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THE NATIVE AMERICAN:

AT WHAT LEVEL SOVEREIGNTY?

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INTRODUCTION

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It has been often stated that the right of tribal self-government is probably the most basic concept in American Indian law. Felix Cohen, in his Handbook on Federal Indian Law originally published in 1945, expressed this belief stating:

> The most basic of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's-land in which government can emanate only from officials of the Interior Department or from Indians themselves. Self-government is thus the Indian's only alternative to rule by a government department.[1]

Cohen goes on to emphasize that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."[2]

It will be my purpose in this paper to discuss the state

of the "sovereignty" possessed, both historically and presently, by Native American peoples. Specifically, I will deal with those Native Americans who are "federally recognized," a term which, itself, will be analyzed in the following pages.

President Richard Nixon in his message to Congress of July 8, 1970, stated his administration's policy on the status of federally recognized tribes. After a century and a half of vacillation between policies of "laissez-faire" self-government and termination of all tribal recognition, the President stated: "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support."[3]

If the intent of this policy is to be carried out, the question "at what level sovereignty?" must be answered. Therefore, I will attempt to look forward and anticipate the controversy and confrontation which would seem to be an inevitable part

of our history in the coming decade, hoping that in so doing I may marshal wisdom and strength both within the federal government and the American Indian community to work together toward just and rational solutions to the problems which we all face.

SECTION I: History of the Native American

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Before one can begin to consider the Native American and his relationship with the United States of America, it is necessary to recognize from the outset that those persons Anglo-American history has termed "Indians" have a heritage which greatly differs from the majority of persons who now inhabit the North American continent. Only the Indians can claim the aboriginal rights and titles to this part of the world now known as the United States of America. And along with those rights and titles is a cultural heritage which, while perhaps overshadowed in recent history by that of the European, African, and Asian immigrants who have settled here, remains as unique in its philosophy as is that of the Protestant Reformation or the doctrines of Marx, Lenin, and Mao Tse-Tung.

The Native American, himself, was probably an immigrant of sorts many years ago when his forefathers gradually crossed the Bering Straits from Asia to Alaska, moving slowly south and eastward to first become nomadic hunters and later, in some instances, tillers of the soil. By the time of the "discovery" of this continent by the European explorers, these aboriginal

peoples had disseminated throughout the Western hemisphere.

The early organization of these peoples into "governmental units" or tribes is not a part of our recorded Anglo-European history, in great part because our early European-American historians found no desire to delve into the past of the "aboriginal savages" of the new world. It is known, however, that by the time of European colonization many bands of Indians did have common ties, much like the early familial tribes of the fertile crescent in the Middle East, organized around the "strongest" individual of the group, usually the individual who was the most successful hunter and best provider of protection from the furies of nature.

This is not to say that different tribes do not have different backgrounds. There are many different lifeways and realities represented by the myriad of aboriginal tribes on this continent. In the new world there are fifty-six different language stocks as different as Indo-European and Sino-Tibetan.[4] Indeed, tribes do differ and this factor is often ignored today by federal officials who follow the "T-V western misconception" that "an Indian is an Indian is an Indian." There were and are "strong" tribes and "weak" tribes, tribes which were technologically

advanced and those which which were not. Obviously, tribes in the hilly, wooded Northeastern part of the continent evolved differently than those in the Great Plains of the Midwest or the deserts of the Southwest as they met their needs. However, the philosophies of most aboriginal Americans had great similarity. And this similarity increased as the need to meet the advance of the "white invader" intensified.

In his book, Custer Died for Your Sins, Vine DeLoria, Jr. discusses Indian leadership. "Indian unity had been an old dream," he stated, going on to enumerate the various attempts to unify tribes by their own leaders which ultimately failed in every case as European settlers pushed further westward. The leader Deganawidah forged the Iroquois Confederacy out of a miscellaneous group of tribes who had been driven out of the Ozark region by stronger tribes. The Iroquois Confederacy was powerful for many years, powerful enough to hold the balance of power in the eighteenth century colonial wars between England and France. But as settlers wanted more land, the Iroqouis tribes were either "conquered and civilized" or pushed westward. The same fate was accorded the Creek Confederacy and the Cherokee Nation in the Southeast, the tribes of the Great Plains, and finally the tribes of the desert

Southwest and the Pacific Northwest.[5]

The reasons that Indian tribes had difficulty putting forth a unified front to protect their homelands are manifold. The most obvious reason, of course, is the lack of sophisiticated weapons for defense in comparison to the European newcomers. But more inportantly most Indian peoples could not, and still do not, understand the Anglo-American concept of property rights, "work-ethic," capitalism, or democracy. Their forefathers did not share in the feudalism of the Middle Ages, the ideas of the Renaissance, the philosophy of the Protestant Reformation, or the signing of the Magna Carta.

Therefore, what are the values which shape a Native American's outlook on reality and his own existence. To gain a knowledge of Native American folkways and mores, I drew upon the assistance of Barbara B. Richards, an instructor in anthropology at Baker and Ottawa Universities in Kansas, and herself a person of Native American background. I believe her observations are essential in understanding the more pragmatic pages of this paper which will be found in its subsequent sections.

Ms. Richards discussed several aspects of Indian philosophy in a letter dated July 1, 1974. On the subject of land tenure she stated:

> Since the universe and all things in it (with the exception of the body of the human being) belong to the Great Spirit, it follows that an individual cannot own land in the Anglo-Saxon sense of exclusive rights. Tribes had only the usufruct rights to a particular territory. Among some tribes, such as those of the Northwest Coast, an individual might have the rights to such things as the flippers of any sealion killed within a particular stretch of beach, but s/he in no way could keep every other member of the tribe from hunting sealion there.
>
> The earth itself is looked upon as Mother Earth. Many tribes believe that it was from Her womb that Indians emerged onto the surface. Some Blackfeet quilled the bottoms of their moccasins as well as the tops because they killed the prairie flowers as they walked and in this way returned some of the beauty to our Mother... Smohalla of the Nez Perce articulated his respect for the Earth this way: "You ask me to plow the ground. Shall I take a knife and tear my Mother's breast?... You ask me to dig for stone. Shall I dig under her skin for her bones?... You ask me to cut the grass and make hay and sell it and be rich like white men. But how dare I cut off my mother's hair?" [6]

On the subject of group life, leadership, and individualism she states:

> While each person is given much latitude in terms of individual development, s/he must always defer to the good of the group as a whole. Even among the competative Plains warriors, none was allowed to gain prestige by hunting bison alone, if if meant spooking

> the herd and thus endangering the food supply for the entire band... Competition as it is known in the larger American culture is almost unheard of...
>
> An individual becomes a leader (chief) because he is successful at hunting, raiding, religion, or whatever the male role is, not necessarily because he is the chief's oldest son. In most tribes one individual has no right to force another to do anything. (This becomes a problem when Whites expect a "chief" to speak for all the tribe and to be able to make them do as he tells them. For example, most treaties were signed by individual Iroquois sachems, but the rest of the Iroquois didn't see it as binding on them. Why? Because virtually all decisions affecting matrilineage, clan, moiety, tribe, or the League as a whole had to be made with the unanimous consent of all the adult members of that particular unit.)
>
> ...To gain prestige, one gives away things one has made or captured or received from someone else. The first game killed by a boy must be given away; the first moccasins quilled or beaded by a girl go to someone as a gift. (contrast this with the "first dollar bill made" framed and hanging on the walls of many non-Indian businesses.) [7]

The idea of time is also somewhat different in an Indian's world, as Ms. Richards states:

> In general Indian time does not seem to be on a horizontal plane, i.e., the past and future do not stretch out behind and before like a segmented worm. The Hopi conceive of day and night as two entities that recur.

> Rather than tomorrow being another day, it is just simply day. The same holds for the seasons. These, along with the earth, the sun, etc., are eternal things. Man, plants, and animals are born, develop, and die, with their component parts being reincorperated into other living beings, but not along a subdivided, lenear abstraction. Religious rites happen when all the preparations, mental and physical, have been made and not before, in spite of clocks and wristwatches. (One could compare it to the countdowns where something goes wrong and we the the "T minus 10 and holding.") Now try to get someone in this system to go to work at "9:00 A. M. sharp" when there's been a pow-wow the night before or it's good fishing weather, or to plan "25 years into the future." It's a separate reality.[8]

The basis for most Native American values is found in the religious bases of the tribes, as it is in most cultures. Ms. Richards explains those beliefs in the following way:

> The Great Spirit (Mystery) of the Plains tribes created the cosmos. It is of such great power and mystery as to be incomprehensible to the mind of a mere human being. Therefore its existence and wonderous ways of working are not to be questioned.
>
> All things (with one exception) belong to this Being--the earth, the animal people, the plant people, the air, the hills, mountains, etc. The one exception is the body of the human being. If we wish to sacrifice something to the Great Spirit, we must give of our own flesh by fasting or cutting

> bits off. We cannot rely on sheep, goats, or another person's sacrifice some two thousand years ago, but must feel it with our own bodies.
>
> The Sun Dance is a prime example of this symbol of the pain and suffering of mankind. Only man in the Plains belief system does not know his meaning in life...
>
> In the Southwest, the themes of balance and oneness with all of creation again appear. Whatever an individual does, no matter how small, affects the universe and the beings in it... One only kills just what is needed by the family and no more because a selfish individual can upset the whole balance of nature by destroying needlessly. (One exception comes to mind: the Northwest Coast potlatch.) Besides, the animal and plant people are just as important in the scheme of things as is man...
>
> Religion is lived every second of every minute. The compartmentalism characteristic of the Euro-American lifestyle, e.g. the division of the secular from the religious and its resulting schizophrenia, has no place in Indian tradition...
>
> It is difficult to translate the feeling of awe and reverence we have for the creations of the Great Spirit. What could inspire the horor felt by Indian America when a coal company invaded and began descrating Black Mesa. It is more to its people than the Wailing Wall is to the Jewish people. Would King Faisal's drilling of an oil well in the nave of the Church of the Nativity in Bethlehem have the same impact?[9]

It should thus be apparent that many of the plans, of even those well meaning non-Indians in the Federal government

have fallen on deaf ears because of a lack of understanding of Native American philosophy. Obviously, many of the traditional beliefs of Indian peoples contrast sharply with those of the Anglo-Saxon heritage of the United States. The problem therefore becomes one of rectifying the differences of culture and background so that Americans of all backgrounds can live together peacefully in the modern age.

During the early history of North American colonization, little was done to consider the rights of those persons already here. In the early days, explorers and later traders and settlers looked upon the New World as a vast area to be exploited to the glory of the fatherland and their own enrichment. The natives were looked upon as "savages" with few if any of the rights held to innate to European citizens. To be sure, Indian tribes were often dealt with as foreign powers, but as weak, backward civilizations which would play little part in the "contemporary world."

A good example of the early attitudes toward Indians, whom most Europeans had claimed as subjects of the Crown if those Indians were within the bounds of colonial territory, may be found in a proclamation issued by the New England colonists in 1755:

> Given at the Council Chamber in Boston this third day of November 1755 in the twenty-ninth year of the Reign of our Sovereign Lord George the Second by the Grace of God of Great Britain, France, and Ireland, King Defender of the Faith.
>
> By His Honour's command
> J. Willard, Secry.
> God Save the King
>
> Whereas the tribe of Penobscot Indians have repeatedly in a perfidious manner acted contrary to their solemn submission unto his Majesty long since made and frequently renewed.
>
> I have therefore at the desire of the House of Representatives...thought fit to issue this Proclamation and to declare the Penobscot tribe of Indians to be enemies, rebels and traitors to his Majesty...And I do hereby require his Majesty's subjects of the Privince to embrace all opportunities of pursuing, captivating, killing, and destroying all and every of the aforesaid Indians...[10]

The proclamation goes on to list the various bounties for the scalps of males, females, and children.

To be sure, Indians in various parts of the colonies were dealt with in different manners. Some were looked on as friends and guides, some were made into slaves (a proposition which did not often succeed), some were dealt with as enemy savages, and some, like the Cherokee of Georgia were taught the culture of the European settlers, being introduced to the printing press, Anglo-Saxon democratic government, and

European-style clothing, as well as the Christian religion. But in almost every case, Indian tribes were looked upon as governmental units, and as such the early settlers made treaties with them as were made with any foreign power.

Early treaties generally covered the precepts of peaceful coexistence, which meant the ceding of certain Indian lands to the colonists in return for protection of rights to hunting grounds and sacred lands. While the colonies remained small in population, most of these agreements were kept by all parties, but as more and more colonists appeared the need for more land became apparent. What more logical step to these early American immigrants than to convince the "ignorant Red Man" to give up a little more territory.

By the end of the colonial period, Indian tribes were considered dependent, but sovereign nations. The first concerted effort to deal with Indians as a part of the whole people of the continent was made by King George III of England in 1763 when he sought to "separate 'his' red 'children' from 'his' white 'children'"[11] by drawing a line along the crest of the Appalachian Mountains. This was a prelude to the "paternalistic" attitude which the government of the new Republic would take toward their Indian

peoples, as it undertook the "white man's burden" of dealing with "inferior, less civilized" peoples.

The new Nation immediately recognized the necessity of providing for Indian dealings. Section IX of the Articles of Confederation provided that Congress "shall have the sole and exclusive right of...regulating the trade and managing all affairs with the Indians, not members of any states, provided that the legislative right of any state within its own limits be not infringed or violated."[12] This set up the basic premise, still followed today, that Indian affairs are a matter of national concern and regulation, and not the affairs of the individual states.

A statement of good faith toward the Indians was expressed one year later in the Northwest Ordinance of July 13, 1787. It asserted that "the utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them and for preserving peace and friendship with them."[13] This set up the idea of "quasi-sovereign" nations, dependent on the protection of the

Federal government and established a policy statement to which supporters of Indian rights and federal authorities could refer.

Treaties were soon found to be inadequate to protect the Indian tribes from the intrusion of the whites on the outreaches of the frontier. It became apparent to President Washington and his Secretary of State that laws were needed to fulfill the requirement of regulation of trade and intercourse with Indians as set up in the Articles of Confederation and restated in the Constitution. In 1890, therefore, the Intercourse Act was adopted. It attempted to regulate trade through licensing and declared invalid any attempts by individuals to purchase land from Indians in the absence of a treaty providing for the same. Further, it attempted to provide for the punishment of crimes committed by whites in Indian territory. While it was not fully successful, the Intercourse Act did set up the first basis of Federal regulation of Indian affairs.

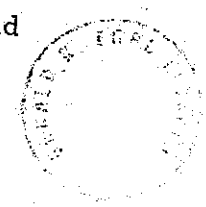
Another Intercourse Act was passed under the tenure of President Jefferson in 1902. It put into permanent form a number of measures previously enacted temporarily for the regulation of Indian affairs. It again attempted to draw out in detail the boundaries between white and Indian country. The Act was strongly opposed by those who stood to benefit by

white intrusion into Indian country, but it was passed at President Jefferson's urging, to provide the government with a more efficient means of upholding its treaty commitments. This Act stood as the official Federal Indian policy until 1834.

The indication that the dealings of the United States with its Indian inhabitants on an official level would not remain on the peaceful, honorable plane which they had begun came quickly. As the new Nation expanded westward from the original colonies, frontiersman hungered for the good land which was held by the Indians west of the Appalchians. The first test of the good faith of the Federal government was to come in Georgia and South Carolina which bordered on the lands of one of the most "civilized" of the Indian nations, the Cherokee Nation.

As early as 1803, Jefferson had suggested the advisability of removing all of the southern Indians west of the Mississippi. In 1909 a delegation of Cherokees made a visit to the Western lands. In 1816 General Andrew Jackson reported that the whole nation would soon offer to move west. However, there was a division of opinion among the Indians, themselves.

The Lower Cherokees, who lived chiefly in Georgia, agreed to emigrate, while the Upper Cherokees wished to remain and



change from being primarily hunters to farmers. On July 8, 1817, the Cherokees ceded a tract of land in Georgia and about one third of the Cherokees moved into the Louisiana Territory. However, each section of the nation had apparently altered it original feelings, so that many of the Upper Cherokees, in Tennessee, moved west, while a number of those in the Lower division remained in Georgia. Soon, most of the emigration had ceased.

In 1820, President James Monroe asked Congress for appropriations to extinguish by treaty the Indian title to all Georgia lands. The Cheorkees officially replied in 1823 that they were determined to cede absolutely no more land. The United States still regarded the Indians as sovereign, if dependent nations who could received diplomatic courtesies in the same manner as any foreign power, and did so for the Cherokees in March of 1824. This act angered the citizens of Georgia who demanded that the President speed up the process of removing the Indians. In a message to Congress on March 30, Monroe replied that he had done his best to carry out the terms of the agreement of 1802, stating that the government was under no obligation to use any means other than peaceable and reasonable ones. The issue was then dropped for a time.

It might be noted that the Cherokees had been substantially

"educated"in the ways of the white settlers by this time. In 1825 Sequoyah devised the Cherokee alphabet and set up a printing press in the Cherokee capital. Steps were taken to formulate a written constitution. Such constitution was adopted in a representative convention on July 26, 1827. The Indians had also taken the white custom of keeping slaves; a census taken in 1825 in the Eastern Nation showed Indians numbering 13,563; whites married into the nation numbering 220; and negro slaves numbering 1,277.[14]

The ratification of the Cherokee constitution in 1827, stirred the citizens of Georgia, led by their governor, to pass a resolution on December 27, 1827, to the effect that the United States had not acted in good faith toward Georgia and asserted that the Indians on Georgia land were "tenants at will" who could be dealt with under the laws of Georgia. The resolution did not have the force of law, and the citizens of Georgia waited for a year before acting to carry out the threat. On December 20, 1828, the Georgia legislature passed an act stating that all white persons should be subject to Georgia law, and that after June 1, 1830, all Indian residents would be subject to such laws as might be prescribed, the law made by the Cherokee Nation after that date being null and void. The situation was greatly worsened by the discovery of gold deposits that same year.[15]

Nationally, the Cherokees had lost whatever support they might have earlier found in the executive branch. Andrew Jackson, just elected President, delivered a message to Congress on December 8, 1829, calling for the removal of the Eastern tribes. Thus a gradual erosion of "sovereignty" had occured since Washington's time, and on May 28, 1830, Congress passed the Removal Act. This act provided for the exchange of Indian land in the East for Federal territory in the West, and was designed to guarantee the removal of the entire Cherokee Nation.

The matter was not to be settled so easily, however, for in 1831 the Cherokees turned to the Federal courts to assist them. Chief Justice John Marshall rendered the opinion for the Supreme Court in 1831 in The Cherokee Nation v. Georgia,[16] to the effect that the Supreme Court was not the proper tribunal for such a dispute, having no jurisdiction. The motion for injunction was denied.

The decision was based on the feeling of the Court that the Cherokee nation was not a foreign "State" in the Constitutional sense, nor could it bring an action in a Federal court. The majority opinion did, however, grant recognition that the

the Cherokee Nation was a separate entity (with the exception of Mr. Justice Johnson who felt that to hold the Cherokees in even that high a regard was too much for "so low a grade of organized society as the Indian Tribes."[17]) A dissenting opinion, however, held that the Cherokee Nation was indeed competent to sue in Court and that the injunction should be awarded.

The issue of the sovereignty of the Cherokees was again raised only one year later in the case of Worcester v. Georgia.[18] In that case the state of Georgia had attempted to excercise its police power over Cherokee territory by imprisoning a white missionary who was living among the Cherokees. If this action had been maintained, the Indians would have been totally subjected to the laws of the state and sovereignty would have virtually been lost. The actual question of the level of sovereignty accorded to the Indians had been skirted in The Cherokee Nation v. Georgia, when the court simply held that it lacked proper jurisdiction, but this case called for a definite definition of the powers, if any, that states held over the regulation of Indian affairs.

Justice Marshall thus articulated his view of the concept of "tribal sovereignty" in the Worcester opinion:

> The Indian nations have always been considered as distinct, independent, political communities...
>
> The settled doctrine of the law of nations is, that a weaker power does not surrender its independence--its right of self-government--by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state...
>
> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with the treaties, and with the acts of Congress.[19]

The seaming disparity between the two decisions which came back to back was discussed in an article in the Iowa Law Review in the spring of 1966: "Although he (Marshall) recognized tribal sovereignty over internal tribal matters, at least to the extent that it did not come into conflict with federal law, he thought the existence of any external sovereignty was highly questionable."[20]

The fact remains, however, that Marshall clearly indicated that Indian nations were not foreign states in The Cherokee Nation v. Georgia. His basic premise is quite

possibly the status which is afforded Indian tribes today. He said: "It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be dominated foreign nations. They may, more correctly, perhaps, be dominated, domestic dependent nations.... They are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."[21]

The Intercourse Act of 1834 expressed the change in Indian policy necessitated by the westward movement of whites. While it codified and continued the basic Indian policy of the previous Intercourse Acts, it accepted removal as an accomplished fact. Indians east of the Mississippi River were no longer considered to be in "Indian country." Also, the hands-off policy with respect to inter-tribal disputes was revised to protect the interests of frontier settlers, trappers, traders, and general domestic stability.

So it was with Federal Indian policy for the next thirty-two years. But with the advent of far westward expansion brough on by the end of the Civil War, it became apparent that areas West of the Mississippi, would also have to be taken into account by the planners in Washington. In 1868, the last two Federal treaties were made by the Federal government, one

with the Sioux and one with the Navajo. Three years later, the Indian Department Appropriations Act was passed. The Act took away whatever external sovereignty the tribes might have claimed, for it forbade the making of treaties between the United States and the Indian tribes or the Indians and any sovereign power, for that matter. It may be significant that almost one hundred years had passed before the inevitable had come, yet the passage of this Act marked the legal "closing" of the American frontier and with it the Indian's last hopes for independence.

From this point on the Federal government, while still upholding the premise of internal sovereignty, entered into agreements and passed laws to control the Indian population within the states and territories of the United States. A major court decision in 1883, Ex parte Crow Dog,[22] upheld the right of Indian tribes to assert jurisdiction in criminal cases arising on Indian lands. The case involved the murder of a Sioux named Spotted Tail by another Sioux, Crow Dog, within the confines of Indian country. The Supreme Court overturned the death sentence of a district court in South Dakota Territory, reasoning that neither the treaty of 1868 nor an agreement ratified by Congress with the Sioux in 1877 abrogated the tribes right to determine the punishment to be assessed for a crime over

which the United States had never specifically claimed jurisdiction.[23]

The court noted that to hold otherwise would be:

> to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its extractions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by the superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[24]

The effect of Crow Dog, however, was not a positive one for the Indians. So incensed was the Congress at what most Congressmen considered an outrageous decision, that two years later the Major Crimes Act of 1885 was passed. It expressed general dismay for the native customs of the tribes, generally, and specifically denounced the idea of permitting Indians to handle legal matters on their own. The act provided that Indians, either while on or off the reservation, committing certain crimes would

be subject to the laws of the territory in which the crime was committed. This was, effectively, the first intrusion of States of the United States into the internal sovereignty of Indian tribal governments. The act originally specified seven crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny,[25] but was later amended to include a number of other offenses.

Two years after the Major Crimes Act was passed, a major turning point in Indian policy was arrived at with the passage of the passage of the Dawes General Allotment Act. Before the Act was passed, Indians had been considered as a group. The Act treated them as individuals. The plan was to open tracts of government land to be allotted to the Indians for their individual use. The hope of its authors was to transform the "savage, nomadic peoples" into Christian farmers, and thereby assimilate them into the mainstream of American life. Subsequent acts in 1891, 1894, and 1897 permitted the Indians to lease their lands to whites, a prelude of today's checkerboarding of Indian reservations with non-Indian controlled land. The Act did not, however, preclude the retention of tribal land in common. It merely was assumed to be the first step in

solving the "Indian problem" for a country which had by that time expanded across a continent.

Indian law and authority continued to erode as time passed. In 1898, the final blow to the jurisdictional sovereignty expressed in the Crow Dog decision was dealt with the passage of the Curtis Act. It placed the tribes of Oklahoma territory under the jurisdictional law of that territory and specifically abolished all tribal courts. By the end of the nineteenth century, therefore, the United States government felt that it had effectively emasculated the Indians as a sovereign people and that the road to assimilation of the Indian into the mainstream of society was well under way.

During the first third of the twentieth century little attention was paid the American Indian. He had quietly taken his place along with many other ethnic minorities at the low end of the spectrum of American society. He became the sideshow attraction, the bumbling, yet kind companion of the White Man, relagated neatly forever to the stutus of a second class entity.

In 1924, the Congress passed the Indian Citizenship Act on June 2. According to some sources, this small advance in status was occasioned by the increased respect white legislators held for Indians after their exemplary performance during World War I. This, along with with the support of whites who disliked

the ongoing paternalism of the Bureau of Indian Affairs, brought about the Act which briefly stated that all Indians born within the territrial limits of the United States were citizens. The act specifically stated, however, that this would not affect an Indian's right to tribal or other property.[26]

In 1928, Congress was prompted by a report of the Institute for Government Research, known as the Meriam Report, to move for a special Senate Committee to study the status of Indians in the United States. The committee began actively soul-searching to reconsider the treatment of Indians in the past and the status to which they has evolved.

The reexamination of Federal Indian policy lead to another dramatic turn of events for the American Indian. In 1934, inspired by the reports of the Commissioner of Indian Affairs, John Collier, the Congress passed the Wheeler-Howard Act, which sought to give back to the Indian his voice in planning his own affairs and maintaining his own culture. It had become obvious that the Indian was not prepared to assmilate into the mainstream of American society, and furthermore, he did not desire to do so. The Act extended the trust protection of the Department of the Interior over tribally held lands and reinstated some of the perogatives of tribes as self-governing bodies. It

served to strengthen the tribal land base, that factor which gives Indians a certain advantage over many other minority groups who have attempted to assert their power in American society.

Almost as quickly as the tide had turned in the 1930's, the dawn of the 1950's saw even stronger attempts to do away with a "separate" Indian society. Public Law 280 passed in 1953 gave certain states the right to assume jurisdiction over acts committed by Indians on the reservation, much as the Major Crimes Act had done years earlier. The Law angered many Indians who were just beginning to enjoy the powers which were restored in 1934; it was a prelude to the most significant attempt to take away all tribal power which occured the next year.

During 1954, the Senate Subcommittee on Indian Affairs decided that many tribes had advanced to the level at which they no longer needed the protection of the Federal government. While to some this seamed to be the culmination of the Indian's fight to get away from the paternalism of the Federal bureaucracy, it was seen by many members of the Indian community as a final blow. Without an economic base and holding the stigma of being considered by many Americans (as exemplified in Western fiction) as second class, intellectually inferior citizens, the

Indian community looked on termination as a means to force the Indian off his precious land holdings to join the Blacks and other minorities in the glumness of the poverty pockets of the big city: the ghetto slums. Without the training and economic resources of many Americans, Indians were certain to be the victims of yet another attempt to take their lands for the economic exploitation of the white majority.

The effects of termination on tribes such as the Menominee of Wisconsin were total failures. The principal result was the impoverishment of many individuals who bacame wards of the state on welfare roles, rather than the problem of the Federal government. The freedom of termination resulted in an even greater bondage. In 1973 the Menominees, after much work, were restored to their tribal status and given back land so that the tribal community could function once more.

The most recent major legislation affecting tribal self-government and sovereignty was passed on April 11, 1968. The Indian Civil Rights Act, as it is called, grants to Indians on reservations the protections found in the Constitution, generally termed the Bill of Rights or the first ten amendments. While it is considered by many as a positive step in guaranteeing civil liberties to Indian citizens, it is nevertheless one more detraction from tribal authority, which culturally often bases

its decisions on customs and practices far different from the Anglo-Saxon legal tradition brought to the United States Constitution by the Founding Fathers.

Finally, to bring Federal Indian policy up to the present, one must turn to the July 8, 1970, message which President Richard Nixon delivered to Congress. In that message the President recognized that neither of the old alternatives of overt paternalism or termination were the answer to the Indian's problems in the 1970's. He therefore set forth the policy of "self-determination, without termination."[27] This simply means that the Indian Community must have the protection of the Federal government with respect to its lands and economic base, while at the same time enjoying the freedom to choose its own path for the future. In subsequent sections, this paper will deal with the current status of Indian affairs and the direction they may be heading.

SECTION II: Current Stutus of Tribal Sovereignty

SECTION II: Current Status of Tribal Sovereignty

To look at the Indian scene today is to look at an extremely diverse situation. At the outset, one realizes that even the mere attempt to isolate and identify a person as an "Indian" is a complicated matter. The same individual may be an "Indian" under some criteria and a "non-Indian" under others. Persons of Indian descent, for example, who are not enrolled members of a federally recognized tribe are not eligible for the services of the Bureau of Indian Affairs and many other federally administered programs for Indians.

As stated out the outset, this paper is intended to deal with the federally recognized tribes for it is these entities which are involved in the question of "tribal sovereignty." To be sure, there are many Native Americans in urban centers and in the Eastern Seaboard area of the United States who are vitally concerned with having a larger voice in their own affairs and being included in federal programs, but most or all of these people back the

[redacted] tribal land base from which federal recognition as a special entity flows.

It is the land, the age-old Anglo-American preocupation with property, that sets federally recognized Indians apart from all other minority groups in the United States today. Real property connotes "jurisdiction" in Anglo-American law. This, coupled with the early recognition of native Indian tribes as foreign national powers, later amended to "domestic, dependent nations," gives organized tribes, groups, and bands of Indians an historical basis for governmental power, not held by any other "peoples" in the United States' melting pot.

What are the requirements for legal recognition by the Federal government? What, in fact, is an "Indian?" According to Felix Cohen in his Handbook of Federal Indian Law published in 1945 and still regarded as one of the most authoritative volumes on the subject states:

> The term "Indian" may be used in an ethnological or in a legal sense. Ethnologically, the Indian race may be distinguished from... other races. If a person is three-fourths Caucasian and one-fourth Indian, it is absurd, from the ethnological standpoint, to assign him to the Indian race.

> Yet legally such a person may be an Indian. From a legal standpoint, then, the biological question of race is generally pertinent but not conclusive. Legal status depends not only upon biological, but also upon social factors, such as the relation of the individual concerned to a white or Indian community.... The individual may withdraw from a tribe or be expelled from a tribe; or he may be adopted by a tribe. He may or may not reside on an Indian reservation...
>
> What must be remembered is that legislators, when they use the term "Indian" to establish special rules of law applicable to "Indians," are generally trying to deal with a group distinguished from "non-Indian" groups by public opinion, and this public opinion varies so widely that on certain reservations it is common to refer to a person as an Indian although 15 of his 16 ancestors, 4 generations back, were white persons; while in other parts of the country, as in the Southwest, a person may be considered a Spanish-American rather than an Indian although his blood is predominately Indian....[28]

Cohen goes on to state that generally "Indians" must meet two qualifications to be considered as such: 1) some of his ancestors lived in America before the coming of the White race, and 2) that he is considered an Indian by the community in which he lives. In the question of services to members of federally recognized tribes, this second factor is crucial. While tribes are permitted to establish their own criterion for enrollment,

on which the Federal government bases a tribe's official membership, the individual criteria may vary greatly from tribe to tribe. In most cases, an individual must meet certain "blood requirements," usually one quarter Indian blood, for tribal recognition. However, he may or may not have to be a descendent of a tribal member, biologically, and he may or may not have to live on the reservation. This disparity between the tribes around the country has, of course, led to great confusion when Federal officials attempt to establish a national Indian policy. The confusion is usually resolved by permitting the tribes to be the sole judge of the "Indianness" of their members.[29]

To be federally recognized, a tribe, group, or band of Indians must have made an agreement with the Federal government establishing itself as a legal entity, subjecting itself to Federal control. There are five basic relationships which can make a tribe "federally recognized." These relationships can have been arrived at either by treaty or legislation, or in some cases by executive order.

The five relationships are : 1) Indian or Alaska Native organizations whose constitutions are approved by the Secretary of the Interior under Federal Statutory authority of the Indian

Reorganization Act; the Oklahoma Indian Welfare Act; or the Alaska Native Act; 2) Indian or Alaska Native organizations whose constitutions are approved by the Secretary of the Interior or his designated representative under the authority of treaty, or other acts not mentioned above; 3) Indian organizations serviced by the Bureau of Indian Affairs; 4) Indian organizations and tribal members who live on public allotment land administered by the BIA and the Secretary of the Interior; and 5) Indian groups which receive assistance for matters relating to the settlement of claims agains the United States government, such as those involving inadequate compensation for land in the past.[30]

The domain of tribal self-government is, of course, the reservation. And it is here that a number of problems have arisen in the recent years. For through many actions, the land base so precious to the tribes has slipped from their hands. The result is often a quasi-sovereign governmental entity, which represents only tribal members yet which claims jurisdiction over all matters arising on reservation land, thus having theoretical control over non-represented non-Indian people living within the legal boundaries of the reservation.

The problems arising from the "checkerboarding" of Indian held and non-Indian held land on reservations has given

rise to a number of legal and extra-legal occurances recently. On the Flathead Reservation in Montana, for example, non-Indian interests control about 80 percent of the reservation lands, including a sizeable part of the Flathead Lake, a commercially developed area. The Flathead Reservation was created by the Hell Gate Treaty in 1855. By this treaty, the confederation of tribes ceded all their right and title to much of their land in Washington State, in return for which the government created the Flathead Reservation. Up until 1909, only Indians were permitted to use the land of the reservation. In 1909, however, Congressional action permitted non-Indians to settle in portions of the reservation.[31]

The legislation under which the reseravation was opened provided for the survey of all lands within the reservation boundaries and for individual allotments to all eligible persons having tribal rights in the confederation of tribes. The remaining lands were to be classified and appraised and opened to settlement by non-Indians. Subsequent special legislation authorized the Secretary of the Interior to subdivide into lots of not less than two or more than five acres and sell all the unallotted lands fronting on the lake.[32]

The result of this action was to create a sizeable non-Indian

community inside the reservation. The first challenge to this situation came in the case of Rochester v. Montana Power Co. in 1899. The South half of Flathead Lake was within the reservation. The question before the court was the determination of the boundary of the lake as it affected the lakes bed. The decision ruled that state law was not applicable to the lands below high water mark. The Ninth Circuit ruled that there was no question but that the lands of the lake bed as well as the submerged shoreline in trust for the tribe.[33]

Subsequent cases bore out this basic theory, but the question of the access and wharfage rights of the non-Indian owners of the allotted land persisted. Since they held allotted land on the shore of a lake that was owned by the Indians and held in trust by the government, did they as riparian owners possess rights for which they could not be deprived without compensation? The question, still raging, is just one of many such problems faced by non-Indians on Indian land.

This summer, the Onandaga tribe of New York State have sought to forcibly remove all non-Indians from their reservation. In Washington State, the Puyallup tribe whose "reservation" encompasses much of the suburban area of Tacoma, could

theoretically assert tribal authority over thousands of non-Indians with a power base of a few hundred Indians. And in many other areas of "Indian country" the push for soveriegnty has begun to include the push for non-Indians to leave the tribal lands.

It should be noted that many reservations still maintain a largely Indian population, the most notable being the Navajo Nation, which is also the largest reservation with a population of nearly 100,000 in three states.

The question of Indian/non-Indian relationships lead directly to the problem of legal jurisdiction on Indian reservations with respect to judicial matters. As has been pointed earlier, the original protection of Indian sovereignty in judicial matters by the Federal government eroded with the passage of time, beginning with the Major Crimes Act in 1885 and leading up to the enactment of Public Law 280 in 1953, giving states the right to claim jurisdiction over Indian reservations with (or without) the consent of the tribe. Public Law 284, the Indian Civil Rights Act passed in 1968, represented another intrusion into the Indian's perogative to deal with his own problems in his own, customary fashion.

As the law now stands legal jurisdiction is broken down between Federal, state, and tribal authorities in the following

manner. In areas where the state has not assumed Public Law 280 Jurisdiction in crimes having a victim major crimes committed by either an Indian or a non-Indian are under Federal jurisdiction when committed against an Indian, as are Indian major crimes against non-Indians. Major crimes committed in Indian country involving a non-Indian as both victim and perpetrator are under the jurisdiction of the state. Tribal jurisdiction applies only in minor crimes perpetrated by Indians, with the Federal judiciary reserving the right to assert jurisdiction in the case of minor crimes by Indians against non-Indians. Minor crimes committed by a non-Indian against an Indian are Federally prosecuted, while non-Indian against non-Indian crimes are again within the state's jurisdiction.

In the case of victimless crimes, such as forgery, gambling, and traffic violations, those perpetrated by Indians may be handled by either Federal or tribal authorities, while those of non-Indians may be handled by either Federal or state authorities.[34]

States who have assumed jurisdiction under Public Law 280 simply apply the same criteria to crimes on reservations as are applied to crimes elsewhere in the state. The Federal

judiciary is not involved unless it would normally be invloved due to regular jurisdictional rights asserted in the Federal Code of Criminal Procedure. This law conferred jurisdiction only to certain states, namely California, Minnesota, Nebraska, Oregon, and Wisconsin, and again, was discretionary on the part of the state involved. The failure of Public Law 280 to provide additional revenue for increased state administration costs, however, has restrained a majority of the states from exercising jurisdiction.[35]

While it was held by many in Congress to be a giant step forward in human rights for Indians, the enactment of Public Law 284, the Indian Civil Rights Act, brought with it its own set of problems. The Act basically extends formally the protection of the basic concepts of the first ten Amendments of the United States Constitution, plus the fourteenth Amendment, to Indians under the jurisdiction of tribal law. The problem created can be seen in a recent case evolving from an arrest on the Navajo reservation. The case, which occured prior to the enactment of Public Law 284, would have undoubtedly had a different outcome under its authority.

The case, reviewed in the Oklahoma Law Review in 1963,[36] involved the arrest of several worshipers involved in a ritual

ceremony of the Native American Church in which the peyote bean in used. The use of the peyote is analogous to the use of sacramental wine and bread in other Christian churches. The Navajo Tribal Council had passed a law forbidding the introduction, sale, and use of the peyote bean in Navajo country. [37]

When the case was brought in tribal court, the church sought an injunction to forbid the enforcement of the ordinance on the grounds that it violated the first, fourth, and fifth amendments to the Constitution of the United States, and the individual worshipers sought damages on the grounds of violation of their constitutional rights. Action was dismissed on two main grounds by the tribal court. First, it declared that the ordinance was valid as an excercise of tribal police power and, secondly, that the Navajo Tribal Council could not be sued without the consent of Congress which had not been obtained. The Native Church then brought suit in Federal District Court in the case of Native Church of North America v. Navajo Tribal Council, where the tribal court was upheld, and the decision was finally affirmed by the circuit court of appeals on the grounds that federal courts had no jurisdiction over penal ordinances passed by a tribal legislative body for the regulation

of reservation activities. This was based on the fact that no law was found to show that the Navajo tribe could be subject to the laws of the United States with respect to the internal affairs of the tribe, and thus the Constitution did not apply.[38]

This precedent was eradicated by the Indian Civil Rights Act. While the Act may be lauded as a step toward granting Indians, as United States citizens, their lawful protection under the Constitution, it was a major strike against the Indian tribes' right to self-determination with regard to their internal governmental sovereignty.

In civil matters, the Indian tribal courts are charged with the same responsibility of dealing with the same type of litigation as state and county courts consider within their jurisdictions. Indian courts handle matters which have a personal impact upon the individual, such as probates, and other matters of inheritance; domestic relations, including divorce, child custody, property settlements, and child adoptions; juvenile delinquency; and matters of property.[39]

Like federal court jurisdiction in criminal matters, civil jurisdiction of federal courts over Indian affairs is limited to those areas specifically granted by Congress. The only suits by or against an individual Indian over which the federal courts have jurisdiction are those in which there is diversity of

citizenship between the parties or in which the cause of action arose under the Constitution, laws or treaties of the United States.[40]

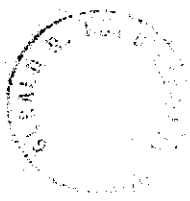
Federal courts have no jurisdiction over a civil suit merely because one of the litigants is an Indian, a doctrine stated explicitly in Deere v. St. Lawrence River Power Co. in 1929.[41] This had earlier been expressed in Paul v. Chilsoquie[42] in 1895 when the court stated:

> While it would seem, since Indians are members of a dependent domestic tribe or nation, and are regarede as wards of the national government, that the courts of the United States ought to have jurisdiction of civil suits by or against them, it suffices to say that no such jurisdiction has been conferred.[43]

The same is true with state courts, even though prior to 1959 many states considered that they did. The Supreme Court's ruling in Williams v. Lee,[44] a case involving a debt owed by a Navajo tribesman and his wife to a federally liscensed trader which was incurred on the Navajo reservation, changed that.

The court stated that:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that the respondent is not an Indian...[45]



The Williams doctrine, while having been modified to a certain degree by recent decisions, is still the leading case in matters of civil jurisdiction asserted by an Indian tribe. The interpretation of what undermines tribal court authority has been made less discretionery by decisions such as Kennerly v. District Court of Montana in 1971.[46] That decision held that tribes could not voluntarily bestow civil jurisdiction to state courts.

Turning, now from tribal judicial matters, there are a number of legislative and executive matters which tribal governments have asserted and wish to further assert their perogatives. Indians wish to have more say in economic matters, zoning and land use, fishing and water rights, and environmental protection. In these areas, the tribes meet with internal dissent. While all Indians wish to have more say about their own destinys, the battle between the progressives and the traditionalists rages. In today's technocratic society it is difficult for Indians to both establish a sound economic base, essential for self-determination, as well as preserving the cultural heritage and customs of their ancestors.

To delve into zoning, for example, the Indian must forgoe his age-old dislike for the laws of property. In order to become finalcially viable in 1974, Indians must of necessity turn

to the larger society around them. In order to provide adequate education of thier children, Indians face the possibility that such education may entice their children from the reservation and thus the cultural ties of that special society, unless jobs are provided on the reservation.

On the question of zoning and land use, the first problem the Indians face is the fact that most tribal land is held in common for the tribe by the Secretary of the Interior, under the Federal government's trust relationship with the tribe. Thus, both the United States government and the tribe have an interest in the land. Zoning requires a "police power" which must come from an "enabling act." Since a tribe must receive the permission of the Secretary of the Interior before providing for any land use plan, it essentially cannot exert a sovereign authority to control its own property. It should be pointed out that tribes have traditionally maintained the internal sovereignty to keep other authorities from dictating land use, but the tribal government does not have the ultimate zoning authority.

During the 1973-74 session of Congress, a land use planning bill was introduced (in several versions), which included provisions relating to Indian land use planning. A

Senate version of the bill (S. 268) passed the Senate with an amendment offered by Senator Henry Jackson which would have had a significant effect on an Indian tribe's right to control its own land. The amendment authorized tribes to:

> enact zoning ordinances or otherwise to regulate the use of the reservation and other tribal lands of such tribe subject to the approval of the Secretary.[47]

The report on the bill stated:

> Section 503 (b) provides that, in the implementation of its land use program, the governing body of each Indian tribe (would be authorized to implement the above quoted provision.) While existing law clearly appears to permit an Indian tribe, in its quasi-sovereign capacity and in the exercise of local self-government, to exercise powers similar to those exercised by any state or municipal corporation in regulating the use and disposition of private property within its jurisdiction, the Committee thought it desirable expressly to set forth within the act tribal zoning and other regulatory powers over reservation and other tribal lands. Any concern that an Indian tribe might seek to adopt an unreasonable land use regulation is avoided by making zoning regulations subject to approval by the Secretary of the Interior....[48]

Within Title V of the Act was contained a provision to give the Indian tribes funding to successfully administer the land use programs which they formulated.

The key issue was that this would have included "all lands within the exterior bounds of any Indian reservation," significantly extending tribal authority over non-Indian

lands within the bounds of the reservation. The control was the approval clause, which gave the Secretary of the Interior the final say in determining the reasonability of a tribe's land use plan.

The entire bill, however, failed in the House of Representatives this summer. Intended to be called the "Land Use Planning Act of 1974," the bill met with great criticism from state and local authorities who saw it as an infringement on their police power to zone.

The bill's main function was to provide for uniform environmental standards. The Indians themselves are concerned with environmental protection. But like the rest of society, economic development can sometimes get in the way of ecological concerns. An example is the proposal of the Hualapai tribe of Arizona to build a dam on a portion of the Colorado River between Lake Meade and the Grand Canyon. The tribe would gain substantial capital from the project, but much of the senic canyonland would be placed under water, destroying the natural environment of the area. The question which the Federal government faces with Indian governments is the same as it faces with State governments: can the local authority be depended upon to maintain an ecological balance without Federal intervention when local actions in one area may affect the environment of other jurisdictions?

Environmental protection is, then, an issue in tribal sovereignty. As the situation now exists, the Interior Department can exercise substantial control through its trust responsibility status. But if more "sovereignty" is recognized and the doctrine of Williams v. Lee of non-interference in essential tribal relations is met, increased economic development of large, pollution-producing industries on reservations will bring about certain conflict.

Already, states are attempting to assert control of environmental standards in Indian country. In 1929, Congress gave all states jurisdiction to enforce health and sanitation codes on Indian reservations. Public Law 280 gave states the right to take jurisdiction over air and water pollution laws, which Arizona assumed in 1967. In 1965, the Department of the Interior's regulations were changed to authorize federal extension of state zoning and land use laws over Indian lands were leases are in existence.[49]

A recent amendment to 25 U. S. C. Sec. 415 provides that before the Secretary of the Interior approves any lease, he must first: "satisfy himself that adequate consideration has been given the relationship between the use of leased lands and the use of neighboring lands;... and the effect on the environment of the uses to which the leased lands

will be subject."[50]

Following along these lines are the questions of fishing rights and conservation and water rights. "State efforts to control the taking of fish both on and off the reservation can be viewed as a rehearsal for extensions of environmental and zoning jurisdiction," states Monroe Price in Law and the American Indian.[51]

He continues, stating:

> Indian fishing practices, where the custom is not restricted to subsistence fishing, may be thought to have a major impact on the fish resources available to non-Indian commercial or sports fisherman. In particular, if Indian fisherman use modern techniques for gathering as much of the fishery as possible, some think there is a danger of the destruction of the resource. As in the environmental area, there are two questions: one is whether there will be adequate regulation of the fishing practices at least of a sort that will mean preservation of the fish run; the second is who is entitled to provide the regulation.[52]

Most Indians are as concerned with fish conservation as any persons who are involved with fisheries. (For example,) In order to exert their own influence on fishing regulation, members of the Indian community (in the area covered by the "Boldt decision") have begun to organize what is known as The Indian Fisheries Commission, which will handle the management of fishing within in the Indians' domain. The 1973 Boldt decision held that certain tribes in the Northwest do, by treaty, have a right to the opportunity

to fifty percent of the annual fish run.

Another point of controversy is the Indian's control of their water resources. In the Southwest, for example, water is in very short supply and competition for what water does exist is intensive. According to Price:

> The nature of Indian title to the water is thought by some to be in doubt, and the extent of Indian title to water is indefinite.... The question often becomes not who owns the water, but how it can best be used: for the reservation and their relatively few inhabitants or for the industrial metropolises of the Southwest? Water rights are as critical for Indian well-being and development now as land rights were in the late nineteenth century. But as with land...Congress has assumed enormous powers in the definition of Indian rights to water.[53]

A leading case in Indian water rights is Winters v. United States[54] in which the "reserved rights" doctrine was established. The doctrine proposes that when an Indian tribe made a reservation treaty or agreement with the United States government, the Indians, themselves, reserved for their own use water which would be sufficient to sustain the reservation and make it productive. This doctrine has been interpreted in a different manner, however, in the case of Arizona v. California.[55] In that

case, the interpretation is that when the United States created Indian reservations, the United States reserved the necessary water from adjacent sources for those reservations.

Price summarizes the aspects of Indian water rights in the following way:

> 1. The priority date is the date the reservation is created. State created water rights in existence before this period are superior; those arising thereafter are suborsinate.
> 2. The reserved right, unlike state-created appropriative rights, does not depend upon diversion from the stream and application to beneficial use. The reserved right arises when the reservation is established, even though the water right is not exercised for decades thereafter. In this respect the right is like a riparian right. In time of shortage, however, it is unlike a riparian right, for it does not share the available right pro rata but rather takes its place on the priority schedule and receives water ahead of all rights of later date...[56]

He goes on to point out that the quantity of water to be used under a reserve right is determined by the amount necessary to fulfill the needs of the reservation at both the present and future times. Arizona v. California quantified this amount as the amount of water necessary to irrigate all the irrigable lands on each reservation.[57]

Often, the Federal government is caught between an

obligation to fulfill its responsibilities as trustee for the Indians and their water rights and the general public interest. The Department of the Interior has been caught in many such bureaucratic entanglements. During the Nixon administration a special Indian Water Rights Office was created to handle these problems. Such responsibilities might in the future be overtaken by a proposed Indian Trust Council Authority.

Last year, a number of Northwest tribes began drafting a model water code for administration of Indian water rights by the Department of the Interior. In March, 1974, a set of proposed water regulations was circulated by the Department, which proposed three options for promulgating tribal water codes.

An example of one such code is the Colville Water Code drafted by the Colville Confederated Tribes, the first tribal authority to attempt such. The proposed code outlines in detail a plan to regulate the water resources of the reservation, working in conjunction with the surrounding area, in a manner which would provide equitable protection of rights to both Indians and non-Indians.

Many other areas of concern common to all communities are involved in the sovereignty question. Among these are

taxation, revenue sharing, education and economic development. Taxation is vital to the building of an economic base for a community's function. Without funds to administer a government, a tribal council cannot perform the necessary functions of self-sufficient management operations. There has been ever increasing attempts by local and state governments to tax Indian lands, especially where non-Indian residents are concerned. This conflict is, like other sovereignty questions, still unresolved.

Revenue sharing is a concern of Indian tribal leadership. Indians have had a tendency to react to revenue sharing negatively, fearing that they will be overlooked in their special relationship to the Federal government as State and local authorities begin to control funding for programs of projects which were formerly controlled by the Federal government. Indians feel that their voice in the local communities will not be heard, as other minority groups have had a tendency to dominate the local administration of many such programs. Indians have been included in revenue sharing proposals, but many tribal leaders, in their power to lobby in Washington, rather than in regional or state offices.

Education in the Indian community is a severe problem.

In the past, education has often been a divisive factor between young Indians and the traditional concept of tribal life. Indian leaders face the dilemma of "over education," that is to say that often Indian children are trained to a level where their skills cannot be utilized in the exisitng development of the reservation. In order to find jobs the young people must leave the reservation.

A serious attempt is being made to improve both the Indian education facilities and Native American teaching staffs, as well as to provide a community sufficient to support the newly qualified Indian peoples on the reservation. Of course, education often means the instilling of "white" values and the subsequent breakdown of respect for traditional Indian customs and mores. Indian leaders are called upon to decide how they can best serve both their children's needs and perpetuate the tribal unit at the same time.

The attempt to make reservation life appealing to young Indians involves, to a large extent, tribal economic development. While Indian lands have been exploited by leaseholding non-Indian entreprenuers for many years, only recently have Indian tribes themselves begun to use their enormous potential for their own enrichment. Immediately there is conflict between the traditionalists and the progressives on a reservation when

economic development issues arise. As discussed in Section I, the mores of traditional Indians find great disfavor in the development of the earth's resources in projects such as mining, forestry, or even agriculture. But with the disapperance of any other economic alternatives, the progressives feel that Indian lands should be used for the Indian tribe's own benefit, rather than waiting for what has often been inevitable exploitation by non-Indian interests.

Many tribes have been quite successful in developing non-Indian-oriented businesses. One example is the Mescalero Apache tribe of New Mexico which over a ten year period has developed a ski resort complex worth more than one million dollars, with plans for substantial expansion. The Northwest tribes are gradually building a substantial fisheries business. Economic self-determination is a prime prequisite to governmental self-determination.

Indians are, therefore, again at a point of change in American society. Tribal consent in state and federal matters is in question. "An important measure of tribal political integrity is the power of the tribe to determine what body of law will apply to its members..." [58] says Monroe Price. This political integrity is in a state of limbo in many areas today.

With the intermingling of Indians and non-Indians on tribal lands, the need for economic development, definition of fishing rights, water rights, and land use planning, as well as protection of the Indian cultural community, the question of sovereignty is perhaps the single most important question in the Indian community today. Suprisingly, there has been little thought given to the future direction of soveriegnty in the next decade or in the many years to come. In the final section of this paper, then, I will discuss some of the options with which both the Indian community and the Federal and state governments must come to grips in the future.

SECTION III: What Lies Ahead--The Options

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This final section of the paper will be devoted to a discussion of what may lie ahead with respect to future action to be taken both within and without the Indian community. To begin, it will be essential during the next decade and on into the future to maintain a positive political dialogue between Indians and non-Indians. But more than this, two centuries of vacillation between patronage and neglect must cease, and a concrete plan developed which will meet the pressing concerns of the Native American peoples of this country. The question, "at what level sovereignty," must be looked at squarely.

It should be apparent, at this point in the paper, that at present the Federal government has no definitive plan, as to the long-term future of dealings with the Indian community. In looking at the complex situation now existing in Indian affairs, with governmental tendencies toward more sovereignty in some areas and less in others, it becomes apparent that if an all-inclusive policy direction is not taken, chaos could ensure. For this reason, the following

options are presented for analysis as proposals which would meet such a policy direction.

I. Assimilation/Termination.

One option in a duscussion such as this is that of assimilation/termination. It is argued by some there is a sound basis for this option. The concept of minority governmental entities based on racial restrictions, i.e., governments in which only members of a single, that is the "Indian" race can participate either as elected officials or voters, challenges, it can be argued, the basic concept of all civil rights and equal protection authority in the United States. Realizing that Native Americans, unlike other racial minorities, do have an historical land base, it is still a fact that on some reservations as many as 80 percent of the residents within the external boundaries of the reservation's jurisdiction are non-Indians who are denied voting privileges and representation in the tribal government of that reservation. Can the United States condone the perpetuation of such a discriminatory system into the next century?

On the other hand, the effects of past attempts at termination have been very unfair to the Indian community, as discussed earlier. The fact that Indians have a special communal society rather than an individual society poses great problems in attempting

to assimilate individual Indians into the mainstream of society. In past termination attempts, it would appear that sufficient concern was not given to assuring that a former tribe member would have economic viabilility as a citizen who no longer has the benefit of special Federal privileges and immunities. For example, when the Menominee tribe was terminated in 1961, the tribes holdings were divided among individual members, who were required to keep them for twenty years. When the tribe lost federal recognition, these holdings became taxible under local law. Many Menominees could not afford the taxes levied on their forest land and were forced to sell land to pay taxes. The result, then of termination, may be that a relatively economically viable tribe may enter the mainstream of society without the economic support necessary to maintain the new way of life. If the termination/assimilation option is to be seriously considered, provisions would have to be made for protection of individual Indian's welfare during the transition period.

Also, since termination involves the breaking up of the Indian tribal community as a political entity, if often leads to a breakdown of the tribe as a cultural group some Indians note. As each tribesman goes his own way, the community would disappear, they fear. But some observers

feel that it is wrong to assume that a cultural heritage cannot be maintained by the Indian community in the absence of a separate governmental base. Most ethnic groups in the United States have their traditions which they have retained, and many such minorities question way Indians are more special than members of the Chinese community, the Italian community, or the Jewish community, in the Indians' desire to preserve cultural tradition.

There is much precedent, both legal and historical, however, for the special separateness of the Indian community. Indeed, the recent decision of the Supreme Court in Morton, Secretary of the Interior v. Mancari[59] decided on June 17, 1974, held that the policy of preferential hiring of Indians by the Bureau of Indian Affairs was not a discriminatory practice. Since the doctrine of Worcester v. Georgia, supra, American legal precedent has afforded a special status, based on race, to Indians.

It may be argued that these precedents are simply a part of the confusion about Indian status caused by a desire for legal penitence for the longsuffering of this country's native peoples, coupled with an indefinable feeling that Indians do have an aboriginal right to self-government, whether it is racially discriminatory or not.

Many are inclined to feel, however, that as wrong as past actions against Native Americans may allegedly have been, in this modern age the intermingling of two standards of racial equality in government cannot continue side by side. These persons say that the national racial policy of the United States cannot "serve two master," i.e. one whichholds that all Americans are equally endowed with basic civil equality and one which which perpetuates a racially discriminatory system of governmental entities. Has our present Indian policy forced us to do just this?

II. Separatism

On the other side of the spectrum is the second option, [redacted] separatism. If Indians do, in fact, have the right to separate governmental entities, this option suggests, then perhaps Indians should be [redacted] separated, legally, from non-Indians in order to afford fair governmental representation to all citizens.

Following the precedent of nations such as Austrailia and South Africa which set aside exclusive areas for the use of aboriginal peoples, the United States could insure that Indian governmental jurisdictions are just that by one of two methods.

First, using the existing boundaries of the reservations,

the United States government could take back for the Indians, either by purchase or by exercise of a type of eminent domain, all the non-Indian held reservation land and restore it to the holdings of the tribe. This, advocates of this policy argue, would eliminate the discriminatory aspects of tribal government with respect to non-representation of non-Indian residents within the external boundaries of a reservation. At the same time, they state, it would restore to the tribes the land which was originally theirs.

The feasibility of this method can be questioned for a number of reasons. First, many specific problem areas come to mind, notably the Puyallup reservation mentioned earlier in this paper. Public opinion would very possibly be quite adverse to the government's taking of a major portion of the metropolitan area of Tacoma, Washington, for the protection of sovereignty of a relatively small number of Indians. The cost of offsetting the non-Indian residents' interest in the reservation land would probably be very high. Would United States citizens stand for their tax dollars being used to provide for land to perpetuate racially separatist governmental entities?

Another drawback to this method might be the driving away of the non-Indian economic community on which the

reservation must depend for support.

A second method of acheiving exclusive land bases for separate tribal governments would be to redraw reservation boundaries so that only land presently occupied by Indians is included. This, of course, would have the effect of significantly diminishing the size of many reservations and stiffle hopes of regaining reservation land back from non-Indians after the permanent new lines were drawn. Also, this method would result in an untenable administrative situation for tribes which are checkerboarded with Indian and non-Indian lands within the recervation's present boundaries. The problems of structuring land use proposals for such mottled areas, by tribal, Federal, and state officials, alike, would be enormous, for example.

The separatism option does probably not serve to solve the problem of Indian governments in conflict with state governments. If a state identified reservations as racially distinct, county-like organizations, the state would probably attempt to assert more control, since the problem of jurisdictional accountability is not really solved by this option.

Also, separatism does not address itself any further than "federally recognized" tribes. What criteria could be established to help other Indian peoples who no longer

hold a land base? The suggested solution would, of course, be to create new reservations for these persons, but the practicality of such a proposal is [redacted] has been questio by many who feel such is not a wise course for the presen Separatism, then, while affording absolute internal sovereignty to tribes, has many pitfalls with respect to implementation. The setting aside of special governmental privileges for a class of persons based on race, has special problems when one considers the administration of programs for citizens who in effect would be separate, but equal.

III. Political Agreement between Indians and Non-Indians

A third option is for local tribal governments to reach some equitable political agreement with the non-Indian residents of a reservation to provide for the protection of the civil liberties, rights, and welfare of such individuals. Since the situation with respect to percentages of non-Indian residents varies greatly from reservation, as do many other factors, a discussion of specific political agreements is probably not applicable here. This option assumes that local tribal governments would deal with their individual situations in the most equitable manner to be found to meet the needs of their unique situations.

A neceesary step in selecting this option would probably

be for the Federal government to require all federally recognized tribes to implement provisions for the protection of the rights on all non-Indian residents of the reservation. Along these lines, it is argued that it would be very difficult to administer such a requirement and still respect the internal soveriegnty of the tribes. However, it is pointed out the the Federal government protects citizens from such encroachment of rights by state governments and thus could do the same for tribal governments.

Finally, the drawback which is seen by some in regard to this option is that its selection sets the stage for local confrontation, rather than arriving at an overall Federal solution. One would hope that local tribal governments and non-Indians could work out differences so that all people within the jurisdiction of the tribe could receive the benefit of the equal protection guaranteed by the U. S. Constitution. However, in some cases local animosity might preclude such rational settlement of differences. For example, recent actions by some tribal governments in asserting their sovereignty may be interpreted to mean that the Indian desire to keep the tribal community intact, precludes the desire to seek compromise. A recent example which exemplifies this fear is the case of the

bodily expulsion of non-Indians from the Onandaga reservation in New York State. The question, then, becomes ~~whether~~ can local tribal governments can be realistically expected to pursue the political agreement option in light of the great pressures they face?

IV. Creation of an Indian State

Another option which should be mentioned in considering Indian tribal sovereignty is that of creating a national Indian "state" which would be an organization of local Indians possessing the governmental powers of a state, with the normal three-branch system of government organization. What has been suggested is the removal of all Indian peoples from the legal jurisdiction of the states in which they are located (not physical removal, however), and the creation of a fifty-first state made up entirely of Indian citizens. This state would then administer its own Indian programs as well as those offered by the Federal government in the same way as any other state of the Union. Individual reservations would have a status similar to that of counties.

One suggested advantage of this option is that a single sovereign entity would be created, giving Indians a unified, national voice in their own affairs. But the feasibility of such an entity being accepted is open to the same question as

option two with respect to Federal condoning of separate, racially-oriented governmental entity at any level. Also, it is pointed out that such a state would probably meet with enormous administrative problems. And aside from the physical difficulties of such administration, it is argued that the natural sectionalism of the Indian community would render such a state unworkable.

As pointed out in Section I, Indians are a myriad group of individual tribes, who have in the past exhibited a tendency toward intra-group divisiveness as the peoples of national groups in Europe. Vine Deloria, Jr., points out in his book that Indians often unify only when it serves their local tribal purposes and interests. National Indian organizations, for example, have seen the tendency of a rising and falling of participation by local tribes as interest in issues affecting tribes locally rises and falls.[60] Sectional tribal prejudices, then, might render a national Indian state ineffective.

Such a state would also probably give rise to the decline of any special lobbying influence which Indians may now have in the Federal bureaucracy. If the national Indian state was set up as a state with its own Senators and Congressmen, for example, the effect of the Indian community directly on

the U.S. Congress would be cut drastically.

V. Absolute sovereignty.

It must be mentioned, as a final option, that some individuals propose the untimate sovereignty: i.e., the external sovereignty of an independent nation, outside the jurisdiction of the United States, entirely. This option, while probably being ruled out as somewhat extreme by many persons, could have substantial support. It has, in fact, been suggested by some Indian groups, as evidenced by the recent action of members of the American Indian Movement to attempt establishment of diplomatic relations on behalf of tribal governments, with the United Nations, foreign nations, and the United States, itself.

The acceptability of this option as a viable alternative, many indicate, is probably highly unlikely. They point out that Indian people have been full citizens of the United States since 1924 and as such, necessarily come under the jurisdiction of the United States Constitution. And such assumption necessarily implys that open conflict reminiscent of the Civil War or repeal of the provision of the Constitution denying "secession" would be required to permit the Indians to create a sovereign nation carved out of the existing states of the Union - a highly unlikely prospect in 1974 or the future.

As stated at the outset, the purpose of this paper is not to draw any conclusion as to what option should be selected, but to marshal wisdom and strength to consider the questions herein presented. Other options undoubtedly could be formulated. And, all of the options presented are open to strenuous debate. But the time has come to recognize that the status quo is too uncertain for us to ignore the consideration of the long-range future of the governmental sovereignty of the Native American peoples of this nation.

FOOTNOTES

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[1]Felix Cohen, Handbook on Federal Indian Law (Washington, D. C. : Government Printing Office, 1942), p. 122.

[2]Ibid.

[3]Message of President Richard M. Nixon release by the White House Press Office, July 8, 1970.

[4]Letter of Barbara B. Richards, July 1, 1974.

[5]Vine Deloria, Jr., Custer Died for Your Sins (London: The Macmillan Company, Collier-Macmillan, Limited, 1969), p. 263.

[6]Letter of Barbara B. Richards, op. cit.

[7]Ibid.

[8]Ibid.

[9]Ibid.

[10]Vine DeLoria, Jr., op. cit., p. 6.

[11]Wilcomb E. Washburn, The American Indian and the United States: A Documentary History, Vol. III (New York: Random House, 1973), p. 2133.

[12]Articles of Confederation, Section IX.

[13]Northwest Ordinance, 1 Stat. 53 (1787).

[14]Louis Fuller and Allen Guttman, eds., The Removal of the Cherokee Nation: Manifest Destiny or National Dishonor? (Boston: D. C. Heath and Company, 1962), p. 4.

[15]Ibid., p. 5.

[16]30 U. S. 1 (1831).

[17]Louis Fuller, op. cit., p. 7.

[18]315 U. S. 515 (1832).

[19]Ibid.

[20]"The American Indian--Tribal Sovereignty and Civil Rights," 51 Iowa L. Rev. 657 (Spring, 1966).

[21]30 U. S. 1 (1831).

[22]109 U. S. 556 (1883).

[23]Ibid.

[24]Ibid.

[25]Major Crimes Act, 23 Stat. 385 (1885).

[26]Indian Citizenship Act, H.R. 6355, 68th Congress, 1st Sess. (1924).

[27]Message of President Richard M. Nixon release by the White House Press Office, July 8, 1970.

[28]Cohen, op. cit., p. 2.

[29]Ibid.

[30]Theodore W. Taylor, The States and Their Indian Citizens (Washington: Government Printing Office, 1972), p. 233.

[31]"Access and Wharfage Rights and the Territorial Extent of Indian Reservation Reservation Bordering on Navigable Water--Who Owns the Bed of Flathead Lake?," 27 Mont. L. Rev. 55 (1965).

[32]Ibid.

[33]127 F. 2d 189 (9th Cir. 1942).

[34]"The 'Right of Tribal Self-Government' and Jurisdiction of Indian Affairs," 1970 Utah L. Rev. 298 (1970).

[35]Ibid.

[36]"Constitutional Law: Applicability of Constitutional Limitations to Indian Tribal Government," 16 Okla. L. Rev 94 (1963).

[37]Ibid.

[38]272 F. 2d 131 (10th Cir. 1959)

[39]"Indian Autonomy and Legal Problems," 15 Kan. L. Rev. 506 (1967).

[40]Ibid.

[41]32 F.2d 551 (2d Cir. 1929).

[42]70 Fed. 401 (D. Ind. 1895).

[43]Ibid.

[44]83 Ariz. 241, 319 P.2d 998 (1958).

[45]Ibid.

[46]400 U.S. 423, 91 S. Ct. 480, 27 L.Ed. 2d 507 (1971).

[47]S. 298, 93rd Congress, 1st Sess (1973).

[48]Ibid.

[49]Monroe Price, Law and the American Indian (New York: The Bobbs-Merrill Company, Inc., 1973), p. 276.

[50]25 U.S.C. § 415

[51]Monroe Price, op.cit., p. 293.

[52]Ibid., p. 293-4.

[34]"The 'Right of Tribal Self-Government' and Jurisdiction of Indian Affairs," 1970 Utah L. Rev. 298 (1970).

[35]Ibid.

[36]"Constitutional Law: Applicability of Constitutional Limitations to Indian Tribal Government," 16 Okla. L. Rev 94 (1963).

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[49]Monroe Price, Law and the American Indian (New York: The Bobbs-Merrill Company, Inc., 1973), p. 276.

[50]25 U.S.C. §415

[51]Monroe Price, op.cit., p. 293.

[52]Ibid., p. 293-4.

[53] Ibid., p. 310.

[54] 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

[55] 373 U. S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d. 542 (1963).

[56] Monroe Price, op.cit., pp. 318-9.

[57] Arizona v. California, supra, footnote 55.

[redacted]

[58] Monroe Price, op.cit., p. 784.

[59] [redacted] op.cit. (Mancari-cite)

[60] Vine Deloria, Jr., [redacted], p. 220.

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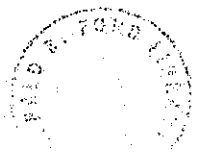

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