Subject: Indian Country
Date: Sun, 16 Feb 1997 11:59:40 -0800
From: Jim Frame <jhframe@dcn.davis.ca.us>
To: aspls@polarnet.com

Dear Mr. Bennett:

I am the individual who posted the message to sci.engr.surveying objecting to the use of the term "Indian Country" in your February 2 posting. As my intent was to register my concern rather than to start a flame war, I have refrained from responding publicly to the postings that followed. I am contacting you privately in an effort to clarify a few things.

In my original response, I tried to attack what I found to be an offensive term without attacking you personally. The reactions expressed in almost all of the followup posts (including your own) suggests that I failed rather spectacularly in that effort. For that failure I apologize. It was my desire and intent to call attention to a perceived racial/ethnic slight, as I believe that insensitivity in these matters is the cause of a great deal of misery in the world. I had then, and have now, no interest in villifying you.

Several responses (some of which were sent to me privately) have suggested that "Indian Country" is an acceptable term for the situation you described, and that my protest was ill-informed. Since I readily admit to being unfamiliar with things Alaskan, I would be interested to learn whether or not the term is used in official and other public documents dealing with tribal lands issues.

In any event, I wish you the best in your professional undertakings.

Jim Frame jhframe@dcn.davis.ca.us (916) 756-8584 756-8201 (FAX)
Frame Surveying & Mapping 609 A Street Davis, CA 95616
----------< Davis Community Network >----------

Subject: Re: Indian Country
Date: Sun, 16 Feb 1997 10:46:55 -0900
From: Steve Hamrick <shamrick@sprynet.com>
To: "John F. Bennett" <aspls@polarnet.com>

John,

Regarding the newsgroup messages, your message has already scrolled off the system, but mine and two others are still on. I'm not sure how long they stay on, but it seems to be about a week. If you don't still see them, you may want to check and see if your browser is set to only show you unread messages, or all messages in a particular newsgroup. I'm still learning how to get around the internet myself, but have spent a lot of time lately exploring. There is so much information out there, but it's a little hard to find the stuff that's really interesting to you individually.

BTW, your presentation was great on Wednesday! I'd always wondered how many people were actually complying with the record of survey law and under what conditions they were required to file something with the Recorder's Office. It looks like the jury is still out on that one, at least in terms of how our profession interprets the law.

This "Indian Country" issue is one that will be fascinating to watch! I myself can see strong legal arguments on both sides of the aisle. This whole thing was set up when the federal government recognized the 227 villages in Alaska as tribes in 1993. Up until that point, I believe they saw the Native status in Alaska as different from the "Lower 48" because of the provisions in ANCSA. After they recognized the villages as Tribes, it was only a matter of time before the tribal governments would assert their claim to "Indian Country" status. The courts have always placed a fair degree of deference in the federal government's position regarding the status of Indian relationships. Although the State of Alaska has some strong arguments (particularly Sec. 1601(b) of ANCSA), this doesn't bode well for their position in terms of a final outcome.

I'm heading down to L.A. tomorrow for a week of meetings with tribal and government representatives on rulemaking for the "Indian Self-Determination Act" amendments. I'm sure the "Indian Country" issue will come up in after-hours discussion, so I'll let you know if I hear anything interesting.

If you run across any other interesting web sites or newsgroups, drop me a line sometime. If you want to keep tabs on tribal affairs you may want to subscribe to a David Case's ANCSA Discussion Group at http://www.micronet.net/~clbw/ancsadg.htm

You've got to go through a little rigamaroll to get on-board, but it's free and there is some interesting conversation from time to time.

Well, bye for now. Good talking to you.

Steve Hamrick

Indian Country

Original Post

```
     Subject: Indian Country
        Date: Wed, 05 Feb 1997 19:22:46 -0900
        From: "John F. Bennett" <aspls@polarnet.com>
Organization: Alaska Society of Professional Land Surveyors
  Newsgroups: sci.engr.surveying
```

In Alaska there is a movement to impose tribal sovereignty status upon about 250 villages. If this occurs, there is a possibility that a large portion of the state could be designated "Indian Country". My limited understanding of "Indian Country" in the western states is that these lands are only subject to those state laws as approved by the federal government. For those of your who practice in "Indian Country" states, I ask these questions regarding land surveying. In Indian country, does your seal as a licensed land surveyor mean anything, or can anyone perform land surveys. If you have performed a subivision, what kind of platting authority are you under? County? Tribal? Conveyance documents are recorded where? Many states have a "right of entry" statute that allow surveyors to enter onto property of adjoiners to tie in evidence relating to the survey at hand. I would initially assume that these would have no effect in indian country? Any thoughts or ideas would be appreciated.

Jim Frame's Response

jhframe@dcn.davis.ca.us (Jim Frame) wrote:

>I find it unfortunate that a post to a newsgroup dedicated to the
>profession of surveying expresses an attitude toward native Americans
>that can at best be described as insensitive, at worst as racist. The
>term "Indian Country" conjures up a mindset that prevailed during an
>especially painful period in our national history, when genocidal wars
>were waged against native populations. Its use may have been overtly
>hostile or simply the result of the carelessness to which we all, at
>times, succumb. In either case, its presence in this forum tarnishes
>all of us.
>
>Respect is one of the hallmarks of professionalism, but we must respect
>others before we can ask them to respect us.
>
>--
>Jim Frame jhframe@dcn.davis.ca.us (916) 756-8584 756-8201 (FAX)
>Frame Surveying & Mapping 609 A Street Davis, CA 95616
>----------------------< Davis Community Network >-------------------

Responses to Jim Frame

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     Subject:
          Re: Indian Country
        Date: Thu, 06 Feb 1997 17:24:32 GMT
        From: papabear@roadrunner.com (Jerry Anderson)
Organization: The Santa Fe Institute
  Newsgroups: sci.engr.surveying
  References: 1 , 2
```

JIM!! Relax! Heel! Down Boy!!

The term "Indian Country" it the term most often used by the Alaskan Natives!!

It is NOT a racist term when used in the context of John's posting!

(The tribal sovereignty issue i n Alaska was _supposed_ to have been addressed and EXTINGUISHED with the passage of the Alaska Native Claims Settlement Act. Oh well, another treaty ignored!)

John, to answer your question ... Alaska should be a whole different situation than the lower 48 Indian tribes, in that there were never any "treaties" with or recognition of Indian Nations in Alaska. (maybe in southeastern, but I'm not sure) If the same rules are followed as exist in New Mex & Ariz, the Tribes pretty much call the shots on their land. Right of entry doesn't mean much if you're hauled in by the Tribal Police. Even the Highway Department doesn't conduct location surveys w/o written permission from the tribe.

Wish the rest of America understood being a sovereign citizen like the Tribes do.

(One too many white men in the wood-pile of my family tree - my native american blood had been diluted to the point that I can't qualify as 1/4 ANYTHING!!)

Cheers! Jerry

Subject: Re: Indian Country
Date: 6 Feb 1997 20:48:50 GMT
From: Phil <phil@ime.net>
Organization: Internet Maine, Inc.
Newsgroups: sci.engr.surveying
References: 1 , 2

Jim:

A hallmark of good citizenship is respect for others in one's actions and deeds. Another hallmark of a good citizen is the belief in free speech. I really believe that you have over reacted to the your qouted post.There are injustices in this world that are more deserving of your ire!

Subject: Re: Indian Country
Date: 6 Feb 1997 16:31:02 -0700
From: Rudy J. Stricklan <rstrick@primenet.com>
Organization: Primenet (602)416-7000
Newsgroups: sci.engr.surveying
References: 1 , 2

Geez, Jim-- lighten up. The previous poster was merely referring to Indian-owned lands in an aggregate sense, not demeaning Native Americans in any way that I could see. My current largest client is the Salt River Pima-Maricopa *Indian* Community, as they officially refer to themselves. One of their on-Community stores is called "Indian Country", again by themselves. Or are they being insensitive?

Rudy Stricklan, RLS	rstrick@mapauto.com
Mapping Automation, Inc.	(602)829-3090
335 North Alma School Rd.	(602)732-0554 fax
Chandler, AZ 85224	

Subject:
Re: Indian Country
Date: 7 Feb 1997 22:09:22 GMT
From: "Michael Williams" <mwill016@concentric.net>
Organization: Optomotrist
Newsgroups: sci.engr.surveying
References: 1 , 2

Having grown up nest to the Colorado Indian River Tribes Reservation in Arizona, and also went to High School there, I believe that I am more in touch with the indian culture than you will ever be. The term "Indian Country" is used throughout the area by all cultures and it is not, nor has ever been, a racial term. Until individuals like yourself can get off of your moral soapbox and just answer the simple questions he has posed our profession as a whole will never again be viewed as a group of professionals.

Jim Frame <jhframe@dcn.davis.ca.us> wrote in article
>
> I find it unfortunate that a post to a newsgroup dedicated to the
> profession of surveying expresses an attitude toward native Americans
> that can at best be described as insensitive, at worst as racist.

Subject: Indian Country
Date: Fri, 07 Feb 1997 20:49:19 -0900
From: "John F. Bennett" <aspls@polarnet.com>
Organization: Alaska Society of Professional Land Surveyors
Newsgroups: sci.engr.surveying

I was a bit surprised to see the post suggesting that my use of the term "Indian Country" was racist and insensitive. However, I will start by apologizing to those who misunderstood my question. No slur was intended. This was a serious post and an important issue. The term "Indian country" is not something I made up. It is a legally defined and accepted term for a type of land status.

Unfortunately, I am now at home and not at the office where my copy of Blacks Law and Indian Law books are located. However, one paper I recently downloaded from http://www.mt.gov/leg/branch/handbook.htm is a handbook for legislators entitled "The tribal nations of Montana". This document includes a definition of "Indian Country" as follows:

"Indian Country includes: (1) all land within the limits of an Indian reservation under the jurisdiction of the United States government; (2) all dependent Indian communities, such as the New Mexico Pueblos; and (3) all Indian allotments still in trust, whether they are located within reservations or not. See 18 U.S.C 1151"

The term "Indian Country" is commonly used in the volumes of case law regarding these lands.

Also, I appreciate the couple of surveyors who recognized the mistake and came to my defense.

THE TRIBAL NATIONS OF MONTANA

A Handbook for Legislators
March 1995
Prepared by
The Committee on Indian Affairs

BASIC PRINCIPLES OF STATE-TRIBAL RELATIONS

Tribal governments are not subordinate to state governments and are not bound by state laws. With rare exceptions, a state has jurisdiction within a reservation only to the extent that Congress has delegated specific authority to it or in situations in which neither federal nor tribal law preempt state law.

What is "Indian country"?

Indian country includes:

(1) all land within the limits of an Indian reservation under the jurisdiction of the United States government;

(2) all dependent Indian communities, such as the New Mexico Pueblos; and

(3) all Indian allotments still in trust, whether they are located within reservations or not.

The term includes land owned by non-Indians, as well as towns incorporated by non- Indians if they are within the boundaries of an Indian reservation.

It is generally within these areas that tribal sovereignty applies and state power is limited.

INTERPRETATION OF INDIAN LAW

Are the rules for interpreting Indian law different from those used to interpret other laws?

Yes. From the early 1800s, the United States Supreme Court, in numerous decisions, held that the federal government had a special trust responsibility with Indian tribes. See footnote 7 From this trust relationship, the Court also developed and used a unique set of rules, commonly known as "canons of construction", for interpreting or construing treaties, statutes, or executive orders that affected Indian tribes and peoples.

These canons of construction acknowledged the existence of the unequal bargaining positions that existed between the federal government and the tribes during negotiations. In many cases, tribal negotiators did not speak or understand English and were, therefore, placed at a significant disadvantage during the negotiation process. Often, the federal government negotiated with individuals whom it had selected and who were not the traditional leaders of a particular tribe.

More importantly, these canons reflect a presumption, based on this federal trust responsibility, that an act of Congress was meant to protect tribes and Indian peoples. As a result, these canons assume that unless there is a "clear purpose" or an "explicit statement" to the contrary in treaties, statutes, or executive orders, Congress intended to preserve or maintain the rights of tribes.

Specifically, these canons provide that the treaties, statutes, orders, or agreements with Indian tribes are to be construed liberally in favor of Indians. If ambiguities exist, they are to be resolved in favor of Indians.

Can the abrogation of tribal rights be presumed under the canons?

No. Unless Congress clearly indicates through a treaty or legislation or in an agreement that rights are extinguished or altered, it is presumed that all tribal rights are retained. See footnote 9 Congress must demonstrate a clear purpose to abrogate tribal rights.

TRIBAL SOVEREIGNTY AND STATE POWER

What is tribal sovereignty?

Although sovereignty is often loosely defined, it refers to the inherent right or power to govern a people and a territory.

If the U.S. Constitution prohibits discrimination based on race, why do Indians retain special rights not held by other citizens in the United States?

The special status of Indian tribes predates the U.S. Constitution and federal law. When the United States was founded, tribes were self-governing and sovereign nations whose powers were not extinguished by the constitution. The constitution may have subjected the tribes to federal power, but it did not extinguish tribal internal sovereignty or subject them to the powers of the states.

The different treatment of Indians and non-Indians is allowed because Indians are a separate political group. The United States did not enter into treaties with Indians because of their race, but rather because of their political status. Congress treats Indians and non-Indians differently because the Commerce and Treaty Clauses of the U.S. Constitution authorize Congress to do so.

Were treaties necessary to grant certain powers to Indian tribes?

No. Many mistakenly believe that a treaty contains those rights that the federal government granted to a tribe. As recognized by both the United States and the Montana Supreme Courts, a treaty is not a grant of rights to the Indians, but instead is a grant of rights from Indians.

Indian treaties stand on essentially the same footing as treaties with foreign nations. Because they were made pursuant to the U.S. Constitution, treaties take precedence over conflicting state law because of the Supremacy Clause of the U.S. Constitution.

What tribes lost with adoption of the U.S. Constitution was "external sovereignty" or the ability to interact with foreign nations. Similar to states, tribes retained sovereignty within tribal territories and retained the power of self-government with respect to their land and members.

Can abrogation of treaties be implied by passage of other acts?

No. The trust relationship between the federal government and Indians tribes weighs heavily against implied abrogation of treaties. It must be clear that Congress considered the conflict between its intended action and a treaty and chose to resolve that conflict by abrogating the treaty.

Congress's power to abrogate a treaty does not free it from the duty to compensate for the destruction of a property right. Although an abrogation itself may be effective, a tribe may have a "takings" claim under the fifth amendment.

Can Montana unilaterally enact legislation affecting jurisdiction?

No. The Indian Commerce Clause of the U.S. Constitution gives Congress, not the states, plenary or absolute authority over Indian tribes. Only Congress can repeal treaties, eliminate reservations, or grant the states jurisdiction over Indians on reservations. The actions of the federal government are controlled by the rights guaranteed through the Bill of Rights and the 14th amendment to the U.S. Constitution. A state only has the power over Indian affairs within Indian country that Congress specifically grants it. A state only has power in Indian country if Congress has delegated power to it or if the exercise of state authority is not preempted.

CIVIL JURISDICTION IN INDIAN COUNTRY

Although criminal jurisdiction is used to maintain law and order, civil jurisdiction is used to regulate matters such as taxes, domestic relations, child custody, probate, zoning, and traffic accidents.

Early in America's history, the question of jurisdiction in Indian country was answered by the United States Supreme Court in 1832 quite simply: "State laws can have no force in Indian country without the approval of Congress."

What is civil regulatory jurisdiction?

Governments regulate conduct through zoning, licensing, taxation, or other methods. Unless limited by Congress, a tribe has exclusive regulatory jurisdiction over its members and over land held in trust.

Article 17 of 3013

Subject: Re: Indian Country
From: jhframe@dcn.davis.ca.us (Jim Frame)
Date: 1997/02/06
Message-Id: <5dcv49$fu4_001@dcn.davis.ca.us>
References: <32F95C96.2E23@polarnet.com>
Organization: Frame Surveying & Mapping
Newsgroups: sci.engr.surveying

In article <32F95C96.2E23@polarnet.com>,
"John F. Bennett" <aspls@polarnet.com> wrote:

>In Alaska there is a movement to impose tribal sovereignty status upon
>about 250 villages. If this occurs, there is a possibility that a large
>portion of the state could be designated **"Indian Country"**. My limited
>understanding of **"Indian Country"**

I find it unfortunate that a post to a newsgroup dedicated to the profession of surveying expresses an attitude toward native Americans that can at best be described as insensitive, at worst as racist. The term **"Indian Country"** conjures up a mindset that prevailed during an especially painful period in our national history, when genocidal wars were waged against native populations. Its use may have been overtly hostile or simply the result of the carelessness to which we all, at times, succumb. In either case, its presence in this forum tarnishes all of us.

Respect is one of the hallmarks of professionalism, but we must respect others before we can ask them to respect us.

Jim Frame jhframe@dcn.davis.ca.us (916) 756-8584 756-8201 (FAX)
Frame Surveying & Mapping 609 A Street Davis, CA 95616
----------< Davis Community Network >----------

Carol_Whelan@commerce.state.ak.us

Article 6 of 3013

Subject: Re: Indian Country
From: Steve Hamrick <shamrick@sprynet.com>
Date: 1997/02/10
Message-Id: <33001D04.1CDA@sprynet.com>
References: <32F95C96.2E23@polarnet.com>
Content-Type: text/plain; charset=us-Ascii
Organization: Sprynet News Service
Mime-Version: 1.0
Newsgroups: sci.engr.surveying
X-Mailer: Mozilla 2.01 (Win95; U)

Hi John,

I won't bother to echo the sentiments of others who have jumped to your defense regarding the use of the term **"Indian Country."** It is a quasi-legal term understood and used by all sides in debating the existence of governmental authority on **Indian** or Native lands throughout the United States. As a result of the recent Venetie decision by the 9th Circuit Court, it does appear that **"Indian Country"** may exist for some or all of the 226 federally recognized tribes in Alaska.

I'm not a legal expert in this arena, but I have followed the court cases enough to form an opinion. I believe the exterior boundaries of village selected lands may end up constituting the boundaries of **"Indian Country"** for those villages which meet the criteria set forth by the 9th Circuit Court decision. I believe there were six factors to be considered, i.e. percentage of Native residents relative to the total population of the village, whether the Native lands were contiguous and reasonably close the village, etc.

At any rate, I think Jerry Anderson probably hit the mark with his assessment. I believe that tribal governments will be able to dictate what requirements are necessary to survey or record property within their jurisdiction for those lands declared **"Indian Country."** The exterior boundary, however, may be another matter. These boundaries have third party interests involved and are probably subject to State and Federal law. If the boundary is between village and regional land, and only village selected land is deemed **"Indian Country"** then it may take a court case to settle that one.

Don't take any of this to the bank though! Unless the Venetie case is overturned by the Supreme Court, I think it may be many years before the issue of **"Indian Country"** is settled in Alaska.

to exercise criminal jurisdiction over "Indian country...to the same extent that such State...has jurisdiction over offenses committed elsewhere within the State...."[165]

As with the civil provisions of P.L. 280, it was originally assumed that the criminal provisions also granted exclusive jurisdiction to the states over Indian "offenses" and prohibited all tribal enforcement of tribal criminal statutes. For example, several years after P.L. 280 was extended to Alaska in 1958, the Metlakatla tribal government was informed that it no longer had jurisdiction to prosecute even minor offenses occurring on the reservation, because the state had exclusive jurisdiction. The Metlakatlans then ceased enforcing their local laws and relied on the state to control criminal conduct on the reservation.

It soon became obvious that Metlakatla's isolation and the state's then limited resources meant that the state could not adequately enforce its criminal laws on the reservation. Both Metlakatla and the state petitioned Congress for relief. Congress responded in 1970 by amending P.L. 280 to permit Metlakatla and the state to exercise concurrent criminal jurisdiction. The congressional reports and debates accompanying the amendment demonstrate that the 1970 Congress interpreted P.L. 280 to confer state exclusive criminal jurisdiction unless Congress provided otherwise.[166] However, more recent scholarly opinion, legal analysis and administrative practice has consistently interpreted P.L. 280 as a grant of concurrent jurisdiction to the states rather than a totally gratuitous ouster of continued tribal authority.[167]

Nonetheless, state jurisdiction does extend to all "offenses" against state law committed by Indians in Indian country. Unlike the corresponding provisions governing state civil jurisdiction, there is no requirement that state adjudication of such offenses give any force to tribal ordinances and customs. On the other hand, as with civil court proceedings, state criminal prosecutions are limited in so far as they cannot result in the "encumbrance" of trust or restricted property.[168]

State criminal prosecutions are also limited to "offenses," which has been interpreted to mean only activities which are "prohibited" under state law. Thus, the Ninth Circuit Court of Appeals has refused to approve state P.L. 280 jurisdiction to enforce state gambling regulations on Indian reservations where gambling is regulated but not prohibited as a matter of state public policy. Conversely, where gambling is prohibited, the same court seems willing to permit state enforcement as an element of its P.L. 280 criminal jurisdiction.[169]

D. Jurisdiction Over Territory–The "Indian Country" Question

1. Territorial Jurisdiction in General

Territorial jurisdiction describes the geographic extent of a government's power which, for Native communities, is largely a question of defining the meaning of "Indian country."[170] The phrase has a long legisla-

tive and judicial history dating back to the early trade and intercourse acts and is now defined by a comprehensive federal statute as the land within: 1) "Indian reservations," 2) "dependent Indian communities" or 3) "Indian allotments."[171] All three definitions have some application to Alaska, but the "dependent Indian community" concept is the one that has the most significance.

The concept originated in *U.S. v. Sandoval* wherein the U.S. Supreme Court held that the lands owned by a New Mexico Pueblo were "Indian country" for purposes of enforcing the federal Indian liquor laws, thus prohibiting the distribution of liquor on the Pueblo's lands.[172] The argument in *Sandoval* was that the Pueblo lands were not Indian country because they were owned in fee simple. In rejecting that argument, the Supreme Court concluded that the Pueblo constituted Indian country under the liquor laws because it was treated by the United States as a "dependent Indian community" entitled to federal protection.[173]

Twenty years later, the U. S. Supreme Court again considered the meaning of "Indian country" as applied to a New Mexico Pueblo. This case, *U.S. v. Chavez,* was a federal prosecution of a non-Indian for larceny against Pueblo Indians.[174] The prosecution was under the so-called General Crimes Act[175] which makes the general criminal laws of the United States applicable (with certain exceptions) to Indian country. The Supreme Court expanded on its definition in *Sandoval* to include within the concept "any unceded land owned or occupied by an Indian nation or tribe of Indians."[176] This was the same definition which the Alaska Federal District Court later applied to the Tyonek reservation in the case of *In re McCord,* previously noted.[177]

That case was a federal prosecution for statutory rape under territorial law. The defendant argued he was subject only to tribal jurisdiction, because his crime was committed in Indian country, and because statu tory rape was not then included among the crimes which could be prosecuted under the Indian Major Crimes Act.[178] The prosecution argued, in part, that the Tyonek lands were not Indian country because they were not really "reservation" lands. The court concluded that the Tyonek lands were within the statutory definition of Indian country because, as interpreted by *Chavez,* the term included "any unceded lands owned or occupied by an Indian nation or tribe of Indians...."[179]

2. "Indian Country" After ANCSA

McCord carefully restricted its holding to only those lands "set aside for the use of and...governed by an operational tribal unit."[180] Nevertheless, lands conveyed under the Alaska Native Claims Settlement Act might fall within the broader *Chavez* Indian country definition. Indeed the Interior Department has gone so far as to conclude that ANCSA selected lands are Indian country at least for purposes of villages exercising federally *delegated* powers under the Indian liquor laws.[181] Additionally, Natives occupying those lands do so as "dependent communities" in so far

as they are dependent on the United States for many of the public services they receive.[182] Several federal courts have held that this sort of dependency is an influential factor in determining whether nonreservation, tribally owned lands are "Indian country."[183] Prevailing scholarly opinion does not tie the existence of Indian country to the existence of either federally or tribally owned land,[184] but one court has concluded that whether the United States retains title to the lands occupied by the Natives is also a relevant factor.[185]

The extent to which ANCSA lands, owned by a Native village corporation, may be "governed by an operational tribal unit" as "Indian country" is theoretically an open question.[186] However, the U.S. Supreme Court has characterized the "Indian country" concept as a flexible one which "may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes"[187] Furthermore, subsequent to ANCSA, lands in Alaska actually owned by a Native government have been judicially treated as Indian country over which a Native government may exert jurisdiction.[188] It is also likely that allotments and restricted townsite lands, given the language of the federal Indian country statute, are Indian country for some purposes of tribal jurisdiction.[189] Finally, it is clear, even in Alaska, that lands, such as the Metlakatla reservation, which are held in federal trust are also Indian country.[190]

Indeed, the U.S. Supreme Court has upheld the existence of Indian country in a variety of land ownership situations.[191] In all of these situations it seems clear that federal jurisdiction could displace state jurisdiction when it comes to the exercise of authority over Indian country. What is not clear is the extent to which Native jurisdiction could exclude state jurisdiction on *nonreservation* lands. Generally, tribal jurisdiction is exclusive of state authority within the confines of a federal reservation,[192] but even within reservations, the U.S. Supreme Court has permitted some exercise of authority infringe on important tribal interests.[193] On the other hand, exclusive tribal authority on allotments no longer within a reservation has also been sustained.[194] It therefore seems that the mere existence of "Indian country" will not be the only factor in deciding whether tribal authority can be exercised free of concurrent state jurisdiction.

3. Off-Reservation Civil Regulation

In addition to permitting state adjudication of civil "causes of action," P.L. 280 also provides that:

> [T]hose civil laws of [a] State...that are of general application to private persons or private property shall have the same force and effect within...Indian country as they have elsewhere within the State....[195]

It was long contended that this provision permitted states to regulate and tax nontrust property even on Indian reservations.[196] The U.S. Supreme Court rejected that argument in *Bryan v. Itasca County*[197] and drew a broad distinction between a state's jurisdiction to "adjudicate" and jurisdiction to "regulate" under P.L. 280.

Itasca County argued in *Bryan* that it could levy a personal property tax against a trailer occupying reservation land. It contended that P.L. 280 extended all state civil laws of "general application" to Mr. Bryan's reservation, and that the county was therefore authorized to tax his trailer under state law.[198] The Court held that the legislative history of P.L. 280 revealed a restrictive purpose to apply to reservations only those laws of the state related to "adjudication" of disputes between private individuals. Under this interpretation, the Court ruled that regulatory laws, such as those relating to taxation, could not be applied to Indian reservations in P.L. 280 states. In spite of P.L. 280, state tax laws were "preempted" from application to individual private property on federally guaranteed reservations.[199] The decision has effectively insulated federal reservations from a wide variety of state regulatory laws, notably, for example, laws relating to gambling.[200]

However, the *Bryan* Court specifically noted that the preemptive analysis "usually yields different results" when applied to "tribal Indians who have left or never inhabited Federally established reservations."[201] The statement illustrates the presumption, clarified in later cases, that tribal interests are considered stronger, and therefore state preemption is more easily found, within the boundaries of federal reservations.[202] Because there are no reservations (except Metlakatla) in Alaska, that presumption may not be available as a means of excluding state jurisdiction in most of Alaska's "Indian country." The U.S. Supreme Court has implied as much in at least three cases, one of which arose in Alaska.

In *Mescalero Apache Tribe v. Jones* (1972),[203] the Court permitted state taxation of gross receipts from a tribal ski resort located *off* the Mescalero reservation. *McClanahan v. Arizona State Tax Commission*[204] was a companion case to *Mescalero Apache,* and in both cases the Supreme Court noted that *Kake v. Egan* was authority for the power of a state to tax and otherwise regulate *off*-reservation Indian enterprises. The general implication seems to be that in these particular off-reservation situations, the interests of the tribe did not outweigh the interests of the state in regulating the particular activity. Unless some more significant tribal interests were at stake, it is likely that the state would have regulatory authority over other off-reservation Native interests in Alaska, even if the affected territory were considered "Indian country." State authority in these circumstances is not derived from any provison of P.L. 280 but rather from a "balancing" of tribal, state and federal interests which the Supreme Court has employed to determine the relative scope of each government's jurisdiction under the related but distinct doctrines of "preemption" and "infringement." These concepts are discussed in more detail in section VI of this chapter.

However, even if the State of Alaska were to have regulatory jurisdiction over off-reservation Indian country, there is nothing in P.L. 280 or the general jurisdictional principles of federal Indian law to preclude a Native village government from exercising concurrent regulatory authority over the same lands. This could, at least theoretically, include the usual powers of tribal governments such as zoning, taxation and other forms of civil regulation.[205] The actual authority of the Native government could be substantial. On the other hand, the existence of a state chartered municipality with jurisdiction over some of the same lands[206] would likely preclude, as a practical matter, the exercise of duplicate authority by a Native government. In the absence of state chartered governments, however, Alaska Native traditional or IRA councils could provide effective local government.

4. Delegation and Other Expansions of Tribal Jurisdiction

As communities with inherent rights of political self-government, Alaska Native village traditional and IRA councils can also exercise federally delegated criminal and civil authority in Indian country.[207] The Indian liquor laws are perhaps the most prominent example of this sort of delegated authority,[208] and by the specific terms of P.L. 280 they are specifically excepted from state criminal jurisdiction.[209] Under these statutes, Indian tribes have been held to have concurrent authority with states to regulate the introduction of liquor into Indian country even though the tribes supposedly did not exercise such authority traditionally.[210] As previously noted, this authority has been delegated to villages in Alaska and provides these villages with an alternate and locally enforceable means of preventing the introduction of liquor into their communities.[211] Although it is not exactly analogous, under the Indian Child Welfare Act, Alaska Native villages may also obtain retrocession of exclusive jurisdiction over child custody cases involving children domiciled within Indian country governed by the tribe.[212] Similarly, 1981 amendments to the Lacey Act, discussed in chapter 7, permit Native fish and game ordinances as applied to Indian country to be enforced as federal law.[213]

E. Jurisdiction Over Persons and Property

As a general principle, Native governments have large measures of criminal and civil jurisdiction over the persons and property of persons (especially tribal members) living within Indian country.[214] Within the limits discussed above, P.L. 280 affords the State of Alaska concurrent jurisdiction over criminal "offenses" and civil "causes of action" involving "Indians" arising within "Indian country." The state may even be able to exercise concurrent civil regulatory jurisdiction over Indian persons and unrestricted property within off reservation Indian country. One significant unresolved question is whether, under some circumstances, the interests of the tribe in the exercise of exclusive jurisdiction over particular

"waiver" of sovereign immunity it accomplishes the same result—judicial intervention in governmental affairs. The principle appears applicable to tribal officials as well,[262] but this is a complex area of law which is still evolving, so it is not clear precisely when tribal officials might be considered to be acting "beyond their authority."

Although, circumstances involving denials of civil rights are one of the notable instances where federal officials can be sued individually as acting beyond their authority,[263] except for *habeas corpus* actions, suits in similar circumstances do not appear to be permitted against tribal officials. In *Santa Clara Pueblo v. Martinez,* disucssed earlier, the U.S. Supreme Court concluded that tribal officials were exempt from all but *habeas corpus* actions even though their actions may have been a denial of rights under the Indian Civil Rights Act.

One Ninth Circuit Court of Appeals decision suggests that the limitations of *Martinez* are generally applicable to "intratribal" disputes between tribal members and tribal officials.[264] Another federal circuit court has suggested, in a suit brought by a non-Indian oil company to enjoin tribal officials from terminating an oil lease, that whether the officials could be sued or not depended on whether the tribal government could legally authorize them to terminate the lease. That in turn was said to turn on whether the tribe's power to terminate the lease trespassed on the "overriding interests of the National Government," or was "necessary to protect tribal self-government or to control internal relations."[265] There is a disquieting hint in both these cases that federal courts may be more willing to find ways to assert jurisdiction over cases involving conflicts between non-Indians and tribal officials than in cases involving Indians and tribal officials, but it is simply too early to predict circumstances under which tribal officials may be held to be acting beyond their authority for purposes of asserting federal jurisdiction to review their actions.

G. Conclusions

Tribal jurisdiction in a nonreservation, P.L 280 state like Alaska is perhaps subject to a greater degree of state interference than is the case on reservations in other P.L. 280 states. Nonetheless, it is important to realize that P.L. 280 is not a grant of either exclusive or general state jurisdiction over "Indians" in "Indian country." The statute has been specifically limited to civil "causes of action" and criminal "offenses," and in neither case can state jurisdiction interfere with Native property held in restricted or trust status. Significantly, in civil cases, P.L. 280 also requires state courts to give "full force and effect" to certain tribal ordinances or customs. In Alaska this may mean that enactments and customary practices of Native governments must be accorded a deference similar to that afforded the ordinances of home rule municipalities chartered under Alaska state law. Finally, P.L. 280 does not grant any state

jurisdiction over tribal governments themselves, but only authority over private causes of action and individual criminal offenses.

In many respects, therefore, P.L. 280 in Alaska is not so important as a grant of state jurisdiction over Native affairs as it is for the restrictions it imposes on the exercise of state authority. Furthermore, whether the state can exercise more general regulatory authority over Alaska Natives in off-reservation Indian country than is possible in a reservation situation is something of an open question, which has little to do with P.L. 280. Instead, the degree to which the state may have concurrent regulatory jurisdiction with off-reservation tribes seems likely to depend on the relative interests of the state and tribal governments in the subject matter being regulated.

VI. The Nature of the Alaska Native Claim to Self-Government

A. Politics or Property

Aboriginal powers of self-government or "sovereignty" are not founded on a claim to property ownership or "title," but rather on inherent political independence which incidentally enables a government to assert authority over people and property subject to its jurisdiction. The discovery of what came to be known as the Americas generated a vigorous European debate over the rights of the original inhabitants of the "new world."[266] The debate, initially among the Spanish clergy of the mid-sixteenth century,[267] influenced the theory, if not usually the practice, of Spanish aboriginal policy.[268] The debate was taken up in the seventeenth century by the Dutch jurist and statesman, Hugo Grotius and was carried on through the eighteenth century by the Swiss jurist, Emmerich Vattel,[269] both of whose thoughts influenced the early Indian cases decided by John Marshall.[270]

The focus of these early debates was on the relative rights of the aboriginal inhabitants of the newly discovered lands to both property and sovereignty.[271] At least under the English common law, with its feudal heritage, the concepts of property ownership and political authority were joined together in the person of the sovereign.[272] However, the British negotiation of treaties with the North American aboriginal tribes implied, Marshall later held, that the aboriginal people were also sovereign.[273] The purpose of the treaties was the acquisition of aboriginal property rights to the land held by the Indians,[274] to which the British asserted an *exclusive* right of acquisition by virtue of their "discovery."[275] However the title of the British (and later the Americans) could not be realistically equated to complete political control, because the Indians were able to oppose early assertions of such sovereignty militarily.[276] The result was that the concepts of sovereignty and land title were judicially distinguished so that even though the land titles of the aboriginal inhabitants were theoretically impaired by the doctrine of discovery (i.e.' they could only sell to the "discovering" nation), their inherent right to political self-government was not.[277]

ubject matter over which state or tribal jurisdiction extends
lian country.

— The distinction between judicial jurisdiction and legislative jurisdiction.

— The distinction between subject matter jurisdiction and personal jurisdiction.

— The distinction between exclusive jurisdiction and concurrent jurisdiction.

— The extent to which Congress, in exercising its plenary power, has altered the original exclusive jurisdiction of the tribes and has transferred all or part of that jurisdiction to the federal government or state governments.

It will be valuable to articulate, in several different contexts, a characterization of Indian country. Is the tribe in question best described as a "state within a state"? As a "foreign nation"? As a "federal instrumentality"? As a "private association"? As will be seen, each of those characterizations, depending upon the specific facts and laws at issue, can fairly be applied to different reservations in different legal contexts.

But one broad point remains strikingly apparent. From Worcester v. Georgia over one and one-half centuries ago to the cases decided at the Court's last term, the central issue in Indian law has changed hardly a whit: who governs the land, the resources, and the people in Indian country?

Most of the remainder of this book will deal with jurisdiction in Indian country. Even the material covering hunting and fishing rights and water rights, which are premised in part on property rights, repeatedly turn on jurisdictional questions. This chapter treats three fundamental, recurring issues that lay a foundation for the subsequent chapters on jurisdiction.

SECTION A. INDIAN COUNTRY

The term "Indian country" is the starting point for analysis of jurisdictional questions in Indian law, because it defines the geographic area in which tribal and federal laws normally apply and state laws normally do not apply. 18 U.S.C.A. § 1151, adopted in 1948, defines Indian country as follows:

> * * * [T]he 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.

Section 1151 is a criminal statute, but the Supreme Court has found that it "generally applies as well to questions of civil jurisdiction." DeCoteau v. District County Court, 420 U.S. 425, 427 n. 2 (1975), page 342, infra.

The phrase "Indian country" was used as early as the 18th century as a reflection of the then prevailing concept that a separate territory would be set aside for Indians. The early Nonintercourse acts used the term, but there was no statutory definition. As the policy of removing tribes west began to take effect, a statutory definition was provided in the Nonintercourse Act of 1834:

> '[A]ll that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, [shall be] deemed to be the Indian country.

4 Stat. 729. That definition remained on the books until the general statutory revision of 1874 when it was deleted, reflecting the fact that the westward expansion had made the earlier definition obsolete. In the absence of a statutory definition the courts then proceeded to define Indian country judicially. As the following excerpt shows, those decisions were incorporated into the 1948 statute and are of assistance in understanding the current statutory definition of Indian country.

ROBERT N. CLINTON, CRIMINAL JURISDICTION OVER INDIAN LANDS: A JOURNEY THROUGH A JURISDICTIONAL MAZE *

18 Ariz.L.Rev. 503, 507–13 (1976).

The first clauses of sections 1151(a) and (b) merely restate prior law. Since the early definitions of Indian country were predicated in great part on aboriginal title, the removal of Indians to reservations in the 19th century prompted questions as to whether reservations created either by congressional act or Presidential proclamation were Indian country because they were not, in many instances, lands to which the tribe held aboriginal title. In Donnelly v. United States,[27] the Supreme Court rejected this distinction and specifically held that land set aside from the public domain by Executive order for use as an Indian reservation was Indian country. That portion of section 1151(a) which includes within the definition of Indian country "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" is a direct outgrowth of *Donnelly*. Not all lands presently occupied by Indian tribes are the product of the federal reservation policy, however, and thus some Indian lands are not technically reservations. In United States v. Sandoval,[29] decided the same year as *Donnelly*, the Supreme Court held that the lands of the Pueblo

27. 228 U.S. 243 (1913). * * *

29. 231 U.S. 28 (1913).

Indians, which were not federally owned reservations, but rather consisted of communally owned lands held in fee simple, were nonetheless Indian country since they were occupied by "distinctly Indian communities" which were "dependent tribes" recognized and protected by the federal government. Section 1151(b) is a codification of *Sandoval.* The simple ownership of lands by a federally-recognized, dependent Indian tribe is sufficient to bring the lands so held within the ambit of the phrase "Indian country."

Section 1151(b) includes within the scope of Indian country all dependent Indian communities in the United States "whether within or without the limits of a state." Although the reasons for this language are not fully spelled out in the legislative history notes, its inclusion apparently is an effort to resolve a conflict in Supreme Court decisions as to whether land located within the boundaries of a state, whose enabling act or constitution does not contain a disclaimer of state jurisdiction over Indian lands, is subject to state or federal jurisdiction. By enacting section 1151(b), Congress has put to rest any argument that Indian lands ceased being federal Indian enclaves when the state within which they are located was admitted to the Union without a disclaimer of jurisdiction.

A number of the clauses contained in section 1151 are designed to clarify the vestigial impact on jurisdictional arrangements of the General Allotment Act of 1887, and related programs. These programs altered the traditional communal ownership patterns for Indian lands by allotting and patenting specified [parcels] of land both within and without Indian reservations to individual Indians either in trust or in fee. For a time, these programs created problems of "checkerboard" jurisdiction within particular reservations, as provisions in these acts vested the states with jurisdiction over the allotted land. Moreover, since the Indian Reorganization Act of 1934 had indefinitely extended the trust period of lands still held under these allotment programs, many parcels of allotted land might have been left effectively in a checkerboard jurisdictional limbo. Although the courts had addressed many of the problems created by the allotment program, the provisions in section 1151 are an effort to codify the results of litigation and promulgate clear statutory solutions to other difficulties. Specifically, section 1151 resolved many of the jurisdictional problems created by allotment, by expressly including within the definition of Indian country all allotted and patented land located within the limits of an Indian reservation and all Indian allotments to which Indian title has not been extinguished, even if not located within a reservation.[37]

37. The first important solution to the jurisdictional problems created by the allotment programs is found in section 1151(a), which includes within Indian country "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*" 18 U.S.C.A. § 1151(a) (emphasis added). This provision codifies prior case law holding that all land within the exterior boundaries of an Indian reservation remain Indian country despite the issuance of patents for parcels of land therein. *See* United States v. Celestine, 215 U.S. 278 (1909). * * *

[Section] 1151(c) contains no reference, unlike 1151(a), to a requirement that allot-

The cumulative breadth of the definition of Indian country found in section 1151 is evident. For example, the reservations of the Sac and Fox Tribe in Iowa and the Eastern Band of Cherokee in North Carolina both constitute Indian country even though they were established de facto by the refusal of members of the tribes to comply with treaty provisions calling for their removal to other lands. In State v. Youngbear,[40] the Iowa supreme court correctly stated that the appropriate test to determine whether a reservation is within the definition of Indian country set forth in section 1151 is not how the land was acquired, but rather whether the land has been set apart for the use and occupancy of Indians. To be sure, this test does not mean that by simply congregating in any confined area, such as a hospital or apartment building, Indians can claim to be residing in Indian country. Under section 1151(a) and (c), there must be federal recognition of land as an Indian reservation or allotment, or, alternatively, under section 1151(b), the existence and dependent nature of the affected Indian community must be established.

* * *

In short, the definition of Indian country set forth in section 1151 is quite expansive. Once a reservation has been established, or a dependent Indian community shown to exist, it will remain Indian country until terminated by Congress, irrespective of the nature of the land ownership. Moreover, even if individual allotted parcels of land are not located within the reservation, they may still constitute Indian country if the Indian title thereto has not been extinguished. A finding that the land on which a crime was committed is Indian country will generally result in exclusive tribal and federal jurisdiction, thereby excluding the exercise of state authority. Hence, the expansiveness of the definition of Indian country is important in preserving policies of tribal self-government and the protective federal trusteeship over Indians.

Notes

1. Why is it imprecise to describe tribal jurisdiction over a "reservation" rather than over "Indian country"? Under what provisions of § 1151 is the title to land determinative? Has there ever been a time when *original* Indian title was determinative? Which of the following types of land are Indian country: Homesteaded land owned in fee by a non-Indian

ted land comprise property located within an established Indian reservation. The omission is deliberate. Section 1151(c) was intended to codify United States v. Pelican, 232 U.S. 442 (1914), where the Supreme Court held that allotted land within the Colville reservation which had been terminated as reservation land and placed in the public domain, was nevertheless Indian country, so long as an Indian held title to the allotted parcel. The codification of *Pelican* in section 1151(c) apparently ends any dispute as to whether lands allotted from the public domain, from former Indian reservations, are Indian country. All such allotments fall within the statutory definition.

Congress has specifically included rights-of-way running through any Indian reservation or allotment within its definition of Indian country. This clarified prior case law as to whether state highways or railroad rights-of-way running through a reservation constituted Indian land for jurisdictional purposes. * * *

40. 229 N.W.2d 728 (Iowa), cert. denied, 423 U.S. 1018 (1975). * * *

within a reservation? A town, established under state law, within an Indian reservation? A state highway or railroad route through an Indian reservation? A trust allotment beyond the boundaries of a reservation? A former allotment, now owned by an Indian in fee, within a reservation? A former allotment, now owned by an Indian in fee, not within the exterior limits of a reservation?

2. Congress can, of course, terminate the existence of Indian country. Although tribal jurisdiction can continue for some purposes after the passage of a termination act, e.g., Menominee Tribe v. United States, 391 U.S. 404 (1968), page 140, supra, the termination acts of the 1950's generally operated to extinguish Indian country. Tougher questions have arisen concerning reservations where large blocks of land were opened to homesteading during the allotment era. In Seymour v. Superintendent, 368 U.S. 351 (1962), a crime occurred on land owned in fee by a non-Indian. The land was transferred from tribal ownership when a large part of the southern half of the Colville Reservation was "opened" to non-Indian ownership in 1906. The land on which the crime occurred was within the limits of the town of Omak. After analyzing the legislative history of the 1906 act, the Court concluded that the parcel in question remained Indian country in spite of being owned by a non-Indian and being within township limits. As a policy matter, the Court found that § 1151 intended to avoid "an impractical pattern of checkerboard jurisdiction" that would require "law enforcement officers operating in the area * * * to search tract books in order to determine" jurisdiction. 368 U.S. at 358.

Seymour was followed in Mattz v. Arnett, 412 U.S. 481 (1973), holding that the Klamath River Reservation in California was not terminated by an 1892 Act that allotted some reservation land to Indians and opened other reservation land to settlement by non-Indian homesteaders. After providing an account of the legislative history, the Court concluded as follows:

> The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U.S.C.A. § 1151, defining Indian country 'notwithstanding the issuance of any patent' therein. More significantly, throughout the period from 1871–1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.

412 U.S. at 504. (Emphasis by the court.)

DE COTEAU v. DISTRICT COUNTY COURT

Supreme Court of the United States, 1975.
420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300.

MR. JUSTICE STEWART delivered the opinion of the Court.

[The Lake Traverse Reservation in South Dakota was created by treaty in 1867. An 1889 agreement, which ceded and conveyed all unallotted lands to the United States, was ratified in 1891 by Congress and resulted in the return of such lands to the public domain. The

5. How do the various protections afforded to Alaska Native subsistence hunting and fishing compare with the hunting and fishing rights of Indians in the Lower 48 states?

6. TRIBAL STATUS, RIGHTS, AND IMMUNITIES

DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS *

373–378 (1984).

TRADITIONAL AND IRA GOVERNMENTS

1. GENERAL

The federal government has recognized two types of Native governments in Alaska—traditional and IRA. * * * Although modified over time by western influence, traditional governments still exist in many remote Alaska Native villages. There were 210 Native villages recognized initially under ANCSA, of these approximately 120 are organized as municipalities under state law, and of those 120 approximately 70 also have organized IRA councils. That leaves approximately 90 Alaska Native communities which are governed solely by traditional village councils.

Alaska Native IRA governments have been authorized since 1934 under section 16 of the Indian Reorganization Act. Although officials and previous studies seldom agree on the exact number of IRA governments in Alaska, a survey done for the present study revealed that twenty-four communities organized under the IRA in the late 1930's, forty in the 1940's, five in the 1950's, and two in 1971. That is a total of 71 IRA governments; however, many of these may not have been operational for many years owing to the confusion surrounding their status. This was particularly true where, as in most cases, the community was also organized as a municipality under state law.

2. TRADITIONAL GOVERNMENTS

As is the case with any traditional Native government, traditional Alaska Native governments have inherent governmental authority unless the federal government has specifically deprived them of it. Unless modified by Congress, inherent powers of internal self-government allow Indian tribes to:

> Adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.

However, because Alaska is a "P.L. 280 state," the exclusive authority of traditional governments to exercise some of these powers may be something of a moot point. P.L. 83–280 is a federal statute

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granting certain states some measure of civil and criminal jurisdiction over Native Americans and their lands. The law was applied to Alaska in 1958. As a consequence, state government—with specific exceptions—appears to have some jurisdiction over many of those matters normally within the exclusive jurisdiction of traditional Native governments.

Of course, the exercise of state jurisdiction does not prevent the federal government from recognizing traditional Native governments for purposes of federal Native programs and services. Most villages recognized as eligible for ANCSA benefits have also been specifically recognized for other federal services and programs by being included in the annual list of "Indian Tribal Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." These same villages are included in the Internal Revenue Service list of "tribal governments" eligible for benefits under the Tribal Tax Status Act of 1982. However, twelve ANCSA villages with traditional councils are inexplicably excluded from these lists, as are four non-ANCSA communities governed by traditional councils, all of which have long received BIA services.

The Department of the Interior has recognized traditional governments for Native program and service purposes for many years prior to ANCSA. When it recognized traditional Alaska Native communities, the Bureau of Indian Affairs usually requested them to adopt a simple constitution and bylaws. The primary purpose in doing so was to assure that the bureau was dealing with a government which truly represented the Native people of the community and that it would not later be confronted with another group within the same village demanding equal recognition. Adoption of a constitution and bylaws does not appear to be a requirement for recognition, but administratively the BIA has been reluctant to deal with a community not formally organized under these organic documents.

Constitutions of traditional villages are patterned after IRA constitutions in some respects. For example, a traditional constitution must be approved by a majority vote in an election wherein at least thirty percent of those eligible participate. Under a typical constitution, the traditional government has broad power

> to do all things for the common good which it has done or has had the right to do in the past and which are not against Federal and State laws *as may apply* (emphasis added).

Other powers include authority to deal with the federal and state governments and to levy "dues, fees and assessments for community purposes." These provisions were specifically written to preserve the community's inherent governmental authority.

3. IRA Governments

Section 16 of the 1934 Indian Reorganization Act permits "[a]ny Indian tribe or tribes, residing on the same reservation" to organize for its common welfare by adopting an appropriate constitution and by-

laws. Because there were few reservations in Alaska, the IRA was amended in 1936 to permit Alaska Natives to organize on the basis of "a common bond of occupation, or association, or residence." As noted earlier, seventy-one communities have adopted constitutions and by-laws under this provision of IRA.

A Native community does not appear to surrender any of its inherent powers of self-government by adopting an IRA constitution. Section 16 provides in part that:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel . . . ; to prevent the sale, disposition, lease, or encumbrance of tribal lands . . . without the consent of the tribe; and to negotiate with the Federal, State and local Governments.

The Interior Department Solicitor has interpreted "all powers vested * * * by existing law" to include all those powers of inherent sovereignty previously mentioned which are appropriate to Native governments generally. However, as noted earlier, those inherent powers may be somewhat limited by the application of P.L. 280 to Alaska. Nevertheless, the tribes certainly retain the power to determine their membership, and the IRA as applied to Alaska implies that any community organized under the IRA will always be "recognized" as eligible for federal Native programs and services. Thus, members of an Alaska IRA community or "tribe" will always be eligible for federal programs and services provided to Natives because of their status as Natives.

Currently, all Natives in Alaska appear to be eligible for those programs and services, but there is concern among some that this will not always be so. Some believe eligibility for federal programs may be administratively restricted to those who can point to some sort of "tribal" membership. In Alaska that might mean being either a shareholder in a Native village or regional corporation or a member of some other "recognized" tribal entity. It is apparent that many Natives born after the enactment of ANCSA will not become Native corporation shareholders for many years, if at all. Therefore, membership in an IRA (or traditional) community may be the only way in which individual Natives will be able to maintain a clear relationship with the federal government should current broad criteria for Alaska Native eligibility be reduced or eliminated.

* * *

As previously mentioned, Alaska IRA governments have for many years been eclipsed by the organization of state-incorporated municipalities. Beginning in 1963, the BIA even encouraged IRA decline by supporting state municipal incorporation, but the Self-Determination Act [Pub.L. No. 93–638, codified at 25 U.S.C.A. §§ 450f–450n] has seemingly eliminated that trend, because IRA (and traditional) village governments now have first priority for federal contracting and grants under that act. However, access to federal funding in some cases has

placed the IRA (and traditional) councils in competition with state-chartered city governments when it comes to community planning and service delivery within the same village. On the other hand, several commentators have suggested that "concurrent government," drawing on both "tribal" and state municipal forms of government may be the most effective way to govern rural Alaska villages.

Many Native non-profit associations now have village or tribal government improvement programs which provide assistance to villages in the drafting or amendment of IRA constitutions as well as training and information on the application of federal law to the exercise of tribal self-government. NANA Regional Corporation also relies on the IRA's to fulfill the approval requirements of section 14(f) ANCSA. Under 1976 amendments to ANCSA, NANA has merged all of its village corporations into the regional corporation. One of the statutory requirements for doing so was that a "separate entity" be conveyed the right to "withhold consent to mineral exploration, development, or removal within the boundaries of the Native village." The IRA governing bodies have been designated to perform that function in the NANA region.

Most IRA councils are found in unincorporated villages, where they are the primary form of government. Even in some of the state's larger municipalities, however, IRA councils have operated substantial social service programs. For example, in Sitka, the Sitka Community Association operates a tribal court and a variety of other programs employing a staff of about one hundred. The Ketchikan Indian Corporation IRA operates a number of cultural, educational, vocational, health and community service programs out of a federally financed Native center located within the city of Ketchikan. The Kotzebue IRA has managed welfare assistance programs. Even in small communities, some IRA's have been able to attract substantial community development funds, but most rural Alaska IRA's have not been extremely active, primarily due to limited funds.

The funding limits have been particularly noticeable (since) the 1981 federal budget cuts, especially in light of the corresponding increase in state-funded support for state chartered municipalities. The state legislature has from time to time adopted legislation to pass substantial revenues to unincorporated communities and even specifically to IRA chartered governments, but at least up to 1984, the state executive branch, led by the restrictive interpretations of the attorney general, had interpreted the state constitution and these statutes narrowly to substantially restrict the funding which might otherwise have been available to IRA (and traditional) councils from state sources.

In spite of these difficulties, the early 1980's has seen a remarkable resurgence of interest in the IRA in Alaska. By 1981 some thirty new applications had been filed with the Interior Department. A few
A village corporations (particularly on former reserves) have also
rred lands received under the claims act to IRA governments.

provided by the Nonintercourse Act, 25 U.S.C.A. § 177, and that specific statutory recognition is not always required).

4. Recent diminishment cases include Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir.1985) (no diminishment); United States v. Sohappy, 770 F.2d 816 (9th Cir.1985) (no diminishment); Russ v. Wilkins, 624 F.2d 914 (9th Cir.1980), cert. denied, 451 U.S. 908 (1981) (reservation diminished); Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980) (reservation diminished); United States v. Long Elk, 565 F.2d 1032 (8th Cir.1977) (no diminishment); Lower Brule Sioux Tribe v. State of South Dakota, 540 F.Supp. 276 (D.S.D.1982) (partial diminishment); White Earth Band of Chippewa Indians v. Alexander, 518 F.Supp. 527 (D.Minn.1981) (reservation diminished); State v. Janis, 317 N.W.2d 133 (S.D.1982) (reservation diminished).

5. States also resist any erosion of their jurisdiction through expansion of Indian country. Section 5 of the Indian Reorganization Act authorizes the Secretary of the Interior, "in his discretion," to acquire land "within or without existing reservations * * * for the purpose of providing land to Indians." 25 U.S.C.A. § 465. This provision provides an additional tool to augment the Indian land base. Are there limits on the Secretary's discretion?

Suppose the Secretary were to acquire commercial property in the central business district of a major city in trust for a tribe. What would be the implications for municipal and state jurisdiction? Would the tribe be subject to city land use regulation? Must it pay taxes of any sort? If the property were former trust land within a reservation, would the answers differ?

Considerable recent activity has begun to shape the parameters of section 5. See Florida Department of Business Regulation v. United States Department of Interior, 768 F.2d 1248 (11th Cir.1985); Chase v. McMasters, 573 F.2d 1011 (8th Cir.), cert. denied, 439 U.S. 965 (1978); City of Sault Ste. Marie v. Andrus, 532 F.Supp. 157 (D.D.C.1980), affirmed 672 F.2d 893 (D.C. Cir.1981), cert. denied 459 U.S. 825 (1982); City of Tacoma v. Andrus, 457 F.Supp. 342 (D.D.C.1978). In these cases the courts have broadly construed section 5 to authorize acquisition of lands for individuals (*Chase, Tacoma*) and tribes (*Sault Ste. Marie* and *Florida Department*). BIA regulations governing land acquisitions are found at 25 C.F.R. Part 151 (1985). Indian country issues are treated in F. Cohen, Handbook of Federal Indian Law 27–46 (1982 ed.).

SECTION B. "PUBLIC LAW 280"—A TRANSFER OF JURISDICTION IN SOME STATES

As noted earlier, the termination era produced several assimilationist policies other than the termination acts themselves. The principal example is Public Law 280, which alters the traditional dominance of federal and tribal law as to those reservations affected by the Act. Public Law 280 is thus an exception to the general jurisdictional structure in Indian country. We present the subject in this foundational chapter because Public Law 280 applies to enough tribes that it is

important in its own right and because Public Law 280 is discussed by way of comparison in many opinions involving non-Public Law 280 reservations.

CAROLE E. GOLDBERG, PUBLIC LAW 280: THE LIMITS OF STATE JURISDICTION OVER RESERVATION INDIANS *

22 U.C.L.A. L.Rev. 535, 537–62 (1975).

* * *

Passed in 1953, PL–280 was an attempt at compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction. The statute originally transferred to five willing states [11] and offered all others, civil and criminal jurisdiction over reservation Indians regardless of the Indians' preference for continued autonomy. PL–280 did not, however, terminate the trust status of reservation lands.

From the outset, PL–280 left both the Indians and the states dissatisfied, the Indians because they did not want state jurisdiction thrust upon them against their will, the states because they resented the remaining federal protection which seemed to deprive them of the ability to finance their newly acquired powers. Predictably, disagreement between the Indians and the states erupted over the scope of jurisdiction offered by PL–280 and the means by which transfers of jurisdiction were to be effected. Among the matters in dispute were whether states assuming jurisdiction under PL–280 acquired the power to tax and zone on Indian reservations, and whether states asserting PL–280 jurisdiction had satisfied the procedural prerequisites for doing so.

11. * * * In regard to criminal jurisdiction in the mandatory states the Act provides: **

Each of the States or Territories [sic] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

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

** [*Ed.*] 18 U.S.C.A. § 1162(a). The parallel provision for civil jurisdiction is 28 U.S.C.A. § 1360(a).

Recent social, economic, and political developments have made the Indians and states especially anxious that their respective interpretations of PL–280 prevail. The expansion of metropolitan areas near Indian reservations has increased the states' interest in regulating and exploiting residential and recreational development on trust land. States have been notably desirous of acquiring pollution and subdivision control. The discovery of substantial energy resources on reservations, and consequent industrial development, have spurred similar state interest in regulating and taxing those activities. At the same time, tribal governments have been receiving encouragement from the federal government to develop tribal enterprises and strengthen their administrative apparatus, increasing their interest in freedom from state power. Finally, growing demands on the part of Indians that they receive their share of state services and their share of representation in state legislatures have produced concomitant demands on the part of the states that Indians submit to state jurisdiction.

The jurisdictional stakes are considerably higher today than they were when PL–280 was enacted; at the same time federal Indian policy is more devoted to fulfilling federal responsibility for Indians and building effective tribal governments. Broadly speaking, the model for federal Indian policy seems to be changing from one favoring state power with minimum protection for Indian interests to one favoring tribal autonomy with minimum protection for state interests. Nevertheless, since PL–280 is the most direct evidence of congressional intent with respect to state jurisdiction, the debate over the scope of state power on Indian reservations must contend with policy choices Congress made when PL–280 was enacted. Amendments to the Act adopted in 1968 did, however, bring PL–280 more in conformity with current policy by rendering all *future* assertions of state jurisdiction under the Act subject to the affected Indians' consent, and authorizing states to return jurisdiction to the federal government. But controversies persist over jurisdiction claimed by the states prior to these amendments.

* * *

PL–280 differed from earlier relinquishments of federal Indian jurisdiction in that it authorized every state to assume jurisdiction at any time in the future. Previous transfers had been limited to some or all the reservations in a single state, and had followed consultation with the individual state and affected tribes by the Bureau of Indian Affairs (hereinafter referred to as B.I.A.). Although PL–280 itself had begun as an attempt to confer jurisdiction on California only, by the time it was reported out of the Senate, the prevailing view was that "any legislation in [the] area should be on a general basis, making provision for all affected States to come within its terms * * *." The Senate Report of the bill in committee suggests why Congress was concerned with effectuating a general transfer of jurisdiction after years of an ad hoc policy which had involved careful evaluation in each case from the point of view of both Indians and the states. The Report indicates the foremost concern of Congress at the time of enacting of

PL–280 was lawlessness on the reservations and the accompanying threat to Anglos living nearby. * * *

Of course, conferring jurisdiction on the states was not the only available solution to the very real law enforcement problem. * * * State criminal jurisdiction was preferred to other alternatives however, because it was the cheapest solution; Congress was interested in saving money as well as bringing law and order to the reservations.

There is much less evidence of the congressional rationale for conferring civil jurisdiction on the states, and much less factual support for that decision. * * * In this context, the Senate Report on PL–280 declared that the Indians "have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction * * *." The implication of this and similar statements was that Indians were just as socially advanced as other state citizens, and should therefore be released from second-class citizenship as well as the paternalistic supervision of the B.I.A.

Considering the absence of any significant investigation of the Indians' stage of social development prior to the broad delegation of jurisdiction to every state by PL–280, it seems unlikely that Congress knew or cared about the Indians' readiness for state jurisdiction. Furthermore, it is difficult to reconcile this theme of advanced acculturation with the prevailing notion that state criminal jurisdiction was necessary because the Indians were disorderly and incapable of self-government. Most likely, civil jurisdiction was an afterthought in a measure aimed primarily at bringing law and order to the reservations, added because it comported with the pro-assimilationist drift of federal policy, and because it was convenient and cheap.

The choice Congress made in PL–280 did not wholly satisfy either the tribes or the states. The source of the Indians' displeasure was the absence of a provision for tribal consent prior to state assumption of jurisdiction. The states; on the other hand, were unhappy about the absence of a provision either granting federal subsidies to states that accepted jurisdiction or removing reservation lands from tax-exempt trust status. * * *

The five, later six, states that were granted PL–280 jurisdiction immediately and irrevocably (mandatory states) lacked the flexibility to condition their jurisdiction on Indian consent. * * * In contrast, the states merely authorized to assume jurisdiction at their discretion (optional states) could take the Indians' wishes into account before asserting their power, and many did so, either formally or informally. For some states, this recognition of Indian sovereignty was spontaneous; in others, it was formed by the bitter experience of states such as Wyoming, South Dakota, Washington, and New Mexico, in which the Indians had waged vigorous and successful battles against bills and constitutional amendments imposing state jurisdiction unilaterally. Although Arizona and Iowa simply asserted jurisdiction without seeking concurrence of the affected Indians, and Idaho and Washington ignored Indian preferences as to some subject matters, Florida first

solicited the consent of the Seminole tribe, Nevada consulted with every tribe in the state prior to assuming jurisdiction, and Idaho, Montana, North Dakota, South Dakota, and Washington established some form of Indian consent procedure despite the absence of a requirement in PL–280.

* * *

In 1968, Congress eliminated the need for self-imposed limits on state jurisdiction in the future by establishing a tribal consent provision in PL–280 itself. Congress provided in the Civil Rights Act of 1968 that henceforth no state could acquire PL–280 jurisdiction over the objections of the affected Indians.[79] Furthermore, in an action which most legislators believed did no more than make explicit existing law, the 1968 Act declared that state jurisdiction could be acquired one tribe at a time, so long as a majority of the adult enrolled members of the tribe expressed their consent in a special election. Finally, in a more controversial action, it allowed acceptance of jurisdiction over some subject matters, but not others.[81]

* * *

The significance of the addition of a tribal consent provision to PL–280 lies not only in its recognition of the principle of Indian self-determination, but also in its new conception of the role of state jurisdiction on reservations. The tribal consent provision transformed PL–280 from a law which justified state jurisdiction on law enforcement, budgetary, and assimilationist grounds to one which justified state jurisdiction as a means of providing services to Indian communities. Among the strongest arguments in favor of the 1968 Act's amendment was that the institution of state jurisdiction under PL–280, far from improving reservation law and order and elevating Indians from second-class citizenship, had subjected them to discriminatory treatment in the courts, as well as discrimination in the provision of state services.* * * *

The beneficial impact of the 1968 amendments to PL–280 should not be overemphasized, however. The Indian consent provision was not made retroactive, and thus earlier assumptions of state jurisdiction over Indian objections were not affected. Moreover, it did not enable Indians who had consented to state jurisdiction under a state-initiated consent provision to reconsider their decisions.

79. 25 U.S.C.A. § 1326 provides * * *:

> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election * * * when requested to do so by the tribal council or other governing body, or by 20 per centum of the such enrolled adults.

81. 25 U.S.C.A. § 1321(a) provides that states may assume criminal jurisdiction "over any or all * * * offenses"; 25 U.S.C.A. § 1322(a) provides that states may assume civil jurisdiction over "any or all * * * civil causes of action arising within * * * Indian country * * *."

* [Ed.] No tribe has consented to state jurisdiction under Public Law 280 under the 1968 provision.

The absence of an Indian consent provision in PL–280 reflected insensitivity to the interests of the Indians; the absence of federal subsidies to PL–280 states demonstrated similar insensitivity to the dilemma of states handed jurisdiction but simultaneously denied the means to finance it. This financial dilemma derives from a basic inconsistency in federal policy. On the one hand, Congress wished to satisfy state demands for improved law and order on the reservation; on the other hand, Congress was itself unwilling to pay for such improvements or to enable the states to do so by lifting the tax-exempt status of Indian trust lands.

The failure to resolve this inconsistency had disastrous consequences for states acquiring PL–280 jurisdiction. Local governments acquiring jurisdiction were required to hire more police, more judges, more prison guards, more probation and parole officers, and more juvenile aid officers, and to build new police stations, courthouses, and jails. It could have been predicted that a state which undertook law enforcement on the reservation as vigorously as elsewhere in the state would incur higher expenses than the federal government, even allowing for the greater expense of operating a federal as opposed to a municipal court. The new resources available to the states under PL–280 such as fines and court costs were clearly inadequate; estimates based on federal experience indicated such funds would cover only about 10 percent of all newly-acquired law enforcement expenses. The mandatory PL–280 states were hardest hit; they could not avoid the economic consequences of federal withdrawal from the reservations by refusing jurisdiction under the Act.

Financial hardship for the states translated into inadequate law enforcement for the reservations. The most notable failure among the mandatory states was Nebraska, where the Omaha and Winnebago reservations were left without any law enforcement at all once federal officers withdrew. This bitter experience made Indians and local governments alike wary of state assumption of jurisdiction under the Act in the optional PL–280 states. * * *

Political debates over who should bear the cost of Indian jurisdiction and who should make decisions about allocation of Indian jurisdiction between the federal government, the states, and the tribes, should not be viewed apart from litigation that has arisen concerning (1) the procedures for effecting PL–280 transfers (2) the scope of the jurisdiction transferred. Judicial resolutions of these disputes affect both the degree to which Indians are displeased with unilaterally assumed state jurisdiction or limited retrocession, and the states with congressional failure to subsidize their assumptions of PL–280 jurisdiction. * * *

* * *

Had PL–280 originally contained a provision permitting the states and the tribes to demand the return or "retrocession" of state PL–280 jurisdiction to the federal government, much of the dissatisfaction with the Act would have been avoided, though federal dissatisfaction might have been greater. Retrocession would have allowed both states and

tribes to experiment with state jurisdiction, the states to determine whether it was too costly, the tribes to determine whether it fairly met their needs. In addition, retrocession would have permitted jurisdictional arrangements to reflect changed circumstances. If a tribe subject to PL–280 jurisdiction developed new economic resources, or a new generation of tribal members wished to establish strong tribal governing institutions, the state could be required to relinquish jurisdiction.

* * *

Eventually, however, Congress extended the advantages of retrocession to the states, although not to the Indians. By 1968, the states' financial difficulties with PL–280 had become so apparent that relief was provided in the form of a section of the 1968 Civil Rights Act [25 U.S.C.A. § 1323] enabling any state which had previously assumed jurisdiction under PL–280 to offer the return of all or any measure of its jurisdiction to the federal government by sending a resolution to the Secretary of the Interior. The Secretary could accept or reject the retrocession in his discretion. Under this provision, the Indians could not participate in the retrocession decision, although they might attempt to do so informally through appeals directly to the Secretary.

* * *

Notes

1. The optional states have proceeded in the following manner:

> In addition to conferring criminal and civil jurisdiction on six named states, Public Law 280 authorized all other states to assume such jurisdiction over Indian country if they chose. P.L. 280, § 7, 67 Stat. 588, 590 (1953). Under this provision there have been total or partial assumptions of jurisdiction by the following states: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah and Washington. The manner in which these optional states assumed jurisdiction varied greatly, ranging from total assumptions of both criminal and civil jurisdiction, Iowa Code Ann. §§ 1.12–.14, to a very limited assumption for the purposes of regulating only air and water pollution, Ariz.Rev.Stat.Ann. §§ 36–1801–1865. Other states assumed jurisdiction only over certain reservations, e.g., Mont.Rev.Code §§ 83–801–806, or over certain offenses, Wash.Rev.Code §§ 37.12.010–.070.

W. Canby, American Indian Law in a Nutshell 173 (1981). See also F. Cohen, Handbook of Federal Indian Law 362–63 n. 125 (1982 ed.).

2. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), resolved several basic procedural issues arising under Public Law 280. Washington, an optional state, enacted a 1963 law with these characteristics:

> The most significant feature of the new statute was its provision for the extension of at least some jurisdiction over all Indian lands within the State, whether or not the affected tribe gave its consent. Full criminal and civil jurisdiction to the extent permitted by Pub.L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved. Except for

eight categories of law, however, state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested. The eight jurisdictional categories of state law that were thus extended to all parts of every Indian reservation were in the areas of compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and motor vehicles.

Id. at 475–6.

The lower court held that Washington's action was a denial of equal protection because there was no rational basis for the distinctions based on land title. The Supreme Court upheld the constitutionality of the "partial geographic and subject-matter jurisdiction" approach taken by Washington. The state action was entitled to the deference given to congressional action in Indian affairs since "Washington was legislating under explicit authority granted by Congress." The state statute met the rational basis test because it was not an arbitrary "means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power," particularly since "checkerboard jurisdiction is not novel in Indian Law." Id. at 501–502.

The Court also found that Washington's approach was not barred as a matter of federal law by the disclaimer clause in the state constitution, in which Washington disclaimed all title to Indian lands and recognized that such lands would remain under the "absolute jurisdiction" of Congress; Public Law 280 granted congressional consent to the extension of statute jurisdiction and the question of whether the state constitution must be amended was purely a matter of state law. Finally, the Court found that the terms of Public Law 280 did not require an "all or nothing" assumption of jurisdiction in optional states and that nothing in the Act invalidated Washington's approach.

3. The Menominee Restoration Act did not speak directly to the question of whether Public Law 280 would apply to the restored reservation. Cf. Application of Nacotee, 389 F.Supp. 784 (E.D.Wis.1975). After protracted negotiations among the tribe, the state, and the Department of Interior, Governor Lucey retroceded jurisdiction on February 19, 1976, so as to render the ambiguity moot. Several other tribes have negotiated with the states and have achieved partial or complete retrocession under 25 U.S.C.A. § 1323. Retrocessions as of 1982 are cited in F. Cohen, supra, at 370–71 n. 195.

4. Perhaps the crucial inquiry surrounding Public Law 280 concerns the extent of the jurisdictional shift effected by the statute. In what respects does the measure of jurisdiction conferred on some states by Public Law 280 change existing jurisdictional patterns that remain in other states and on those reservations (e.g., Red Lake in Minnesota, Warm Springs in Oregon, and Menominee in Wisconsin) where Public Law 280 is inapplicable? Indian water, hunting, and fishing rights were expressly protected by the Act, see, e.g., 18 U.S.C.A. §§ 1162(b), (c), but other issues were more difficult to divine from the face of the statute.

Prior to 1975, the courts as well as lawyers and government officials appeared baffled by Public Law 280's effect on state and local regulatory laws. Compare, e.g., Rincon Band of Mission Indians v. County of San

Diego, 324 F.Supp. 371 (S.D.Cal.1971), rev'd on other grounds 495 F.2d 1 (9th Cir.1974) (county card room and gambling ordinance applicable in Indian country) and Agua Caliente Tribal Council v. City of Palm Springs, 347 F.Supp. 42 (C.D.Cal.1972) (city zoning ordinance applicable in Indian country) with Snohomish County v. Seattle Disposal Co., 70 Wash.2d 668, 425 P.2d 22 (1967), cert. denied, 389 U.S. 1016 (1968) (county zoning ordinance regulating garbage dumps not applicable in Indian country). In that year, however, Professor Carole Goldberg of U.C.L.A. demonstrated the occasional power of the professor's pen when she published her analysis of Public Law 280 addressing and answering many of the unresolved issues. Goldberg's analysis was substantially adopted by the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir.1975) and by the United States Supreme Court in Bryan v. Itasca County, page 362, infra. *Santa Rosa* involved the applicability of a county zoning ordinance to the Santa Rosa Rancheria in California. The plaintiffs had been living in "totally inadequate housing" but received a grant from the BIA for a mobile home, water, and sanitary plumbing. The county ordinance, however, permitted mobile homes in the area only with prior administrative approval, and then only for a maximum period of two years. In addition, county officials advised the Indian plaintiffs that various fees were required. Plaintiffs lacked money to pay the fees.

The *Santa Rosa* opinion rested on three alternate grounds. First, the court held that county ordinances and other local laws are not within the scope of Public Law 280 because the federal legislation extended only "civil laws of [the] *State* * * * that are of general application * * * within the State * * *." (emphasis supplied) Second, the court dealt squarely with the issue of regulatory authority under Public Law 280:

> P.L. 280 expressly disclaims authorizing state "encumbrance or taxation of any real * * * property * * * held in trust by the United States * * *" 28 U.S.C. § 1360(b). The word "encumbrance" is of course ambiguous, and courts have split on whether or not it evidences an intent to exempt trust lands from state zoning and land use regulations. Compare Snohomish County v. Seattle Disposal Co., 70 Wash.2d 668, 425 P.2d 22 (1967), cert. denied 389 U.S. 1016 (1967) (Douglas and White JJ., dissenting), with Rincon Band, supra, and Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F.Supp. 42 (C.D.Cal.1972), vacated and remanded by this court in an unpublished order, January 24, 1975. See Hastings L.J., at 1496–1499; Goldberg, at 586–587; [M. Price, Law and the American Indian, at 277–83 (1973)].
>
> Relying on the canon of construction applied in favor of Indians, the Court has ruled in different contexts that the word "encumbrance" is to be broadly construed and is not limited to a burden which hinders alienation of the fee, see Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Rickert, 188 U.S. 432 (1903); Kirkwood v. Arenas, 243 F.2d 863 (9th Cir.1957), rather focussing on the effect the challenged state action would have on the value, use and enjoyment of the land. See Hastings L.J., at 1498–1499. Compare the majority and dissenting opinions in Snohomish, supra. Following the Court's lead, and resolving, as we must, doubts in favor of the Indians, we think that the word