett dealt with subsistence rather than commercial fishing, and noted further that pertinent Federal regulations prohibited commercial fishing on the lower Klamath River at the time of the defendant's arrest. Frank relied upon the McCovey reasoning.

by Federal regulations issued by the Department of the Interior on April 28, 1980. 66/ On July 16, 1980, the Court of Appeals placed affected Indian treaty fishing under the Interior Department regulations. 67/

Since these regulations were allowed to expire on May 11, 1981, however, the Court subsequently enunciated a standard to determine when it is permissible for State law to regulate the treaty fishing in question and retained the Interior Department regulations as an interim measure, subject to modification by the district court. (653 F.2d 277 [6th Cir. 1981], cert. denied, 454 U.S. 1124.) 68/ The case still awaits final resolution.

#### Economic Development

A priority of the Reagan Administration's Indian policy, first articulated in January 1983, is economic development, with an emphasis on strengthening reservation economies through the participation of the private sector--both Indian and non-Indian--in reservation economic growth, and through reducing tribal dependence on Federal grant programs. Buttressing this view, the Presidential Commission on Reservation Economies issued its report in December 1984, stressing the need for stimulating Indian business development through investment by the private sector. The report made numerous recommendations for achieving this goal, as well as for the reorganization of Federal Government support systems and the modernization of tribal governments.

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66/ Ibid., p. 31.

67/ 712 F.2d 243 (1983).

68/ See U.S. v. Michigan, 712 F.2d 243 (1983). For a full discussion of this issue see also U.S. Library of Congress. Congressional Research Service. Indian Treaty Fishing Rights: Resource Issues, Legal Developments, Legislative Initiatives. CRS Rept. No. 81-204 GOV. Washington, 1981.

Congressional activity regarding Indian economic development has focused on a number of measures in recent years. Thus, the Administration supported enactment of P.L. 97-473, the Indian Tribal Governmental Tax Status Act, which provides tribes with similar tax treatment under Federal tax laws as applies to State governments with regard to revenue raising mechanisms, including the issuance of bonds.

The 98th Congress enacted P.L. 98-449, amending the Indian Financing Act of 1974, which assists the goal of infusing private sector capital into reservation economies by, among other things, raising the ceiling placed on Indian business development grants to individual Indians and Indian tribes, and by raising the ceiling on guaranteed loans made to individual Indians under provisions of the act.

Also, the fiscal year 1984 Defense Appropriations Act (P.L. 98-212) (as well as P.L. 98-473, making continuing appropriations for fiscal year 1985) contains a provision directing that "so far as may be practicable, Indian labor shall be employed, and purchase of the products of Indian industry may be made in open market in the discretion of the Secretary of Defense." This authority, if utilized, is seen by some as potentially helping to stimulate the development of Indian business enterprise.

Finally, it is estimated that some 80 or more Indian tribes (within the 43 States which allow gambling activity) are currently conducting or will soon begin to conduct bingo activities on their reservations:

Of these 80 activities, some 20-25 are considered "high stakes" operations with unlimited jackpots and which gross \$100,000 to \$1 million plus in revenues. Of these, approximately half are 100 percent tribally-owned and operated. The remaining operations are financed and managed by outside management firms." 69/

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69/ U.S. Congress. House of Representatives. Committee on Interior and Insular Affairs. Indian Gambling Control Act. Hearing on H.R. 4566 to establish Federal Standards and Regulations for the Conduct of Gambling Activities within Indian Country, and for Other Purposes. June 19, 1984. 98th Cong., 2nd sess. Washington, D.C., U.S. Govt. Print. Off. p. 62.

Indians tend to see these activities as a source of revenue, consistent with the private enterprise motif, but States object to the fact that the activity usually involves non-Indian customers, are frequently inconsistent with State regulations, and present a variety of law enforcement problems as a result.

This situation derives primarily from a number of court decisions, notably that of the 5th Circuit Court of Appeals, which in 1982 upheld a ruling of a Federal District Court that the Seminole Tribe of Florida may engage in bingo operations within the reservation free of State licensing and regulation (Seminole Tribe v. Butterworth, 658 F.2d 310 (1981), cert. denied, 102 S. Ct. 1717 (1982)):

While the court found that the State of Florida has criminal and civil jurisdiction over the Seminole reservation pursuant to Public Law 83-280 [see discussion on p. 37], it found that, pursuant to the Supreme Court's decision in Bryan v. Itaska County, 426 U.S. 373 (1976), P.L. 83-280 did not confer general regulatory power over Indian tribes.

Therefore, the question of whether or not Florida had the right to license and regulate bingo operations on the Seminole Reservation turned on whether the State law regulating bingo operations was criminal-prohibitory in nature or civil-regulatory. Finding that the operation of bingo games in Florida was not prohibited by the State law as against public policy, but merely regulated, the Court held that the State law was civil-regulatory in nature and, therefore, was not applicable to bingo operations on the Indian reservation. Similar decisions were handed down in the case of Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (1981) and Barona Group of the Capitan Grande Band of Mission Indians v. Duffy (9th Circuit; 1982). 70/

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70/ Ibid., p. 9-10. Generally speaking, in a State which has civil and criminal jurisdiction over Indian reservations under Public Law 83-280, violation of a State law prohibiting gambling would be subject to prosecution in State court. In a non-280 State, such violations might be subject to prosecution in Federal court under the Organized Crime Control Act of 1970 (18 U.S.C. 1955), which defines as illegal gambling activities that violate the laws of a State.

Legislation was introduced in the 98th Congress providing for establishment of Federal standards for gambling in Indian country, especially with an eye toward preventing the infiltration of such activities by organized crime (H.R. 4566; H.R. 6390). Hearings on H.R. 4566 were held by the House Committee on Interior and Insular Affairs on June 19, 1984, and an Indian-created task force made recommendations for amendments to the legislation as introduced. It is therefore possible that such legislation will be re-introduced in the 99th Congress (although litigation could preclude the need for it).

#### Indian Natural Resource Development

Development of Indian natural resources also offers significant opportunities for tribes to foster economic development on the reservations. Such development is inevitably linked to environmental concerns of tribes with regard to responsible protection of their natural habitat.

Indian trust lands total more than 50 million acres, and the natural resources contained on and under these lands are just beginning to be evaluated in the light of their true worth. Moreover, with the continued national need for development of existing energy resources, Indian tribes find themselves under increasing pressure to develop their own enormous energy reserves. The question for Indians is: how, if, and when they will enter into such development and if so, how to harmonize economic potential with ecological preservation.

The emergence of a world-wide conflict of interest between energy-supplier and energy-consumer nations, occasioned by growing energy shortages, has spotlighted the fact that anywhere from 12 to 30 percent of American energy resources may be located on lands owned by American Indians. The U.S. Geological Survey estimates that up to 13 percent of identified coal resources and at least three percent of known oil and gas reserves are Indian-owned. In addition,

Indians are thought to control a substantial, uncharted proportion of American uranium supplies. 71/

In recent years Indians have demanded a greater share of benefits from development of their energy reserves. They charged that government-approved leases required for non-Indian development of tribal mineral, oil and gas resources, often provided royalties far below competitive market prices. With increasing frequency, tribes attempted to break and renegotiate existing leases, in order to obtain more favorable terms. Tribes have also sought to acquire management and development expertise of their own, to assume a role in national energy policymaking, and, as quasi-sovereign political entities, to assert taxing authority over non-tribal developers of Indian resources. As a result of increased Indian awareness in this area, and in order to formulate energy development policies that will maximize Indian benefits, some 25 tribes formed an organization call CERT--the Council of Energy Resource Tribes.

Three recent developments are indicative of heightened concern--both Federal and tribal--with Indian development of tribal energy reserves.

With regard to agreements for the development by non-Indians of tribal energy resources, it is significant that the 97th Congress enacted legislation to amend the 1938 Indian Mineral Leasing Act to allow tribes to enter into various types of such agreements heretofore legally prohibited. The 1938 Act limited tribes to leasing under competitive-bidding procedures; the new legislation (P.L. 97-382) allows tribes to enter into various kinds of negotiated

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71/ U.S. Congress. Senate. Committee on Interior and Insular Affairs. Management of Indian Natural Resources. Committee Print, Prepared by the Comptroller General of the United States, 94th Cong., 2nd Sess., Nov. 1976. Washington, U.S. Govt. Print. Off., 1976. p. 1, 78.



agreements more competitive with modern-day practices for the production and sale of oil, gas, and mineral resources. In its Indian policy statement released in January 1983 (see p. 32 above), the Reagan Administration pledged to work with tribes to implement this legislation.

A second area whereby tribes are asserting themselves with regard to energy and mineral development is in the field of tribal taxation. The Supreme Court has upheld imposition by a tribe of a severance tax on oil and gas that is produced by oil companies on reservation land under leases approved by the Secretary of the Interior, even though the tax falls on non-members (Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)). Moreover, the Tenth Circuit Court of Appeals has held that Navajo taxation of oil and gas leases is a valid exercise of tribal authority, and that approval by the Secretary of the Interior of the particular tax regulations is not required (Southland Royalty Co., et. al., v. Navajo Tribe, et. al., Nos. 80-2035- 80-2038, 80-2067, 80-2159 (Aug. 22, 1983)).

Third, with passage by the 97th Congress of the Federal Oil and Gas Royalty Management Act of 1982 (P.L. 97-451), Congress has assured renewed Federal attention to the collection of royalties owed to tribes that are derived from oil and gas resource leases on tribal lands.

House Report No. 97-859, to accompany H.R. 5121 (P.L. 97-451), underscored the depth of the problem of royalty management and collection as it has developed over the past two decades:

The shortcomings of the royalty management systems over the past 20 years have been well documented by the General Accounting Office and others in numerous reports. Recently, the Commission on Fiscal Accountability of the Nation's Energy Resources (the Linowes Commission), concurred with the findings of previous studies in its own 267-page report and detailed 60 specific recommendations for revamping the royalty management system. Congressional oversight hearings underscored both the scope and the magnitude of the problem.

The problems with past management of the Federal oil and gas royalty system include the following; (1) royalty accounting procedures have been inadequate to cope with the rapidly expanding volume and complexity of the accounting system; (2) the absence of security in the field has been an open invitation to theft; and (3) the experience and willingness of the States and Indian tribes to assist in the management of the system have not been properly utilized. Until very recently there has been no capability in the Federal Government to verify production data or sales data with respect to oil produced from a Federal lease, allowing industry to operate essentially on an honor system.

Initial response to the Linowes Commission report was creation in January 1982 of the Minerals Management Service (MMS) within the Interior Department to manage and collect oil and gas royalties on Federal, including most Indian, lands. This was followed by passage in January 1983 of P.L. 97-451, which directs the Secretary of the Interior to establish within the agency a comprehensive inspection, collection, and fiscal and production accounting and auditing system to provide the capability accurately to determine oil and gas royalties, interests, fines, penalties, fees, deposits, and other payments owed, and to collect and account for such amounts. P.L. 97-451 further authorizes the Secretary of the Interior to enter into cooperative agreements with States or Indian tribes to share oil or gas royalty management information, and to carry out inspection, auditing investigation or enforcement activities under the Act. Responsibility for carrying out the directives of this Act is, in practice, divided among various agencies with the Interior Department. 72/

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72/ See also U.S. General Accounting Office. Interior Should Solve Its Royalty Accounting Problems Before Implementing New Accounting System. Report No. GAO/AFMD-83-43, January 27, 1983. Washington, 1983. 24 p.

At issue are the interrelated and sometimes conflicting goals of economic development of valuable tribal resources balanced by environmental responsibility. Underlying both is the obligation of the Federal Government, acting in its capacity as trustee, to ensure protection of Indian resources in a manner consistent with the concept of tribal self-determination.

### Water Rights

A resource issue of particular concern is the matter of Indian water rights.

As stated by water rights expert William Veeder:

Water is a matter of life and death in the Western United States. Without it farming, fishing, and industry are impossible. For whites, the problem is serious. But whites at least have the option of settling where water is available. But Indians, however, do not. Their destiny is circumscribed by the boundaries of the reservations allotted them by the Federal government.

During the 19th century, when the Indians were rounded up and confined by the U.S. Army, water was not a major issue. There wasn't much of it, but it was sufficient for the population at hand.

By the turn of the century, the demands for white settlers began to outstrip the supply. The Federal Government became involved in irrigation and reclamation, and water rights were fiercely contested.

The course of this struggle as it affected Indians was shaped by two landmark events: passage of the Reclamation Act of 1902, and promulgation of the Winters Doctrine in 1908. Together, they plunged the Department of the Interior into a conflict of interest from which it has yet to extricate itself. And the American Indian has been the loser. 73/

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73/ Veeder, William. Indian Water Rights and the National Water Commission. Civil Rights Digest, Fall 1973. p. 29-30.

The Reclamation Act of 1902 (32 Stat. 388) authorized the Secretary of the Interior "to locate, construct, operate and maintain works for the storage, diversion and development of water for the reclamation of arid and semi-arid lands in the western States. That mandate involves such things as irrigation, municipal and industrial water supply, hydroelectric power generation and transmission, flood control, fish and wildlife enhancement, and outdoor recreation." 74/

The reclamation policy authorized by this Act frequently conflicts with the "Winters Doctrine" of Indian water rights. This "doctrine," which derives from the Supreme Court decision Winters v. U.S., 207 U.S. 564 (1908), holds that when Indian reservations were created by treaties with the U.S. Government, the Indians implicitly retained the right to sufficient water to fulfill the purpose for which their reservations were created. This decision resulted from a case in which the U.S. Government brought suit against upstream water users who were diverting water from the Milk River, which flows through the Fort Belknap Reservation in Montana. In regard to this case, the Ninth Circuit Court of Appeals had held that--

. . . we are of the opinion that the court below did not err in holding that when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of the Milk River, at least to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees [non-Indians], as well as against the state and its grantees. 75/

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74/ Ibid., p. 30.

75/ See Ibid., p. 30.

Veeder has underscored the significance of the "Winters Doctrine": i.e., that it was the Indians who granted title to the United States, and not vice versa. Accordingly, as the National Water Commission has stated,

Indian water rights are different from Federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release, or otherwise convey its own Federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of trust . . . . 76/

A second important case in Indian water law, is Arizona v. California, 373 U.S. 546 (1963), which declared that the water right is reserved at the time the reservation is created no matter the manner in which the reservation was established. In addition, the Arizona v. California decision specified that it is the amount of water sufficient to irrigate all the practicably irrigable acreage on the reservation that is reserved for Indian use, not just the amount of land currently under irrigation. Thus the Arizona decision declares that Indian water rights encompass not only present, but future irrigation needs as well. 77/

Four courses of action toward resolution of the water rights issue are possible:

- (1) Litigation over water rights, which is proceeding in many western States.

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76/ U.S. Congress. Senate. Committee on Interior and Insular Affairs. Indian Water Rights. Hearings. 93rd Cong., 2nd Sess., Mar. 25 and 26, 1974. Washington, U.S. Govt. Print. Off., 1974. p. 95.

77/ U.S. Congress. Senate. Committee on Interior and Insular Affairs. Indian Water Rights of the Five Central Tribes of Arizona. Hearings. 94th Cong., 1st Sess., Oct. 23 and 24, 1975. Washington, U.S. Govt. Print. Off., 1976. p. 7-11.

(2) However, former President Carter's Water Policy Message sent to Congress in 1978 strongly favored a process of negotiation and administrative quantification of Indian water rights, rather than litigation, as a means of resolving Indian water rights claims. To facilitate negotiation of Indian water rights claims, the President directed the Bureau of Indian Affairs to review the claims and inventory the water rights involved. President Reagan has also voiced support for negotiated settlements (see p. 53, below).

(3) Legislative ratification of negotiated settlements is also possible and there is precedent for this route. Exemplary of such legislation is P.L. 95-328 (92 Stat. 409), providing for settlement of the water claims of the Ak-Chin Indian Community in Arizona.

(4) Finally, an alternative to administrative quantification or statutory endorsement of negotiated settlements is legislation to quantify Indian water rights without prior negotiation.

Proponents of allowing the litigation process to be carried out may argue that to do so offers the Indians the opportunity to press their legal rights in a forum which previously has been favorable to them. Those who so argue might favor legislation to assure adjudication of Indian water rights in Federal courts, perceived by some as better equipped to deal with the issue than State courts. (Not all concerned parties favor legislation to place such litigation exclusively in Federal courts, however.) 78/

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78/ 43 Stat. 466 permits, but does not necessarily require, the United States to submit to State jurisdiction in cases involving Federal reserved water rights. The effect of this statute is to give "concurrent jurisdiction to the state and federal courts over controversies involving federal rights to the use of water [Cf. 28 U.S.C. 1345]." Water Rights: The McCarren Amendment and Indian Tribes' Reserved Water Rights. American Indian Journal, University of Oklahoma Press, Norman, Oklahoma, Vol. 4, No. 2. p. 303-9.

Others argue that, as in the land claims issue, litigation would take too long and work too much of a hardship on the litigants.

Proponents of negotiation and administrative quantification feel this is the most equitable and simplest approach. Requiring piecemeal legislation to confirm individual negotiated settlements, they argue, is too time-consuming and offers only partial solutions. Similarly, across-the-board legislative quantification is seen by those who so argue as inequitable as it deprives tribes of a voice in the process.

On the other hand, proponents of legislative ratification of individually negotiated settlements feel that this is a more binding, certain way to resolve the conflicts. Administrative quantification, they argue, is more easily subject to change than legislatively defined quantification.

Finally, there are those who favor a universal quantification formula, as the most effective means of resolving the problem in a comprehensive, final manner.

On June 1, 1982, President Reagan vetoed H.R. 5118, the Southern Arizona Water Rights Settlement Act of 1982. This legislation would have ratified a negotiated settlement of the water rights claims of the Papago Tribe of Arizona. The President vetoed the measure on the grounds that as written, it would be too expensive for the Federal Government and inequitable in that State and local governments were not required to share in the cost. An alternative settlement was included in P.L. 97-293, subsequently enacted, in which State and local entities are required to share in the cost of the settlement.

Both President Reagan and former Secretary of the Interior Watt indicated support for negotiated settlements that are economically acceptable to the Administration. Thus, future consideration by Congress of proposed settlements is likely, with the above mentioned Papago settlement serving as a model.

Two recent Supreme Court decisions may have an impact on Congressional involvement in water rights issues. Both decisions let stand earlier water rights allocations despite Indian claims that their rights had not been adequately presented in earlier litigation. In a further development in Arizona v. California, et. al. (see above), the Court held on March 30, 1983, that the reserved water rights of five Indian tribes in the Colorado River may not be readjusted at the tribes' request, letting stand a 1964 judicial decree. On June 24, 1983, the Court similarly refused to reconsider an earlier allocation of water from the Truckee River among the Pyramid Lake Paiutes (Nevada) and non-Indian users. (Nevada v. U.S., et. al., No. 81-2245, Truckee-Carson Irrigation District v. U.S., et. al., No. 81-2276, Pyramid Lake Paiute Tribe v. Truckee-Carson Irrigation District, et. al., No. 82-38 (U.S. Sup. Ct., June 24, 1983)). The Indians were in both cases seeking a more favorable reallocation of existing water resources. (A full discussion of the water rights issue is found in U.S. General Accounting Office Report No. CED-78-176, "Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution" (November 16, 1978)).

#### Navajo and Hopi Relocation

P.L. 93-531 (88 Stat. 1712) (as amended), enacted in 1974, provided a legislative solution to a land dispute in Arizona between the Navajo and Hopi Tribes that originated more than a century ago. The legislation provided for a court-ordered partition of disputed lands and relocation of individual tribal members living on lands partitioned to the other tribe.



The land involved is that withdrawn from the public domain under an Executive order on December 16, 1882, for the use and occupancy of the Hopi and "such other Indians as the Secretary of the Interior may see fit to settle thereon." This area is now surrounded by the Navajo Reservation as defined in the Act of June 14, 1934 (48 Stat. 960). The dispute arises because Navajos have settled on a portion of the land in question. In 1891 the Interior Department drew a boundary line reflecting the location of most of the Hopis within the 1882 Executive Order Area, and the Navajos were forbidden to cross this line. The Navajos have conceded that the Hopis have exclusive rights to the land within this boundary; the dispute, therefore, is primarily in regard to the remainder of the 1882 Executive Order Area.

In 1962 an Arizona district court ruled that the Navajo and Hopi have joint, undivided equal rights and interests in that portion of the 1882 Executive Order Area which lies outside the exclusive Hopi area ("Joint Use Area"). The decision was affirmed by the U.S. Supreme Court in 1963.

Subsequently, Congress enacted the 1974 statute, which provided for a court-ordered partition of the disputed area and relocation of members of each tribe then living in lands partitioned to the other. The 1974 statute created a Navajo and Hopi Indian Relocation Commission and required that relocation be completed five years after a relocation plan prepared by the Commission was accepted by Congress. The plan was transmitted Congress on April 8, 1981, and relocation must be completed by July 7, 1986.

There is some concern that the required relocation may not be completed by the required date. The present issue, therefore, is the role, if any, which Congress may play in executing completion of the relocation, or devising alternatives thereto.

Alaska Native Claims Settlement Act

The Alaska Native Claims Settlement Act of 1971 (85 Stat. 688), as amended, settled the claims of Alaska's Native Indian, Aleut, and Eskimo population to their aboriginal lands.

This Act extinguished Native claims to aboriginal title in Alaska, and in settlement of such claims accorded the Natives title to a total of 40 million acres in the State, to be divided among some 220 Native villages and twelve Regional Corporations established by the Act to do business for profit. The Regional Corporations (together with a thirteenth Regional Corporation comprised of Natives who are non-permanent residents of Alaska) shared in a payment of \$462,500,000 (to be made over an eleven-year period from funds from the U.S. Treasury), and an additional \$500 million in mineral revenues deriving from specified Alaska lands. (For a full discussion of background to the Alaska Native claims issue, the Act, and a list of amendments to the Act, see U.S. Library of Congress. Congressional Research Service. Alaska Native Claims Settlement Act of 1971 (Public Law 92-203): History and Analysis Together with Subsequent Amendments, by Richard S. Jones. Report No. 81-127. June 1, 1981. 231 p.)

Section 23 of the Act required the Secretary of the Interior to submit to Congress at the beginning of 1985 a report on the status of the Natives, actions taken under the Act since its passage, and recommendations for future action where deemed appropriate.

Congress is thus likely to be concerned with examination of this report and recommendations, and with continuing oversight of the implementation of the statute. Of special interest may be the financial condition of the regional profit corporations established by the Act thirteen years ago;

the fact that restrictions on the alienability of regional corporation stock become inoperative in 1991; and the legal status of Alaska Native governments generally, especially with regard to the current controversy over applicability of aspects of the Indian Reorganization Act to Native governmental entities.

Eastern Land Claims (Indian Trade and Intercourse Act Claims)

The issue of land claims asserted by Indians in the eastern United States against States, municipalities, and private landowners has received national attention resulting in the passage of legislation by both Houses of Congress. Such claims are against States, cities, and individuals, rather than against the Federal Government, and are based on the allegation that the Federal Government did not give its approval to the transference of these lands by Indians to non-Indians. Such approval is allegedly required by a 1790 statute, the Indian Trade and Intercourse Act, as amended (25 U.S.C. 177). At present, land claims by Indian tribes, bands, or groups have arisen in Maine, Massachusetts, Connecticut, Rhode Island, New York, South Carolina, Louisiana, Florida, and Virginia.

Precedent-setting legislation to settle the claims of the Narragansett Indians in Rhode Island was enacted by Congress on Sept. 30, 1978 (P.L. 95-395, 92 Stat. 813). (On May 4, 1979, the State of Rhode Island enacted legislation to effectuate relevant portions of the settlement.) This law implements, with certain modifications, a previously agreed upon settlement signed by representatives of the Narragansett Indians, the State of Rhode Island, the town of Charlestown, R.I. (where these land claims are located), and specified private landholders owning lands to which the Indians laid claims. Negotiations leading to the agreement were carried out in consultation with the Carter Administration.

In effect, P.L. 95-395 extinguished all land claims of the Narragansett Indians in exchange for approximately 1,800 acres of land--approximately 900 acres to be donated by the State of Rhode Island and approximately 900 additional acres to be purchased by the Indians from specified landholders at Federal expense. (The effect of the Act was contingent upon establishment by Rhode Island of a State corporation to acquire, manage, and hold the lands for the Indians.) (Such legislation was enacted by the State of Rhode Island on May 4, 1979). A settlement fund of \$3.5 million was established in the U.S. Treasury for the purpose of implementing the Act.

On Oct. 10, 1980, President Carter signed into law P.L. 96-420 (94 Stat. 1785), to settle claims to the Penobscot, Passamaquoddy, and Maliseet Indians to up to 12.5 million acres in Maine. This is by far the largest claim settled to date.

P.L. 96-420 contains provisions of a previously negotiated settlement which among other things--

(1) Retroactively ratify, in accord with State and Federal law, any prior transfer of Indian land in the State of Maine, and extinguish Indian aboriginal title to such land and all claims arising therefrom.

(2) Direct the Secretary of the Treasury to establish in the U.S. Treasury a \$27 million trust fund, one half of which would be held in trust for the benefit of the Passamaquoddy Tribe, the other half of which would be held in trust for the Penobscot Nation (to be known as the "Maine Indian Claims Settlement Fund.")

(3) Direct the Secretary of the Treasury to establish an account in the U.S. Treasury to be known as the "Maine Indian Claims Land Acquisition Fund," into which would be transferred \$54.5 million from the general funds of the U.S. Treasury.

Legislation enacted by the 97th Congress included a settlement of Miccosukee claims in Florida (P.L. 97-399) and extension of the deadline for filing Indian claims for money damages governed by 28 U.S.C. 2415 (P.L. 97-394). The latter authorizes the Secretary of Interior to determine which claims should be litigated, which should be treated legislatively, and which should not be pursued. If the affected Indian claimants were to disagree with these determinations, they could initiate litigation within legislatively prescribed time periods.

The 98th Congress saw passage of legislation to settle claims of the Mashantucket Pequot Indians in Connecticut (P.L. 98-134); the 99th Congress may become involved in the settlement of some of the remaining Non-Intercourse Act claims, as well as additional "2415" claims allowed under P.L. 97-934. (For a fuller discussion of this issue, see Archived IB77040, "Indians: Land Claims of Eastern Tribes").

Remaining land claims include those of the Wampanoag Tribe of Gay Head, Mass., which seeks 5,000 acres in the town of Gay Head; the Schaghticoke Tribe in Connecticut; the Oneida, St. Regis Mohawk, and Cayuga Nation in New York, claiming, respectively, up to five million, up to 14,000, and up to 64,000 acres; the Catawba Tribe in South Carolina, seeking the return of some 140,000 acres; and the Chitimacha Tribe in Louisiana, seeking the return of some 2,000 to 3,000 acres. Within the past several years suits seeking return of lands claimed have been filed by the Oneida, Cayuga and Catawba Indians. All these involve substantial areas of land and may command the increased attention of Congress now that litigation has commenced.

What are the prospects for solution to the remaining claims? In the first place, negotiated, out-of-court settlements between the executive branch and the tribes (subject to approval by Congress) are being explored, and in instances

cited above were agreed to and confirmed by statute. Second, congressional action, independent of negotiation, is possible. Third, resolution through the courts remains as an alternative should the first two avenues not be pursued to successful conclusion. A brief discussion of each of these alternatives follows.

#### Judicial Process: Adjudication Through the Courts

Judicial process is potentially the most time-consuming method of resolution. The Department of Justice has noted that "it is impossible to overemphasize . . . that . . . litigation, while resolving past injustices imposed on the tribes, would place substantial hardships on innocent parties, who acted largely in good faith in purchasing real estate, investing their funds and improving their property. Only a congressional resolution of the Indian claims can correct the past injustices to the tribes without creating new hardships for others." <sup>79/</sup> It is the pendency of such suits with their resultant uncertainty which has, in certain instances, precipitated economic disruption (in Maine and Massachusetts, for example), and augurs severe problems in other areas as well--most notably in New York State.

#### Out-of-Court Settlement Between the Administration and the Tribes (Subject to Congressional Approval)

Negotiations are underway in a number of instances, including New York and South Carolina. Legislation already enacted to settle claims in Rhode

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<sup>79/</sup> U.S. Department of Justice. Memorandum in Support of Plaintiff's Motion for Further Extension of Time to Report to the Court [Pursuant to the Court's Order of January 17, 1977]. In United States v. the State of Maine. District of Maine, Northern Division. Civil No. 1966-ND and No. 1969 ND. p. 16.

Island, Maine, Connecticut, and Florida, 80/ might serve as an example for future settlements, but the prospect of protracted litigation cannot be ruled out. 81/

#### Congressional Action, Independent of Settlement Out of Court

At least three potential alternatives are open to Congress, should out-of-court settlements fail. These are (a) extinguishment of the aboriginal title claimed by the Indians (with the possibility of a cash settlement of the claim in compensation therefor); (b) retroactive ratification of the allegedly illegal treaties and agreements by which the land was transferred; and (c) a settlement similar to the Alaska Native Claims Settlement Act of 1971, whereby the aboriginal land claims of the Alaska Natives were extinguished in return for compensation by means of both a land settlement and a cash payment.

#### Federal Recognition

Many Indian tribes (nearly 300) are recognized by the Federal Government and receive Bureau of Indian Affairs and other Federal agency special services, together with the numerous additional benefits, privileges and immunities which attend Federal recognition. At the same time, more than 100 tribes,

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80/ In addition, P.L. 96-484 (94 Stat. 2365) ratified a negotiated settlement of a small claim of the Pamunkey Indians in Virginia.

81/ The Supreme Court granted certiorari in the Oneida case (Nos. 83-1065 and 83-1240) (See 52 USLW 3687 and 53 USLW 3044), and on March 4, 1985, held that two New York counties are liable for damages representing the fair rental value of the land presently owned and occupied by the counties, for the years 1968 and 1969. The Court ruled that the Oneidas have a Federal common law cause of action "for violation of their possessory rights." (See 53 USLW 4225). This ruling would thus seem to clear the way for the Oneidas to pursue their claims in court. There remains the possibility of a congressional settlement.

according to the American Indian Policy Review Commission Final Report (1977), do not have recognized status and thus are ineligible for the services, benefits, and privileges accorded to federally recognized Indians.

Until recently, there has been no clear, consistent, and uniformly applied Federal policy regarding Federal recognition of Indian tribes. Recognition was a de facto condition usually growing out of treaty relationships which certain tribes had with the Federal Government, or from the fact that certain tribes had concluded agreements with the Federal Government, had been mentioned in Federal statutes or Executive Orders, or had otherwise dealt in some formal way with the Federal Government. At the American Indian Policy Review Commission noted in its Final Report in 1977:

The distinction [heretofore drawn] between the status of recognized and unrecognized tribes seems to be based . . . on precedent--whether at some point in a tribe's history it established a formal political relationship with the Government of the United States . . . .

The special Federal-Indian relationship usually was established by treaties. These are tribes, however, which have no treaties and receive services from the BIA; and there are tribes which signed treaties but do not receive services . . . .

Congressional measures mentioning a specific tribe often are used as the basis for a tribe's special relationship with the U.S. Government, but there are tribes mentioned in legislation that receive no Federal attention . . . [and] tribes which never were mentioned in legislation that receive services . . . . 82/

Or, as explained by the Bureau of Indian Affairs:

Groups which never made war on the United States often did not have treaties made with them. Some groups claim to have treaties but did not seek or were unable to obtain acknowledgment for various

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82/ U.S. American Indian Policy Review Commission. Final Report, May 17, 1977. Washington, U.S. Govt. Print. Off., 1977. p. 462.



reasons obscured by the passage of time. Some groups were so isolated nobody dealt with them. Others chose to keep to themselves and avoid contact with the United States. During the period of the Federal Government's termination policy (1953-58), activity to acknowledge additional groups as tribes was suspended as the Government sought to end its special relationship with Indian people. 83/

Since Federal recognition has been, and is, used by the Bureau of Indian Affairs and most other Federal agencies as the primary criterion for extension of special services granted to Indians as Indians, such a consistent and uniformly applied policy in extending recognition has been deemed necessary to establishment of an objective Federal policy in this regard. Consequently, the Bureau of Indian Affairs published in the Federal Register, on Aug. 24, 1978, final regulations regarding a set of "procedures for establishing that an American Indian group exists as an Indian tribe." Such regulations became effective on Oct. 2, 1978. 84/

These regulations comprise a formalized procedure and set of standards describing the criteria to be used in tracing an "identifiable Indian group containing a membership core which has exercised a governing influence over its members from historic times to the present." 85/

The Bureau of Indian Affairs defines seven basic requirements an Indian tribal group must conform to in order to qualify for "Federal recognition" under these regulations.

Petitioning groups must--

(1) Establish that they have been identified from historical times to the present on a substantially continuous basis as American Indians or aboriginals;

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83/ U.S. Bureau of Indian Affairs. Information about Acknowledgement. Typescript. March 1983. p. 1.

84/ See 25 CFR 83 (1984).

85/ Information about Acknowledgement, p. 4. As of March 1983 a total of 85 groups had petitioned the B.I.A. for recognition (p. 3).

(2) Establish that a substantial portion of the group inhabits a specific area or lives in a community viewed as American Indian, distinct from other populations in the area, and that its members are descendants of an Indian tribe which inhabited a specific area;

(3) Furnish a statement of facts which establishes that the group has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present;

(4) Furnish a copy of the group's present governing document, or in the absence of such a document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members;

(5) Furnish a list of all known members of the group and a copy of each available former list of members based on the group's own defined membership criteria;

(6) Establish that the membership of the group is composed principally of persons who are not members of any other North American Indian tribe;

(7) Establish that the group or its members are not the subject of Congressional legislation which has expressly terminated or forbidden the Federal relationship.

Since, however, these regulations preclude an Indian group whose Federal status was terminated by Act of Congress from qualifying for recognition thereunder, legislation to grant recognition to certain Indian tribes whose Federal status was terminated has been enacted by the 93rd, 95th, 96th, 97th and 98th Congresses. 86/

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86/ 87 Stat. 770; 91 Stat. 1415; 92 Stat. 246; 94 Stat. 317; 96 Stat. 1960; 96 Stat. 2269; 97 Stat. 1064; 98 Stat. 2250.

APPENDIX A: HISTORY OF HOUSE AND SENATE COMMITTEE  
JURISDICTION OVER INDIAN AFFAIRS

Congressional authority over Indian affairs is derived from the Constitution, which assigns to Congress power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes" (Art 1, sec. 3).

During the early Congresses, Indian matters were considered either by the whole Senate or House, by select committees appointed for that purpose, or by various other committees. In January 1820, the Senate established a Standing Committee on Indian Affairs 87/ having jurisdiction over Indian affairs legislation; this was followed in December 1821 by establishment of a Standing Committee on Indians Affairs in the House of Representatives as well. 88/

Throughout the nineteenth century and into the twentieth, there existed other standing committees in the Senate, and select committees in both Houses, that had jurisdiction over various aspects of Indian affairs. These included committees to investigate trespassing on Indian lands as well as Indian attacks on settlers, and committees to coordinate legislation affecting specific tribes or groups of tribes.

In addition to Standing Committees on Indian Affairs in both Houses the following Committees existed from 1838 to 1920 having jurisdiction over Indian Affairs:

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87/ U.S. Congress. Annals of the Congress of the United States. 16th Cong., 1st Sess., Vol. 35, 1855 ed. p. 51. [Hereafter cited as Annals.]

88/ Annals, 17th Cong., 1st Sess., Vol. 38, 1855 ed. p. 548.

## Committees Having Jurisdiction Over Indian Affairs, 1838-1920

Year(s)	Senate	House
1838		Select Committee on Indian Fighters
1878	Joint Committee on Transfer of the Indian Bureau	
1879-1880	Select Committee to Examine into Removal of Northern Cheyennes	
1881	Select Committee to Examine into Circumstances Connected With Removal of Northern Cheyennes from the Sioux Reservation to the Indian Territory	
1836-1892	Select Committee on Indian Traders	Select Committee on Expenditures for the Indians and Yellowstone Park
1888-1892	Select Committee on Indian Traders Select Committee on the Five Civilized Tribes	Select Committee on Indian Depredation Claims (1888-1891)
1893-1908	Select Committee to Investigate Trespassers on Indian [Cherokee] Lands Select Committee on the Five Civilized Tribes Standing Committee on Indian Depredations	
1909-1920	Standing Committee on Indian Depredations Standing Committee on the Five Civilized Tribes Standing Committee to Investigate Trespassers on Indian Lands	

In 1921 all existing standing Senate committees 89/ dealing with Indian legislation were consolidated with the existing Committee on Indian Affairs. The Indian Affairs Committee was in turn one of the five committees 90/ combined in 1947 into the new Senate Public Lands Committee (in accord with provisions of the Legislative Reorganization Act of 1946 (60 Stat. 812)), 91/ which became the Senate Committee on Interior and Insular Affairs in 1948. 92/ In the House, the Indian Affairs Committee was in 1947 (by provision of the Legislative Reorganization Act) subsumed under the House Public Lands Committee, which in 1951 became the House Committee on Interior and Insular Affairs. 93/

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89/ Indian Affairs, Five Civilized Tribes, Indian Depredations, to Investigate Trespassers on Indian Lands.

90/ Public Lands and Surveys, Mines and Mining, Territories and Insular Affairs, Irrigation and Reclamation, Indian Affairs.

91/ See Senate Manual. 80th Cong., 1st Sess., 1947. Standing Rules of the Senate, p. 38-9: "(m). Committee on Public Lands, to consist of thirteen Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subject: . . . .

"15. Relations of the United States with the Indians and the Indian tribes.

"16. Measures relating to the care, education, and management of Indians, including the care and allotment of Indian lands and general and specific measures relating to claims which are paid out of Indian funds." (Rule XXV)

92/ See Senate Manual. 81st Cong., 1st Sess., 1949. Standing Rules of the Senate, p. 37-8: "(m). Committee on Interior and Insular Affairs, to consist of thirteen Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects: . . . .

"15. Relations of the United States with the Indians and Indian tribes.

"16. Measures relating to the care, education, and management of Indians, including the care and allotment of Indian lands and general and specific measures relating to claims which are paid out of Indian funds." (Rule XXV)

93/ See House Manual and Digest. 66th Cong., 3rd Sess., 1921. Rules of the House of Representatives, p. 297: "16. To the relations of the United States with the Indians and the Indian tribes--to the Committee on Indian Affairs. (continued)

In addition, a Joint Committee on Navajo-Hopi Administration was created in 1951 by P.L. 81-474 (64 Stat. 44). It was officially abolished by the Navajo-Hopi Settlement Act of 1974 (88 Stat. 1712).

It should be noted that in 1975 the House Committee on Education and Labor was given jurisdiction over Indian education. <sup>94/</sup> Moreover, bills concerned with other aspects of Indian affairs (Indian health, for example) have on occasion, been referred to various committees in addition to, or other than, Interior and Insular Affairs. (In cases where comprehensive bills overlap

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(continued) "This committee was created in 1821, and had jurisdiction of appropriations from 1955 to 1920 (IV, 4204).

"It has broad jurisdiction of subjects relating to the care, education, and management of the Indians, including the care and allotment of their lands (IV, 4205). It also reports both general and special bills as to claims which are paid out of Indian funds (IV, 4206)." (Rule XI)

See also Constitution, Jefferson's Manual and Rules of the House of Representatives, Eighty-first Congress. 80th Cong., 2d sess., 1949. p. 345-6: "(n). Committee on Public Lands.

". . . . 15. Relations of the United States with the Indians and the Indian tribes.

"16. Measures relating to the care, education, and management of Indians, including the care and allotment of Indian lands and general and special measures relating to claims which are paid out of Indian funds. "This committee was created in 1905 (IV, 4194). The jurisdiction as defined in the rule was made effective January 2, 1947, as a part of the Legislative Reorganization Act of 1946, and combined the Committees on Mines and Mining (created in 1865, IV, 4223), Insular Affairs (created in 1899, IV, 4213), Irrigation and Reclamation (created in 1893, IV, 4307), Indian Affairs (created in 1821, IV, 4204), and Territories (created in 1825, IV, 4208)." (Rule XI)

See also Constitution . . . [Etc.], Eighty-third Congress. 82nd Cong. 2nd Sess., 1953. p. 343-4: "10. Committee on Interior and Insular Affairs . . . . "(p) Relations of the United States with the Indians and the Indian tribes. "The name of this committee was on February 2, 1951, changed from 'Public Lands' to 'Interior and Insular Affairs.'" (Rule XV)

<sup>94/</sup> See Constitution . . . [Etc.], Ninety-fourth Congress. 93rd Cong., 2nd Sess., 1975, p. 358-9: "(g). Committee on Education and Labor . . . . "Effective January 3, 1975 (H. Res. 988, 93rd Congress), this committee was given jurisdiction over . . . Indian education (a matter formerly within the specific jurisdiction of the Committee on Interior and Insular Affairs but eliminated from cl. 1(j)(6)), (Rule X)." (Rule X)

the jurisdiction of several committees, the Speaker may refer a bill to several committees simultaneously or sequentially). 95/ In the Senate, similarly, there are areas where a bill may, depending on the subject matter and language, be referred to committees other than, or in addition to, the committee with primary jurisdiction (see next paragraph).

In 1977 jurisdiction over Indian affairs in the Senate was transferred to the newly created Select Committee on Indian Affairs as part of the reorganization plan effectuated at that time (the Committee on Interior and Insular Affairs was abolished). At that time the Select Committee was to exist for two years, after which Indian affairs jurisdiction was to pass to the Committee on Labor and Human Resources. 96/ The Select Committee was extended for two more years in 1978 97/ and again in 1980 for another three years. 98/

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95/ See Ibid. p. 408: "Referral of Bills, Resolutions, and Other Matters to Committees . . . .

". . . (c) In carrying out paragraph (a) and (b) with respect to any matter, the Speaker may refer the matter simultaneously to two or more committees for concurrent consideration or for consideration in sequence (subject to appropriate time limitations in the case of more parts (reflecting different subject and jurisdictions) and refer each such part to a different committee, or refer the matter to a special ad hoc committee appointed by the Speaker with the approval of the House (from the members of the committees having legislative jurisdiction) for the specific purpose of considering that matter and reporting to the House thereon, or make such other provision as may be considered appropriate." (Rule X)

96/ S. Res. 4. 95th Congress. Congressional Record, Feb. 4, 1977. p. 3691.

97/ S. Res. 405. 95th Congress. Congressional Record, Oct. 14, 1978. p. S18847.

98/ S. Res. 448. 96th Congress. Congressional Record, Dec. 11, 1980. p. S16257-60.

S. Res. 127, introduced in the first session of the 98th Congress, would make the Select Committee on Indian Affairs a permanent committee of the Senate. The measure was reported on November 2, 1983, from the Committee on Rules and Administration (S. Rept. 98-294). By unanimous consent the Senate agreed on November 18, 1983, to provide for the continuation of the Select Committee on Indian Affairs until July 1, 1984, while the proposal to make the committee permanent was further considered in the second session of the 98th Congress (See Congressional Record, November 18, 1983, p. S17193).

On June 6, 1985, the Senate agreed to S. Res. 127, making the Select Committee on Indian Affairs a permanent committee of the Senate, after agreeing to an amendment to establish a temporary select committee of the Senate to conduct a study of the Senate committee system (See Congressional Record, June 6, 1984, p. S6669).

In the House in 1977 Indian affairs jurisdiction was vested in a newly created Subcommittee on Indian Affairs and Public Lands within the Committee on Interior and Insular Affairs, 99/ and in 1979 jurisdiction over Indian affairs was vested in the entire Committee. 100/ This was the first time since 1820 that a body of Congress had neither a committee nor a subcommittee on Indian Affairs.

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99/ Rules of the House Committee on Interior and Insular Affairs. Congressional Record, Feb. 2, 1977. p. 3420.

100/ Rules of the House Committee on Interior and Insular Affairs. Congressional Record, Feb. 8, 1979. p. H546.



APPENDIX B: SELECTED MAJOR LAWS CONCERNING  
AMERICAN INDIANS, 1789 TO PRESENT

The power of Congress over Indian affairs has manifested itself in a large body of laws that pertain to Indians in general as well as to specific tribes. These in turn have been continually interpreted through the judicial process over the past two centuries.

A thorough study of Indian affairs legislation and judicial interpretation is contained in the following volume:

Felix Cohen's Handbook of Federal Indian Law. 1982 ed. Charlottesville, Virginia, Michie, Bobbs-Merrill, 1982. 912 p.

Major Laws Concerning Indians

Below is a selection of major laws concerning Indians, as defined, both in general and with regard to specific groups. 100A/

August 7, 1789 (1 Stat. 49). Established Department of War with responsibility for "such other matters . . . as the President of the United States shall assign to the said department . . . relative to Indian affairs."

July 22, 1790 (1 Stat. 137). Intercourse Act. First in a series of four such acts, regulating "trade and intercourse with Indian tribes." Contains provision disallowing alienation of Indian lands except "under the Constitution." Amendments to this Act on March 1, 1793 (1 Stat. 329); May 19, 1796 (1 Stat. 469); and March 3, 1799 (1 Stat. 743).

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100A/ Partially derived from: U.S. Department of the Interior. Federal Indian Law. Washington, U.S. Govt. Print. Off., 1958. Passim.

April 18, 1796 (1 Stat. 452). Established government trading houses with Indians, under control of the President.

May 18, 1796 (1 Stat. 469). Contained first provision regarding punishment of tribal Indians living in peace with U.S. for crimes.

March 30, 1802 (2 Stat. 139). Permanent Trade and Intercourse Act. Incorporated the first four temporary Intercourse Acts (see above) and restricted liquor consumption among tribes.

March 3, 1817 (3 Stat 383). Gave Federal courts jurisdiction over Indians and non-Indians in Indian territory, specifically excluding crimes committed by one Indian against another.

March 3, 1819 (3 Stat. 516). Made "provision for the civilization of the Indian tribes adjoining the frontier settlements," including authorization of appropriations toward this end.

May 28, 1830 (4 Stat. 411). Indian Removal Act. Established policy of exchanging Federal lands west of the Mississippi for lands occupied by Indian tribes in the eastern portion of the United States.

July 9, 1832 (4 Stat. 564). Established Commissioner of Indian Affairs under the Secretary of War.

June 30, 1834 (4 Stat. 729). Indian Trade and Intercourse Act. Redefined boundaries of Indian lands; ended passport requirements for non-Indian Americans; summarized previous criminal and trader laws; proclaimed that crimes of Indians against Indians on Indian land were not within Federal jurisdiction, among other provisions.

June 30, 1834 (4 Stat. 735). Provided for organization of Department of Indian Affairs within the Department of War.

March 3, 1849 (9 Stat. 395). Established Department of Interior and placed Commissioner of Indian Affairs thereunder.

March 27, 1854 (10 Stat. 269). Extended tribal jurisdiction over crimes committed by Indians against Indians on Indian lands.

March 3, 1871 (16 Stat. 544, 566). Ended treaty-making by the United States with Indian tribes.

March 3, 1883 (22 Stat. 582, 585). First general statute regarding Indian monies: released through the Treasury all pasturage, timber, mining and other "proceeds of labor" funds, to be used by the tribes, with approval of the Interior Department.

March 3, 1885 (23 Stat. 362, 385). Extended Federal court jurisdiction over Indian country to seven major crimes where both the offender and the victim were Indian.

February 8, 1887 (24 Stat. 388). General Allotment Act. Authorized the individual allotment of reservation lands to tribal members and conveyed citizenship on the allottee upon termination of the trust status of the land or to any Indian who voluntarily established residence apart from his tribe and adopted the "habits of civilized life." (This statute did not apply to some tribes, but most were later brought under its provisions or those of similar statutes).

March 3, 1891 (26 Stat. 851). Authorized depredations claims for damages sustained by acts of Indian individuals or bands of tribes living at peace with the United States to be sent to the claims courts and settled.

July 13, 1892 (27 Stat. 120). Authorized Commissioner of Indian Affairs to make and enforce regulations to secure the attendance of Indian children "at schools established and maintained for their benefit."

August 13, 1894 (28 Stat. 286, 313). Required the Department of Interior to hire Indians in the Indian service as practicable.

November 21, 1921 (42 Stat. 208). Snyder Act. Authorized permanent "appropriations and expenditures for the administration of Indian affairs."

June 2, 1924 (43 Stat. 253). Conferred U.S. citizenship on all non-citizen Indians born within territorial limits of the United States.

February 29, 1929 (45 Stat. 1185). Directed the Secretary of Interior to permit agents and employees of any State to enter on Indian lands to inspect health and educational conditions, to enforce sanitation and quarantine regulations, or to enforce compulsory school attendance of Indian pupils as provided by law.

April 16, 1934 (48 Stat. 596). Johnson-O'Mally Act. Provided for Federal-State cooperation in Indian affairs (education in particular) by means of Federal contracts with State governments, or political subdivisions thereof, for the operation of Federal Indian programs.

June 18, 1934 (48 Stat. 984). Indian Reorganization Act. Ended allotments; ended practice of terminating trust periods of restricted alienability of Indian lands; authorized annual appropriation of two million dollars for acquisition of lands for tribes in order to augment the diminished Indian land base; directed the Secretary of the Interior to issue conservation regulations to prevent erosion, deforestation and overgrazing of Indian lands; authorized annual appropriations not to exceed \$250,000 for educational loans; provided that qualified Indians are accorded employment preference in the Bureau of Indian Affairs.

(Later amended to extend specified coverage to Oklahoma and Alaska).

August 13, 1946 (60 Stat. 1049). Established Indian Claims Commission to hear and settle remaining Indian land claims against the Federal government (The Commission expired in 1978 by provision of 90 Stat. 1990).

August 1, 1953. H. Con. Res. 108. Set forth the sense of Congress that specified tribes should be freed from "Federal supervision and control" in accord with the policy of making "as rapidly as possible," Indians "within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . ." This expressed the policy of "termination."

August 15, 1953 (67 Stat. 588). "Public Law 280." Transferred specified jurisdiction (criminal and civil) over Indian country to five States (later six (72 Stat. 545)), and gave others the option of assuming such jurisdiction.

June 17, 1954 (68 Stat. 250). Federal supervision over the Menominee Tribe terminated. Supervision over other tribes terminated by other statutes during the 1950's and early 1960's. While these are specific statutes applying to specific tribes, they reflected the National policy of termination as expressed in H. Con. Res. 108.

August 5, 1954 (68 Stat. 674). Transferred Federal responsibility for Indian health from the Bureau of Indian Affairs to the Department of Health, Education and Welfare. (Now Health and Human Services).

April 11, 1968 (82 Stat. 77). Indian Civil Rights Act of 1968. Made tribal governments under Federal jurisdiction subject to certain provisions of the Bill of Rights which guarantee individual rights; authorized a model code of justice for Indian offenses on Indian reservations; and provided that States may assume criminal and civil jurisdiction over Indian country as provided by Public Law 280 only with the consent of the tribe.

December 18, 1971 (85 Stat. 688). Alaska Native Claims Settlement Act. Provided for conveyance of both property title and monetary award to Alaska natives in settlement of their aboriginal land claims.

June 23, 1972 (86 Stat. 334). Indian Education Act (Title IV of Higher Education Act). Established a comprehensive program of federal aid for the special educational needs of Indians.

December 22, 1973 (87 Stat. 770). Menominee Restoration Act. Repealed the Menominee Termination Act and extended Federal recognition to the Tribe.

January 2, 1975 (88 Stat. 1910). American Indian Policy Review Commission Act. Established the American Indian Policy Review Commission to reassess the direction of Federal Indian policy and to provide legislative recommendations thereon.

January 4, 1975 (88 Stat. 2203). Indian Self-Determination and Education Assistance Act. Authorized the Secretary of the Interior and the Secretary of Health, Education and Welfare (now Health and Human Services) to contract with Indian tribal organizations to operate federally funded Indian programs.

September 30, 1976 (90 Stat. 1400). Indian Health Care Improvement Act.

August 11, 1978 (92 Stat. 469). American Indian Religious Freedom Act.

September 30, 1978 (92 Stat. 813). Rhode Island Indian Claims Settlement Act. Settled land and damage claims of the Narragansett Indians asserted under the Indian Trade and Intercourse Act (25 U.S.C. 177).

November 8, 1978 (92 Stat. 3069). Indian Child Welfare Act.

October 10, 1980 (94 Stat. 1785). Maine Indian Land Claims Settlement Act. Settled land and damage claims of the Passamaquoddy, Penobscot, and Maliseet Indians asserted under the Indian Trade and Intercourse act (25 U.S.C. 177).

December 22, 1982 (96 Stat. 1938). Indian Mineral Development Act. Authorized Indian tribes to enter into specified types of commercial agreements for the production and sale of oil, gas and other mineral resources on Indian lands.

January 12, 1983 (96 Stat. 2447). Federal Oil and Gas Royalty Management Act. Directed the Secretary of the Interior to establish a comprehensive inspection, collection, and fiscal and production accounting and auditing system to provide accurate determination of oil and gas royalties, interests, fines penalties, fees, deposits, and other payments owed on minerals taken from Federal (including Indian) lands pursuant to commercial agreements; and collection of and accounting for such amounts.

January 14, 1983 (96 Stat. 2605). Indian Tribal Governmental Tax Status Act. Provided Indian tribes with specified tax treatment similar to that applicable to States.

Laws Pertaining to Indian Groups with Exceptional Status

In addition to treaties and other legislation which are addressed to specific tribes and groups of Indians, there also exist large bodies of law which refer to certain tribes and groups whose status is exceptional, owing to particular historical circumstances. These include, among others, the Pueblos of New Mexico, the Natives of Alaska, New York Indians and the Indians of Oklahoma. Certain laws relating specifically to these Indians are set forth below:

Pueblos of New Mexico

The special body of laws dealing with the New Mexico Pueblos derives from the historical fact that these Indians became U.S. citizens following cession of New Mexico to the United States by provision of the Treaty of Guadalupe Hidalgo and had special land claims predating that treaty which derived from the Spanish and Mexican governments. 101/

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101/ See Federal Indian Law (1958), p. 893 ff.

July 22, 1854 (10 Stat. 308). Provided for appointment of a surveyor general for New Mexico who was to ascertain the origin, nature, character, and extent of all claims to lands under the laws and customs of Spain and Mexico, before the annexation of that territory by the United States.

December 22, 1858 (11 Stat. 374). Acted favorably upon report of the surveyor general for Territory of New Mexico, confirming pueblo land claims of specified pueblos.

July 15, 1870 (16 Stat. 335, 357). Appropriated a sum "to be expended in establishing schools among Pueblo Indians."

May 17, 1882 (22 Stat. 68). Contained provision embodying first assumption of Federal responsibility of "civilizing" the Pueblo Indians. Included funds for pay of teachers, purchase of seeds and agricultural implements, and construction of irrigation ditches.

July 1, 1898 (30 Stat. 571, 594). Established the post of "special attorney" for Pueblo Indians.

March 3, 1905 (33 Stat. 1048). Exempted lands held by pueblo villages or individuals within Pueblo reservation from "taxation of any kind whatsoever . . . until Congress shall otherwise provide." Included in this exemption were cattle, sheep and any personal property furnished by the United States or used in the cultivation of lands.

June 20, 1910 (36 Stat. 557). New Mexico Enabling Act. Contained a specific provision that "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them." Background to this statute and the special status of the Pueblos at that time is given in Federal Indian Law (1958):

It may be said that during the period from the accession of New Mexico to the granting of statehood, the Pueblos had a legal status



sharply distinguished from that of most other Indian tribes and comprehended under Indian legislation only where Congress had expressly so provided, as in the matter of agency maintenance, 'civilization' appropriations, and tax exemption. In all other respects, each pueblo had a status substantially similar to that of any other municipal corporation of the Territory . . . .

With the admission of New Mexico to statehood, however, a sharp reversal occurred . . . The termination of the Territorial government created a clear distinction between State and Federal authority and the center of control over the Pueblos shifted from Sante Fe to Washington. Thus the Pueblos came to be treated more and more as other Indian tribes.

The first important step in this direction was taken in the New Mexico Enabling Act, which contained a specific provision that "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them." <sup>102/</sup>

June 7, 1924 (43 Stat. 636). Pueblo Lands Act. Established a "Pueblo Lands Board" to investigate Pueblo land titles and provided the means by which a final solution was made regarding the many non-Indian claims with the lands of the Pueblo Indians.

#### Alaskan Natives

Alaskan Natives occupy a unique status among aboriginal peoples in the United States in that the 1867 Treaty of Cession (15 Stat. 539) virtually gave Congress a blank check regarding what the Russians has considered "uncivilized" tribes by providing that such tribes "will be subject to such laws and regulations as the United States may from time to time adopt in regard to the aboriginal tribes of that country." On the other hand, the Treaty of Cession provided for the collective naturalization of the members of the so-called "civilized" native tribes in Alaska. Congress impliedly consented to this contract which obligated it to incorporate the inhabitants,

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<sup>102/</sup> Ibid., p. 902.

except uncivilized tribes, as citizens of the United States, by extending certain laws to the Territory and by passing the Organic Acts of 1884 and 1912. The difficulty of defining "civilization" initially made the "legal status of the Natives of Alaska a matter of much doubt and uncertainty." 103/ Nevertheless, "Alaska Natives, including Eskimos and Aleuts, have long been considered to have the same legal status as Indians as wards under the guardianship of the Federal Government." 104/

Among those laws specifically relating to Alaskan Natives are acts pertaining to hunting and fishing rights, reindeer ownership, and the like. In addition, numerous laws relate to the possessory rights of the Natives in the land used and occupied by them. The Act of May 1, 1936 (49 Stat. 1250) extended to Alaska Natives specified provisions of the Indian Reorganization Act not already applicable.

Finally, in 1971 the Alaska Native Claims Settlement Act provided for the conveyance of both property title and monetary award to Alaska natives in settlement of their aboriginal land claims (85 Stat. 688). 105/

#### New York Indians

Because of the persistence of traditional forms of tribal organization, and because of treaty arrangements with New York which preceded the Federal

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103/ Ibid., p. 933.

See also U.S. Library of Congress Congressional Research Search. Alaska Native Claims Settlement Act: History and Analysis. CRS Report No. 81-127 GOV, Washington, 1981.

104/ Felix S. Cohen's Handbook of Federal Indian Law. 1982 Edition. Charlottesville, Michie, Bobbs-Merrill, 1982. p. 739. The Alaska Native Claims Settlement Act of 1971 did not create new trust responsibility, however.

105/ See Ibid., p. 739 ff. for a detailed analysis of this legislation.

Constitution and special dealings with the State since that time, the various New York tribes have peculiar status. 106/

In addition, the State of New York has legislated for and dealt with the Indians within its borders for many years. The Revised Statutes of the State of New York of 1882 (p. 272-336) show the extent and purpose of this legislation.

Because the State of New York has legislated so extensively regarding the Indian tribes living within its borders, there is a smaller body of Federal laws concerned with these Indians than with certain other Indians, like those mentioned above: i.e., the Pueblos or Alaskan Natives, for example. Nonetheless, certain Federal laws specifically regarding the Indians of the New York have been enacted. These include restrictions upon the alienation of Indian lands, treaties involving removal of some of these Indians to the west, and other specified matters primarily involving recognition by the Federal Government of specific tribes or establishment of reservations. 107/

#### Indians of Oklahoma

Federal Indian Law (1958) notes that "the laws governing the Indians of Oklahoma and the applicable decisions are so voluminous that analysis of them would require a treatise in itself." 108/ Nonetheless,

in many respects the statutes and legal principles. . . generally applicable to Indians of the United States, also apply to Oklahoma Indians, while in other respects Oklahoma Indians, or certain groups thereof, are excluded from the scope of such statutes and legal principles . . . .

[S]ome of the important fields in which Oklahoma Indians have received distinctive treatment . . . include enrollment, property laws affecting the Five Civilized Tribes, taxation, and among the

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106/ Federal Indian Law (1958), p. 965.

107/ Ibid., p. 973.

108/ Ibid., p. 985.

Osages, questions of head rights, competency, wills and leasing.  
 In each field effort is made to note how far principles generally  
 applicable to Indians are applicable or inapplicable in Oklahoma  
 . . . . 109/

Initially, laws dealing with Oklahoma tribes were concerned with locating these Indians in that Territory--since few of these tribes were indigenous to the area. "By treaty and the use of a degree of force in instances, the tribes agreed to take up their abode farther west, out of the way of the white man, on the land that was afterward designated as Indian Territory." 110/

In 1893 Congress inaugurated a policy aimed at diminishing the tribal governments of the Five Civilized Tribes 111/ and allotting tribal lands to individual Indians. 112/ Agreements with these tribes were negotiated by a Commission created for that purpose, as directed by Congress, in order to carry out these objectives. This was in conjunction with a number of other laws which affected the governments of the Five Civilized Tribes: 113/

March 1, 1889 (25 Stat. 783). Established a special Federal court in Indian Territory which was given jurisdiction over many offenses against the United States and certain civil cases not wholly between Indians.

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109/ Ibid., p. 985-6.

See Felix Cohen's Handbook of Federal Indian Law (1982 ed.), at p. 775 ff., for a full discussion of questions raised about the application in Oklahoma of the statute defining Indian country (18 U.S.C. 1151).

See also Ibid., at p. 784 ff., for a discussion of special property laws applying to Indian tribes in Oklahoma.

110/ Federal Indian Law (1958), p. 988.

111/ This term refers to five tribes removed to Oklahoma from the southeastern United States: Cherokee, Chickasaw, Choctaw, Creek and Seminole.

112/ Act of March 3, 1893 (Sec. 16), 27 Stat. 612, 645.

113/ Federal Indian Law (1958), p. 992 ff.; and Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.), p. 770-797.

May 2, 1890 (26 Stat. 81, 93). Created the Territory of Oklahoma out of a portion of the Indian Territory. Enlarged the jurisdiction of the special court created by Act of March 1, 1889 (above) and put in force several general statutes of the State of Arkansas.

June 7, 1897 (30 Stat. 83-84). Gave to the special court exclusive jurisdiction of all future cases, civil and criminal, and made the laws of the United States and the State of Arkansas in force in the Territory applicable to "all persons therein, irrespective of race," but with the qualification that any agreement negotiated by the commission with any of the Five Civilized Tribes, when ratified, should supersede as to such tribe any conflicting provision of the act.

June 28, 1898 (30 Stat. 495) ("Curtis Act"). Forbad the enforcement of tribal laws in Federal court in Indian Territory and abolished tribal courts.

April 28, 1904 (33 Stat. 573). Extended and continued all the laws of Arkansas heretofore put in force in the Indian Territory, so as to embrace all persons and estates therein, "whether Indian, freedmen or otherwise," and conferred "full and complete jurisdiction" upon the district courts in the Territory regarding "all estate of decedents, the guardianship, of minors and incompetents, whether Indians, freedman, or otherwise."

April 26, 1906 (34 Stat. 137) ("Five Tribes Act"). Concerned the governments of the Five Civilized Tribes. Empowered the President to fill the office of the principal chief in certain circumstances; abolished all tribal taxes under tribal law or regulations of the Secretary of the Interior; required Presidential approval of tribal legislation and contracts affecting Federal property; provided for continuation of tribal governments until otherwise provided by Congress.

June 16, 1906 (34 Stat. 267). Provided for admission into the Union of both Indian Territory and Oklahoma Territory as the State of Oklahoma.

Provided that "the laws in force in the Territory of Oklahoma shall extend over and apply to said State until changed by the legislature thereof."

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Federal legislation enacted since statehood strengthens the governmental powers of the Five Tribes. . . . A 1922 law prohibits the expenditure of the funds of the Five Tribes by the Secretary of the Interior without specific appropriations by Congress, except for certain purposes. . . . A 1932 Act requires the approval of the Seminole General Council for transactions involving tribal lands. . . . A 1952 statute recognizes the right of each of the Five Tribes to make contracts involving tribal monies or property with the approval of the Secretary of the Interior. . . . The power of tribal members to select their leaders is recognized by a 1970 law. . . . And the Five Tribes are covered by the Oklahoma Indian Welfare Act, which implicitly recognizes all tribal powers of internal sovereignty not expressly extinguished by Congress. 114/

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