WHEN TRIBES AND STATES COLLIDE

PART II
A Special Report Prepared for
The Inter-Tribal Study Group on Tribal/State Relations
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SYMPTOMS OF A GREATER PROBLEM

The tribes and the State of Washington have been unable to relate to one another as sovereign peers within the United States. Instead of acting as responsible governments, relationships between the tribes and the state have become so strained in recent years that virtually every conflict between them is dragged into court to await a solution. More than 2,000 such cases are now pending in U.S. courts. Rather than talk openly with one another and negotiate fair and equitable settlements on a government-to-government basis, the tribes, the state and the federal government continue to prolong the agony of facing up to the fact that there is indeed a very fundamental problem which must be resolved.

To clarify the concept of a fundamental problem which is at the core of all conflicts between the tribes, the state and federal governments, it might be useful to examine some of the symptomatic conflicts which have come to the forefront in recent years. To simplify this discussion, we will focus our attention on three primary areas of conflict:

1. LAW & ORDER: Tribal Law Enforcement After Oliphant
2. ENVIRONMENT & NATURAL RESOURCES: Tribal Rights to Protect Their Own
3. TAXATION: A Key to Tribal Autonomy

IN ALL THREE CONFLICT AREAS, WE FIND THE ROOT CAUSE IS A FAILURE TO ACKNOWLEDGE THE INHERENT SOVEREIGNTY OF THE TRIBES AS A POLITICAL UNIT. That is, the tribes, the state and the federal government cannot agree on the appropriate powers which should be under the jurisdiction of each of these distinct sovereign entities. Rather than working together in harmony to solve the problems which plague tribal and non-tribal peoples alike, these sovereign governments all too frequently choose not to talk with one another unless someone decides to take them to court. The end result of this process is that the tribes' effectiveness in dealing with outside governments becomes totally dependent upon lawyers who have only to gain by prolonging these disputes. The problems of providing valuable and much needed services to tribal people are disrupted by these frequent sojourns into the courts. Many tribal leaders seem to have fallen hopelessly into the trap of legal rhetoric which nobody seems to understand, especially the courts which are supposed to interpret their meaning. Because of the practice of looking for legal solutions to political problems, every time there is a change in the

U.S. judicial bench, some judge thinks its a good idea to change all the rules regarding Indian Affairs! The fundamental problem of the tribes in the United States today is a political one, not a legal one. THE POLITICAL RELATIONSHIP BETWEEN THE TRIBES ON THE ONE HAND AND THE FEDERAL SYSTEM OF GOVERNMENTS ON THE OTHER REMAINS UNDEFINED.

THE SICKNESS AFFECTING INDIAN COUNTRY

There is a sickness that affects Indian Country which can only be cured by open discussion and negotiation with other governments. This sickness cannot be cured by the President of the United States or the U.S. Congress, by the Governor or the state legislature, by tribal chairmen or tribal councils. The sickness pervades all branches of federal, state and tribal government. It can only be cured by all three governments working together. It is choking out the life of tribal police and courts; it is crippling the tribes' power to raise revenues through taxation and economic development; it is threatening forests, lands and streams which have long provided for the needs of tribal people.

The symptoms of this sickness are clearly evident in the numerous conflicts between the tribes, the state and the federal government. Roadblock after roadblock has been set up on the road to tribal self-government and autonomy. There are several conflicts involving water rights, fishing rights, taxation powers, police and court jurisdiction, environmental protection, welfare, education, health and social services. When we take the hundreds of conflicts between tribal governments and state and federal governments and add them up, we get one very BIG confrontation between tribal and U.S. jurisdiction - a conflict which costs millions of dollars each year and which has begun to threaten the very existence of tribes through the erosion of tribal powers and the strangulation of their inherent sovereign rights to self-government.

The problem is so large it cannot be attributed to a single cause. It is not caused by tribal governments. It has not been caused by the U.S. courts which, despite occasional contradictions, have consistently upheld tribal rights to self-government. It is not caused by the U.S. Congress or the Bureau of Indian Affairs who have (for the most part) long sought to protect the tribes from encroachments upon their sovereign rights to self-government. Nor is it caused by the State of Washington which has frequently challenged tribal authority in specific areas while supporting a degree of tribal autonomy. The problem is so big that it is caused by ALL THREE of these governmental powers (federal, state, tribal) which sometimes work together, and sometimes work separately, to reinforce their own confusion, perplexity and ambiguous relationships to one another.

A GREATER PROBLEM

We can view this greater, but very elementary problem, through a number of windows which (for lack of a better way of explaining the situation) we might call SYMPTOMS OF A GREATER PROBLEM. Whether we begin our examination by considering environmental concerns, legal-jurisdictional disputes, powers of taxation, economic development or whatever, the inescapable conclusion is that the three governments aren't really facing up to the task of solving this very elementary problem. Either they aren't listening to one another or they are waiting for some divine intervention to clear up the basic political dilemma. In any event, the fact remains unaltered - THE QUESTION OF WHETHER THE TRIBES SHOULD BE FULLY INTEGRATED INTO THE U.S. FEDERAL SYSTEM OR WHETHER THE TRIBES SHOULD REMAIN SEPARATE HAS NEVER BEEN RESOLVED. (If it were resolved then the role and

powers of tribal governments would be clear and unquestionable.)

In order to build upon inherent tribal sovereignty, tribal leaders must address themselves to this simple political question and develop a workable solution. This means, tribes must have a clear understanding that as long as their sovereign political status remains undefined, there can be no lasting solutions to the intergovernmental conflicts between the tribes, the state and the federal government.

AN OLD PROBLEM

We have pointed out that the nebulous status of tribes in relation to the U.S. federal system is not a new problem. The problem has become greater with the passage of each year that it is ignored by the tribes, the state and federal governments. The problem of intergovernmental relations between the tribes, the U.S. government and the State of Washington is so old, no one knows exactly when it first began. We do know that in the Enabling Act of 1889, the State of Washington began the first in a long series of side-stepping the issue by claiming to have no jurisdiction over Indians (a policy which has changed 180 degrees since the State of Washington decided it wanted authority over the tribes under provisions in federal law PL83-280). Of course, the state never bothered to ask the tribes.

CURRENT U.S. POLICY TOWARDS TRIBES

In the 1970's, the U.S. government, through Presidential statements and Congressional legislation (i.e. Self-Determination Act of 1974 and the Indian Child Welfare Act of 1978) firmly advocated a policy of self-government for the tribes. There has been a great deal of progress made in developing the capabilities of tribal governments on many reservations. Paradoxically, each advance of tribal government capability in a given area has been challenged by state and local governments seeking to extend their powers over the affairs of the tribes.

As long as the tribes, the state and the federal governments continue to merely treat the symptoms, the political sickness in Indian Country will continue to cloud the effectiveness of tribal governments. Indian peoples will have to be content with a political status which is neither here nor there, inside or outside of the U.S. federal system, separate from or in unison with other sovereign powers. The failure to reach political solutions in the past is primarily caused by the simple fact that the fundamental political problem has never been fully addressed.

THE NEED FOR A NEUTRAL GROUND

If we remember that the tribes, the state and the federal government are three sides to contend with in any jurisdictional dispute, it only makes sense for these three powers to work things out together at some neutral negotiating ground. To date, no such ground exists. Existing problems for resolving intergovernmental disputes are either so narrow in scope as to be impracticable for solving the fundamental political problem or they are merely governmental ploys to avoid dealing directly with the problem thus allowing federal and state governments to freely encroach upon the inherent sovereignty of the tribes while supposedly working on behalf of the tribes' best interest.

It has been said in preceding parts of this publication that tribes are distinct and separate governmental powers within the geographical boundaries of the United States and the State of Washington, but THEY ARE NOT A PART OF THE POLITICAL FEDERATION KNOWN AS

THE UNITED STATES. The tribes remain outside looking in through glasses provided by their American "trustee" who once pledged to protect the tribes forever .... but the pledge has been broken. The trustee has not always acted in the best interests of the tribes. There remains a very basic political problem which has never been fully addressed. All three governments are aware of it but none seems willing to take the lead in doing anything about it.

THE PROBLEM WON'T GO AWAY

The political problem won't go away because the tribes have been granted 50 percent of the salmon harvest (which once belonged entirely to them). It won't go away because the U.S. Supreme Court has decided Indian policemen shouldn't be allowed to arrest white men. The problem won't go away because the state wants to tax revenues from businesses which operate on reservations. The problem won't go away because so many long term timber, mineral and land-leases were signed in deals made by the BIA and giant non- Indian corporate interests. The problem won't go away because the tribes say they do not want to disappear. Something must be actively done to seek a solution.

No one can deny that the tribes are proud of their heritage and that they are firmly resolved to preserve their autonomous political status at whatever cost. THE GREATER, BUT VERY ELEMENTARY PROBLEM CAN ONLY BE SOLVED BY GREAT CARE AND CONSIDERATION OF WHAT IS FAIR AND EQUITABLE TO ALL THREE POLITICAL ENTITIES. The complexity of the symptoms which spring from this fundamental problem should serve to illustrate the challenge which lies ahead for all three governments TRIBAL, STATE AND FEDERAL.

SYMPTOM ONE

LAW & ORDER: TRIBAL LAW ENFORCEMENT AFTER OLIPHANT

A recent controversy involving the State of Washington and tribal law enforcement (known as OLIPHANT VS. THE SUQUAMISH TRIBE) clearly demonstrates the tendency of the U.S. Courts to view tribal/state disputes through racist misconceptions regarding the political status of tribes.

Should a tribe be allowed to arrest and convict ALL lawbreakers within its own boundaries?

What principle of sovereign authority justifies the State of Washington's claim to jurisdiction over non-Indians within the boundaries of a sovereign Indian nation?

Should the State of Washington likewise be forbidden to arrest and try Indians who break the laws outside of the reservation boundaries?

To what extent can tribes exercise civil and criminal jurisdiction over people and property within their reserved territories?

In reviewing the legal proceedings surrounding the OLIPHANT ruling, one can see how the U.S. Supreme Court still has difficulty in separating legal and political realities from the personal bias of its judges. Traditionally, U.S. Supreme Court rulings are considered to be the last word on conflicts between governments within the U.S. federation. In the case of OLIPHANT, the ruling

of the U.S. highest court has actually created more problems than it solved. By letting a white criminal off the hook, the court has gone too far! The U.S. court has shown whose side it is on. NOW IT IS TIME FOR TRIBES TO DECIDE FOR THEMSELVES WHETHER OR NOT TO ACCEPT ANOTHER FEDERAL ACTION WHICH IS NOT IN THE TRIBES' BEST INTEREST.

THE POWER OF JURISDICTION

One of the clearest powers of any sovereign is the right to assert legal jurisdiction. The jurisdiction of a nation defines the legal and political powers which a government possesses to rule its people and territory, including the power to make and enforce laws, as well as the power to make final legal interpretations when there are disagreements among the people. The tribes which reside within the boundaries of Washington State today have always been sovereign. At the time of contact with European culture, the Indian tribes of North America had already established their own unique forms of government and justice. Each tribal nation occupied a traditional territory and possessed unquestionable jurisdiction over the people living in or entering that territory. During treaty-making, these tribes never specifically relinquished their power of enforcement over both Indian and non-Indian crimes within their treaty lands. Unfortunately, since those treaties were signed, the United States and the State of Washington have engaged in numerous legal battles in U.S. courts over the meanings of these treaties. U.S. laws and courts have repeatedly confused and ignored the intentions of the treaties.

Acting on patently racist and ethnocentric assumptions, the federal government has frequently treated the many unique tribal nations as if they were one homogeneous minority which was able and willing to be callously assimilated into the Anglo-American culture. These actions continue today. Recent federal and state court rulings have served to confuse tribal jurisdiction over law enforcement and the courts. Tribes within the state are under increasing pressure to bring their law enforcement and court systems within jurisdictional rules set by the U.S. and Washington State government. Because of their failure to define their political relationship to these other governments, tribes have often had to go along with rules established by the U.S. government.

Like so many of the 2,000 or more U.S. laws which pertain to Indians, the basis for the federal involvement in law enforcement on sovereign tribal territories is founded upon myth and misunderstandings. In efforts to expand its own sovereign power, the U.S. government has long discouraged non-Indians from recognizing tribal sovereignty. A commissioner for the Bureau of Indian Affairs wrote in 1869 that the tribes "have been falsely impressed with the notion of national independence. It is time that this idea should be dispelled and the government should cease the cruel force of thus dealing with its helpless and ignorant wards." This was the beginning of an era of BIA law enforcement on tribal lands which lasted until the 1950's and '60's (the U.S. Termination Policy period). It made little difference to the federal government that these supposedly "helpless and ignorant" nations of people already had well-established systems of law enforcement that had served tribal people for hundreds of years. The 100-year old U.S. federal government arrogantly assumed that the lack of a formal Anglo-European enforcement system in the 1,000-year old tribes was somehow proof-positive that they were PRIMITIVE AND LAWLESS. Nothing could be further from the truth.

Unfortunately, this absurd notion of backward, primitive and lawless Indians has suffered little federal examination in the 100 years since that BIA assessment in 1869. In fact, we see the same culturally-biased notions used as a foundation for the 1978 U.S. Supreme Court ruling in OLIPHANT VS. SUQUAMISH TRIBE, where the court bluntly asserts that the only proper law

enforcement system is the U.S. law enforcement system. In order to understand the current conditions regarding law enforcement on reservations, one must examine the most critical influence on this case. It is important to study the basic intent of this Supreme Court decision and the tribal reaction to that decision.

Simply stated, OLIPHANT said that exercise of criminal jurisdiction on the reservation over non-Indians was "inconsistent with the status" of tribes, meaning that the Court felt that tribes had no sovereign right to enforce tribal law over non-Indians. Most tribal officials reacted to the 1978 OLIPHANT decision in much the same way they have reacted to 200 years of U.S. court rulings and Congressional legislation - they followed the U.S. Apparently, tribes seldom seriously consider the possibility that they once were independent political sovereigns, free from the control of another nation's courts and laws. It is no surprise, therefore, that in the aftermath of OLIPHANT and subsequent rulings, the tribes are faced with a myriad of conflicts over law enforcement jurisdiction. At first, tribal leaders apparently did not comprehend the intentions or implications of OLIPHANT. Was this ruling aimed only at criminal offenses? Were tribal officials to be equally powerless if they sought to enforce civil laws? Many tribes played it safe and chose to altogether avoid arresting non-Indians on their reservation. Others began recodifying their laws, turning criminal offenses into civil matters in the hopes that OLIPHANT only applied to criminal actions.

There can be little doubt about the damaging effect done to tribal police forces when they could not enforce their laws over non-Indians within reservation boundaries. As the following Chart shows (NON-INDIANS ON RESERVATIONS), Indians are actually in a minority on many reservations in Washington State. For tribes like the Makah, Tulalips, or Yakima (where the non-Indian population exceeds two-thirds of the total reservation population), the power of OLIPHANT can be devastating. But what is the power of OLIPHANT? Such an outside court ruling only has power if the tribes choose to go along with it. This is especially true if tribal governments choose to interpret the U.S. court ruling as a factor which diminishes both criminal and civil jurisdiction over non-Indians on the reservation. Worse yet, the power of OLIPHANT can be devastating if U.S. and state agencies do not respect their own court rulings.

NON-INDIANS ON RESERVATIONS

Reservation	Indian Population	Non-Indian Population	Non-Indian % of Population
Tulalip	352	1329	79%
Makah	443	1553	78%
Yakima	2509	8280	77%
Skokomish	100	270	73%
Swinomish	214	399	65%
Lummi	651	901	58%

(This represents a sampling of the tribes in Washington State; based on 1978 figures.)

WHAT WAS LOST IN OLIPHANT?

Perhaps the most surprising aspect of the Supreme Court's 1978 ruling on OLIPHANT VS. SUQUAMISH TRIBE is not the majority opinion, which runs twenty pages and clumsily denies tribal sovereignty - but, rather, the minority opinion, a precise eighty-word statement by Justice Burger and Marshall. They uphold the tribe's full civil and criminal jurisdiction over its territory and ail people within that territory. "In the absence of affirmative withdrawal by treaty or statute", the dissenting justices state, "(we are) in the view that Indian tribes enjoy as a necessary aspect of

their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation".

It is indeed surprising that a court which usually passes judgment on very narrow items of contention should have a dissenting opinion which acknowledges the broadest of powers to the tribe. The case of OLIPHANT VS. SUQUAMISH, nevertheless, is a fairly typical example of both inter- governmental conflict and the ineffective "solutions" being offered. This conflict involved criminal offenses committed by two non-Indians on the Suquamish reservation in 1976. Mark OLIPHANT and David Belgarde were accused by the tribal police of speed-racing through the reservation during a tribal celebration. The race apparently ended when Belgarde allegedly crashed into a tribal police car. Charged by the police with "recklessly endangering another person" and injuring tribal property, the two defendants protested that the Suquamish court had no criminal jurisdiction over non- Indians on their reservation. In the two years following, both the U.S. District Court for Western Washington and the Appeals Court denied the contention of OLIPHANT and Belgarde. Belgarde's case, however, did not come to the Supreme Court in January, 1978 with OLIPHANT. The Supreme Court ruled 6-2 (one abstention) on March 6, 1978 that the Suquamish tribe did, indeed, lack non-Indian criminal jurisdiction on their reservation. The finality of the ruling, combined with other high and low court rulings, signals a federal and state position that tribes lack both civil and criminal jurisdiction.

The majority opinion in OLIPHANT stated that the decision to reverse the lower court's rulings was based on four "facts":

1. From the earliest treaties, "it was assumed" that tribes had no justice systems of their own and, hence, had no jurisdiction over their lands unless Congress gave it to them;
2. Congressional actions - and INACTIONS - in the 19th and 20th centuries "seem" to indicate this belief;
3. A "presumption" is shared by Congress, the Executive and Judicial branches that tribes have no power to try non-Indians; and
4. Because the tribes "submitted to the overriding sovereignty of the United States" in the original treaties, they have lost the power to try non- Indians, except when Congress gives its approval.

Although the Supreme Court ruling refers at times to the Treaty of Point Elliot (1855) - which is the treaty of the Suquamish tribe - the ruling quickly dismissed this treaty as only one of several U.S./Tribal treaties that somehow are relevant to the question of jurisdiction for this tribe. The blunt truth is that much of the Supreme Court's ruling relies on ALL Indian treaties signed with the United States, indicating a racist assumption by the Supreme Court that one tribe's solemn treaty is the same as another in court. Actually, it is easy to see why the Supreme Court chose to ignore the Suquamish Tribe's treaty and instead "pick and choose" among other treaties. The court admits that the Treaty of Point Elliot is "silent as to tribal jurisdiction over non-Indians".

Relying on treaties signed by other tribes and culturally biased, racist BIA reports from the 1800's (the court refers to this as "historical perspective"), the Supreme Court builds the heart of the OLIPHANT illogic around what they call "unspoken assumptions". The basic "unspoken assumption" cited by the Court is that the Suquamish Tribe - indeed any tribe possesses only that jurisdiction which the United States government wants it to have. The LACK of specific details on relinquished jurisdictional powers, says the court, is assumed to mean that the tribes must not have those powers. (The dissenting justices, however, felt that this same lack of detail ought not to be interpreted AGAINST the tribes.) Using 19th century "historical perspective", the court

ruled that the tribes did not have "proper" enforcement systems of their own at the time of the treaties and, therefore, civil and criminal jurisdiction were, and somehow still are, "inconsistent with their status" as defined by the United States. Adding insult to injury, this federal court then goes on to justify its assertions by saying that they must be true because the rest of the federal system seems to agree with the Supreme Court. How convenient.

Typical of so many other court decisions, from both high and low benches throughout Washington State and the United States, the OLIPHANT ruling denies the sovereign power of tribes with a confusing series of home-grown assumptions and historical myths. Stated simply, OLIPHANT seems to say "as long as we cover our eyes, the power of tribes does not exist".

THE QUESTION WHICH THE TRIBES MUST NOW DEBATE IS NOT WHETHER THEY HAVE JURISDICTION OVER THE NON-INDIANS BUT, RATHER, WHETHER THE SUPREME COURT HAS JURISDICTION OVER THE TRIBES.

WHO IS WATCHING THE LAW-BREAKERS?

In the aftermath of the 1978 decision, non-Indian law enforcement agencies were slow to fill the gap created by the U.S. court. In many instances, the gap is still there and creates a dangerous vacuum of law enforcement on reservations. In an apparently naive understanding of crime on Indian reservations, the U.S. Supreme Court assumed that U.S. and state agencies were somehow willing to take on the responsibility for law enforcement over non-Indians on reservations. The truth has shown to be quite to the contrary. No adequate method exists in many federal and state courts for the prosecution of non-Indians who commit crimes on Indian reservations. Because such non-tribal courts are usually a long distance from the reservation community, they are out of touch with the reality of tribal life and law enforcement problems. The question which should be asked is: IF THE TRIBE FEELS OBLIGED TO RESPECT THE SUPREME COURT'S RULING AND THE STATE IS UNABLE OR UNWILLING TO FOLLOW THAT RULING, THEN *WHO IS* WATCHING THE LAWBREAKERS? Apparently, no one is watching and the tribe will take the brunt of the crisis.

The most immediate effect of OLIPHANT was felt by tribal police officers. Even in instances where tribal and non-tribal police agencies participated in cross- deputization programs, tribal and non-Indian police officers are compelled to approach their jobs from two different perspectives in the aftermath of OLIPHANT. Ideally, a police officer should approach each arrest as objectively as possible, closely and fairly enforcing law without regard to age, sex or race. It can be said that non-tribal police can still work within these guidelines, but the tribal police officer is compelled to approach each potential arrest with apprehension and subjectivity. Is the offender a member of the tribe? Will the tribal officer and his tribe be taken into a U.S. court on the coattails of OLIPHANT if he makes an arrest? Is the offense serious enough to outweigh all these fears? Not surprisingly, many tribal police officers are frustrated and confused as they attempt to fairly enforce tribal laws with the unfair sword of federal and state courts hanging over their heads.

OLIPHANT and related symptoms have also had a substantial impact on the economies of tribal governments. Many tribes have lost their pre-OLIPHANT fines which were collected from non-Indian offenders. For those reservations with a predominantly non-Indian population, the economic losses were great. Even more frustrating than the loss of revenues, however, is the fact that the law-breaking which produced fines in the past hasn't disappeared on reservations. In fact, in many reservations the number of non-Indian crimes have increased dramatically over the past two years. State and local non-Indian law enforcement agencies are reluctant to waste their time

collecting fines for minor offenses which were committed by their citizens on often far-away reservations. Thus, many tribes must watch a number of offenses go unenforced and unfined.

Another long-range economic impact resulting from OLIPHANT is a trend towards decreased federal support for tribal law enforcement program development. The Supreme Court ruling has irritated an already tenuous relationship between the tribes and the federal government. For many tribes, sources of funding for training and support of tribal police were cut by their federal sources, apparently on the assumption that the responsibilities of the tribal police had decreased and therefore their level of development ought to decrease. For larger tribes, (such as the Colville and Yakima), the tribal contribution is substantial and almost enough to withstand the decrease in federal support. But for many smaller reservations with limited budgets, the decrease in law enforcement funding is more deeply felt.

There has been an ongoing conflict between tribal and non-tribal police regarding the quality of tribal law enforcement. The tribal police are often criticized (even in the Supreme Court decisions), for having poor, substandard police agencies. The hypocrisy of, on the one hand, ethnocentrically criticizing tribal police and, on the other hand, decreasing federal funding to improve the quality of tribal law enforcement serves only to aggravate the devastating effects of OLIPHANT on tribal police efforts.

All of these factors have led to serious attitude problems among tribal police, tribal courts and tribal populations on Indian reservations in the State of Washington. Because of the post-OLIPHANT gap, many tribal law enforcement officers have been under strong attack for not enforcing the law against both Indian and non-Indian offenders. Tribal populations have become upset and confused with their own tribal institutions. How some tribes have attempted to solve some of these law enforcement difficulties is discussed in case studies later in this chapter. Many tribes have attempted to enter into agreements with local non-tribal police agencies, but before long-term solutions can be developed in law enforcement, the tribes must first wrestle with the overall jurisdictional relationships with the governments which surround them, based on premises of tribal political sovereignty which are in keeping with U.S. policies of self-determination and self-government for the tribes.

SOLUTIONS THAT AREN'T REALLY SOLUTIONS

As our previous analyses have shown, many of the law enforcement problems experienced by tribes are really symptoms of a much bigger problem - the lack of a clear definition of legal jurisdiction. Because the tribes have not accurately recognized this real problem, they are finding unrealistic solutions to the problem's symptoms. The tribes have attempted to temporarily plug the jurisdictional leaks with short-term answers that aren't answers at all. In fact, these "solutions" have caused more problems than they have solved.

As an example, a seemingly simple answer to the OLIPHANT ruling was to merely shuffle the laws. Interpreted as narrowly as possible, OLIPHANT only denied criminal jurisdiction over non-Indians, so the tribes thought that it was possible to avoid trouble by simply recodifying criminal laws - turning a criminal offense into a civil offense and, in the process, avoid the jurisdictional problems presented with OLIPHANT. Unfortunately, this was a poor solution because it relied on the thin assumption that state and federal courts would never assert civil jurisdiction - but they have. Even worse, the recodification of tribal laws by the tribes in order to dodge non-tribal rulings is an act of retreat, throwing serious doubt on the credibility of tribal institutions as independent bodies. If a ruling by the United States can cause a tribe to shuffle its own laws into

confusion, then where will the tribe draw the line after the next ruling? The "law shuffle" is more of a problem than a solution

The most common answer to the law enforcement problem has been the notion of cross-deputization. This solution comes in many varieties, varying from reservation to reservation as a result of the tribe's relationship with local agencies. Typically, a tribal law agency will enter into an agreement with a county or state law agency that establishes a cross-commission of officers in order to "mutually aid" law enforcement. This kind of agreement then allows a tribal officer to arrest non-Indians on the reservation because that officer is a recognized agent on both sides of the reservation line. Unfortunately, some state or county agencies won't even enter into these agreements because they feel that the tribal officers are poorly trained. This assertion is not based on any fact. Tribal police must not only complete rigorous federal training in Utah, but they also participate in local training programs whenever possible. Ironically, many tribes are denied access to these local non-tribal training programs and then they are later judged "unfit" by the very standards of these programs - a "no win" situation for the tribal officers.

But cross-deputization still doesn't answer the nagging jurisdictional problems of the reservation. Once an arrest has been made, for example, a tribal officer must deliver a non-tribal offender to the non-tribal agency. The tribe immediately loses the all-important power to try and punish the offender by the rules (and within the boundaries) of the community. A more crucial flaw with the cross-deputization "solution", however, is that these arrangements are often based on personal friendships and not agreed-upon legal principles. In many cases, then, a tribe's policing ability is on shaky ground, dependent upon a favorable political climate in the surrounding governments. These programs may appear attractive now, but the long-run possibility of a change of personnel or personal argument could render an entire police force useless. In the end, a tribe can only stand to lose from the political effects of cross- deputization. As a sovereign nation, a tribe is giving away crucial jurisdictional power to non-tribal agencies in these agreements.

SYMPTOM TWO

ENVIRONMENTAL & NATURAL RESOURCES: TRIBAL RIGHTS TO PROTECT THEIR OWN

Tribal people have always lived in close harmony with their natural surroundings. The forests, lands and streams once provided all that was necessary for survival. There seemed to be a limitless supply of everything and the tribes of Washington were once among the wealthiest and most contented peoples of the world. At first, tribes were not concerned about the coming of the white man to their lands. There was more than enough to go around. But things have changed a lot since then. In the last 100 years, tribal forests have fallen victim to the overconsumptive appetite of the white man's axes. Under Bureau of Indian Affairs management, giant logging companies leased timber rights on tribal lands and clear-cut millions of acres of precious cedar, spruce, hemlock and douglas fir. Mountains of slash and logging debris scar the once flourishing forests of tribal people.

With each advance of the white man's technology, the tribal way of life suffered. With the development of automated canning and food processing techniques, the whites became interested in the salmon which filled the streams and waterways. Their commercial fishing enterprises soon threatened not only to weaken tribal economies, but actually began to threaten the very existence of many species of salmon. To compound the problem, the development of hydro- electric dams for power blocked the migratory routes of many other salmon and they were unable to spawn as

they did for centuries. State fisheries and game officials soon began to realize that the salmon were indeed disappearing; but rather than halt the overfishing of the white man's commercial fleets, the state went after the tribes instead. State fisheries officials routinely harassed tribal fisherman and tried to keep them away from "their usual and accustomed fishing grounds", in direct violation of treaty provisions. These abuses continued unchecked for years and little was done about the problem until the treaty tribes teamed up with the United States government in a lawsuit against the State of Washington (U.S. VS. WASHINGTON). That was 12 years ago. In 1979, the U.S. Supreme Court upheld Judge Boldt's decision to recognize the right of tribes to harvest 50 percent of the salmon and to preserve their rights "to fish in usual and accustomed places".

With Phase One of the decision going in favor of the tribes, the State of Washington stepped up its efforts to challenge the tribes in Phase Two of the Boldt case. The state immediately raised the question of whether or not the tribe's share of the salmon should include state-bred hatchery fish. In addition the tribes sought authority to protect themselves from the environmental abuses which threaten salmon runs. In September, 1980, Judge William H. Orrick of the U.S. Ninth District Court found in the tribes' favor on both disputed issues. The State of Washington had claimed rights of ownership of hatchery fish; however, Judge Orrick ruled that the Supreme Court "has flatly rejected the notion that a state owns fish swimming in its waters". The court ruled that such fish must be included in the tribes' 50-50 share of the salmon as directed in Phase One because all hatchery-bred fish (including tribal, state, federal and private hatcheries) are planted to replenish wild fish stocks. Furthermore, Judge Orrick ruled that the treaties oblige both the state and federal governments "to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs". This, in effect, means that the tribes have an unconditional right to determine if state and/or federal actions have harmed the fisheries and to seek corrective action when the habitat of the salmon is threatened. This ruling by the U.S. District Court has raised the hopes of tribes who seek to exercise their sovereign powers over the environment on and near their reservations.

THE BOLDT DECISION RELATES TO MORE THAN FISH

Yet, it is anticipated that Judge Orrick's ruling on Phase Two will be appealed by the State of Washington and that such an appeal will take up to two more years to reach a conclusion in the Supreme Court. It is important to note that in both Phase One and Phase Two of this landmark decision, treaty obligation and rights were the central issue. A treaty is (and always has been) an agreement between two sovereign nations. The rulings clearly acknowledge that the treaties are in full force. For tribes who wish to protect their environment and natural resources, this decision reinforces their historic claim to authority over these matters. The legal and political principle that the tribes must be the judge of whether or not the environment has been damaged has to do with a lot more than fish.

Tribes throughout the state have become concerned about such things as forestry practices, nuclear contamination of tribal lands and waterways, air pollution, sewage and waste problems and water supplies. In all of these areas, tribes are seeking to join with the State of Washington and the United States government to seek solutions to complex legal environmental conflicts. To sort these matters out will take an even greater effort to work in harmony to protect the environment and natural resources of the entire region. The fishing controversy has taken over 12 years in the courts and no final decision has been reached. Meanwhile, environmental degradation caused by non-Indians within the vicinity of Indian reservations is likely to continue unless alternative solutions to litigation are found and developed. The U.S. and the state of Washington

have only to gain by supporting tribal efforts to protect their own environment and by acknowledging tribal authorities in these areas.

Closely related to the fishing question is the matter of tribal water rights. To tribes in the arid lands of Eastern Washington, the right to control and allocate water on and near their reservations is perhaps the single most critical issue of conflict between tribal, state and federal authorities. In a 1908 U.S. Supreme Court ruling, known as the WINTERS DECISION, tribal rights to control water on and adjacent to reservations was firmly upheld. But court cases involving tribes and their water rights still fill the dockets of many courts within the State of Washington.

Recent population and agricultural growth in Eastern Washington have brought attention to the water rights on or adjacent to the Spokane, Colville and Yakima Indian reservations. The legalities of water rights disputes have so bogged down in the courts that less than 10 percent of the private and Indian claims to water have been adjudicated. According to some sources, both the Yakima Indian Nation and the state attorney general recently acknowledged that litigation was not only too slow and costly as a method of resolving water rights conflicts, but it was also true that the inconsistent nature of recent court decisions makes litigation risky for both of them.

At the federal level, the Carter administration encouraged Indians to quantify their water needs. The President promised to support Indian water rights in the courts, but urged the tribes and the states to negotiate settlements, if possible, because of the lengthiness of court procedures. The Bureau of Indian Affairs, in fulfilling its trust responsibility to tribes, has often faced strong opposition from other federal agencies who seek to control water resources for energy, irrigation and development. Indeed, although water rights disputes have plagued the BIA and the tribes for a long time, the BIA has never developed a policy to deal with the problem. At the core of the dilemma within the federal government itself is the misconception that Indian lands are the same as public lands in the United States. Indian lands are lands held in trust by the federal government. The tribes, not the federal government, own the land, and most federal officials agree that the federally reserved water rights for public lands do not apply to Indian lands.

It is here that the political status question becomes apparent. The courts, the federal government and the states have long discussed the questions of water rights in terms of land ownership. As self-governing bodies, Indian tribes need not own all of the lands over which their sovereign authority extends. In recent years, a federal court case known as WALTON VS. THE COLVILLE CONFEDERATED TRIBES raised the question of land ownership and tribal jurisdiction over water within the reservation boundaries. In this case, and most other cases involving non-Indian landowners within the boundaries of Indian reservations, the courts along with federal and state water authorities have attempted to define Indian water rights in terms of individual land ownership.

AVOIDING THE POLITICAL QUESTION

It is obvious that both the federal government and the states have avoided the political status question. Indeed, U.S. citizens who own land within the jurisdiction of federal public lands (Bureau of Land Management, Bureau of Reclamation, etc.) and owners of land within state boundaries are subject to those respective federal and state authorities. However, for some reason, both state and federal courts have often failed to acknowledge tribal sovereign authority over all lands within their boundaries when it comes to the allocation of water. In fact, in exercising its trust responsibility to tribes, the federal government has created a situation on reservations which causes severe problems for tribes who seek to become fully self-governing. That so many of the

actions taken in the past were done completely without the participation of tribal officials is proof enough that the impositions of federal and state authorities in the arena of water rights have been contrary to the Winters Doctrine which established clearly that tribes maintain all sovereign powers which they did not specifically surrender or transfer to the federal government in their treaties.

Many tribes have actually attempted to adopt and enforce water ordinances of their own. However, because of the one-sided agreements with the federal government, such tribal laws have been subject to the approval of the Secretary of the Interior. In the early 1970's, the Shoshone-Bannock tribes in Idaho attempted to have their own water ordinances approved. Their request was subsequently denied by the Secretary of the Interior. In addition, the Secretary ordered all BIA officials to disapprove any tribal water ordinances until an ultimate decision regarding federal policies within the Department of Interior was reached. The tribes are still waiting.

In a BIA memorandum dated January, 1976, the Bureau pledged "to continue the initiative and support in the protection of Indian water rights through the development of basic resources inventory data, pursuing water rights litigation efforts and assisting in planning for the future. A very basic need is to come to grips with future water management on and adjacent to Indian reservation lands. A vacuum exists because the Secretary has not issued regulations governing trust land waters, although efforts to accomplish this have been going on for years ... A Departmental decision on Indian water resources management and follow-up action is desperately needed, both to provide the Bureau with a firm policy and to avoid conflict (because of no action) with tribal governments in the future."

Tribes throughout the United States actually retain full sovereign authority over water rights because none of the treaties ever granted such authority to the federal government. If the tribes involved in water rights disputes were dealt with as political equals with federal and state authorities who also seek to allocate water resources, the disputes could be handled expeditiously by tribal authorities within the boundaries of Indian reservations. For the tribes to suffer while awaiting federal and/or state court decisions would not be necessary if tribes themselves enacted and enforced their own water ordinances within their own reservations. Only by asserting their full sovereign power and right to self-government can the tribes hope to preserve the water rights which are so critical for their survival. The dismal truth of the matter is that, even though the BIA and the courts have long supported tribal water rights, the tribes themselves have often been excluded from participation in the formation of laws and policies which ultimately affect their water, lands and people. No discussion of the water rights issue would be complete without a mention of the ARIZONA VS. CALIFORNIA cases involving tribes on the Colorado River. For the 25 years or more of litigation which ultimately ended in the tribes' favor, waters from the Colorado River were (and continue to be) channeled into the large urban centers of Arizona and Southern California. By the time the tribes won their case in court, the ground waters and available river water were virtually depleted and there was no water left to control. Only recently have Arizona tribes begun to benefit from new federal irrigation projects. Past projects (such as the Central Arizona Project), although supposedly to help Indians as well as non-Indian farmers in Arizona, actually seldom included tribal lands.

For many years, tribal leaders throughout the United States have resisted attempts to quantify their water rights. In the 1980's and coming decades, tribes will have to discover ways to wean themselves from federal controls of sovereign tribal powers. In the case of water rights, this probably means that tribes must continue to work in the arena of intergovernmental mechanisms

for resolving conflicts over the allocation of waters. IF THE TRIBES ARE TO PROTECT THE INTERESTS OF THEIR PEOPLE, THEN THEY MUST BE FREE TO ACT AS FULLY SELF-GOVERNING POLITICAL BODIES WITHOUT HAVING TO GO TO THE FEDERAL GOVERNMENT FOR APPROVAL AND WITHOUT ASKING THE UNITED STATES COURTS TO OVER AND OVER AGAIN UPHOLD THEIR BASIC INHERENT SOVEREIGN POWERS.

SYMPTOM THREE

TAXATION: A KEY TO TRIBAL AUTONOMY

In sharp contrast to the LAW & ORDER and ENVIRONMENT symptoms which have been previously described in this section, the symptom of TAXATION: A KEY TO TRIBAL AUTONOMY illustrates a need for preventative medicine as opposed to the curing of specific tribal/state government ills. This is because most of the conflicts regarding taxation are attributable to tribal unwillingness to assert their sovereign jurisdiction in the area of taxation. In the vacuum of tribal government inaction regarding the imposition of taxes of their own, the state has recently attempted to impose sales taxes, business and occupations taxes and property taxes within reservation boundaries. To effectively prevent the state government from pre-empting tribal taxation authority, a tribe should consider what taxes it wants to impose and provide a tribal court system and tax administration so that the tribe's assertion of taxation jurisdiction will be immune from attacks in non- Indian courts.

Tribes across the continent have been contending with increased efforts by states to impose taxes within tribal boundaries. Faced with growing bureaucracies and shrinking budgets, states, such as Washington, have set their sights on tribes as an easy target to get additional tax money. Previously, the states honored exemption of tribal revenues from taxation in keeping with the trust status of tribal lands. However, states are now claiming authority to tax retail businesses which are located on reservations (especially transactions involving non-Indians). The racial arguments for distinguishing between non-Indians and Indians in the arena of taxation completely disregard the political status of tribal government and tribal citizenship. Taxation is a privilege of sovereignty, not race. Tribes who wish to exercise their powers to tax can do so because of this political reality. This means, tribes alone should ultimately decide what taxes are appropriate for all persons, non-Indian and Indian alike, within reservation boundaries.

A number of lawsuits have been filed by tribes in Washington during recent years over questions of taxation. The American Indian Policy Review Commission Task Force Report Four explains the situation thusly:

"For the State of Washington, two issues emerge: (1) How to collect taxes from non-Indian purchasers from on- reservation retailers and (2) the competitive advantage which may accrue to on-reservation retailers from being beyond the reach of State sales taxes. The favorite example used by the State of Washington ....is lost revenues from cigarette sales on reservations estimated at from $8 million to $9.5 million. State officials also estimate loss of revenues from cigarette sales on military reservations within the State in excess of $8 million. The State has not taken any legal action against the Defense Department over that loss, although they claim to be negotiating. Likewise, where Washington residents make purchases in Oregon, which has no sales tax, there are significant losses of revenues which the State of Washington has done little about. The fair conclusion is that the Indians are the prime focus."

The logical fallacy in the state's efforts to impose taxes upon sales to non-Indians within the boundaries of Indian reservations is easily seen. Certainly the state has not been able to extend its taxation authority into other states or countries (i.e. Oregon, Idaho or Canada) where its citizens make purchases to avoid sales taxes. If the state is not allowed to impose a tax in Oregon, it should also be barred from imposing any taxes whatsoever within the jurisdiction of tribal governments. For the State of Washington to claim a loss of revenues from sources which do not fall under its jurisdiction would seem ludicrous if it tried to get tax money from Oregon, Idaho or Canada. But because the sovereign tribes are so small in size, the state see's their jurisdictional boundaries as penetrable. It is a clear case of one sovereign government attempting to bully another one. Thus far, the state has been frustrated by U.S. court decisions which affirm tribal exemptions from either imposing a tax of their own or finding themselves subject to state taxation.

This jurisdictional dispute is at the core of tribal efforts to function as self-governing entities. If the tribes are not somehow protected from encroachments by state taxation authorities within tribal boundaries, potential revenues to provide for the needs of tribal people will be seriously jeopardized. The AIPRC Task Force report also noted that much of the tribes' revenues come from federal government sources. Certain types of income are taxed by the federal government among Indian populations. According to the AIPRC, "In resolving questions concerning the extent of federal tax jurisdiction over Indians and Indian property, it is generally accepted that federal tax statutes apply to Indians and Indian property unless such taxation is inconsistent with specific rights reserved either by treaty or federal statue."

Most Washington tribes have been reluctant to develop formalized taxes of their own. (One notable exception is the Quileute tribe which has maintained a tribal taxing program since the 1920's). Some writers say that tribal failures to tax within their boundaries is caused by the uncertainty regarding sovereign authority of tribes to tax. Actually, tribes in the Pacific Northwest have been imposing a unique form of tribal tax for centuries. Tribal economies in this region have long practiced a method of wealth distribution called a "potlatch". For those tribes who continue a potlatch tradition, the notion of tribal taxation takes on a different quality. In fact, potlatches can be viewed as a form of tribal taxation. This is because all tribal members are obliged to participate and contribute gifts at various rites and occasions (i.e. births, marriages, etc.) As a form of taxation, the potlatch is among other things a means of spreading the wealth among those who need it. The notion of using a tax to redistribute wealth among the people is a characteristic of the tribes which is perplexing to non- Indian governments. Tribes routinely share revenues from tribal business enterprise and tribal government land- leases. Rather than using taxation to build large, complex bureaucracies, tribes frequently share their excess revenues on a per capita basis to all tribal members. For outside governments to attempt to define the purpose and structure of tribal taxation methods is tantamount to a denial of tribal rights to exercise free will and self-government.

The power to tax or not to tax is essential to the development of effective self-sufficient tribal governments and economies. If the tribes in Washington are to ward off state attempts to tax within tribal jurisdiction, the fundamental political status problem must first be resolved. If tribes choose to stand firm in their inherent aboriginal sovereignty, the State will be forced to find other sources of tax revenues. As tribes continue to develop full self- governing capabilities, it is possible they ultimately will have to consider additional taxes of their own making. It may become necessary to formalize tribal potlatch philosophies and customs of sharing wealth in order to prevent the state from pre-empting tribal taxation powers.

In a paper "Taxation by Indian Tribes", Tom P. Schloser notes, "If a tribe wants to impose taxes, it should examine its own constitution to determine whether or not it indeed has the power to tax. The tribal government should also determine its revenue needs and sources of revenue on the reservation. The council should then consider the types of taxes available, the effects of those taxes -- positive and negative -- on the tribal people, and the characteristics which are desirable in choosing a taxing ordinance..."

TRIBAL TAXATION AUTHORITY IS A VITAL KEY TO THE AUTONOMY OF ALL SELF-GOVERNING TRIBES. THE CHALLENGES TO TRIBAL POWERS TO TAX CAN BEST BE RESOLVED AT A MUTUAL NEGOTIATING TABLE WITH TRIBAL, FEDERAL AND STATE GOVERNMENTS, NOT IN U.S. COURTS. A SIMPLE, STRAIGHTFORWARD TRI-LATERAL AGREEMENT REGARDING TRIBAL TAXATION AUTHORITY WOULD EFFECTIVELY PUT AN END TO COSTLY LITIGATION IN THIS AREA SO THAT ATTORNEYS FEES AND COURT COSTS WILL NO LONGER DRAIN BOTH TRIBAL AND STATE REVENUES.

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