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STATE JURISDICTION OVER INDIANS IN INDIAN COUNTRY

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Prior to the coming of the white man, Indian tribes were sovereign in their own countries. The law of the tribe was the law of the land. The tribe possessed all powers of self-government. After the United States came into being, Indian tribes continued "as distinct, independent political communities, . . ."[1] under the protection of the federal government. Tribes lost their power to deal with other nations, but they retained all other sovereign powers subject to the legislative authority of the dominant sovereign.[2] For all practical purposes, as between state and tribe, tribal country was regarded as if it were foreign soil.[3] This inherent power of a limited tribal sovereignty underpins the controlling principle, first laid down in *Worcester v. Georgia*,[4] that state jurisdiction does not extend to Indians in Indian Country, except as authorized by Congress.[5] The ". . . basic policy of *Worcester* has remained"[6] although over the years the broad applications flowing from that policy have been modififed.

Within this exception, Congress twice has enacted general legislation subjecting Indians in Indian country to state jurisdiction,[7] once under Section 6 of the General Allotment Act of 1887[8] and again

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1. Worcester v. Ga., 31 U.S. (6 Pet.) 515, 559 (1832).
2. Native American Church v. Navajo Tribal Council, 272 F.2d 131, 133-34 (10th Cir. 1959); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (GPO 1945).
3. Worcester v. Ga., 31 U.S. (6 Pet.) 515, 561 (1832).
4. *Id.*
5. Warren Trading Post v. Ariz. Tax. Com., 380 U.S. 685, 687, n. 3 (1965); Williams v. Lee, 358 U.S. 217, 219 (1959); State *ex rel.* Merrill v. Turtle, 413 F.2d 683, 684 (9th Cir. 1969); Colliflower v. Garland, 342 F.2d 369, 374-376 (9th Cir. 1965); Native American Church v. Navajo Tribal Council, 272 F.2d 131, 133-134 (10th Cir. 1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 92, 94 (8th Cir. 1956); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-126 (GPO 1945).
6. Williams v. Lee, 358 U.S. 217, 219 (1959).
7. There may be local statutes relating to particular tribes or areas; these have not been examined. *See* examples in F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 379 (GPO 1945).
8. Act of February 8, 1887, ch. 119, 24 Stat. 390 *as amended* by the Act of May 8, 1906, ch. 2348, 34 Stat. 182, 25 U.S.C. 349. Section 6 provided that after fee patents issued, the allottees were to "be subject to the laws both civil and criminal, of the State or Territory in which they may reside . . ." To be precise, this language did not extend state laws to allottees. Rather, the fee patent provision stripped the allottee of the special status that barred state law from applying in Indian country. Section 6 was "largely ineffective," mainly because the occasion for its use never

under the Act of August 15, 1953, as amended.[9] These acts must be distinguished from statutes authorizing the administrative application of state law by the Secretary of the Interior directly, or under his *aegis*,[10] and from statutes adopting as federal law the provisions of state law.[11]

Absent superseding Congressional action, tribal sovereignty controls. It confers on Indians in "Indian country" the right to be free of state jurisdiction. The question is—what is "Indian country?" Before Congress defined Indian country in 1948, the federal cases generally defined "Indian country" to mean land to which the trust[12] or restricted[13] Indian title had not been extinguished.[14] But the inconsistencies and conflicts arising from court decisions[15] led Congress to enact a statutory definition of "Indian country."

> Except as otherwise provided in Sec. 1154 and 1156 of this Title, the term 'Indian country' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including

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came to pass. The hope was that by the end of the 25-year trust period practically all Indian land would be in fee status, there would be no Indian country and Indians would be assimilated into the general population. This policy failed and the United States continued to deal with the allottees as tribal Indians under federal supervision. *Patents in Fee*, 61 I.D. 298, 302-304 (1954).

9. Act of August 15, 1953, ch. 505, 67 Stat. 588, *as amended*, codified in 18 U.S.C. 1162 as to criminal jurisdiction and in 28 U.S.C. 1360 as to civil jurisdiction. Strictly speaking, the 1953 Act is the only general statute where Congress acted to extend state laws over Indians in Indian country. That Act is a unilateral effort to vest five named states, and Alaska, later covered as a state by amendment, with civil and criminal jurisdiction over Indians "in the areas of Indian country listed opposite the name of the State" and offered the same jurisdiction to all other affected states that wished to accept it regardless of the wishes of the Indians. With respect to the six named states, it would seem that whether jurisdiction vested depends on whether such states accepted jurisdiction, either by affirmative action or by implication. Silas Mason Co. v. Tax Comm. of Wash., 302 U.S. 186, 207 (1937); Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525, 528 (1884). The 1953 Act was amended in 1968 to require Indian consent by referendum. Act of April 11, 1968, Title IV, §§ 401-406, 82 Stat. 73, 78-80, 25 U.S.C. 1321-1326.

10. For example, the enforcement of sanitation and quarantine regulations, and with the consent of the tribe, compulsory school attendance. Act of February 15, 1929, ch. 216, 45 Stat. 1185, *as amended* 25 U.S.C. 231.

11. For example, the Assimilative Crimes Act, 18 U.S.C. § 13 (1970), adopting as federal law the state law defining offenses not covered by federal law, if committed in areas within federal jurisdiction, was extended to Indian country except as to offenses by one Indian against another, or by an Indian punished by the law of the tribe, or where the tribe has exclusive jurisdiction by treaty. 18 U.S.C. 1152 (1948). The Act of March 29, 1956, ch. 107, 70 Stat. 62, 25 U.S.C. 483a, authorized mortgages of trust land by individual Indians to be foreclosed "in accordance with the laws of the State . . . ." This did not extend jurisdiction to the state courts where the state had not accepted jurisdiction. Crow Tribe of Indians v. Deernose, 157 Mont., 487 P.2d 1133 (1971) (Tribe sought to foreclose against an Indian mortgagor).

12. Title in the United States in trust for the Indian or the tribe. United States v. Pelican, 232 U.S. 442, 449-450 (1914).

13. Fee title in the Indian or the tribe subject to restrictions against alienation imposed by federal law. United States v. Ramsey, 271 U.S. 467, 470-471 (1926).

14. United States v. McGowan, 302 U.S. 535 (1938); United States v. Ramsey 271 U.S. 467, 470-471 (1926); United States v. Pelican, 232 U.S. 442, 449-450 (1914); United States v. Sandoval, 231 U.S. 28, 46 (1913); Donnelly v. United States, 228 U.S. 243 (1913); Clairmont v. United States, 225 U.S. 551, 557-559 (1912); Dick v. United States, 208 U.S. 340 (1908); United States v. Bris, 121 U.S. 278 (1887); Bates v. Clark, 95 U.S. 204, 207-208 (1877).

15. *See* reviser's note to 18 U.S.C. § 1151 (1970).

> rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including the rights-of-way running through the same.[16]

The opening exception in Section 1151, effectually extends state liquor laws to fee-patented lands within non-Indian communities in Indian country, and to rights-of-way through Indian reservations.[17] Passing Clause (a), Clause (b) relating to dependent Indian communities, seldom called into play, is derived from *United States v. McGowan*,[18] Clause (c) concerning allotments is fairly obvious.[19]

Clause (a) contains the controversial phrase, "Indian reservation." The cases usually arise out of a claim of jurisdiction under state law over an Indian on nontrust land within the exterior bounds of an area that at some time in the past was established as an Indian reservation. State law does not apply unless the reservation has been disestablished or the reservation status otherwise dissolved by Congressional action.[20]

The original Indian reservations were large blocks of land held in beneficial tribal ownership. In the early years these reservations were greatly reduced in size by outright cessions and sales to the United States.[21] Commencing around 1890 and continuing until the Indian Reorganization Act of 1934,[22] the policy of the United States was to "break up reservations, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life, and deal with them not as nations or tribes or bands, but as individual citizens."[23] This was accomplished in part by issuing allotments that ultimately passed into non-Indian hands by sale or inheritance, but mainly by dividing a portion of the tribal land into allotments, reserving small acreages for Indian schools, religious and administrative purposes, purchasing sections 16 and 36 of each town-

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16. Act of June 25, 1948, ch. 645, 62 Stat. 757, *as amended,* 18 U.S.C. § 1151 (1970).
17. 18 U.S.C.A. § 1154:
    (c) The term "Indian Country" as used in this section does not include fee-patented lands in non-Indian comunities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto. June 25, 1948, ch. 645, 62 Stat. 758; May 24, 1949, ch. 139, § 27, 63 Stat. 94.
18. United States v. McGowan, 302 U.S. 535 (1938).
19. United States v. Jewett, 438 F.2d 495 (8th Cir. 1971) held that a trust allotment, to which no fee patent had ever issued, was Indian Country.
20. Seymour v. Superintendent, 368 U.S. 351 (1962).
21. For examples, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 294-295, ns. 64, 67 (GPO 1945).
22. Act of June 18, 1934, ch. 576, 48 Stat. 984, *as amended,* 25 U.S.C. 461, *et. seq.*
23. Commissioner of Indian Affairs Report, 1890, p. VI.

ship or lieu lands from the state for common schools, and treatng the remaining tribal lands as surplus to the needs of the Indians.

Following the usual pattern, the United States either bought the "surplus" land from the tribe for an agreed consideration (outright sale and cession), or entered into arrangements referred to as "surplus land" statutes, or "sessions in trust." Under these arrangements the United States, sometimes unilaterally, and sometimes with tribal consent, by statute ordered the surplus land sold to settlers under the public land laws,[24] or by statute, confirmed tribal agreements, containing the usual broad language of cession and surrender of title.[25] In both instances, the statutes specified that the United States was not a purchaser but was acting simply as trustee to sell the land and credit the proceeds to the tribe. These arrangements are referred to as "surplus land" statutes or "cessions in trust."

The policy of destroying tribal relations via the allotment route continued until reversed in the early 1930's when allotments were halted, new reservations were created, and lands were added to existing reservations.[26] The sale of "surplus lands" was suspended and in 1934, the "surplus lands" remaining undisposed of were restored to the tribes on 33 reservations.[27]

Through the years preceding the shift in policy, non-Indians had established themselves on Indian reservations. Counties, towns, and school districts were organized under state law within the reservation bounds. Non-Indians resented the immunity of their Indian neighbors from state law. They were particularly vexed with the tax exemption of Indian trust property.[28] Conflicts inevitably resulted.

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24. *E.g.*:
North Dakota. Standing Rock—Act of May 29, 1908, ch. 218, 35 Stat. 460; Act of February 14, 1913, ch. 54, 37 Stat. 675; *Fort Berthold*—Act of June 1, 1910, ch. 264, 36 Stat. 455. *South Dakota. Pine Ridge*—Act of May 27, 1910, ch. 257, 36 Stat. 440; *Rosebud*—Acts of April 23, 1904, ch. 1484, 33 Stat. 254; March 2, 1907, ch. 2536, 34 Stat. 1230; May 30, 1910, ch. 260, 36 Stat. 448; *Cheyenne River*—Act of May 29, 1908, *supra Standing Rock*—Acts of May 29, 1908, *supra*, and February 14, 1913, *supra; Lower Brule*—Act of April 21, 1906, ch. 1645, 34 Stat. 124. *Montana. Fort Peck*—Act of May 20, 1908, ch. 237, 35 Stat. 558; *Flathead*—Act of April 23, 1904, ch. 1495, 33 Stat. 302. *Washington Colville*—Act of March 22, 1906, ch. 1126, 34 Stat. 80, interpreted in Seymour v. Superintendent, 368 U.S. 351 (1962); *Spokane*—Act of May 29, 1908, ch. 217, 35 Stat. 458.

25. *E.g.*, Act of January 14, 1889, ch. 24, 25 Stat. 642 (Chippewas in Minnesota)—"complete cession and relinquishment . . . of all their title and interest." Under this act each of the Chippewa bands did "hereby grant, cede, relinquish and convey to the United States all our right, title and interest." Interpreted in Morrison v. Work, 266 U.S. 481, 483 (1925). Act of April 23, 1904, ch. 1624, 33 Stat. 352 (Crow Tribe, Montana) — "cede, grant and relinquish . . . all right, title and interest . . . ." Interpreted in Ash Sheep Co. v. United States, 252 U.S. 159 (1920).
Treaty of May 6, 1854, 10 Stat. 1048 (Delaware Tribe) — "cede, relinquish and quitclaim . . . all their right, title, and interest . . . ." Interpreted in United States v. Brindle, 110 U.S. 688, 693 (1884).
Agreement modified and confirmed by Act of April 27, 1904, ch. 1620, 33 Stat. 319 (Devils Lake, North Dakota) — "cede, surrender, grant, and convey . . . ."
Agreement modified and confirmed by Act of March 3, 1905, ch. 1452, 33 Stat. 1016. (Wind River, Wyoming) — "hereby cede, grant, and relinquish . . . all right, title, and interest . . . ." Interpreted in State of Wyoming v. Moss, 471 P.2d 333, 336 (Wyo. 1970).

26. *See* Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

27. *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559 (1934).

28. States are prohibited from taxing Indian trust property. *See eg.g.*, the Enabling

Analysis discloses that the conflict of jurisdiction cases arise in three different reservation situations. In each, the site in controversy is fee land[29] within an area at one time established as a reservation. In the first, the land never was acquired by the United States or affected by a cession in trust. It remains "Indian country."[30]

In the second situation, the land was sold by the tribe and purchased by the United States. The tribal title is extinguished, the reservation dissolved. The fee land is not "Indian country."[31]

In the third situation, the fee land is located within a reservation affected by a "surplus land" statute or a "cession in trust." In testing whether the situs is "Indian country," the federal courts follow the precept that when "Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."[32]

The landmark case is *Seymour* v. *Superintendent*[33] where the Supreme Court considered a surplus land statute. In *Seymour* the State of Washington convicted an Indian of burglary committed on fee land in a state municipality on the south half of the Colville Indian Reservation, affected by a 1906 "surplus land" act directing the Secretary of the Interior "to sell or dispose of unallotted lands in the diminished Colville Indian Reservation."[34] The state court denied the Indian's petition for a writ of habeas corpus on the ground that the situs was not an "Indian reservation" within the meaning of 18 U.S.C. § 1151 (a) and therefore was not "Indian country."[35]

The Supreme Court reversed. It applied the doctrine of *United States* v. *Celestine*[36] to test whether the surplus land statute expressed a Congressional intent to disestablish the reservation. To ascertain the intent of Congress, the Court examined the surplus land statute in the light of the background of the reservation, the legis-

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Act of North and South Dakota, Montana, and Washington, Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676.

29. If it were trust or restricted land it would be "Indian country" under Section 1151(c) and there would be no dispute. 18 U.S.C. § 1151 (1970).

30. Beardslee v. United States, 387 F.2d 280 (8th Cir., 1967); Sigana v. Bailey, 282 Minn. 367, 164 N.W.2d 886 (1969) (Red Lake); State of Minnesota v. Lussier, 269 Minn. 176, 130 N.W.2d 484 (1964) (Red Lake); Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961) (Pueblo); Pourier v. Board of County Com'rs. Shannon Co., 83 S.D. 235, 157 N.W.2d 532 (1968); *In re* Hankins Petition, 80 S.D. 44, 125 N.W.2d 839 (1964).

31. Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); DeMarrias v. State of South Dakota, 319 F.2d 845, 846 (8th Cir. 1963); Kain v. Wilson, 83 S.D. 428, 161 N.W.2d 704 (1968); Wood v. Jameson, 81 S.D. 12, 130 N.W.2d 95 (1964); State v. DeMarrias, 79 S.D. 1, 107 N.W.2d 255 (1941), *cert. denied*, 368 U.S. 844.

32. United States v. Celestine, 215 U.S. 278, 285 (1909), quoted with approval in Seymour v. Superintendent, 368 U.S. 351, 359 (1962).

33. Seymour v. Superintendent, 368 U.S. 351 (1962).

34. Act of March 22, 1906, ch. 1126, 34 Stat. 80. The original Colville Reservation was carved out of the public domain by Executive Order. The tribe had no compensable title in that reservation. Ute Indians v. United States, 330 U.S. 169, 179 (1947); Sioux Tribe v. United States, 316 U.S. 317 (1942). In 1892 Congress restored the north half to the public domain. Seymour v. Superintendent, 368 U.S. 351, 355-356 (1962). The 1906 surplus land act recognized title to the south half in the Colville Tribe and at the same time allotted and opened the south half for the sale of surplus land.

35. Seymour v. Schneckloth, 55 Wash.2d 109, 346 P.2d 669 (1959).

36. United States v. Celestine, 215 U.S. 278 (1909).

lative history of the statutes affecting the reservation and the tribe, the administrative treatment of the area affected by the surplus land statute, and the relevant federal policy. The Court could not find where Congress had dissolved the reservation. The Court's review led it to the conclusion that the purpose of the surplus land statute "was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the federal government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."[37] In other words, the Act was not designed to destroy the reservation status, but was intended to permit non-Indian settlers to live among the Indian allottees, so that the latter might learn from their white neighbors.

Since *Seymour*, two cases have come before the United States Court of Appeals for the Eighth Circuit in which the situs was land affected by a surplus land statute.[38] In *Miner* an Indian pleaded guilty to a state offense committed on fee land in a town on a portion of the Cheyenne River Reservation in South Dakota affected by a surplus land act.[39]

The Indian's appeal raised an issue of constitutional law concerning the right to counsel at the sentencing. The question of whether the situs was within the jurisdiction of the state was not reached because it was not raised below.[40] Circuit Judge Lay, in his dissent, indicated that the state had the obligation to establish jurisdiction before putting a person on trial and suggested that the "state 'guessed' wrong concerning its jurisdiction."[41] The dissent expressed the view that the *Seymour* decision provided a basis for strong argument that the land affected by the 1908 surplus land act did not lose its reservation status.[42]

In *City of New Town, North Dakota*, the same court of appeals held that the state's jurisdiction did not extend to Indians in a city organized under state law located on a portion of the reservation affected by the Fort Berthold surplus land act.[43]

The state decisions do not lend themselves to uniform analysis. Where state jurisdiction has been challenged, there seems to be a reluctance to acknowledge the controlling principle of *Seymour* v.

37. Seymour v. Superintendent, 368 U.S. 351, 356 (1962).
38. City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972); United States *ex rel.* Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970).
39. Act of May 29, 1908, ch. 218, 35 Stat. 460. The same act affected land on the Standing Rock Reservation in both South Dakota and North Dakota.
40. United States *ex rel.* Miner v. Erickson, 428 F.2d 623, 628 (8th Cir. 1970).
41. *Id.* at 637.
42. *Id.* at 637-639, n. 11.
43. Act of June 1, 1910, ch. 264, 36 Stat. 455, listed in note 24, *supra*.

Superintendent. Some state courts explain *Seymour* by equating the broad language of divestiture of title in the surplus land statutes with the *Seymour* restoration of the north half of Colville to the public domain.[44] These cases do not distinguish surplus land statutes from outright sales extinguishing Indian title.[45]

There is a distinction and the status of land as Indian country may not be correctly reached without recognizing the distinction. To be sure, the surplus land statutes generally direct the Secretary of the Interior to "sell and dispose of" the surplus lands,[46] while the cessions in trust employ even broader language of divestiture of title.[47] However, the law is established that it does not matter how broad, clear and exhaustive the words of conveyance. While an outright purchase by the United States destroys the tribal title and the reservation status, under a surplus land statute or cession in trust, the United States does not purchase. The proceeds of sale are paid to the tribe and beneficial title remains in the tribe until final disposition to the entryman or other purchaser.[48]

It does not follow that every area affected by a surplus land act or cession in trust continues as an Indian reservation. But, the answer cannot be reached without examination of the applicable legislation, its history, the background of the reservation, and the treatment of the area by federal agencies to find whether Congress intends to disestablish the reservation. This is the approach of the Supreme Court and the federal courts of appeals.

Jurisdiction is a definitive thing. Certainty is an essential element. If it is correct that state law does not extend over Indians in Indian country, except as authorized by Congress, jurisdiction should depend solely on whether the *situs* is Indian country, assuming no Congressional authorization. Recent state decisions would make state jurisdiction depend on whether the extension of state jurisdiction over Indians in Indian country would interfere with the tribe's autonomy or self-government.[49]

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44. *See* note 34 *supra.*

45. State *ex rel.* Swift v. Erickson, 82 S.D. 60, 61, 141 N.W.2d 1, 2 (1966); State v. Barnes, 81 S.D. 511, 137 N.W.2d 683, 684 (1965); Lafferty v. State, 80 S.D. 411, 416, 125 N.W.2d 171, 174 (1963); State *ex rel.* Hollow Horn Bear v. Jameson, 77 S.D. 527, 95 N.W.2d 181 (1959); State v. Moss, 471 P.2d 333, 336 (Wyo. 1970), where the court could find no parallel between the Wind River surplus land act and the 1906 surplus land act in Seymour.

46. *See* note 24 *supra.*

47. *See* note 25 *supra.*

48. Morrison v. Work, 266 U.S. 481, 483 (1925); Ash Sheep Co. v. United States, 252 U.S. 159 (1920); United States v. Mille Lac Band, 229 U.S. 498 (1913); Minnesota v. Hitchcock, 185 U.S. 373, 394-395 (1902); United States v. Brindle, 110 U.S. 688, 693 (1884); City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972); Ellis v. Page, 351 F.2d 250, 252 (10th Cir. 1965); Hanson v. United States, 153 F.2d 162, 163 (10th Cir 1946).

49. Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970); County of Beltrami v. County of Hennepin, 264 Minn. 406, 119 N.W.2d 25, 31 (1963); McClanahan v. State Tax Commission, 14 Ariz. App. 452, 484 P.2d 221 (1971), *appeal docketed,* No. 71-834, 40 U.S.L.W. 3322 (U.S. Dec. 23, 1971); State of Montana *ex rel.*

Under *County of Beltrami*,[50] the Minnesota Supreme Court denied aid to the dependent children of a poor Indian on the Red Lake Reservation, undisputedly Indian country, on the ground that extending the "poor-laws" of the state to Indians on the reservation would interfere with tribal administration of a welfare program, and because the state believed that it would have no jurisdiction to enforce state "poor-laws." Consistently, under *Commissioner of Taxation v. Brun*[51] the Minnesota Supreme Court did not impose the state tax on income earned by Indians on the Red Lake Reservation on the ground that to do so would interfere with tribal self-government.

The Arizona Supreme Court, on the other hand, in *McClanahan v. State Tax Commission*,[52] did not agree with the Minnesota Supreme Court. It held that the collection of state income taxes from Indians on the Navajo Reservation, undisputedly Indian country, was "not an infringement of the right of self-government by the tribe. . . ."[53] In *State of Montana ex. rel. Kennerly v. District Court*,[54] the Supreme Court of Montana defined the "crux" of the case as whether the tribal council's effort to transfer civil jurisdiction to the state " 'infringe[d] on the right of reservation Indians to make their own laws and be ruled by them' . . . ."[55] It thought not.

The state courts find support for the interference test in dictum in *Organized Village of Kake v. Egan*.[56] There the court rejected the Indians' claimed right to fish salmon with traps, holding that the Indians had no reservation and no property right to fish by trap, that the Secretary of the Interior was not empowered by Congress to vest them with such a right, and that Alaska had not disclaimed jurisdiction under the Statehood Act.

The Supreme Court reviewed the few decisions of the court "as to the power of the states when not granted Congressional authority to regulate matters affecting Indians."[57] Those decisions simply confirmed state jurisdiction over non-Indians and non-Indian affairs in Indian country in situations where no Indian or Indian interest was affected.[58] It was in the context of its review of those decisions that

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Kennerly v. District Court, ——Mont.——, 466 P.2d 85 (1970), *reversed* 400 U.S. 423 (1971).

50. County of Beltrami v. County of Hennepin, 264 Minn. 406, 119 N.W.2d 25 (1963).

51. Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970).

52. McClanahan v. State Tax Commission, 14 Ariz. App. 452, 484 P.2d 221 (1971), *appeal docketed*, No. 71-834, 40 U.S.L.W. 3322 (U.S. Dec. 23, 1971).

53. *Id.* at 457; 484 P.2d at 226.

54. State of Montana *ex rel.* Kennerly v. District Court, ——Mont.——, 466 P.2d 85 (1970), *reversed* 400 U.S. 423 (1971).

55. *Id.* at 90.

56. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

57. *Id.* at 74.

58. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499 (1946); Thomas v. Gay, 169 U.S. 264 (1898); Utah & Northern Ry. Co. v. Fisher, 116 U.S. 28 (1885) (property of a non-Indian subject to state taxation); United States v. McBratney, 104 U.S. 621 (1882) (state jurisdiction extends to crimes committed by one non-Indian against another); Langford v. Monteith, 102 U.S. 145 (1880) (state jurisdiction extends to civil suits between non-Indians).

the Supreme Court expressed the dictum on which state courts rely for making state jurisdiction dependent on whether tribal self-government is affected. The Court stated:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.[59]

The jurisdictional test of tribal autonomy employed by the state courts cannot be reconciled with the sovereignty doctrine on which tribal freedom from state jurisdiction rests. Any action by one sovereign (the state) that impinges on the sovereign powers of another (the tribe) necessarily interferes with the right of the Indians to govern themselves and with the authority of Indian governments over their reservations.[60]

The dictum in *Village of Kake* does not innovate a departure from the sovereignty principle first announced by Chief Justice Marshall 140 years ago in *Worcester* v. *Georgia*.[61] State jurisdiction over Indians in Indian country cannot be dependent on what each state court conceives to be interference with tribal self-government. Such an approach serves only to confuse, and to aggravate the jurisdictional problems.

The following summary may be helpful in testing whether a particular site is Indian country under 18 U.S.C. § 1151:

1. If the situs is trust or restricted property, regardless of whether it is in a reservation, it is Indian country, including rights-of-way running through it.

2. If the situs is fee land or a right-of-way, within a reservation never sold to the United States and never affected by a "surplus land" statute or "cession in trust," it is Indian country.

3. If the situs is fee land, within the boundaries of a reservation that was sold outright by the tribe to the United States, it is not Indian country.

4. If the situs is fee land or a right-of-way, within the boundaries of a reservation affected by a "surplus land" statute or a "cession in trust," it is Indian country, in the absence of a clear Congressional intent to the contrary.

59. Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962).
60. Worcester v. Ga. 31 U.S. (6 Pet.) 515 (1832).
61. *Id.* at 559.