REFLECTIONS ON THE CHANGES IN INDIAN LAW, FEDERAL INDIAN POLICIES AND CONDITIONS ON INDIAN RESERVATIONS SINCE THE LATE 1960S

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I want to begin by thanking my longtime friend and colleague Bob Clinton for his too generous introduction, and to Bob and the faculty at the Law School for inviting me to give this lecture in honor of Judge Canby. I also want to thank my many friends and colleagues in the audience who have sat through water rights negotiations in Arizona with me over the past two decades for coming to listen to me once again, particularly in this context where I get to talk uninterrupted for an hour and they can only speak during the question period.

Lastly, I want to thank Judge Canby for several things. First, for your continuing scholarship in Indian law during your busy and long tenure on the Ninth Circuit. Your *American Indian Law in a Nutshell* volume is something most teachers of seminars in Federal Indian Law recommend to their students, as I do at Georgetown. You have also written an excellent article setting forth errors the Supreme Court has made in Indian law decisions, stretching back into the nineteenth century. I want to add two decisions you did not mention, cases in which the Court reversed decisions you wrote. In both cases, I believe you got it right and the Supreme Court got it wrong.

The first case, *Northwest Indian Cemetery Protective Ass'n v. Peterson*,[1] concerned a suit by Yurok and Karuk Indians to enjoin the Forest Service from constructing a road into the high country in northern California that would introduce logging trucks and timber cutting into the places where the Indians regularly practiced their traditional religion.[2] The Ninth Circuit held, in an opinion by Judge Canby, that since the Forest Service road would virtually destroy the Indians' ability to practice their religion, it constituted an impermissible burden on the free exercise of their religion under the First Amendment.[3] The Supreme Court reversed in an opinion by the Justice for whom this law school is named.[4] A strong indicator that Judge Canby was right and the Supreme Court was wrong is shown by a subsequent Act of Congress, the Religious Freedom Restoration Act,[5] which sought to broaden the Court's restrictive reading of the Free Exercise Clause because Congress concluded it interfered with everyone's practice of their religion, not just that of Indians.

In the second case, *United States v. Dann*,[6] the Ninth Circuit, in an opinion by Judge Canby, held that Western Shoshone aboriginal title had not been

1. 795 F.2d 688, 704 (9th Cir. 1986).
2. *Id.* at 689–90.
3. *Id.* at 692.
4. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988).
5. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).
6. 706 F.2d 919, 933 (9th Cir. 1983).

extinguished to portions of Nevada, despite an Indian Claims Commission judgment awarding the Western Shoshone a monetary judgment that had not yet been distributed.[7] The Supreme Court's reversal of that decision was especially painful to me because several years before Judge Canby's decision, the Temoak Band of Western Shoshone Indians had hired me as their attorney and sought to stay the Indian Claims Commission case the Band had brought in 1951 under a statute that set up a Commission to award tribes money damages (usually based on the nineteenth-century land values) for lands they had lost or other past wrongs done to them by the United States. When I studied the history of the Western Shoshone, I concluded they had never lost title to most of the lands the tribe had historically occupied. I thought this was so because their 1863 Ruby Valley Treaty was an unusual one—it described the boundaries of lands the Western Shoshone historically occupied, contained provisions allowing towns, mines, ranches, roads, mills and the like to be introduced onto those lands, but stated that Western Shoshone title would remain to the other lands until a reservation was established within the treaty protected area. No reservation was ever set aside in that area, so I concluded the Western Shoshone still held title to public lands that had not been occupied by non-Indians.

I tried unsuccessfully to persuade the Indian Claims Commission and then the Court of Claims to stay the suit for money damages to allow the Western Shoshone to pursue their claim to public lands within the area that had never been occupied by non-Indians—arguing that the Indian Claims Commission Act was never intended to pay Indians for lands they still owned. The Justice Department stubbornly resisted this, and I failed in my effort to persuade the Commission and Court of Claims to stay the proceedings to allow the Interior Department to consider the Western Shoshone's petition to return public lands within the area to them.[8] After the Supreme Court denied the Band's petition for a writ of certiorari, the Commission issued a final judgment.[9]

In the early 1980s, the Dann sisters—two Western Shoshone—were operating a ranch in the area protected by the Treaty that their family had occupied for many decades, and the United States filed suit to eject them as trespassers on public lands.[10] Judge Canby's opinion held that the Western-Shoshone still had title to these lands, generally adopting my reading of the Treaty, and that the Commission's judgment did not foreclose the Western

7. *Id.* at 933.

8. Temoak Band of W. Shoshone Indians v. United States, 593 F.2d 994, 996 (Ct. Cl. 1979).

9. *Id.* at 996.

10. 706 F.2d 919, 921 (9th Cir. 1983).

Shoshone title claim because the payment had not been distributed.[11] The Supreme Court reversed, holding that once the Commission's judgment was entered, the Western Shoshone title was extinguished.[12]

Once again, I think Judge Canby was right and the Supreme Court wrong. The Western Shoshone ultimately took their claim to the Inter-American Commission on Human Rights which ruled that the United States had unfairly deprived the Western Shoshone of their aboriginal lands—a decision that is not legally enforceable against the United States but in my view brings deserved shame on the decisions of the United States forcing compensation on the Western Shoshone for lands they had never lost.

I want to begin this lecture with a brief introduction about myself. I began my legal career in Indian law both as a law professor at UCLA Law School teaching Indian Law[13] and as one of a group of activist lawyers—attorneys on reservations and organizations like the Native American Rights Fund (NARF) and California Indian Legal Services (CILS)—that dedicated ourselves to prosecuting litigation to reform the laws that governed tribes and reservation Indians. In 1970, I joined the extremely bright, energetic and enthusiastic young lawyers at CILS and at NARF at its founding. I then served as the chief Indian lawyer at the Interior Department in the mid-1970s where my goal was to dramatically increase litigation, in which the United States acted as a trustee, to protect and advance Indian rights. Since 1976 I have been a partner in the private, Washington, D.C. law firm that Marvin Sonosky, Harry Sachse and I founded to represent the rights and interests of tribes and tribal organizations.

In the 1970s and thereafter, I and the other lawyers at NARF, Interior, CILS and our law firm were inspired by the successes of the prior generation of lawyers with the NAACP Legal Defense Fund who, from the 1930s through the 1960s, had systematically attacked the racial segregation of African-Americans through carefully planned litigation. Their efforts have consciously guided my colleagues and me in representing Indian tribes. One

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11. *Id.* at 927.

12. United States v. Dann, 470 U.S. 39, 50 (1985). In a subsequent decision, the Ninth Circuit, another opinion written by Judge Canby, in *United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989), sustained an individual Indian occupancy right of the Dann sisters to their ranch lands.

13. MONROE E. PRICE, LAW AND THE AMERICAN INDIAN, at viii (1st ed. 1973). In the late 1960s and early 1970s, there were only a few courses in Federal Indian Law at western law schools—the late Ralph Johnson's seminar at the University of Washington, Monroe Price's at UCLA, which I co-taught with him in 1972 and in 1973, and Judge Canby's here at Arizona State. Monroe Price published the first Indian law casebook in 1973, assisted considerably by his interactions with attorneys at California Indian Legal Services and the Native American Rights Fund who "helped [him] learn as they themselves learned." *Id.*

question I want to explore in this lecture is the extent to which litigation brought on behalf of tribes has contributed to reform of Indian law and to the substantially improved conditions on many Indian reservations over the past forty-five years.

I also had the good fortune to begin my career in Indian law at a time of considerable ferment and active pressure by Indians themselves to change the deplorable but longstanding conditions that existed on reservations in the late 1960s. Many tribal leaders at that time were also veterans of World War II and/or the Korean War, who had returned home determined to better conditions on their reservations and to resist the longstanding subordination of their tribes to federal bureaucracies.

Also, during the 1960s tribes became direct recipients of grants for Headstart, Neighborhood Youth Corps and Community Action programs from the federal "poverty program" initiated by the Kennedy and Johnson Administrations and administered by the Office of Economic Opportunity (OEO). Other federal agencies such as the Federal Housing Authority, Labor Department and Economic Development Administration also began in the 1960s to develop flexible grant making programs specifically for tribes. Tribes used this direct funding from OEO and other federal agencies—which bypassed the largely paternalistic Bureau of Indian Affairs (BIA)—to develop tribal governmental institutions serving the impoverished Indian communities on their reservations.[14] For the first time, OEO also funded attorneys who came to live and practice on some reservations to provide legal representation to tribes and Indians in litigation to reform the law, and many of these attorneys at CILS and elsewhere became treasured colleagues and collaborators of mine.

I. CONDITIONS ON INDIAN RESERVATIONS IN THE LATE 1960S AND TODAY.

A. Late 1960s.

In the late 1960s, conditions on virtually all reservations were simply terrible. Three problems stood out that particularly cried out for improvement.

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14. This history is admirably chronicled in a groundbreaking recent law review article. Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal Relations*: *Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553, 555–56, n.9 (2012).

First, dire poverty, which was generally extreme and grinding, was pervasive on all reservations. In the late 1960s, the yearly per capita income average of reservation Indians was half the national poverty level.[15] Unemployment rates were ten times the national average.[16] This was certainly true for the small Mission reservations I travelled to in southern California, like Morongo, when I assisted CILS in cases challenging substandard housing. Here in Arizona, development in Scottsdale virtually stopped at Pima Road, the western border of the Salt River Reservation. I also observed first hand the severe poverty on the Pyramid Lake Reservation in Nevada and numerous reservations in the Pacific Northwest.

Second, most reservations were also geographically isolated.[17] As was also largely true of most African-Americans at that time, reservation Indians were largely separated from American society, and historically had been treated by it as a subordinate group. In fact, as discussed in Part II, *infra*, a conscious purpose of much federal Indian policy before the late 1960s had actually been to separate Indians from mainstream society. The isolation of reservation Indians was also a product of racial discrimination that was endemic throughout the west.

Third, the federal Bureau of Indian Affairs (BIA) controlled many, perhaps most, actions by tribes and reservation Indians. In 1968, the *Harvard Law Review* summarized the situation on reservations by stating that "[a]lthough the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government . . . the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government."[18] As this Harvard Law Review study observed, BIA approval was generally required whenever a tribe entered into a contract, hired an attorney, leased lands, expended money or amended its constitution.[19] The BIA basically functioned as the "government of the Indians, and supplant[ed] . . . the private sector as well."[20] It managed and dispensed tribal trust funds, ran the schools

15. EDGAR S. CAHN, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA, at viii (1969). Dr. Edgar S. Cahn, later the Dean of Antioch Law School, where I taught Indian Law in the mid-1970s as an adjunct lecturer, published this landmark contemporaneous study of the Bureau of Indian Affairs in 1969.

16. *See* Warren H. Cohen & Philip J. Mause, Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1838–39 (1968).

17. *Id.*

18. *Id.* at 1820. This study by the *Harvard Law Review* was based on the first-hand observations by two of its student editors,Warren H. Cohen and Philip J. Mause, who had traveled through Indian country during the previous summer. Warren Cohen later served on the faculty here at Arizona State Law School.

19. *Id.* at 1820.

20. CAHN, *supra* note 15, at 7.

most Indians attended, and served as "the employment service, vocational and job training program . . . highway authority, housing agency, police department . . . [and] planning office" on reservations.[21]

Most productive lands on many reservations were not used by Indians, but leased to non-Indian farmers and ranchers at prices set by the BIA or used by non-Indian trespassers that the BIA neglected to remove.[22] The BIA's formal legal powers over tribes and reservation Indians and their property[23] enabled it to hold tribes, their elected officials and their members largely dependent on the good will and largesse of BIA officials.[24] In summary, "the exercise of power and administration of [federal Indian] programs by the BIA . . . ensure[d] that every effort by the Indian to achieve self-realization is frustrated and penalized; that the Indian is kept in a state of permanent dependency."[25]

Although in 1966, for the first time in nearly 100 years, President Johnson appointed an Indian as BIA Commissioner, the BIA remained a largely non-Indian civil service. Despite statutory provisions that required an employment preference for Indians in the BIA, virtually all senior-level positions and the great majority of middle-level positions in the BIA were in fact filled by non-Indians.[26] For example, in 1968, almost ninety percent of Indians employed by BIA earned less than $8,000 a year.[27] As late as 1972, after the Nixon Administration began more vigorous enforcement of statutes giving preference to Indians for all BIA jobs, over forty percent of BIA employees were still non-Indians.[28]

The *Harvard Law Review*'*s* 1968 study also concluded that at that time tribal sovereignty was largely "moribund."[29] And while the United States had an acknowledged trust responsibility to protect Indian lands, natural resources and tribes' right to self-government, the Justice and Interior

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21. *Id.* at 7. For example, the BIA prescribed "the number of cattle which may graze on a parcel of land . . . [u]nder certain circumstances the Bureau can sell timber on Indian land without the owners' consent," as well as leasing and granting right of way for roads or pipelines without consent of the landowner. *Id.* at 9.

22. *Id.* at 82–83, 88–89.

23. *See*, *e.g.*, *id.* at 117 ("The Indian cannot control his own property or manage his own private affairs without continuously securing the consent and approval of the Bureau of Indian Affairs.").

24. *Id.* at 117–23, 129–31.

25. *Id.* at 13; *see also* Cohen & Mause, *supra* note 16.

26. Cohen & Mause, *supra* note 16, at 1854. In the first case in which I represented a tribe, *Mescalero Apache Tribe v. Hickel*, I sought unsuccessfully to enjoin BIA from discharging Indian employees and retaining non-Indians with veterans' preference as a violation of the Indian preference statutes. 432 F.2d 956 (10th Cir. 1970).

27. CAHN, *supra* note 15, at 150.

28. Morton v. Mancari, 417 U.S. 535, 545 (1974).

29. Cohen & Mause, *supra* note 16, at 1821.

Departments acted only sporadically to bring litigation as a trustee to enforce such rights. This is not to say that before the late 1960s the Government never brought suit as a trustee to protect Indians rights; I shall discuss some historic exceptions below. However, the primary concern of Government lawyers in the 1950s and 1960s was defending the United States from lawsuits brought against it by tribes under the Indian Claims Commission Act passed by Congress in 1946, which allowed tribal suits against the United States seeking money damages for past breaches of trust by the Government.

B. Today.

The conditions on most reservations today are in many ways dramatically different from the late 1960s. First, severe poverty no longer persists on some (but unfortunately not all) reservations. Since 1970, the real per capita income of Indians on reservations more than doubled, increasing by 104%, in contrast to a 49% increase for all races in the United States.[30] And while average incomes of reservation Indians are still less than half of the national average,[31] per capita incomes on all reservations grew more than twice as fast as the national average during the 1990s, even on reservations without significant gaming operations.[32]

These economic gains, unfortunately, have not been evenly distributed: tribes with lucrative casino gambling operations, those located near major metropolitan areas and tribes in tourist destinations have seen far greater economic advances than the large, mainly rural reservations in the northern plains and southwest. On the Morongo, Tulalip and Salt River Reservations, for example, there are lucrative casinos and shopping malls where only poverty and high unemployment existed in the early 1970s. While casino gaming produces over $27 billion annually in tribal revenues, tribes also operate tourist destination spas, hotel and golf resorts, and a variety of manufacturing and service businesses.[33] Most tribes are no longer isolated from the mainstream American economy although this is less true of large rural tribes than for tribes near metropolitan centers.

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30. RANDALL K. Q. AKEE & JONATHAN B. TAYLOR, SOCIAL AND ECONOMIC CHANGE ON AMERICAN INDIAN RESERVATIONS 6 (2014).

31. *Id.* ("The per capita income of Indians on reservations . . . consistently falls far below that of Hispanics, African Americans, Asian Americans, and Indians living elsewhere."); *id.* at 28 ("[R]eservation per capita incomes are only 45% of the US average.").

32. JONATHAN B. TAYLOR & JOSEPH P. KALT, AMERICAN INDIANS ON RESERVATIONS 11 (2005).

33. AKEE & TAYLOR, *supra* note 30, at 10.

Another major change is that the BIA is no longer a non-Indian bureaucracy exerting control over Indians. As noted, the Nixon Administration began robustly to enforce statutes providing Indian preference for employment in the BIA that had been enacted decades before in the New Deal and earlier (but largely ignored), and successfully defended that policy transformation in the Supreme Court against a challenge of reverse racial discrimination in *Morton v. Mancari*,[34] a case that my close friend and law partner Harry Sachse argued for the United States. Today, the BIA is run and staffed almost entirely by Indians.

But even more importantly, tribes—rather than any federal agency—have taken control over governing their reservations, as I discuss in more detail in Part III.A, *infra*. This tribal control over reservation affairs has been supported by federal statutory changes—beginning with the Indian Self-Determination Act enacted by Congress in 1975—which authorize tribes to contract with federal agencies to administer many federal programs on their reservations and by a myriad of other statutes supporting tribal control over reservations that I describe in Part III.A, *infra*. This occurred as a result of a major change in Federal Indian policy that began in the late 1960s—in large part in response to the concentrated pressure from tribal leaders and reservation Indians to improve conditions on reservations—which I discuss next.

II. FEDERAL INDIAN POLICIES IN THE 1960S AND TODAY.

In March 1968, President Johnson issued the first ever Presidential Message to Congress on Indian Affairs. His Message "propose[d] a new goal for our Indian programs: A goal that . . . stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help."[35] President Johnson's Message established a National Council of Indian Opportunity (NCIO) in the Vice President's office, and the Council's membership included a number of recognized Indian leaders.[36] NCIO continued in the Nixon Administration, and contributed to the more detailed and comprehensive Message to Congress on Indian Affairs which President Nixon issued on July 8, 1970.[37] These two Presidential Messages—one by a Democratic President, the other by a Republican—represented a very dramatic departure from and rejection of virtually all prior Indian policies of

34. 417 U.S. 535, 535 (1974).

35. Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335 (Mar. 6, 1968).

36. *Id.*

37. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970).

the United States Government and have lasted today to guide the federal Indian policy of all future Administrations of both parties.

The Indian policy that immediately preceded these Presidential Messages—embraced by the Truman and Eisenhower Administrations and congressional majorities, particularly during the 1950s—had been to terminate the treaty and other special rights of tribes and the federal trust responsibility of the United States to protect and enforce these rights, seeking instead to forcibly assimilate Indians into the American melting pot.[38] Both the Johnson and Nixon Presidential Messages forcefully renounced that termination policy, which Congress had imposed on over seventy tribes in the 1950s and 1960s.[39]

President Nixon's Message also expressly reaffirmed the federal trust responsibility as a permanent legal obligation of the United States to tribes, which the United States could not discontinue unilaterally. The Message promised "that the . . . Government would continue to carry out its treaty and trusteeship obligations" [40] so long as a tribe itself wished. This was the first time that an Administration had ever adopted a policy that the federal-tribal relationship could be a permanent one, that tribes could have perpetual existence as governmental entities.

In addition, both Presidential Messages rejected the practice of prior decades where the Bureau of Indian Affairs had administered virtually all aspects of life on Indian reservations. The Nixon Message observed that "the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials" and denounced that practice as fostering "excessive dependence of the Federal government."[41] It proposed instead that tribes should control and govern affairs on reservations free of federal dominance, and sent legislation to Congress to accomplish that objective, which Congress enacted as I discuss in a moment.

As noted, promoting tribal self-determination has been the policy of every subsequent administration and bipartisan majorities in Congress. Looking back more than four decades later, this tribal self-determination policy seems

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38. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 94–95 (Nell J. Newton ed., 2005).

39. *Id.* at 95.

40. Special Message to the Congress on Indian Affairs, *supra* note 35, at 567.

41. *Id.* at 565–68. In rejecting the legacy of both the termination policy and overreaching federal paternalism, the Nixon Message proclaimed that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." The Nixon Message proposed legislation requiring BIA and Indian Health Service to contract most Indian programs to tribes, which as noted above Congress enacted in the Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–450e (2012).

almost self-evidently the correct one; it has certainly been extraordinarily successful in helping to change and improve conditions on reservations. But as of the late 1960s and early 1970s, these Presidential Messages constituted a remarkable, largely unprecedented,[42] break with the prior *two centuries* of federal Indian policy. Let me briefly describe the history of these prior federal Indian policies.

First, termination and other federal policies to assimilate Indians—sometimes abruptly and forcibly, sometimes more gradually—were dominant for most of the 100 years prior to 1968. For example, in the decades after the Civil War, members of Congress ostensibly sympathetic to the Indians sought to break up reservations into individually owned tracts called allotments and to convert Indians from hunters into subsistence farmers. This policy—which prevailed until the New Deal—was in part idealistically inspired to help Indians transition into becoming "normal" American citizens, which in those days meant farmers. In the 1950s, a similar federal policy subsidized the "relocation" of Indian families from reservations to cities where they could become urban industrial workers. Indeed, proponents of the termination policy in the 1950s also justified it by reference to idealistic aims—such as treating Indians equally, just like everyone else, free from the paternalistic yoke of the federal government.[43]

There is no question, of course, that termination, allotment and relocation policies seeking to assimilate Indians also clearly had much darker motivations—such as seizing Indian lands and resources and reducing federal spending on Indian programs. The allotment acts explicitly sought to provide cheap western lands to non-Indian settlers, and the actions that senators and congressmen who favored termination took in the 1950s to force tribes to accept termination plans as a condition of securing passage of other legislation those tribes needed, such as the payment of monies owed the tribe by the United States or other routine legislation benefitting the tribe, were especially odious.[44]

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42. There was one historic exception to the oscillation between the assimilationist and segregationist policies that I describe in this section. The Roosevelt New Deal program—embodied in the Indian Reorganization Act of 1934, 25 U.S.C. § 461–79—did encourage tribes to be self-governing and encouraged them to organize formal governmental structures with written constitutions. But this policy was in place for only a short time until World War II, after which the Truman and Eisenhower Administrations returned to the historic concept that Indians should be assimilated as quickly as possible and, indeed, that the federal trust responsibility toward them should cease as they were assimilated.

43. COHEN, *supra* note 38, at 94.

44. *See* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 63–77 (1969).

All policies that had assimilation as their principal goal viewed tribal existence and the federal trust relationship as a temporary phase, to be discontinued when Indians were fully ready to be assimilated into the American melting pot—a position expressly renounced by the Nixon Message. Most assuredly, no administration until the late 1960s ever proclaimed that federal policymakers should largely step aside and defer to Indian self-determination.

The alternative federal Indian policy in the two centuries prior to the late 1960s was even harsher and more distasteful than forcing assimilation on Indians. The premise of that policy was that Indians must be confined to separate existences on reservations because they were too different from white Americans to assimilate—too wild and savage, too racially inferior. The premise of this policy was that the rest of the country needed to impose a quarantine of sorts on tribes so as to be protected from reservation Indians, or at least needed to be separated from an inferior race. Thus, in the 1830s, especially in the Jackson Administration, eastern tribes were forcibly removed from their lands, despite treaty protections, to lands west of the Mississippi for the purpose of separating them from the dominant society. Forced marches resulted in Indian "trails of tears," on which about one quarter of the removed tribes' members died! In the decades after the Civil War, the remnants of the Union army made war on western tribes to capture and virtually imprison them on reservations; and some Apache Tribes were literally transported to prisons in Florida and Oklahoma to protect the dominant society from them. In 1913, the United States Supreme Court, in an opinion determining that Pueblos in New Mexico were Indians under the authority of the United States, stated the prevalent premise of this policy when it characterized Indians as "a simple, uniformed and inferior people . . . adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors."[45]

III. STATE OF FEDERAL INDIAN LAW IN THE LATE 1960S AND TODAY.

Federal Indian law in the late 1960s somewhat resembled a sculpture where basic contours had been etched, but where many details remained to be developed and finished and the final outcome of the project was in doubt. By contrast, in the past four and one-half decades, the sculpture that is Indian law has largely been chiseled. Questions that were open in the late 1960s—even such basic questions as whether tribes have criminal jurisdiction over

45. United States v. Sandoval, 231 U.S. 28, 39 (1913).

non-Indians—have been answered. As gaps in the law have been closed, Indian law has become a more stabilized subject area. Much of this has been the result of the case-by-case litigation handled by lawyers representing tribes and consciously seeking to reform Indian law.

As matters stood in the 1960s, the foundation of the sculpture that was Indian law had been chiseled by a master, Felix S. Cohen, the Shakespeare and Blackstone combined in our field, who had prepared a magisterial treatise synthesizing the basic case law, treaties, and legislation in the field as of 1940 which the Government published as Cohen's Handbook of Federal Indian Law.[46] Cohen's Handbook relied upon two landmark decisions written by Chief Justice Marshall in the 1830s involving the Cherokee Nation's resistance to efforts by the State of Georgia to extend its laws over the Nation's treaty protected lands with the State.[47] In these famous decisions, taken together, Chief Justice Marshall held that the treaties with the Cherokee established: (1) a trust responsibility between the Cherokees and the federal government—Marshall likened it to a guardianship;[48] (2) recognized the Cherokee as a self-governing society;[49] and (3) excluded the State of Georgia from any authority over Cherokee lands protected by the treaties.[50] Felix Cohen's treatise relied upon the Cherokee decisions and a handful of later cases as establishing that tribes possessed governmental authority as distinct political societies over their members and lands—except to the extent a tribe's power over a particular subject area had been diminished by Congress.

A. The Law on Tribal Governmental Authority.

1. In the late 1960s.

Today the proposition that tribes are distinct political societies possessing inherent sovereign powers seems so well established[51] that it is easy to forget that five decades ago that proposition seemed at least somewhat fragile and uncertain. The Marshall Court decisions on which Cohen relied were 140

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46. COHEN, *supra* note 38.

47. Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v Georgia, 30 U.S. 1 (1831).

48. *Cherokee Nation*, 30 U.S. at 18.

49. *Worcester*, 31 U.S. at 561.

50. *Id.*

51. Nevertheless at the oral argument of the Bay Mills case in December 2013, Justice Scalia inquired "Who made these Indian tribe[s] sovereign, was it Congress?" Transcript of Oral Argument at 55, Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014) (No. 12-515).

years old and the relatively few intervening decisions that followed them were several decades old and seemed potentially fragile.[52]

In the 1960s, for example, some Ninth Circuit decisions[53] addressing tribal sovereignty took a contrary view that tribes were simply appendages or instrumentalities of the federal government, lacking any real inherent government powers of their own.[54] The most significant Act of Congress in this time period, the Alaska Native Claims Settlement Act of 1971[55]—which dealt with the land and other rights of Alaska Natives—organized Native regions and villages into stock-holding corporations rather than tribes, eschewed "a lengthy wardship or trusteeship" with Alaska Natives, 43 U.S.C. § 1601(b), and abolished all but one existing Indian reservation in Alaska. The Alaska Native groups, counseled by eminent attorneys including former Justice Arthur Goldberg and former Attorney General Ramsey Clark, sought consciously to avoid the model of tribal reservations in the "lower 48," which they (understandably given conditions at that time) saw largely as an irredeemable failure.

2. The state of the law today.

a. Four key cases in the 1970s confirming tribal sovereign status.

Four Supreme Court decisions in the 1970s reaffirmed the foundational principles in Chief Justice Marshall's Cherokee decisions that tribes are "distinct political societ[ies]" that inherently possess governmental authority.

In *United States v. Mazurie*,[56] another case argued by Harry Sachse for the United States—the Supreme Court in a unanimous opinion written by Justice Rehnquist sustained the power of Congress to "regulate the sale of alcoholic beverages to tribal Indians"[57] on non-Indian owned land within the Wind River Reservation in Wyoming, and held that Congress could permissibly delegate some or all of that power to Indian tribes. Using this delegated

52. Morris v. Hitchcock, 194 U.S. 384 (1904); Talton v. Mayes, 163 U.S. 376 (1896), Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation, S.D., 231 F.2d 89 (8th Cir. 1956); Buster v. Wright, 135 F. 947 (8th Cir. 1905).

53. Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) (tribal courts were so pervasively regulated by BIA that it was in effect a federal instrumentality); *see also, e.g.*, Robert W. Oliver, *The Legal Status of American Indian Tribes*, 38 OR. L. REV. 193, 231 (1959) (arguing that tribal sovereignty "has been pure legal fiction for decades").

54. The *Harvard Law Review* study in 1968 also concluded tribal sovereignty was largely moribund. Cohen & Mause, *supra* note 16, at 1821.

55. 43 U.S.C. §§ 1601–1624.

56. 419 U.S. 544 (1975).

57. *Id.* at 554.

authority, the tribes at Wind River (counseled by my friend, mentor and future law partner Marvin Sonosky) had adopted an ordinance regulating the sale of liquor by a bar operated by non-Indians on the reservation.[58] Reversing a Tenth Circuit decision holding that an Indian tribe was merely a "voluntary association" which cannot exercise governmental authority over persons who do not belong to it and cannot participate in the tribal government, the Court in *Mazurie* held "that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," and that tribes are a "separate people" with power to regulate their internal and social relations, including those with non-Indians.[59] While the Court in *Mazurie* declined to discuss the *extent* of the tribe's authority to regulate the distribution and use of liquor, the above language, confirming the existence of such governmental power as being inherent in the tribe, became a staple of subsequent Supreme Court holdings on tribal governmental authority.

Three years later, in *United States v. Wheeler*,[60] the Court held that successive criminal prosecutions of a tribal member for a criminal offense by a tribe and by the United States did not impermissibly subject the offender to double jeopardy under the Constitution, just as successive prosecutions by a state and the United States do not constitute double jeopardy. Speaking for a unanimous Supreme Court in *Wheeler*, Justice Stewart concluded that tribes' governmental powers (like a state's) are based on a tribe's inherent sovereignty, and not a delegation of authority from the United States.[61] The Court stressed in *Wheeler*, as it had in *Mazurie*, that tribes are "unique aggregations . . . possessing attributes of sovereignty over both their members and their territory,"[62] and that tribes have an interest in reservation law enforcement that is separate and distinct from that of the federal government.[63]

Two months later, in *Santa Clara Pueblo v. Martinez*,[64] the Supreme Court sustained a tribe's authority to deny membership "to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe."[65] Echoing *Mazurie*

58. *Id.* at 547–48.
59. *Id.* at 557.
60. 435 U.S. 313 (1978).
61. *Id.* at 322–23.
62. *Id.* at 323 (citation omitted).
63. *Id.* at 331–32.
64. 436 U.S. 49 (1978).
65. *Id.* at 51, 72. While it held that the tribe's officials were not immune and could be sued under *Ex Parte Young*, the Court interpreted the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), which provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws", as *not* impliedly

and *Wheeler*, the Court held that the tribe as a government possessed governmental immunity from being sued, stating that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign power."[66]

As in *Wheeler* and *Mazurie*, the Court based its *Santa Clara Pueblo* decision on the long-established recognition of tribes as "distinct, independent political communities, retaining their original natural rights in matters of local self-government,"[67] The Court also relied upon the intent of the Congress that enacted the Indian Civil Rights Act and other modern federal Indian statutes "to promote the well-established federal 'policy of furthering Indian self-government.'"[68]

It is true, of course, that a third decision in 1978, *Oliphant v. Suquamish Indian Tribe*,[69] held that although "Indian tribes . . . retain elements of 'quasi-sovereign' authority,"[70] they had been implicitly divested of the power to exercise criminal jurisdiction over non-Indians "absent affirmative delegation of such power by Congress."[71] In 1990, the Court extended *Oliphant* to preclude tribes from exercising jurisdiction over Indians who were members of other tribes in *Duro v. Reina*.[72] But significantly, while the Court's decisions categorically precluded all tribes from exercising criminal jurisdiction over non-Indians and Indians who were members of other tribes unless Congress acted, the Court in *Oliphant* and *Duro* accepted the analytical framework of the Marshall Cherokee decisions, and the more contemporaneous *Mazurie*, *Wheeler* and *Martinez* decisions, that tribes possessed inherent sovereign powers of self-government.[73]

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authorizing a civil action in federal court to enforce the Act's substantive provisions against the tribe or its officers. *Id.* at 51–52, 59. The Court in *Santa Clara Pueblo* noted that one provision in the Act expressly authorized federal court review of tribal criminal convictions by a writ of habeas corpus, and determined not to extend that express provision to imply review of other tribal decisions in civil actions. *Id.* at 58, 60, 66–68.

This outcome was contrary to decisions in every federal circuit that had considered the question. It rested in part on groundbreaking analysis of the legislative history of the Indian Civil Rights Act by my friend and colleague Alvin Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 1 (1975), who also was a leading lawyer from Seattle in the Indian fishing rights cases of the 1970s. *See* discussion *infra* Part III.C.2.

66. *Santa Clara Pueblo*, 436 U.S. at 58 (citation omitted).
67. *Id.* at 55 (quoting Worcester v. Georgia, 31 U.S. 515, 559 (1832)).
68. *Id.* at 62–64 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).
69. 435 U.S. 191 (1978).
70. *Id.* at 208.
71. *Id.*
72. 495 U.S. 676 (1990).
73. *Oliphant*, 435 U.S. at 204; *Duro*, 495 U.S. at 684–85.

Despite the framework of these prior cases, the *Oliphant* Court rejected the Tribe's argument that a tribe's inherent sovereign powers exist unless expressly divested by Congress.[74] Although the Court in *Oliphant* could not discover any treaty or congressional statute that had expressly proscribed tribes from exercising criminal jurisdiction over non-Indians, it relied on a number of treaties, statutes and executive actions over the previous two centuries that the Court concluded reflected a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians", for crimes they committed on reservations.[75] The *Oliphant* Court held that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[76] In rejecting the argument of tribal lawyers (which I supported and had helped to develop)—that tribal governmental powers extended over all subject areas and persons on reservations unless Congress had expressly eliminated or diminished that tribal governmental power—the Court in *Oliphant* essentially balanced its recognition of tribal sovereignty in prior decisions (extending from *Mazurie*, *Wheeler*, and *Martinez* back to the Cherokee cases) with other considerations, such as concern for due process rights of non-Indians in tribal courts.[77] While rejecting our more absolute conception of tribal sovereignty, the Court nonetheless recognized that tribes did have significant sovereign power, as it had in *Mazurie, Wheeler* and *Martinez*.[78]

b. Subsequent Supreme Court decisions on tribal sovereign authority.

Most Supreme Court cases concerning tribal governmental authority in the years after these four bedrock decisions in the 1970s have focused on the extent of tribal civil authority over non-Indians on reservation lands. The overall outcome of cases in this area has been checkered, but like *Oliphant*, the decisions all agree that tribes have substantial governmental powers.

Several Supreme Court decisions in the 1980s upheld tribal authority to tax non-Indians engaging in commercial transactions with tribes on reservations, *Washington v. Confederated Tribes of Colville Indian Reservation*,[79] or leasing tribal trust lands, *Merrion v. Jicarilla Apache*

74. *Oliphant*, 435 U.S. at 208.
75. *Id.* at 206.
76. *Id.* at 210; *accord*, *Duro*, 495 U.S. at 692–94.
77. *Oliphant*, 435 U.S. at 208–11.
78. *Id.* at 208–09.
79. 447 U.S. 134 (1980).

Tribe,[80] *Kerr-McGee Corp. v. Navajo Tribe of Indians*.[81] The Court also sustained the authority of tribes to regulate hunting and fishing by non-Indians on tribal lands and barred state regulation of those activities in *New Mexico v. Mescalero Apache Tribe*.[82] Two other decisions, *National Farmers Union Insurance Co. v. Crow Tribe*[83] and *Iowa Mutual Insurance Co. v. LaPlante*,[84] required the exhaustion of tribal court remedies as a prerequisite to challenging tribal civil jurisdiction over non-Indians in federal courts.

While these decisions from the 1980s remain good law, a number of more recent decisions have limited the extent of tribal civil jurisdiction over non-Indians on reservation lands in various factual contexts without undermining the principles of inherent tribal sovereign authority derived from the Cherokee decisions of the Marshall Court or the modern decisions in *Mazurie*, *Wheeler*, *Santa Clara Pueblo* and *Oliphant*.

Thus, in what the Court has considered its "pathmaking" decision in this area, *Montana v. United States*,[85] the Supreme Court held that, while a tribe had inherent sovereign authority to prohibit or regulate non-Indian hunting and fishing on tribal lands,[86] its authority to do so on reservation lands that had been alienated in fee to non-Indians pursuant to acts of Congress opening the reservation to non-Indians had been implicitly divested, like the criminal jurisdiction over non-Indians in *Oliphant*.[87] Emphasizing, however, that—unlike criminal jurisdiction—tribal inherent sovereign civil authority has not been categorically divested, the Court in *Montana* concluded that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands"[88] The Court recognized two forms of inherent sovereign power that became known as the *Montana* exceptions. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[89] Second, a tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians . . . that . . . threatens or has some direct effect on the political

80. 455 U.S. 130 (1982).
81. 471 U.S. 195 (1985).
82. 462 U.S. 324 (1983).
83. 471 U.S. 585 (1985).
84. 480 U.S. 9 (1987).
85. 450 U.S. 544 (1981).
86. *Id.* at 557; *accord* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
87. *Montana*, 450 U.S. at 563–64.
88. *Id.* at 565.
89. *Id.*

integrity, the economic security, or the health or welfare of the tribe."[90] On the facts before it, the Court in *Montana* concluded that neither of these exceptions applied. Non-Indian hunters and fisherman on fee lands had not entered into consensual commercial arrangements with the tribe or its members. Nor did their activities threaten the tribal interests protected in the second *Montana* exception; there was no allegation in the complaint that non-Indian hunting and fishing imperiled the subsistence or welfare of the Tribe.[91]

In recent decades, subsequent decisions of the Supreme Court dealing with particular issues concerning tribal civil authority over nonmembers have increasingly applied the *Montana* framework to resolve the question before the Court. Thus, for example, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation,* a fragmented and sharply divided Court issued three separate opinions.[92] The result of these opinions was that a Court majority sustained the Yakima Tribe's power to enforce its land use ordinance over non-Indian owners of fee lands in a largely pristine forested part of the Reservation where most tracts were owned by Indians. The Court reasoned that land uses in that area could affect the health and welfare of the tribe and its members, and thus were encompassed by *Montana*'s second exception. A different majority of the Court held that the Tribe could not enforce its land use ordinance against non-Indian fee land owners in another portion of the reservation where substantial amounts of land were owned in fee by non-Indians.

In *Strate v. A-1 Contractors,*[93] the Court specifically described *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers,"[94] and applied the two *Montana* exceptions to determine whether a tribal court had jurisdiction to adjudicate a tort claim arising out of an automobile accident by one non-Indian against another non-Indian that occurred on a state highway crossing a reservation. Although the state highway in *Strate* was located on a right-of-way granted over tribal lands with the Tribe's consent, the Supreme Court concluded that *Montana* governed because it considered the right-of-way "equivalent for nonmember governance purposes, to alienated non-Indian land."[95] The Court concluded, for example, that the Tribe had retained "no gatekeeping right" to exclude persons from the public highway.[96] The Court then held that the first *Montana*

90. *Id.*
91. *Id.* at 566.
92. 492 U.S. 408, 409–68 (1989).
93. 520 U.S. 438, 438 (1997).
94. *Id.* at 445.
95. *Id.* at 454.
96. *Id.* at 456.

exception did not apply because, while the defendant had a subcontract to work on a tribal construction project, the injured non-Indian plaintiff was not a party to the subcontract and the Tribe had no connection to the accident. The Court also ruled that the second *Montana* exception did not apply because tribal court adjudicatory jurisdiction was not essential to tribal self-government, reasoning that in these circumstances where no Indian was involved in the accident, the Tribe's interest was minimal.[97] The Court recognized that careless driving on a public highway on the reservation implicated concerns of public safety, but held that this factor alone did not invoke the second *Montana* exception,[98] reasoning that sustaining tribal court jurisdiction in these circumstances would allow the exception to "shrink the rule."[99] The Court determined that the exercise of tribal court jurisdiction to adjudicate a case involving only non-Indian parties was "not necessary to protect tribal self-government," and observed that state courts were available to adjudicate the claims arising out of injuries on a state highway.[100] Notably, the Court did not question the authority of tribal police to patrol the highway.[101]

In another recent case, *Nevada v. Hicks*,[102] the Court considered whether a tribal court has jurisdiction to adjudicate a case brought by a tribal member against state game wardens in their individual capacities for entering the members' home on reservation trust lands in the process of investigating the crime of hunting protected species of sheep outside the reservation. No evidence of unlawful hunting was discovered, and the tribal member plaintiff filed a suit claiming the state wardens had damaged his mounted sheep-heads in their investigation.

As in *Brendale*, the Court in *Hicks* was sharply divided and issued several opinions. The Supreme Court's majority opinion in *Hicks*, by Justice Scalia, determined that the Tribe had no authority to regulate the activities of state game wardens investigating an alleged crime committed by an Indian outside the reservation, a crime over which the State had jurisdiction based on the Court's prior precedents.[103] The basis for this conclusion was that such tribal authority was "not essential to tribal self-government."[104] The Court found the State's interest in investigating the off-reservation crime "considerable,"

97. *Id*. at 458–59.
98. *Id.*
99. *Id.* at 458.
100. *Id*. at 459.
101. *Id*. at 456 n.11.
102. 533 U.S. 353 (2001).
103. *Id.* at 362 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973)).
104. *Id*. at 364.

and concluded it did not impair the tribe's self-government.[105] Accordingly, under the circumstances, the Court held that the trust ownership status of the lands on which the tribal member lived did not preclude the State's authority.

The Court's opinion in *Hicks* also rejected the arguments by the Tribe and the United States that the tribal court, as a court of general jurisdiction, could entertain federal claims under 28 U.S.C. § 1983. The Court held that the tribal court could not exercise adjudicatory jurisdiction beyond the Tribe's legislative jurisdiction, expressing concern that Section 1983 provided no right of removal of such claims to federal court.[106]

A concurring opinion in *Hicks* by Justice Souter (joined by Justices Kennedy and Thomas) expressed concern that "there is no effective review mechanism in place to police tribal courts' decisions on nontribal matters, since tribal-court judgments based on state or federal law can be neither removed or appealed to state or federal courts," thus creating "a substantial disuniformity in the interpretation of state and federal law."[107] Justice Ginsburg issued a separate opinion observing that the Court had left open the question of whether tribal courts could exercise jurisdiction over civil suits against non-Indian defendants. Justice O'Connor issued a concurring and dissenting opinion (joined by Justices Stevens and Breyer) that would have sustained tribal court jurisdiction over the case because the locus of the investigation was on trust lands, but would have permitted expedited federal court review of a tribal court decision rejecting the wardens' claims of official immunity.

The latest word by the Supreme Court on tribal civil jurisdiction over non-Indians is *Plains Commerce Bank v. Long Family Land and Cattle Co.*,[108] which involved a suit by tribal members in the Long family against the Bank arising out of a series of commercial loans by the Bank connected with the Longs' cattle operations on reservation lands. During this process, the Longs had deeded to the Bank some fee land they owned on the Reservation subject to a lease back to them, with an option to repurchase the land at the end of the lease at a fixed price.[109] When the lease expired and the Longs were unable to purchase the fee land from the Bank, the Bank sold the lands to others.[110]

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105. *Id.* at 359 n.3 (concluding that Montana's first exception did not apply because the State's obtaining a tribal court search warrant validating its state court warrant did not qualify as a "consensual relationship," which the Court saw as limited to private commercial or other arrangements).

106. *Id*. at 368.

107. *Id*. at 385.

108. 554 U.S. 316 (2008).

109. *Id.* at 321.

110. *Id.* at 322.

The Longs refused to vacate the lands and brought suit in tribal court against the Bank. The Bank claimed the tribal court lacked jurisdiction over it.[111]

By the time the case reached the Supreme Court, the only remaining claim against the Bank was that it had discriminated against the Longs by offering to sell the lands to others on more favorable terms.[112] The Longs sought to enjoin the sale as the remedy for the claimed discrimination.[113] The majority of the Court, in an opinion by Chief Justice Roberts, held that the tribal court had no jurisdiction to enjoin the Bank from selling land it owned in fee simple on the Reservation.[114] The Court reasoned that the Tribe lost jurisdiction over the sale of alienable reservation land when it passed out of trust status.[115] Applying *Montana* because of the non-Indian fee status of the land, the Court reasoned that the first "consensual relations" exception in *Montana* was limited to regulation of uses of reservation land that implicated the Tribe's sovereign interests, and did not extend to preventing sale of lands the Bank owned in fee.[116] The Court observed, by contrast, that, under the *Montana* exceptions, the Tribe could protect its members from noxious non-Indian conduct on fee land that threatens tribal welfare or security.[117] The Court also acknowledged that tribal sovereign interests were greater on trust than fee land, and favorably cited cases where the Court had sustained tribal jurisdiction to tax non-Indian commercial activities on Indian owned reservation lands[118] and regulate non-Indian hunting and fishing on tribal lands.[119] The Court also favorably cited *Brendale*, the one case where the Court majority had sustained tribal authority to zone uses of non-Indian fee land surrounded by tribal forest lands.[120]

Taken together, the Court's cases on tribal civil jurisdiction over non-Indians since *Oliphant* sustain the template of the Cherokee cases (also followed in *Oliphant*) that tribes are governmental entities, but the cases apply the principles of tribal sovereignty in particular fact situations that reject broad all-or-nothing principles—either categorically precluding all tribal civil authority (as the Court did for criminal jurisdiction in *Oliphant*)

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111. *Id.*
112. *Id.* at 320.
113. *Id.* at 326.
114. *Id.* at 330.
115. *Id.* at 330–31.
116. *Id.*
117. *Id.* at 336.
118. *Id.* at 332 (citing Washington v. Colville Confederated Tribes, 447 U.S. 134, 152–53 (1980); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); and Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985)).
119. *Id.* at 333 (citing New Mexico v. Mescalero Apache, 462 U.S. 324, 337 (1983)).
120. *Id.*

or upholding civil authority whenever Congress has not affirmatively prohibited it. In the absence of specific guidance from Congress on the extent of tribal civil jurisdiction over non-Indians, the Court appears to be fashioning federal common law, and has chosen to use the *Montana* standards to guide that process, particularly with respect to activities on fee lands. Each case has turned on its particular facts within the general framework of recognizing tribal sovereignty and weighing its importance in the circumstance of the case against other factors. In the specific circumstances of most recent cases, the Court has determined that the tribal interest was outweighed by countervailing concerns such as: (1) property rights on non-Indian landowners (as in *Plains Commerce Bank* and *Brendale*), (2) state regulatory authority (as in *Hicks*), or (3) concerns about the effective administration of justice (as in *Hicks* and *Strate*).

c. Implementation of congressional statutes furthering the self-determination policy.

While the case-by-case litigation described above has unquestionably provided a foundation for anchoring tribal self-government and facilitating the growth of tribal governmental institutions in the past four decades, the most important factor in establishing tribal sovereign authority has been actions by tribes themselves implementing innovative federal legislation and programs established during the past forty years in furtherance of the self-determination policy.

First, tribes have dramatically improved their governmental institutions and increased their control over their reservations by contracting to operate federal programs in areas such as human services, education, healthcare, housing and transportation. The Indian Self-Determination and Educational Assistance Act of 1975 mandated that the BIA and Indian Health Service (IHS) contract with tribes to operate programs under those agencies, including contracts with tribes to administer BIA schools and IHS clinics on reservations,[121] policies strengthened by the Indian Healthcare Improvement Act of 1976[122] and the Tribally Controlled Schools Act of 1988.[123] The Tribal Self-Governance Act of 1994 allowed tribes to obtain substantial additional flexibility in administering BIA and IHS programs by entering into self-governance compacts.[124] Later statutes authorized the U.S. Department of Housing and Urban Development (HUD) and the Department of

121. 25 U.S.C. §§ 450–458 (2012).

122. *See* 25 U.S.C. §§ 1601–1603 (2012).

123. *See* 25 U.S.C. §§ 2501–2511 (2012).

124. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 458cc, 108 Stat. 4250 (1994).

Transportation (DOT) to contract with tribes to control the operation of most federal housing and road programs on reservations.[125]

Tribal entities operating all these federal programs generally enjoy liability coverage under the Federal Tort Claims Act and access to sources that supply the federal government at preferential prices. Overall, tribal governments and intertribal entities administer several billion dollars a year of federal programs pursuant to contracts under these statutes. For example, over half the federal budget of IHS is administered by tribes pursuant to contracts with IHS. As a result, tribes or tribal organizations largely manage the provision of most health, housing, social service, law enforcement, and many other federal programs on their reservations.

In addition to the contracting statutes, Congress has amended most federal environmental statutes to allow tribes to be treated like state governments in setting matters like air, water, and safe drinking water standards and administering other environmental programs on reservations, and the Environmental Protection Agency (EPA) has granted many tribal applications to do so.[126] Congress enacted these statutory amendments after a watershed Ninth Circuit decision written by Judge Canby sustaining the EPA's policy that states have no authority to administer federal environmental programs on reservation lands owned by tribes or individual Indians.[127] While federal environmental statutes commonly establish minimum federal standards for a subject area—such as air, water, and drinking water quality—and allow states to administer statewide programs to administer those (or stricter) standards, the EPA established a policy in the Carter and Reagan Administrations of declining to recognize state authority to administer these programs on reservations.[128] In *Department of Ecology*, Judge Canby accorded deference to that EPA policy, observing that it was consistent with the normal rule dating back to the Cherokee cases precluding state jurisdiction over reservation Indians.[129] In 1986, the year after Judge Canby's decision, Congress began to amend federal environmental statutes

125. 25 U.S.C. § 4111 (2012) (consolidating most Indian housing programs for Indians and allowed tribes or tribally designated housing entities to receive block grants to operate those programs); 23 U.S.C. § 202(d)(5)(D) (2012), *amended by* 23 U.S.C. § 202(b)(7)(D) (2012) (in the transportation field, under the SAFETY-LU Act of 2005, Pub. L.109-59, 23 U.S.C. § 202(d)(5)(D), over 100 tribes have in recent years contracted with the Federal Highway Administration to construct and operate roads on or connecting to their reservations).

126. Clean Air Act, 42 U.S.C. § 7601(d)(2) (2012); 42 U.S.C. § 300j-11(a)(1) (2012); Clean Water Act, 33 U.S.C. § 1377(e) (2012), *amended by* Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193.

127. *See* State of Wash., Dep't of Ecology v. U.S. Env't Prot. Agency, 752 F.2d 1465, 1472 (9th Cir. 2012).

128. *Id.* at 1471.

129. *Id.* at 1469–70.

authorizing the EPA to treat tribes as states. As a result, tribes have developed substantial environmental enforcement programs and governmental infrastructure in this area.[130]

Congress has also implemented the self-determination policy by defining the federal responsibility to tribes in other key areas of Indian policy, such as human services,[131] law enforcement,[132] administration of justice,[133] and education.[134] With respect to tribal law enforcement and the administration of justice, Congress specifically altered the result of a Supreme Court decision in *Duro v. Reina*, holding that tribes' powers of inherent sovereignty did not include the authority to try crimes committed on their reservations by Indians who were members of other tribes.[135] More recently, Congress created an exception to *Oliphant* by amending the Violence Against Women Act to authorize tribes that meet standards set in the Act to exercise criminal jurisdiction over certain non-Indians who perpetrate crimes of domestic violence against Indian women on reservations.[136]

Moreover, in recent years, Congress has consistently recognized the federal obligation to protect and preserve reservation lands and trust resources in the National Historic Preservation Act,[137] American Indian Agricultural Resource Management Act,[138] National Indian Forest Resources Management Act,[139] and the American Indian Trust Fund Management

130. *See* 25 U.S.C. §§ 1601–1603 (2012)

131. 25 U.S.C. § 1901 (2012); 25 U.S.C. § 3201 (2012).

132. 25 U.S.C. § 2801 (2012).

133. 25 U.S.C. § 2801 (2012); 25 U.S.C. § 3601 (2012).

134. 20 U.S.C. § 7401 (2012) (Congress has also addressed the right of Indian tribes to be involved in the education of their children in amending the Indian Education Act: "It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The Federal Government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally related academic needs of these children."); Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518; No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 701, 115 Stat. 1425; *see also* 25 U.S.C. § 2501(b) (2012) (expressing "the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children through the establishment of a meaningful Indian self-determination policy for education that will deter further perpetuation of Federal bureaucratic domination of programs").

135. Duro v. Reina, 495 U.S. 676 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193, 200 (2004).

136. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 55.

137. 16 U.S.C. § 470 (2012).

138. 25 U.S.C. § 3701(2) (2012).

139. 25 U.S.C. § 3101(2) (2012).

Reform Act.[140] Congress has also acted to protect significant aspects of Indian culture. The Native American Graves Protection and Repatriation Act (NAGPRA)[141] sets forth a legal framework for the ownership and repatriation of Native American human remains and funerary and cultural objects, "reflect[ing] the unique relationship between the Federal Government and Indian tribes . . . ."[142] NAGPRA places ownership and control of Indian human remains, funerary objects, sacred objects, and objects of cultural patrimony from federal or tribal lands to lineal descendants and Indian tribes.[143] The Native American Languages Act specifically acknowledges that "the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages."[144]

B. The Law Concerning State Authority over Reservations.

1. In the Late 1960s.

With respect to state authority over Indian reservations, as noted above, the Cherokee decisions written by Chief Justice Marshall in the 1830s held that states' authority over reservations had been preempted by exclusive federal control over relations with Indians, even where non-Indian activities were involved.[145] Cohen's Handbook relied on these decisions—amplified in later court decisions—for the proposition that states had no regulatory or adjudicatory jurisdiction over Indians on their federally protected lands—largely on the ground that such jurisdiction would interfere with tribal governmental authority preserved in treaties with the United States.

In the late nineteenth century, the Court modified the principles of the Cherokee cases concerning state jurisdiction over non-Indians on reservations, holding that states had exclusive jurisdiction to try non-Indians for crimes on reservations with non-Indian victims,[146] and over civil matters

140. 25 U.S.C. § 4041(3) (2012).

141. 25 U.S.C. §§ 3001–3013 (2012).

142. § 3010.

143. § 3002(a)(1) (NAGPRA vests ownership or control of Native American human remains and objects that are excavated or discovered on federal or tribal lands in lineal descendants of the Native American if ascertainable); § 3002(a)(2)(A)–(B) (if the descendants cannot be ascertained, ownership or control of the items will be vested in the Indian tribe on whose tribal land the objects or remains were discovered or to the tribe that has the closest cultural affiliations).

144. 25 U.S.C. § 2901(1) (2012).

145. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 558 (1832).

146. *See, e.g.*, United States v. McBratney, 104 U.S. 621, 621–22 (1881).

on reservations involving only non-Indians where Indians and tribes were not affected.[147] However, at the same time, the Court steadfastly precluded state jurisdiction over Indians on reservation lands.[148]

In 1959, the Supreme Court's unanimous decision in *Williams v. Lee*[149] robustly adhered to these principles by precluding a state court from exercising jurisdiction to adjudicate a non-Indian creditor's claim against a reservation Indian.[150] The Court in *Williams* rested its decision on, and specifically reaffirmed, the principles of Chief Justice Marshall's *Worcester v. Georgia* decision, which it described as "one of his most courageous and eloquent opinions."[151] The Court in *Williams* summarized prior case law with the phrase: "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[152]

However, three years after *Williams*, the Supreme Court in *Organized Village of Kake v. Egan*,[153] held that the State of Alaska *could* regulate the operation of fish traps for catching salmon by two Alaskan native villages. The Court in *Kake* cautioned that "[t]he relation between the Indians and the States has by no means remained constant since the days of John Marshall,"[154] and that "the general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia* . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations."[155] The Court in *Kake* specifically indicated that the language in *Williams* that had shielded tribes from state jurisdiction might possibly also be used as a sword for states, observing that "even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government . . . ."[156]

In the late 1960s and early 1970s, many states were actively hostile to tribes exercising governmental authority independent of state control. These states seized on this language in *Kake* to assert that a state *could* regulate or tax reservation Indians in circumstances that did *not* interfere with a tribe's

147. *E.g.*, Mont. Catholic Missions v. Missoula Cnty., 200 U.S. 118, 129 (1906); Thomas v. Gay, 169 U.S. 264, 273 (1898).
148. *E.g.*, Kan. Indians, 72 U.S. 737, 759 (1866); N.Y. Indians, 72 U.S. 761, 761 (1866).
149. 358 U.S. 217 (1959).
150. *Id.* at 223.
151. *Id.* at 219.
152. *Id.* at 220.
153. 369 U.S. 60, 75–76 (1962).
154. *Id.* at 71.
155. *Id.* at 72 (citation omitted).
156. *Id.* at 75.

self-governing authority. The states advocating this position insisted that this was a factual question to be determined on a case-by-case basis. Many states were also aggressively trying to tax and regulate Indian activities on reservations and restrict special Indian water, hunting, and fishing rights outside the state's regulatory system.[157]

In addition, at the height of the terminationist era, Congress enacted a statute in 1953 entitled "Public Law 280" which empowered five states—California, Minnesota, Nebraska, Oregon, and Wisconsin—to exercise both criminal and civil jurisdiction over reservation Indians.[158] Public Law 280 also invited other states to opt to exercise such jurisdiction. By 1968, several states had accepted Congress's invitation. Congress then amended Public Law 280 to require tribes' consent for any further state assumptions of Public Law 280 jurisdiction.[159]

Thus, like the law upholding inherent tribal governmental authority, the law concerning state jurisdiction over reservation Indians seemed unsettled in the late 1960s. States were actively asserting a broad range of civil tax and regulatory authority over reservation Indians—both relying on expansive readings of the jurisdiction authorized in Public Law 280 where it applied and, where it did not, relying on the argument that the specific state tax or regulation did not infringe on a tribe's powers of self-government.

2. The law today.

a. State authority over Indians on reservation lands.

Several decisions by the Supreme Court in the 1970s and 1980s reaffirmed the foundational principles of Chief Justice Marshall's *Worcester* decision that states generally have no authority to tax and regulate reservation Indians unless Congress has specifically provided otherwise. The leading case was *McClanahan v. State Tax Commission of Arizona*,[160] a suit brought and argued in the Supreme Court by OEO legal services attorney Richard Collins

157. *See* discussion *infra* Part III.C. Most interactions between tribes and states in the 1960s and 1970s were mutually hostile, sometimes confrontational, as the Supreme Court observed in the Washington fishing rights case, likening the resistance of state agencies to federal court decrees upholding Indian fishing rights to state actions resisting court ordered racial desegregation. *See infra* Part III.C.4. In my early years representing tribes, I often cited the Supreme Court's statement in *United States v. Kagama* that "[b]ecause of the local ill feeling, the people of the states where they are found are often [tribes'] deadliest enemies" as a correct statement of the current circumstances. 118 U.S. 375, 384 (1886).

158. 18 U.S.C. § 1162 (2012) (Alaska was added in 1958).

159. 25 U.S.C. § 1326 (2012).

160. 411 U.S. 164, 165–66 (1973).

(now a professor at Colorado Law School), challenging the imposition of the state income tax on a Navajo woman who resided and worked on the reservation. The State argued, and the state courts had held, that the state tax was valid because it did not infringe on the right of the Navajo Tribe to make its own laws and be ruled by them. The Supreme Court reversed, holding that federal law categorically preempted the state tax.[161] The Court in *McClanahan* held that the "infringement" test in *Williams* did not apply to state authority over reservation Indians, but "dealt principally with situations involving non-Indians . . . [where] both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions."[162] The Court in *Mescalero Apache Tribe v. Jones*[163] also observed that *Kake* arose outside an Indian reservation, and confined *Kake's* analysis of state jurisdiction to matters occurring outside reservations, where the Court sustained broad state authority in a case decided the same day as *McClanahan*.[164]

Another suit brought by OEO legal services attorneys in Minnesota, a state (unlike Arizona) where Public Law 280 applied, led to a restrictive interpretation of that statute. In *Bryan v. Itasca County*,[165] reservation Indians challenged a state tax upon the personal property of an Indian residing on a reservation. The Supreme Court held in *Bryan* that the tax was inapplicable despite Public Law 280, concluding Public Law 280 only granted states jurisdiction over "civil causes of action" so as "to redress the lack of adequate Indian forums for resolving private legal disputes" involving reservation Indians "by permitting the courts of the States to resolve such disputes."[166] The Court in *Bryan* rejected a broader construction of Public Law 280 as evincing an "intention" to confer upon the States general state regulatory powers . . . over reservations."[167] The result was a major limitation on the scope of Public Law 280 as it had been asserted by the states, because it excluded not just taxation of reservation Indians,[168] but also matters such as land use and zoning regulations over them. This limitation opened the way for tribes to control these matters.

Eleven years later, the Supreme Court held in *California v. Cabazon Band of Mission Indians*[169] that Public Law 280 did not authorize states to regulate

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161. *See id.* at 181.
162. *Id.* at 179.
163. 411 U.S. 145, 148 (1973).
164. *Id.* at 148.
165. 426 U.S. 373 (1976).
166. *Id.* at 383–84.
167. *Id.* at 390.
168. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), the Court held state taxation of reservation Indians was categorically preempted absent specific congressional authorization.
169. 480 U.S. 202 (1987).

high stakes bingo games on reservations. Although Public Law 280 did authorize states to exercise "broad criminal jurisdiction over offenses committed by . . . Indians"[170] and violation of the California bingo statute was punishable as a misdemeanor, the Court sustained the lower federal courts' rulings that the state statute was "civil/regulatory" in nature and thus Public Law 280 did not authorize its enforcement against tribal bingo games.[171] The Court noted that California did "not prohibit all forms of gambling."[172]

In summary, *McClanahan*, *Bryan* and *Cabazon* exemplified the efficacy of case-by-case litigation in anchoring basic precepts of preemption of state jurisdiction over reservation Indians.

Congress passed the Indian Gaming Regulatory Act (IGRA)[173] a year after the *Cabazon* decision. Through the compacting process, IGRA has indirectly resulted in some significant state assumptions of jurisdiction over Indian gaming on reservations. IGRA established a framework under which tribes could conduct bingo games in states that did not prohibit bingo under federal administrative regulation. IGRA also allowed tribes to conduct casino-type games in states where those games were allowed by state law only pursuant to compacts negotiated between the tribe and the state setting the terms and conditions, including regulatory jurisdiction, under which such games would be conducted.

Although the compacts authorized by IGRA might sanction state regulatory jurisdiction over tribal gaming, Congress contemplated this would occur only with a tribe's consent. IGRA imposed a legal requirement on states to negotiate casino gaming compacts in good faith with tribes, and Congress waived states' sovereign immunity to permit tribes to sue states in federal court to compel that they negotiate compacts in good faith with tribes.[174] In 1996 however, the Supreme Court invalidated the provision in IGRA allowing tribes to sue states for failure to negotiate in good faith as beyond the power of Congress, overturning prior precedents to hold that Congress could only abrogate a state's Eleventh Amendment immunity when it acted under the Fourteenth or Fifteenth Amendments.[175] *Seminole Tribe* seemed to leave tribes with no judicial remedy to compel states to negotiate gaming compacts in good faith, thereby upsetting the balance in IGRA by which Congress granted states some authority through the compacting

170. *Id.* at 207.
171. *Id.* at 207.
172. *Id.* at 209.
173. 25 U.S.C. §§ 2701–21.
174. 25 U.S.C. § 2710(d)(7)(A)(i).
175. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

process in permitting tribal gaming on reservations but subjected them to suits by tribes if they did not negotiate compacts with tribes in good faith.

But in the years since *Seminole Tribe*, most states and tribes have nevertheless in fact continued to negotiate casino gaming compacts. Tribes today conduct gaming that in recent years has produced over $27 billion a year in revenues for tribes—significantly greater than the amount provided by all federal Indian programs annually. These compacts negotiated in the shadow of *Seminole Tribe* commonly provide that tribes will share a portion of these revenues with states—despite a prohibition in IGRA barring state taxation of Indian gaming. Most compacts also recognize significant (and sometimes dominant) tribal authority to regulate casino gaming on their lands.

b. State authority over non-Indian activities on reservation lands.

In a series of cases in the 1980s, the Supreme Court weakened the principles of *Worcester* by allowing significant state regulation and taxation of non-Indians doing business with Indians on reservations. In *Washington v. Confederated Tribes of the Colville Reservation*,[176] the Court sustained a state's authority to tax sales of cigarettes by tribal smokeshops to non-Indians. In another case decided that same year, *White Mountain Apache Tribe v. Bracker*, the Court set forth the governing test in such cases:

> [W]here, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation . . . we have . . . [engaged in] a particularized inquiry into the nature of the state, federal and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law.[177]

While the Court in *Colville* allowed the State to tax sales of cigarettes by a tribal smokeshop to non-Indians, in *Bracker* it applied the same test and invalidated imposition of a state highway use tax on a non-Indian timber contractor of the Tribe with respect to its use of tribal roads.

In 1989, the Court employed *Bracker's* "particularized inquiry" test in *Cotton Petroleum Corp. v. New Mexico*,[178] to hold states *can* tax non-Indian companies which lease Indian reservation lands to produce oil and gas. *Cotton Petroleum* has been justly criticized for discouraging economic

176. 447 U.S. 134 (1980).
177. 448 U.S. 136, 144–45 (1980).
178. 490 U.S. 163 (1989).

development on reservations by allowing *both* tribes[179] *and* states to tax transactions on Indian lands—in contrast to private non-Indian lands where only a single tax must be paid. As Justice Brennan stated in his concurring and dissenting opinion in *Colville*:

> Perhaps most striking is the fact that a rule permitting imposition of the state taxes would have the curious effect of making the federal concerns with tribal self-government and commercial development inconsistent with one another. In essence, Tribes are put to an unsatisfactory choice. They are free to tax sales to non-Indians, but doing so will place a burden upon such sales which may well make it profitable for non-Indian buyers who are located on the reservation to journey to surrounding communities to purchase cigarettes. Or they can decide to remain competitive by not taxing such sales, and in the process forgo revenues urgently needed to fill governmental coffers. Commercial growth, in short, can be had only at the expense of tax dollars. And having to make that choice seriously intrudes on the Indians' right "to make their own laws and be ruled by them.[180]

Another justifiable criticism of the *Bracker* "particularized inquiry" test is that it introduces considerable uncertainty into questions concerning the extent of state jurisdiction over transactions between Indians and non-Indians on reservations, and such uncertainty may breed litigation. An alternative to *Bracker* would have been to rule that the dormant Indian Commerce Clause preempts state jurisdiction unless Congress expressly authorizes otherwise.[181] That concept was specifically urged on the Court by the Solicitor General in *Ramah Navajo School Board v. Bureau of Revenue*[182] in 1982, but was rejected.

In sum, it appears that in cases such as *Colville*, *Bracker* and *Cotton Petroleum* the Court is fashioning federal common law to determine when states have civil jurisdiction over non-Indians on reservations in the absence of specific direction from Congress—here using the *Bracker* standard—in much the same way it is fashioning federal common law in the area of tribal civil jurisdiction over non-Indians using the *Montana* standard. Both these standards are heavily fact-dependent and can lead to unpredictable results in particular cases. The results of a particular case often do not seem ascertainable in advance. While the Court held that tribes could conduct

179. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1982); Jicarilla Apache Tribe v. Merrion, 455 U.S. 130 (1982).

180. *Colville*, 447 U.S. at 170–71.

181. *See generally* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995).

182. 458 U.S. 832, 845–46 (1982).

bingo and card games with non-Indian customers on their reservations free of state regulation in *Cabazon*, it held tribes could not sell cigarettes to non-Indians on reservation free of state taxes in *Colville*, or protect oil and gas lessees of tribal lands from state taxes in *Cotton Petroleum*. For example, once it became clear that the Supreme Court would address state regulation of tribal bingo games, I overcautiously advised tribal clients not to make substantial investments in gaming, incorrectly anticipating an adverse decision along the lines of *Colville*.

c. Overall assessment of case law and other developments concerning state jurisdiction over reservations.

Overall, the outcome of case-by-case litigation in the state jurisdiction area seems more complicated and nuanced than in any other subject area. *Worcester v. Georgia's* pristine prohibition of state jurisdiction over Indian lands has largely survived to preempt state jurisdiction over matters involving only Indians on reservations, as the Supreme Court held in the *McClanahan* and *Bryan* cases in the 1970s. This represents a significant tribal victory. But wherever the Supreme Court over the last four decades has perceived that Indian activities on Indian lands either significantly (1) involve non-Indians or (2) affect non-Indians outside reservations, it has adopted the awkward and somewhat indeterminate balancing test set forth in *Bracker* to determine whether state jurisdiction will be allowed. As discussed in Part III.C.1, *infra*, the Supreme Court has also ruled that Congress has authorized state courts to adjudicate Indian reserved water rights.[183] And in the tribal gaming area, after *Cabazon*, Congress in IGRA required tribes wishing to do casino gaming to enter into compacts with states, but *Seminole* precluded tribes from suing states if they refused to negotiate compacts in good faith with tribes.

The end result of these judicial and congressional actions is that states today have assumed a much more significant role in major activities conducted by tribes on reservations, such as those related to tribal gaming and the determination and use of tribal reserved water rights, than was true or seemed likely in the early 1970s. But while there has been a very significant increase in interactions between states and tribes today, much more of this interaction has been positive and cooperative than was true in the 1970s.

One cause of this change is the significantly greater involvement by tribal governments and tribal members in state governmental affairs and

183. As also discussed in Part II.C.2, in actual practice, administration of federal court decrees in hunting and fishing cases has also often required considerable negotiation and collaboration between states and tribes, often month-to-month or more frequently in setting seasons and adjusting allocations for taking game and fish.

correspondingly heightened interest by state political leaders in activities on Indian reservations. Far greater numbers of reservation Indians actively participate in state political affairs than was the case four decades ago. Tribal members increasingly sit in state legislatures or serve in the executive agencies of states, and Indian votes have often tipped the balance in contested local legislative and even statewide elections in states such as Washington, Montana, North and South Dakota, New Mexico and Arizona.

In recent decades, tribal and state governments have also entered into an increased number of cooperative and other power sharing intergovernmental agreements that allocate and share tax and gaming revenues, and resolve other jurisdictional problems, such as by cross-deputization.[184] As the legal principles governing state jurisdiction have stabilized—even with the indeterminate "particularized inquiry" test—states and tribes have entered into these agreements to avoid or manage risks of litigation and reach mutually agreeable outcomes. The fiscal policies of many states increasingly rely on negotiated compacts with tribes sharing tribal gaming revenues and, probably to a lesser extent, taxes from non-Indian activities on Indian lands, often based on tribal-state tax sharing agreements.

It seems ironic that after nearly five decades in which federal Indian policies have supported tribal autonomy and self-determination, tribes and tribal members must in fact increasingly interact with state governments on a broad range of topics. The result, however, has not generally been a competitive attempt by hostile state governments to suppress Indian treaty and other rights as was common in the 1970s, but more often a series of mutually agreed upon adjustments of state and tribal interests to address common problems in particular subject areas on a government-to-government basis.

C. The Case Law Concerning Indians' Rights to Natural Resources.

Two turn-of-the-century decisions by the Supreme Court furnished a promising structure for protecting Indian rights to natural resources—particularly to water and to hunt and fish. However, those cases had largely not been enforced or implemented in the decades since they were issued until the 1960s.

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184. *See* Hanna et al., *supra* note 14, at 580–89 (describing how this process of tribal-state agreements began and significantly accelerated in the mid-1970s, largely due to the efforts of my longtime friend Sam Deloria of the American Indian Law Center at the University of New Mexico.); *see also* Nevada v. Hicks, 533 U.S 353, 393 (2001) (O'Connor, J., concurring) (referencing "a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement.").

1. Water rights

a. Case law as of the 1960s.

In 1908, the Supreme Court decided an Indian landmark historic water rights case called *Winters v. United States*.[185] This suit had been filed by the United States, as trustee for the Fort Belknap Indian Tribe in northern Montana, to enjoin non-Indians from diverting water for irrigation upstream from the Tribe's reservation because insufficient water was reaching lands on the reservation which the Tribe and Bureau of Indian Affairs wanted to develop for agriculture and related uses.[186] The non-Indians asserted rights under the laws of Montana, which protected the rights of prior appropriators of water as against subsequent users.[187] If these state law principles had applied to the Tribe in *Winters*, the non-Indians would have prevailed by virtue of their earlier actual uses of water.

The Supreme Court in *Winters* held that the agreement and federal statute creating the Fort Belknap Reservation overrode these state law claims by reserving water rights for Indians to use on the Reservation. The case held that the Tribes' water right was reserved when the Reservation was established, and did not require an actual diversion of water for a beneficial use.

But despite the legal framework established in *Winters*, Indian reservations did *not* receive plentiful amounts of water in the decades after *Winters* was decided. Instead, the federal government funded major projects providing water to non-Indian farmers and cities that tribes needed and had a reasonable claim to. In 1909, one year after the *Winters* decision, the United States negotiated the Boundary Waters Treaty in 1909 with Canada, one purpose of which was to augment the flows of the Milk River (which entered the United States north of the Reservation from Canada) to replenish the water uses of the non-Indians near the Reservation through a federal reclamation project.[188] No federal funds were provided to increase Indian water uses on the Fort Belknap Reservation which remained the same in 1970 as they had been in 1910.[189] From the time of the *Winters* decision to the late 1960s, Congress appropriated millions of dollars each year to construct water projects operated under federal reclamation laws on the Milk River and elsewhere in the west, almost entirely to provide water to non-Indians. And

185. 207 U.S. 564 (1908).

186. *Id.* at 565–67.

187. *Id.* at 568–69.

188. Norris Hundley, Jr., *The "*Winters*" Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17, 41 (1982).

189. *Id*. at 41.

the Bureau of Reclamation, an Interior Department agency, constructed and operated most of these non-Indian irrigation systems, or contracted with irrigators within each project to administer it. The legally prior rights to water of Indians on these same river systems, recognized in the *Winters* case, were largely ignored.

Those Indian water rights were also largely ignored by the Justice Department. As of the late 1960s, only a dozen or so cases had even cited the *Winters* opinion. In the very few cases that did involve Indian water rights since *Winters*, the United States usually failed to properly assert reserved rights as set forth in *Winters* for tribes. In Arizona, for example, the United States participated in cases in the Salt River and Gila River watersheds where it failed to assert prior *Winters*-type claims for the Salt and Gila River Pima Maricopa Reservations in those systems that would have deprived non-Indians of water they were using or intended to develop.[190] In a Nevada case that involved the Pyramid Lake Paiute Tribe, the United States failed to assert any *Winters* rights to protect the lake located on the Tribe's reservation and its unique fish resources on which the tribe depended for its livelihood.[191] The normal state of affairs on most western stream systems in the late 1960s was that almost all waters were appropriated by non-Indian users—often as a result of participation in federally funded reclamation projects. The fact that the Bureau of Reclamation, an agency within the Interior Department, was "engaged in a dam building and irrigation projects which directly threaten[ed] Indian water rights" led to the ignoring or compromising of tribes' water rights due to the Government's conflict of interest between its duties to Bureau of Reclamation projects and its trust responsibilities to tribes.[192]

As the National Water Commission's Final Report summarized the situation in 1973:

> During most of this 50-year period [following the decision in *Winters v. United States*, 207 U.S. 564 (1908)], the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior—the very office entrusted with protection of all Indian rights—many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions

190. Gila River Pima-Maricopa Indian Cmty. v. United States, 695 F.2d 559 (Fed. Cir. 1982).
191. *See* Nevada v. United States, 463 U.S. 110, 116–18 (1963).
192. CAHN, *supra* note 15, at 100–02.

> the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.[193]

The United States' failure to enforce tribes' *Winters* doctrine reserved water rights began to change with *Arizona v. California*,[194] decided in 1963. The State of Arizona had filed suit in 1952 against California and Nevada in the original jurisdiction of the United States Supreme Court to determine its share of water from the lower Colorado River.[195] Without such a determination, Arizona could not obtain federal assistance in building its long-coveted Central Arizona Project to bring Colorado River water into the populated portions of central Arizona. The United States intervened, asserting, among other things, reserved water rights for five Indian reservations located in the lower Colorado River basin.[196] The Court referred the case to a Special Master, who held lengthy hearings on the issues presented.[197]

The Master accepted the position of the United States that the tribes' water rights should be quantified not by their current uses but the future needs of each reservation.[198] He determined those future needs by relying on evidence presented by the Government as to which reservation lands were practicably irrigable, and entered a quantified water right for five reservations on the main stem of the Colorado River in his proposed decree.

The Supreme Court affirmed the Master's reasoning and decree:

> [The Master] found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations . . . . How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which

193. U.S. NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 474–75 (1973).

194. 373 U.S. 546 (1963).

195. *Id.* at 550–51.

196. *Id.* at 595–96.

197. *Id.* at 551.

198. *Id.* at 600.

> the Master found to be on different reservations we can find to be reasonable.[199]

The five tribes in *Arizona* were decreed 905,496 acre feet a year[200] for 135,636 practically irrigable acres, even though in the early 1960s, these tribes were actually irrigating less than 36,000 acres.[201] The quantification of 905,406 acre feet a year—changed in subsequent decisions to over 940,000 acre feet per year—allocated over twelve percent of the total dependable water supply of the Lower Colorado River (and over twenty-five percent of Arizona's total Colorado River allocation established in the case) to these five tribes.

b. Case law since the 1960s.

Particularly since President Nixon's 1970 Message to Congress directing that executive agencies adhere to their trust responsibility to Indians, the federal government has more actively asserted the water rights of tribes and tribal members in the litigation to quantify those rights and in settlement negotiations concerning that litigation.

Beginning in the mid-1970s, the Justice Department established a special litigating section of lawyers experienced in Indian law to commence and prosecute civil cases asserting and protecting Indian rights to trust property. This section in what is now the Environment and Natural Resources Division exists today, four decades later, and handles several dozen active Indian water rights cases as well as other cases where the United States is asserting Indian rights as the Indians' trustee. The Interior Department, working increasingly with tribes, has actively assisted this section in both litigation support and settlement negotiations.

The increased federal activism in protecting Indian water rights began, however, with a very significant setback for tribal water rights. After *Arizona v. California*, several western states adopted the policy of seeking definite quantifications of Indian reserved water rights within their boundaries, thus avoiding the open-ended threat unexercised Indian claims were seen as posing to non-Indian uses. Relying on a 1952 federal statute known as "the McCarran Amendment," 43 U.S.C. § 666, states sought to have this federal law question adjudicated in their state court systems. The McCarran

199. *Id.* at 600–01.

200. An acre foot is 325,900 gallons—enough water to cover an acre with one foot of water. This amount of water is generally enough to supply all the municipal and drinking water needs of a family of five in a city or suburb. However, a farmer must generally divert about four acre feet to grow crops on one acre of farmland (more if the climate permits a longer growing season). *See* Arizona v. California, 376 U.S. 340, 344–45 (1964).

201. *See id.*

Amendment waived the sovereign immunity of the United States to permit it to be sued in state court suits to adjudicate all water rights in a stream system as extending to reserved rights owned by the United States.[202] Although state courts generally lack jurisdiction over cases where the United States or an Indian tribe is a defendant, in 1971 the Supreme Court construed the McCarran Amendment to permit the United States to be sued in state court in a suit seeking to adjudicate the reserved water rights the United States claimed for a national forest.[203] Although this case did not involve Indian reserved rights and the McCarran Amendment did not mention Indian rights or waive tribes' sovereign immunity from suit, states began after the 1971 decision to try to adjudicate Indian water rights in state courts.

The question of whether Indian tribal water rights were covered by the McCarran Amendment and could be determined in state courts was hotly contested throughout the 1970s and early 1980s. The United States generally joined tribes in steadfastly resisting determination of tribal water rights in state courts. The United States and tribes pointed out that nothing in the language or legislative history of the McCarran Amendment authorized or considered adjudication of Indian rights, and the Amendment did not waive tribes' sovereign immunity from suit. They demonstrated as well that historically state courts had often been hostile to Indians' special rights.

Although when the Supreme Court decided this question, it acknowledged that "[e]ach of these arguments has a good deal of force,"[204] the Court held that federal courts should ordinarily defer to state proceedings to determine Indian and other water rights.[205] The Court did emphasize however that the state courts "have a solemn obligation to follow federal law" and to respect "the powerful federal interest in safeguarding [Indian water] rights from state encroachment."[206] As in *Cotton Petroleum* and *Seminole Tribe*, the Court's decision in *San Carlos Apache* significantly intruded states into the affairs and interests of reservation Indians.[207]

The McCarran Amendment general stream adjudications have proved to be extremely costly and protracted. Since all water users on a given stream system must be joined as parties, hundreds or even thousands of parties are commonly involved. Each party is adverse to every other party. The rights of each party must be proven: the priority date, quantity of use, place of use and

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202. 43 U.S.C. § 666(a) (1996).

203. United States v. Eagle Cnty., 401 U.S. 520, 523, 525–26 (1971).

204. Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 567 (1983); *see also* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

205. *San Carlos Apache Tribe of Ariz.*, 463 U.S. at 570.

206. *Id.* at 571.

207. *See id.* at 561–65.

purpose of use must be established for each water user. Trials take many years, and millions of dollars in costs, fees of expert witnesses and attorney's fees.[208] As a result, very few of these cases involving tribal reserved water rights have been litigated to final judgment.

The principal exception was a general stream adjudication of the Big Horn River system initiated by the state of Wyoming in 1977, where my friend and partner, Harry R. Sachse, represented the Shoshone Tribe at trial. The Big Horn system includes the only Indian Reservation in that state—the Wind River Reservation. The Wyoming courts generally followed the principles of *Winters* and *Arizona v. California*. The Wyoming Supreme Court applied and adhered to the practicably irrigable acreage standard of *Arizona v. California* and determined that there were slightly over 100,000 practicably irrigable acres of Indian land on the Reservation.[209] After trial, the Wyoming courts awarded the United States in trust for the two tribes of this Reservation an annual water right of approximately 500,000 acre feet.[210] Only about half the reservation lands which the Wyoming courts determined to be practicably irrigable had an actual history of irrigation.

An equally divided United States Supreme Court affirmed the decision without opinion.[211] As the Wind River and its tributaries are in most years fully appropriated under state law, the decree, if and when implemented, could curtail irrigation on thousands of acres owned by non-Indians in water short years unless storage projects are built, because the reservation was established prior to any of those uses and is therefore legally senior to them. But to date, the United States has not funded infrastructure to put this water to use, so the tribes' rights remain "paper water rights."

During the past three decades, particularly after the costly and bitter Wyoming litigation, both tribes and non-Indian parties have increasingly sought to negotiate settlements in water rights cases. In these settlements, tribes and non-Indian parties to the cases, including states, have generally reached compromise agreements: (1) to protect existing non-Indian uses from being "cut-off" by legally prior Indian reserved water rights—a major objective sought by states and non-Indian parties to the litigation; and (2) to provide infrastructure largely constructed with federal funds appropriated by

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208. For example, the state of Wyoming reportedly spent $14 million in attorney's fees in its general stream adjudication involving Indian and other water rights in the Big Horn River case discussed below during a twelve-year period in the 1970s and 1980s. *Wyoming's Water Dilemma*, DENVER POST, July 9, 1989.

209. *In re* Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 753 P.2d 76, 105 (Wyo. 1988).

210. *In re* Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 835 P.2d 273, 286 (Wyo. 1992).

211. Wyoming v. United States, 492 U.S. 406, 407 (1989).

Congress to augment existing water supplies and deliver water to tribes and reservations—a primary objective of tribes. The provision of federally-funded infrastructure delivers "wet water" to tribes in contrast to the "paper water" rights awarded to the tribes in the Wyoming litigation. There have been twenty-seven Indian water rights settlements in the past four decades.[212] The overall result where settlements have been concluded has been to significantly increase water supplies to tribes, generally without diminishing (and indeed sometimes increasing) water available for non-Indian tribal uses.

Arizona is an instructive example of the successes and failures of these settlements. Most tribes in Arizona have been involved in general stream adjudications to determine their reserved water rights, but no pending case has actually resulted in a final judgment like *Big Horn* quantifying those rights. Congress has ratified settlements for eight Arizona tribes—White Mountain Apache, Gila River, Yavapai-Prescott, San Carlos, Fort McDowell, Salt River, Tohono O'odham and Ak-Chin.[213] A ninth ratified settlement provides water to the Zuni Tribe in New Mexico for lands it owns in Arizona.[214] These settlements, together with administrative allocations of Central Arizona Project water to tribes by the Secretary of the Interior, have resulted in slightly less than *half* of all the waters of the Central Arizona Project (over 650,000 acre feet per year) being dedicated to Indian tribes.[215] A project that initially had been conceived as largely devoted to non-Indian agriculture when Arizona filed its Supreme Court action against California in 1952 has thus morphed into a project principally serving municipal/industrial uses of non-Indian cities and Indian uses.

While water settlements have thus often produced dramatic improvements for tribes (in contrast to litigation which typically establishes "paper" rights but not infrastructure to deliver water to reservations), most tribes have *not* been able to finalize settlements. For example, the Navajo and Hopi Tribes in Arizona have not been able to negotiate a settlement of their water rights, despite negotiations of over twenty years' duration that ultimately did not produce a settlement, in which I served for many years as an attorney representing the Hopi Tribe.

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212. COHEN, *supra* note 38, at § 19.05(2).

213. *Id.*

214. Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, 117 Stat. 782.

215. When the amount of water decreed in *Arizona v. California* to Indian tribal lands located in Arizona is added to: (1) the water awarded to Arizona Indian tribes in water settlements, and (2) water administratively allocated to Arizona tribes by the Secretary of the Interior from the Central Arizona Project, almost half of Arizona's entire share of Lower Colorado River water is apportioned to tribes.

Water settlements also invariably require lengthy negotiations between tribes, states and non-Indian water uses—both in finalizing the settlement agreement and receiving necessary legislative approval. Often the implementation of the settlement after it is approved by Congress also requires protracted and complicated negotiations. Many of these settlements have provided water to tribes for municipal uses, not exclusively water for irrigation. Municipal water is an especially vital need for most tribes. As of 2003, the United States Commission on Civil Rights reported that fifty percent of all homes on Indian reservations lacked complete kitchen and plumbing facilities, such as kitchen sinks and flush toilets.[216] This is true today on the Hopi and Navajo Reservations in Arizona, where tribal members must travel to (often low quality) community wells to haul water and to distant off-reservation towns to launder clothes. Economic self-sufficiency is virtually unattainable when tribal members must devote large amounts of time to such activities.

Because many cases involving Indian reserved rights in recent years have settled rather than going to final judgment, the case law may have developed less in this subject area than in the others I have discussed. In recent years, however, the Arizona Supreme Court has issued two important decisions concerning Indian reserved water rights. In In Re *the General Adjudication of All Rights to Use Water in the Gila River System and Source*,[217] (*Gila V*), the Arizona Supreme Court rejected the notion that the "practically irrigable acreage" standard in *Arizona v. California* constitutes the exclusive test for quantifying Indian reserved water rights—for example, on reservations far from major surface water sources or located in mountainous terrain unsuitable for irrigated agricultural but useful for recreation and tourism, and where there are unmet needs for municipal and domestic water supplies. The Court ruled that the standard for quantifying Indian reserved rights necessarily changes with a reservation's evolving purposes, and includes water for on-reservation development other than agriculture, so long as such development is practically achievable and economically sound.[218] The court in *Gila V* held that the determination of how much water is necessary to establish and maintain a permanent and livable tribal homeland requires consideration of factors such as: (1) the tribe's history and traditions relating to water use; (2) preservation of the tribe's culture; (3) the tribe's geography and topography, and natural resources (including groundwater); (4) the

216. DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 15 (6th ed. 2011).

217. 35 P.3d 68, 77 (2001).

218. *Id.* at 76.

tribe's economic base; (5) the past water use on the reservation; and (6) the present and projected population of the reservation.[219]

The Arizona Supreme Court has also determined that federal reserved rights may include rights to groundwater if other water sources are insufficient to serve the purposes of the reservation,[220] and that tribal reserved right holders may enjoy greater protection from groundwater pumping than do holders of state created rights.[221] The decision of the Arizona Supreme Court in *Gila III* is consistent with most Indian water rights cases that have considered these questions[222] and with hydrology and logic.[223] In the future, Indian reserved rights to groundwater—together with the right to restrict competing non-Indian groundwater uses that would interfere with those rights—are likely to be of dramatically increasing importance in western states. Many Indian reservations lack dependable surface supplies and must of necessity rely on groundwater. Also many western surface streams are fully or even over-appropriated, forcing future water users to look to groundwater.

2. Hunting and fishing rights

a. Case law as of the 1960s.

As in the Indian water rights area, a legal structure was in place favoring protection of Indian treaty fishing rights based on a key turn-of-the-century

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219. *Id.* at 79–80.

220. *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila III*), 195 Ariz. 411, 420 (1999) (en banc).

221. *Id.* at 415.

222. *E.g.*, Gila River Pima-Maricopa Indian Cmty. v. United States, 9 Cl. Ct. 660, 699 (1986), *aff'd*, 877 F.2d 961, 965 (Fed. Cir. R. 1989); New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985); Tweedy v. Tex. Co., 286 F. Supp. 383, 385 (D. Mont. 1968); *see also* Cappaert v. United States, 426 U.S. 128, 141 (1976); United States v. City and Cnty. of Denver, 656 P.2d 1, 13, 31–33 (Colo. 1982) (en banc); Park Ctr. Water Dist. v. United States, 781 P.2d 90, 95 n.13 (Colo. 1989) (en banc). The sole exception to these holdings is the Wyoming Supreme Court's decision in In re *General Adjudication of All Rights to Use Water in the Big Horn River System* (*Big Horn River System*), 753 P.2d 76, 99–100 (Wyo. 1988), *aff'd on other grounds by an equally divided court*, 492 U.S. 406, 407 (1989). There, in a case, as noted, that involved a surface water system supplying an average of almost a 1,000,000 acre feet a year, of which the Tribes were awarded about 500,000 acre feet, and where groundwater uses were minimal and largely uncontested, the Wyoming Supreme Court held, without analysis, "that the reserved water doctrine does not extend to groundwater . . . ." *Big Horn River System*, 753 P.2d at 100.

223. *See* COHEN, *supra* note 38, at 1177–78 (finding that groundwater is often connected hydrologically with surface water and both "sources should be available to the extent necessary to satisfy the purposes of the reservation").

Supreme Court decision. Some treaties, such as those with tribes in the Pacific Northwest and many tribes in the upper Midwest—states such as Michigan, Minnesota, and Wisconsin—expressly provide that the tribes also retained the right to hunt and/or fish on the lands they ceded under the treaty. For example, the treaties with the tribes in Washington and Oregon typically provided that the tribe should have "[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States."[224] In contrast to tribes' exclusive on-reservation treaty right, the tribe's off-reservation fishing rights are nonexclusive, shared with non-Indian citizens.

After Oregon and Washington became states, both states came to regulate non-Indian fishing. And as these states became heavily populated and the fish resources decreased with increased fishing, conflicts arose between Indians and non-Indians over the exercise of the Indians' fishing rights. In a case roughly contemporaneous with *Winters* (and in an opinion authored by the same Justice, Joseph McKenna), the Supreme Court determined in *United States v. Winans*[225] that the Yakima Indians had an easement or servitude created by the treaties over privately owned lands riparian to the Columbia River to reach their usual and accustomed fishing sites on the River, and that the private landowner could not operate a fish wheel on his lands—even though it was licensed by the State—in a manner that captured all the fish at the site, depriving the Indians of any fish. Observing that the fish "were not much less necessary to . . . the Indians than the atmosphere they breathed,"[226] the Supreme Court in *Winans* rejected the non-Indian landowner's argument that the Treaty conferred on the Indians only such rights as the non-Indians would have as landowners under state law, and that the non-Indians could exclude the Indians as a condition of their land ownership.[227] The Court instead construed the Treaty as imposing "a servitude" on the private non-Indian lands—"the right of crossing it to the river[—]the right to occupy it to the extent and for the purpose . . ." of taking fish.[228]

In the years after *Winans*, however, the states of the Pacific Northwest nevertheless sought increasingly to regulate Indian off-reservation treaty rights. In *Tulee v. Washington*,[229] the United States Supreme Court struck down a state law requirement that Indians must purchase a state fishing

224. Treaty with the S'klallam, Jan. 26, 1855, 12 Stat. 933.

225. 198 U.S. 371, 381–84 (1905).

226. *Id.* at 381.

227. *Id.* at 379.

228. *Id.* at 381. *Winans*, like *Winters*, was a suit the United States had filed as trustee for the Indian rights.

229. 315 U.S. 681, 685 (1942).

license to exercise their off-reservation treaty fishing rights. But, in *Puyallup Tribe v. Department of Game of Washington* (*Puyallup I*),[230] the Supreme Court sustained state regulation of the manner of off-reservation Indian fishing "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[231]

Assertions of state jurisdiction to regulate Indian fishing rights in the late 1960s led to serious, heated, and sometimes even violent confrontations between tribes and Indian fishermen on the one hand, and non-Indian commercial and sports fishermen and state law enforcement officers on the other hand. Tribal fishermen regularly staged "fish-ins" at traditional off-reservation Indian fishing sites and asserted their treaty right to fish outside the state seasons and without obeying any state restrictions. State law enforcement officers responded with arrests, sometimes very harshly.[232]

The Court's 1968 decision in *Puyallup I* represented a serious setback for tribes and Indian fisherman in the Pacific Northwest because, for the first time, the Court sustained some state authority to regulate federal treaty rights of Indians.[233] In the late 1960s, the state regulatory systems in Washington and Oregon were heavily weighted in favor of non-Indian commercial and sports fishermen, who generally located their operations near the mouths of the Columbia River or Puget Sound, below the tribes' reservations and most off-reservation fishing sites. The salmon and steelhead fish in the Columbia River and Puget Sound on which the tribal fisherman depended for their livelihoods are "anadromous," meaning they are born in the fresh water streams of the Pacific Northwest, migrate as tiny fingerlings to the ocean where they live the majority of their life only to return to the very freshwater stream where they were born to spawn, producing the next generation.[234]

The state regulations would typically set escapement goals for each fish run in the interest of conservation to allow a critical set number of each salmon and steelhead species to reach the spawning grounds; the tribes correctly felt these goals typically left relatively few fish for Indians to catch by the time a particular run reached the Indian fishing grounds. In the Puget Sound area of Washington State, for example, Indian treaty fisherman harvested "approximately two percent of the total harvest of salmon and trout in the treaty area."[235]

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230. 391 U.S. 392, 398 (1968).

231. *Id.*

232. CAHN, *supra* note 15, at 75–81; Hanna et al., *supra* note 14, at 560.

233. *See Puyallup I*, 391 U.S. at 398.

234. Sohappy v. Smith, 302 F. Supp. 899, 910 (D. Or. 1969).

235. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 n.22 (1979) (relying on United States v. Washington, 459 F. Supp. 1020, 1032 (W.D. Wash. 1978)).

b. Case law since the late 1960s.

The tribes along the Columbia River and in Puget Sound and their attorneys together with lawyers in the Justice and Interior Departments engineered a remarkable recovery from the Supreme Court loss in *Puyallup I* in case-by-case litigation.

First, tribal fishermen and all the tribes in the Lower Columbia River brought suit in federal court in Portland shortly after the *Puyallup I* decision, arguing that the state regulations of Indian off-reservation fishing permitted in *Puyallup I* were limited to those regulations "necessary to prevent the exercise of [the Indian] right in a manner that will imperil the . . . fish resource."[236] In *Sohappy v. Smith*,[237] Judge Robert Belloni held that the state regulatory scheme unreasonably limited Indian off-reservation fishing, because it allowed the non-Indian commercial and sports fishing near the mouth of the River to take so many fish that few fish were left to the Indians by the time they reached the usual and accustomed fishing sites near the inland reservations.[238] The case led to a series of annual and even seasonal disputes about the State's fishing regulations that at least once resulted in Judge Belloni signing temporary restraining orders after a hearing in the locker room of his golf club—but Judge Belloni was resolute in his adherence to the principles of the *Sohappy* decision, a position that took considerable courage given the vocal opposition of non-Indian fisherman to his rulings.

The Justice and Interior Departments and a number of attorneys representing tribes, such as my close friend and former colleague at NARF, the late David Getches, then used Judge Belloni's decision in *Sohappy* as a springboard to initiate a suit in the federal district court in Seattle in 1970 on behalf of tribes in the Puget Sound area to determine what allocation of fish the tribes in Puget Sound were entitled to. In February, 1974, after a lengthy trial, federal district judge George Boldt held that the tribes were entitled to up to fifty percent of the harvestable fish runs at their off-reservation fishing sites.[239] Judge Boldt agreed with Judge Belloni's decision in *Sohappy* that the state must justify its regulations of Indian off-reservation fishing were "essential to conservation."[240] Judge Boldt held that the state must show that its conservation purpose cannot first be satisfied by a restriction of non-Indian fishing.[241]

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236. United States v. Washington, 459 F. Supp. at 1032.
237. 302 F. Supp. at 900.
238. *See id.* at 910.
239. United States v. Washington, 384 F. Supp. at 343.
240. *Id.* at 342.
241. *Id.*

The Ninth Circuit affirmed this decision.[242] After the Supreme Court denied the State's petition for a writ of certiorari, the federal district court then ordered the State to adopt regulations to implement the decision.[243] However, the Washington Supreme Court subsequently then held these regulations were beyond the authority of the State Department of Fisheries, and enjoined the state agencies from complying with the federal court order.[244] The federal district court, with the assistance of the United States Attorney and various federal law enforcement agencies, then undertook direct supervision of the fisheries in a manner to protect the treaty rights,[245] which the Ninth Circuit affirmed.[246] The Supreme Court then reviewed both the Ninth Circuit and State Supreme Court decisions "to resolve the conflict between the state and federal courts regarding what, if any, right the Indians have to a share of the fish. . . ."[247]

With some relatively minor modifications, the Supreme Court upheld the decisions of the lower federal courts. Judge Boldt, like Judge Belloni, showed great resolve and courage in enforcing the tribes' treaty fishing rights, for which he was often reviled and sometimes even burned in effigy by non-Indian fisherman. Oddly, even after his decisions were twice affirmed by the Ninth Circuit and once by the Supreme Court, the case was still colloquially referred to as "the Boldt decision," which doubtless reflected the non-Indians' prevalent views that "no one but Boldt would issue such a decision." The Supreme Court correctly concluded the fault lay elsewhere when it observed:

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.[248]

This was a major victory for tribes in the Puget Sound region because the decision necessarily increased their share of the fish harvested in the treaty

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242. United States v. Washington, 520 F.2d 676, 692–93 (9th Cir. 1975).

243. Washington v. United States, 423 U.S. 1086, 1086 (1976).

244. Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151, 1152 (Wash. 1979).

245. United States v. Washington, 459 F. Supp. 1020, 1020 (W.D. Wash. 1978).

246. United States v. Washington, 645 F.2d 749, 756 (9th Cir. 1981).

247. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674 (1979).

248. *Id.* at 696 n.36 (quoting Puget Sound Gillnetters Ass'n v. United States Dist. Court for W. Dist. of Wash., 573 F.2d 1123, 1126 (9th Cir. 1978)) (internal quotation marks omitted).

areas—from approximately two percent to around fifty percent.[249] This has proven to be a dramatic and lasting reallocation of fishery resources in favor of Indian tribal fisherman. Since fisheries, unlike water, may be fixed in quantity, this stands as a truly remarkable result.

Importantly, the *Fishing Vessel* decision has furnished a basic template for similar decisions in Oregon along the Columbia River and elsewhere in the upper Midwest where tribes retain off-reservation hunting and fishing rights in treaties. In *United States v. Oregon*,[250] the Ninth Circuit held state regulation of tribal treaty off-reservation fishing on the Columbia River "must be the least restrictive" alternative method available to the State. A number of treaties for tribes in the upper Midwest-Great Lakes region reserve hunting and fishing rights in tribes' ceded territories, and courts construing those treaties have reached similar results.[251] Since some, albeit limited, state regulation of Indian off-reservation treaty fishing is allowed, states and tribes—especially in the Pacific Northwest—have engaged in a virtually continuous process of negotiated annual and seasonal agreements overseen by federal district courts.[252]

The courts have held that off-reservation hunting, fishing, and gathering rights reserved by treaty survive cessions of land unless they are clearly and plainly surrendered as part of the cession. An important more recent case applying this principle is *Minnesota v. Mille Lacs Band*,[253] where the United States Supreme Court held that off-reservation treaty hunting, fishing, and gathering rights reserved in an 1837 treaty were not extinguished by an 1855 treaty ceding those lands. The Seventh Circuit had earlier reached this conclusion with respect to off-reservation hunting, fishing, and gathering rights of Chippewa tribes in Wisconsin in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*,[254] holding that an 1854 treaty establishing reservations for the tribes and ceding lands outside those reservations did not abrogate those usufructuary rights reserved in the 1837 treaty.

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249. *Id.* at 676 n.22, 686.

250. 769 F.2d 1410, 1416 (9th Cir. 1985) (quoting Sohappy v. Smith, 302 F. Supp. 899, 907–08 (D. Or. 1969)) (internal quotation marks omitted).

251. *E.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999); United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981).

252. *E.g.*, United States v. Oregon, 913 F.2d 576, 579 (9th Cir. 1990).

253. 526 U.S. at 173.

254. 700 F.2d 341, 358 (7th Cir. 1983).

IV. CONCLUDING THOUGHTS.

Let me return to a question I raised at the outset: the extent to which the case-by-case litigation in which I and other tribal advocates have engaged over the last forty-five years has produced changes in Indian law and in conditions on reservations.

Overall, I think perhaps the most successful area in case-by-case litigation has been the cases brought to secure off-reservation hunting and fishing rights. The dramatic reallocation of fish resources to tribes in the Washington case that reached the Supreme Court in 1979 as well as to tribes in Oregon and the states of the Upper Midwest seems a remarkable and largely unblemished success. In addition, unlike most water cases, these fishing rights cases have remained in the federal court system and have generally resulted in final decrees upholding the tribal treaty rights rather than the negotiated compromise settlements that predominate in the water area.

It is also true, however, that where tribes have achieved settlements of their reserved water rights, significant reallocations of water resources to those tribes have occurred, and tribal water supplies for irrigation, municipal, and domestic uses have significantly increased. Unfortunately, this process has proceeded on a tribe-by-tribe basis, without a coherent federal policy that ensures sufficient funding to meet the demonstrable needs of all tribes to utilize their reserved water rights to sustain their economies.

Case-by-case litigation has also confirmed inherent tribal authority to govern their reservations and restricted state regulation and taxation of Indian activities on reservations, at least where non-Indian interests are not substantially implicated. The most significant litigation victories in both these areas took place in the 1970s and 1980s, but in each area, litigation successes established a legal framework which continues in effect today.

Most importantly, over the past four decades tribal governments have operated within these legal frameworks to establish cooperative relationships with counterpart agencies in most states, forging intergovernmental agreements on a variety of subjects—such as law enforcement, tax administration, fish and wildlife management, water allocation, regulation of tribal gaming and sharing of revenues from tribal gaming, and addressing environmental issues. In that same time period, tribes have also taken advantage both of that legal framework and of the transformation in federal Indian policy to contract with federal agencies for the operation of many federal programs providing services to reservation Indians and to develop stronger and more effective tribal governmental institutions to control activities and provide services on their reservations. As a result, the tribal self-determination policy in the past forty-five years has become the only

federal Indian policy in American history that has produced substantially improved conditions on Indian reservations over a sustained period of time.