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Problems of State Jurisdiction over Indian Reservations

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COMMENTS

PROBLEMS OF STATE JURISDICTION OVER INDIAN RESERVATIONS

Introduction

The purpose of this comment is to briefly examine the legal patchwork of the past in an attempt to understand the emerging present legal status of the American Indian. Set within the context of the nearly flippant, *ad hoc* programs which have periodically characterized the government's Indian policy, the courts have generally tried to accommodate fairly—at least as Americans visualize it—the rights and remedies of the parties. Yet it may be well to recall that conceptually, justice may seem a double-edged sword when viewed by a conquered people, especially when the impartial tribunal is the victor's progeny. We shall first analyze the extent of federal jurisdiction over Indians in terms of land, persons, property rights and crimes. Next, we shall investigate state jurisdiction over Indian lands, persons, property rights and crimes. We shall then examine the cession of this jurisdiction by the federal government to the states. From these insights, we shall attempt to determine the extent to which state laws are or should be applicable to Indians on Indian reservations.

General Federal Jurisdiction

As early as 1790, Congress exercised its constitutional jurisdiction to regulate trade and commerce with the Indians, by an act which provided, *inter alia*, that sales of land by Indians were invalid unless made by treaty.[1] Later, in 1817, Congress extended federal jurisdiction over all criminal offenses committed within Indian country.[2] A fundamental exception in the Act, however, was the exclusion of a criminal offense committed by one Indian against another—these were left for the Indians to deal with themselves, explicitly recognizing the inherent jurisdiction existing in the tribes by reason of their aboriginal origins.

One of the landmark decisions which afforded a delineation of the varying positions of the United States, the states, and the Indian tribes came before the Supreme Court in 1831 in the case of *Cherokee Nation v. Georgia*.[3] The Cherokee Nation sought an injunction against the State of Georgia to restrain it from seizing certain lands guaranteed them by the

[1] 1 Stat. 137 (1790).

[2] 3 Stat. 383 (1817).

[3] 30 U.S. (5 Pet.) 1 (1831).

United States government in treaties, and to restrain the application of certain laws passed by the Georgia Legislature. The Court denied the relief sought holding that the tribes were "domestic dependent nations" and not foreign nations; therefore, the original jurisdiction[4] of the Court was lacking and the Nation could not maintain an action in the courts of the United States. Chief Justice Marshall, who spoke for the Court, found that the "acts of our government plainly recognize the Cherokee nation as a state." And although

> the Indians are acknowledged to have an unquestionable . . . right to the lands they occupy . . . it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can . . . be denominated foreign nations. . . . [T]hey are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.[5]

One year later, however, Chief Justice Marshall was again called upon to address himself to the problem of federal jurisdiction over the Indians. Samuel Worcester, a citizen of Vermont and a missionary, entered the Cherokee Nation to preach the Gospel under license of the Federal Government. The State of Georgia had by statute forbidden white persons to reside on the reservation without a license. Worcester was kidnapped and forcibly removed from the reservation by the Georgia authorities, indicted, tried, convicted and sentenced to four years at hard labor for violation of the statute. On writ of error, *reversed.*[6] Describing the status of the Cherokee Nation, Marshall wrote:

> The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force . . . The whole intercourse between the United States and this nation, is,* by our constitution and laws, *vested in the government of the United States.*[7]

By 1832, largely as a result of these two landmark cases, several key propositions had emerged: first, that state law had no application on Indian reservation lands; second, that the posture of the Indian nation was something more than a state,[8] but not that of an independent nation;

[4] U.S. CONST. art. III, § 2.

[5] 30 U.S. (5 Pet.) at 17 (1831).

[6] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). However, Rev. Worcester apparently served out his sentence. Pres. Jackson, on learning of Chief Justice Marshall's decision, was said to have remarked: "John Marshall has made his decision, now let him enforce it." 20 FED. B.J. 224 (1960).

[7] *Id.* at 561 (Emphasis added).

[8] "At no time has the sovereignty of the country been recognised as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate

third, that the relationship epitomized by the phrase "a ward to his guardian"[9] provided a convenient axis around which future judicial edifices could be built; and fourth, that the Indians, although originally sovereign, were now subject to the United States through conquest. All the tools of the jurist had been employed to forge these concepts.[10]

The federal government's enhanced jurisdiction and power over the Indian tribes continued to expand as the country developed westward. The tribes occupied a somewhat anomalous position. Arguably they occupied a position superior to that of states, but they had no redress in the courts of the United States in suits against the United States, either as individuals or as tribal entities.[11] What one writer has described as the "treaty period"[12] of Indian affairs finally saw its demise in 1871 by an addendum to the Indian Appropriations Act of that year which unilaterally abrogated the treaty power of the Indians as to future treaties, although no obligation with any Indian Tribe or Nation was impaired or invalidated by the legislation.[13] Thus, in the scant space of four decades, Marshall's concept of the Indian tribes as "domestic dependent nations" was completely eroded.

FEDERAL JURISDICTION OVER LAND

We now turn to examine the concept of Indian title to land. Although in American history it is prosaically American to believe that the lands of the United States were purchased from the discovering countries, Felix Cohen has expressed a contrary view which is realistically nearer the truth.[14] His view is that the United States acquired not the real estate, but merely the "power to govern and to tax."[15] Cohen traced the underpinnings of governmental policy to Article 3 of the Northwest Ordinance of 1787.[16]

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domain, but the Indians have a present right of possession . . . under the constitution, no state can enter into any treaty. . . ." 31 U.S. (6 Pet.) 515, 580–81 (1832) (concurring opinion).

[9] For brief history of the development of this concept, see Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193, 197–98 (1959).

[10] U.S. CONST. art. I § 8, art. II § 2, art. IV.

[11] Elk v. Wilkins, 112 U.S. 94 (1884) held that Indians are not citizens within the meaning of the fourteenth amendment to the Constitution. The federal bar to suits by Indian tribes against the United States in the Court of Claims is to be found in section 9 of the Act of March 3, 1863, 12 Stat. 765, 767 (1863). Both problems were cured later by Congressional legislation.

[12] Flickinger, *The American Indian*, 20 FED. B. J. 212 (1960).

[13] 16 Stat. 570 (1871); 25 U.S.C. § 71 (1952).

[14] Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–43 (1947).

[15] *Id.* at 35.

[16] ". . . The utmost good faith shall always be observed towards the Indians; their land and their property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed . . ."

The first significant case in the development of the doctrine of Indian title was *Johnson v. McIntosh*,[17] wherein it was held that a private individual claiming title to land via private purchase from an Indian tribe could not maintain his title against the United States or its grantees, if the United States acquired the land from the Indians by treaty. The Indians would be protected in their title until the government terminated it. *Worcester v. Georgia*[18] subsequently declared that a state could not ignore Indian title. The contention that Indian lands were actually public lands and subject to whimsical governmental disposition without regard to the Indians' claims was rejected in *Holden v. Joy*.[19] Then in *United States v. Shoshone Tribe*,[20] wherein the Court explored the scope of Indian title, it was held that it extended not only to cultivation of the land and grazing uses but also to ownership of the timber and mineral resources thereon. From this line of authority it could be hypothesized that an Indian claim to land based merely on immemorial possession of the land would be sufficient to found a valid claim for compensation in the event the government takes the tribal land. The courts have reached contrary conclusions, however.

The basis on which the Indian tribes may claim compensation for a taking of their land rests on whether Congress has "recognized" their title. This recognition is manifested in one of two ways: either by a treaty or through an Executive order reservation. Executive order reservations had their origin in 1871, when Congress abolished the treaty power of the Indians,[21] and the President was assigned supervisory responsibility over the tribes and granted authority to declare Executive order reservations. By 1919, because most tribal Indians were settled on reservations, Congress forbade further use of this power.[22] But owing to certain unique problems in Alaska, Indian property rights there required settling at a later date, and Congress, in 1936, authorized the Secretary of the Interior to designate certain reservations without any additional statutory ratification.[23] The Secretary, acting pursuant to this statute established six such reservations, covering some million and one-half acres of land.[24] Questions as to their title have not as yet been litigated.

[17] 21 U.S. (8 Wheat.) 543 (1883).

[18] 31 U.S. (6 Pet.) 515 (1832).

[19] 84 U.S. (17 Wall.) 211 (1872); "the lands . . . were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain . . ." *Id.* at 244.

[20] 304 U.S. 111 (1938).

[21] *Supra* note 13.

[22] 41 Stat. 34 (1919), 43 U.S.C. § 150 (1958).

[23] 49 Stat. 1250 (1936), 48 U.S.C. § 358a (1958).

[24] S. REP. No. 1366, 80th Cong., 2d Sess. 6 (1948); see H.R. REP. No. 2503, 82d Cong., 2d Sess. 1386–99 (1952).

The rule was well established, however, that if the United States government had not "recognized"—either through a treaty or an Executive order reservation—the claim of original Indian title, it could extinguish such Indian title at will, without compensation.[25] Moreover, it has been suggested that this recognition must come within the purview of a claim founded on either legal or equitable rights, to properly fulfill the jurisdictional requirements of the Court of Claims.[26] The *McIntosh* case,[27] discussed above, announced the doctrine that a claim founded on original Indian title would be treated with respect and fair mindedness. This dogma found the zenith of its application in *United States v. Alcea Band of Tillamooks*.[28] In this case the Court, although split three ways, found the United States liable for the taking of lands held under nothing more than an *unrecognized aboriginal title*. Four justices thought recovery should be based on Congressional action a century before which was not brought before the Court for adjudication until 1946. Justice Black, concurring, thought the Indians should be compensated because Congress passed a jurisdictional act allowing them to bring suit. The suggested requirement of a "recognized title" was ignored. The important point is, however, that the decision represents the highest regard for a right asserted by an Indian Tribe—compensation for a taking of their land.[29]

Another aspect of the doctrine of federal jurisdiction over Indian lands can be seen in cases where the federal government attempted to violate property rights in the tribal lands. In *Lone Wolf v. Hitchcock*,[30] the plaintiff sought to enjoin the operation of a Congressional act which

[25] Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945). What the courts construe as conferring a vested property interest is of note. In the following treaties the courts uniformly found a compensable property interest: United States v. Klamath & Moadoc Tribes of Indians, 304 U.S. 119, 123 (1938) (treaty language: "held and regarded as an Indian reservation"); Worcester v. Georgia, 21 U.S. (6 Pet.) 515, 553 (1832) (treaty language: "hunting grounds").

[26] The Indian Claims Commission Act of 1946, ch. 959, sec. 24, 60 Stat. 1055 (1946); 28 U.S.C. § 1505 (1958) incorporates the jurisdictional requirements of Act of Nov. 3, 1911, ch. 231, sec. 231, sec. 145, 36 Stat. 1136. The jurisdiction of the Court of Claims does not include a claim "not recognized by any existing rule of law and equity." For further development of the subject of Indian property interests see Comment: *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627 (1960).

[27] *Supra* note 17.

[28] 329 U.S. 40 (1946).

[29] The case was again before the Supreme Court in 1951 and the government won a reversal on the amount of interest. There was no provision in the jurisdictional act, whence the case arose, for interest, and the Court held that only when a taking entitles the claimant to "just compensation" under the fifth amendment is an award of interest proper; and that recovery here was not grounded on a taking under the fifth amendment. 341 U.S. 48, 49 (1951).

[30] 187 U.S. 553 (1903).

would have allegedly violated tribal property rights without due process of law. The United States had agreed by the terms of the Treaty of Medicine Lodge[31] that all future cessions of tribal lands would be invalid unless signed by three-fourths of the male members of the Kiowa and Comanche tribes. The plaintiff alleged that Congress had willfully violated this treaty provision. The Supreme Court held that Congress had full administrative control and power over tribal property and that this sale was a valid exercise of that power. Hence, there was merely a conversion of tribal assests—that is, land for cash, which converted assests were to be held for the benefit of the Indians.

The *Lone Wolf*[32] case can be contrasted with *United States v. Klamath Indians*.[33] By the terms of a treaty of 1870,[34] the Klamath Indians ceded twenty million acres of land to the United States, reserving the remainder. The government then conveyed one hundred eleven thousand acres of land held by tribal allottees to the State of Oregon which subsequently assigned the lands to a road construction company. Congress then authorized the Secretary of the Interior[35] to exchange unalloted lands for the allotted lands. The value of the timber resources on these assigned lands was $2,980,000, but the tribe had accepted $108,750 in payment and released their claims. This release was held valid in *Klamath Indians v. United States*.[36] By a special act in 1936[37] Congress granted jurisdiction to the Court of Claims to hear this disputed Indian claim for compensation. The Supreme Court held that Congress, by opening the door, agreed to grant the Indians the right to have their claim for compensation judicially determined, without regard to the earlier settlement and irrespective of the release.

Title to restricted tribal land cannot be acquired through a claim of adverse possession.[38] Moreover, where the United States granted certain lands to the defendant's assignor, but never extinguished Indian title to the land, the Court has held such a defendant to be liable for rents and profits from whatever lands could be proven to have been occupied by the tribe from time immemorial.[39]

Another case which graphically demonstrates the extent of federal jurisdiction over Indian lands is *United States v. Forness*.[40] The Seneca

[31] 15 Stat. 581 (1867).

[32] *Supra* note 30.

[33] 304 U.S. 119 (1938).

[34] 16 Stat. 707 (1870).

[35] Act of June 21, 1906, 34 Stat. 325 (1906).

[36] 296 U.S. 244 (1935).

[37] 49 Stat. 1276 (1936).

[38] United States v. 7405.3 Acres of Land, 97 F. 2d 417 (4th Cir. 1938).

[39] United States v. Santa Fe Pac. R. R., 314 U.S. 339 (1941).

[40] 125 F. 2d 928 (2d Cir. 1942).

Nation of Indians granted a ninety-nine year lease to certain lands within the City of Salamanca, for a consideration of $4 per year. The lessee had been in default for nine years before the United States, on behalf of the Indians, sought to cancel the lease. The defense interposed was that, in effect, it was an action of ejectment and was therefore barred by a New York statute providing that upon tender of the rent in arrears before judgment, the court shall dismiss the complaint. The district court denied relief, but the Court of Appeals reversed. Thus, the court dispelled any notions that juristiction as between the State of New York and the United States over the lands in question might be concurrent,[41] and held that state law does not apply to Indian land except as far as the United States has given its consent.

Within this conceptual framework—that the United States, as guardian, will stand up to defend its Indian wards, the recent case of *Tee-Hit-Ton Indians v. United States*[42] must be assessed. Here, petitioners sued in the Court of Claims contending that a sale of all the merchantable timber on lands claimed by the petitioner was a compensable taking of a portion of its proprietary interest in land. The petitioners' claim rested on aboriginal occupation, a claim which the Russian government had recognized prior to the conveyance of Alaska to the United States by treaty,[43] and fortified by Congressional enactments[44] subsequent to this treaty which have recognized the petitioners' right to occupy the land. The Court of Appeals held that although the petitioners were an identifiable group of American Indians residing in Alaska, Congress had recognized no legal rights in the petitioner to the lands in dispute and that, therefore, no grounds were afforded on which the tribe could claim that its land had been taken. Regrettably for the Indians, the Supreme Court agreed and affirmed. This decision has been thoroughly criticized from both moral and legal viewpoints.[45]

The question arises as to whether the *Tee-Hit-Ton* decision sounds the death knell to Indian claims in the absence of any Congressional recognition of Indian title. At least one writer has answered affirmatively,[46] but notes that Congress has supplied the "missing link" in the *Tee-Hit-Ton*

[41] For discussion of the legal situation in New York which afforded a basis for belief that jurisdiction might be concurrent, see Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations*, 8 BUFFALO L. REV. 1 (1958).

[42] 348 U.S. 272 (1955). [43] 15 Stat. 539 (1867).

[44] Organic Act of Alaska, Act of May 17, 1884, 23 Stat. 24; Act of June 6, 1900, 31 Stat. 321, 330 (1900).

[45] *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 150 (1955).

[46] Oliver, *The Legal Status of American Indians*, 38 ORE. L. REV. 193 (1959). Acts which constitute recognition of an interest in land may be either: (1) treaty ratification;

case by subsequently conferring general jurisdiction on the Indian Claims Commission.[47]

FEDERAL JURISDICTION OVER PERSONS

The question of the extent of federal jurisdiction over individual Indians next arises. Although it might seem that the first Americans would be citizens, such was not always the case. As recently as 1916, the case of *Elk v. Wilkins*[48] held that tribal Indians were not citizens within the meaning of the fourteenth amendment to the Constitution. And even though a Sioux Indian had been naturalized and granted federal and state citizenship, it was held in *United States v. Nice*[49] that he still had a wardship status and that therefore, as a consequence, the sale of his interest in lands held in trust by the federal government was invalid. In 1924, however, Congress provided that henceforth Indians were citizens.[50] Other questions surrounding the exertion of control by federal authorities have arisen but for the most part remain unlitigated. Federal interference with Indian voting rights, patent federal interference with the "free exercise of religion" by Indians—this despite such nice pronouncements as the *Vitale* case[51]—and occurrences where Indian funds belonging to the Oglala Sioux were impounded after tribesmen criticized wasteful government spending are fully documented elsewhere[52] and are essentially beyond the scope of this comment.

FEDERAL JURISDICTION OVER PROPERTY RIGHTS

We shall now briefly examine federal jurisdiction over Indian property rights in such matters as fishing, sealing and water.[53] In *Alaska Pacific*

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(2) indirect Congressional delegation to the Executive who then possesses power to vest Indian property interest, e.g., Congressional acquiescence plus a Congressional understanding that Executive establishment of an Indian reservation vests rights in the Indians; or (3) statutory recognition of tribal property interests in a reservation defined by Executive order and in esse at the passage of the statute, and Tribal property interests would become compensable at the passage of the statute. Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) and United States v. Midwest Oil Co., 236 U.S. 459 (1915) represent examples of the second category above. *Contra* is Ute Indians v. United States, 330 U.S. 169 (1947) which held lands withdrawn by the President from the public domain as new reservations are not vested in the tribes to the extent of requiring compensation if the government later takes them back.

47 60 Stat. 1050 (1946), 25 U.S.C. § 70a (1958).

48 112 U.S. 94 (1884).

49 241 U.S. 591 (1916).

50 43 Stat. 253 (1924); 8 U.S.C. § 3 (1958).

51 Engel v. Vitale, 370 U.S. 421 (1962).

52 Cohen, *The Erosion of Indian Rights 1950–1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 353–59 (1954).

53 See case in note 20 *supra*, and accompanying text wherein the Supreme Court held that a title to land would support subsurface and surface rights, as well as farming and grazing uses.

Fisheries v. United States,[54] the United States, on behalf of the Metlakatla Indians, sued to enjoin the defendant cannery from maintaining a fish trap in the navigable waters adjacent to the Annette Islands, a statutory reservation.[55] The Court "upheld the right of the Metlakatlans to exclude others from the waters surrounding their islands on the ground that these waters were included within the original reservation by Congress."[56] Protection, therefore, is apparently allied to the concept of a recognized reservation or other claim of right. It is, however, subject at the other extremity to state police power since the decision in *Aleut Community of St. Paul Island v. United States*[57] indicated that even where Indians had enjoyed exclusive sealing rights under the Russian czars, and had occupied reservations lands,[58] the Indians became subject to the government's paramount power to control the taking of seals when the United States purchased Alaska. Similarly, by way of dictum the Supreme Court has indicated that withdrawal by the United States of exclusive fishing rights conferred on a tribe would create no liability in favor of Indians against the government, unless the tribe had a "recognized" claim of title to their lands.[59]

The desires of the Indian tribes, then, seem sometimes at odds with those of their guardian—the United States. To the extent their reservations lands remain unrecognized by the government and as to sporadic applications of the police power, this is true. But the federal authorities have not hesitated to sue or intervene in suits wherein other parties might jeopardize or infringe on Indian rights. The best example of this can be found in the Supreme Court's disposition, last term, of the case of *Arizona v. California*.[60] There, the government on behalf of five Indian reservations in three states asserted rights to water in the mainstream of the Colorado River. Arizona argued that the United States had no power to reserve navigable waters of the river after Arizona became a state; that the United States did not intend to reserve water; and that the amount of water should be measured by the reasonably forseeable needs of the Indians living on the reservation. Justice Black, who wrote for the Court, relied on the *Winters*[61] doctrine and rejected all three contentions:

[54] 248 U.S. 78 (1918).

[55] 26 Stat. 1095, 1101 (1891), 48 U.S.C. § 358 (1958).

[56] Metlakatla Indians v. Egan, 369 U.S. 45, 49 (1962).

[57] 117 F. Supp. 427 (Ct. Cl. 1954).

[58] Act of March 3, 1869, 15 Stat. 348 (1869).

[59] Hynes v. Grimes Packing Co., 337 U.S. 86 (1949).

[60] 373 U.S. 546, 83 S. Ct. 1468 (1963).

[61] Winters v. United States, 207 U.S. 564 (1908) holding that Indians impliedly reserved sufficient waters to make their reservation lands tillable, useful and livable despite their failure to expressly reserve these waters.

[T]hese reservations . . . were not limited to land, but included waters as well. . . . We follow [Winters] now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means . . . that these water rights . . . are "present perfected rights" . . .[62]

The majority also concluded that the quantity of water intended to be reserved was intended to satisfy not only present, but also future needs of the Indians. Thus although the application of the *Winters* doctrine has been seriously questioned as applied in the Western states,[63] the Court vigorously asserted a protective shield between the Indians and conflicting state interests.

FEDERAL CRIMINAL JURISDICTION

As early as 1817, Congress extended federal criminal jurisdiction over all Indian lands for all offenses, except those committed by one Indian against another.[64] Since this act excluded crimes by Indians against Indians and since the *Worcester*[65] case excluded the application of state law, the only law which could apply was Indian law. Three decisions in 1883 caused an awakening of public opinion as to the unfortunate state of the law and resulted in the inclusion, in the Indian Appropriations Act of 1885,[66] of federal criminal jurisdiction over seven major crimes when perpetrated by one Indian against another: murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny. The most significant of these three opinions was *Ex Parte Crow Dog*.[67] Crow Dog, a Sioux, shot and killed Spotted Tail for having appropriated the wife of his friend, Medicine Bear. According to tribal custom Crow Dog's friends made amends to Spotted Tail's family and the matter was then closed. But interloping federal authorities arrested, tried and convicted Crow Dog of murder. He then sought and was granted a writ of habeas corpus on the grounds that the federal court lacked jurisdiction because the right of prosecution lay exclusively within the Sioux tribal courts.

[62] Arizona v. California, 373 U.S. 546, 598–600; 83 S. Ct. 1468, 1497–98 (1963).

[63] Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 So. CAL. L. REV. 1 (1960).

[64] 3 Stat. 383 (1817).

[65] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); and see Benge, *Law and Order on Indian Reservations*, 20 FED. B. J. 223, 223–24 (1960).

[66] 23 Stat. 385 (1885). In 1932, Congress added three more crimes: assault with a deadly weapon, robbery and incest. 47 Stat. 337 (1932); codified in 18 U.S.C. § 1153 (1952). In 1956, embezzlement or theft from tribal funds was added: 70 Stat. 792 (1956); 18 U.S.C. § 1163 (Supp. IV 1957).

[67] 109 U.S. 556 (1883). The other two decisions were State v. McKenney, 18 Nev. 182, 2 Pac. 171 (1883) and an opinion of the Attorney General reported in 17 OPS. ATT'Y GEN. 171 (1883).

Although not the law today, because of the Federal Assimilative Crimes Act,[68] the Court strictly construed the enactment of the Seven Major Crimes Act.[69] Illustrative of this policy of strict construction is the case of *United States v. Quiver*[70] in which an indictment charging the defendant with adultery was dismissed on the ground that the Seven Major Crimes Act left everything within tribal jurisdiction except the crimes specified in the Act.

There was some doubt as to whether the Seven Major Crimes Act gave the federal courts exclusive or concurrent jurisdiction. Such doubt was quickly resolved in practice, however, because the effect of its application was to give the federal authorities exclusive jurisdiction. The case of *United States v. Whaley*[71] affirmed the manslaughter conviction against four tribal executioners who imposed the death sentence pursuant to an order of the tribal court. But if two courts would attempt a prosecution of the same offense, a plea of double jeopardy in the second would effectively bar its prosecution.[72]

By about 1930, dicta statements indicated that state laws would apply to Indian reservation lands, but not state jurisdiction. Thus, in *Surplus Trading Co. v. Cook*,[73] the Supreme Court in dictum said that a reservation is a part of the state wherein it is located and that state civil and criminal laws have the same force and effect therein as elsewhere within the state, except that these laws have restricted application to Indian wards. Eight years later, Mr. Justice Black in *United States v. McGowan*[74] discussed the same point and stated that a federal prohibition against, for example, taking intoxicants into a reservation did not negative Nevada's sovereignty over the area; that the federal government did not assert *exclusive* jurisdiction within it and that only federal enactments designed to protect and guard its Indian wards affect the operation of conflicting state laws.

In certain cases, Indians became subject to state law, but not state jurisdiction, if: 1) Congress remains silent; or, 2) there was no tribal ban on the matter; and 3) if the victim was not a tribesman. For example, in *United States v. Sosseur*,[75] the defendant was indicted for maintaining slot machines on his reservation, which Wisconsin law declared to be ille-

[68] 54 Stat. 234 (1940), 18 U.S.C. § 289 (1949).

[69] 23 Stat. 385 (1885).

[70] 241 U.S. 602 (1916).

[71] 37 Fed. 145 (Cir. Ct. S. D. Cal. 1888).

[72] United States v. La Plant, 156 F. Supp. 660 (D. Mont. 1957).

[73] 281 U.S. 647 (1930).

[74] 302 U.S. 535, 539 (1938) and citing Surplus Trading Co. v. Cook, *supra* note 73 and Hallowell v. United States, 221 U.S. 317 (1911).

[75] 181 F. 2d 873 (7th Cir. 1950).

gal. The defendant's conviction was affirmed on the basis that nontribesmen had used the machines and that the offense, therefore, was not solely against another Indian. The Assimilative Crimes Act[76] made Wisconsin law applicable.

As to jurisdiction over whites and/or non-tribal Indians on reservations, the law applicable to places within the sole and exclusive jurisdiction of the United States extends to Indian country[77] and the federal government has jurisdiction to prosecute such persons even if the offense is committed on property which is also within state jurisdiction. Illustrative of this is *Guith v. United States*[78] wherein the defendant, a white rancher, raped an Indian girl on his ranch, which, although situated within the reservation boundaries, had been acquired by a tax deed from the local county without any express reservation of federal jurisdiction. An analogous case[79] further illustrates the effect of the Assimilative Crimes Act. Petitioner, a white man, had been convicted in a federal district court of having had sexual intercourse on an Indian reservation in Arizona with an unmarried Indian girl under eighteen, but over sixteen. The Supreme Court held that the Assimilative Crimes Act[80] would not render Arizona law applicable, under which the defendant would have committed rape,[81] the penalty for which was imprisonment for not less than five years and up to life. Instead, the Court held that because Congress defined the act as that of adultery, the penalty for which, incidentally, was imprisonment for not more than three years,[82] this crime could not be considered to be redefined by application of the Assimilative Crimes Act.[83] Mr. Oliver summarizes the present state of the law as follows:

> As the law now stands, (1) major crimes by one tribesman against another on a reservation are under exclusive Federal jurisdiction, and minor crimes are under exclusive tribal jurisdiction; (2) crimes by a tribesman against a nontribesman are under exclusive Federal jurisdiction if the offense is committed on the reservation, is an offense proscribed in places within the exclusive jurisdiction of the United States, or is an offense in the state where the reservation is located. However, if the tribesman has already been punished by his tribe or if a treaty reserves exclusive jurisdiction in the tribe, neither Federal nor state courts have jurisdiction in situation (2).[84]

[76] 54 Stat. 234 (1940), 18 U.S.C. § 289 (1949). The converse of the proposition is not always true, however. See *infra*, note 79 and accompanying text.

[77] The term Indian country was defined for the first time in Act of June 30, 1834, 4 Stat. 729, and redefined in 62 Stat. 757 (1948), as amended 18 U.S.C. § 1151 (1949).

[78] 230 F. 2d 481 (9th Cir. 1956).

[79] Williams v. United States, 327 U.S. 711 (1946).

[80] 54 Stat. 234 (1940), 18 U.S.C. § 289 (1949).

[81] ARIZ. CODE SEC. 43-4901 (1939).

[82] 35 Stat. 1149 (1909), 18 U.S.C. § 516 (1949).

[83] *Supra* note 80.

[84] Oliver, *op. cit. supra* note 46 at 224 (1960) (Footnotes omitted).

State Jurisdiction over Indians

Although state jurisdiction was in the early years of the United States almost nonexistent,[85] this proposition was not universally true[86] and became less so as years passed. We shall now examine such jurisdiction in terms of land, persons, property rights and crimes.

STATE JURISDICTION OVER LAND

In the early history of the State of New York, the state authorities believed the state could exercise almost exclusive jurisdiction without any federal consent.[87] Indeed, they apparently drew such inferences from the case of *New York ex rel. Cutler v. Dibble*[88] wherein the Supreme Court held that the State of New York could apply its law to remove intruders from Tonawanda Indian lands. Converse to this application, however, was the earlier case of *Fellows v. Blacksmith.*[89] There, the Supreme Court had held that land claimants had no right to remove the Tonawanda Indians from lands surrendered by the Treaty of 1842,[90] because the removal of Indians from their ancient possessions "must be by the authority of the federal government"[91] and "under its care and superintendence."[92]

In 1840, the New York legislature authorized the sale of Indian lands which the Seneca Indians had agreed to remove from, after the Indians had defaulted on tax payments. The Supreme Court voided these laws and the taxes, holding that the rights of the Indians did not depend on this or any other statute of the state, but upon treaties, which were the supreme law of the land.[93] Also, the case of *United States v. Boylan*[94] is significant. The United States sued to eject one Boylan, on behalf of the Oneida Indians. Boylan's defense was that his purchase of land was authorized under New York law. It was held that only if Congress authorized disposal of the land could Boylan get good title. Even where Congress stands mute, the state cannot regulate the sale of reservation lands and state courts

[85] Worcester v. Ga., 31 U.S. (6 Pet.) 515 (1832).

[86] See, e.g., Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations,* 8 BUFFALO L. REV. 1 (1958).

[87] *Id.* pp. 11–13.

[88] 62 U.S. (21 How.) 366 (1858).

[89] 60 U.S. (19 How.) 366 (1856).

[90] Act of Jan. 15, 1838, 7 Stat. 550 (1838).

[91] Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 370–71 (1856).

[92] *Ibid.*

[93] The New York Indians, 72 U.S. (5 Wall.) 761 (1866). And see The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) wherein it was held that Indians "enjoy the privilege of total immunity from state taxation." *Id.* at 756.

[94] 265 Fed. 165 (2d Cir. 1920), *appeal dismissed* 257 U.S. 614 (1921).

cannot render effective judgments against them. Thus, the state can act to protect reservation Indians within its borders, but cannot take, sell or effectively render judgments against their lands absent Indian and federal consent; Congress could be said to impliedly consent if the legislature's act is beneficial to the Indians.

STATE JURISDICTION OVER PERSONS

The states have historically been at a loss to exercise jurisdiction over Indians on federal reservations. Thus, *Martinez v. Southern Ute Tribe*[95] held that a federal court cannot, through a mandamus order, compel a tribe to accept the petitioner as a member. Since the federal court is deficient in this respect it would be strange indeed if the state courts could do so and it has expressly been held that they cannot.[96] Earlier than the *Patterson*[97] case the courts refused to assume jurisdiction to litigate internal questions relating solely to Indian rights to tribal property.[98] Where one state court did grant an injunction prohibiting a Tribal Council from enforcing its tribal laws on the reservation, the injunction was held invalid.[99] Even when a non-Indian asserted that state law was available to him to prevent the Indians from cancelling property leases for defaults in rental payments, the Court of Appeals held that the state law did not bind the Indians.[100] A late state case recognized that its state courts had no jurisdiction to litigate claims for personal injuries arising out of an automobile accident on an Indian reservation in which only Indian claimants were involved.[101] Any claim for relief had to be asserted in the tribal court—the state was without jurisdiction over the parties.

Attempts by the states to exercise the traditional power to tax against Indians have met with dubious success. The early case of *Childers v. Beaver*[102] involved the application of an Oklahoma statute to a Federal Act which provided that when an Indian allottee died before the trust period over his estate had expired, succession to his estate was to follow state law. The Supreme Court held that the effect of the state statute was a mere expression of Congressional will and that the statute was ineffective

95 249 F. 2d 915 (10th Cir. 1957).

96 Matter of Patterson v. Council of the Seneca Nation, 245 N.Y. 433, 157 N. E. 734 (1927).

97 *Ibid.*

98 United States v. Seneca Nation, 274 Fed. 946 (W. D. N. Y. 1921). For the extent of this doctrine's application, see Rice v. Maybee, 2 F. Supp. 669, 672 (W. D. N. Y. 1933).

99 United States v. Charles, 23 F. Supp. 346 (W. D. N.Y. 1938).

100 United States v. Forness, 125 F. 2d 928 (2d Cir. 1942).

101 Valdez v. Johnson, 68 N. Mex. 476, 362 P. 2d 1004 (1961).

102 270 U.S. 555 (1926).

as to inheritance tax provisions. Indians are, of course, subject to federal income tax, but the Supreme Court has suggested, via dicta, that income received from the United States as a share of royalties from oil and gas leases subject to federal tax would probably not be subject to state income taxes absent Congressional consent.[103]

STATE JURISDICTION OVER PROPERTY RIGHTS

The question which arises here is highly relevant from the standpoint of jurisdiction. It becomes important when a tribe cedes lands to the United States reserving perpetual hunting and fishing rights, and subsequently, the United States includes the lands within the boundaries of a state or territory. The legal question is whether the state's police power can be used to, in effect, abrogate the federal treaty guarantees. To some extent, this discussion overlaps the discussion below of state criminal jurisdiction, since violations of state hunting and fishing laws are, in many cases misdemeanors.

The Supreme Court faced this very problem in the case of *Ward v. Race Horse*.[104] A treaty[105] with the Bannock Tribe gave the Indians virtually perpetual hunting rights on their reservation lands. The Wyoming Organic Act[106] admitted the State of Wyoming into the Union on the same status as the original thirteen states and it contained no saving clause of tribal hunting rights under prior treaties. Race Horse was arrested for killing elk on unoccupied public lands within the boundaries of Wyoming, but belonging to the United States. His petition for a writ of habeas corpus was denied. The reason was that although the Wyoming Territorial Act[107] expressly reserved tribal hunting rights, there was no such clause in the Statehood Act and the Supreme Court held the prior treaty provision was thereby abrogated. Effectively the same case arose before the Supreme Court of Idaho in 1953.[108] The Indian, a Nez Perce, had killed a deer outside the reservation on lands ceded to the United States. Idaho's Territorial Act[109] saved tribal hunting rights but the Statehood Act[110] did not. In an enlightened opinion, the Supreme Court of Idaho reached a result contrary to that of the United States Supreme Court in *Race Horse*. The court pointed out that neither within its State-

[103] Choteau v. Burnet, 283 U.S. 691 (1931).

[104] 163 U.S. 504 (1896).

[105] 15 Stat. 674 (1869).

[106] 26 Stat. 222 (1890).

[107] 15 Stat. 178 (1868).

[108] State v. Arthur, 74 Ida. 251, 261 P. 2d 135, *cert. denied*, 347 U.S. 937 (1954).

[109] Act of March 3, 1863, 12 Stat. 808 (1863). [110] 26 Stat. 215 (1890).

hood Act nor in its constitution was there an expressed intention to extinguish any treaty rights or obligations and that "repeal of such provisions by implication is not to be favored."[111]

In 1942, a Yakima tribesman was convicted of violating a Washington conservation law which prohibited the unlicensed catching of salmon. The tribe had by treaty[112] reserved the right to take fish "at all times and places."[113] The Supreme Court held that the State of Washington could not charge the Yakima tribe a fee as a condition to the exercise of their treaty rights.[114] In a dictum, however, it intimated that the state could impose on all persons reasonable conservation regulations. Fifteen years later, the Washington Supreme Court was still in doubt over the matter. Puyallup tribesmen were charged with violating state laws for catching salmon. The charges were dropped and the State Supreme Court affirmed,[115] but the court was divided as to the reason. Half the court thought the applicable treaty language[116] granted to virtually everyone the right to fish with the Indians and that the Indians had reserved their fishing rights unless the United States government abrogated them. The other half of the court thought the state failed to show the law was reasonably applied.

Where the Indians conduct their activities within the confines of their reservations, it appears the law is settled to the effect that state law has no application to the activity. In *Klamath and Modoc Tribes v. Maison*[117] it was argued that the terms of Public Law 280,[118] which extended state jurisdiction over certain reservations, included a jurisdictional extension of state fish and game laws over tribal domains as well. The district court held that such was not Congressional intention and that no treaty was abrogated by the extension of jurisdiction where the treaty in question specifically reserved to the tribe the exclusive right to take fish on its reservation.[119]

The State of Alaska recently tried to enforce a state law banning the use of "fish traps" against the Metlakatla Indians. The contention was that the Statehood Act[120] transferred control of all fishing to the state. The

[111] 74 Ida. 257, 261 P. 2d at 138.

[112] 12 Stat. 953 (1859).

[113] *Ibid.*

[114] Tulee v. Washington, 315 U.S. 681 (1942).

[115] State v. Satiacum, 50 Wash. 2d 513, 315 P. 2d 400 (1957).

[116] 10 Stat. 1133 (1855) (Treaty language: "in common with all citizens of the territory.").

[117] 139 F. Supp. 634 (D. Ore. 1956).

[118] 68 Stat. 795 (1954), 18 U.S.C. § 1162 (Supp. IV 1957).

[119] *Supra* note 117. [120] 72 Stat. 339 (1958).

Indians argued that the statute[121] which granted to Alaska civil and criminal jurisdiction over Indian reservations expressly preserved Indian reservation fishing rights from state laws.[122] Justice Frankfurter, writing for the Court, held that the reservation was Indian property within the Statehood Act, and that this statute "clearly preserves federal authority over the reservation."[123] Thus, if the Secretary of the Interior chose to do so, he could provide for the use of the fish traps by the Indians.

STATE JURISDICTION OVER CRIME

The original line of authority in this area was influenced considerably by Marshall's leading opinions in the *Cherokee Nation*[124] and *Worcester*[125] cases. Since state law had no application on Indian reservations, federal law applied if Congress had so provided, as it did, for example, with the passage of the Seven Major Crimes Act.[126] Tribal law applied wherever there was no Congressional enactment. However, we have already noted that the enactment of the Federal Assimilative Crimes Act[127] brought state law—though not state jurisdiction—into operation wherever federal law was silent. Moreover, periodically the Supreme Court would assert, through dicta, that state laws did apply on Indian reservations except to the extent that federal laws had been enacted to the contrary.[128]

One early leading case, while this issue was still in doubt, was that of *State v. Campbell*.[129] There, Campbell, a nontribal white, committed adultery with Belonge, a tribal Indian, on the reservation. The trial court convicted both defendants. The Minnesota Supreme Court affirmed Campbell's conviction but reversed and remanded with directions to dismiss the other defendant. The reason was that the State of Minnesota had no jurisdiction over this defendant. The *Campbell* case refused to follow an earlier decision by the Wisconsin Supreme Court. In that case,[130] the defendant, an Oneida Indian, committed adultery on the reservation with a nontribal married woman. The Wisconsin Supreme Court unequivocally

[121] 72 Stat. 545 (1958).

[122] A reservation for these Indians was provided by Congress: 26 Stat. 1095, 1101 (1891), 48 U.S.C. § 358 (1952).

[123] Metlakatla Indians v. Egan, 369 U.S. 45, 59 (1963).

[124] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[125] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[126] 23 Stat. 385 (1885).

[127] 54 Stat. 234 (1940), 18 U.S.C. § 289 (1949).

[128] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); Hallowell v. United States, 221 U.S. 317 (1911); United States v. Sosseur, 181 F. 2d 873 (7th Cir. 1950).

[129] 53 Minn. 354, 55 N.W. 553 (1893).

[130] State v. Dextater, 47 Wis. 278, 2 N.W. 439 (1879).

held that the criminal laws of the state did apply to Indians on their reservations and that the state circuit court had jurisdiction over the reservation territory. If the act was committed off the reservation, the states had no trouble in deciding that jurisdiction was predicated on the locus of the act, and the wardship status of the defendant was no bar to prosecution. A representative case is *State v. Youpee*,[131] where the conviction of the defendant, a tribal Indian, for raping a tribeswoman off the reservation, was affirmed by the Montana Supreme Court on the above-mentioned grounds.

Federal Cession of Civil and Criminal Jurisdiction

Although some writers have characterized the history of the American Indian into as many as five or six separate eras,[132] it will suffice for our purposes here to discuss only four. The first was the treaty period which lasted until 1871, at which time Congress unilaterally denied the treaty power of the Indians by passage of the Indian Appropriations Act[133] of that year. The second period began with the passage of the General Allotment or Dawes Act[134] in 1887. During this era the Indians were dealt with as individuals—assimilation into American society was the concept, whether the Indians liked it or not. The act provided that tribal lands could be broken up into individual plots and the individuals' title would be free and clear at the expiration of a twenty-five year trust period. Tribal land holdings shrank during this period from 155,632,212 acres in 1881 to a scant 52,651,393 acres in 1933—all largely due to the beneficent operation of the General Allotment Act.[135] Owing to dissatisfaction with Indian policy and other upheavals, the Congressional disposition shifted sharply in 1933. This resulted in enactment of the Wheeler-Howard Act or the Indian Reorganization Act of 1934.[136] Tribal participation in this program was voluntary, but to quote Mr. Oliver, "195 out of the 272 tribes in the United States accepted it."[137] The motive of the I.R.A. was to reunite the tribes into a virile community. The Act reversed the allotment policy by imposing an indefinite period of trusteeship and, among other things, provided machinery by which local self-governing groups could be organized.

[131] 103 Mont. 86, 61 P. 2d 832 (1936).

[132] Flickinger, *The American Indian*, 20 Fed. B. J. 212 (1960).

[133] 16 Stat. 570 (1871); 25 U.S.C. § 71 (1952).

[134] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified in miscellaneous portions of 25 U.S.C. 1952).

[135] Oliver, *The Legal Status of American Indian Tribes*, 38 Ore. L. Rev. 193, 202 (1959), citing Cohen, Handbook of Federal Indian Law 78 (4th printing 1945).

[136] Act of June 18, 1934, 48 Stat. 984 (1934), 25 U.S.C. § 1461–75 (1952).

[137] Oliver, *supra* note 135, at 202.

The fourth period of Indian affairs began with Congressional adoption of House Concurrent Resolution 108 in 1953.[138] The resolution embraced all the tribes in California, Florida and New York, the Flathead Tribe in Montana, the Klamath Tribe in Oregon, all Texas tribes and the Menominees in Wisconsin, and some other tribes.[139] The concept of this resolution was that various Indian tribes should be released from federal supervision and control—whether the Indians liked it or not, since there was no consultation with the tribes. The proposal encountered strong advocates as well as opponents. Apparently, some members of Congress felt that it was time for the government to extricate itself from Indian affairs.[140]

Other groups bitterly opposed and criticized these plans. For example, Sol Tax, noted anthropologist, characterized both the Menominee and Klamath terminations as "disasters."[141] The Association on American Indian Affairs also opposed the resolution.[142] Mr. LaFarge, noted expert on Indians, summarized the opposition thus:

> Intermittently for some 75 years proponents of disintegration have applied their theories by various processes ending tribal ownership of property and encouraging the break-up of solid blocks of Indian land into fragments accompanied by measures to weaken or destroy tribal governments, frustrate Indian leadership, and in the past either to cut young Indians off from their cultures and languages or to instil in them contempt for their elders and their tradition. The similarity of these procedures to those of communism is startling, and, as with Communists, we have enforced them for the people's "own good." We did not, however, make the subjects over into white men, mentally, morally, or physically; what we did was nearly to destroy the Indian economic base, reduce tens of thousands to landless beggary, and prepared the desolate mess that many now want to sweep under the rug by means of "termination."[143]

Apparently, the opposition to this law was based on long-standing fears by the Indians of mistreatment at the hands of the states. Justice Miller, writing in *Kagama v. United States*,[144] articulated the ideal well, "Because of the local ill feeling, the people of the States, where they are found, are often their deadliest enemies."[145] Moreover, it will be recalled that the

[138] 99 CONG. REC. 6283 (1953).

[139] 99 CONG. REC. 9968 (1953).

[140] *Hearings Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 83 Cong., 1st Sess., ser. 7 (1953). See for example the remarks of Representative Saylor at p. 4.

[141] Letter to Representative O'Hara from Sol Tax, reprinted in 103 CONG. REC. 9020 (Daily ed., June 21, 1957).

[142] See 23 *Indian Affairs Newsletter 3* (1957).

[143] La Farge, *Termination of Federal Supervision: Disintegration and the American Indians*, 311 ANNALS 41, 42 (1957).

[144] 118 U.S. 375 (1886). [145] *Id.* at 383.

Elk case held that Indians were not citizens despite the apparent command of the fourteenth amendment.[146] Professor Gunther has also discussed these fears.[147] In the face of the plans to turn the Indians over to the states, it appears anomalous that there is still some doubt as to whether reservation Indians enjoy state citizenship.[148] Despite, however, the fears and opposition of the Indian groups, at least nine such acts have been passed,[149] the effect of which has been to transfer jurisdiction, civil and criminal, over all matters committed on the reservations to the states. Moreover, Congress has provided in the same basic law that any state may take over Indian affairs at its pleasure.

To view the effect of this Congressional action, we need to examine the case of *Williams v. Lee*.[150] Here the operator of a general store on the Navajo Indian Reservation sued in an Arizona state court to collect for goods sold on account. Defendants, a Navajo Indian and his wife, moved to dismiss on the ground that exclusive jurisdiction lay in the tribal court. The Arizona Superior Court denied this motion and judgment was entered for the store operator. The Arizona Supreme Court affirmed.[151] On appeal to the Supreme Court, *reversed*. No jurisdiction existed in the Arizona courts because Arizona had not exercised the privilege of assuming control over the Indians. Moreover, allowing the state to undermine tribal courts would palliate the Indians' right to govern themselves. The Court said that since Congress had recognized the right of the Indians to govern themselves, the Court would guard the authority of the Indian government. The New Mexico court applied this rule in *Valdez v. Johnson*[152] where it was held that it had no jurisdiction over an automobile accident occurring on an Indian reservation involving only Indian parties.

We now consider two recent Supreme Court cases.[153] Both arise on similar facts from the State of Alaska, which had, in 1958, assumed civil and criminal jurisdiction over all Indian country within the state.[154] Alaska's economy depends to a large extent on salmon fishing. For many

146 Elk v. Wilkins, 112 U.S. 94 (1884).

147 GUNTHER, *op. cit. supra* note 24, at 26.

148 Suggested in unpublished paper on file in DePaul University Law School Library.

149 18 U.S.C. § 1162, 28 U.S.C. § 1360 granting such civil and criminal jurisdiction to California, Minnesota, Nebraska, Oklahoma, Oregon, Texas, Utah, Wisconsin, Alaska: 72 Stat. 545 (1956).

150 358 U.S. 217 (1959).

151 83 Ariz. 241, 319 P.2d 998 (1958).

152 68 N. Mex. 476, 362 P.2d 1004 (1959).

153 Kake Village v. Egan, 369 U.S. 60 (1962); Metlakatla Indians v. Egan, 369 U.S. 45 (1962).

154 72 Stat. 545 (1958).

years, Congress and the Territorial government were concerned over salmon conservation. A particularly menacing object which became the focus for governmental attention was the "fish trap," a device which traps the salmon on their way upstream. The Metlakatla Indians, occupying the Annette Islands, a statutory reservation,[155] were allowed to use "fish traps" by the Secretary of the Interior,[156] and President Wilson by proclamation set aside the waters within 3,000 feet of certain of the Annette Islands as a part of the Metlakatla reserve.[157] Then in 1959, after Alaska had become a state, she warned the Metlakatlans and others that she would enforce her anti-trap law[158] against them. This threat, when acted upon by the state, resulted in the instant litigation in which the Indians sought to enjoin this law as an interference with their federal rights. The district court and the Alaska Supreme Court found against the Indians,[159] and from this adverse judgment the Indians appealed.

The Court examined the statute under which the state was granted civil and criminal jurisdiction over Indian lands and noted that one section thereof specifically prohibited the state from regulating or depriving any Indian or Indian tribe of "any right, privilege or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping or fishing or the control, licensing, or regulation thereof."[160] The Metlakatla Indians derived their right to fish from an 1891 statute under regulations of the Secretary of the Interior.[161] Alaska argued that under the Statehood Act[162] control of all fishing was transferred to the state. But the Court denied this contention, holding that the statute transferring civil and criminal jurisdiction to the state "clearly preserves federal *authority* over the reservation."[163] Thus, the determination of whether the Indians needed the fish traps, as opposed to legitimate conservation measures by the state, was for the Secretary of the Interior to make.

Unfortunately for the Tlingit Indians residing at Kake Village, they did not fare as well.[164] This was the companion case to the *Metlakatla* case. This community's entire economy was based on salmon fishing. Here, however, there was neither an Executive order nor a statutory reser-

155 26 Stat. 1095 (1891), 25 U.S.C. § 358 (1952).

156 25 C.F.R. ch. 1 (1958).

157 39 Stat. 1777 (1916).

158 ALASKA LAWS 1959, c.17.

159 362 P.2d 901 (Alaska 1961).

160 18 U.S.C. §§ 1162–66 (1958).

161 26 Stat. 1101 (1891), 48 U.S.C. § 358 (1958).

162 72 Stat. 339 (1958).

163 369 U.S. 59 (Emphasis added).

164 Kake Village v. Egan, 369 U.S. 60 (1962).

vation involved. Basing his actions on the White Act[165] and the Alaska Statehood Act,[166] the Secretary of the Interior issued regulations[167] authorizing this village to use certain fish traps. But the Court distinguished this case on the fact that Congress had provided these Indians with no reservation and decided that there was no statutory authority under which the Secretary could validly permit use of the fish traps.[168] The Court said the White Act merely gave the Secretary powers to limit fishing and that the Statehood Act "did not give powers of the nature claimed by the Secretary of the Interior."[169]

The Court carefully considered section 4 of the Alaska Statehood Act wherein the state disclaimed, and the United States retained absolute jurisdiction over lands and property including fishing rights; and decided that the section's purpose was to preserve the status quo as to aboriginal and possessory claims, neither extinguishing them nor making them compensable. Moreover it held that "appellants' claims are property (including fishing rights) within section 4."[170]

Having so held, the next question was whether Alaska could apply her police power to those rights. The Court noted that the same language as used in section 4 had been used in nine prior Statehood Acts. Then it applied the criterion of the *Williams* case,[171] that state law could have no effect on the reservation because it would impinge on tribal self-government,[172] and analogized another case[173] to arrive at the conclusion that "absolute" federal jurisdiction did not equate with "exclusive" jurisdiction. It then held that section 4 did not exclude application of state conservation laws to the Indians' fish traps.[174] The Court comprehensively reviewed the development of state power over Indians and stated:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. . . . State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. . . . This Court has never held that States lack power to regu-

165 43 Stat. 464 (1924), as amended 48 U.S.C. §§ 221–28 (1958).

166 72 Stat. 339.

167 24 Fed. Reg. 2053, 2069.

168 369 U.S. at 62.

169 *Id.* at 63.

170 *Id.* at 67.

171 Williams v. Lee, 358 U.S. 217 (1959). See note 150, *supra* and accompanying text.

172 Note, however, the absence of any reservation in the instant case—the case deals with an "aboriginal right."

173 Draper v. United States, 164 U.S. 240 (1896).

174 369 U.S. 60, 68 (1962).

late the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy.[175]

Summarily, the Court decided that although these Indians had a "right," the state could, by exercise of its police power, completely emasculate that right and render it a nullity. And since this "right" would probably not be compensable,[176] it must be small satisfaction to the Tlingits to know they have a "right," the exercise of which vitally effects their entire economy and which a United States statute would seem to preserve, yet which is for them, unenforceable.

Here, ostensibly due to the transfer of civil and criminal jurisdiction to the State of Alaska, the practice of the Tlingits in the use of fish traps, undisturbed by the federal government, was suddenly illegalized by application of state law. No mean application either, but state action striking at the heart of the Indian community's economy. Despite Justice Frankfurter's reliance on the *Williams* case,[177] it seems inapplicable precedent because, first, in that case there was no *state* action, one of the parties, the non-Indian, sought relief in a state court, and his remedy was held to lie in the tribal court, but he had a remedy. Secondly, the State of Arizona had not exercised, nor had Congress granted, civil and criminal jurisdiction over those tribes.

Apparently, one can see some distinction in comparing the *Metlakatla* and *Kake Village* cases. In the first, the State was impotent to enforce its anti-fish trap law in the domain of a statutory Indian reservation; in the second, that impotency was cured due to an absence of any "right" derived from federal law. And yet in the last term, the Court vigorously protected Indian water rights, by application of the *Winters* doctrine, again where federally recognized reservations were involved.[178]

Conclusion

The purpose of this analysis has been to derive some basis for determining the extent to which state laws are applicable on Indian reservations. Early in this nation's history, the Supreme Court spoke in terms of "ward and guardian," as to the Indians. At the core of those terms lies the principle of fiduciary responsibility. From those early cases can be derived the tool which the Court, if it is so inclined, can use to cloak the Indians from deleterious state action. It is the rankest form of legal hocus pocus when by the mere cession of civil and criminal jurisdiction to a state,

[175] *Id.* at 75–76.

[176] See text and discussion *supra* note 46 discussing under what circumstances the courts will grant compensation for a taking of Indian rights.

[177] Williams v. Lee, 358 U.S. 217 (1959).

[178] Arizona v. California, 373 U.S. 546, 83 S. Ct. 1468 (1963).

without the consent of the Indians, their rights are emasculated and their economies wrecked, whereas before the statute's enactment they peacefully pursued their own paths.

Neither the Supreme Court nor Congress has been at a loss in the past to effectively allow the state to apply laws which would serve the best interests of the Indians. Through a Congressional enactment,[179] the states were allowed to enforce their sanitation and quarantine laws, make inspections for health and educational purposes, and enforce compulsory school attendance. The Court has taken pains to note that state law applies on Indian reservations except where Congress has spoken to the contrary.[180] Thus, it would seem to be the rule that after a cession of civil and criminal jurisdiction to a state, all state laws would apply on the reservation except where a federal treaty or claim founded on federal law may be asserted to the contrary. To these two exceptions should be added a third, namely, where a practice is sanctioned or acquiesced in under the federal jurisdiction so that the Indian tribe involved may be said to have acquired an equitable right, the mere cession of jurisdiction should not operate to the tribe's disadvantage—that which was legal before the transfer should remain protected under residuary federal guardianship.

Arguably, when Congress fails to speak, it can be interpreted as a manner of speaking. Failure to express disapproval may be interpreted as approval. Where an Indian community acts, relies and sustains detriment, the equitable principle of estoppel is a handy sword to slay the dragon of paternalistic state laws which could not operate but for a jurisdictional cession. For the government to try to get out of the "Indian business" may be praiseworthy. It will be sad indeed if, to effect this laudable objective, it abandons the racial group it, as well as this country collectively, has treated most shabbily. Continuation of these spineless withdrawals will only further sully the shabby linen.

The record is not totally replete with failure yet. It is arguable that where an Indian reservation is concerned, or a claim can be traced to federal law, the courts will vigorously protect those rights from deleterious state legislation while at the same time taking due cognizance of state law. One would hope that the conceptual basis of the *Metlakatla* case could be extended to cases where the asserted right might be more tenuous than one founded on a treaty or federal law. The Tlingit Indians present an appealing case for application of an estoppel principle. This is not founded on the basis of their race alone. It is founded on the fact that they acted for years on what was arguably an implied promise, namely, federal ac-

[179] 45 Stat. 1185 (1929), as amended 25 U.S.C. § 231 (1958).

[180] *Supra* note 73, Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); *Cf.* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).