

THE COMMISSION ON STATE-TRIBAL RELATIONS: ENDURING LESSONS IN THE MODERN STATE-TRIBAL RELATIONSHIP

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INTRODUCTION

Forty years ago the relationship between states and tribes was primarily adversarial, both in perception and practice. Leaders of both state and tribal governments looked to the courts or Congress to define it in their favor, until events led to the creation of the Commission on State-Tribal Relations (“CSTR”) and the evolution of a different approach. The CSTR was the first organized national attempt to study the state-tribal relationship, and the principles it developed are still relevant to successful interactions of Indian and non-Indian governments. This article, written by the founders of the Commission on State-Tribal Relations, traces the historical development of a new approach to state-tribal relations in the 1970’s, during a time of heightened tension between state and tribal governments.

In the late 1960’s and early 1970’s federal Indian policy underwent dramatic changes. Within a relatively short period of time, the dreaded Termination Policy of the 1950’s¹ was replaced by the new self-determination era in all three branches of the federal government. The Executive Branch began to recognize tribal governments as more than administrative tools of the Bureau of Indian Affairs, and in 1970 President Nixon promulgated a sweeping new policy of Indian Self-Determination. Congress embarked on an ambitious legislative agenda, in which it codified the policy of self-determination and provided a structure within which Indian tribal governments could

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1. In 1953, Congress had adopted a policy of ‘termination,’ with the specific goal “as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States....” H.R. Res. 108, 83rd Cong. (1953). Under this policy, Congress completely terminated the federal relationship with over 70 tribes. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 95 (Nell Newton ed., 2005) [hereinafter COHEN]. The policy was accompanied by a program of relocating tribal members off their reservations and authorizing the unilateral transfer of jurisdiction to states under Public Law 280. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006), 25 U.S.C. §§ 1321-1326 (2006), 28 U.S.C. §1360 (2006)).

largely chart their own course. The Supreme Court issued a series of decisions recognizing and supporting tribal jurisdiction and limiting the exercise of state jurisdiction in Indian country. At the same time, tribes across the country began to take advantage of the fresh opportunities for governing their lands, resources and people and to challenge the historic failure of the federal government to honor their treaty rights.

The Introduction to the Final Report of the American Indian Policy Review Commission, published in 1977, summed up the atmosphere this way:

A history, once thought ancient and dead, has risen to challenge this generation of Americans. As never before, since the days of the last century when they were forced to fight militarily for their lands, their freedoms, and their existence, the Indian peoples of our country are today stirring both the consciousness and conscience of the Government and all elements of the Nation.²

While these long-awaited changes were hailed by tribal governments and their advocates across the country, their reception generally was different at the state and local level. They also appeared to be generating momentum, which alarmed non-Indian communities in reservation areas, as the historical power balance appeared to be shifting. In the midst of the escalating pace of change, state and local non-Indian government leaders viewed their tribal neighbors apprehensively and many began to challenge the new status of tribal governments with more vehemence than in the past.

What follows is a history of how some of these leaders of tribal, state and local governments found alternatives to the growing enmity and conflict and found productive ways of dealing with a changed world. We begin with an overview of some of the major developments of the time and their impact on relations at the local level.³

GROWTH OF TRIBAL GOVERNANCE

By the mid-1960s, despite the promise of the Indian Reorganization Act of 1934 and the formation of hundreds of constitutional governments pursuant to the Act, the governance of Indian reservations was still largely in the hands of the Bureau of Indian Affairs and the Indian Health Service, the federal government's lead agencies in Indian affairs.⁴ Tribal governments lacked the money and infrastructure to perform the functions of government — setting and enforcing civil and criminal regulations, delivering services, and raising revenue (other than as landowners). To be sure, the Kennedy and Johnson Administrations had distanced themselves from the Termination Policy, but they were not yet ready to relax federal control and let tribes govern

2. AMERICAN INDIAN POLICY REVIEW COMM'N., FINAL REPORT 1, 95th Cong. (1977). The American Indian Policy Review Commission (AIPRC) was a two-year study of federal Indian policy authorized by Congress in 1975. We discuss the AIPRC and the impact of its recommendations, *infra* notes 68-73 and accompanying text.

3. Other commentators and scholars have written various articulate and detailed descriptions of the history of this time, so it is not our intention here to dwell in detail on the specifics. *See generally* MARK N. TRAHANT, THE LAST GREAT BATTLE OF THE INDIAN WARS (2010); COHEN, *supra* note 1, 97-113; WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL, 29-34 (5th ed., 2009); *infra* sources at note 5.

4. Wheeler-Howard Act (The Indian Reorganization Act), 48 Stat. 984-88 (1934) (codified as amended at 25 U.S.C. § 461 *et seq.*).

themselves.⁵ Although they cast around for new policy ideas, little beyond promises and aspirations were forthcoming

But across town in Washington, D.C., things were happening that would pave the way for self-determination. Task forces launched in the Kennedy Administration and continued by Johnson brought a plan for an extensive War on Poverty. Although the Economic Opportunity Act of 1964 barely mentioned Indians,⁶ as the poorest people in the nation their credentials could not have been denied, and they were included in the Neighborhood Youth Corps, the Head Start program, and most significantly for state-tribal relations, Legal Services and the Community Action Program.⁷

The Office of Economic Opportunity (“OEO”), the main agency administering the War on Poverty programs, needed to decide how Indian tribes and reservations would be served by OEO programs: whether Indians were to be included in the War on Poverty as merely recipients of programs intended to help them but designed and run by others, or whether the Indians themselves would run the programs.⁸ OEO really had little choice. It had to take the leap that the makers of federal Indian policy at the Department of the Interior would not and give the Indians a meaningful voice in the OEO programs that would serve them; it also had to recognize that tribal governments were the only vehicle through which OEO programs could reasonably be administered and still keep the faith of maximum participation. Far from being indifferent, ineffectual old-line agencies, tribal governments were the poor people themselves, governmental institutions that had been kept as rubber stamps for the Bureau of Indian Affairs and the Indian Health Service, and thus far denied the power and the means to govern themselves.

The decision to fund tribal governments directly caught the policymakers in the Interior Department flatfooted, and it mooted their policy discussions about whether tribal governments were ready for incremental increases in power and responsibility. Implicitly, it raised the question of the status of tribal governments vis-a-vis the federal government as a whole. If tribal governments could receive grants from OEO as governments in the context of legislation in which they were barely mentioned, then why could they not compete with state and local governments across the board for all federal domestic assistance program funds?

In a series of seemingly routine bureaucratic decisions made within OEO, the fundamental question of Indian law and policy had been raised in a way that still resounds: are Indian tribal governments merely administrative conveniences for colonial

5. For a more detailed account of federal administrative policies of this era, see generally THOMAS CLARKIN, *FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS 1961-1969* (2001); KENNETH PHILP, *INDIAN SELF-RULE: FIRST HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN* (1995); Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285 (1994).

6. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified at 42 U.S.C. § 2701).

7. Some legal services programs brought significant lawsuits and, while representing individual Indian clients, were raising fundamental issues involving jurisdiction. *See, e.g., McClanahan v. Ariz. State Tax Comm'n.*, 41 U.S. 164 (1973).

8. A fundamental principle of the War on Poverty was a phrase contained in the legislation: “maximum feasible participation of the poor.” Elsewhere, the implementation of this principle would set organizations representing poor people against municipal governments, urban and rural, and what were called “old-line established agencies,” which were scorned for not having solved the problem of poverty.

administration in the BIA and IHS, or are they real governments, entitled to recognition by federal agencies? And if they are real governments, are they entitled to the same status as state and local governments, or should they be treated differently in some respects, and if so, how and why? Few recognized the historic significance and implications of these matters, including the tribes themselves, but in the ensuing years, virtually everyone on and near Indian reservations would feel their import, not the least the state and local governments.

Before long, as tribes pursued recognition by all federal agencies and eligibility for federal assistance on the same basis as state and local governments, another consequence of the OEO decision became apparent. Many federal assistance programs were designed to supplement the infrastructure of existing state and local governments. For example, assistance might be offered to a state department of education to become involved in initiatives thought by Congress to be important, or state health departments might be offered research assistance or hospital construction funds. In a remarkable feat of inventiveness, tribes would often fund their infrastructures out of funds designed as ornaments for pre-existing state systems. Thus, a tribe might create and fund an environmental protection agency out of EPA funds designed to strengthen the environmental agencies of state and local governments. The eligibility issue in effect put tribes “in the game.”

Tribal governments seeking and receiving funding from Federal agencies dealing with regulatory issues soon raised a new set of issues regarding the scope and status of these governments. These would prove to be of intense interest to state and municipal governments on and near reservations — and their non-Indian constituents. Because of Constitutional concerns, Congress often took special care when it sought to encourage, if not compel, national regulatory standards binding on the states. Thus, for example, in order to bring about uniformity of speed limits in an era of gas shortages, Congress mandated a 55 mile per hour speed limit by making it a condition of the receipt of federal highway construction funds, assuming the states would not forgo those funds.

So it was often the case that the federal funds for which the tribes were competing were interwoven with a state-local regulatory structure. If the tribes could compete for and receive these funds, the granting federal agency would eventually have to face the question of whether it would also recognize the inherent power of the tribe to establish and enforce its own regulatory structure. And if the tribes could go into the regulatory business in a big way, what, if anything, was the limit of their regulatory jurisdiction, particularly over non-Indians on the reservation? What is their relationship to their counterparts and competitors in state agencies, who often assumed that it was *they* who were uniquely equipped to perform these functions?

All of these implications flowed from the simple OEO decision to fund Community Action Programs directly to Indian tribal governments, and totally changed the intergovernmental context on Indian reservations in the late 60's and early 70's, giving non-Indian residents of reservations a completely different view of their relationships with tribal governments.⁹

9. Earlier in the 1960's, the Public Housing Administration had agreed to recognize tribally-created housing authorities as eligible for PHS funding, and tribes were also eligible for funding through the Area

The BIA leadership began contracting with tribes to perform municipal government services formerly delivered in Indian communities by BIA employees.¹⁰ These contracts were based on 19th century authority given to the Bureau to use local labor for various purposes. Due to growing concerns about the perceived haphazard nature of the contracts and the fear that they were not being properly supervised, Congress proposed legislation that would authorize such contracts in a more orderly fashion. The resulting Indian Self-Determination and Education Assistance Act¹¹ authorized the Secretaries of Interior, Health, Education and Welfare to enter contracts under which the tribes would assume responsibility for administering federal Indian programs themselves. It allowed tribes to contract with the BIA and IHS to run health, education, economic development, and varied social programs by enabling federal appropriations to be contracted rather than spent on direct services.¹²

It was only one of many new authorities tribes across the country began to exercise, of course.¹³ In addition to assuming responsibility for programs that had been administered by the federal government, they began to actively assert control over reservation lands, resources, and tribal members, as well as non-members and non-Indians, by right of their own inherent sovereignty. Tribal governments began to administer their reservations in all areas, from law enforcement to economic development. Tribes also began to seek recognition of treaty rights that had long been ignored.

CHALLENGES IN THE COURTS

This outbreak of activity by tribal governments of course posed a direct challenge to state and local governments that had grown accustomed to exercising their powers over the same areas. As tribal governments increasingly wielded authority and resisted state jurisdiction, non-Indians and some state and local officials began to push back with substantial legal and political challenges.

At the same time that tensions were rising, the Solicitor's Office in the Department of Interior was also beginning to aggressively champion the legal rights of tribes, and secure rights to their natural resources. Beginning in 1973, the Solicitor was Kent Frizzell, who had formerly been head of the Lands Division in the Department of Justice and served as head federal negotiator at Wounded Knee. He was personally committed to protecting the rights of both tribes and individual Indians. In 1973, Solicitor Frizzell filled the vacant position of Associate Solicitor for Indian Affairs with Reid Chambers, an equally committed advocate for Indian rights, who had served as counsel to the Native

Redevelopment Administration. In the political context of the time, neither of these actions seemed a political threat to state and local governments.

10. While the Johnson Administration BIA experimented with tribal and community contracts, the Nixon Administration's efforts increased the momentum and brought about the congressional interest that led to the passage of Public Law 93-638. *Infra* note 11.

11. The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450 et seq.).

12. COHEN, *supra* note 1, at 103.

13. Other programs played a key role supporting tribal governments at the time, including grants from the Economic Development Administration, and so-called "701 Planning Grants" from the Department of Housing and Urban Development.

American Rights Fund and California Indian Legal Services.¹⁴ Under Frizzell and Chambers, the Division of Indian Affairs not only accelerated the pace of litigation to protect Indian rights, but also raised issues that were important in beginning to define the still untested extent of government powers and rights.

In 1976, Chambers summed up the Indian Affairs Division's approach in this era in the Annual Report for the Indian Affairs Division:

The objective of the Division has been to engage single-mindedly in the strongest possible advocacy for the rights of Indian tribes and individual Indians for which the Department of Interior is the trustee. This has included, of course, rights to natural resources. It also requires advocacy for tribal governmental powers, including sovereign authority over reservation territory and attempts to limit the jurisdiction of states over Indian reservations . . . Our singular role has been to urge the most extensive legal claims of the Indian trust beneficiaries.¹⁵

The Indian Affairs Division set an ambitious agenda throughout the 1970's.¹⁶ The Division worked closely with the Justice Department, either referring cases to be filed on behalf of tribes or asking the Justice Department to intervene or file *amicus* briefs to protect Indian rights in private suits.¹⁷ Under Frizzell and Chambers, the Indian Affairs Division pursued a number of the landmark cases of the era, some of which are touched on below. The Indian Affairs Division represented tribal interests in major cases involving water rights,¹⁸ hunting and fishing rights,¹⁹ reservation boundaries,²⁰ land

14. Reid Chambers, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, ANNUAL REPORT OF THE ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, 1 (1974) [hereinafter 1974 ANN. REP.].

15. U.S. DEPARTMENT OF INTERIOR, DIVISION OF INDIAN AFFAIRS, ANNUAL REPORT FOR THE 1976 FISCAL YEAR JULY 1 – SEPT. 30, 1976, 1 (1976) [hereinafter 1976 ANN. REP.]. The Department of the Interior's responsibilities at times created a conflict of interest between its fiduciary duties to Indians and the programs of other Interior agencies and this had on occasion hampered the Indian Affairs Division's advocacy in the past. At Chambers' urging, Frizzell strengthened the position of the Indian Affairs Division by relieving it of any duty to advocate competing claims and directed it to pursue only claims on behalf of tribes and Indians to the exclusion of the other agencies, leaving other Divisions within the Solicitor's Office to represent the agencies. Reid Chambers, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, ANNUAL REPORT 1975 FISCAL YEAR, 3 (1975) [hereinafter 1975 ANN. REP.]. The Nixon White House and the Interior Department also worked out an agreement under which the Interior Department could ask the Justice Department to file a "split brief," in which it would state the Indian position separately in any cases where the position taken by the Department of Justice on behalf of a public agency threatened an Indian claim. *Id.* at 1; U.S. DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, ANNUAL REPORT, 1 (1973) [hereinafter 1973 ANN. REP.].

16. The Division of Indian Affairs during this period increased its staff from 10 to 16 full time attorneys, with the workload growing correspondingly. Newly hired attorneys tended to be young attorneys who had gained legal experience while working to protect tribal rights, for example in the office of DNA- People's Legal Services on the Navajo Reservation, with the Native American Rights Fund, or the California Indian Legal Services program. 1975 ANN. REP., *supra* note 15, at 1, 6-7. In notes 18 through 24, we highlight only a few of the cases the Indian Affairs Division supported during this time.

17. Because of the growing caseload, the Land and Natural Resources Division at Justice established a new ten lawyer Indian resources litigation unit in 1975. 1975 ANN. REP., *supra* note 15, at 1.

18. By 1976, the Division was asserting the rights of tribes in twenty three water rights cases, including rights of the Crow, Northern Cheyenne, Southern Ute, Ute Mountain, Jicarilla Apache, Navajo Tribes, and Pyramid Lake Tribes and various pueblos in New Mexico. In six additional proceedings, the Division was challenging the relicensing of projects by the Federal Power Commission that would interfere with Indian water rights and other resources. 1976 ANN. REP., *supra* note 15, at 2. The Division was also involved in ongoing proceedings in *Arizona v. California*, *infra* notes 32-33 and accompanying text, by working to resolve boundary disputes for four of the five tribes and thereby secure additional decreed water rights. *Id.* at 12.

claims,²¹ and the immunity of reservation Indians from state jurisdiction and taxation.²²

The Indian Affairs Division also worked administratively with the BIA to resolve controversies between Indian tribes and other federal agencies regarding tribal trust resources, especially regarding disputed land and water claims on behalf of tribes. These actions were effective in securing title to lands and rights to water for smaller tribes without costly and unpredictable litigation.²³

This aggressive protection of tribal governments and Indian rights by the Department of Interior of course added to the growing non-Indian resentment and hostility. Backed by the commanding legal support of the federal government, tribal governments were asserting their authority and resisting the incursions of state jurisdiction. Tribes also began to seek long-delayed recognition of their treaty rights in a number of hotly contested issues — fishing rights, water rights, land claims and boundary disputes — with often serious ramifications for the neighboring non-Indian community.

19. *Dep't of Game v. Puyallup Tribe* 414 U.S. 44 (1973) was an early victory for the Division. 414 U.S. 44 (1973). See discussion *infra* at notes 24-29 and accompanying text. By 1976, the Division had thirteen hunting and fishing cases on file, including the lower federal court proceedings in *U.S. v. Washington*, to which it lent full support. *U.S. v. Washington*, 496 F.2d 620 (1974); 1975 ANN. REP., *supra* note 15, at 13-14; 1974 ANN. REP., *supra* note 14, at 5. Other cases involved the rights of the Hoopa Valley, Klamath, Washoe, Sac and Fox, Crow, Colville, Eastern Cherokee and Chippewa Tribes. 1976 ANN. REP., *supra* note 15, at 2, 17-21; 1975 ANN. REP., *supra* note 15, at 2, 13-14.

20. The Division had supported the favorable outcome for the Puyallup Tribe in *United States v. Washington*, and in 1976 was also successful in lower courts on diminishment cases for the Round Valley and Flathead Tribes. 1976 ANN. REP., *supra* note 15, at 37. Efforts of the Division and Justice to support the Sisseton Wahpeton and Rosebud Tribes, however, were disappointingly unsuccessful. *DeCoteau v. D. Ct Tenth Judicial Dist.*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); 1976 ANN. REP., *supra* note 15, at 37; 1975 ANN. REP., *supra* note 15, at 28; 1973 ANN. REP., *supra* note 15, at 3. See *infra* discussion at notes 35-41 and accompanying text.

21. In *Oneida Indian Nation of N.Y. v. Oneida*, 414 U.S. 661 (1974), the Supreme Court adopted the Division's position and held that federal courts have jurisdiction to hear claims regarding Indian land claims. Following *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the Division prosecuted the land claims on behalf of the Passamaquoddy and Penobscot Tribes in Maine. The Division also pursued miscellaneous land claims on behalf of the Omaha, Salt River, Chemehuevi, Flathead, Walker River, Choctaw, Chickasaw, Osage, Crow, and Winnebago Tribes. 1976 ANN. REP., *supra* note 15, at 21-26. In 1974, the Division had over 100 lands cases pending and had closed three-quarters of those cases by 1975, but had added another 34 new lands cases, leaving 70 cases pending by the end of 1975. 1975 ANN. REP., *supra* note 15, at 11.

22. In *Bryan v. Itasca County*, 426 U.S. 373 (1976) the Supreme Court agreed with the Division and Justice, holding that Public Law 280 does not authorize state regulation of reservation Indians. 1976 ANN. REP., *supra* note 15, at 1, 9. See discussion on the creation of the Commission *infra* at note 91 and accompanying text. The Division also participated in the preparation of *United States v. Mazurie*, 419 U.S. 544 (1975) in proceedings up to the Supreme Court. 1975 ANN. REP., *supra* note 15, at 12; 1973 ANN. REP., *supra* note 15, at 3-4. The decision was a significant holding in revitalizing the concepts of tribal sovereignty and the authority of Congress under the Commerce Clause. 1975 ANN. REP., *supra* note 15, at 12.

23. In 1974, for example, Solicitor Frizzell overruled an earlier Solicitor's Opinion, and recognized title to some 3,500 acres of land to the Fort Mojave Tribe. Solicitor Frizzell also administratively determined the boundaries and status of title to lands within the Colville and Spokane Tribes in an Opinion that had implications for their hunting and fishing rights. 1973 ANN. REP., *supra* note 15, at 11. In another case, Secretary Rogers C. B. Morton ruled administratively that the Chemehuevi Tribe held equitable title to 2,500 acres of land along the Colorado River at Lake Havasu. In that instance, the lands had been administered since 1941 as public lands and a wildlife refuge and some of these lands had been under permit to non-Indians for businesses and cottage residences. Some of the permits were extended, but not before the Division's action had caused a conflict of interest controversy within Interior. 1975 ANN. REP., *supra* note 15, at 32. In other cases, the Solicitor determined that the Omaha Indian Tribe owned over 3,000 acres of land along the Missouri River in Iowa and Nebraska to which title had been disputed and it prevailed in a dispute with the Park Service over land in the Olympic National Forest, securing the land instead for the Quileute Tribe. *Id.* at 36.

1. Treaty fishing rights in the Pacific Northwest

The first and most volatile issues were the disputes over treaty-based fishing rights in the Pacific Northwest.²⁴ The right to take fish and game was of immense economic and cultural significance to tribes, and attempts to exercise those rights brought them into conflict with non-Indians who had economic and sporting motivations of their own. In particular, the right to take salmon and steelhead trout in rivers and at sea was highly prized.

The first dispute arose in a line of cases in the 1960's with a tribal campaign to reassert fishing rights guaranteed by treaties. Western Washington tribes had been assured the right to fish at "usual and accustomed grounds and stations" by federal treaties signed in 1854 and 1855. Over the years, non-Indian commercial and sport fishing activities had gradually displaced them.

The State of Washington had been trying to regulate salmon and steelhead trout fishing and limit the treaty fishing right of tribes for several years. In the late 1960's, members of the Puyallup Tribe challenged the state, defying it with "fish-ins" on the Puyallup River. The conflict eventually landed in the U.S. Supreme Court, which wrote an ambiguous decision in 1968 that left the issue unresolved.²⁵ Several other suits followed, along with continued confrontation and "fish-ins."²⁶

24. See *People v. Leblanc*, 248 N.W.2d 199 (1976). Here, a similar dispute riled the Upper Peninsula of Michigan in the late 1970's regarding Indian off-reservation commercial fishing rights. Michigan authorities charged a Chippewa tribal member with fishing without a commercial license and with using a gill net, prohibited under state law. The state supreme court decision in *People v. Leblanc*, which held that the state could not require a license but could impose its gill net regulations. *Id.* However, the court's decision was subsequently overturned by the federal district court in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979). In *United States v. Michigan* the court held that the state had no power to regulate the exercise of Indian treaty rights to Great Lakes fishing. *Id.*

When Chippewa fishermen tried to exercise their rights, the conflict aroused the same heated and sometimes violent conflicts as a few years earlier in the Pacific Northwest. Central Michigan University records the following account:

[I]nflammatory statements by public officials, and a sometimes very biased print media all created an escalating spiral of increasing White protest. As anger escalated these protests sometimes changed from speech and political advocacy to intimidation and violence. John Alexander, a commercial fisher and an Odawa Indian, recalled that logs or rocks frequently were used to block his access to boat ramps. Nails were dropped to flatten the tires of his truck and trailer. Occasionally sand was poured into the gas tank of his truck. White boaters would sometimes attempt to swamp his fishing boat. In one instance rifle shots were fired at him and his boat.

Two groups, the Stop Gill Netting Association (SGN) and the Grand Traverse Area Sport Fishing Association (GTASFA) were particularly active in protesting Native American commercial fishing activity. . . . Both groups issued inflammatory statements that some viewed as tinted with racism. . . . Both organizations bitterly denied these charges, arguing that their principal concern was preserving sports fishing opportunities against the potential devastation to the fishery that might be caused by commercial fishing.

Native American Treaty Rights Enforcement 1965-1999, CENTRAL MICHIGAN UNIVERSITY, http://clarke.cmich.edu/resource_tab/native_american_in_michigan/treaty_rights/treaty_rights_and_the_great_lakes_fishery/native_american_treaty_rights_enforcement_1965-1999/introduction.html (last visited March 17, 2012).

Later, in the 1980's and early 1990s, the dispute spread to Wisconsin with even more intense, racial and violent confrontations, although these disputes occurred after the period that is the focus of this article. For a description of the Wisconsin Indian treaty rights conflicts see RONALD N. SATZ, CHIPPEWA TREATY RIGHTS: THE RESERVED RIGHTS OF WISCONSIN'S CHIPPEWA INDIANS IN HISTORICAL PERSPECTIVE 1, 91-128 (1991).

25. *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968).

26. *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44 (1973), *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165

Then in 1970, the Nixon Administration's U.S. Attorney for Western Washington filed a new complaint against the state of Washington on behalf of seven tribes in *United States v. Washington*, also asserting treaty fishing rights.²⁷ On February 12, 1974, Federal Judge George Boldt issued an historic ruling reaffirming the rights of Washington's Indian tribes to fish in accustomed places. The "*Boldt* decision" as it quickly became known, allocated fifty percent of the annual catch to treaty tribes,²⁸ and further ordered the state to take action to limit fishing by non-Indians.

The *Boldt* decision led to bitter and violent clashes between tribal and non-tribal fishermen and regulators. While the Ninth Circuit Court of Appeals upheld the ruling in 1975, and the U.S. Supreme Court largely affirmed it in 1979,²⁹ the *Boldt* decision gave rise to a number of non-Indian groups who began to organize efforts to challenge tribal treaty rights in other forums, especially Congress.

2. Water Rights Disputes in the West

While conflicts were brewing in the Pacific Northwest over treaty fishing rights, disputes were stirring in the West over Indian claims to water. In the arid states of the West and Southwest in particular, dependable and continued access to water is key to industry, agriculture and growing urban communities. Given the scarcity of water sources and the need to build distribution systems of dams, reservoirs and canals to redirect rivers and streams, a different system of water law had developed in the West.

Under this appropriative system, rights to water belong to the first user who appropriates water and puts it to beneficial use. That user is guaranteed the right to continue taking water without interference from any later appropriators. In times of drought, the earliest appropriators are guaranteed the full share while the latest lose the entire share first. Appropriation dates are therefore of immense importance, with the oldest being the strongest.³⁰

In 1908, the Supreme Court had held in *Winters v. United States*³¹ that when Congress reserved land for an Indian reservation, it also by implication reserved water to fulfill the purposes of the Reservation. As a result, in Western states, tribal rights under the *Winters* doctrine would almost always be senior to other users who had perfected their rights under state law, because most reservations were established in the 1800's.

While *Winters* recognized a reserved water right for reservations, it was nearly half a century before tribes were able to claim and use those rights; by then other non-Indian users had put the water to use. In part, this was because *Winters* failed to set a standard for quantifying those rights; furthermore, tribes lacked the means to develop their rights

(1977).

27. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). Interestingly, the suit was defended by Washington Attorney General Slade Gorton, who later won the U.S. Senate seat for Washington, in part on the strength of the publicity he gained opposing tribes in this suit.

28. At the same time, Judge Boldt denied four landless tribes federal recognition and treaty rights, but this part of the ruling was lost in the fracas that followed.

29. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

30. For general information on Indian water rights, see COHEN, *supra* note 1, at §§ 1901 - 1906; DAVID GETCHES, *WATER LAW IN A NUTSHELL* (1997); CANBY, JR., *supra* note 3, at 473-95; NATHAN BROOKS, *INDIAN RESERVED WATER RIGHTS: AN OVERVIEW* (2005).

31. 207 U.S. 564 (1908).

and the federal government failed to protect tribal rights.

In the mid-1960's, the Winters doctrine sprang back to life with the Supreme Court case *Arizona v. California*.³² The Court considered the rights accruing to tribes along the lower Colorado River and held that neither Congress nor the President could have intended to create reservations without also reserving the water necessary to make the land habitable and productive. The Court went further and set the standard for determining the amount of water reserved for tribes — the amount necessary to irrigate all the “practicably irrigable acreage on reservations.”³³ This standard resulted in five Indian tribes being allocated 15 percent of the water in the Lower Colorado River, an astonishing outcome.

Throughout the West, then, downstream non-Indian communities, industries, farmers, and ranchers faced the potential prospect of losing access to the water they had come to depend on and/or paying higher prices. They also faced the daunting task of participating in a quantification of all claims to water in a given river system, either through a massive general stream adjudication or a negotiated agreement.³⁴

Once again, where tribes had finally gained recognition of a right long denied them, it came at the expense of non-Indians who had an expectation that their water rights, which they assumed and thought they had been assured were lawful, were secure. By finally securing recognition of their treaty-based water rights in federal courts in the 1960's and 1970's, the tribes appeared to hold the potential to threaten the economy and way of life of the entire region.

3. *Reservation boundary disputes*

Another of the contentious disputes during this period squared off tribal and non-Indian interests where large portions of the reservation had passed into non-Indian hands during the allotment era. When tribes claimed jurisdiction over parts of the original reservation that non-Indian settlers and their descendants thought had been “opened” — that is, removed from the reservation — and to which the non-Indians felt they had been invited to settle by the federal government, hostile feelings inflamed parties on both sides.

The legal issue raised by the cases was whether Indian reservation lands sold to non-Indian settlers at the turn of the century under the Dawes General Allotment Act³⁵ remained tribal territory and therefore whether a tribe or state could exercise jurisdiction over the lands. Because the Dawes Act itself was general, Congress used a variety of tools to open lands to settlement on each reservation. Some of these “surplus lands acts” carried out terms of agreements negotiated with tribes; others unilaterally opened surplus

32. 373 U.S. 546 (1963).

33. *Id.* at 600-01 (emphasis added).

34. In 1952, Congress passed an appropriations rider, known as the McCarran Amendment, waiving the federal government's sovereign immunity and permitting joinder of the U.S. in suits adjudicating water rights of a river system. Act of July 10, 1952, 66 Stat. 549, 560 (codified at 43 U.S.C. § 666). In 1976 the Supreme Court allowed an adjudication of tribal water rights in a state court in *Colorado River Water Conservation District v. United States* 424 U.S. 800, 811 (1976), but held that state court adjudications under the McCarran Amendment must be comprehensive to be valid. The end result was that the United States would represent tribes in state court suits to adjudicate water rights of a river system.

35. The Dawes Act, Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. 331 et. seq.).

lands to non-Indian settlement without tribal consent. Regardless of the approach, the surplus lands acts returned Indian reservation lands to the public domain for white settlement. Frequently, Congress had not explicitly redrawn the reservation boundary and simply declared the ceded or “surplus” lands to be non-reservation, leaving the courts to decide congressional intent years later on very little evidence.

The results are well known. Boundaries of Indian country on these reservations became hard to define because the legislation resulted in mixing non-Indian and Indian lands in checkerboard patterns. More important, in the late 1960’s and early 1970’s, questions about the reach of tribal jurisdiction over these areas were still in the formative stage before the federal courts. In deciding these so-called “diminishment” cases, the courts applied a case by case approach and examined the language and intent of the antiquated legislation.³⁶

Early cases brought by tribes to test the reach of state jurisdiction over these opened reservations favored tribes. In 1962, the Supreme Court held in *Seymour v. Superintendent*,³⁷ that the Colville Reservation remained in existence and the State of Washington did not have jurisdiction over an offense committed on the Reservation. In *Mattz v. Arnett*,³⁸ in 1973, the Supreme Court held that the Klamath River Reservation that had been opened to settlement in 1892 remained Indian country.

Following on the success of these two cases, two tribes in South Dakota challenged state attempts to assert jurisdiction over lands owned by non-Indians within the former reservations and both became especially contentious.³⁹ Under the Allotment Act, land on the Sisseton Lake Traverse and Rosebud Reservations had been opened to white settlers who bought the land at the turn of the century, legally. Ownership of land on the former reservations became intermingled, with whites outnumbering Indians. As in the earlier cases, the question before the courts was whether the reservations had been diminished when Congress returned the disputed lands to the public domain or whether the reservations held their status, and ultimately, whether the state or tribes had jurisdiction over those lands.

In *DeCoteau v. District Court*,⁴⁰ the Supreme Court consolidated two cases which raised the question of whether the Lake Traverse Indian Reservation in South Dakota was terminated when the lands were opened to settlement. In the first case, the South Dakota Welfare Department had placed two Indian children in foster care. Their mother brought a habeas corpus action in state court, alleging that the state lacked jurisdiction to take her children and asking that they be released. After appeals, the case ended up before the Supreme Court. In a second case, members of the Sisseton-Wahpeton Indian Tribe were convicted in South Dakota courts of various crimes committed on non-Indian lands within the reservation boundaries. Contesting the state’s jurisdiction, they filed a

36. Surplus land acts seldom detailed whether Congress intended to open reservation lands for settlement or diminish a particular reservation’s boundaries. Courts therefore determined reservation boundaries arbitrarily, based on different fact patterns in each instance.

37. 368 U.S. 351 (1962).

38. 412 U.S. 481 (1973).

39. For an in depth discussion of the diminishment cases, see A.J. Taylor, Note, *A Lack of Trust: South Dakota v. Yankton Sioux Tribe and the Abandonment of the Trust Doctrine in Reservation Diminishment Cases*, 73 WASH. L. REV. 1163 (1998).

40. 420 U.S. 425 (1975).

petition for writ of federal habeas corpus. The federal district court denied their petition and they eventually ended up before the Supreme Court as well.

Both cases involved the question of whether South Dakota courts had jurisdiction over members of the Sisseton-Wahpeton Tribe on non-Indian lands within the reservation borders. The Supreme Court held that the Lake Traverse Indian Reservation was terminated when the lands were opened and as a result, South Dakota state courts had civil and criminal jurisdiction when the lands were opened and, thus, South Dakota state courts had civil and criminal jurisdiction over the conduct of members of the Tribe on non-Indian, unallotted lands within the 1867 reservation borders

In a similar South Dakota case, the Rosebud Sioux Tribe in June 1972 sued in federal district court to obtain a declaratory judgment that three subsequent Acts of Congress had not diminished the original boundaries of their reservation. When established, the Rosebud Indian Reservation contained over 3.2 million acres and covered all or a portion of what later became five counties in South Dakota: Gregory, Tripp, Lyman, Mellette, and Todd. In *Rosebud Sioux Tribe v. Kneip*,⁴¹ the Supreme Court reached a result similar to the Sisseton case, holding that Congress had disestablished large tracts of the reservation when it was opened.

These South Dakota cases raised similar issues and the tribal positions were met with similar hostile opposition by the state and non-Indians. The state argued that when Congress reduced the reservations in size or diminished tribal territory, it also extinguished tribal jurisdiction over the lands. In addition, the area was heavily populated with non-Indians, and non-Indians far outnumbered Indians on those parts of the reservation. There were established municipal governments within the original reservation boundaries that were part of the state government system which had exercised unchallenged jurisdiction for decades. Non-Indians felt betrayed; they had been living on lands purchased under the federal authority of the surplus lands acts. They had settled on the land in good faith and had secured legal title to the land.

Tribes on the other hand reasoned that their reservations were established long ago for their exclusive use and non-Indians who wished to live on the reservation gave implied consent to tribal authority. In other settings, courts had generally agreed with tribe's position based on the dominant notion of protecting tribal sovereignty.

4. Eastern Land Claims

Eastern states were not immune from the turmoil that followed the recognition of tribal claims, however. In the mid-1970's, non-federally recognized tribes in Eastern states brought suits to recover tribal lands under the Nonintercourse Acts, based on their aboriginal title.⁴² The Acts, passed in the late 1700's and early 1800's, regulated commerce between Indians and non-Indians and regulated the alienability of aboriginal

41. 430 U.S. 584 (1977).

42. The Nonintercourse Act is actually six statutes passed by Congress in the late 1700's: Act of July 22, 1790, Pub. L. No. 1-33, § 4, 1 Stat. 137, 138; Act of March 1, 1793, Pub. L. No. 2-19, § 8, 1 Stat. 329, 330-331; Act of May 19, 1796, Pub. L. No. 4-30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, Pub. L. No. 5-46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, Pub. L. No. 7-13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730-731 (codified as amended at 25 U.S.C. § 177 (2006)). See, *Johnson v. McIntosh*, 21 U.S. 543, 8 Wheat 543 (1823) defining aboriginal title to land.

title in the United States. In effect, they prohibited the purchase of Indian lands without the approval of the federal government.

In the intervening centuries, of course, tribal lands had passed into non-Indian hands without the requisite federal approval. At the same time, the Nonintercourse Acts had fallen into obscurity until the early 1970's. These cases revived the Acts and legitimized tribal claims to their aboriginal lands, now settled and owned by non-Indians.⁴³

The first case arose in New York, where the Oneida tribe brought a claim for lands ceded to New York without consent of the United States under the Nonintercourse Act. In *Oneida Indian Nation v. County of Oneida*,⁴⁴ the Supreme Court found that there was federal subject-matter jurisdiction for Indian land claims based on aboriginal title and violations of the Nonintercourse Act. The decision inspired dozens of other cases involving land claims.

The largest and most publicized case involved the State of Maine and the Passamaquoddy and Penobscot tribes. When a decision by the First Circuit in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*⁴⁵ held that the Nonintercourse Act applied to their claims and established a trust relationship between the tribe and the federal government, the federal government was obligated to litigate their case. The case also implied that the tribes had a potentially meritorious claim to nearly 60 percent of the state.

The reaction of Maine's non-Indian citizens and state leaders to the claims was initially an amused incredulity, but it moved quickly to shock and then to "very real and very deep anger" as the reality and seriousness of the claims settled in.⁴⁶ In 1976, the Boston law firm of Ropes and Gray announced that the state's \$27 million bond issue could not proceed using state property as collateral. Municipalities across the state likewise questioned whether they would face the same prospect. It was not long before the real estate market across the state began to stall, as questions arose regarding title to property.

The parties in Maine eventually negotiated a settlement with the help of two different White House Task Forces. In 1979 the Maine state legislature passed a statute enabling the settlement,⁴⁷ and in 1980 Congress passed the Maine Indian Claims Settlement Act,⁴⁸ allocating \$81.5 million to allow the tribes to purchase 300,000 acres of land in Maine. In exchange, Congress extinguished all aboriginal title in Maine and granted the tribes federal recognition.

Similar, though smaller, suits were brought in a number of other states on the East Coast: the Narragansett Tribe in Rhode Island, Miccosukee and Seminole Tribes in

43. These cases, perhaps coupled with the use by the BIA of an 1830's statute as authority for funding tribal government operations, led to the claim that Indians were relying on "ancient treaties" to support dubious claims of land and jurisdiction.

44. 414 U.S. 661 (1974).

45. 528 F.2d 370 (1st Cir. 1975).

46. *Resolving Eastern Land Claims*, Hearing Before the Task Force on Indian Affairs of the National Conference of State Legislatures, Transcript, at 106 (statement of Maine State Rep. James Tierney, House Majority Floor Leader). Copy on file with authors.

47. ME. REV. STAT. ANN. tit. 30 §§ 6201-14 (1979).

48. 25 U.S.C. § 1721 et seq (2006).

Florida, the Mashantucket Pequot Tribe in Connecticut, and the Wampanoag Tribe in Massachusetts. Settlement terms and findings varied, but each concluded with Congress passing an Indian Claims Settlement Act.⁴⁹ Throughout the 1970's, these cases had the potential to disrupt the local economies of communities throughout large sections of Eastern states and were very much in the public's mind.

CONGRESS IN THE 1970'S

While all the foregoing disputes were brewing, Congress in the early 1970's broke from the prior federal policy of termination⁵⁰ and embarked on a new legislative course, enacting a series of laws designed to support the emerging tribal governments by enhancing tribal self-determination in almost every area of government.⁵¹ In a special message to Congress in 1970, President Nixon announced a new federal policy of self-determination, affirming tribes' right to survive and conveying a renewed respect for the historical commitments made by the United States to Indians.⁵² His message called upon Congress to repudiate the termination policy and instead find ways to encourage and enable tribes to manage their own affairs.

Although Congress did not endorse Nixon's resolution to officially repudiate termination,⁵³ the break with the past policy was clear and decisive: Congress was including tribes in federal development programs and enacting legislation totally inconsistent with Termination, including the Indian Self-Determination Act, which was accompanied by findings that ran counter to any idea of terminating the federal relationship with tribes. With a new policy in hand, what followed has been referred to by Indian advocates as "the Golden Age" of American Indian federal legislation, "the most prolific era of positive national Indian policy and programs in the history of U.S.-Indian relations in the 20th century."⁵⁴

The list of bills enacted during this time includes, for example, the Indian Education Act of 1972,⁵⁵ the Indian Financing Act of 1974,⁵⁶ the establishment of the American Indian Policy Review Commission in 1975,⁵⁷ the Indian Self-Determination and Education Assistance Act of 1975,⁵⁸ the Indian Health Care Improvement Act,⁵⁹ the

49. See Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 et seq.; Florida Indian Land Claims Settlement Acts, 25 U.S.C. § 1741 et seq., and § 1772; Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751 et seq.; Massachusetts Indian Land Claims Settlement, 25 U.S.C. § 1771 et seq (2006).

50. See *supra* note 1.

51. TRAHANT, *supra* note 3, at 2.

52. 116 Cong. Rec. 23258 (daily ed. July 8, 1970) (message from President Nixon). While Presidents Kennedy and Johnson had been moving away from the prior federal policy of termination and towards a policy of tribal self-determination, it was President Nixon who finally renounced termination in 1970. See, COHEN, *supra* note 1, at 100-01.

53. Much of the statutory language in the 1960's and 1970's was totally at variance with the tenets of the Termination Policy. Some commentators pointed out that, as a congressional resolution expressing the sense of a particular Congress, H.C.R. 108 became history with the end of the Congress that passed it; others argued that as a statement of congressional policy, it remained pertinent until repealed. Still, most Indians would not rest until it was explicitly repudiated by Congress.

54. TRAHANT, *supra* note 3, at 2 (quoting Charles Trimble).

55. Education Amendments of 1972, 20 U.S.C. § 7401-7402 (2006).

56. Indian Financing Act of 1974, 25 U.S.C. § 1451 et. seq (2006).

57. Pub. L. No. 93-580, 94th Cong. (1975).

58. See *supra* note 11.

Indian Child Welfare Act of 1978,⁶⁰ the Tribally Controlled Community Colleges Act,⁶¹ and the American Indian Religious Freedom Act of 1978.⁶² In addition, this era marked the unprecedented return of lands to tribes, including significant acreage to the Passamaquoddy and Penobscot in Maine, described above,⁶³ Blue Lake to the Taos Pueblo,⁶⁴ Mt. Adams to the Yakima (now Yakama),⁶⁵ and thousands of acres of sub-marginal lands to several tribes.⁶⁶

During this time, Congress also reorganized its committee system to ensure continuing tribal access and consultation. Following the completion of the work of the American Indian Policy Review Commission, it created a Senate Select Committee on Indian Affairs, subsequently made a permanent standing committee. The House Interior and Insular Affairs Committee had a Subcommittee on Indian Affairs, which has come and gone with subsequent Congresses. By giving each oversight and legislative authority, Congress ensured greater tribal access and more single-minded attention to the details of federal Indian legislation.⁶⁷

The sum effect of these new laws and the legislative sentiment supporting their passage was broad federal support for enhanced power and activities by tribal governments to control their territory, people and resources. Congressional activity not only encouraged and authorized enlarged governing roles for tribal governments, but also provided access to funding those activities at varying levels.

AMERICAN INDIAN POLICY REVIEW COMMISSION

One of the many items passed by Congress during the mid 1970's was the creation of the American Indian Policy Review Commission (AIPRC) in 1975. The AIPRC was charged with conducting "a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the federal government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians."⁶⁸ To conduct this comprehensive review, Congress had appointed six members of Congress and five representatives of Indian tribes to address the long list of policy issues relating to the federal government and tribes.

The AIPRC was organized into task forces⁶⁹ which investigated various areas of

59. Indian Health Care Improvement Act, 25 U.S.C. § 603 (2006).

60. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq (2006).

61. Tribally Controlled Community College Assistance Act, 25 U.S.C. § 640c - 1(c) (2006); 25 U.S.C. § 1815 (2006).

62. American Indian Religious Freedom Act, 42 U.S.C. 1996 and 1996a (2006).

63. See *supra* notes 42-49 and accompanying text.

64. Pub. L. No. 91-550, 84 Stat. 1437 (1976).

65. Exec. Order No. 11670, 37 Fed. Reg. 1043 (1972) ("Providing for the Return of Certain Lands to the Yakima Indian Reservation").

66. Pub. L. No. 94-114, Sec. 1, 89 Stat. 577 (1975) (codified at 25 U.S.C § 459).

67. For a history of the Senate Select Committee on Indian Affairs, see <http://indian.senate.gov/about/>.

68. *Supra* note 57.

69. There were eleven task forces: Trust Responsibility and Federal/Indian Relationship; Tribal Government; Federal Administration and Structure of Indian Affairs; Federal, State and Tribal Jurisdiction; Indian Education; Indian Health; Reservation and Resource Development and Protection; Urban and Non-Reservation Indians; Indian Law Revision, Consolidation and Codification; Terminated and Non-Federally

Indian policies, although neither the Commission nor the task forces held many hearings during the next two years. In May of 1977, it submitted a Final Report to Congress.⁷⁰ The multi-volume final report contained over 200 recommendations, which in general called for a firm rejection of past policies, reaffirmed the status of tribes as permanent, self-governing institutions and called for an increase in financial aid to tribes. Although it contained numerous practical and achievable recommendations, the most far-reaching and definitive recommendations – those most threatening to non-Indians – were essentially a “wish list of the Indian community, an idealized list with virtually no chance of enactment by the Congress.”⁷¹

The Final Report called for federal recognition of broad tribal powers on reservations and recommended that future policy be based on the following objectives: reaffirm the doctrine of tribal sovereignty and the trust relationship; increase financial commitment to tribal economic development; consolidate federal Indian programs in a new department or agency; encourage greater Indian participation in planning and budgetary processes; and federally recognize terminated and other non-federally recognized tribes, including extending federal services to them.⁷²

With the conclusion of the AIPRC, it fell to the staff of the new Select Committee on Indian Affairs to package the recommendations into bills for consideration by the next Congress. At the time, the Select Committee had an energetic staff of twenty, the largest committee on Indian affairs in the history of Congress. In the House of Representatives, however, Indian legislation shared time, staff and priority in a subcommittee with that of Public Lands, and Indian legislation was bottlenecked. The pace slowed.⁷³

THE BACKLASH OF 1976 TO 1977

Despite the pessimistic outlook for the AIPRC's most far-reaching recommendations in Washington, the report caused an uproar among non-Indians living on and near Indian reservations because they feared the recommendations if enacted would greatly increase tribal jurisdiction over them.⁷⁴ In some respects it was the last straw. When the alarming recommendations of the AIPRC were added on top of the already heated and sometimes violent conflicts occurring over tribal government actions and legal victories, non-Indians began to organize to counter the tribal successes in what was referred to as the “Backlash of 1976-1977.”

As noted, the period immediately preceding the backlash was a golden age for the tribes – an era of favorable court decisions, enlightened national policy, and legislation with new programs for tribal self-determination, education, economic development, housing, child care, health care, and religious freedom.⁷⁵ This, plus restoration of federal

Recognized Indians; and Alcohol and Drug Abuse.

70. AIPRC, FINAL REPORT, *supra* note 2, at 6-9; COHEN, *supra* note 1, at 104.

71. Deloria, *supra* note 5, at 301.

72. COHEN, *supra* note 1 at 104.

73. Charles E. Trimble, *The 95th Congress and Indian Affairs: A Report on Legislation*, at 7, Report to the National Congress of American Indians. Copy on file with authors.

74. Deloria, *supra* note 5, at 301.

75. The following text through note 86 and accompanying text is reprinted with permission, and contains minor changes adapted from Chuck Trimble, *Is It Time for Another Backlash?* INDIAN COUNTRY TODAY, June 25, 2003.

recognition to tribes and unprecedented land return in significant acreage, added to long-seething resentment over what some non-Indians in areas neighboring the reservations perceived as “womb-to-tomb pampering” of Indians by the federal government.

Presages of the backlash appeared in the late 1960’s and early 1970’s. Indian fishermen in Washington State, exercising their fishing rights newly confirmed in the *Boldt* decision, were fired on and had their boats vandalized or destroyed by vigilante groups. On the Plains, following the 1973 standoff between the American Indian Movement and the FBI and the U.S. Marshalls at Wounded Knee, fear spread among ranchers. Automatic weapons began appearing in gun racks of pickup trucks and CB radios crackled militia-like chatter between ranches and small town constabularies. Soon, statewide groups began organizing into so-called protective associations, cemented by these fears, resentment and long-standing bigotry.

In July 1976, the state groups came together in Salt Lake City to form the Interstate Congress for Equal Rights and Responsibilities (ICERR), and set out on a campaign to rally the states against the tribes. Their goals were to push Congress to do away with Indian hunting and fishing rights, and to get Indian treaties abrogated and the tribal governments terminated.

To set the stage, the ICERR published for wide distribution *Are We Giving American Back to the Indians?*⁷⁶ This 26-page booklet described what they viewed as inequitable and unjust rights, privileges and immunities enjoyed by the tribes, and was designed to inflame smoldering resentment into anti-tribal political action. Similar publications came out of other organizations, and the mainstream press joined in with expose articles on tribal abuses of federal funds and sovereign rights.⁷⁷

In October 1976, four months after the ICERR meeting there, the National Congress of American Indians (NCAI) held its 33rd annual convention in Salt Lake City, with an agenda dominated by the impending backlash. In a panel discussion on legislative issues in the upcoming 95th Congress, legal counsel to the House Interior Subcommittee on Indian Affairs Franklin Ducheneaux, Cheyenne River Sioux, warned the tribes:

In the past two Congresses, we have worked to pass favorable legislation for Indian people. . . But I think in the next Congress and perhaps the one after that, we are going to be reacting, I’m afraid, to unfavorable legislation; legislation designed to go as far as to abrogate treaties. And I think it’s something that you are going to have to be ready to combat.

76. *Id.* Copy on file with authors.

77. ICERR was the leading backlash group, but others sprang up as across the country in the 1970’s as well. In the North West, ICERR was joined by Steelhead/Salmon Protective Association and Wildlife Network (S/SPAWN). In the northern plains, land and water disputes led to the formation of smaller groups: in Montana, groups like the East Slope Taxpayers Association, All Citizens Equal (ACE), and the Citizens Rights Organization; in the Dakotas, groups like the Cheyenne River Landowners Association and the North Dakota Committee for Equality; and in Nebraska, the Concerned Citizens Council. See ZOLTAN GROSSMAN, WHEN HATE GROUPS COME TO TOWN: A HANDBOOK OF EFFECTIVE COMMUNITY RESPONSES (1992).

Ducheneaux was in fact prophetic. In that fall's election, Congressman Lloyd Meeds, D-WA, was nearly defeated by a candidate who charged that Meeds was favoring Indians at the expense of his white constituents in the state's fishing industry. Congressman Meeds had served for a number of years as Chairman of the Indian Affairs Subcommittee and had been widely respected by Indian leaders for his efforts on their behalf. He had even been the prime sponsor in the House of Representatives of the bill creating the AIPRC. Following the election, Meeds returned to Congress and reversed course, filing a dissent to the AIPRC report and more importantly, filing bills that would have curtailed Indian fishing rights and Indian water rights and destroyed tribal jurisdiction.⁷⁸ By the next election, he declined to run for re-election.⁷⁹

After nearly losing his 1976 election, the first of the bills Meeds introduced was the first piece of legislation of the 95th Congress — House Joint Resolution 1.⁸⁰ Meeds and the five other members of the Washington delegation sponsored House Joint Resolution 1, which would have established an 11 member Commission of public and private sector representatives to assess the impact of the *Boldt* decision and other holdings which affected the commercial, sport, and recreational fishing industry in the Northwest.

House Joint Resolution 1 was followed by an onslaught of bills calling for curtailing Indian hunting and fishing rights, overriding Indian land claims, and terminating the extension of the statute of limitations on Indian claims. Among the most threatening of these to tribes were two other bills filed by Meeds — House Bill 9950 and 9951. House Bill 9950, the Omnibus Indian Jurisdiction Act,⁸¹ would have granted criminal and civil jurisdiction over Indian reservations to the states. Tribes would have retained only criminal jurisdiction over crimes committed by members of the tribe in Indian country, and civil jurisdiction only over conduct or property of tribal members in Indian country. The bill would also have waived tribal sovereign immunity from suit and subjected Indian hunting and fishing rights to state regulation. House Bill 9951⁸² called for the quantification of reserved water rights for reservations within a five-year period of limitations and would have severely limited Indian water rights by setting a ceiling on Indian water rights based on past usage. Since water use on reservations had historically been negligible, tribes would have lost their as yet unclaimed rights. In addition the bill would have given states authority to regulate water usage on reservations.

Representative John Cunningham (R-WA) joined Meeds in the effort, lending his name to a series of bills known as the "Meeds-Cunningham" bills, although Cunningham's bills were even more extreme. In the fall, Cunningham introduced H.R.

78. Charles E. Trimble, *95th Congress and Indian Affairs*, 2d. ed., at 1. Copy on file with authors.

79. Fear of the backlash groups affected Congress in a number of ways. While legislation favorable to tribes was still considered and passed, individual members, especially from Western states had taken notice. The Chairman of the House Interior and Insular Affairs Committee could not entice any Committee member, aside from non-voting delegates from Guam and the Virgin Islands, to serve as Chairman of the Indian Affairs Subcommittee. Only by merging the Subcommittee jurisdiction with that of Public Lands into a single subcommittee was Chairman Mo Udall able to entice Representative Teno Roncalio to serve as Chairman. Trimble, *The 95th Congress and Indian Affairs*, supra note 73, at 1.

80. H.J. Res. 1, 95th Cong. (1977).

81. H.R. 9950, 95th Cong. (1977).

82. H.R. 9951, 95th Cong. (1977).

9054, ironically titled the “Native Americans Equal Opportunity Act,” that would have abrogated all Indian treaties and terminated all tribes.⁸³ Cunningham also introduced H.R. 9175, which would have overturned the *Boldt* decision, applying state hunting and fishing laws and regulations to Indians and tribes.⁸⁴

While none of the backlash bills passed or even surfaced out of the House Interior Committee, the pace of action on legislation favorable to tribes had slowed.⁸⁵ Favorable legislation that in recent past years would have sailed through on the consent calendar now met with strong opposition, including the Black Hills claim appropriation, the Indian provisions in the Clean Air and Safe Drinking Water Act, and the Legal Services Corporation Act. Even legislation calling for the most humane measures, such as the Indian Child Welfare Act,⁸⁶ met with opposition.

CREATION OF THE COMMISSION ON STATE-TRIBAL RELATIONS⁸⁷

In the mid-1970’s, none of the organizations of state government leaders had yet begun to focus either on the tensions that were simmering at the local level or the changes in federal Indian policy. Neither the National Conference of State Legislatures (NCSL), the National Governor’s Association (NGA), the National Association of Attorneys General (NAAG) nor the National Association of Counties (NACo) had officially addressed the conflicts that were plaguing some of their members.⁸⁸ While there were informal discussions at the organizations’ meetings among individual members, none of the organizations had approved efforts to tackle the undefined state-tribal relationship.

National Conference of State Legislatures

In 1976, the newly formed National Conference of State Legislatures had selected a new President, Martin Sabo, who was a member of the progressive Democratic-Farmer-Labor Party (DFL) in Minnesota and was then Speaker of the Minnesota House of Representatives.⁸⁹ In June of 1976, the US Supreme Court had handed down one of the landmark decisions of the era, *Bryan v. Itasca County*,⁹⁰ which had come out of

83. H.R. 9054, 95th Cong. (1977). *See also* Native Americans Equal Opportunity Act, H.R. 13329, 95th Cong. (1978), which added provisions to address the status of tribal property, which became subject to state taxations, and to terminate the Bureau of Indian Affairs.

84. H.R. 9175, 95th Cong. (1977).

85. A major reason for the failure of the backlash bills was the presence of Sen. James Abourezk, D-SD, as Chairman of the Senate Select Committee on Indians Affairs. Abourezk announced that all the bills would have to come to his committee and that he would kill the bills. Sponsors decided not to push the bills. Trimble, *The 95th Congress and Indian Affairs*, 2d. ed., *supra* note 78 at 4.

86. *Supra*, note 60. Trimble, *The 95th Congress and Indian Affairs*, *supra* note 73, at 2-3.

87. A note on resources: Much of the discussion that follows is experientially based and draws on the authors’ years as directors of the American Indian Law Center and National Congress of American Indians, and as staff with the National Conference of State Legislatures and the Commission on State-Tribal Relations.

88. Greater attention to these issues, and less diversity of opinion, could be found in regional organizations such as the Western Governors Association and the Western Association of Attorneys General.

89. *Legislators Past and Present*, MINNESOTA LEGISLATIVE REFERENCE LIBRARY, <http://www.leg.state.mn.us/legdb/fulldetail.aspx?id=10579> (last visited Mar. 17, 2012). Martin O. Sabo served as Speaker of the Minnesota House from 1973 to 1978, and subsequently served 14 terms in the U.S. House of Representatives for Minnesota’s fifth district, retiring on January 3, 2007.

90. 426 U.S. 373 (1976).

Minnesota and therefore caught Speaker Sabo's attention.

Minnesota had been one of the five states upon which Public Law 280 extended state civil and criminal jurisdiction.⁹¹ In *Bryan*, the county had attempted to assess a state and local property tax against a tribal member's mobile home, which was located on the Leech Lake Reservation. Bryan refused to pay, arguing that state tax and regulatory laws did not apply to an Indian living on a reservation. In a stunning decision, the Court held that Public Law 280 had not conferred upon those states taxation or general regulatory power within Indian country. It concluded that the purpose of the civil provisions of Public Law 280 had been to provide a state forum for the resolution of disputes, not for states to exercise their full powers of taxation or regulation, absent a specific grant of Congressional authority.

The case caused significant upheaval and confusion in the state, raising questions over the state's jurisdiction and the relationship of the state to the tribes. Since Speaker Sabo was President of NCSL, he asked the organization to examine the relationship of states and tribes and recommend a structure for doing so. NCSL assigned the job to Tassie Hanna, who proposed that NCSL create a task force of state legislators. By May of 1977, the Executive Board agreed and NCSL created the Task Force and appointed members. Hanna was assigned to staff the Task Force.

The initial committee members included legislators from all regions of the country and represented diverse points of view. First, the Speaker of the Rhode Island House of Representatives Edward Manning expressed a personal interest in the Task Force, because his state was involved in settlement talks with the Narragansett Tribe over their land claim, and settlement seemed near enough that Rhode Island appeared poised to be the first Eastern state to settle a land claim. Since he was the ranking legislator, he chaired the Task Force.

The other members who played a major role in the Task Force represented a cross section of attitudes and experiences. Senator Carroll Graham owned a ranch within the boundaries of the Crow Reservation in Montana and opposed the looming extension of tribal authority over non-Indians. Senator Sue Gould was an articulate, moderate Republican from Washington with special interests in education and energy and an interest in finding productive solutions. Senator Billie Sutton from South Dakota, a former county commissioner who had a farm and ranch operation in Gregory County (on the so-called "open" part of the Rosebud Reservation, whose boundaries were the subject of the Supreme Court decision *Rosebud Sioux Tribe v. Kneip*⁹²), had developed close personal relationships with members of nearby reservations. Representative Irv Anderson of Minnesota was Majority Leader in the state's House of Representatives and was from International Falls. He was most familiar with the neighboring Red Lake Band, which had parcels of noncontiguous land scattered around northern Minnesota and was asserting sovereignty, to the point of issuing its own license plates. Colorado Representative Robert DeNier was a first term legislator from Durango who was also an agent of the Federal Bureau of Investigation. Others on the Task Force who played a role were Senator Ted Montoya from New Mexico, Senator John Mawhinney from Arizona

91. See COHEN, *supra* note 1, at 96-97, for a description of Public Law 280.

92. 430 U.S. 584 (1977).

and Representative Jim Peakes from Maine, all of whom had personal experience with tribes in their home states.

While NCSL had authorized the Task Force, its mission was undefined and the objective was broad — to explore the state-tribal relationship. It was clear that the members of the Task Force represented a variety of viewpoints. Speaker Ed Manning and Senator Gould balanced the views of Carroll Graham on the Task Force. Senator Graham⁹³ represented a so-called hard line non-Indian position, as he had personal experience and concerns about being subjected to tribal authority; other members were uneasy about adopting a rigid position and were looking for a more flexible position, especially Ed Manning. Speaker Manning and Rep. Peakes had lived through some of the economic turmoil of the Eastern land claims in their states, but were intrigued by the issues. They were mindful of the organization's reputation and were steering clear of positions that might brand them as bigoted or racist, although they naturally supported the states' interests. Manning was proud of Rhode Island's settlement with the Narragansetts and especially keen on publicizing what he saw as a successful resolution. Senator Gould had experienced some of the tactics of the anti-fishing rights groups in Washington and was wary of the rhetoric and the violence.

Soon after the Task Force was created, it met in Washington with Congressional and federal staff for an overview of the issues, including the AIPRC recommendations. Later that year, they met in Denver at NCSL's headquarters and began to narrow the issues they would address. They formed subcommittees to address individual issues: jurisdiction and Eastern Land Claims were first. Senator Ted Montoya invited the group to Albuquerque for the next meeting, which the group decided should be the Subcommittee on Jurisdiction, as that seemed to be the core issue. The meeting was scheduled for December of 1977.

National Congress of American Indians and the United Effort Trust

Tribes and Indian leaders were alarmed at the turn of political events, especially in Congress. Although tribal leaders knew the states and local governments in general were not happy with federal Indian policy, these governments had never organized effectively to counter proposals favorable to tribes. Any counter-proposals from tribal adversaries had historically been too extreme to be a serious threat. What made the Meeds-Cunningham proposals threatening was that Meeds was an important convert, having been so ostentatiously on the Indians' side before his near loss in the last election and the AIPRC Final Report. It was the first turn of events that had potential to unite the other side, and the AIPRC report gave opponents of tribal interests an agenda to run against.

NCAI organized a counter offensive. In December 1977, tribes convened in Phoenix to mobilize and create a strategy to counter the political work of the ICERR and to effectively lobby for the defeat of the backlash bills. A plan was devised for a

93. Senator Graham articulated many of the views of the opponents of tribal governments without a hint of rancor or racism, at least detectable by the staff of the Commission over the course of his years with the Commission. His example helped teach the staff that equating all opposition to tribal government with racism was oversimplifying.

campaign bringing together NCAI and the National Tribal Chairmen's Association (NTCA), to be funded by contributions pledged by tribes at the meeting. In cooperation with the American Indian Law Center at the University of New Mexico, the United Effort Trust (UET) was established to engage the anti-tribal forces and begin a concentrated effort to educate the public on Indian rights and to focus the lobbying effort on the defeat of the backlash legislation. Their campaign had four goals: organizing, lobbying, communicating and intergovernmental relations.⁹⁴

Other organizations were created as well. Several Northwest tribes created the Campaign for the Survival of Tribal Governments. And in the state of Washington, non-Indians created the Coalition to Support Indian Treaties.⁹⁵

With the newly formed UET, NCAI was organizing to defeat the backlash bills and support the bills viewed as favorable to the tribes. The organizations had identified priority issues and were planning meetings to coordinate efforts with tribes across the country to develop strategies to support the issues. UET had assembled information on potential allies, press, Congressional delegations and executive branch personnel. It coordinated the preparation of issue papers and distributed them. It helped organize political action campaigns in a number of states designed to getting people registered and voting.

As part of this campaign, NCAI Executive Director Chuck Trimble had Sam Deloria, Director of the American Indian Law Center, Inc., speaking around the country and attending meetings of state and county officials to gauge their sentiments. Trimble and Deloria discussed various strategies for dealing with the state and county public interest groups. They saw that if the organizations of state and local governments could unite on a single strategy against the tribes, they could have considerable influence on Congress. The tribal strategy, then, would be to prevent such a united front.

The question was how to accomplish this, when these organizations did seem to share a common interest in rolling back recent tribal advances. Trimble and Deloria's recent attendance at several local and regional meetings of state and county officials had taught them that the views expressed at these meetings were far from monolithic. The task was to encourage diversity of opinion among the non-Indian governmental organizations. The last thing the tribes needed to do was enable more state and municipal unity than would otherwise have been the case by overreacting and calling people racists who had not even taken a position yet. Merely being in a position where one's job was to articulate and advance state governmental interests did not guarantee that a person was a racist or that he or she was opposed to all forms and expressions of tribal government.

One notion was to engage the organizations, to get them "in a bear hug" to distract them and keep them from attacking the tribes as strongly as they might otherwise. Put more positively, it was important to persuade the state and municipal organizations that the tribal-state relationship was too complex to be usefully reduced to jurisdictional

94. Although the actual contributions from tribes were far less than originally pledged, and the UET effort closed its doors in 1978, the campaign was considered successful, with much help from other organizations that rallied support and resources behind the UET. The threat abated in the 96th Congress, with none of the backlash bills being enacted. Cunningham was defeated in his bid for reelection and Meeds declined to run, due in large part to effective tribal political action in the Northwest. Trimble, *supra* note 75.

95. Trimble, *95th Congress and Indian Affairs*, *supra* note 78 at 3.

slogans. But the tactic of engagement, or “bear hug,” carried the risk that if this tactic didn’t realistically show the promise of something real, the lull would be only temporary, and the backlash would last a very long time. It was a distraction in the short term, but in the long term they were increasingly feeling that they were on to something of lasting significance.

Meeting of NCSL and Deloria

As decided at the Denver meeting of the NCSL Task Force, the subcommittee on jurisdiction scheduled a meeting in Albuquerque in December 1977. The group included Speaker Manning, Senators Gould, Graham and Montoya and Representative Peakes. They had not yet coalesced, and appeared still to be of several different minds. The purpose of the meeting was to find some positions they could agree on; most were looking for a way to represent states’ interests without adopting a hard line, backlash position.

In particular, the Task Force had decided in Denver that they needed to wrestle with their overall position on state and tribal jurisdiction and state-tribal relations. Earlier in the fall, Congressmen Meeds and Cunningham had introduced their backlash-supported bills. The group decided to organize the agenda around Meeds’ House Bill 9950, the Omnibus Indian Jurisdiction Act, using it as a vehicle to concentrate their attention directly on the exercise of state and tribal jurisdiction in Indian country. They intended to use the bill to focus their debate and to help them draft a policy position they could all agree on and which would guide their work.

Being legislators, they were accustomed to listening to a variety of viewpoints. Hanna invited a staff member from Meeds’ office to present the legislation, with the understanding he would try to solicit NCSL’s support. To represent the tribes’ universal opposition to the bill, Hanna invited Sam Deloria. First, the meeting was in Albuquerque and Deloria directed the American Indian Law Center there. Second and more important, she had received several strong recommendations from a number of Indian organizations who knew of his work with Trimble and the UET. Deloria had also, coincidentally, recently prepared a study for the New Mexico Commission on Indian Affairs regarding the tribal-state tax relationship, urging a negotiated approach, based on the sales tax collection agreement South Dakota had entered with the Oglala Sioux Tribe.⁹⁶

Meeds’ staff person made a brief statement asking the group for its endorsement, apparently assuming the group would embrace the bill that would have extended state jurisdiction throughout Indian country. Deloria then took up the charge and began to disarm the Task Force.

Deloria first argued that the Meeds-Cunningham bills had no chance of passing. He noted that the tribes were too well-organized and that Congress, while showing signs of slowing the pace of passing legislation favorable to tribes, would have no appetite for the policy reversal these bills represented.⁹⁷

96. AMERICAN INDIAN LAW CENTER, INC., *TAXATION AND INDIAN SOVEREIGNTY: A LOOK AT THE MATTER OF TAXATION IN A STATE TRIBAL CONTEXT* (1975). Copy on file with authors.

97. See *supra* notes 81-84 and accompanying text. The committee was only considering Meeds’ bill H.R. 9950, as Cunningham’s bills were considered much too radical. Cunningham’s H.R. 9054 and H.R. 9175

He cautioned the legislators that their support then would not only be futile, but potentially damaging. First he argued that NCSL's support for the Meeds-Cunningham bills would set back individual state-tribal relationships across the country and jeopardize these situations as tribes would then perceive a trick in any discussions. NCSL's support for these bills would vitiate any trust that was building. He told the legislators that tribes already were strongly convinced that states were not to be trusted, so that their support of these bills would revive old memories of being invited as Indian leaders to "talks" and then being arrested or killed, incidents which seemed remote to non-Indian legislators, perhaps, but are well within the memory of many tribes. He also foresaw that NCAI and the other Indian organizations would accuse NCSL and other state public interest groups as being racist, tarnishing NCSL's reputation.

He then pointed out that these bills were radical and urged them to consider that organizational policy should not be set by extremists. He argued that for NCSL to support these bills would mean they were focusing only on divergent interests, which would drive all policy. Instead, he asked them to consider that while there were clearly conflicting interests between state and tribal governments, there were also many common interests for them to examine.

In addition, he argued that the solutions proposed by the bills were illusory anyway; they only moved the problem geographically but did not ultimately resolve any of the existing important issues. They would expand state power relatively, but not definitively. For example, if tribal jurisdiction were to be limited to trust land on a checkerboard reservation, the jurisdictional argument would simply move from the reservation border to the boundary of each piece of trust land, becoming vastly more complex. Only by doing away with tribes (which was not politically feasible) or restoring complete tribal territorial jurisdiction (which also was not politically feasible) would there ever be definitive resolution. Therefore, he argued, national organizations should support the efforts of tribes and states to deal with the issues as they are rather than pursue illusory and unrealistic solutions.

And then Deloria proposed that NCSL should, instead of supporting the Meeds-Cunningham proposals, join with tribes to study the overall governance of Indian reservations. He noted that many communities had already entered agreements to solve local problems but these solutions were routinely overlooked in the debates at the national level. Leaders of tribes and states and non-Indians were still—and only—focusing on the conflicts. A cooperative approach was available, yet no one was viewing it as the answer because they were stuck in viewing each other as the enemy. No one at any level of government was talking about this approach at the time — it was not part of the conversation.

He argued that the state-tribal relationship was a very unusual, undefined intergovernmental relationship, which had been mostly perceived as negative and

would have revived the termination policies of the 1950's and even abrogated all Indian treaties. *See supra* notes 81-84 and accompanying text. Deloria intentionally linked Meeds to Cunningham precisely because Cunningham's were so extreme and he hoped to sink Meeds' bills by tying them to Cunningham's. Deloria reported subsequently being on television with Meeds in San Diego when Meeds — with a wink — tried to return the favor by linking him in the same sentence with Russell Means.

adversarial. Both sides had been aggressively seeking to define the relationship in court, but court decisions never seemed to provide the hoped-for finality. It seemed that after every court decision, the other side would launch new litigation on the same topic, with a slightly different set of facts. Deloria proposed that they look at the state-tribal relationship with a view to understanding it, to see if there was a possibility for a positive, mature and mutually respectful intergovernmental relationship.

Specifically, he proposed that they join with the two primary Indian organizations, NCAI and NTCA, to study the state-tribal relationship to determine: what was actually happening, what the patterns of divergent and common interests were and the varieties of process.

At the end of the meeting, Deloria left the legislators to deliberate. His persuasive message had fallen on very receptive ears; the group readily accepted the invitation at the session's conclusion, with barely any discussion. Deloria gave them what they had been looking for — a mission and a way to make a positive contribution. The sense was overwhelming relief and optimism. They felt that they could go beyond the normal approach of studying an issue and writing policy positions. They had the sense that they could actually make a positive contribution to the nature of state-tribal relations. It was new and different and they were excited. It also let them sidestep the difficult jurisdictional issues amongst themselves, much the same way that tribal-state agreements do for communities. They all signed on — even Senator Carroll Graham.

Hanna called Deloria early the next week and reported that they had accepted his argument and asked him when he could deliver the tribal organizations. He responded, "Me?"

Support of the tribal organizations: NCAI and NTCA

Deloria was in a bit of an awkward situation. Although NCAI had recommended him to speak to the NCSL Task Force, both he and NCAI knew that he was not there as a representative of NCAI or any other organization other than the American Indian Law Center, and was certainly not in a position to commit anyone to a policy position or course of action. He had, he thought, told the Task Force that they should approach NCAI and NTCA with the idea, and had not represented himself as bringing such a specific invitation from NCAI and NTCA to the Task Force. His main goal at the meeting was to prevent the Task Force from supporting the Meeds bill, and he thought that if an invitation from NCSL to NCAI and NTCA seemed forthcoming, he and Trimble could prepare the ground. But he did not go out of his way to make sure the Task Force would perceive that he was winging it, either.

While the NCSL Task Force members may have understood that, or might have had they known to listen very closely, it was at least fortuitous that they put the burden on Deloria to bring the national organizations on board. Had they advanced the idea on their own to these organizations, the response could have been anything, but most certainly would have delayed progress. But by holding Deloria's feet to the fire, it became incumbent on him to persuade the Indian organizations to view the idea favorably. Having proposed the idea, he could hardly wish NCSL good luck and walk away from it.

Deloria was experienced enough to know that he had to try not to let the discussion wander into the question of whether he had overstated his credentials and presented himself as representing the organizations or, even more seriously, the tribes themselves.⁹⁸ He had to sell the idea on its merits and overcome the natural suspicion the tribes might have toward an invitation from one of the principal organizations of state government. Deloria met first with NCAI, and with the essential support of Trimble and key tribal chairmen such as Joe DeLaCruz⁹⁹ of Quinault, who immediately grasped the importance of the proposal and likened it to efforts in Washington State to coordinate fisheries management, NCAI support was readily given.

The National Tribal Chairmen's Association was another story. It was not an organization joined and controlled by tribes as tribes but instead was an organization of tribal chairmen, presidents, governors and various other chief executives intended to be similar to the National Governors Association, very conscious of their prerogatives as elected officials. To be fair, this was an era of cacophonous voices, all claiming to speak for the Indians, and elected officials had frequently been singled out as targets of criticism, especially during the Wounded Knee II episode; elected tribal officials were struggling to maintain their primacy as spokespersons and policymakers for tribal governments. Although the attendance at NCAI and NTCA meetings included many of the same people, the nature and quality of discussion was frequently different.

At first, the proposal to engage with NCSL was met with silence — thoughtful silence, it was hoped, but definitely silence. Experience indicated that the first comment would mightily influence the subsequent discussion, so a diatribe from the floor about the untrustworthiness of the states would pretty much sink the proposal. Finally the floor was claimed by Caleb Shields of the Fort Peck Assiniboine and Sioux Tribes in Montana. Shields commented that they had been engaged in negotiations with the State of Montana for quite some time to establish their water rights, and they knew that sometimes one can get a better outcome with negotiation than litigation or legislation. NCTA was on board.

COMMISSION ON STATE-TRIBAL RELATIONS

Thus, in the midst of some of the worst tensions between states and tribes in the nation's modern history, national organizations of both came together to explore a different approach. NCAI and NTCA joined with NCSL to form the Commission on State-Tribal Relations.

98. Throughout the work of the Commission, great care was required to ensure that all parties understood the nature of any given discussion. The eagerness of some state and municipal representatives to make progress on intractable issues frequently led them to think they were "negotiating with the Indians," and they had to be constantly reminded that no one had the portfolio to negotiate on behalf of Indian tribes other than each individual tribe itself.

99. The late Joe DeLaCruz, long-time chairman of the Quinault Tribe in the State of Washington, was a leader of great vision. He served as co-chair of the Commission throughout its existence, and his understanding of the issues and unwavering support for the Commission was of inestimable value.

Members

The first step was to appoint members.¹⁰⁰ When NCSL, NCAI and NTCA agreed to create the Commission, they agreed to each appoint representatives — six legislators and six tribal chairmen. NCSL appointed six legislators, some of whom had been at the December meeting in Albuquerque and had played a role in creating it — Speaker Manning (RI), who served as Co-Chair, Sen. Sue Gould (WA), Sen. Carroll Graham (MT), Sen. John Mawhinney (AZ) Rep. Irv Anderson (MN) and Rep. Robert DeNier (CO). The leadership in the first few years remained fairly consistent, with Senator Sue Gould replacing Speaker Ed Manning as the state Co-Chair when Manning stepped down from public office in the early 1980's.

NCAI and NTCA likewise appointed 6 members, all tribal chief executives: Joe DeLaCruz (Quinault), Eugene Green (Warm Springs), Allen Rowland (Northern Cheyenne), Reuben Snake (Nebraska Winnebago), Patricia McGee (Yavapai) and Paul Tafoya (Santa Clara). Geographic representation was a consideration, and some of them had positive experiences dealing with their state and local governments, but most were invited to join based on a reputation for independent thought and political courage. Despite the agreement of the national organizations, the idea of even talking with representatives of state and local governments was controversial in some circles.

These twelve were the initial members of the Commission. Over time, the membership naturally changed as members either left office or resigned. It soon became clear that since negotiating agreements was not a legislative function, the leadership exercised by NCSL in forming the Commission would need to be supplemented by the executive branch of state government, notably the governors and attorneys general. Eventually, the National Association of Counties and individual county officials pointed out the importance of county government in the day-to-day governance of Indian reservation areas and the advantages their perspectives would bring to the Commission's work.¹⁰¹

The Commission was told that both the National and Western Governors Associations, however, had policies that discouraged their joining with other organizations in efforts like that of the Commission, so that neither of these organizations formally became a co-sponsor of the Commission. As it became clear that governors had to be involved, an informal understanding developed that allowed the Commission to invite participation by individual governors, with the understanding that they would keep their organizations informed.

100. From the outset, the Commission established that since it was not engaged in negotiation, it needed people who represented points of view but were not tied to the kind of one-from-each-BIA-area approach that people often used in those days. It might have been the Commission's best decision. People always wanted each meeting to be a negotiation, so the issue of whom each Indian represented was always there, either at the meeting or after the meeting when someone did not like the outcome. The Commission avoided that by making it clear that no one was negotiating, it was only looking at prototype positions in order to provide an overall framework for people who were interested in understanding the kinds of considerations states and tribes might have regarding certain topics.

101. This transformation was eased by the fact that most of the original founding legislators had retired from their respective legislatures — some to run for higher office, some to literally retire — and left vacancies on the CSTR.

When contemplating who in particular should join, the CSTR carefully sought out officials with public reputations for being strong advocates of the government they represented. It felt there was more to learn from officials who had opposed the other government and taken on tough issues, sometimes in hard opposition to tribes, than from those who had willingly cooperated in the past and embraced tribal positions. The first, and most involved governor in the work of the CSTR was South Dakota Governor William Janklow. His appointment came with an acknowledgement that he had been a forceful opponent of tribes, first as attorney general and later as governor, and in some of the most trying conflicts of the 1970's. At the same time, tribes in South Dakota had still worked with the state on a number of issues and entered agreements, none of which seemed to be threatened in the aftermath of the traumatic occupation of Wounded Knee, South Dakota. In 1982, Governor Janklow joined the CSTR as Co-Chairman, replacing Senator Gould who had retired from the legislature to run for Congress. He remained with the CSTR as Co-Chairman until his term as governor expired in 1986.

A number of state attorneys general also served on the CSTR as of 1982, upon the formal endorsement by the Conference of Western Attorneys General. Attorney General Bob Wefald of North Dakota played an especially active and helpful role. Attorneys General Paul Bardacke of New Mexico, Steven Freudenthal of Wyoming and Ken Eikenberry of Washington all served terms from 1982 through 1986.

Eventually, the National Association of Counties (NACo) accepted the CSTR's invitation and appointed two county officials to add the perspective of county government in the day-to-day governance of Indian reservation areas and the advantages their perspectives would bring to the Commission's work. The County Commissioners, who chaired NACo's Indian Affairs Subcommittee when they served on the CSTR, included Jimmie Reidhead of Duchesne County, Utah, Seth Neibaur of Power County, Idaho, and Charles Tollander from Burnett County, Wisconsin.

During these times, the representation of tribal chairman remained fairly stable. Joe DeLaCruz, Chairman of the Quinault Tribe of Washington, who served as the tribal Co-Chairman throughout, provided a strong and experienced voice to the perspective of tribal governments on the CSTR. As tribal members stepped down from public office, NCAI asked others to take their place. Throughout the 1980's other tribal chairs served on the CSTR — Leonard Burch of the Southern Ute Tribe, Gerald Flute of the Sisseton-Wahpeton Tribes, Peterson Zah of the Navajo Tribe, Newton Lamar of the Wichita Tribe, and Joe Corbine of the Bad River Tribe.

FUNDAMENTAL PRINCIPLES

Coordinating Without Transferring Jurisdiction

As the staff listened to tribal and state officials talk about the intergovernmental relationship, certain themes and patterns became apparent. State officials tended to seek solutions to problems in terms of assuming jurisdiction over reservation lands and activities, often reasoning that they could do a better job of governing because of their size, complexity and what they saw as their greater experience and sophistication. Tribal officials were often wary of talking with state officials, having gotten the impression that

all the states had in mind and wanted to talk about were solutions based on the transfer of jurisdiction. It was clear, then, that little could be accomplished if the sides had these attitudes and concerns.

Once this problem was brought to the attention of the Commission members, they understood that another approach was required. As it turned out, federal law provided exactly the protection needed. Under the 1968 Civil Rights Act, in the course of amending Public Law 280, which had permitted states to assume jurisdiction over reservations unilaterally, Congress had provided that jurisdiction could be transferred from a tribe to a state only with the consent of the tribe; in the *Kennerly*¹⁰² case the United States Supreme Court held that this consent required a referendum of the tribal members on the reservation. Proponents of a more cooperative relationship could reassure the tribes that they need not fear talking to the states about common concerns and working on agreements because there was no way they could be pressured or tricked into ceding jurisdiction without a referendum. Correspondingly, state officials were reminded that if tribes thought all the state wanted to do was transfer jurisdiction, they would not talk to them at all.

In effect, jurisdictional transfer was off the table for the Commission, and its analysis of issues for tribes and states instead directed attention elsewhere — what could be done cooperatively between the governments in the absence of a transfer of jurisdiction?¹⁰³ As the staff looked at the range of tribal-state agreements that had been negotiated in the past, many of which were still in effect, they saw that these agreements fell into three functional areas of government which seemed to have similar structures and be susceptible to similar approaches. They were: regulatory functions (both civil and criminal); revenue-raising (largely taxation); and the delivery of services. In each of these areas, tribes and states over the years had devised ingenious methods of coordinating their activities and utilizing the machinery of government so as to maximize efficiency and sidestep where possible troublesome and intractable jurisdictional issues. Basically, they involved the governments saying: if we cannot definitively resolve the issue of jurisdiction, what can we do in the meantime to provide the best possible governance of the reservation?

1. Civil and Criminal Regulation: Cross-Deputization

Government regulation, both civil and criminal, has common features pertinent to tribal-state relations. Both entail a government defining an area of activity or behavior subject to a particular regulation, defining activity that is either required, regulated or prohibited and specifying criminal or civil sanctions for violating the regulation in question. Defining and enforcing regulations are the essence of jurisdiction and the Commission was not looking at the transfer of jurisdiction. But it was looking at what tribes, states and local governments had done short of transferring jurisdiction in this

102. *Kennerly v. Dist. Ct. of the Ninth Judicial Dist. of MT.*, 400 U.S. 423 (1971).

103. This basic feature of the relationship seemed difficult for some in Washington to understand. Several times in the course of the life of the Commission (without seeking the advice of the Commission members or staff), and even down to the present day, someone in Washington would want to be helpful and draft legislation that would remove the *Kennerly* protection and allow jurisdiction to be transferred pursuant to a tribal-state agreement, which would of course have destroyed the only context in which tribes and states could meet safely.

most delicate and important area of government, and found it in the device of cross-deputization.

In some respects, cross-deputization is the keystone of intergovernmental cooperation in the governance of Indian reservations. Cross-deputization is the delegation of law enforcement authority by one jurisdiction to the enforcement personnel of another jurisdiction, such as deputy sheriffs being authorized to enforce tribal law and tribal officers in turn being commissioned to enforce state and municipal law. Such agreements can be tailored to the situation, being effective as to certain areas of the law, such as traffic, and not others, such as major felonies, or in a certain area on and near the reservation. The practice of cross-deputization was familiar, its origins lost in history; it was more common, perhaps, between state and various federal agencies not associated with Indian affairs, but was far from unknown in Indian affairs.

Cross-deputization offers certain obvious advantages to both parties. It extends the reach of enforcement resources, removes jurisdictional arguments from the point of enforcement to the courtroom, builds communication among law enforcement personnel, brings training and qualification closer together, contextualizes regulatory standards, highlighting differences and causing the governments to examine the rationale for differences. Differing regulatory standards between tribal and state governments may be attributable to local culture or conditions; tribes have found that state building codes might stifle the growth of housing for the disproportionately poor population on the reservation, or discourage the use of traditional indigenous housing styles. Or, as among the states — sometimes called the “laboratories of democracy” — regulations may be different precisely to attract investment to areas with “looser” standards. These issues were characteristically not even addressed when the byword seemed to be “jurisdiction for the sake of jurisdiction.” But where enforcement resources are shared, enforcement is assured, and the negotiation of standards becomes a matter of intergovernmental relations, as it is between the states.

At the same time, cross-deputization comes with well-known barriers and pitfalls. There may be historical antagonisms between tribal and local law enforcement, both personal and stemming from a difficult intergovernmental relationship. After years of becoming accustomed to the “traditional” jurisdictional lines, tribal members may not be comfortable having tribal law enforced on them by non-Indian officers, and correspondingly, non-Indians may not welcome tribal officers having authority to enforce the law on them. The governments will have to consider the nature and extent of their individual potential risks created by an agreement and decide how they will protect themselves against the risk, either individually or by sharing the risk. Governments can become liable in a number of ways, either by an officer injuring people or property, violating a person’s constitutional rights or by an officer being injured; agencies that pool resources may suffer loss or harm as a result of the joint efforts.

The critically important feature of cross-deputization is that it does not entail the expansion or diminution of the jurisdiction or authority of either government being party to it. A tribal officer deputized as a deputy sheriff and enforcing state law is exactly that — for that moment a deputy sheriff; likewise, a deputy sheriff is a tribal officer when enforcing tribal law pursuant to a cross-deputization agreement. For practical purposes,

then, SOME law will be enforced regardless of ongoing disputes between the governments as to personal, subject matter or territorial jurisdiction. Having removed the incentive for an individual to avoid accountability by claiming jurisdictional immunity from one law enforcement agency or another, cross-deputization agreements can be expected to have the prophylactic effect of increasing voluntary compliance with the law. Cross-deputization as a model shows that, apart from the fixed jurisdictional posts,¹⁰⁴ virtually everything else in a regulatory system can be shared, from data-gathering to training and even to some aspects of sanctions.¹⁰⁵

The utility of cross-deputization agreements also illuminates another feature of the tribal-state relationship when removed somewhat from the rhetoric of the day. That is, the only ultimate solution to the particular set of jurisdictional issues embodied in the tribal-state situation involves the abolishment of one or the other form of government, mooted discussions about jurisdictional issues. Since the abolition of either tribal or state and municipal government is unlikely, and unconstitutional in the case of state government, then to talk of “solving” jurisdictional disputes is fruitless. As long as the governments co-exist, the issue will always be one of managing jurisdictional complications, and cross-deputization will doubtless be a viable management tool no matter the adjustments made to jurisdiction.

2. Revenue-Raising: Tax Collection Agreements

Tribal and state taxing authority often conflicted, mainly in the efforts of states to collect various taxes from all parties on the reservation, just as they did off-reservation. Most tribes did not exercise their authority to tax, given that the lack of economic activity on the reservations gave them precious little tax base to begin with. Additionally, tribes as landowners had traditionally derived their income as landowners, from rents, leases and other exploitation of tribal resources rather than in their governmental taxing authority.

For many years, the State of South Dakota had attempted to collect its sales tax from the few retail establishments on the reservations in the state. The tribes resisted these efforts, on general grounds of sovereignty but also because the sales tax is a regressive tax falling heavily on the poor people of the reservations. The state’s position was that many transactions involving non-Indians would escape a legitimate tax if no sales tax collection were permitted on any reservation-based business.

In the late 1960’s, however, the Oglala Sioux Tribe expanded services and began to look at ways to fund the programs. The tribe enacted a tribal sales tax that was the same as the state’s, with the resulting problem that there were therefore two taxes on the Reservation, with neither government deriving much benefit as the tribe lacked a way to collect its taxes. The tribe therefore approached the state, leading to the first tax-collection agreement in the state and perhaps the nation. The tribe’s motivation was

104. In the Commission jargon, jurisdictional markers were referred to as “fixed but undetermined,” like a property boundary. Although one may not be able to point to the exact line, everyone knows that a line could be established if necessary.

105. A number of jurisdictions contract for jail services, for example, obviating the need to have separate facilities in the same physical community.

twofold: deriving revenue while avoiding the cost of administering the tax.¹⁰⁶

In the course of many meetings between tribal and state attorneys, the idea was advanced that they write an agreement whereby the sales tax would be collected by the state, and a portion of the proceeds would be rebated to the tribe according to an agreed-upon formula. This proposal found willing ears in Pine Ridge, home of the Oglala Sioux Tribe, represented by S. Bobo Dean of the Washington, D.C. law firm Fried, Frank. Much like the cross-deputization concept, the tax collection agreement used the infrastructure of one government to aid in the administration of the laws of the other government — in this case the Oglala Sioux Tribe.

The difference in this case, of course, was that the tax collection agreement was not bilateral because the tribe had no machinery for collecting taxes. It also mimicked cross-deputization in that it assumed that everyone on the reservation and every transaction was at least potentially subject to the taxing jurisdiction of either the tribal or state government, removing the possibility of individuals or retail establishments avoiding the sales tax by claiming that the authority attempting to collect the tax lacked jurisdiction.

The model of the South Dakota-OST tax collection agreement, then, provided an approach to avoiding a number of difficult issues in the raising of revenue to support the governments serving Indian reservations. It at least provided the opportunity where the state and the tribe could agree on what needed to be taxed and at what rate and it allowed the tribe to use its absolute discretion as to how to use the tax revenue, whether to alleviate its burden on the poorest people subject to it or for other purposes.

By no means did it remove tax or other revenue-raising issues from the agenda of contentious issues, but in accordance with one of the fundamental principles of the Commission's work, it narrowed the area of conflict from a purely jurisdictional standoff to a series of issues wherein the state and the tribe found themselves disagreeing on tax policy for articulable reasons beyond "jurisdiction for the sake of jurisdiction" and made the relationship resemble a more orthodox intergovernmental relationship.

3. Delivery of Services: Service and Program Agreements

Indian people are considered to be citizens of the state in which they reside, in addition to their national and tribal citizenship. As such, they are eligible for all public services for which they qualify, whether the services are delivered by federal, tribal or state governments. Access to public services, then, is not a matter of jurisdiction.

Not infrequently, parallel delivery systems existed on and near reservations, with seemingly duplicative cadres of social workers, probation officers, environmental technicians, or vocational rehabilitation or employment counselors. Some state social and other services are funded largely or at least in part by federal funds, and the state's share is calculated with data including demographics from the reservation population. Given that most reservations are the most economically deprived parts of the state, tribes were well aware that they were contributing to the state's coffers and often not receiving

106. *Tax Collection Agreements*, Hearing Before the Commission on State-Tribal Relations, Transcript, pp. 5-7 (Statement of S. Bobo Dean, Att'y for Oglala Sioux Tribe). Copy on file with authors.

commensurate services.

Public services of all sorts, including vital social services, presented two kinds of challenges to the tribal-state relationship. First, it was necessary to ensure that every person on the reservation receive the services to which he or she was entitled, from some government agency, and not allow them to fall through the cracks created by the lack of coordination among the governments involved. This affected not only the Indian people. Non-Indians living on the reservation may not have access to state services because it was not economical for the state to provide them on the reservation. Second, simple access to services was not enough. It mattered a great deal which government allocated budgets, hired, trained and supervised staff, and planned and executed programs. In the sense of which government controlled the program, it was a matter of jurisdiction, or power, after all.

But in many individual cases throughout the country, tribes, states and municipalities were beginning to see that if they negotiated administrative agreements, the parallel delivery systems could be coordinated and rather than compete and duplicate, they could vastly extend their benefits. A wide variety of formal and informal agreements were discovered, from the contracting for the use of jails from one jurisdiction to another to the sharing of social workers and counselors, foster home resources and placement officials.

These arrangements were probably the least controversial because they did not entail the coercive powers of government which are necessarily at the foundation of regulatory and taxing authority. They were more like agreements by each government to exercise its discretion in certain ways conducive to greater coordination and more efficient use of scarce resources. At their most complex, they were analogous to contracts for services, except between governments rather than between a government and a non-profit or even profit-making provider.

Faulty Assumptions

As the word of the formation of the Commission was spread, the members and staff were asked to attend intertribal meetings, state legislative hearings and other gatherings to explain the work of the Commission, often as these entities responded to the revitalization of the field and became eager to see what they could do within their own governments to improve the situation. Several issues tended to come up at the outset of these discussions that had to be dealt with before the discussion could become productive. Not infrequently, a legislative committee chairperson would open a session by making two erroneous observations: (1) we need at the outset to establish the exact outlines of state and tribal jurisdiction so that we can see where the problems are; and (2) we do not think we can negotiate agreements without the permission and perhaps the participation of the federal government as trustee for the Indians.

The first observation probably is the result of the old habit of thinking in terms of jurisdictional transfer as a solution. Jurisdictional disputes are for the most part the result of the governments not agreeing as to which government has the power in a particular situation. The problems then being faced by the governments were for the most part situations in which the states had thought jurisdictional arrangements were long-settled

and were startled that the tribes were beginning to challenge these assumptions; the tribes, for their part, were resentful of what they considered as state over-reaching beyond any powers over the reservation given to them by Congress. The job of the Commission representative, then, was to politely explain that if you could do what no one else in the country seemed to be able to do, that is, define jurisdiction precisely to the satisfaction of both governments, then there would be little left to talk about. Instead, it was explained, the Commission was drawing attention to what could be done in the absence of agreement about precisely where the jurisdictional line was.

The second erroneous observation, that federal permission or involvement is required, persists to the present day in some quarters, is a bit more complex and a lot more interesting. Coming from a state official, it can be dismissed as a product of a lack of understanding of the legal powers of Indian tribal governments and their relationship to the federal governments. But, much to the surprise of the Commission and staff, this observation was often heard from the tribal side as well, including from well-known scholars and tribal advocates.

There are two kinds of answers to this concern. First, simply as a matter of the language itself it cannot be said that a tribe and a state cannot make an agreement without the involvement of the federal government. The term “agreement” can cover a multitude of things, from declaring a holiday to having a joint staff picnic or softball game to the most complex sharing of governmental functions. So a blanket statement of this type, which would presumably even prohibit the state governor and the tribal chairman from setting a date for lunch, is on its face absurd.

Second, the proper inquiry is to examine what a particular agreement would propose to do and determine whether that is within the legal competence of the governments involved — a pretty routine exercise for any proposed governmental action. The first inquiry would be to look at the constitution and laws of the state and the tribe to see if they have the power to do what is proposed in the agreement,¹⁰⁷ and, next, to look to federal law to see if some federal limitation is being transgressed. Several general provisions of federal law would seem to place certain kinds of agreements off-limits, such as agreements which would in some sense threaten the status of Indian trust property or agreements that would run afoul of *Kennerly*¹⁰⁸ and purport to transfer jurisdiction from the tribe to the state. But other than these specific features peculiar to the status of Indian tribes, not only is there no evident general principle of federal law that prohibits tribes and states from making agreements within their competence, the Indian Reorganization Act itself, the foundational statutory statement of Congressional policy regarding tribal governments, includes as one of the enumerated powers of tribal governments that of negotiating with state governments.¹⁰⁹

107. During the days of negotiating state-tribal gaming compacts, a number of states found themselves in heated debate as to the power of the governor to negotiate a compact setting forth the terms of Indian gaming in the state. This would sometimes result in going to the state supreme court for resolution and sometimes requiring a complete renegotiation.

108. *Kennerly v. Dist. Ct of the Ninth Judicial Dist. of MT.*, 400 U.S. 423 (1971).

109. A basic doctrine of Federal Indian law, somewhat eroded by the Supreme Court in recent years but still relevant, is that tribes are presumed to have inherent powers not taken away by Congress (or “inconsistent with their status as domestic dependent nations,” whatever that means).

Another inexplicable concern, particularly in light of the *Kennerly*¹¹⁰ protection of tribal jurisdiction and statutory protection of trust property, was that entering into agreements with state governments somehow poses a threat to tribal sovereignty. Some critics, for example, expressed concerns about the impact on tribal governments generally of what they called “bad agreements.” The staff’s facetious response was that it was not recommending bad agreements, only good agreements. But the enigma remains: what kind of concept of tribal sovereignty is it that sees tribal governmental acts themselves as threats to sovereignty?

In the real world, it is difficult to see how tribal sovereignty could be better protected, and recent history shows that the diminutions of tribal sovereignty have come from the courts’ responses to tribal unilateral assertions of sovereignty or from efforts by individuals to avoid sovereignty, in lawsuits that might well have not been brought if the situations had been addressed — and managed — by an intergovernmental agreement. To be sure, sovereignty can be used in a way that erodes itself, but the record seems to show that this has never happened as a result of an ill-conceived tribal-state agreement. In the modern world, where tribes have a great deal of control over their own policies, the dicta that the only way to preserve tribal sovereignty is not to use it, or that acts of tribal sovereignty, such as tribal-state agreements, themselves threaten it, seem misguided to the point of paranoia.

The Role of Attitudes

Introducing the real-world facts of many positive intergovernmental relationships and many agreements, formal and informal, into the overall conceptual framework involved identifying commonly-stated clichés and attitudes that provided blind spots for government leaders on both sides, as well as advocates, scholars, and the general public.

Because of the preoccupation with jurisdiction as the overriding issue, there was a tendency to overstate the importance of the federal government in reaching solutions. Each side devised plans to capture the support of Congress, the Executive and the Federal Courts in the hope of achieving a definitive victory, notwithstanding the historic fact that each such seeming victory only changed the details of the continuing conflict. The futility of capturing Washington was in itself exemplified by the existence of agreements throughout the country — over 100, as the subsequent Commission study would reveal — that the governments found it necessary to develop in the absence of definitive guidance from Washington.

Trimble and Deloria had found that each side considered the other to be overwhelmingly powerful in Washington as well. The NCSL had an office in the magisterially-titled Hall of the States, the office building near the capitol shared by a number of state and municipal-interest organizations. Given the overwhelming advantage of numbers and the record of history, the tribes naturally felt that they were always at a tremendous disadvantage in Washington, and that any period of seeming tribal ascendance was only temporary. The states, despite these advantages, wondered why they did not result in federal support to keep the tribes under restraint. They blamed

110. *Kennerly*, 400 U.S. 423 (1971).

liberal members of Congress who, in their view, were safely in states with no Indian reservations and could afford to take strong pro-tribal stands without political risk. To the degree that this observation was accurate, it became less so as Eastern land claims brought a threat to Martha's Vineyard itself, the summer playground of the Washington Establishment.

A number of attitudes were faced at all tribal levels: the states can't be trusted; they will always seek to limit or abolish tribal governments. Tribes need to think carefully whether they want a relationship with state and county governments. States and tribes will never get along, and it is illusory to promise that this approach will solve all the problems. Of course, these concerns did not address the Commission's purpose or approach, at least from the Commission's point of view. The Commission and the staff had discussed, and tried to communicate, that the concept of "trust" in intergovernmental relations as in politics itself, is elusive and largely rhetorical. The days of adopting politicians into Indian tribes to encourage their good will were largely gone. The Commission was engaged in examining and publicizing instances where the governments had addressed mutual concerns as governments, not potential "friends," articulated what they saw as legitimate interests, and arrived at mutually-satisfactory means of dealing with them. And the question, of course, is not whether the tribe and the state "want" to have a relationship. They have one by virtue of their coexistence and their overlapping jurisdiction. Whether it is a good one or bad one, healthy or dysfunctional, constructive or destructive, those were the questions.

No one was talking about "solving" problems, but rather managing them more effectively through discussion and mutual acceptance of legitimate government concern. In fact, one of the principal tenets of the Commission's work was that, once "jurisdiction for the sake of jurisdiction" was no longer a fetish, the governments would deal with each other on the basis of their views of proper government, and would disagree about regulatory standards, tax policy, and the administration of public services — in short, they would have an intergovernmental relationship much like those between federal, state and municipal governments. Far from being presented as a panacea, the Commission's message was simply to de-escalate the rhetoric of state-tribal relations and normalize it as much as possible. From the tribal side, it was hoped that once the states could see the important role of the tribes in the governance of Indian reservation areas — and the substantial federal funds they brought into the state for governance — the historic state preoccupation with abolishing tribal governments would subside into an acceptance of the more or less permanence of these governments.

In the course of bringing tribal and state officials together to discuss various issues, the Commission staff noticed an interesting phenomenon. Each side came into the meeting with a vastly erroneous notion of the other side's position, often including their jurisdictional ambitions, if any. To avoid the meeting deteriorating into serial recitations of the clichés that often marred intergovernmental meetings, the staff tried to short-circuit that process and begin with the stereotypes — the tribes tend to see this issue as one in which the state simply ignores the tribal governmental process; the state thinks it is uniquely qualified to perform this governmental function and that the tribes have neither the capability to do the job nor the interest in doing so. Now that that is on the

table, can those attitudes be set aside and a new look be taken at the field?

Time after time, the discussion would address the issues underlying the superficial jurisdictional conflict and find that each government had more orthodox and arguably pertinent concerns. Each government would be able to see that the other was getting at something of substance, but the substance was being obscured by the preoccupation of both sides with jurisdiction as the sole issue and the sole solution. On many occasions, representatives of both governments — sometimes elected officials, but often the civil servants who help define the issues for elected officials — left the room for a break, saying, “Is that all it is? We can work with this. We thought their position was. . . .” They did not necessarily agree with the position of the other government, but having learned what it really was and that there was a rationale for it — whether they agreed with the rationale or not — they were encouraged to think that they could work something out in the areas that might be compatible.

Problems continued, as one might expect, and as experience mounted, a pattern seemed to emerge that the staff, while it could not articulate it publicly, seemed to find very revealing. The states and tribes that seemed most resistant seemed also to be those least able to articulate legitimate government concerns, and thus were most likely to keep their focus on “jurisdiction for the sake of jurisdiction.” And the governments with well-understood interests to promote and protect seemed also to be the ones with the least reluctance to sit down with the other government and talk.

CSTR ACTIVITIES

The Commission was funded over the years with a mix of public and private funding. The Ford Foundation and the William H. Donner Foundation, which had a long-standing interest in Indian affairs and had provided seed money for the Law Center and an Institute for Tribal Government at the Law Center, provided generous initial funding. Deloria and Hanna added to the initial private funding over the years by securing a series of grants from the Bureau of Indian Affairs, the Community Services Administration and the Administration for Native Americans. With this mix of private and public funding, the CSTR embarked on an ambitious program of studying the state-tribal relationship and working with state, local and tribal leaders to educate them about the range of possibilities and the results of its findings.

From the beginning, the Commission maintained a dual staffing pattern. As staff, Deloria and Hanna recognized their individual bases of operations — NCSL on one hand and NCAI/NTCA/AILC on the other. They recognized that they were not part of an adversary proceeding; their role was not to make the argument for “their side,” but rather to try to represent fairly the kinds of considerations each type of government might deem important. The staff presented issues so as to recognize the legitimate interests of each government as accurately as possible.¹¹¹ It was the job of the Commission members to

111. Sen. Carroll Graham kept saying that he was disappointed that Deloria still took the Indians’ side, but he appreciated that he was fair in giving each side their due. He was, teasingly, making the point that it was important that the Commission staff remain neutral. He of course was not trying to convert Deloria, but observing that he understood the importance of how the staff handled the issues without cutting themselves off from their “base.”

analyze these positions to see whether they were in any sense compatible or susceptible to better management. While Deloria and Hanna were the primary staff, other staff members of the American Indian Law Center over the years lent their expertise to specific projects, especially Nancy Tuthill as Deputy Director of the AILC and Marc Mannes.

1. Studying the state-tribal relationship

In the beginning, the Commission concentrated on studying the state-tribal relationship from every perspective. It delved into the history of the relationship, sought to identify all the varieties of then-existing forms of cooperation, as well as the common tensions and their causes. The goal was to document this, first, and then discover some common elements from which could be crafted a loose framework to guide other tribal and state governments interested in working on shared problems. Its focus was solely on the practical issues that are more important to the daily functioning of the complex, permanent and unavoidable intergovernmental relationship. What are the dynamics and mechanics of the relationship? How do they foster or frustrate cooperation? What works and what does not work? Why?

It was uncharted territory at the time, filled with only anecdotes of a few commonly recognized cooperative efforts. Because the state-tribal relationship had always been perceived as adversarial, no information had ever been gathered in a systematic manner on positive state-tribal relations as a serious policy alternative. The Commission therefore set out in an organized effort to gather information — state by state, tribe by tribe — across the broad spectrum of government functions. It initiated the first attempt to comprehensively document the extent of past contacts and interactions and to discover the different models invented by officials to solve their intergovernmental problems.¹¹²

Throughout 1979 and 1980, Hanna contacted state and tribal officials at all levels, ranging from the offices of governors and tribal chairmen down to program officials at the field level. Through direct personal telephone conversations and written surveys, she collected information on existing formal agreements, contracts or grants, as well as informal arrangements for coordinating programs and regulations. It was a multi-year effort, resulting in the first publication of agreements — *State-Tribal Agreements: A Comprehensive Study*¹¹³ — yielding over 100 agreements already in existence. It summarized agreements according to general subject areas, law enforcement, tax collection, social services, natural resources (including wildlife management) and general efforts to ensure ongoing communication. The *Survey* described the general provisions of an agreement, the nature of the contact between agencies and contact information.

The findings of the survey were supplemented by a series of public hearings the

112. Numerous studies and surveys have since been published, identifying hundreds of agreements. In the late 1970's and early 1980's, however, no such information existed.

113. STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY, COMM'N ON STATE-TRIBAL RELATIONS (1981).

Commission conducted around the country at the same time.¹¹⁴ This series of hearings addressed one subject area that governments typically deal with at each hearing, organized around panels of tribal officials and their state counterparts who were invited to testify about their successful experience and agreements. Each hearing also presented panels of tribal and state officials who addressed the other side of the state-tribal relationship — existing needs, problems, failures and shortcomings. At each hearing, Commissioners probed for legitimate policy and legal concerns governments have for not coordinating and for keeping their system and services separate.¹¹⁵

The information collected in the survey and the hearings began to build the base of the Commission's knowledge, but it also became apparent that merely documenting and describing existing agreements was insufficient to fully understand the elements of successful state-tribal relationships. To supplement the ongoing research, Hanna therefore also conducted a number of case studies, examining in depth the policy context, legislative and case law foundations, the political process leading up to and sustaining their relationships and the present quality of the operating process.¹¹⁶ Of particular help were a study of the law enforcement agreement between the Colville Tribe and Okanogan County, a cigarette tax collection agreement between the Warm Springs Tribe and State of Oregon, child welfare arrangements between Quinault and the local juvenile court in Washington, and a land use and ownership agreement between the Lummi Tribe and Whatcom County.

Other, smaller exercises also provided a closer look and more revealing information about the more personal dynamics in the state-tribal relationship. The Commission, for example, convened a small group of representative state and tribal wildlife managers to discuss how they coordinated hunting and fishing regulation. The results were telling. During an initial period of posturing, officials from both sides staked out opposing positions — state officials seeing themselves as scientific professionals

114. Transcripts of all hearings are on file with the authors.

115. The Commission convened the first hearing in Washington, D.C. in late 1979, to gather information on coordinated law enforcement services. It heard testimony from one of the most successfully coordinated communities, the Warm Springs Tribe and Jefferson County, followed by the Navajo Tribe and the local state's district attorney and then the Yakima (now Yakama) Tribe. Later, a panel consisting of the Colville Tribe and the Menominee Tribe and the Wisconsin Attorney General's office talked about barriers to cooperation and the hearing concluded with a panel on the federal role, with representatives of the U.S. Department of Justice, the FBI, the BIA and the Senate Select Committee on Indian Affairs.

The second hearing, held in Phoenix, Arizona in February 1980, addressed tax collection agreements, and focused specifically on the experience with tax collection agreements in Oregon, and South Dakota. It included spirited debates with an Assistant Attorney General from Washington about the useful role of litigation. The third hearing, held in Olympia, Washington later that spring, addressed social service issues and spent considerable time learning about the complicated problem of tribal commitments to state mental health institutions and possible solutions. Other panels explained how states coordinated the provision of social services in Arizona, Washington and South Dakota.

The fourth hearing in Helena, Montana covered a number of environmental and wildlife management issues. In Helena, a primary focus was wildlife management, with testimony from state and tribal representatives explaining the status of planning in the aftermath of the *Boldt* decision. Other panelists talked about water quality planning in South Dakota, air quality regulation in Montana, and concluded with land use planning in Washington.

Each of the hearings was widely publicized and well attended, serving the dual purposes of gathering information and publicizing the notion of positive state-tribal relations.

116. Final Report, Grant No. 00804-T-81/01, Community Services Administration, Region X (December 1981). Copy on file with authors.

seeking to manage and conserve a resource and tribal officials viewing themselves as balancing those concerns with the traditional relationship of Indian people and nature, involving subsistence and religious uses and ideas. State officials tended to view tribal management as amounting to no regulations at all, while tribal officials viewed states as serving sports or commercial interests and denying Indians access for religious or subsistence purposes. By the session's conclusion, both sides relaxed from their initial hostility and began to view each other as fellow bureaucrats with many shared problems.¹¹⁷

2. *Compiling the results of the Commission's study: the Handbook on State-Tribal Relations*

By 1982, the Commission had gathered sufficient information, insights and knowledge that Deloria was able to compile the collective findings into the *Handbook on State-Tribal Relations*.¹¹⁸ While no single publication can ever address all the possible issues that might arise, the *Handbook* was designed to contribute to the understanding of both governments of the tribal-state relationship. First, the *Handbook* set the proper historical, legal and policy contexts. Second, the *Handbook* analyzed the purpose and function of certain critical governmental activities in an effort to identify those common interests that are better served by cooperation and coordination than competition and confrontation.

The *Handbook* also identified some of the pressures on state and tribal governments and institutions that generally contribute to either positive or negative relationships between them. Mostly, it offered those officials interested in beginning the process an analytical tool for defining the areas best suited to cooperative relationships – the range of process choices, the elements critical to each and the pitfalls to be avoided.

When published, the *Handbook* was among the first words on the subject. Its thoughtful treatment of the enormously complicated relationship has proved to be as insightful and helpful as when it was published and remains among the most useful resources available.

3. *Studies on particular issues*

Given that there was little documentation and even less understanding of the generic state-tribal relationship, the research efforts of the Commission at first were broadly focused. Within a few years, the Commission began to narrow its focus to a number of particular issues in more detail, adding the general knowledge it had acquired to the concerns occurring in specific subject areas and problems.

For example, the recently enacted Indian Child Welfare Act (ICWA)¹¹⁹ was the subject of intense interest and debate on the part of both state and tribal social service agencies at the time. The Act was passed in 1978 in response to the alarmingly high number of Indian children being removed from their homes by both public and private

117. COMM'N ON STATE-TRIBAL RELATIONS, HANDBOOK: STATE-TRIBAL RELATIONS, 24-26 (1984).

118. *Id.* at 4.

119. *See supra* note 60.

agencies. It set federal requirements for state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe, and in part, authorized states and tribes to enter agreements.¹²⁰

The Commission, with the help of AILC staff Tuthill and Mannes, conducted a public hearing on the ICWA in Lincoln, Nebraska in August, 1980, at which the common themes were complaints about inadequate funding, lack of intergovernmental communication and understanding and pervasive confusion. The hearing led to a subsequent project in which the Commission first compiled information on the implementation of the Act in all 50 states and then selected a number of agreements for case studies of successful agreement processes — Spokane Tribe and Washington, Minnesota Chippewa and Minnesota, and the Eastern Band of Cherokees and North Carolina.

Tuthill and Mannes extended this work in child welfare with four workshops and training programs for over 200 state, tribal, BIA and HIS personnel and officials regarding planning for permanency placements of Indian foster children, including training on state tribal agreement topics. As a measure of its success, another 500 had requested registration but could not be accommodated.¹²¹

Another major study was the Reagan administration's significant reworking of the distribution of federal domestic assistance spending. With congressional approval, 57 programs of federal domestic assistance were consolidated into nine block grants to states through the Omnibus Budget Reconciliation Act of 1981.¹²² The legislation however failed to consider the serious implications for tribal governments and the complications created for the state-tribal relationship.

The Act authorized the Secretary of the U.S. Department of Health and Human Services (HHS) to award grants directly to Indian tribes and organizations in five of the nine block grants.¹²³ In the majority of these block grants, however, funding levels were based either on grant awards previously received or on the same population basis as states, resulting in significantly reduced allocations for tribes in most cases. Tribal governments therefore often faced the choice of foregoing federal funds, applying for funding through the state or negotiating with the state for supplemental funds. Needless to say, state funding of tribal governments was far from certain, given the demands on the state to fund its own constituents.

This inadequate attention to the effects of block grant implementation on the federal-tribal and state-tribal relationships raised endless concerns at the time, the primary one being the lack of funding for tribal governments. Another, related concern was the strain placed on the state-tribal relationship by pitting states and tribes against

120. Section 109 of the Act specifically authorized states and tribes to enter agreements regarding the care and custody of Indian children and jurisdiction over child custody proceedings, including agreements for the orderly transfer of jurisdiction on a case-by-case basis and concurrent jurisdiction. Section 109 specifies that these agreements may be revoked on 180 days notice and that revocation would not affect any pending action or proceeding, unless the agreement provided otherwise.

121. *COMM'N ON STATE-TRIBAL RELATIONS, 1984 ANNUAL REPORT* (1984). Tuthill and Mannes were invaluable to the Commission's work on the implementation of the ICWA.

122. Pub. L. No. 97-35, 95 Stat. 357 (1981).

123. The five HHS block grants included Preventive Health and Health Services, Social Services, Education, Primary Care, Maternal and Child Health, and Community Services.

each other in competition for limited funds. In the fall of 1982, the Commission began a study of the implementation of the block grant program at the state-tribal level. The study documented the opinions of state and tribal leaders regarding their experience with block grants during the first year and documented the experiences where tribes had to collaborate with states to secure funding. The project culminated with a national conference in Albuquerque.¹²⁴

And finally, from the beginning, the coordination of law enforcement had been a primary concern of the Commission. It seems fitting then that the Commission's last publication in 1988 was the *Model State/Tribal Law Enforcement Agreement*.¹²⁵ At the BIA's request, Hanna compiled a model agreement for the Commission that discussed a variety of issues related to law enforcement agreements and provided multiple sample provisions for handling each one in a variety of ways. For example, instead of merely assembling a complete model agreement, there was an explanation of the issues involved — certification, standards, and liability, to name a few — and samples of provisions that other governments had developed. The model included a variety of provisions for cross-deputization and mutual assistance agreements, along with more limited issues of fresh pursuit, serving warrants, extradition, and prisoner housing. It also addressed general concerns such as costs, oversight, enforcement and maintenance of the agreement.

4. Workshops and training programs

While one of the major contributions of the Commission was to accumulate a body of knowledge regarding the state-tribal relationship, the Commission did not limit its activities to merely gathering information and analyzing it. In the early 1980's, the Commission began to develop curricula for workshops and training programs for particular subject areas. The issues varied widely, covering nearly every government function of states and tribes.

At times these workshops were requested by a particular tribe, state or county; at other times, they were part of a concentrated study by the Commission. At the request of tribal, state, and or local officials, the Commission would bring the parties together and provide counterpart officials who had confronted a similar problem and worked through it to their own solution. The workshops provided a framework and a program based on the Commission's accumulated information, offering a structured opportunity for the local parties to devise their own plan for resolving their issue.

For example, the Commission conducted a workshop for the Alaska State Troopers and the Tanana Chiefs Conference to explore problems relating to the operation of the Village Public Safety Officer Program in 'unincorporated' Alaskan Native villages organized under the IRA. The state troopers were faced with implementing their village public safety officer program in native villages. The Commission invited representatives from all the relevant players, and then arranged for resources for those to attend who had successfully coordinated their law enforcement systems — Warm Springs and Colville. The workshop was attended by 70 representatives and ended with the formation of a

124. AM. INDIAN LAW CTR & COMM'N ON STATE-TRIBAL RELATIONS, BLOCK GRANTS AND THE STATE-TRIBAL RELATIONSHIP (1984). Copy on file with authors.

125. MODEL STATE/TRIBAL ENFORCEMENT AGREEMENT, COMM'N ON STATE-TRIBAL RELATIONS (1988).

native committee and a commitment by the state officials to coordinate similar efforts.¹²⁶

Other workshops included a program designed to help the Navajo Tribe implement the recently enacted Indian Child Welfare Act through an intergovernmental agreement. Implementation was complicated of course because portions of the reservation lie in three states — Arizona, New Mexico and Utah. The Hopi Tribe requested a workshop to help the tribe and public school district coordinate local school board districts and requirements, and the Nez Perce Tribe requested a workshop to help it initiate joint ventures in land use planning, law enforcement, and water quality management.¹²⁷

Indian reservations are usually thought of as geographically, socially and economically isolated. Yet many of the most intractable intergovernmental relations issues in reservation governance arose from situations in which reservations were located on the borders of large metropolitan areas: the Salt River and Gila River Reservations surrounding the greater Phoenix area; the Wisconsin Oneida reservation bordering on Green Bay, Wisconsin (with its original boundary encompassing virtually the entire city); the Laguna, Isleta and Sandia Pueblos surrounding the city of Albuquerque, New Mexico; and numerous small tribes scattered throughout the densely-settled areas of western Washington. The Commission hosted a conference in Albuquerque, co-sponsored with the City of Albuquerque, called Towns and Tribes. It was attended by tribal chairmen and delegations, mayors, county and state officials, including at least one state attorney general. These officials discussed a host of coordination and jurisdiction issues, from the coordination of police patrols to the sites of waste dumps (later to be called “environmental justice”) to the location of schools and other public services, and, of great importance, planning and zoning.¹²⁸

Commission and Law Center staff collaborated on a curriculum called Towns and Tribes, based on the proceedings of that conference. That curriculum was pilot-tested at a subsequent widely-attended conference in Seattle, and was adopted by several civic groups for ongoing intergovernmental coordination efforts.

5. National Conference on the Indian Criminal Justice System¹²⁹

At the height of its existence, the Commission planned a national conference designed to pull together professionals from every aspect of the criminal justice system and at all four levels — tribal, state, local and federal. The conference examined the Indian criminal justice system from the perspective of intergovernmental cooperation, to highlight successful solutions to the fragmented system, as well as to raise the possibilities for improving the performance of the criminal justice system in those areas where coordination was lacking. As the conference convened in Denver in 1985, over 200 law enforcement professionals gathered for 3 days to focus on law enforcement in reservation communities.

There were several specific purposes for the conference: first, to publicize

126. Bureau of Indian Affairs, Final Report, Grant No. K51C1420G030 (September 1981). Copy on file with authors.

127. *Id.*

128. AILC Staff Marc Mannes was instrumental in planning and organizing the conference.

129. Transcripts of the conference panels are on file with the authors.

successful examples of communities where the Indian criminal justice system had been successfully coordinated, and where the effort was comprehensive — from arrest and detention to probation and parole; second, to gather criminal justice professionals from around the country who could address the range of problems inherent in the situation and identify those that could be readily solved through intergovernmental cooperation; and third, to encourage criminal justice officials to return to their local communities and establish coordinating committees, and begin an ongoing process of coordination. The conference combined panel presentations and informal working groups where conference attendees had an opportunity to share their own perspectives and develop recommendations

Because of the scope of the conference, the Commission appointed a steering committee consisting of the appropriate heads of the BIA's Judicial and Law Enforcement Services, the head of the FBI's Fugitive Crimes Unit, the staff director of the Senate Select Committee on Indian Affairs, a state and federal judge from New Mexico, a state attorney general, a tribal chairman, a county sheriff, a tribal judge, a tribal chief of police, and an assistant district attorney for New Mexico. With the steering committee's guidance, staff planned the agenda, the panel structures and potential speakers.¹³⁰

6. *Technical assistance.*

As with any national effort, staff provided technical assistance and information on a continuing basis to the broad spectrum of tribal, state and local officials and committees. On occasion, these involved significant effort. In 1985, for example, Deloria took the lead in promoting and facilitating an historic meeting between the leadership of the Navajo Tribe and the governors and attorneys general of Arizona, New Mexico and Utah. As a result of the meeting, an intergovernmental compact of all governments was signed.¹³¹

The Commission also developed a training program in Indian law for tribal officers and county and city police at the request of the New Mexico Law Enforcement Academy and worked with the office of the New Mexico governor to implement the 1984 amendments to the state's Joint Powers Agreement Act, which authorized public agencies to enter into agreements with tribes for the joint exercise of any common power.

At other times, Commission staff provided information on types of agreements or contacts, and organized meetings. Staff for example organized a meeting between the Montana Association of Counties and tribal leaders in Montana at their request and participated in a meeting between several tribes and local officials in Wisconsin concerning off-reservation hunting and fishing rights. During the life of the Commission, staff regularly spoke at national conferences, such as the Federal Bar Association Conference on Indian Law and the orientation program for newly-elected state attorneys

130. Staff also solicited sponsorships from national governmental associations, including, of course, the Commission's sponsoring organizations, but also the Conference of Western Attorneys General, Washington State Association of Sheriffs and Police Chiefs, and the National Criminal Justice Association.

131. COMM'N ON STATE-TRIBAL RELATIONS, 1985 ANNUAL REPORT (1985).

general conducted by the National Association of Attorneys General, and on request, at hearings before state legislatures and state commissions on Indian affairs.

CONCLUSION

By the late 1980's, the Commission quietly ended its efforts. The Commission had spent a decade studying the state-tribal relationship and bringing it to public attention as an acceptable alternative to what had been an exclusively adversarial approach in the past. During those years, government leaders at all levels had come to accept the possibility that they could establish a positive intergovernmental relationship as one of many options to governing their communities. In some states, it was reported, the political atmosphere changed, and rather than run on a platform of Indian-fighting, more and more candidates competed to see who could promise better relations with tribal governments.

From its inception, the Commission's founders never envisioned that it would continue indefinitely. In fact, when Deloria and Hanna had described the Commission's task to the Ford and Donner Foundations in their initial meetings and proposals, they assured them the sponsoring organizations had no desire for the CSTR to evolve into a permanent organization. As a practical matter, there was no desire to create a new national organization, perpetually competing for funding with other Indian organizations.

Several years after the Commission had concluded its work, NCSL reentered the field of state-tribal relations and eventually joined with NCAI again. The organizations unfortunately, however, chose to pursue a lesser effort at the national level rather than acknowledge and resume the work of their predecessor organization, the Commission on State-Tribal Relations.

Regardless of this, some of the concepts of the Commission have now been found in subsequent federal policy, such as the state-tribal compacts permitted in the Indian Gaming Regulatory Act. Since Congress and the courts have created a maze of overlapping authority in the governance of Indian reservations over the years, it may be that the most important legacy of the Commission is that at the local level, tribes, states, counties, and towns continue to explore ways of managing their policies and actions on Indian reservations more effectively through a variety of agreements, demonstrating the remarkable creativity of local people when they realize that they, not Washington, are responsible for their affairs in the first instance.