Golden Gate University Law Review

Volume 7
Issue 1 *Ninth Circuit Survey*

Article 12

January 1976

Indian Law

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INDIAN LAW

INTRODUCTION

The Eighth, Ninth and Tenth Circuits have become the primary arbiters in disputes between state and federal governments and Indian tribes. This article will examine in detail the Ninth Circuit decision *Santa Rosa Band of Indians v. Kings County*,[1] which involved the application of local zoning ordinances to Indian reservation trust lands. Other cases discussed herein involved the right to appointed counsel,[2] the validity of residency requirements for candidates seeking tribal offices[3] and Indian hunting and fishing rights.[4]

I. OVERVIEW

A. THE INDIAN BILL OF RIGHTS

In 1968, Congress enacted the Indian Civil Rights Act (ICRA), commonly known as the Indian Bill of Rights.[5] The Act guarantees to those individuals under tribal jurisdiction civil rights similar to those held by non-Indian American citizens under the Constitution's Bill of Rights. A matter of great concern to tribes that wish to maintain their political and cultural independence is

1. 532 F.2d 655 (9th Cir. Nov., 1975) (per Koelsch, J.), *cert. denied*, 97 S. Ct. 51 (1976).

2. *See* Tom v. Sutton, 533 F.2d 1101 (9th Cir. Mar., 1976) (per Taylor, D.J.).

3. *See* Howlett v. Salish & Kootenai Tribes, 529 F.2d 233 (9th Cir. Jan., 1976) (per Barnes, J.).

4. *See* Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. Feb. 1976) (per Chambers, J.); Sohappy v. Smith, 529 F.2d 570 (9th Cir. Jan., 1976) (per curiam).

5. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1303 (1970)). Section 1302 provides:

> No Indian tribe in exercising powers of self-government shall—
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> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
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> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> (3) subject any person for the same offense to be twice put in jeopardy;

whether the constitutional restrictions placed on federal and state governments will also be applicable to tribal governments. Thus, one issue which is always present in cases arising under the ICRA is whether the Indian Bill of Rights should be interpreted in the same way as the Constitution's Bill of Rights or whether it should be interpreted in light of standards which recognize tribal culture and values. Many commentators have urged the latter position out of fear that tribal sovereignty[6] will otherwise be seriously undermined.[7] Some commentators have even suggested that the

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> (4) compel any person in any criminal case to be a witness against himself;
> (5) take any private property for a public use without just compensation;
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
> (9) pass any bill of attainder or ex post facto law; or
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (1970). Section 1303 provides:

> The privilege of the right of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Id. § 1303. The Indian Bill of Rights thus incorporates the first, fourth, fifth, sixth, seventh and eighth amendments of the Constitution with the following exceptions: establishment of religion is not prohibited; the right to counsel is guaranteed only at defendant's own expense; there is no right to indictment by a grand jury; and the petit jury right assures a jury of six members in all cases involving the possibility of imprisonment.

6. Sovereignty can be defined as a state's inherent power of independent action in external and internal affairs. Tribal nations possess only quasi-sovereignty since they have essentially no external powers and since their inherent internal powers may be qualified by treaty or express congressional enactments. Thus, the tribal sovereignty discussed in this article refers to the tribal exercise of power over internal affairs which is essentially the exercise of self-government. For a detailed discussion of tribal sovereignty see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-26 (1942) (undated University of New Mexico Reprint ed.).

7. *See* Bean, *The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers*, 49 N.D.L. REV. 303 (1973), Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. REV. 337 (1969); Note, *The Indian Bill of Rights and the Constitutional*

statute be repealed.[8] The courts, when faced with cases arising under the Indian Bill of Rights, have usually opted for an interpretation which takes into account tribal culture and values and, in effect, sustains tribal sovereignty.[9]

Two cases dealing with the ICRA came before the Ninth Circuit this term. In *Tom v. Sutton*,[10] a Ninth Circuit panel considered an indigent Indian defendant's right to appointed counsel.[11] A second case, *Howlett v. Salish & Kootenai Tribes*,[12] addressed the constitutionality of a residency requirement for candidates seeking tribal offices. In both cases, the Ninth Circuit concluded that rights protected under the Indian Bill of Rights had not been violated and that tribal customs, though not consonant with non-Indian procedures, must be upheld as valid exercises of self-government. The significance of these cases lies in the judicial recognition of the vitality of tribal culture and tribal self-government.

Right-to-Counsel

In *Tom v. Sutton*, a panel of the Ninth Circuit held that an Indian criminal defendant does not have the right to the assistance of appointed counsel in a tribal proceeding. The defendant, an enrolled member of the Lummi Indian Tribe, entered a plea of guilty to driving a motor vehicle without a valid operator's license on the Lummi Reservation, a violation of the Lummi Law and Order Code. He was sentenced to a ten-day jail sentence and while incarcerated, filed a petition for a writ of habeas corpus.[13]

Status of Tribal Governments, 82 HARV. L. REV. 1343 (1969) [hereinafter cited as *The Indian Bill of Rights*]; Note, *An Interpretation of the Due Process Clause of the Indian Bill of Rights* 51 N.D.L. REV. 191 (1974) [hereinafter cited as *An Interpretation of the Due Process Clause*].

8. *See* Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURVEY OF HUMAN RIGHTS L. 49, 93 (1971); Reiblich, *Indians Under The Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 644 (1968).

9. *See, e.g.*, Daly v. United States, 483 F.2d 700 (8th Cir. 1973) (equal protection); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973) (equal protection, due process); Janis v. Wilson, 385 F. Supp. 1143 (D.S.D. 1974), *rev'd*, 521 F.2d 724 (8th Cir. 1975) (free speech and assembly, due process and equal protection); Lohnes v. Cloud, 366 F. Supp. 619 (D.N.D. 1973) (due process).

10. 533 F.2d 1101 (9th Cir. Mar., 1976) (per Taylor, D.J.).

11. A similar case is pending in a district court of the Ninth Circuit. In Cliff v. Hawley, No. CV-75-97-HG (D. Mont., Feb. 24, 1976), the district court initially ordered that counsel be appointed by the tribal court for an indigent Indian defendant. Subsequently, the district court stayed this order pending the outcome of the instant case. *See* 10 CLEARINGHOUSE REV. 60 (1976).

12. 529 F.2d 233 (9th Cir. Jan., 1976) (per Barnes, J.).

13. This habeas corpus right is provided for in 25 U.S.C. § 1303 (1970), the text of which is found in note 5 *supra*.

The defendant contended that he was denied his right to appointed counsel as provided by either the Indian Bill of Rights or the Lummi Tribal Constitution.[14] In response, the court first noted that neither the sixth nor the fourteenth amendments to the United States Constitution required Indian tribal courts to provide members of their tribe with representation by counsel in proceedings before the tribal court.[15] Constitutional standards are not applicable to the actions of a tribal court because an Indian tribe is considered a quasi-sovereign nation vested with the power to adopt a constitution, to enact laws, and to create and administer a criminal justice system.[16] However, the *Sutton* court noted that a tribe's power to govern its own affairs may nevertheless be limited by treaties or congressional enactments.[17] The ICRA, by guaranteeing certain rights to individuals under tribal jurisdiction, limits the power of tribal governments. Thus, the *Sutton* court was required to analyze the Act in order to determine if a right to appointed counsel was guaranteed to the defendant. Since section six of the Act expressly guarantees only a right to retained counsel,[18] the right to appointed counsel would have to be inferred from the due process language of section eight of the Act.[19] The court analyzed the legislative history and the language of the Act and found that a right to appointed counsel, as embodied by the United States Constitution, was purposefully excluded from the Act in order to avoid unduly burdening the operations of tribal governments.[20] Consequently, the Ninth Circuit

14. In 1970, the Commissioner of Indian Affairs approved the Lummi Tribal Constitution which had previously been adopted by the tribe pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1970). *See* 533 F.2d at 1105.

15. *See* Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974). The *Sutton* court further noted that *Settler* is consistent with other judicial decisions which have found the Constitution inapplicable to the actions of Indian tribes, Indian courts and Indians on a reservation. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896) (fifth amendment); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974) (fifth, sixth, seventh, fourteenth and fifteenth amendments); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963) (fifth, sixth and fourteenth amendments). *See also* Note, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973, 998 n.125 (1973).

16. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); United States v. Washington, 520 F.2d 676 (9th Cir. 1975); Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975). *See generally* 25 U.S.C. § 476 (1970).

17. *See* Winton v. Amos, 255 U.S. 373 (1921); Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975).

18. 25 U.S.C. § 1302(6) (1970). For the text of section 6 see note 5 *supra*.

19. 25 U.S.C. § 1302(8) (1970). For the text of section 8 see note 5 *supra*.

20. The legislative history of the Act indicates that the right to retained counsel was added as a special amendment to the original bill which had provided for a right to counsel similar to that of the United States Constitution's Bill of Rights. This amendment was added after representatives of various Indian tribes objected to the original clause because qualified attorneys were not available and because tribes were not finan-

refused to construe the due process language of section eight of the Act in a manner which would alter the congressional intent in enacting the statute.

The court proceeded to examine the Lummi Constitution to determine if it provided for a more extensive right to counsel than was guaranteed by the Indian Bill of Rights. The court found that the Lummi Constitution guarantees rights established both by the United States Constitution and rights provided by the Indian Bill of Rights.[21] Since the former provides for appointed counsel and the latter does not, a conflict arises as to the scope of the right to counsel. To resolve this conflict, the Ninth Circuit relied on general rules of constitutional construction[22] and found that: (1) the Lummi Tribe's intent at the time of adopting their constitution was not to provide indigents with appointed counsel;[23] and (2) by adopting the ICRA, the Lummi Tribe intended to place certain

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cially prepared to pay for counsel should this burden fall to them. *See Hearings on S. 961, S. 962, S. 963, S. 964, S. 966, S. 967, S. 968, S.J. Res. 40, To protect the Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm.*, 89th Cong., 1st Sess. (1965). *See also* AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 26-27 (1972). The legislative history of the ICRA is discussed at length in Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. LEGIS. 557 (1972). *See also* Coulter, *supra* note 8, at 75-78; *The Indian Bill of Rights*, *supra* note 7, at 1355-60; *An Interpretation of the Due Process Clause*, *supra* note 7, at 145-200.

For a further discussion of why a right to appointed counsel may be neither necessary nor desirable in tribal courts *see* Bean, *supra* note 7, at 319; Coulter, *supra* note 8; Fretz, *The Bill of Rights and American Tribal Governments*, 6 NAT. RESOURCES J. 581, 602-03 (1966); Reiblich, *supra* note 8, at 628-29.

21. *See* LUMMI CONST. art. VII which provides in part:

> All members of the Lummi Indian Tribe shall be accorded equal rights pursuant to tribal law. *No member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution of the United States*, including, but not limited to, freedom of religion and conscience, freedom of speech, the right to orderly association of assembly, the right to petition for action or the redress of grievances, and due process of law. *No member shall be denied any of the rights or guarantees as provided in [the Indian Civil Rights Act]* . . . .

533 F.2d at 1105 (emphasis added).

22. The court in *Sutton* relied on the following general rules of constitutional construction: (1) a provision should be given the effect intended by the framers and the people adopting it; (2) every provision should be given equal weight and interpreted in light of the rest of the document; and (3) provisions should be constructed so as to be in harmony with each other and so as to render all provisions operative. 533 F.2d at 1105.

23. The court based its conclusion on the conditions present at the time the Lummi Constitution was adopted in 1970. At that time, under 25 U.S.C. section 1302(7), the tribal court could only deal with petty offenses. Furthermore, the constitutional right to appointed counsel for indigent defendants attached only to "serious" crimes. *See* Gideon v. Wainright, 372 U.S. 335 (1963). The right to appointed counsel for minor offenses was not upheld until 1972 in Argersinger v. Hamlin, 407 U.S. 25 (1972).

limitations on the rights afforded by the Constitution, including the right to counsel. In addition, the court asserted that deference should be given to tribal courts in regard to their interpretation of tribal constitutions. [24] Based on these considerations, the *Sutton* court concluded that the defendant was not entitled to appointed counsel.

The *Sutton* decision makes it clear that there is no right to appointed counsel for indigent Indian criminal defendants unless such a right is expressly granted by either the federal government or an Indian tribe. Additionally, the decision affirms the principle that the Indian Bill of Rights should not be construed in light of decisions based on the Constitution's Bill of Rights, but rather in light of the various social, cultural and political values held by individual tribes.

Residency Requirements

In *Howlett v. Salish & Kootenai Tribes*,[25] the plaintiffs, members of the Salish and Kootenai Tribes, were declared ineligible as candidates for tribal council membership as a result of their failure to satisfy a one-year residency requirement as mandated by the tribes' constitution.[26] The plaintiffs brought suit against the tribes, contending that the residency requirement was unconstitutional because it violated section 1302(8) of the ICRA[27] and abridged their fundamental right to travel and right to seek office.

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24. The court noted decisions which suggest that federal courts should accept the interpretation of state courts in defining the purpose, scope and operative effect of a state constitution unless there are federal constitutional questions involved. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Reed v. Rhay, 323 F.2d 498 (9th Cir. 1963), *cert. denied*, 377 U.S. 917 (1964). The *Sutton* court concluded that federal courts should likewise accept a tribal court's interpretation of a tribal constitution.

25. 529 F.2d 233 (9th Cir. Jan., 1976) (per Barnes, J.).

26. SALISH & KOOTENAI CONST art. III, § 6, defines the residency requirement as follows:

> No person shall be a candidate for membership in the Tribal Council unless he shall be a member of the Confederated Tribes of the Flathead Reservation and *shall have resided in the district of his candidacy for a period of one year next preceding the election.*

529 F.2d at 238 (emphasis added). The district court found that one plaintiff was physically absent from the reservation for a period of approximately six months and that the other was physically absent for approximately five and one-half months in the year immediately preceding the election. It was this substantial physical absence, during the year preceding the election, that led to the plaintiffs disqualification as candidates by the tribal council.

27. 25 U.S.C. § 1302(8) (1970) provides in relevant part:

> No Indian tribe in exercising powers of self-government shall—
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> . . . .

After concluding that the district court had properly assumed jurisdiction in the case,[28] the *Howlett* court proceeded to examine the merits of the plaintiffs' claims. The plaintiffs argued that the tribes' constitutional definition of residency, which required actual presence on the reservation, was without legal precedent.[29]

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(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .

28. The tribes contended on appeal that the district court lacked jurisdiction to hear the plaintiffs' claims because: (1) Indian tribes are quasi-sovereign entities which may not be sued without express congressional consent; (2) no federal statute exists which grants jurisdiction in this particular area involving tribal elections; and (3) the plaintiffs did not exhaust their tribal remedies.

With regard to the exhaustion requirement, the court noted that the plaintiffs had not sought redress in the tribal court before bringing suit in the district court. However, since the evidence indicated that such an attempt would have been futile, the court concluded that the plaintiffs had effectively exhausted their tribal remedies. 529 F.2d at 240.

With regard to the tribes' other contentions, the court found that 28 U.S.C. § 1343(4) (1970), which states that district courts shall have jurisdiction of any civil action commenced under any act of Congress for the protection of civil rights, granted jurisdiction to the district courts if the matter in issue arose under the ICRA. The court concluded that the tribal election procedures in issue were embraced by the ICRA in section 1302(8) and thus were subject to review by the federal courts. The court based its conclusion on the fact that the tribal election procedures were analogous to those commonly employed in Anglo-American society. Since the constitutionality of the latter is tested by the due process clause of the fourteenth amendment of the United States Constitution, then, by analogy, the former should be tested by the due process clause of section 1302(8) of the ICRA. The court relied on several opinions which have held that tribal election procedures are reviewable by federal courts where there would be no problem of enforcing an alien culture, with strange procedures, on the tribe. *See* White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973). Quoting extensively from *One Feather*, the court stated that the approach adopted by that circuit "promotes both the maintenance of cultural tribal identity and the preservation of fundamental constitutional rights for the individual Indian." 529 F.2d at 238.

It is arguable whether this is a sufficient basis for assumption of jurisdiction. Other cases dealing with tribal elections have held that jurisdiction was not conferred by section 1302(8). The basis for these holdings could be found applicable to *Howlett* as well. *See* Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971) (since Indian Bill of Rights is not concerned primarily with specifics of tribal structure or officeholding, it cannot be basis for jurisdiction in election cases); Jacobsen v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974) (doctrine of internal controversies operates to deprive federal courts of subject matter jurisdiction, except in those areas specifically provided for in the ICRA). *Accord*, McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438 (D.S.D. 1974).

For a discussion of tribal council candidacy and the judiciary's reluctance to intrude in this area see Kennedy, *Tribal Elections: An Appraisal After the Indian Civil Rights Act*, 3 AM. INDIAN L. REV. 497 (1975).

29. The plaintiffs cited a number of cases which held that a person who temporarily leaves his district but entertains the intent to return, and maintains voting residence in that district, qualifies to run as a candidate from that district. *See, e.g.*, Frakes v. Farragut Community School Dist., 255 Iowa 88, 121 N.W.2d 636 (1963); Wilson v. Holsington, 110 Mont. 20, 98 P.2d 369 (1940).

However, the Ninth Circuit panel stated that the tribes may structure their government in any manner they choose so long as they do not violate the ICRA. The court reasoned that since neither the federal Constitution nor any congressional legislation defined the term "residency," the one-year residency requirement did not violate the ICRA.[30]

Next, the Ninth Circuit panel examined whether the one-year residency requirement abridged the plaintiffs' right to travel and right to seek office. The court assumed that the requirement did abridge these fundamental rights and hence could be justified only by a compelling tribal interest.[31] The *Howlett* court found that

> [t]he extremely localized problem of the Tribes intensify the need for exposure of prospective candidates to the constituency for a substantial period of time as a prerequisite to Tribal Council eligibility. The Tribes have a great interest in promoting serious and knowledgeable candidates for Tribal Council positions, and in providing the electorate with the opportunity to observe and acquire first-hand knowledge of prospective candidates.[32]

The court noted that there was ample evidence in the record to support the finding that the term "resided in the district of his candidacy for a period of one year next preceding the election" had been interpreted by the tribes to signify the following:

> [Residence] means actual residence. No allowance may be made for absence for military service, school attendance, work, or otherwise. The allowance for absence due to the above are for enrollment and voting purposes and not made for candidates for a position on the council or the Constitutional Convention Committee.

529 F.2d at 241.

30. 529 F.2d at 242.

31. For an example of other durational residency requirement cases which have employed the compelling interest standard see Dunn v. Blumstein, 405 U.S. 330 (1972); Green v. McKeon, 468 F.2d 883 (6th Cir. 1972); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973); Alexander v. Kammer, 363 F. Supp. 324 (E.D. Mich. 1973). *Cf.* 76 Interior Dec. 353 (1969), where the rational basis test rather than the compelling state interest test was used to find that the classification of persons as illegitimate for purposes of exclusion from tribal membership was violative of equal protection under section 1302(8).

32. 529 F.2d at 244. The tribes also put forth several other equally compelling interests:

> First, the political and managerial responsibilities placed on the members of the Tribal Council can be discharged responsibly only with the benefit of the full knowledge and information that can be acquired only by almost daily living on the reservation. Second, the cultural identity of the Salish and Kootenai Tribes is primarily a product of continued physical presence on the reservation, and the elected leaders of the

Thus, the Ninth Circuit concluded that these compelling tribal interests justified the imposition of the one-year durational residency requirement.[33]

The *Howlett* decision not only recognizes a tribe's right to determine how it will govern itself, but also provides further instruction on how a court should go about determining the constitutionality of a tribal action.[34] It is clear that a tribe's cultural and governmental interests must be given great weight when a court evaluates the constitutionality of tribal laws under the Indian Bill of Rights.

B. Hunting and Fishing Rights

Traditionally, hunting and fishing provided sources of food, clothing and commodities of exchange for the Indian tribes. Today, such activities are of major importance to many tribes as a means of economic independence. The hunting and fishing rights of Indians off their reservations are based primarily on treaties made between the federal government and Indian tribes.[35] Although the treaties clearly provide for hunting and fishing rights, the validity and scope of these rights are constantly being challenged by state and local governments, as they seek to both extend their authority over Indian activities and, more importantly, to share in the economic benefits derived from the natural resources within their territorial boundaries.[36]

> Tribe must be current and long-term actual residents (i.e., at least one year) in order to insure that they are sufficiently familiar with and part of that culture in order to be entrusted to carry it forward.

Id. at 243.

33. *Id.* at 244. The court qualified its holding by stating that it did not intend to suggest either that inconsequential absences from the reservation would warrant disqualification for candidacy or that the plaintiffs were barred from becoming eligible candidates in the future.

34. The significance and scope of *Howlett* may soon be examined in St. Marks v. Chippewa-Cree Tribe, No. 75-2298 (9th Cir., Oct. 18, 1976). *St. Marks* involves a constitutional challenge of a two-year physical residency requirement for candidates seeking the post of Chief Tribal Judge. The district court dismissed the case on the ground that the plaintiffs failed to exhaust their tribal remedies. On appeal, the Ninth Circuit determined that plaintiffs had satisfied the exhaustion requirement and remanded the case to the district court for a decision on the merits of the residency issue.

35. In 1855, the United States negotiated treaties with several tribes who presently reside in the states of Oregon and Washington. Each of these treaties contains a provision which secured to the tribes the right to take fish at all usual and accustomed places in common with citizens of the territory. *See, e.g.*, Treaty with the Yakimas, June 9, 1855, art. III, 12 Stat. 951; Treaty with the Nez Perce, June 11, 1855, art. III, 12 Stat. 957.

36. *See, e.g.*, United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*,

In order to resolve such controversies, the courts must define Indian treaty rights while considering the interests of all other parties involved.[37] Indians desire both a recognition of their treaty rights by state governments and an interpretation of such rights which will permit them not only to survive but also to gain economic independence as well.[38] The states, on the other hand,

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423 U.S. 1086 (1976); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Tulee v. Washington, 315 U.S. 681 (1942); Kennedy v. Becker, 241 U.S. 556 (1916); United States v. Winans, 198 U.S. 371 (1905); Ward v. Race Horse, 163 U.S. 504 (1896).

37. The Supreme Court has attempted to delineate the scope of Indian treaty rights with regard to off-reservation fishing and hunting and, concomitantly, to define the scope of the state's power to regulate these rights. In Tulee v. Washington, 315 U.S. 681 (1942), the Court held that a state's power to regulate the exercise of the Indian treaty right to fish was limited to restrictions of a purely regulatory nature which were necessary for the conservation of fish, such as the time and manner of fishing outside the reservation. Similarly, in Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968), the Court indicated that although the state may not qualify the Indian right to fish "at all usual and accustomed" places, the state may regulate the manner of fishing, the size of the take and commercial fishing if the regulation is necessary for conservation, meets appropriate standards, and does not discriminate against Indians. These decisions affirm the validity of Indian treaty rights while supporting qualification of those rights by the states under certain circumstances. At least one commentator has argued that Indian treaty rights are not subject to qualification by the states under any circumstances. *See* Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972).

A federal district court has attempted to clarify the *Puyallup* holding in Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969). The court asserted that "the state cannot so manage the fishery that little or no harvestable portions of the run remains to reach the upper portion of the stream where the historic Indian places are mostly located." *Id.* at 911. A regulation which does not discriminate against Indians is one that gives Indians "an opportunity to catch fish at their usual and accustomed places equal to that of other users to catch fish at locations preferred by them or by the state." *Id.* at 910. With regard to regulations for conservation purposes, the court made it clear that the state may restrict Indian fishing as long as the Indians still receive their "fair share" of the harvestable run. To accomplish this, the state may impose more stringent restrictions on non-Indian fishing than on Indian fishing. *Id.* at 911. As to what is an appropriate regulation, the court indicated that "the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users." *Id.*

The Ninth Circuit, in United States v. Washington, 520 F.2d 676 (9th Cir. 1975), went even further in defining the scope of Indian treaty rights and the extent of the state's regulatory powers over Indian fishing. The court indicated that states, for conservation purposes, could directly regulate fishing by Indians with treaty-derived fishing rights only after the state had proved its inability to preserve a run by restricting non-Indian fishing. The court also asserted that the "fair share" to which the Indians are entitled under their treaty rights is 50% of the harvestable run, excluding fish caught on the reservation and fish caught for ceremonial and subsistence purposes.

The Supreme Court has not dealt with the issues involved in the *Sohappy* and *Washington* decisions. As controlling decisions in the Ninth Circuit, the cases provide precedent for further expansion of the scope of Indian treaty rights and further restriction of state regulation of those rights.

38. It has been suggested that the limits of state power over Indian treaty fishing

desire as much control as possible over the resources within their borders in order to both benefit commercial and sporting interests and to conserve natural resources.[39]

Another current question in the Indian hunting and fishing rights area involves the extent to which a tribe may regulate hunting and fishing on its reservation. This tribal power is based on a recognition of tribal sovereignty as limited by treaties and congressional enactments.[40] As states persist in asserting their governmental powers over Indian reservations, judicial affirmation of tribal power to regulate intra-reservation activities becomes vital to the preservation of tribal self-govermnent and sovereignty.[41]

Two cases involving Indian hunting and fishing rights were decided by Ninth Circuit panels this past term. The first, *Sohappy v. Smith*,[42] adjudicated a dispute which arose in 1974 between Indian fishermen and the states of Oregon and Washington. At issue was the meaning of a 1969 district court order. This order established that treaty tribes[43] were entitled to a "fair share" of the Columbia River Fishery.[44] When the spring run of the Chinook salmon failed to accommodate the needs of both Indian and non-Indian fishermen, Oregon and Washington unilaterally decided to close the Columbia River to Indian commercial fishing. However, state law still permitted Indian subsistence fishing, ceremonial fishing and sportfishing. At a subsequent hearing on

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should be defined by Indian economic needs. *See* Comment, *State Power and the Indian Treaty Right to Fish*, 59 CALIF. L. REV. 485 (1971).

39. There has been considerable commentary on Indian treaty fishing and hunting rights vis-à-vis the state's right to regulate hunting and fishing activities. *See, e.g.*, Bean, *Off-Reservation Hunting and Fishing Rights: Scales Tip in Favor of States and Sportsmen?* 51 N.D.L. REV. 11 (1974); Burnett, *Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 IDAHO L. REV. 49 (1970); Hobbs, *Indian Hunting and Fishing Rights II*, 37 GEO. WASH. L. REV. 1251 (1969); Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO. WASH. L. REV. 504 (1964); Johnson, *supra* note 37; Comment, *Indian Fishing Rights*, 8 WILLAMETTE L.J. 248 (1972).

40. F. COHEN, *supra* note 6, at 122-23.

41. Some commentators have argued that the tribe should have jurisdiction over all activities within the reservation. *See* Baldassin & McDermott, *Jurisdiction over Non-Indians: An Opinion of the "Opinion,"* 1 AM. INDIAN L. REV. 13 (1973).

42. 529 F.2d 570 (9th Cir. Jan., 1976) (per curiam), *aff'g* 302 F. Supp. 899 (D. Ore. 1969).

43. The tribes involved in the litigation were the Confederated Tribes and Bands of the Yakima Indian Nation, the Confederated Tribes of the Umatilla Reservation (the Walla Walla, Cayuse and Umatilla Tribes), the Nez Perce Indian Tribe of Idaho, and the Confederated Tribes of the Warm Springs Indian Reservation. 529 F.2d at 571.

44. The order also stated that the states may regulate Indian treaty fishing if the regulations were reasonable, were necessary to conserve fish resources, and did not discriminate against Indians. *See* Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969).

the legality of the river closing, the district court amended its 1969 order to expressly grant Indian treaty fishermen the right to take up to fifty percent of the harvest of the spring Chinook salmon run which was destined to reach the tribes' usual and accustomed fishing grounds.

On appeal, the amendment was challenged by Washington and Oregon as being a substantial departure from the original 1969 decree. In a per curiam decision, the *Sohappy* court declared that the fifty percent allocation was only a definition of the term "fair share" and thus was not a departure from the 1969 decree. The court further found that such an interpretation was justified since there was no evidence that the fifty percent allocation was inequitable or impracticable.[45] The court supported its decision by noting both that a like allocation had recently been upheld by another Ninth Circuit panel[46] and that a district court has great discretion in devising the details of an apportionment of a harvestable run between Indian and non-Indian parties. *Sohappy* is significant for its recognition and support of Indian treaty rights vis-à-vis state interests and for its implicit support of Indian economic independence based on these rights.

In *Quechan Tribe of Indians v. Rowe*,[47] a tribe[48] brought an action seeking both an affirmance of its right to enact ordinances governing hunting and fishing on its reservation and an injunction against local interference with the enforcement of such ordinances. The action was precipitated by the arrest of the chief game warden of the Quechan Tribe after he had confiscated weapons of non-Indians believed to be violating the tribe's hunting and fishing ordinances.[49] The Ninth Court held that the tribe was not entitled to injunctive relief because the requisite element of irreparable

45. The *Sohappy* court noted that the state should have the opportunity to present evidence as to the propriety of a 50% allocation for *future* salmon runs. 529 F.2d at 573. However, the burden of establishing that the 50% allocation is inequitable or impracticable is upon the state, which must also offer alternative allocation plans which will both protect the Indian treaty rights as defined by the 1969 decree and conserve the salmon run.

46. *See* United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *aff'g* 384 F. Supp. 312 (W.D. Wash. 1974), *cert. denied*, 423 U.S. 1086 (1976). For a recent survey discussion of *Washington* see *Ninth Circuit Survey—Indian Law*, 6 GOLDEN GATE U.L. REV. 649, 669 (1976).

47. 531 F.2d 408 (9th Cir. Feb., 1976) (per Wallace, J.).

48. The Quechan Tribe resides on and governs the Fort Yuma Indian Reservation located along the Colorado River. The Tribe was organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1970)). The Secretary of the Interior approved the Quechan Tribe Constitution and bylaws in 1936.

49. 531 F.2d at 409-10.

future harm was missing.[50] However, the *Rowe* court affirmed the tribe's right to control and regulate hunting and fishing on its reservation and then proceeded to define the basis and scope of that right.

The Quechan Tribe's regulatory authority over non-Indians is based on the inherent tribal power to exclude nonmembers from the reservation[51] and on certain powers authorized by the Quechan Constitution and bylaws. These express powers include the right to (1) govern internal affairs;[52] (2) control reservation hunting and fishing;[53] and (3) maintain a tribal police force.[54] Pursuant to these powers, the tribe may exercise several types of authority over nonmembers who enter the reservation to hunt or fish. Such authority includes the power to determine who may enter the reservation, to define the conditions upon which they may enter, and to prescribe rules of conduct.[55] The Ninth Circuit found, however, that the Quechan Constitution did not permit the tribe to bring nonmembers to trial for violations of tribal law.[56] Consequently, the *Rowe* court concluded that although the tribe had the right to control hunting and fishing on the reservation, it could not demand the forfeiture of weapons from nonmembers who violated tribal laws.[57]

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50. *Id.* at 410. The court found that there was neither any current action pending against the Tribe nor any threatened future action in derogation of tribal rights.

51. *See* Williams v. Lee, 358 U.S. 217 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

52. 531 F.2d at 411. *See* QUECHAN CONST. art. IV, § 17.

53. 531 F.2d at 411. *See* QUECHAN CONST. art. XI.

54. 531 F.2d at 411. *See* Quechan bylaws art. XIII.

55. Additionally, the court asserted that the Tribe may expel those who enter the reservation without proper authority or those who violate federal, state or tribal laws. The Tribe may also refer violators of state or federal law to state or federal officials. *See* Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); Note, *Land Use: Exclusion of Non-Indians From Tribal Lands—An Established Right*, 4 AM. INDIAN L. REV. 135 (1976).

56. QUECHAN CONST. art IV, § 7 provides:

> The Council shall have the power to promulgate ordinances . . . and to establish minor courts . . . for the *trial and punishment of members of the tribe* charged with the commission of offenses set forth in such ordinances.

531 F.2d at 411 (emphasis added). The court asserted that the Tribe, by omitting nonmembers from this provision, had forsworn the power to try nonmembers in the tribal court. *Id.*

57. The court asserted that the forfeiture of weapons was a form of penalty for the commission of an offense and was therefore a quasi-criminal proceeding. Since a nonmember cannot be subjected to a criminal trial proceeding under article IV, section 7, of the Quechan Constitution, the court reasoned that a nonmenber could not be subjected to the quasi-criminal forfeiture proceeding. Although the Quechan Constitution

II. PUBLIC LAW 280

A. INTRODUCTION

Indian tribes are self-governing bodies with full authority to regulate tribal affairs, tribal members and tribal property, except where their powers have been expressly limited by Congress.[1] In 1953, Congress limited tribal powers by enacting Public Law 280 (P.L. 280)[2] which expressly granted certain states[3] civil and crimi-

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precluded court consideration of tribal criminal jurisdiction over nonmembers on the reservation in the instant case, the Ninth Circuit addressed this issue in Oliphant v. Schlie, No. 74-2154 (9th Cir., Aug. 24, 1976). *Oliphant* concluded that the tribe has the power, as qualified by treaties or congressional enactments, to preserve order on the reservation by punishing nonmembers who violate tribal law.

1. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942) (undated University of New Mexico reprint ed.). For a discussion of the powers of Indian government which are recognized under United States law see Berkey, *The Inherent Powers of Indian Governments*, 2 AM. INDIAN J., May, 1976, at 15.

2. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (1953) (partially codified at 18 U.S.C. § 1162 (1970) (criminal jurisdiction) and 28 U.S.C. § 1360 (1970) (civil jurisdiction)). This Note will deal exclusively with the grant of civil jurisdiction codified at 28 U.S.C. § 1360 (1970), which provides:

> (a) [A state] . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise [within any Indian country within the state] to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .
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> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.
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> (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

3. P.L. 280 originally conferred criminal and civil jurisdiction over Indian lands to California, Minnesota, Nebraska, Oregon and Wisconsin, and offered such jurisdiction to all other states. In 1968, an amendment was added to require Indian consent before

nal jurisdiction over Indian reservations.[4] Since the passage of P.L. 280, controversies have arisen in those states as to the extent of civil jurisdiction conferred, particularly with respect to the power to tax[5] and the power to regulate land use.[6]

Efforts by the states to assert power over property and activities of reservation Indians have consistently been rejected by the United States Supreme Court on the basis of tribal sovereignty and federal preemption.[7] Nevertheless, state and local governments have attempted, on the basis of inherent state police power and the express grant of civil jurisdiction in P.L. 280, to apply their land use regulations to reservation lands.[8] As yet, there has been no definitive statement by the Supreme Court as to

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the assumption of state jurisdiction. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 402, 82 Stat. 79 (codified at 25 U.S.C. § 1322 (1970)).

4. Whether P.L. 280 is the only means by which a state can obtain jurisdiction over Indians and their lands is still an unresolved question. *See* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600, 631 (1976); Comment, *State Jurisdiction Over Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280*, 9 LAND WATER REV. 421, 444 (1974) [hereinafter cited as Comment, *Interpretation of Encumbrance Clause*].

5. *See, e.g.*, Omaha Tribe of Indians v. Peters, 382 F. Supp. 421 (D. Neb. 1974), *aff'd*, 516 F.2d 133 (8th Cir. 1975); Bryan v. Itasca County, 228 N.W.2d 249, (Minn. Sup. Ct. 1975), *rev'd*, 96 S. Ct. 2102 (1976). For a general discussion of a state's power to tax see M. PRICE, LAW AND THE AMERICAN INDIAN 251-76 (1973). For a discussion of P.L. 280 and Indian taxation see Israel & Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D.L. REV. 267, 290-97 (1973).

6. *See, 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.), *cert. denied*, 419 U.S. 1008 (1974); Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967).

7. Initially, cases arising in the area of state regulation of Indian activities and reservation lands were decided against the states on the basis of the doctrines of exclusive federal jurisdiction and tribal sovereignty, as espoused in Worcester v. Georgia, 31 U.S. (6 Pet. 515) 350 (1832). Later, this standard was modified so as to allow state regulation if there was no interference with Indian self-government or impairment of a right granted or reserved by federal law. *See* Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Williams v. Lee, 358 U.S. 217 (1959). Finally, the most modern cases have looked to whether the federal government, via federal policy and legislation, has preempted concurrent state jurisdiction in a particular area. Such federal preemption has been found in the area of regulation of reservation lands and activities. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

Although the Indian sovereignty doctrine is no longer utilized by the Court for a definitive resolution of jurisdictional questions, it does provide a "backdrop against which the applicable treaties and federal statutes must be read." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

8. *See, 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.), *cert. denied*, 419 U.S. 1008 (1974) (use of property for gambling purposes prohibited); People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (3d Dist. 1970), *cert. denied*, 404 U.S. 823 (1971)

the validity of such regulatory actions. However, the issue was finally addressed by the Ninth Circuit this past term in *Santa Rosa Band of Indians v. Kings County*[9] when it considered a county's attempt to apply its zoning ordinances and building code to an Indian reservation.

Land use regulation of Indian reservations, which is primarily enforced via state-authorized county ordinances, is of great interest to the states because of its economic, social and political ramifications.[10] However, the tribes have an equal interest in resisting such state regulations as they attempt to assert their economic and political independence.[11] A controversy thus arises between the states and the tribes as to the extent of a state's power to enforce ordinances and regulations on the reservation.[12] The *Santa Rosa* court clearly delineated the standards to be used in resolving this controversy.

B. THE *Santa Rosa* DECISION

In *Santa Rosa*, the plaintiffs, members of the Santa Rosa Band of Indians,[13] had applied to the Bureau of Indian Affairs (BIA) for assistance in procuring mobile homes under the Bureau's Housing Improvement Program. Grants were authorized by the BIA,

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(maintenance of firebreak around building required under certain conditions); Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967) (conditional use permit required for disposal of garbage).

9. 532 F.2d 655 (9th Cir. Nov., 1975) (per Koelsch, J.), *cert. denied*, 45 U.S.L.W. 3459 (U.S. Jan. 10, 1977).

10. One commentator has noted several interests of the state in reservation lands, such as regulation and exploitation of residential and recreational development, pollution and subdivision control, regulation and taxation of energy resources, and industrial development. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A.L. REV. 535, 538 (1975).

11. Tribal self-government and economic development have been encouraged by the Federal government. *See* Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-478 (1970), which provides for the establishment of tribal constitutions and the creation of tribal enterprises. *See also* President Nixon's special message to Congress on July 8, 1970, *reprinted in* 116 CONG. REC. 23131 (1970), which urged that Indian communities be allowed to administer federally funded Indian programs and that financial aid be provided to enable Indians to develop and use natural resources on the reservation.

12. It has been argued that state-authorized zoning laws should be enforced on state reservations. *See* Reynolds, *Zoning the Reservation–Village of Euclid Meets Agua Caliente*, 2 AM. INDIAN L. REV. 1 (1974). For a rebuttal to this argument see Note, *Zoning: A Rebuttal to "Village of Euclid Meets Agua Caliente,"* 4 AM. INDIAN L. REV. 141 (1976) [hereinafter cited as Note, *Zoning*].

13. The Santa Rosa Band is an Indian Tribe organized under Section 476 of the INdian Reorganization Act of 1934, 25 U.S.C. §§ 461-478 (1970). Legal title to the Band's reservation, which is located in California, is held in trust by the United States for the use and benefit of the Band.

and the Indian Health Service made plans to provide the plaintiffs with water and sanitary plumbing. After purchasing the mobile homes, the plaintiffs learned that provisions of the Kings County zoning ordinance and building codes effectively deprived them of the full use of the mobile home housing.[14] As a consequence, the plaintiffs brought an action for declaratory and injunctive relief to restrain enforcement of the ordinances.

A panel of the Ninth Circuit, after an extensive examination of P.L. 280, held that the Act did not grant jurisdiction to Kings County to enforce either its zoning ordinance or its building code on the Santa Rosa Reservation.[15] The court, in reaching its decision, first considered whether county ordinances were made applicable to the reservation by P.L. 280. Although district courts within the Ninth Circuit had reached conflicting answers to the question,[16] this was a matter of first impression for the circuit court.

Statutory Interpretation of P.L. 280

P.L. 280 provides in section 1360(a) that state "civil laws . . . of general application shall have the same force and effect within Indian country as . . . within the state."[17] Unless it can be determined that county ordinances are equivalent to or included within such "civil laws . . . of general application," the ordinances cannot be enforced pursuant to the jurisdiction granted

14. The reservation was zoned as a general agricultural district under Kings County, Cal., Ordinance 269, § 402 (Apr. 7, 1964). Section 402c(7) of the ordinance states that use of a mobile home as a residence in such a zoned area is permitted only with prior administrative approval. Such approval requires the submission of fees for preparation of an environmental impact report and a site plan. If the proposed use conforms to other provisions and objectives of the zoning ordinance, approval is granted under *id.* § 1803.

The County Building Code requires inspections and permits (necessitating additional payment of fees) before the necessary utility hookups and plumbing work can be completed. Because the plaintiffs lacked the funds with which to pay the required fees, they were unable to obtain utility, water and sanitation services for their mobile homes.

15. 532 F.2d at 659.

16. *Compare* Santa Rosa Band of Indians v. Kings County, No. F-836 (E.D. Cal., Oct. 12, 1973) (local ordinances are not applicable to reservations under P.L. 280), *with* 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.), *cert. denied*, 419 U.S. 1008 (1974); Ricci v. County of Riverside, Civ. No. 71-1134 EC (C.D. Cal., Aug. 5, 1971), *appeal dismissed as moot*, 495 F.2d 1 (9th Cir. 1974) (local ordinances are applicable to reservations under P.L. 280). For an extensive discussion of *Rincon* and *Ricci* see Comment, *The Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HASTINGS L.J. 1451 (1974) [hereinafter cited as Comment, *Extension of County Jurisdiction*].

17. 28 U.S.C. § 1360(a) (1970).

under P.L. 280. The phrase "civil laws . . . of general application" is ambiguous in that it can be interpreted to refer only to laws of statewide application or, in addition, to county ordinances if they are applied equally to Indians and non-Indians alike.[18] To interpret this phrase, the *Santa Rosa* court relied on the fundamental rule of statutory construction, first enunciated in *Worcester v. Georgia*,[19] that ambiguities in federal statutes dealing with Indian tribes must be resolved in favor of the tribes. After considering the burden that the Kings County ordinance would place on the plaintiffs and the adverse effect on tribal self-government and economic development which might result from the general enforcement of such a county ordinance,[20] the *Santa Rosa* court concluded that "P.L. 280 subjected Indian Country only to the civil laws of the state, and not to local regulations."[21]

Support for the court's conclusion was found in the legislative history of P.L. 280. The court found upon review of the legis-

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18. One argument put forth to support the equal-application interpretation is, as one commentator labels it, the quid pro quo analysis:

> [I]f a reservation Indian is entitled to the benefits of state citizenship (*e.g.*, right to vote, to attend school, to attend state university at state resident tuition rates, etc.), then he "ought to be" or (as some would argue) "is" subject to the burdens of state citizenship (*e.g.*, obligation to pay state taxes, to submit to state laws, etc.)

Note, *Zoning*, *supra* note 12, at 148. Courts have also used this analysis. *See, e.g.*, Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371, 374-76 (S.D. Cal. 1971), *rev'd on other grounds*, 495 F.2d 1 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008 (1974). *But see* Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 673-74, 425 P.2d 22, 25-27, *cert. denied*, 389 U.S. 1016 (1967); Acosta v. County of San Diego, 126 Cal. App. 2d 455, 466, 272 P.2d 92 (4th Dist. 1954).

19. 31 U.S. (6 Pet.) 515 (1832).

20. One commentator asserts that the extension of county jurisdiction to Indian reservations may "well spell the final blow to tribal culture and identity as founded in the semi-autonomous reservation system." Comment, *Extension of County Jurisdiction*, *supra* note 16, at 1458. Another commentator notes that a limitation on enforcement of county laws on the reservation will have "important implications for the vitality of tribal governments in PL-280 states" especially "in those areas where tribes feel the strongest need for autonomy—areas like taxation and land use which affect opportunities for economic development." Goldberg, *supra* note 10, at 575-76.

21. 532 F.2d at 661. Some commentators have argued that Congress never intended "civil laws" under section 1360(a) to mean the entire array of state noncriminal laws, but rather only those laws involving private rights and status, such as laws of contract, tort, marriage and divorce. *See* Israel & Smithson, *supra* note 5, at 296.

The Supreme Court recently interpreted the phrase "civil laws . . . of general application" in Bryan v. Itasca County, 96 S. Ct. 2102 (1976), a case which arose after the state of Minnesota attempted to impose a personal property tax by virtue of its jurisdictional grant under P.L. 280. The Court held that P.L. 280 did not grant the states the power to tax. This conclusion was based in part on a finding by the Court that "civil laws . . . of general application" only "authorizes application by the state courts of

lative history that Congress had failed (1) to shift jurisdiction from the federal government to the states in all respects[22] and (2) to adequately specify the nature and scope of whatever jurisdiction was conferred.[23] Such a partial and inadequately particularized conferral of jurisdiction to the states could not really support a congressional intent to confer civil jurisdiction on county governments. Instead, the court found it more plausible that Congress intended P.L. 280 to recognize tribal governments as having the same authority over reservation affairs as county governments have over local affairs.[24]

Additionally, the *Santa Rosa* court acknowledged that an interpretation of P.L. 280 which would permit county jurisdiction over reservation lands would conflict with current federal Indian policies encouraging Indian autonomy, self-government and economic self-development.[25] Although the court recognized that the outdated policies of assimilation and termination[26] may have been a basis for the enactment of P.L. 280,[27] the Ninth Circuit declared that it was not obligated "in ambiguous instances to

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their rules of decision to decide [civil causes of action involving Indians]." *Id.* at 2109 (footnote omitted).

The Supreme Court's interpretation of the phrase is much more restrictive than that of the Ninth Circuit Court of Appeals; undoubtedly this explains in part why certiorari was denied by the Supreme Court in the *Santa Rosa* case.

22. 532 F.2d at 662-63. *E.g.*, Section 1360(b), 28 U.S.C. § 1360(b) (1970), restricts the jurisdiction granted in section 1360(a) by assuring that the tax exempt status of trust lands will remain and that state regulation of trust property will be limited.

23. 532 F.2d at 661. The *Santa Rosa* court found no indication in the legislative history of P.L. 280 that Congress had examined the effects that a grant of jurisdiction to the states would have on the regulation of civil affairs on the reservation. In particular, Congress failed to consider the nature of the relationship which would arise between federal, state, local and tribal governments after the passage of P.L. 280. *Id.*

24. 532 F.2d at 663. The court found support for this interpretation in 28 U.S.C. § 1360(c) (1970), which establishes the continuing validity of tribal ordinances. For more information about the legislative history of P.L. 280 see Goldberg, *supra* note 10; Israel & Smithson, *supra* note 5, at 290-94; Comment, *Extension of County Jurisdiction*, *supra* note 16, at 1468-73; Comment, *Interpretation of Encumbrance Clause*, *supra* note 4, at 425-28.

25. 532 F.2d at 662. For a discussion of the present federal policies encouraging Indian self-government and economic self-development see U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, FEDERAL INDIAN POLICIES 10-15 (1975).

26. Assimilation is essentially a process whereby Indians become fully integrated into American society and take on both the rights and responsibilities of a state citizen. Termination refers to withdrawal of federal responsibility for Indian affairs and the end of the application of special federal laws to Indians and their land. *See* Goldberg, *supra* note 10, at 536.

27. 532 F.2d at 662; Goldberg *supra* note 10, at 537; Comment, *Extension of County Jurisdiction*, *supra* note 16, at 1469. The commentators have asserted that the policy of assimilation was later rejected within P.L. 280 itself when it was amended in 1968 to require tribal consent before jurisdiction would be conferred under the Act. *See* Act of

strain to implement a policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."[28] Thus, relying on the statutory language and legislative history of P.L. 280 and current federal Indian policy, the *Santa Rosa* court concluded that an interpretation of P.L. 280 which excluded local jurisdiction was mandated.[29]

Encumbrance Limitation of P.L. 280

Even assuming that P.L. 280 did confer jurisdiction upon local governments, the *Santa Rosa* court found that land use regulation was not included within the grant of jurisdiction authorized by the Act. Section 1360(b) of P.L. 280 contains limitations on the jurisdiction conferred by section 1360(a). One such limitation is phrased "[n]othing in this section shall authorize the . . . encumbrance of any real . . . property . . . held in trust by the United States."[30] The question of whether the application of state zoning and land use regulations to Indian reservations constitutes a prohibited encumbrance has been litigated frequently. The courts which have interpreted the term encumbrance narrowly, as signifying a burden on the land affecting the title thereto or impairing the power of alienation, have found that land use regulations are not an encumbrance.[31] However, where the courts have interpreted encumbrance broadly, as signifying any burden

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Apr. 11, 1968, Pub. L. No. 90-284, § 402, 82 Stat. 79 (codified at 25 U.S.C. § 1322 (1970)); Goldberg, *supra* note 10, at 549-51; Comment, *Extension of County Jurisdiction*, *supra* at 1472-73.

28. 532 F.2d at 663.

29. A statement issued by the U.S. Department of the Interior in 1969 supports an interpretation of P.L. 280 which excludes local jurisdiction over reservation lands:

> [B]oth the language of Public Law 280 and its legislative history make quite clear that it was not intended to invest the states with jurisdiction over trust property. This Department consistently has held that the statute furnishes no basis for the application of state or local zoning, construction, or other land use laws, regulations or standards to trust property. Authority with respect to such property is reposed exclusively in the Federal and tribal governments.

78 Interior Dec. 27, 28 (1971).

30. 28 U.S.C. § 1360(b) (1970).

31. *See, e.g.*, People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (3d Dist. 1970), *cert. denied*, 404 U.S. 823 (1971) (maintenance of a firebreak held to be valid exercise of state police power and not an encumbrance); 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), *cert. denied*, 419 U.S. 1008 (1974) (ordinance prohibiting gambling on the reservation held not to be an encumbrance).

upon land which is depreciative of its value, zoning ordinances has been found to constitute an encumbrance.[32]

The Supreme Court has, in differing contexts, construed the term encumbrance broadly and has focused on the effect a challenged state action would have on the value, use and enjoyment of the land.[33] The Ninth Circuit, following the Supreme Court and relying on the canon of statutory construction which resolves ambiguities in favor of Indians, opted for a broad interpretation of encumbrance.[34] Noting that the application of state zoning and land use regulations could result in various adverse social, political and economic consequences to Indians,[35] the *Santa Rosa* court concluded that the encumbrance clause in section 1360(b) denied the state the power to apply zoning regulations to Indian trust property.[36]

Consistency with Federal Statutes

Another jurisdictional limitation found in section 1360(b) denies the states the authority to regulate Indian trust realty in "a manner inconsistent with any Federal . . . statute or with any regulation made pursuant thereto . . . ."[37] The court found that federal legislation did exist in the area of zoning and land use regulation of reservation property. Section 465 of 25 U.S.C. authorizes the Secretary of the Interior to purchase land for the "purpose of providing land for Indians"[38] and to take the title to such lands in trust. Pursuant to this statutory authority, the Secretary has promulgated a federal regulation[39] which provides that state and local zoning ordinances which regulate Indian trust property are invalid unless specifically authorized by the Sec-

32. *See, e.g.*, Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967) (ordinance requiring conditional use permit for garbage disposal held to be an encumbrance).

33. *See* Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Rickert, 188 U.S. 432 (1903).

34. One commentator has supported the broad interpretation of the encumbrance clause on the basis of the legislative history and statutory construction of P.L. 280. *See* Comment, *Interpretation of Encumbrance Clause, supra* note 4, at 433.

35. 532 F.2d at 667. The court asserted: "Suffice it to say that application of state or local zoning regulations to Indian trust lands threaten the use and economic development of the main tribal resource . . . . and interferes with tribal government of the reservation." *Id.* at 667-68.

36. *Id.*

37. 28 U.S.C. § 1360(b) (1970).

38. 25 U.S.C. § 465 (1970). This provision was enacted as part of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-478 (1970).

39. 25 C.F.R. § 1.4 (1976).

retary as in the best interests of Indians.[40] The Secretary of the Interior has, in fact, adopted all California state zoning ordinances but has explicitly chosen not to adopt or make applicable any local ordinances.[41] Thus, federal regulations bar the application of the county's zoning ordinance to the Santa Rosa reservation and the "inconsistency" limitation in 1360(b) serves to reinforce such an exclusion.

The court found additionally that application of the county's zoning ordinance would be inconsistent with federal statutes authorizing the BIA and the Indian Health Service to provide housing and sanitation aid to Indians.[42] Not only would the administration of the federal programs be hampered, but the receipt of services would be severely restricted by application of the local ordinances.[43]

C. Conclusion

Santa Rosa is significant for its delineation of jurisdiction over reservation lands with regard to county zoning ordinances in P.L. 280 states. The Ninth Circuit affirmed that the federal government has preempted the area of regulation of reservation lands and that the states have no inherent police power jurisdiction over reserva-

40. Several commentators have suggested that 25 C.F.R. § 1.4 (1976) is invalid either because it lacks specific statutory authorization or because it is in derogation of the jurisdiction conferred by P.L. 280. *See* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1091 (1974); Dolan, *State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations*, 52 N.D.L. Rev. 265, 295-96 (1975); Goldberg, *supra* note 10, at 586; Price, *supra* note 5, at 290-93.

In fact, two district courts have refused to apply section 1.4 because of its apparent invalidity. *See* Norvell v. Sangre de Cristo Dev. Co., 372 F. Supp. 348 (D.N.M. 1974), *rev'd on other grounds*, 519 F.2d 370 (10th Cir. 1975); 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.), *cert. denied*, 419 U.S. 1008 (1974).

41. *See* 30 Fed. Reg. 8722 (1965). The California Attorney General believes this regulation is invalid because "the Secretary cannot, after the passage of Public Law 280, issue regulations which have the effect of depriving the state of jurisdiction which it received from Congress by passage of the law." 56 Cal. Op. Att'y Gen. 384, 387-88 (1973).

The *Santa Rosa* court found, on the contrary, that the issuance of such federal regulations as 25 C.F.R. § 1.4 (1976) and the regulations contained in 30 Fed. Reg. 8722 (1965) after the passage of P.L. 280 confirmed the continuance of federal control in the area of reservation land use regulation and, concomitantly, indicated that P.L. 280 did not confer land use regulatory power to the states. 532 F.2d at 665-666.

42. The Housing Improvement Program, which is maintained under the auspices of the BIA, was adopted pursuant to 25 U.S.C. § 13 (1970). The Indian Health Service assistance is provided under 42 U.S.C. § 2004a (1970).

43. The district court in *Santa Rosa* noted that federal projects such as the Housing Improvement Program are usually exempt from state or local regulations which would hinder their completion. Furthermore, application of the county ordinance in this case

tions unless expressly authorized by the federal government. In addition, the court concluded that P.L. 280 did not grant jurisdictional powers to the local governments nor regulatory powers to the state governments. Finally, the *Santa Rosa* court clearly indicated its support for the recognition of Indian tribes as self-governing bodies with the authority to regulate civil affairs and the development of resources on the reservation consistent with federal law and policy.[44] It is hoped that other federal circuit courts will demonstrate an equal sensitivity to the rights of tribes to regulate their own civil affairs.

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would also frustrate the federal policy found in 25 U.S.C. § 13 (1970) to provide for the general welfare of Indians. *See* Santa Rosa Band of Indians v. Kings County, Civ. No. F-836, slip op. at 3-4 (E.D. Cal. Oct. 12, 1973).

44. In dicta, the court indicated that the principles stated in its decision did not bar all incidental on-reservation consequences of county regulations, such as the payment of the same fee for county-supplied water or sanitation hook-ups that is required of other county residents. The *Santa Rosa* court also noted that there might be differing views as to the relative priority of economic development, environmental amenity and public morals between the Indian communities and the local communities. One remedy for such a conflict would be for the state to pass a law of statewide application which is valid pursuant to the limitations of section 1360(b). If the state were unable to act alone, it could seek federal assistance. 532 F.2d at 668-69.