Canadian and United States Approaches to Indian Sovereignty

Michael D. Mason

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# CANADIAN AND UNITED STATES APPROACHES TO INDIAN SOVEREIGNTY

By MICHAEL D. MASON*

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* Mr. Mason is a Reginald Heber Smith Fellow with the Indian Law Unit of Idaho Legal Aid Services in Lewiston, Idaho. He wishes to thank Janay Haas for her invaluable editing assistance and Erika Hamerquist for graciously typing the first three drafts.
I. INTRODUCTION

Sovereignty is the power exercised by a state over its people and its territory. It includes the authority to exclude people from a territory, to regulate domestic relations, to regulate land use and ownership and, generally, to create and enforce laws. Canada and the United States exercise sovereignty as a matter of course; but for Indians, sovereignty is much more tenuously defined. Before coming under the sway of European colonists, Indian tribes were sovereign states, many with well-developed governments. After centuries of European contact and then domination, Indians have been left with what has been described as "sovereignty-at-sufferance." That is, tribes have retained whatever degree of control over their people and territory Parliament or Congress permits. Indians are increasingly asserting their sovereign right, arguing that the respective federal legislatures had no authority to extinguish Indian sovereign rights. This paper examines this claim and explores what remains of Indian sovereignty by comparing the Indian policies of Canada and the United States. As will be argued, both the United States and Canada have followed fairly consistent policies of assimilation and separation (with an option to assimilate) respectively, but have followed divergent courses to effect these ends. Canada has pursued the practice of isolating Indians on separate tracts of land known as reserves with strong legislative incentives and, in the process, has exerted a paternalistic control over Indian life through its Department of Indian Affairs (DIA). Hence Indians have only the slightest residual governmental powers. The United States policy, on the other hand, has walk-

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1 American Legal Institution Publishers, Restatement of the Law Second, Foreign Relations Law of the United States (St. Paul, Minn.: n. pub., 1965) at 14, s.4 defines "state" as "an entity that has defined territory and population under the control of a government and that engages in foreign relations."

2 Worcester v. Georgia, 31 U.S. 515 at 559-60 (1832); see text accompanying notes 17-20 and 201-208, infra.


4 Indian governments traditionally exercised the powers of sovereign nations and the most fundamental right of a sovereign nation is the right to govern its people and territory under its own law and customs. . . . Indian tribes and subsequently Indian bands are qualified to exercise powers of self-government because they are independent political groups. Among the inherent powers of Indian government is the power to:

a) determine the form of government;

b) define conditions for membership in the nation;

c) regulate the domestic relations of its members;

d) levy and collect taxes;

e) administer and enforce laws.


5 See text accompanying notes 39-50, infra.

6 Indian Act, R.S.C. 1970, c. 1-6 ss. 39, 66, 81. With recent administrative policy changes, the Dominion government has given Indians some powers of self-government. See text accompanying notes 77-81, infra.
ed a crooked path between instant assimilation and tribal self-government on a United States-designed model. While the United States Bureau of Indian Affairs (BIA) has played the same paternalistic role as Canada’s DIA, Congress and the courts have limited the BIA’s extensive power during the last fifty years. Legislation designed to foster Indian self-government along with judicially created doctrines have shielded Indians from some BIA and state assertions of power, leaving tribes with a theoretical sovereignty and some self-governing powers.

Given the common cultural beginnings of the United States and Canada and the cultural similarities of Indians that the countries dealt with, one would expect similar Indian policies and practices to develop. The countries both have federal systems with a fairly similar division of authority between federal and provincial or state governments. Both constitutions vested primary authority over Indian affairs in the federal legislatures, and similarly, both federal legislatures have the implicit power to delegate this authority to administrative agencies. Also, the constitutions vested the authority to give effect to treaties in the federal legislatures, impliedly in Canada, expressly in the United States.

The two nations have a specific constitutional difference regarding Indians, however. Canada’s constitution vests exclusive legislative jurisdiction over “Indians and lands reserved for Indians” in the Dominion Parliament;

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10 This is not to imply the United States encountered only Indian cultures similar to those in Canada. The Pueblos of the American Southwest, with their individualistic farm culture, for instance, do not have an analog in Canada. But this paper necessarily paints with a broad brush, and the majority of Indians in the various regions shared by the United States and Canada lived similarly according to region.

11 There are, of course, marked differences between the two constitutions’ separation of national and state power. For instance, the Canadian Parliament is expressly empowered to make criminal laws (The British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.), R.S.C. 1970, Appendix V, s. 91 (27)) [hereinafter the BNA Act], while the United States Congress, to justify a criminal statute, must peg it to an enumerated power through the necessary and proper clause of Article I, s. 8. Many basic federal powers are the same, including those over shipping, currency, defence, navigation, aliens, and Indians. Compare the BNA Act, s. 91 with the U.S. Const. art. I, s. 8.

12 The BNA Act, R.S.C. 1970, Appendix V, s. 91(24); U.S. Const. art. I, s. 8 cl. 3.


the United States Constitution limits Congress' power to the regulation of "commerce . . . with the Indian tribes," granting no explicit authority to other branches of government. This difference, however, has meant little in practice. As the nations' powers increased their leaders found ways to justify ever-greater involvement in Indian culture and self-government. Canada looked to the explicit language of its Constitution; the United States built a theoretical structure on the Indian Commerce Clause and on the Senate's treaty-ratifying powers. Despite some constitutional differences, the two countries' justifications for and means of reducing Indian sovereignty were very similar.

To demonstrate the respective policies of the United States and Canada, this paper looks at the laws relating to Indian self-government, both legislative and judicial, and land use. The remarks here are limited to these aspects of sovereignty as they apply to Indian reserves or reservations created by treaty. The paper discusses both the historical development and the current division of authority between the respective federal, provincial or state and Indian governments. By looking at the vestiges of Indian sovereignty, the paper provides an introduction and background to Indian law issues that are central to Indian control of their communities.

II. INDIAN SELF-GOVERNMENT IN CANADA

A. Introduction

When Europe first made contact with the North American Indians they were using a wide range of governmental systems. The simplest system placed major decision-making in one elder member of the band, with other decisions made according to band consensus. Many small, nomadic bands consisting of one to several extended families, used this method. At the other extreme, the Iroquois, or Six Nations Confederacy, had a relatively complex governmental system in which women elders from each tribe chose chiefs from a few families. These nominees were in turn confirmed by the existing council of chiefs. The women elders reserved the power to oust chiefs for incompetence. The chiefs, who could not hold a military position, met in councils at the "federal" and tribal levels to make major decisions and resolve disputes involving more than one tribe; these councils exercised executive, judicial, and legislative functions with some separation of powers. Dispute resolution within bands was performed by chiefs, consensually by the band as a whole or by negotiation between transgressor and aggrieved party or parties.

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15 See text accompanying notes 369-75, infra.
16 This paper does not deal with the peculiarities of Indian country in the United States involving the legal distinctions between treaty reservations, executive order reservations and allotted Indian lands. It also does not deal with activities that are exercised independently of reservation boundaries such as hunting and fishing and domestic relations.
18 Id. at 617.
19 Id. at 337.
20 Id. at 616; Wahbung, supra note 4, at 3.
B. Dominion Powers Over Indian Government

Early Crown documents and agreements with Indians dealt with Indian land rights and alliances against competing European powers in North America. The first major document regarding Indian-European relations was the Royal Proclamation of 176321 which acknowledged Indians' rights to occupy lands that they inhabited and required that the Crown be the sole purchaser of Indian rights and land. Further, the Proclamation ordered whites settled on Indian lands which were not properly purchased by the Crown to leave.

The Proclamation acknowledged Indian title to land, albeit limiting it to "use", and required that the Crown make agreements with Indians if lands were to be opened for settlement. Thus the Proclamation set the stage for Crown-Indian treaties which are at the base of the Dominion-Indian relationship. The earliest treaties dealt almost solely with land rights, making no mention of Indian government.

During the latter half of the nineteenth century the pressure to open western lands to settlement and northern lands to development led the Crown to prepare treaty drafts which would extinguish Indian title to huge tracts of central, western and northern Canada. These treaties, agreed to during the first decades of Confederation, would become known as the "numbered treaties".22 The Crown representatives usually told Indians that no negotiation was possible over these treaties, they could either sign and secure a degree of protection from the Crown or watch ever growing waves of settlers take their land anyway.23 The Indians, many weakened by disease and facing extermination of the buffalo by whites, generally signed after brief negotiations.

Under the treaties,24 Indians ceded rights of possession in nearly all of the land covered by treaty in exchange for the promise of annuities, goods, farm implements, and protection of Indian game rights in the ceded areas. In return, the Indians retained small areas of land known as reserves and promised to maintain "peace and good order" between themselves and whites. The Crown promised to prevent trespassers and alcohol from entering the reserves. The government retained veto power over Indian reserve land sale and the power to regulate hunting and fishing in the ceded lands.

The treaties do not indicate either Crown or Indian intent that Indian powers of self-government should be surrendered to the Crown.25 It is true that the Crown negotiators saw "civilizing" Indians as a goal of treaty-making and, as Alexander Morris, one of the chief Crown negotiators wrote:

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21 The Royal Proclamation of 1763, R.S.C. 1970, Appendix I.
22 Indian Treaties and Surrenders (Ottawa: C.H. Parmalee, Printer to the King, 1912).
23 Morris, The Treaties of Canada with the Indians of Manitoba and North-west Territories (Toronto: Willing and Williamson, 1880) at 34.
24 Supra note 22, at 35. Treaties do not speak of a change in land title because the Royal Proclamation of 1763 recognized only Indian's perpetual usufructuary right in the lands they occupied. See, St. Catherine's Building and Lumber v. The Queen (1888), 14 A.C. 46 (P.C.).
25 See text accompanying notes 83-87, infra as well as Morris, supra note 23.
The Indians are fully aware that their old mode of life is passing away. . . .

[The Indians are tractable, docile and willing to learn. I think that advantage should be taken of this disposition to teach them to become self-supporting, which can best be accomplished by the aid of a few practical farmers and carpenters to instruct them in farming and house-building.]

Morris, expressing the mood of his people in that day, called upon the churches to fulfill their duty to bring "Christianity and civilization to leaven the mass of heathenism and paganism among the Indian tribes. . . ." Even so, Morris did not suggest that Indians should be deprived of self-government nor did he give them to understand that this would happen during the negotiations. The Crown, by entering into treaties with Indian leaders, did just the opposite. Indian leaders were authorized to act on the bands' behalf. This implied that traditional leadership would be unaffected by the new bond between nations.

Before discussing the Canadian assumption of Indian government, it is important to look at the legal nature of Indian treaties in Canada, a matter that is somewhat confused. Under one analysis, Indian treaties are international in nature, and have no effect on domestic law until formally implemented by appropriate federal legislation. Technically, since the federal legislature has not given explicit recognition to the treaties, they would, under this analysis, have no legal effect. This analysis has been used to justify ignoring Indian treaties, but if carried to its logical end, it would wreak havoc, for were Indian treaties truly of no effect, a cloud would lie upon title to most of the land in Canada.

Canadian courts have avoided this troublesome aspect of treaty law by accepting that Indian treaties create enforceable obligations, although they may not have been agreements between sovereign states. This analysis views Indian treaties as contracts between the Crown and Indians which it is "the duty and obligation of the Crown to carry out." Judicial authority impliedly supports the contractual model for Indian treaties; where legislation appears to

26 Supra note 23, at 288-91.
27 Id. at 296.
28 Francis v. The Queen, supra note 14, at 621. For the legal nature of United States Indian treaties see text accompanying notes 226-29, infra.
29 It is arguable that s. 88 of the Indian Act, R.S.C. 1970, c. 1-6 gives implicit legislative recognition to Indian treaty provisions. Section 88 states: "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder. . . ." Under this section, Indian treaty provisions pre-empt conflicting provincial legislation.

conflict with a treaty, the courts have resolved doubts in favour of Indians\textsuperscript{32} expressing the maxim that agreements are to be interpreted as they were understood by the parties.\textsuperscript{33}

While courts enforce the treaties, the Canadian Parliament has not always carried out the "obligation of the Crown." The language of the \textit{British North America Act}\textsuperscript{34} certainly does not imply that treaty terms limit the Parliament's legislative power over Indians. Shortly after passage of the \textit{British North America Act}, the Dominion Parliament gave the Governor-in-Council power to impose electoral government on Indians and to control band funds\textsuperscript{35} never expressing any concern that it was violating treaties. What was important was that the Governor:

[L]ead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended . . . that intelligent and educated men, recognized as chiefs, should carry out the wishes of the male members of the mature years in each band, who should be fairly represented in the conduct of their internal affairs.

Thus establishing a responsible, for an irresponsible system, this provision, by law was designed to pave the way to the establishment of simple municipal institutions.\textsuperscript{36} 

Band council members were to be elected to three-year terms and were subject to removal by the Governor for dishonesty, intemperance, or immorality. The Bands were to elect one chief for approximately seventy status Indians.

Keeping in mind that many Indians did not have a republican form of government,\textsuperscript{37} this was a drastic measure. Many bands used a democratic form of government based on consensus of the entire band that was sharply limited by electing representatives. Other bands relied on one elder or "thinkers" to make decisions. Under the new elective scheme, only Indian males were to be enfranchised, a measure particularly offensive to the matriarchal Iroquois.

The new policy was carried out by Indian Affairs Agents who were eventually assigned to every reserve. Indians were slow to adopt their new governmental system.\textsuperscript{38} In order to move things along, the Dominion appointed the Indian Agents chairmen of the band councils, and divided the reserves into constituencies.\textsuperscript{39} The latter often ruled with an iron hand, passing band ordinances or acting more directly to destroy traditional Indian government as


\textsuperscript{34}\textit{The BNA Act}, R.S.C. 1970, Appendix V, s. 91(24).

\textsuperscript{35}\textit{An Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs}, (1869), 32 Vict., c. 6.

\textsuperscript{36}\textit{Sessional Paper No. 3} (1871), Indian Affairs Branch 4-7, reprinted in Bartlett, supra note 4, at 594.

\textsuperscript{37}See text accompanying notes 17-19, supra. The term republican is used here to mean a representative government. At the time referred to, the Canadian gov't. was a limited republic, denying the franchise to women and non-whites.

\textsuperscript{38}\textit{Indian Affairs Branch 1871 Annual Report}, reprinted in Bartlett, supra note 4, at 595.

\textsuperscript{39}\textit{The Indian Amendment Act}, 1884, S.C. 46 & 47 Vict., c. 28.
well as other important aspects of Indian culture. Apart from cultivating a few malleable Indian leaders, the Agents did virtually nothing to prepare Indians for participation in Canadian society.

Throughout this period, indeed to the present day, the DIA enjoyed a virtually unlimited delegation of power over Indian affairs. Until recently, the government refused Indians an opportunity to influence Indian legislation. In order for an Indian to vote in federal elections, the Indian had to give up Indian status and rights and sell his rights in reserve lands. Once an Indian gained some power to affect Indian policy, the policy no longer applied to him. As a result, most Indians did not exercise this option.

The Indian Act of 1951 purported to give Indians more self-government. It removed Indian Agents from the chairs of band councils and gave Indian women the band franchise, but the Act consolidated power in the DIA. The Governor-in-Council, through the Minister of Indian Affairs and Northern Development (the Minister), continued to control the form of band government, band council powers, band financial affairs, and land allocation and use. Bands had an advisory capacity in some areas but rarely could they prevent or effect change. The Act also gave the Governor-in-Council power to regulate reserve game, health matters (including compulsory hospitalization), traffic, pest control, amusements, residential conditions, and finances. The Governor-in-Council also had discretion to appoint a justice of the peace to hear certain cases.

The Act left band councils a narrow field of control. Beyond the Governor's and Minister's powers, the council was permitted to regulate law and order, nuisance, construction of roads, public works and buildings, zoning, bees and poultry, merchants, trespass and matters ancilliary to those enumerated. These were powers in name only, for Parliament failed to supervise the DIA during the transition to partial tribal self-government. The Indian Agents stepped down from the chairs of the councils but continued to dominate them.

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40 See Wahbung, supra note 4, at 159 and Dept. of Indian Affairs and Northern Development, Indian Conditions: A Survey (Ottawa: Queen's Printer, 1980) at 40, 82; Frideres, ed., Canada's Indians: Contemporary Conflicts (Scarborough: Prentice Hall of Canada, 1974) at 164.
41 See Robertson, Reservations Are For Indians (Toronto: James Lewis & Samuel, 1970) at 16.
43 Indian Act, R.S.C. 1970, c. I-6, ss. 110 and 111. A newly enfranchised Indian was permitted to keep lands formerly allotted to him if the band council and the Governor-In-Council were willing to let the land cease to be part of the reserve. For a history of Indian voting rights in Canada, see Bartlett, Citizens Minus: Indians and the Right to Vote (1980-81), 44 Sask. L. Rev. 163.
45 Indian Act, R.S.C. 1970, c. I-6, ss. 74, 73, 81, 83, 18 and 20.
46 Indian Act, R.S.C. 1970, c. I-6, s. 66 provides that a band council can prevent the Minister from spending band monies for purposes not specifically enumerated in the Act, for example.
47 Indian Act, R.S.C. 1970, c. I-6, s. 73.
48 Indian Act, R.S.C. 1970, c. I-6, s. 107.
49 Indian Act, R.S.C. 1970, c. I-6, s. 81.
50 Indian Conditions, supra note 40, at 82 and Robertson, supra note 41, at 119.
The Act also ensured that about half of the Indians in Canada were excluded from participation in band government. To vote in band council elections under the Act, one had to be a status Indian. Numerous Indian classes, such as the Métis, Indians who had the right to vote in federal elections, women who had married non-Indians and children of any of the above, were deemed non-Indians.

It is unclear to what extent Indian Agents took dispute resolution out of the hands of the Bands. The Agent, as chair of the Band council (officially until 1951 and actually until the late 1960s), controlled decision-making. Given the white attitude of cultural superiority and the emphasis on "civilizing" Indians, presumably the Agents worked to introduce English legal principles to the bands.

Without question, the Dominion controlled the criminal justice system regarding Indian offences against whites and capital crimes against other Indians. Neither judges, the Northwest Mounted Police (now RCMP), nor the DIA, questioned the courts' power to try Indians. Many of the acts committed were only crimes under white law and the treaty language was ambiguous about who had the power to try people who committed crimes on the reserve.

Some resistance arose to the Dominion-imposed government system. Many bands seemed to covertly resist by following the elective form while making decisions in the traditional manner, while the Iroquois or Six Nations have openly defied the imposed system. In 1959, only 54 of a total 3,600 electors of the Six Nations Indians voted in an important band election. As a result, the bands challenged the elective process and the Act in general, as contrary to treaty. The Ontario High Court upheld the Act and the application of the elective system to the bands, holding that the grant of legislative jurisdiction to the Dominion in the BNA Act gave Parliament the power to abrogate treaties by legislation.

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51 The Indian Act, S.C. 1951, c. 29; R.S.C. 1970, c. 1-6, gave statutory expression to the Crown's disparate treatment of Métis. The Crown had extinguished Métis' title to lands now part of Manitoba and the Northwest Territories by giving Métis alienable land or transferable script that could be exchanged for land. Since Métis had no treaty rights in reserve lands, the Crown did not allow them to participate in reserve government. For a brief history of the Métis people, see Note, Métis Rights in the Mackenzie River District of the Northwest Territories, [1980] 1 C.N.L.R. 1.

52 Indian Act, R.S.C. 1970, c. I-6, s. 12. Exclusion of Indian women who had married non-Indians was carried forward from a much earlier statute: S.C. 1869, 32 & 33 Vict., c. 6, s. 6.


54 Indian acts that only whites defined as crimes included killing those possessed by evil spirits and celebrating the potlatch; id. at 76; Bartlett, supra note 4, at 585.

55 Indian Affairs Branch, Hawthorne Commission, Survey of Contemporary Indians in Canada (Ottawa: n. pub., 1966), reprinted in Bartlett, supra note 4, at 600.


58 Id. The tribe argued in part that s. 74 of the Indian Act was an ultra vires delegation of Parliamentary authority to the Minister of Indian Affairs. The tribes further argued that the Act contravened treaty provisions that had left the tribes free to govern themselves.
The *Indian Acts* of 1884 and 1951 were supposed to foster Indian self-government, gradually molding the bands into something like white municipalities. Indian society languished under the DIA’s supervision. Reserve conditions were poor; most Indians who lived off the reserve lived in urban ghettos.\(^{59}\)

It was in this climate that the government made its latest call for assimilation. In 1969, the Trudeau government, through the Minister of Indian Affairs and Northern Development, Jean Chrétien, delivered a statement on Indian policy — known as the “White Paper” — to Parliament that represented a major “break with the past.”\(^{60}\) Playing on the theme that separate treatment perpetuates unequal treatment which is inherently bad for society, the Minister spoke forcefully for a new five-point plan to bring “Indian people to full and equal participation in the cultural, social, economic and political life of Canada.”\(^{61}\) First, Parliament was to repeal the *Indian Act* and seek repeal of the constitutional provision on Indians and Indian lands. Second, the federal government would close the DIA and turn over all responsibilities for Indian programmes to the provinces, with the suggestion that “they take over the same responsibilities for Indians that they have for other citizens.”\(^{62}\)

Third, the federal government would end the restriction on land alienation, giving Indians fee simple title to their reserves. Full ownership would be accompanied by provincial taxation. Chrétien said that Indians could never control land use, foster development or determine band membership while the federal government held underlying title to their lands. These proposals would be put into effect during a five-year period.

In the interim, the government would initiate two other programmes. One was to provide funds and managerial and technological advice for Indian economic development. The second was a programme of Indian culture promotion.

While the new plan was carried forward, the government would observe the treaties. The Minister saw little value in continuing to follow them for any length of time. “A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. . . . [O]nce Indian lands are securely within Indian control, the anomaly of treaties between groups within society . . . will require that these treaties be reviewed to see how they can be equitably ended.”\(^{63}\)

The Indian response to the new assimilation policy was dramatic — and negative. An important early response was that of the Indian Chiefs of Alberta, who struck a universal Indian chord with *Citizens Plus*.\(^{64}\) The title refers to a conclusion of the Hawthorn Report, a study of Indian affairs commissioned by Parliament only three years before Chrétien’s address, which reads: “Indians should be regarded as ‘Citizens Plus.’” In addition to the normal rights

\(^{59}\) *Indian Conditions*, *supra* note 40, at 143.


\(^{61}\) Id. at 8.

\(^{62}\) Id. at 6.

\(^{63}\) Id. at 11.

\(^{64}\) Indian Chiefs of Alberta, *Citizens Plus* (Indian Assoc. of Alta., 1970).
and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community."

Point by point, *Citizens Plus* rejected the proposed policy. Rather than seek repeal of the Indian section of the Constitution "the Government of Canada should entrench the treaties in the written Constitution." The Chiefs agreed that the *Indian Act* should be amended to remove barriers to band self-government but rejected as simplistic its complete repeal. They argued for retention of the sections protecting special status based on historical rights. As for turning over Indian programmes to the provinces, the Chiefs reminded the Canadian government of its treaty obligations, given in exchange for title to huge tracts of land, to assist Indian people to develop the reserves, provide education and health care and protect Indian hunting and fishing rights. If programmes were to be transferred, they should be transferred to the bands. The DIA should continue, but should "act as a national conscience to see that social and economic equality is achieved between Indians and Whites." The Chiefs also took issue with the land ownership plan and its basic assumptions. First, the Chiefs argued that Indians already owned the lands, the government only held them in trust "to prevent the sale or breaking up of our land." Second, they pointed out the false premise that Indians cannot control their lands unless they own them and are taxed on them like private property owners: tribal governments can make land use decisions without owning alienable and taxable lands.

The Chiefs did not attack the interim proposals for assistance in the economic and cultural spheres, but cultural promotion was empty without preservation of "our status, rights, lands and traditions." The brief period of proposed economic assistance was not enough. In its place, the Chiefs suggested an extensive plan for reserve development which would lead to economic self-sufficiency. The federal government would contribute the better part of a capital development fund to be administered by tribes with the assistance of business and government agencies. Interestingly, this development plan was to bring "the entire [Indian] community into the mainstream of Canadian life." One of the programmes was to teach unemployed reserve Indians "consumer values and the value of a dollar" and other attitudes essential to success as a modern worker. The goals of the Chiefs' economic plan were not so different from those of the government.

The greatest source of Indian rancor in the White Paper was the dismissal of treaties. The Chiefs argued that the government's "plain reading" ignored the oral promises made by the treaty commissioners recorded in their reports.

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65 Id. at i.
66 Id. at 11.
67 Id. at 19.
68 Id. at 9.
69 Indian Act, R.S.C. 1970, c. 1-6, s. 81. It is interesting that the Chiefs referred to removal of lands from trust status as a "system of allotment that would give individuals ownership with rights to sell," *Citizens Plus*, supra note 64, at 9. This seems to be a reference to the allotment system in effect on United States Indian reservations circa 1890-1930. See text accompanying notes 361-68, infra.
70 *Supra* note 64, at 5.
71 Id. at 16.
72 Id. at 51.
and deleted when the treaties were recorded in Ottawa. The oral promises should be observed and all of the promises should be viewed in a modern light. For example, the government’s promise to provide teachers was a commitment to provide Indian children the educational opportunity equal to their white neighbours. The machinery and livestock symbolized economic development. Further, the terms of the treaties should be read in favour of the Indians to compensate for their being written in a foreign tongue. Under these rules of interpretation, the treaty promises are far from minimal.

The White Paper is certainly susceptible of criticism. The proposed implementation period is very brief. In 1969, few Indians had had any experience of self-government or land management and reserve Indians had little experience of life beyond the reserve. Education, missing from the plan, would be necessary for Indians to enter Canadian society as “full and equal” partners. It would require several years to give the average registered Indian enough education to deal with the complexities of modern Canada.

The land programme is especially problematic. The high unemployment rate, coupled with the lack of education, bodes ill for Indian retention of land once it is removed from trust. The White Paper did not contemplate how Indians were to pay property taxes without income pending full development of the reserves. Neither does it show a grasp of the economic reality of being land poor. The unsophisticated rural Indian is not likely to understand that he has signed away his land as collateral for a needed loan or a consumer item.

The White Paper betrayed a limited knowledge of the American experience. The United States followed a policy in the 1950s very similar to that proposed in the White Paper, known as “termination”. Its repercussions were so severe that most of the “terminated” Indians successfully sought return to a government-recognized tribal status.

As with termination in the United States, the White Paper policy would have likely resulted in a major reduction in Indian lands, and led a leading Indian spokesman to declare that the government proposal would leave “our people with no land and consequently the future generation would be condemned to the ugly spectre of urban poverty in ghettos.”

Trudeau’s call for Indian assimilation helped to spark an Indian movement for self-government, but this meeting of opposed forces — the Liberal government for assimilation, Indians for autonomy — has dead-locked proposals for Indian Act amendment. Indians are afraid that the loss of special status would kill any chance for self-government so they accept the Act as a necessary compromise measure pending adoption of their proposals. Parliament, through the DIA, thus retains control over Indian government, although most of the proposals in the White Paper have been dropped.
During the last fifteen years, the DIA has responded to considerable pressure from Indian groups and has weakened its grip on band government. The DIA has exercised its discretion in greater harmony with Indian desire, giving many bands authority to decide on reserve development projects and authority to expend funds. The DIA removed the Indian agents from the reserves. The Dominion no longer forces elective government on the bands. About five percent of the bands have returned to their traditional government system, increasing to one third of the total the bands that had employed traditional government. The DIA has given individual bands a choice of whether Indian women who marry non-Indian men will retain Indian status. Funds for band administration have greatly increased. Yet while the DIA has encouraged band self-government to a degree, the discretion remains in the DIA to stifle Indian efforts of self-government; the Dominion Parliament has not amended the Indian Act to reduce the DIA’s power.

C. Indian Powers of Self-Government

The treaties serve as the only definitions of Indian-White relationships acquiesced to by Indians, and, it is urged, must form the basis of Indian powers. If one treats these agreements as contracts, it can be seen that Indians did not agree to give up self-government when they bargained away use of most of their land in Canada. As with contract interpretation:

In the interpretation of the clauses of a treaty, one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made. To do so, too, it is both proper and advisable to have recourse to whatever authoritative record may be available of the discussions surrounding the execution of the treaty.

The treaties contain two clauses relating to Indian government. The first states that reserves set aside for purposes other than farming were to “administered and dealt with” for Indians by the Dominion. Under the second, the Indians promised to:

[O]bey and abide by the law, that they will maintain peace and good order between each other and also between themselves and other tribes of Indians, and between themselves and other of Her Majesty’s subjects now inhabiting or hereafter to inhabit any part of the said ceded tract . . . ; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws enforced in the country so ceded.

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77 Indian Conditions, supra note 40, at 82.
78 Id.
79 Id. at 84.
80 Indian News, July 1980 at 1, col. 1.
81 Indian Conditions, supra note 40, at 78.
83 “Treaty No. 3” in Indian Treaties and Surrenders, supra note 22, at 305.
84 Id. at 307. For a typical corresponding provision in a United States-Indian treaty see Treaty with the Sioux of 1868, Art. 1, 15 Stat. 635 (1869).
The first provision seems to exclude most reserve lands from federal administration. The treaties speak of federal administration of non-farmland and they mention farmland without stating who is to administer it. There is abundant evidence that most of the reserve lands were to be farmed. First, the treaties provided that the Dominion would give the Indians plows and other farm tools, seed and cattle "all for the encouragement of agriculture among the Indians." Second, reserve size was determined according to the acreage that each Indian family could be expected to farm. After the fact, most reserve land was farmed. In keeping with the principle that the "language used in treaties with the Indians should never be construed to their prejudice," the treaties' silence on the administration of farming reserves, considered in light of the surrounding circumstances, should be interpreted as retaining that power for Indians.

The treaties may also be interpreted as having granted Indians governing power over non-farm reserve lands. Indian understanding of treaty terms at the time of treaty-making is critical to treaty construction. If Indians believed "administer" to be a temporary condition or to mean that the government would exclude non-Indians from reserves, the meaning of the term would be construed as such. It would depend largely on what the Crown representatives told the Indians. Manitoba Indians maintain that the Crown representatives did not tell them that signing treaties meant surrendering autonomy.

The "abide by the law" provision raises more difficulties than the "administer" provision. By which "law" were the Indians to abide? It is hard to imagine the Crown representatives through their translator describing English law to the Indian peoples. There is no indication that they did so: many Indians did not believe that they were signing away self-government. Indeed, the

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85 The "administer" provision could be construed narrowly so that even non-farm reserve lands might be administered by the Crown but Indian activities not directly affecting the land would be left under Indian administration. This more closely accords with the Indian view. See Anderson, Canadian Indian Rights Under International Law (1981), 7 Am. Indian J. 2; Wahbung, supra note 4, at 1.

86 Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by her Majesty's government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territories hereby ceded. Indian Treaties and Surrenders, supra note 22, at 305.

87 Id. at 307. See also Bartlett, The Establishment of Indian Reserves on the Prairies, [1980] 3 Can. L. Rep. 3.

88 Robertson, supra note 41, at 511.

89 Supra note 30.

90 Id. at 648-49 (B.C.C.A.); R. v. Taylor and Williams, supra note 33.

91 See Wahbung, supra note 4, at 3. One of the Crown treaty negotiators in Manitoba, Lieutenant-Governor Archibald, told Indians the following: But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so of your own free will. Morris, supra note 23, at 29.
Six Nations argued as late as 1977 that they had never surrendered sovereignty and had remained allies, not subjects, of the Queen. Even the belief of the Manitoba Indians that they had retained self-government powers has already been mentioned.

Even assuming that Indians agreed to live by Anglo-Canadian law, it is not certain that they surrendered all power to deal with crimes and disputes. Indians agreed to help the government bring Indians who violated the treaty or the laws enforced in the ceded lands "to justice and punishment." This is clearly limited to criminal actions since punishment was involved. The agreement appears further limited to include only disputes and crimes arising off the reserves since it refers to ceded lands and the Indians retained title in the reserves.

To summarize, the treaty language indicates that Indians did not give up the power to govern at least the farming reserves. It is doubtful that the Indians understood that the treaties incorporated Anglo-Canadian law by reference. They probably meant to keep power to punish Indian crimes which occurred on the reserve. Looking to the language of the agreement, the surrounding circumstances and the understanding of the parties, Indians contracted to give up much less self-governing power than the Dominion assumed.

An unconscionability analysis could also be applied to the termination of native self-government. It is readily maintained that Indians received a worse deal than did whites under the numbered treaties. Whites gained the use of huge areas of land, a pledge of peace and, according to Canadian law, near-complete control over Indian life. In return, Indians received annuities and a few farm animals and tools. Indians maintain that the Crown negotiators never mentioned government by the Crown. The negotiators promised the Queen's protection but Indians took this to mean only protection from whites, not control of Indian government. Further, Indians often bargained from an unequal position. Many were close to starvation when treaties were offered and sought government protection against famine. The unconscionable elements of oppression and unfair surprise are both present.

92"See Isaac v. Davey, [1977] 2 S.C.R. 897. The traditional tribal leaders argued that the Six Nations was not a "band" within the meaning of the Act. One definition of "band" at s. 2(a), encompasses Indians who live on lands the title to which is held by the Crown. Since the Six Nations received their lands from the Crown in fee, they were not a "band" and the Act did not apply to them. The Court found a way around this difficulty. The Indians' deed required that land alienation only be made to the Crown. Once this was done the Crown, in accordance with the Act, sold the land and held the money in trust. Once the government had the money in hand, the Six Nations became a "band" under s. 2(b) which defines "band" as any Indians for which the government holds monies.

93"See Wahbung, supra note 4, at 3.

94"E.g., "Treaty No. 3," 1 Treaties, supra note 22, at 307.

95Manitoba Indians argued that they never agreed to surrender jurisdiction over Indians who committed crimes. Wahbung, supra note 4, at 3.


97"E.g., "Treaty No. 3," 1 Treaties, supra note 22, at 305.

98Robertson, supra note 41, at 97.
A degree of Indian self-government is rooted in treaty. To the Indians' dismay, the federal Government considers treaties to be contractual agreements by one segment of society with the rest of society which are subject to unilateral change by the Dominion Parliament. And Parliament has acted forcefully to limit Indian self-government with the Indian Acts.

While Indians can pass by-laws, the federal Government has done virtually nothing to help Indians to develop the enforcement aspect of their municipal powers. Because the federal Government does not consider violation of a by-law to be a federal offence, the RCMP will not help to enforce by-laws. The Dominion has never supplied funds to bands for by-law enforcement. At this time, a band must go into court to enforce by-laws. It can seek representation by the Attorney-General of Canada to press claims or it can bring its own action. An example of band weakness in the area of judicial enforcement is furnished by Joe v. Findley. A band member was residing on reserve land in violation of a reserve zoning ordinance. The band could only impose a maximum penalty of $100 and thirty days in jail under section 81(r) of the Indian Act. To force him to move, the band had to seek an injunction in Provincial court against the violator.

As noted in the Dominion powers section above, Indians are assuming more power over Indian affairs. The government encourages Indian political participation at the band level and, in an advisory capacity, at the federal government level. The DIA has found that an increasing number of bands are "sufficiently advanced" to control their own funds although it considers few bands advanced enough, however, to levy taxes. Most bands manage housing, recreation and social assistance programmes, but less than twenty percent of the bands pass by-laws. Most that do, do not pass by-laws regulating housing, recreation, and social assistance. This seems to say that the band councils are primarily administering Dominion programmes despite their power to create their own regulatory schemes.

The government gives funds to major Indian political organizations, but has limited the participation of these organizations in constitutional amendment and patriation to advice only. They have encouraged Indian

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99 See Cardinal, supra note 32, and Francis, supra note 14. Certainly a nation has the power to unilaterally revoke a contract. Fairness, and the more practical consideration, trust, seem to dictate some sort of compensation for contract breaches.
101 Id. at 65.
102 Unlike the American tribes, Canadian bands do not have band courts. See text accompanying notes 258-68 and 321-34, infra for information on the jurisdiction of Indian tribal courts in the United States.
103 See Logan v. A.G. Can., supra note 57.
106 Robertson, supra note 41, at 111.
108 Indian Conditions, supra note 40, at 87.
109 Id. at 85.
110 Id. at 90.
discussion of their proposals but refused Indians any power or standing in constitutional decision-making. Over strenuous Indian objections, the federal government and the provinces agreed to adopt constitutional provisions on Indians which acknowledged tribal status and legal rights recognized by case law but fell far short of Indian desires. In frustration, Indians took their case — unsuccessfully — to the Queen and the British Parliament.

While Indians did not attain guarantees of partial sovereignty, their rights were clearly strengthened by the new Constitution. At a minimum, section 35 sets a floor for native rights. Existing case law respecting treaty and aboriginal rights may not be overturned insofar as it upholds those rights. Official administrative opinions, to the extent that they upheld native rights at the time of the new Constitution's adoption as well as the few similar provisions of the Indian Act, may not be retreated from. Because the term "existing aboriginal rights" is not qualified, it should be read to include any right exercised by native peoples which the Canadian Parliament has not taken or which was not surrendered by treaty. The separate reference to aboriginal rights in land in section 25 supports the idea that section 35 aboriginal rights encompass ceremonial/religious practices, rights to self-government and other rights not removed by treaty or federal statute.

Indians have also called for federal regulation to make bands self-governing. Arguing that the Indian Act established an unconstitutional ministerial dictatorship over Indians, the Union of Nova Scotia Indians has proposed a Band Government Act. Under the Act, an Indian band would have the option to adopt a constitution setting forth the manner of band government. It would then control all band funds and have the power to revocably assign its powers to the Minister instead of working under the existing contrary Minister-band relationship. Maintaining its position that Indian powers are a privilege subject to Parliamentary revocation, the Dominion has not considered the proposed Band Government Act.

112 Rights of the Aboriginal Peoples of Canada
35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed.
(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada.
114 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that may be required by the aboriginal peoples of Canada by way of land claims settlement.
115 An example would be the right to band courts and more traditional means of dispute resolution. The right was not surrendered by treaty, at least as to jurisdiction over Indian offences, and the Indian Act sanctions it. See R.S.C. 1970, c. 1-6, s. 81.
116 Supra note 75.
D. Conclusion

Little remains of Indian self-government. Band councils retain some powers of municipal government, all of which are revocable by Parliament. Only after increased pressure on and involvement in the federal government are Indians regaining any power over their lives. Since Indian constitutional plans have been thwarted, Indians will have to rely on the non-Indian peoples of Canada, through the federal government, to permit Indians the measure of self-government that non-Indian communities take for granted.

III. CANADIAN INDIAN LAND USE

A. Introduction

Prior to European contact, many Indians farmed and hunted, travelling between farm town and hunting ground on an annual cycle, while others relied solely upon game and fish for food. As a result of their contact, many Indians traded furs for European goods; few Indians adopted the settled European agrarian life. The concepts of land ownership and water rights on which European farming and resource development were based were alien to most Indians, though hunting territories were well-defined. The Great Lakes Indians were an exception, many being farmers. Although farmland might be used in common, individuals or nuclear families generally owned the plots they farmed. Exploitive land use was considered a sacrilege by many bands, particularly those which relied most heavily on hunting and fishing for subsistence.

To assimilate Indians into European Canada the government planned to set up Indian municipal governments to administer reserves which would be farmed by Indians, although many of the affected Indians had in fact been hunters. As with Indian government, Parliament gave the DIA nearly unbridled discretion over Indian lands. Indian Affairs Agents often abused their powers, leasing the prime reserve agricultural land to whites. To the present day, few Indians farm or manage reserve lands. This section discusses these developments, the degree of provincial control over Indian lands, and the amount of Indian control over land use that remains.

B. Dominion Powers Over Indian Lands

Under the treaties negotiated pursuant to the Royal Proclamation of 1763, Indians retained reserve lands, many for unspecified purposes, many ex-

117 Hodge, supra note 17, at 359, 462, 617.

118 Id. at 478.


122 See text accompanying notes 35-39, 86-88, supra.

123 Robertson, supra note 41, at 111.

124 Id.
pressly for farming.\textsuperscript{125} Although they did not mention water or mineral rights, land possession by Indian bands "is of the same effect in relation to day-to-day control thereof as possession of land by any person owning the title in fee simple."\textsuperscript{126} Therefore, presumably, Indians retained water and mineral rights. Indians so believe.\textsuperscript{127} In order to protect Indian rights in land, the treaties required that Indian bands, not Indian individuals, agree to alienate reserve lands and that Indians could only alienate these lands to the Crown.\textsuperscript{128} The Iroquois are in a unique situation regarding their lands. They hold a fee simple patent from the Crown given to them in reward for their alliance with Great Britain during the United States War for Independence.\textsuperscript{129}

The \textit{Indian Act} of 1951 detailed DIA powers over land use that exist to the present. Under section 18 of the Act, the Minister may direct the use of reserve lands for farming, schools, cemeteries, health projects, and, with the band council, any other purpose for the welfare of the band.\textsuperscript{130} The Minister may subdivide land and build roads.\textsuperscript{131} The band can request land management powers from the Minister. However, the Minister has complete discretion regarding this request and can withdraw, at any time, any rights granted.\textsuperscript{132} The only power over land reserved to the band, apart from denial of consent to "any other purpose," is the power of allotment to band members and to transfer rights among members.\textsuperscript{133} Even this power is subject to the Minister's approval.

The Act also sets out a procedure for alienation of reserve land rights to non-Indians known as surrender. Surrender must be made to the Crown and assented to by a majority of band electors or by a majority of the electors present at a second election if only a minority of electors took part in the first election.\textsuperscript{134} Band consent was required under the traditional principle that protection of Indian land interests necessitated exclusive power to purchase Indian lands rest in the Crown.\textsuperscript{135}

This principle was partially circumvented under the Act by permitting the Minister to operate farms on the reserve and to authorize any use of land by any person for up to one year without band consent.\textsuperscript{136} This power fostered a major deprivation of band control over its lands. Agents lease most arable land to white farmers.\textsuperscript{137} Since Indian interest in reserve lands is limited to use, they lost their interest under the Act even absent surrender.

\textsuperscript{125} E.g., "Treaty No. 6," 2 \textit{Treaties}, supra note 22, at 35.
\textsuperscript{127} See "Spirit and Intent of Treaties," supra note 119, at 33 and \textit{Wahbung}, supra note 4, at 1-3.
\textsuperscript{128} See e.g., "Treaty No. 6," 2 \textit{Treaties}, supra note 22.
\textsuperscript{130} \textit{Indian Act}, R.S.C. 1970, c. I-6, ss. 18(2), 70.
\textsuperscript{131} \textit{Indian Act}, R.S.C. 1970, c. I-6, ss. 19, 34.
\textsuperscript{132} \textit{Indian Act}, R.S.C. 1970, c. I-6, s. 60.
\textsuperscript{133} \textit{Indian Act}, R.S.C. 1970, c. I-6, s. 24.
\textsuperscript{134} \textit{Indian Act}, R.S.C. 1970, c. I-6, s. 37 et seg.
\textsuperscript{135} This principle is rooted in the \textit{Royal Proclamation of 1763} and was strongly supported by the chief Canadian negotiators. See Morris, supra note 23, at 30.
\textsuperscript{136} \textit{Indian Act}, R.S.C. 1970, c. I-6, ss. 28(2), 71.
\textsuperscript{137} Robertson, supra note 41, at 111.
The Six Nations (Iroquois Confederacy) attacked the Act's land provisions as inconsistent with Indian sovereignty in *Logan v. Attorney-General for Canada*. In that case, the Six Nations band attacked the surrender method because the election rules conflicted with traditional Iroquois government. The tribes also attacked the broad powers of the Minister under the Act as inconsistent with the fee simple grant given by the King as reward for service in the United States War for Independence. The Court held that the Minister's control of Iroquois funds made the Iroquois "Indians" within the meaning of the *Indian Act*; therefore, the Act applied to them. This case underscored the virtually complete DIA control of Indian reserve lands regardless of whether those lands were set aside by treaty or were owned by Indians in fee simple.

The only mention of water rights in the treaties is the right of all persons to use waterways adjacent to reserves. The treaties indicate no intent to transfer water rights. Indians did not view water as property, yet the Crown's treaty negotiators represented a society that did not consider water alienable from adjacent lands. At common law, water rights were appurtenant to riparian lands. Since the treaties contain no language to the contrary, it should not be assumed that the Dominion gained control of Indian rights in water on or adjacent to reserves by treaty. Arguably, Indians retained at least riparian rights.

With the *Northwest Territories Irrigation Act*, the government enacted a "prior appropriation" water rights scheme throughout all of Canada north and west of Manitoba. It required that persons obtain a licence by 1896 or forfeit rights in water to the Crown that were not riparian or for "domestic" uses. The DIA, which was responsible for Indian lands at this time, apparently sought no licences on behalf of Indian bands, probably forfeiting most Indian water rights in what is now northern Manitoba, Saskatchewan, Alberta, British Columbia, and the Northwest Territories.

The treaties limited the Dominion power to authorize mineral development to ceded lands. This was reflected in the *Indian Act* of 1886 which in-

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138 Supra note 74.
139 The deed or agreement is called the Simcoe Patent. See *Treaties, supra* note 22.
140 E.g., "Treaty No. 7," 2 *Treaties, id.* at 58.
142 *North-west Irrigation Act*, S.C. 1894, c. 30 as am. by S.C. 1895, c. 33.
143 "Prior appropriation" refers to the system of water rights used in most of western North America. The keystone of prior appropriation is the allocation scheme in times of shortage: whomever first appropriates water on a stream for a "beneficial use" — domestic, agricultural, manufacturing or mining — has priority over all subsequent "appropriators" on the stream. No restriction exists on place of use; it may be in another watershed altogether. This is in sharp contrast to the riparian system under which rights to water are tied to riparian land ownership and loss of use is apportioned among the users in times of scarcity. See Clark, *Water and Water Rights* (Allen Smith Co., 1967) at 4.
144 *North-west Irrigation Act*, S.C. 1894, c. 30 as am. by S.C. 1895, c. 33, ss. 6, 7, 8.
145 Bartlett, *supra* note 141, at 70.
146 What is now Northern Manitoba was part of the Northwest Territories when the *North-west Irrigation Act*, S.C. 1894, c. 30 was passed.
147 Supra note 125, at 37.
cluded minerals in the definition of reserve, thus giving them the protection of the formal surrender process. In 1919, Parliament partially abrogated the treaties by amending the Indian Act to allow leases to surface rights for precious metal mining without surrender, which provision Parliament later extended to include leasing for all surface mining. Parliament resumed upholding of Canada's treaty promises in 1951 by making surface minerals subject to surrender once more. Throughout this time, Parliament mandated that a band's interest in a reserve was subject to mineral rights which existed at the time the reserve was created, so jeopardizing the existence of reserves created by government-Indian agreement which contained individual mining claims.

In apparent violation of treaty, the federal government took away a good part of Indian water rights and, for a time, Indian control of surface minerals. Under the quarter-century-old Indian Act provisions, the government continues to dominate reserve land use, the delegation of land use authority to the DIA remaining unchanged.

C. Provincial Powers Over Indian Lands

The clear federal legislative power over Indian lands is muddied by the individual Provincial Terms of Union with the Dominion. As a result, some provincial laws have effect within reserve boundaries and provincial policies have affected reserve size and location.

British Columbia is the extreme case. The British Columbia Terms of Union hold the Dominion to "a policy as liberal as that hitherto pursued by the British Columbia government" toward Indians. Apparently, the colonial government of British Columbia had made several informal agreements with Indians regarding reserves up until about five years prior to joining the Union. During the ensuing five years, Indian concerns were largely ignored by the colonial government. The provincial government adopted the more recent colonial Indian policy, using the "liberal policy" clause to defeat native claims to reserves, many of which, due to the informality of the agreements, were poorly documented.

Saskatchewan successfully worked to keep mineral-rich lands outside reserve boundaries. Northern Saskatchewan Indians have had several un-
completed reserve land claims during this century. In 1925, some of the bands sought to have a mineral-rich area selected as a reserve. In a letter to the then Minister of the Interior, the Saskatchewan premier wrote:

> It seems to me highly desirable that no action should be taken which would have the effect of throwing mineralized sections of our northern country into Indian Reserves, if it can be avoided. . . . If mineralized sections are kept out of Indian Reserves, as far as possible, there is a chance for their development in the future. The placing of them within the borders of the Reserves would hamper development very materially.158

Consistent with the Dominion policy of locating reserves away from mineral deposits, the Saskatchewan Indians’ pending request for reserve location on mineral lands was denied.159

The Natural Resources Transfer Agreements, which transferred “the interest of the Crown and all Crown lands” to the province in which the land was situated,160 do not give the provinces control over minerals on Indian reserves161 but they do convey the Dominion interest in water to the provinces. The Agreements state that “the interest of the Crown in the waters . . . under the Northwest Territories Irrigation Act, 1898 . . . shall . . . belong to the province, subject to any trusts existing in respect thereof and to any interest other than that of the Crown.”162 The Northwest Territories Irrigation Act had set up a prior appropriation scheme throughout the North and West of Canada. It preserved riparian rights for “domestic” uses. Since the DIA failed to obtain water licences for Indian bands, it is unclear to what extent Indian bands are subject to provincial water laws. It may be that Indians did not need licences because of the prior federal power over reserve lands and the appurtenant water rights.

Indians and Dominion alike considered water rights to be appurtenant to land when the numbered treaties were signed and the Indian Act has consistently provided that Indian use rights in land must be surrendered by Indians.163 Yet water rights were not surrendered prior to the Resource Agreements. Since the Dominion only held underlying title while the Indians held use rights,164 it appears that the Agreements only gave the provinces underlying title to water adjacent to Indian reserves. This underlying title in no way gave the provinces the right to permit appropriation of Indian water.165

The provinces do not accept this argument; they contend that they can fully

159 Id. at 25.
163 Indian Act, R.S.C. 1970, c. I-6, s. 37 et seq. Minerals were for a time excepted from this protection. See notes 149 and 150, supra.
165 A leading Indian law commentator has put forth a similar argument but thought it unlikely to succeed because the Indian riparian interest is indistinct from that of other riparian owners. See Bartlett, supra note 141, at 70. It seems to this writer that the major distinction between these groups is the Indian Act protection of Indian land interests. Non-Indian owners had no such protection.
It is clear, however, that the provinces do not control the beds of non-navigable waters nor can they allow flooding of reserve lands without federal approval.\textsuperscript{167}

The Resource Agreements apply to wildlife as well as to water, giving the provinces partial control of reserve hunting. The leading case is \textit{Cardinal v. A.-G. Alberta},\textsuperscript{168} in which an Indian had been convicted of selling moose to a non-Indian on his reserve in violation of the Alberta \textit{Wildlife Act}.\textsuperscript{169} The Supreme Court upheld the conviction, holding the Natural Resources Transfer Agreements a valid delegation of federal powers and construing it as permitting provincial regulation of non-subsistence hunting on reserves.

The decision is somewhat contradictory because, as the Court acknowledges, the purpose of the contested provision was "to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence."\textsuperscript{170} Clearly, the sale of meat by a hunter is to provide him support. Hunting for this purpose should not be capable of provincial regulation unless Parliament was guilty of placing "surplusage" in the statute.

Laskin J.'s dissent strongly argued that the Transfer Agreements were not intended to delegate any federal power over Indian lands to the provinces. Section 91(24) of the Constitution prohibited this, making the resources of Indian lands, including wildlife, subject to exclusive federal jurisdiction at least as far as Indians were concerned.\textsuperscript{171} In his view, the Agreements conformed to constitutional design because their purpose was to affirm Indian hunting rights, not limit them.

The \textit{Cardinal} decision left a portion of the case law on provincial regulation of reserve hunting intact but it left confusion as to the breadth of federal delegation to the western provinces.\textsuperscript{172} The provinces could already regulate non-Indian hunters on the reserve under lower court cases because this regulation was considered incidental to "lands reserved for Indians."\textsuperscript{173} In Ontario, however, outside the realm of the Transfer Agreements, the Court of Appeal had already determined that provincial regulation of Indian hunting on the reserve was \textit{ultra vires}.\textsuperscript{174} It remains unclear how far a western province can go before it enters the federal realm. In \textit{Cardinal}, the Court noted that a provincial law dealing especially with Indians or Indian lands would be \textit{ultra vires}.\textsuperscript{175}


\textsuperscript{166} See the \textit{North-west Irrigation Act}, S.C. 1894, c. 30 as am. by S.C. 1895, c. 33.

\textsuperscript{167} \textit{Cardinal}, supra note 32.


\textsuperscript{170} \textit{Id.} at 570.

\textsuperscript{171} Much of this confusion centres on provincial control of hunting on ceded lands. This issue is related to regulation of reserve hunting because of wildlife's continuing disregard for political boundaries but is beyond the scope of this treatment of reserve issues. For a discussion of some of the off-reserve hunting uncertainties, see Note, \textit{Aboriginal Hunting Rights: Some Issues Raised by the Case of R. v. Frank} (1976-77), 41 Sask. L. Rev. 101.


\textsuperscript{174} This is supported by \textit{R. ex rel. Clinton v. Strongquill}, [1953] 2 D.L.R. 264 (Sask. C.A.).
but this does little to clarify the field. For instance, does a conservation-based restriction on manner of hunting apply to Indians? In a pre-Cardinal decision, a court had held that a regulation prohibiting use of a type of bullet did not apply to an Indian hunting on ceded lands on which he had a right to hunt under the Transfer Agreements.\(^{176}\) The question of what independent meaning the term "support" has, if any, has not really been resolved by the Court either.

Apart from federal-provincial agreement, the Dominion has increased provincial power over Indians unilaterally, with the passage of section 88 of the \textit{Indian Act} which incorporates provincial law by reference:

Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.\(^{177}\)

Prior to its passage in 1951, courts took a very narrow view of provincial powers over Indian affairs on reserves.\(^{178}\) Section 88 grants no provincial powers of enforcement but it has led to ever-greater provincial regulatory control of life on the reserves.\(^{179}\)

Provincial law is still pre-empted by treaty provisions under section 88. In \textit{R. v. White and Bob},\(^{180}\) the Supreme Court upheld the acquittal of an Indian charged with hunting off the reserve in violation of provincial game law. The provincial law was held invalid under section 88 because it contravened a treaty guarantee of traditional hunting rights. It is interesting to note that the treaty on which the defendant relied was not a formal agreement. Nonetheless, the Court held that a section 88 "treaty" included all agreements with Indians "made by persons in authority as may be brought within the term 'the word of the white man'."\(^{181}\)

Section 88 does not apply provincial law regarding minerals, and perhaps water, to Indians due to the \textit{Indian Act} provisions providing for surrender and DIA administration of lands. The scope of "laws of general application" remains unsettled. Chief Justice Laskin has remarked that the provision does not bear on Indian lands at all because it refers only to Indians.\(^{182}\)

D. \textit{Indian Powers Over Indian Lands}

From the foregoing discussion, it is clear that Indians have little remaining power over their lands. They retain the power to prevent land surrender, have regained some control over land use and may hunt wildlife on the reserves.


\(^{177}\) \textit{Indian Act}, R.S.C. 1970, c. 1-6, s. 88.

\(^{178}\) Cumming and Mickenberg, \textit{supra} note 154. The converse was true if the activity was off-reserve: courts took a broad view of provincial power over Indians.


\(^{181}\) \textit{Id.} at 649 (D.L.R.).

\(^{182}\) See \textit{Cardinal}, \textit{supra} note 32, at 576 (dissent).
for food. In accord with Indian intent at the time of treaty-making, Indians cannot freely alienate land.

Although Indians can prevent their lands from being surrendered, the federal government, if it is persistent, can induce surrender by a minority of a band. If only a minority of eligible voters take part in the first vote on a given surrender proposal, the majority of whatever number of voters take part in the second vote may authorize surrender. As a result, in a band with few voters, the federal government can gain surrender by manipulating a small minority of the band. This point was raised in *Cardinal v. The Queen*, now pending before the Supreme Court. A minority of band members had surrendered part of a reserve under the *Indian Act* provisions allowing minority surrender. The band attacked the Act provision, arguing that the intent of the Act was to protect Indian rights in land by requiring surrender by a minority of band members. In ruling against the band, the Federal Court of Appeal applied municipal and labour law analysis. A clearly-reasoned dissent maintained that the Act could not have been intended to permit surrender by a minority of the band since a purpose of the Act is to protect Indian lands. It is conceivable that the Supreme Court would distinguish *Cardinal* from *Logan*, because *Cardinal* involves Indian land, an area traditionally protected by the Crown, while *Logan* dealt with tribal government, an area the Dominion has generally undermined. The outcome is hard to predict because a majority in the Appeal Court drew analogies to traditional legal areas in order to avoid using Indian precedents.

Indian water rights, beyond riparian "domestic" uses, are theoretical. Indians could develop their domestic water right for ranching and industrial power generation under the bands' power to regulate public works on the reserve. A legislative settlement would probably be necessary before bands could assert further riparian rights lost to them under the *Northwest Territories Irrigation Act*.

Indians, however, have retained some power over reserve land use. Band councils can zone, locate roads, regulate public works and buildings and regulate nuisance. They can prevent the Minister from authorizing land use for any purpose other than farming, schools, cemeteries and health projects unless the government exercises its power of eminent domain. A band can also seek enforcement of trespass in provincial court, and one band has successfully sued for damages for power line construction on the reserve.

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185 Wahbung and Bartlett, supra note 4; Robertson, supra note 41.
186 See *Four B Manufacturing, Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031. The Court applied labour law and law of government employees to uphold application of provincial labour law to Indian employees working on a reserve.
187 S.C. 1894 (4th Sess.), c. 30, s. 9 as am. by S.C. 1895 (3d Sess.), c. 33, s. 8(2).
190 *Indian Act*, R.S.C. 1970, c. I-6, s. 74, 73 and 18, 39, 42, 81, 83, 91, 114.
Within its discretion, the federal government has permitted some bands to regulate fish and game.¹⁹³

This regulatory power clearly extends to Indians hunting for food under the Resources Transfer Agreements and, in Ontario, to all treaty-sanctioned hunting. It should also apply to non-Indians even if the regulation conflicts with a provincial regulation because it lies within the ambit of "lands reserved for Indians." This is another area left uncertain by Cardinal v. A.-G. Alberta. Even though section 88 requires that the by-law control, the Transfer Agreements might be interpreted as mandating that the provincial Indians' limited powers are reduced further by bands' failure to exercise control.¹⁹⁴

Several factors are involved here. First, the long federal history of direct control over land use has not prepared bands to manage their lands. Second, few bands have funds for development or band by-law enforcement and the federal government does not provide such funds.¹⁹⁵ Third, band by-laws are subject to nullification by the DIA at any time.¹⁹⁶ Fourth, many bands seem satisfied to leave the land substantially alone.¹⁹⁷

Indians all across Canada are calling for the Indian control of Indian lands which they understand was promised them by treaty.¹⁹⁸ Many Indians have called for federal legislation giving bands complete self-governing status, including full powers over reserves.¹⁹⁹ One such proposal, the Band Government Act, would give bands the power to "exclusively make laws governing . . . the assignment; management, use and disposition of reserve lands and reserves, and of band hunting and fishing rights wherever they may be enjoyed . . . ."²⁰⁰

To date, Indians enjoy little power over their own lands and, subject to the Minister's revocation, exercise only some of the powers of municipal government on the reserve. The key to Indian control of reserve land use lies with the Dominion government. Only Dominion legislation which would weaken the DIA's broad discretion over Indian land use would give Indians any real power over their lands.

IV. INDIAN SELF-GOVERNMENT IN THE UNITED STATES

A. Introduction

Prior to European contact, Indians, in what is now the United States, governed as diversely as did Indians in Canada. The Iroquois Confederacy had a complex "republican" system, with chiefs acting in councils at the tribal and the federal levels.²⁰¹ The Wyandots had a common government system based

¹⁹³ See Indian Conditions, supra note 40, at 85.
¹⁹⁴ Id. at 87.
¹⁹⁵ Morse, supra note 100, at 65.
¹⁹⁶ Indian Act, R.S.C. 1970, c. 1-6, s. 81.
¹⁹⁷ McCullum and McCullum, This Land is Not For Sale (Toronto: Anglican Book Centre, 1975) at 74-78.
¹⁹⁸ Wahbung, supra note 4, at 1 and Bartlett, supra note 127, at 18-19.
¹⁹⁹ Bartlett, supra note 4, at 592-93.
²⁰¹ See text accompanying notes 25-36, supra.
on leadership from heads of extended families. The heads of these families were elder women who selected male chiefs and governed in councils composed of four women and one man. The council of an extended family dealt with family decisions and tried the criminally accused. When tribal decisions were necessary, a grand council of all the family councillors and leading men of the tribe met. This larger council determined property rights and handled appeals from convictions of those accused of internecine crime. Conversely, many Indian bands had no formal government, but when decision-making was necessary, acted consensually with the advice of a headman. The prominent Indians of these bands had power but only insofar as they could persuade their fellows; they lacked authority to give orders.

Indian dispute resolution techniques were as varied as the forms of government. Many Indians, including the Iroquois, used restitution as punishment for crimes. Revenge was also practiced, in many tribes at the discretion of the wronged family and, in some instances, by tribal police. Among several tribes, murder was dealt with by the killer’s giving sufficient goods to satisfy the injured family or by the revenge of an aggrieved person upon a member of the killer’s family, if not upon the actual killer. The Wyandots, for their part, followed formal trial procedures in determining guilt and then applied the concept of restitution or imposed a sentence of capital punishment, depending on the crime.

The following section of the paper deals with Indian government in the United States. The first subsection outlines the United States government’s policies toward Indian government. These policies have varied widely in emphasis, swinging from recognition of Indian sovereignty by treaty-making with tribes and minimal efforts to control internal Indian affairs, to total control of Indian government and toward Indian self-government on a United States-approved model. The assimilation of Indians into white society has been the dominant theme of the United States’ policy with strains of self-determination becoming louder in the 1930s and beyond. A discussion of the current degree of the United States’ control of Indian government follows. The second subsection discusses state powers granted by Congress over Indian government. The final subsection turns to what remains of Indian self-government and the growing powers of tribes to govern themselves.

206 Provinse, “The Underlying Sanctions of Plains Indian Culture,” id. at 341, 349.
208 Supra note 202.
B. Federal Powers Over Indian Self-Government

The federal power regarding Indians was granted, explicitly and implicitly, by the Constitution. The framers vested in the federal government the general powers to deal with Indians that had formerly been vested in the Crown. Congress was given power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The treaty-making power implicitly included Indians because the new national government had made its first Indian treaty a decade before the Constitutional convention. Early on, these two enumerated powers were held to place all power regarding Indians in the federal government. To a lesser extent, other constitutional provisions have been relied upon to justify federal power over Indian affairs; the most important of these are the war-making power and Congress' power over federal property.

Several hundred treaties between Indian tribes and the federal government were made between 1778 and 1871. States were not allowed to make treaties, though treaties in force before the Constitution's ratification were left whole. Treaty language varies depending upon the period and the state of United States-Indian relations, whether peaceful or hostile, at the time of making and the terms of the treaties must be considered in resolving questions of retained sovereignty and jurisdiction. In general, the treaties provided that Indians retain traditional Indian hunting and fishing rights and perpetual use of certain lands known as reservations. The United States promised to provide protection and care on the reservations, farm animals and tools, annuities and education. For their part, Indians promised exclusive trade relations with the United States, an end to hostilities when appropriate and the surrender of rights in ceded lands. Some tribes also surrendered the power to allot reservation lands to individual Indians.

Indian government was not mentioned in some treaties; in others, Indian government was arguably made revocable by the United States. In some, the only Indian surrender of governmental power was the promise to turn over Indians to the United States for punishment who had committed crimes against
whites. The broadest language on Indian government, written into treaties toward the end of the treaty-making period, granted power to the United States to adopt whatever "policy and management of their affairs, as . . . may be most beneficial to them."3

As in Canada, the government's primary purpose in treaty-making was to remove Indians from lands most desired for non-Indian settlement. Unlike Canada, during its most active treaty-making period the United States often dealt with hostile tribes that were a real threat to the new nation's survival. The relative strength of the Indians forced the United States to view them as sovereign peoples though this attitude changed as Indians grew relatively weaker. By 1831, the Supreme Court had adopted a position short of acceptance of complete Indian sovereignty yet recognized Indian treaties as international. The Indian tribes were viewed as "domestic, dependent nations" with inherent retained sovereignty.

Since Indian treaties were not contracts and were not quite international in nature, the courts formulated special rules of interpretation, especially as the United States grew stronger during the nineteenth century: ambiguous expressions must be resolved in favour of the Indian parties concerned; treaties must be interpreted as the Indians would have understood them; and treaties must be liberally construed in favour of Indians. These rules reflect the United States' attitude of wardship towards Indians and the idea that "transactions between a guardian and his wards are to be construed favourably toward the latter." These rules have, generally, led to regular judicial protection of tribes from government actions contrary to treaty.

The relative strengths of Canadian and United States Indians during their respective treaty periods may explain the relative unimportance that Canada accords Indian treaties. Canada, from the time of its first Indian Act, dealt

[222] Treaty with the Sioux Indians, April 29, 1868, 15 Stat. 635, art. I. Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667, art. I.


[227] Id. at 17.


[231] Another factor is the relative independence of United States courts. Canadian Courts feel themselves limited primarily to statutory interpretation. Professor Strayer notes "the courts have refused to concern themselves with the wisdom or fairness of legislation . . . provided that the Dominion does not infringe on provincial powers, nor the provinces on the Dominion power, the courts will not interfere." Strayer, Judicial Review of Legislation in Canada (Toronto: U. of T. Press, 1968) at 5-6.
with friendly, relatively weak bands in what resembled a land contract situation and came to view the treaties as contractual. 232 Canada acted swiftly to abrogate its "contracts" and assume complete control over Indian self-government. 233 The United States assumption of control was somewhat more gradual. 234

With the development of the reservation system in the mid-nineteenth century, the United States government began to assume governmental powers over Indians. Indians retained self-government during the early years of the system, 235 although tribal autonomy was threatened by the United States' policy of squeezing several tribes, sometimes hostile to one another, onto one reservation. 236 Concerned about Indians' unwillingness to adopt white culture, the government placed Indian agents on the reservations with a mandate as arbitrary and as broad as that of Canada's DIA. 237 The Bureau of Indian Affairs of the Department of the Interior eventually sent agents to all of the reservations who, with the aid of Indian police, broke the traditional leadership and assumed the reins of power. 238

The reservation policy often entailed treaty violation, particularly where a given treaty did not mention the United States' assumption of governmental power over Indians. The Supreme Court legitimized Congress' treaty abrogation in Lone Wolf v. Hitchcock, 239 a case challenging a land cession that the United States had obtained in violation of treaty. The Court found that Congress' "plenary power" over Indians gave it the right to take any action concerning Indians regardless of treaty provisions. 240 The Court held that this "plenary power" was exempt from judicial consideration because it was a political question under the Constitution. This power survives but it has been tempered by the canons of treaty construction and the federal courts' unwillingness to deny treaty obligations. 241

The United States further weakened Indian self-government by allotting most Indian lands to individual Indians at the turn of the nineteenth century. Under the General Allotment Act (Dawes Act), 242 Indians with allotted lands

232 See text accompanying notes 16-20, supra.
233 See text accompanying notes 35-42, supra.
234 See discussion in Cohen, supra note 113, at 47-66.
235 Some tribes, most notably the Five Civilized Tribes in Oklahoma governed themselves for several decades after the onset of the reservation system until the United States abrogated its treaties with them and banned the tribes' governments: Prucha, American Indian Policy in Crisis: Christian Reformers and the Indian 1865-1900 (Oklahoma: U. of Oklahoma Press, 1976) at 389-401. This paper necessarily paints with a broad brush.
236 See Shoshone Tribe, supra note 229.
239 187 U.S. 553, 23 S. Ct. 216 (1903).
240 Id. at 565 (U.S.), 221 (S. Ct.).
became United States citizens and were removed from tribal affiliation and control. Most Indians who commented on tribal land allotment were opposed to it as they feared it would weaken tribal culture and expose Indians to land speculators.243 Disparate groups in support of the plan favoured it for much the same reasons, although the reformers who sought to assimilate Indians did not expect the rapid change in land ownership that occurred.244

The land allotment policy was only part of a major assimilative movement that was to place nearly all power over Indian government in federal hands.245 In 1883, the Secretary of the Interior ordered the Indian agents to appoint tribal courts with civil jurisdiction identical to that of Justices of the Peace in the state or territory adjacent to the reservation.246 These agents had complete control over case as well as judge selection. The primary purpose of the courts was to "put a stop to the demoralizing influence of heathenish rites."247 In 1924, Congress made all Indians citizens of the United States so as to foster attachment to American values and institutions.248 The most important existing aspect of the assimilationist policy, however, was embodied in the Indian Reorganization Act of 1934.249

The Indian Reorganization Act acknowledged the tribal right to self-government and permitted tribes to adopt constitutions and by-laws which would be submitted to the BIA for ratification. However, Indians did not have a choice in selecting their manner of government. The Act stated that constitutions and by-laws had to be approved or revoked by a majority of tribal electors.250 At least thirty per cent of the electors had to vote if the election were to be valid. In addition, individual tribes could not set up a government; all tribes on a given reservation had to have one tribal council.251 Most tribes, their traditional governments crushed by the BIA, adopted constitutions and by-laws which set up an elective system on the BIA superintendency model.252

243 Prucha, supra note 235, at 399-400.
244 Id. at 229, 256.
245 For an excellent study of the reform movement that brought forth the assimilation policy, see Prucha, supra note 235.
246 Id. at 209.
247 Report of the Commissioner of Indian Affairs, 1883 quoted in Prucha, supra note 235, at 209. The BIA agents took other measures to destroy Indian culture such as the forced cutting of male Indians' hair and the prohibition of face painting. Hair has religious significance to many Indians; it is not to be cut, see Gallahan v. Hollyfield, 670 F. 2d. 1345 (4th Cir. 1982) holding that Virginia prison regulation requiring haircuts infringes on Indian prisoners' freedom of worship. The BIA Commissioner ordered agents to withhold food from any Indians who insisted on following these customs. See Jackson and Galli, A History of the BIA and its Activities Among Indians (San Francisco: R & E. Assoc., 1977).
248 8 U.S.C. §1401(a)(2) (1976). By the time of the Act's passage, as many as two-thirds of all U.S. Indians had become citizens under other laws and treaties. See Washburn, infra note 255.
249 25 U.S.C. §461-79 (1976), the Act was by no means merely another assimilative measure. It was also intended to safeguard Indian autonomy to a degree, see Cohen, supra note 113, at 84-86.
252 This meant that most power was vested in an elected tribal council, often with a strong chairman replacing the BIA agent or superintendent and that no separation of powers existed. See Comment, Tribal Self-Government and the Indian Reorganization Act of 1934 (1972), 70 Mich. L. Rev. 355.
The BIA was unwilling to permit the Indian Reorganization Act to reduce its power over Indian tribes and interpreted the Act to give it the broadest possible power over tribal government. The BIA assumed not only the power to veto all proposed tribal constitutions and by-laws, but the power to veto all tribal ordinances as well. This authority was generally written into the tribal constitutions that the BIA approved.253

The Act is ambiguous as to a requirement of BIA approval for constitutions and by-laws.254 Since the BIA’s power was not expressly stated in the law and this power intruded on Indian sovereignty, the BIA should not have assumed veto power over these documents. BIA approval power over tribal ordinances is not mentioned in the statute and is in effect a "bootstrapping" of authority. The BIA has argued that the statute was intended to create United States-model tribal governments and that it was simply carrying out Congress' mandate.255 Many tribes, relying on the BIA for guidance, acquiesced in the BIA interpretation.256

While the BIA retained substantial control over tribal government, the Indian Reorganization Act did specify several tribal powers which the BIA had previously denied Indians.257 The Act, however, did not restore tribal court jurisdiction that Congress had previously assumed and Congress has gradually eroded tribal jurisdiction over crimes on the reservation.258

Congress directly assumed a great deal of power by removing jurisdiction over major crimes from tribal authorities.259 Traditionally, most tribes retained the power to deal with offenders on Indian lands and intra-Indian crimes regardless of location.260 Later treaties demanded that Indians deliver non-Indians who committed crimes on the reservation to United States' authorities at the reservation border.261 No tribes surrendered the power to deal with Indians who committed crimes against Indians and, in 1883, the Supreme Court upheld the Indians' right to punish an Indian who had murdered another Indian.262 The murderer was punished by a traditional method: restitution to the deceased relatives. Congress was outraged that the murderer was not punished more severely and reacted by granting the federal courts jurisdiction over murder, rape, assault with intent to kill, arson, burglary, and larceny.263

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253 Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Indian Policy (1978), 56 Tex L. Rev. 1195 at 1211.
257 See text accompanying note 242-63, supra.
260 Cohen, supra note 219, at 45.
261 Id.
263 Id.
Federal court jurisdiction has since been expanded to include robbery, incest, assault with a dangerous weapon, and carnal knowledge of a minor female. The current statute does not provide for either exclusive federal jurisdiction or concurrent jurisdiction with the tribe. Given the ambiguity, traditional Indian statutory interpretation requires that the jurisdiction be concurrent. Federal courts also have jurisdiction over federal crimes that occur on the reservation. The power of tribunal courts has also been reduced by incorporating state criminal law "in force at the time of the [criminal] act" into federal law to fill gaps in federal criminal law affecting federal enclaves. So-called "status" crimes, such as bigamy, are excluded from federal jurisdiction under the statute.

Congress and the BIA turned away from the relatively gradual assimilative policy embodied in the Indian Reorganization Act only twenty years after its passage. The United States returned to its efforts to abruptly bring Indians into the dominant society with the termination policy and with Public Law 280. To encourage Indians to "assume their full responsibilities as American citizens," Congress terminated the tribal status of 109 tribes and bands. Terminated tribes no longer received any of the benefits required under treaty such as annuities and federal protection of reservations. Their tribal lands were allotted individually or placed under the control of a tribal corporation. Without a tribal land base over which to exercise jurisdiction, the affected tribal governments collapsed. Simultaneously, Congress responded to the urgings of several western states by passing Public Law 280. With Public Law 280, Congress gave these states legislative and judicial jurisdiction over Indian lands within the states' borders. The main purpose of the act was to provide uniformity of law to all people within a given state and to provide adequate law enforcement on the reservation.

Indians brought the failings of the termination policy to Congress' atten-

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272 Id. at 152-54. Termination removed two federal protections from the affected tribes, the exemption from taxation and the restriction on tribal land alienation. These were crucial barriers separating tribes from the marketplace and thus protecting tribal culture. See, Clinton, supra note 258, at 1045-62. While termination denied some treaty rights, it left intact two very important rights, hunting and fishing rights, see Menominee Tribe v. United States, supra note 230, and water rights, see United States v. Adair, 478 F. Supp. 336 (D. Or. 1979) appeal pending.
273 Supra note 271.
tion and the policy was ended in the 1960s. Shorty after this, Congress gave states the opportunity to withdraw jurisdiction over Indian country with the Indian Civil Rights Act.

More importantly, the Indian Civil Rights Act imposed several constitutional limitations on federal governmental action on Indian tribes. Under the Act, Indian governments were not to interfere with religion, speech, or the press, take property without compensation or pass bills of attainder or ex post facto laws. Further, tribes were not to deny equal protection and due process to any persons within their jurisdiction. Tribes were also to follow several United States’ constitutional procedures protecting the criminally accused.

United States control over Indian government occurred gradually; it is now extensive. The United States’ belief in the depravity of Indian culture led to Congress’ grant of broad power to the BIA. Indian agents ran tribal governments with the express purpose of imposing white culture; Congress removed many Indians from tribal control by allotting tribal lands and terminating tribes. Even as Congress acknowledged tribal self-government, it allowed the BIA veto power over Indian constitutions, by-laws and ordinances. Congress recognized tribal courts, only to sharply reduce their jurisdiction. Congress and the courts accept that the Constitution gave the courts plenary power over Indian affairs. The BIA retains great power over Indians; the BIA Commissioner is still charged with “the management of all Indian affairs and of all matters arising out of Indian relations.” Among other powers, the Commissioner controls Indian appropriation for “the benefit, care and assistance of the Indians.” As discussed above, the BIA vetoes tribal ordinances. Indian

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276 See Goldberg, supra note 274, at 536; President’s Message to Congress, H.R. 363, 91st Cong., 2d Sess. (1970), reprinted in Getches, Rosenfelt and Wilkinson, Federal Indian Law, (1979) at 106-10. For several reasons, termination had failed miserably to promote assimilation. First, most Indians did not want to become individualistic Americans and the end of federal supervision did not change their desires. See Orfield, supra note 238, at 786-89. Second, the promoters of termination coerced tribes into accepting termination, thus breeding alienation and resentment. Id. at 680, 691, 789. Also, no study was done of reservation conditions; the whole programme was incredibly rushed. Hasse, Termination and Assimilation: Federal Indian Policy 1943 to 1961 (unpublished doctoral dissertation, Wash. State Univ.) at 212. Last, and probably most, racism prevented most Indians who wanted to join white society from doing so. Id. at 2. Indians in Canada have suffered from the same racist attitudes. See Frideres, supra note 40, at 164.


alienation from a United States-type governmental system resulting in low tribal voter turnout\(^{283}\) probably helped to cement BIA control.

Recent federal legislation, however, may reduce the BIA's control. In the \textit{Indian Self-Determination and Education Act of 1975},\(^{284}\) declaring that federal domination over Indians should end, Congress directed the Secretary of the Interior, "upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided in [any existing Indian legislation] . . . .\(^{285}\) The Secretary may only decline to contract with the tribe if he finds that the service contracted for would not be properly provided or that tribal resources would not be protected. If he so finds, he must state specific objections to the proposed contract and assist the tribe in overcoming his objections and provide an appeal. The BIA's policy is to follow the Act and become a service organization, acting according to Indian wishes.

Yet, absent Congressional action to insure that the policy of further Indian control of internal affairs is carried out, it appears that little will be done. The BIA policy is to do nothing to implement the \textit{Indian Self-Determination Act} unless a tribe requests a contract.\(^{286}\) The BIA will not contract with any Indian individual or organization absent a tribal request although the Act itself creates no such limitation.\(^{287}\) Further, the BIA has failed to request adequate funding to finance self-determination.\(^{288}\) The BIA, however, has shown a marked reluctance to surrender the degree of control over Indian government it retains despite the clear intent of the Act.\(^{289}\)

C. \textit{State Powers Over Indian Self-Government}

Congress gave states their greatest powers over Indian self-government with \textit{Public Law 280}.\(^{290}\) Under this Act, five, and later six,\(^{291}\) states gained extensive criminal and some civil jurisdiction over Indian country and permitted all other states to acquire jurisdiction at their option.\(^{292}\) Some tribes successfully sought exemption from the Act.\(^{293}\) Congress retained powers over Indian land alienation, disposition and inheritance and excepted water rights from state jurisdiction.\(^{294}\) It also prohibited state regulations of land use and hunt-

\begin{footnotes}
\footnote{De Raismes, \textit{The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government} (1975), 20 S. Dak. L. Rev. 59 at 69-70.}
\footnote{25 U.S.C. §450 (1976).}
\footnote{25 U.S.C. §450 ff. (1976).}
\footnote{25 C.F.R. §271.4 (d) (1981).}
\footnote{25 C.F.R. §271.11 (1981).}
\footnote{Gross, \textit{Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy} (1978), 56 Texas L. Rev. 1195 at 1229-30.}
\footnote{Id. at 1230-32.}
\footnote{\textit{Act of August 15}, 67 Stat. 588 (1953).}
\footnote{The original states were Arizona, California, Minnesota, Nebraska, and Wisconsin. Alaska was added in 1958. \textit{Act of August 8}, Pub. L. No. 85-615, §1, 72 Stat. 545 (codified at 18 U.S.C. §1162(a), 25 U.S.C. §1360(a)). Alaska became a state in 1959.}
\footnote{18 U.S.C. §1162(b); 25 U.S.C. §1360(b) (1976).}
\end{footnotes}
ing and fishing which was inconsistent with federal law or treaty.\textsuperscript{295} Public Law 280 was meant to promote assimilation and order by making Indians subject to the same laws as other citizens within a given state.\textsuperscript{296}

Responding to Indian criticism that they had no power over changes in jurisdiction under Public Law 280, Congress amended the law to require tribal consent to further state assumption of jurisdiction.\textsuperscript{297} A majority of adult Indians in a tribe must now consent to state jurisdiction.\textsuperscript{298} The amendments also provided for state retrocession of jurisdiction to the federal government without tribal approval.\textsuperscript{299} This statute provides an exclusive method by which states may acquire jurisdiction over Indian country and the procedures must be closely followed or the transfer is invalid.\textsuperscript{300}

Even before Public Law 280, states had criminal jurisdiction over crimes between non-Indians in Indian country.\textsuperscript{301} States had no power over crimes against Indians, except indirectly, if state law was incorporated by reference into federal law relating to federal enclaves.\textsuperscript{302} This was only legislative power; federal courts had jurisdiction over such crimes exclusive of the state. In an unusual application of Indian Law, the Supreme Court recently extended state criminal jurisdiction over non-Indians on the reservation. \textit{Oliphant v. Suquamish Indian Tribe}\textsuperscript{303} arose when Oliphant and his co-petitioner Belgarde, both non-Indian residents of the Suquamish reservation in Washington, were arraigned by a tribal court on the charge of assault of a tribal officer. One of the alleged assaults occurred on the reservation, where the officer had tried to arrest Belgarde on the reservation for reckless driving. The Court agreed with Oliphant that the tribal court had no jurisdiction over a non-Indian offender on the reservation. Rather, the federal government occupied the field. In order to arrive at this conclusion, the court had to ignore its own rules for determining retained tribal sovereignty.

Traditionally, aspects of sovereignty not expressly surrendered by treaty or extinguished by federal statute remain in the tribe. In addition, federal Indian statutes are not to be construed to the prejudice of Indians. The Court found that the tribe had surrendered its sovereignty by making a treaty with the United States in 1855,\textsuperscript{304} and acknowledged that the treaty "would appear to be silent as to tribal criminal jurisdiction over non-Indians."\textsuperscript{305} Nonetheless, holding that the state of protection entered by the tribe when it signed the treaty was inconsistent with the power to try non-Indians, the Court concluded that the tribe was to "deliver up [to non-Indian authorities] any non-Indian offender, rather than try and punish them themselves."\textsuperscript{306}

\textsuperscript{296} Supra note 275.
\textsuperscript{300} See \textit{Kennerly v. District Court}, 400 U.S. 423 (1971).
\textsuperscript{301} See \textit{e.g., New York ex rel Ray v. Martin}, 326 U.S. 496 (1946).
\textsuperscript{302} 18 U.S.C. §13 (1976). This is somewhat similar to the situation in Canada under s. 88 of the \textit{Indian Act}. See discussion in text accompanying notes 177-87, supra.
\textsuperscript{303} 435 U.S. 191 (1978).
\textsuperscript{304} \textit{Treaty of Pt. Elliott}, 12 Stat. 927 (1855).
\textsuperscript{305} Supra note 303, at 206.
\textsuperscript{306} Id. at 208.
As well as ignoring well-established rules of treaty and Indian statutory construction, the Oliphant decision failed to acknowledge a long line of previous decisions concerning the policy behind choice of forum which had established that a major factor in choice of forum was the interest a forum had in the cause of action. The Suquamish court had a greater interest in controlling non-Indian crime on the reservation than did Washington, especially since the alleged crime was against a tribal officer enforcing reservation laws affecting the peace and order of the community.

Time will tell if Oliphant is an aberration or a sharp change in direction for the court. The idea that the Suquamish tribe surrendered sovereignty by treaty-signing could easily be extended to deny Indian sovereignty altogether. For the time being, all states have criminal jurisdiction over non-Indian offences on Indian territory regardless of Public Law 280. The Act states that courts have concurrent jurisdiction with tribal courts over Indian offences, and, in some instances, certain civil matters. Besides this, even Public Law 280 states have no control over most tribes' self-government.

D. Indian Powers of Self-Government

Many tribes have regained some powers from the federal government over their own affairs. Congress and the BIA have determined much of the form of that power, yet Indians have increasing control of the substance. Pursuant to the Indian Reorganization Act, most tribes vested legislative authority in a tribal council with elected members. Tribal council powers include the ability to determine membership, regulate family relations and probate, hire legal counsel, make municipal-type regulations, surrender aspects of jurisdiction to states pursuant to the Indian Civil Rights Act, prevent land alienation and lease, regulate land allotment among members, control other assets, tax reservation residents, negotiate with other governments and set up tribal courts. The Supreme Court has recently confirmed the broad power of tribes as sovereign peoples to tax commercial activities and to allow the severance of

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307 See text accompanying notes 168-79, supra.

The Court seems to be taking the interest of the forum into account in cases subsequent to Oliphant. The Court has limited the Oliphant rule of no tribal control over non-Indians to situations in which the exercise of tribal control is either "inconsistent with the over-riding interests of the national government," Washington v. Consolidated Tribes of the Colville Indian Reservation, 447 U.S. 134 at 153 (1980), or is unnecessary to "protect tribal self-government or to control internal relations," Montana v. United States, 450 U.S. 544 at 558 (1981). If these stances seem contradictory it is because in recent years the Supreme Court has often dealt with Indian cases as if each one stood independently of existing United States Indian caselaw. For a scathing criticism of this practice, see Barsh and Henderson, Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States (1981), 56 Wash. L. Rev. 627.

309 This follows from the principle that federal Indian statutes are construed favourably to Indian rights. The courts have held that Public Law 280 delegates to the States only that jurisdiction which Congress clearly intended to transfer. See Bryan v. Itasca County, 426 U.S. 373 (1976); Santa Rosa Band v. Kings County, 555 F. 2d. 655 at 663 (9th Cir. 1975), cert. denied 429 U.S. 1038 (1977).
reservation minerals by non-Indians. Shortly after this decision, Congress extended the same federal tax advantages and exemptions, as exist for states, to tribes.

Many tribes do not exercise all of their powers because of the BIA assumption of approval power over tribal ordinances. The BIA can also interfere with tribal government through its control of tribal trust funds and its power over tribal attorney's contracts.

Most tribal governments are significantly modelled after United States' municipal governments. The form of governmental powers is embodied in very similar tribal constitutions which empower legislative councils and tribal courts. Tribal councils are elected; many conduct business according to Robert's Rules of Order. Many tribes have business commissions designed to explore and encourage business development on the reservation. One of the most powerful tribes, the Navajo, has set up a Department of Justice, a Tax Commission and an Environmental Protection Commission as well as a Legal Aid and Defenders Department.

A major area modelled after an Anglo-Saxon institution of government is the tribal judiciary. While the degree of independence from the tribal council varies, most tribal courts' procedures are similar to those of federal courts.

Tribal courts have varying degrees of jurisdiction over cases arising on the reservation. Treaties, tribal constitutions and ordinances and federal laws and regulations must be consulted to determine the extent of tribal court jurisdiction on each reservation. A tribal court has civil jurisdiction on the reservation as part of the tribe's inherent retained sovereignty, except to the extent that a tribe has lost jurisdiction under Public Law 280 or has surrendered jurisdiction under the Indian Civil Rights Act or by treaty. Even many tribes with court systems do not fully exercise this attribute of sovereign-

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314 Indian Courts, supra note 280, at 41-42; see Gross, supra note 288, at 1230.
315 Indian Courts, supra note 280, at 41-42.
316 See Orfield, supra note 238, at 680-91.
318 See Fay, supra note 256.
320 See e.g., Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation, No. 80-1810 (10th Cir. 1982). (Tribal business council passed a reservation zoning ordinance in part to protect the "economic benefit of the natural resources" on the reservation.)
321 Id. at 35. The Pueblos of New Mexico continue to employ traditional dispute resolution systems.
322 In a survey of 33 reservations, the National Association of Indian Court Judges found that most tribal courts had a practical, if not constitutionally-based, separation from tribal councils; a substantial minority of tribal councils considered tribal courts an arm of the council. Indian Courts, supra note 280, at 40.
323 Id. at 35. The Pueblos of New Mexico continue to employ traditional dispute resolution systems.
325 Cohen, supra note 219, at 45.
ty. Often tribal courts waive civil jurisdiction because they are unprepared to
deal with the attendant complexities.\textsuperscript{326} When this is done, cases go to state
courts, unless federal jurisdiction exists, or are not heard at all. It is common,
on the other hand, for tribal courts to assert a powerful tool of sovereignty,
the sovereign's immunity from suit.\textsuperscript{327} Also, many tribes use a BIA civil
code\textsuperscript{328} despite their power to promulgate one.\textsuperscript{329}

Tribal courts have jurisdiction over intra-Indian misdemeanors, encom-
passing lesser included offenses of the federally pre-empted major crimes.\textsuperscript{330}
Technically, tribal courts have jurisdiction over major crimes.\textsuperscript{331} Congress has
effectively removed the tribal courts' jurisdiction by mandating a sentencing
limitation of six months' imprisonment and $500 fine and a period of work for
the tribe varying according to the crime.\textsuperscript{332} Many tribes assert misdemeanor
jurisdiction yet follow the BIA's model code.\textsuperscript{333} Some tribes are asserting
sovereignty by making formal extradition agreements with states.\textsuperscript{334}

Apart from reservation government, Indians can affect federal and state
government policy affecting Indians. As in Canada, Indians have both the
federal and the state franchise and can hold public office without having to
surrender Indian status and rights.\textsuperscript{335} Indian lobbying is backed by votes and is
regularly effective.\textsuperscript{336} Further, Indians may gain control over their own affairs
as a result of the BIA Indian hiring preference,\textsuperscript{337} by reason of which some In-
dians have reached policy-making levels in the BIA.\textsuperscript{338} Indeed, a member of
the Confederated Tribes of the Warm Springs Reservation, Kenneth Smith,
was named Assistant Secretary of the Interior for Indian Affairs in 1981.

It seems that given the recognition of Indian taxing powers and the Con-
gressional intent to reduce BIA control while increasing Indian involvement in

\textsuperscript{326} Indian Courts, supra note 280, at 47.
\textsuperscript{329} Indian Courts, supra note 280, at 97. See also, 25 C.F.R. §11.1(e) (1982).
\textsuperscript{330} The Court has held that double jeopardy does not occur because tribal and
federal courts are arms of "separate sovereigns." United States v. Wheeler, supra note
3, at 330. This principle gives tribal courts the power to perform much needed law en-
forcement on the reservation. Federal enforcement is far less than federal criminal
jurisdiction. Samuels, Tribal Court Criminal Jurisdiction Over Non-Indians (1980), 13
Cornell Int'l L.J. 89.

\textsuperscript{331} Tribes retain sovereignty which Congress has not removed and the Major
Crimes Act does not remove tribal court jurisdiction. See discussion in Cohen, supra
\textsuperscript{333} Indian Courts, supra note 280, at 97.
\textsuperscript{334} Id., at 30-31. The United States recognizes a degree of tribal sovereignty by re-
quiring that state and federal courts give full faith and credit to tribal court acts and
\textsuperscript{336} See e.g., Cohen, supra note 219, at 818 (referring to Restoration Acts of several
terminated tribes); Hasse, supra note 276, at 198-200.
\textsuperscript{338} Jackson and Galli, supra note 247. The Indian-priority-hiring law has survived
Indian Sovereignty

the agency, Indians should be able to substantially govern themselves on the reservation. By taxing reservation resource extraction, Indians can fund government, ordinance enforcement, education, and social welfare programmes. Indians can contract with the BIA for services that they are not yet able to provide. Provided that the United States observes the terms of treaties regarding self-government and the judicial rules of treaty construction, many Indians could become self-regulating. Indian government would be through United States created institutions, at least for a time, but it would be no less self-government.339

Great obstacles remain to full tribal self-government. For some tribes, Congressional action would be necessary: a revocation of the Public Law 280 grant of jurisdiction over Indians to states and restoration of the tribe. For most of the remaining tribes, secure self-government would entail BIA approval of amendments to tribal constitutions removing BIA approval power over tribal ordinances. Some tribes can effectively govern themselves without major federal action so long as the BIA continues to take a hands-off approach. As the law now stands, the BIA can still greatly hinder Indian efforts at self-government. As tribes adopt more and more American-style governmental institutions, however, the BIA seems willing to permit a substantial degree of tribal government.

V. INDIAN LAND USE IN THE UNITED STATES

A. Introduction

Prior to European contact, Indians reaped the fruits of the land in diverse ways. Some were nomadic hunters and gatherers; some farmed extensively; still others fished a given area and gathered roots, berries and grubs to supplement diet. All Indian bands or tribes had delineated territories. Various hunting bands strictly observed each others' hunting rights to given territories.340 Agricultural tribes, even semi-nomadic ones, possessed farmlands and controlled surrounding lands as well.341 These tribes held farming land in common and gave families responsibility for specific plots. While Indian land use was similar to European use, Indians saw sharp limits on their power to exploit land. Some lands were sacred and free from any exploitive abuse.342 Even when farmed, land was to be treated as gently as possible, being part of


The Navajo have recently created a Peacemaker Court based on the Navajo tradition of dispute mediation. A Navajo judge appoints a community leader to be "peacemaker" or dispute mediator in a given community, a role held by Navajo elders before United States dominance. (1982), V Indian Law Support Centre Report 12.


341 See generally, Jennings, The Invasion of America: Colonialism and the Cant of Conquest (1975).

Mother Earth.\textsuperscript{343} To many Indians who did not practice agriculture, even farming was an offence to the earth.\textsuperscript{344}

The United States did not have a policy toward Indian land use until implementation of the reservation system.\textsuperscript{345} Consistent with the nineteenth century American ideal of the yeoman farmer, the United States fairly consistently encouraged individual Indians on the reservation to sever plots from tribal lands held in common and to take up farming. The United States also encouraged non-Indian resource exploitation. As in Canada,\textsuperscript{346} the federal government delegated broad discretion over Indian lands to the BIA. Similarly, it came to control every aspect of land use, eventually leasing most arable and mineral-rich land to non-Indians.\textsuperscript{347} Only recently has Congress drawn in the BIA's reins and returned some control over land use to the Indians.\textsuperscript{348}

B. Federal Powers Over Indian Lands

The federal power over Indian lands stems from the executive and congressional treaty-making power\textsuperscript{349} and the congressional power "[t]o regulate Commerce . . . with the Indian Tribes."\textsuperscript{350} Congress relied on the Indian Commerce Clause from an early time to wield an indirect yet powerful influence over Indian lands. In its first session, Congress adopted the principles of the \textit{Royal Proclamations of 1763}\textsuperscript{351} by making non-Indian purchase of Indian land invalid except where done pursuant to Congressional approval.\textsuperscript{352} This effectively denied Indians the power to alienate land and was later justified by Chief Justice Marshall as resting on the United States title by discovery in the Indian lands inherited from the European powers.\textsuperscript{353} Marshall found that Indians had a right of occupancy in lands that could not be disturbed except by agreement between Indians and the United States.

The earliest treaties did not create a United States power to control use of remaining Indian lands.\textsuperscript{354} Not until the United States developed the reserva-
tion system did it begin to bargain for control of Indian land use. From this time forward, most treaties included clauses permitting the federal government to allot tribal lands to individual Indians. These later treaties do not mention water or mineral rights, nor do they grant power to the United States to control reservation lands.

The early days of the reservations saw United States efforts to encourage farming and individual ownership among Indians. These efforts were largely unsuccessful. It was widely believed that Indians would never adopt civilization without the initiative and pride of ownership that would accompany individual ownership of tribal lands. Congress went far toward removing tribal control of land use with the General Allotment Act, otherwise known as the Dawes Act. The Dawes Act granted an allotment of 160 acres of reservation land to each family head, title to which the United States was to hold for twenty-five years. During that period the land could not be alienated or encumbered. Subsequent amendments gave the Secretary of the Interior broad discretion over leasing of allotted lands as well as issuance of fee simple title in allotted lands.

The Dawes Act failed miserably as a civilizing measure for several reasons. For one, it failed to take into account the importance to Indians of tribal identity. Another and probably more important reason was Congress' failure to supervise the BIA as it implemented the Act; the door was opened to massive BIA control over Indian land. The various Indian agents were under considerable pressure by white settlers to turn over the use of Indian lands to them. The BIA had been charged with determining whether an Indian was better able to learn from farming or from observing a white lessee who already knew the value of farming. Faced with this decision, Indian agents generally

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355 Cohen, supra note 219, at 63-64.
356 E.g., Treaty with the Omahas of March 16, 1954, art. VI, 10 Stat. 1043.
357 Treaty with the Omahas of March 16, 1954, art. VI, 10 Stat. 1043. A few treaties contained a broad statement about the United States' management of Indian affairs in Indians' best interest. See text accompanying note 223, supra.
360 Id. at 9.
365 Otis, in his major study of the allotment policy, gives several reasons for the allotment policy's failure including Indian's unwillingness to become independent farmers, insufficient government training prior to allotment, insufficient funds provided to Indians for starting farm operations, pressure from land speculators, and the willingness of the BIA to lease allotments to non-Indian farmers. Supra note 386, at 51, 126-31, 101-103, 141-48.
366 Id. at 141-49.
367 Id. at 108.
leased productive allotted lands to whites, paralleling the land policy of their Canadian counterparts. Indian agents approved many Indians’ applications for fee simple to their allotments which resulted in the sale of most parcels to non-Indians. Few Indians learned to farm as a result of the Dawes Act. Its most significant results were the loss of two-thirds of Indian lands and the BIA’s complete control over Indian land use.368

Neither the Dawes Act, nor its legislative history states a constitutional basis for Congress’ power to control the manner of Indian land ownership.369 The Supreme Court provided a theoretical basis for Congress’ power in a case involving Congressional cession of Indian lands absent Indian permission in violation of treaty, a typical practice during the late nineteenth century.370 The Court held that the Indians’ state of dependency at the time the later treaties were made gave rise to a United States guardianship over Indian interests. This guardianship was implicit in the treaties and comprehended Congress’ plenary authority over Indian affairs. This plenary power made treaty abrogation a political question entrusted to Congress under the Constitution and unreviewable by the Court. The Court noted that “presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.”371

At first glance, the Federal Trust Doctrine, as the notion of federal guardianship over Indians has come to be known, appears to be made from whole cloth. Yet it stems from the Senate’s power to ratify treaties and the language of the treaties extending federal promises of protection, education, and annuities.373 The idea of federal trust responsibility to Indians, therefore, has a constitutional basis. The Court’s acceptance of federal rights over tribal affairs inherent in trusteehip, on the other hand, has no basis in the law of trusts nor can it be tied to an enumerated Congressional power.374 It has since been abandoned in favour of the idea that Congress’ “plenary power” over Indian affairs stems from the Indian commerce clause, an idea in keeping with the current extensive federal power to regulate interstate commerce.376 The courts regularly use the trust doctrine today to hold Congress and the BIA to fiduciary standards.377

368 Clinton, supra note 258, at 1020-22.
370 Lone Wolf v. Hitchcock, supra note 239.
371 Id. at 566.
372 U.S. Const. art. II, s. 2, cl. 2.
374 See Maxfield, Dieterich, Trelease, Natural Resources Law on American Indian Lands (1977) at 45-47.
With the Indian Reorganization Act, Congress prohibited further allotment of Indian lands, thus putting a temporary end to their loss. The Act also placed power in the tribal councils to prevent sale, encumbrance, or lease of tribal lands. Congress had come to believe that Indians required a land base if they were to adjust to the dominant society of the United States. The Dawes Act experience had shown that this adjustment for most Indians had to be gradual if it was to come at all. This change in policy did not affect the BIA's continued control of Indian land use through its assumption of approval power over tribal ordinances. The Act's immediate impact was further reduced because of existing twenty-year mineral leases to non-Indians approved by the BIA.

Some years later, Congress temporarily returned to the disposal of Indian lands with the termination policy of the 1950s. "Termination" refers to the termination of federal trusteeship over certain Indian tribes, accompanied by mandatory distribution of tribal assets to tribal members and, in some cases, disbandment of the tribe. The policy was intended to remove federal control from the Indians and to force Indians to assume "the responsibilities of American citizenship." This policy was applied to many fewer tribes than was the earlier policy of allotment. The termination policy was much more abrupt and harsh. The mantle of federal trusteeship was entirely removed. The terminated tribes were no longer eligible for federal assistance; the federal restraint on land alienation was removed. The affected tribes could no longer exercise jurisdiction over their lands because termination opened Indian lands for disposal to non-Indians.

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378 Supra note 249.
379 25 U.S.C. §476. All tribal constitutions were to include a provision granting tribal councils the power "to prevent the sale, dispossession, lease or encumbrance of tribal lands, interests in lands, or other tribal assets . . . ." Id.
380 Cohen, supra note 113.
381 Jackson and Galli, supra note 247, at 100.
382 These leases were pursuant to Pub. L. No. 66-3, 41 Stat. 3, 31 (codified as amended at 25 U.S.C. §399 (1976)). Oil and gas leases were to last no longer than ten years plus the time that oil or gas was still found in paying quantities.
383 The land of smaller tribes was usually appraised and sold to the highest bidder, with the tribe receiving the proceeds. See, AIPRC Task Force 10, Report on Terminated Tribes (1977), at 57.
384 H.R. Res. 108, 83d Cong., 1st Sess. 67 Stat. B122 (1953). The prime mover of termination was Senator Watkins of Utah. He brought his deep distrust of government and his faith in the work ethic to Indian policy. He believed that BIA supervision was the primary reason for Indians not having fully developed reservations. Watkins was convinced that if BIA supervision was ended, Indians would give up tribal existence and rush to join the mainstream of United States society. Orfield, supra note 238, at 688-89. He had little sense of Indian conditions and desires. Id. at 782. Watkins had a major impact on Indian policy partly because of general Congressional disinterest in Indian affairs during the termination period. Id. at 783. It is ironic that supervision and support of the Menominee was largely transferred to the Wisconsin government, not assumed by the tribe. After a brief interregnum, the United States resumed substantial support of the Menominees with War on Poverty monies. Id. at 806.
385 Supra note 271.
386 For a discussion of the implementation of termination of the Menominee and its impacts on the tribe see, Orfield, supra note 238, at 722-25.
lands to the control of state laws. Termination also reduced the tribal land base, largely because of high Indian unemployment. Their lands their only asset, many opted to sell.

The termination policy was applied more cautiously than the allotment policy; about three per cent of the federally recognized Indians were affected. The policy was also brought to an end much more rapidly than the allotment policy. Early on, many recognized that termination meant loss of Indian control of lands, not an Indian opportunity to enjoy the full rights and responsibilities of United States citizenship. Congress passed the last termination statute in 1962, less than ten years after creating the policy. Yet, although it has restored several tribes to their former status, most of the Indians affected remain "terminated".

The Secretary of Interior's, and thus the BIA's, authority over Indian land use is much less extensive than in past years: the Secretary retains approval power over Indian land leases but is forbidden to lease tribal land for mineral development without tribal permission. The BIA manages non-mineral leasing, but only at the sufferance of the affected tribe. It has to approve a tribal lease unless the lease would not produce a "fair annual rental." As many leases are of twenty-five or ninety-nine year duration, even an aggressive tribe may be unable to regain control over leased lands in the near future. Most Indian lands currently under farm production are leased by non-Indians, as are all Indian lands under mineral development.

The federal government retains actual control over a resource essential to the use of most Indian lands — water. At the turn of the century, the Supreme Court decided Winters v. United States, an Indian challenge to non-Indian diversion of water upstream from a reservation. The diversion reduced flows in a river that adjoined the reservation and which Indians used for irrigation. The Court set forth what is now known as the Winters doctrine, holding that the term "reservation" in Indian treaties and agreements with the United States included not only the land but certain "reserved rights," including the

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388 Id.
389 Supra note 271, at 153-54.
390 Id. at 151.
395 25 U.S.C. §415, §3969 (1976). See also a discussion on BIA approval power over tribal ordinances, text accompanying notes 252-61, supra.
397 AIPRC, Final Report I, supra note 282, at 315.
398 207 U.S. 564, 28 S. Ct. 207 (1907).
right to sufficient water to meet the purposes for which the reservation of land was created. Hence, water necessary to meet the purposes of Indian reservations was exempt from state water appropriation laws. The Court has since held that the date of priority for Indian water rights is the date of the individual reservation. As reservations were generally established before non-Indian settlement of nearby lands, Indians have priority over nearly every other water user.

A primary purpose of Indian reservations was to convert Indians into “a pastoral and civilized people.” For this purpose, the BIA constructed water projects on many of the arid land reservations. Most of the diverted water that was used on the reservations, however, went to the non-Indian lessees who were demonstrating good agriculture to Indian lessors in accordance with the Dawes Act. The lion’s share of Indian water was sold under state prior-appropriation law to non-Indian users in the surrounding country. Generally, the Secretary of the Interior authorized water projects “without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the water used for the projects.” One federal agency characterized the government development and sale of Indian water rights as “inverse condemnation” that had extinguished Indian rights.

The Supreme Court has opened the door to remedying this situation (at least vis-à-vis Indians) by defining the Winters doctrine to include an implied treaty reservation of sufficient water “to irrigate all of the practicably irrigable acreage on the reservations.” This includes any agricultural use regardless of the technology used. The reservation purpose of assimilating or “civilizing” Indians implies that the government contemplated water use for more than just agriculture. In fact, many treaties guaranteed grist mills and other

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399 Id. at 577 (U.S.), 212 (S. Ct.).
400 Id.
401 Arizona v. California, 373 U.S. 546 at 600, 83 S. Ct. 1468, at 1498 (1962). For some purposes, notably preservation of traditional tribal activities such as hunting, fishing and gathering the priority of reserved water rights has been found to be time immemorial. See United States v. Adair, 478 F. Supp. 336 (D. Or. 1979), appeal pending.
405 Id.
407 Arizona v. California, supra note 401, at 600 (U.S.), 1498 (S. Ct.).
408 Id. at 601 (U.S.), 1498 (S. Ct.).
409 Report from Rifkind, Special Master to the Supreme Court in Arizona v. California, supra note 430, reprinted in Cohen, supra note 407, at 592. This is the position taken by the AIPRC, supra note 397, at 332.
farm products processing plants to reservation Indians.\textsuperscript{410} It follows that an implied reservation of water for agricultural purposes would contemplate water for related uses such as power generation for pumping water and milling grain. It follows also that as Indians took their place in white society, they would mimic the predominant white culture and develop “consumptive uses” of water such as mining and manufacture. Even if Indian water rights were limited to the amount necessary for “practically irrigated lands,” nothing would prevent Indians from using a portion of that water for other development.\textsuperscript{411} Nothing, that is, except lack of funds and the fact that federal action is necessary to make Indians’ theoretical water rights a reality.\textsuperscript{412}

As most tribes do not have funds for water development, the federal government would have to take one of several steps to realize Indian water rights. One, the United States could build several very costly additions to current water projects, thus “creating” enough water for Indian uses. Two, it could narrowly define “practically irrigable acreage” and provide just enough water for readily irrigable arable Indian land. Three, it could condemn (or deny) the water rights of current users holding a later priority right than do Indians.\textsuperscript{413} The latter seems impossible because of the drastic impact it would have on the economy in much of the west. Non-Indians would simply not allow it to happen.

The American Indian Policy Review Commission\textsuperscript{414} has recommended something between new water development and United States’ condemnation of non-Indian water rights. The Commission has called for quantification of Indian water rights, federal aid to Indians to litigate water rights, and BIA use of substantially more efficient irrigation systems on Indian lands.\textsuperscript{415} President Carter set quantification in motion and called for negotiation of priority and quantity of Indian water rights.\textsuperscript{416} Considering the scarcity of water in much of the western United States, negotiation seems insufficient to protect Indian water rights. Unless the federal government aids Indians to litigate water

\textsuperscript{410} E.g., Treaty with the Shoshonees and Bannocks, 1868, 15 Stat. 673, Art III.
\textsuperscript{411} Supra note 409.
\textsuperscript{412} Tribes have great difficulty raising private money for water development because tribal trust lands cannot be mortgaged or pledged as collateral. See, Colville Confederated Tribes v. Walton, supra note 402.
\textsuperscript{413} The National Water Commission suggested such a programme limited to water users who initiated water diversions after Arizona v. California, supra note 401, came down. United States National Water Commission Final Report, supra note 404, at 480-83. A fourth possibility is to compensate tribes for the federal “taking” of Indian water rights according to the Fifth Amendment. In the long run, this would be the cheapest, easiest solution for the federal government. Since it would effectively kill Indian chances to fully develop reservations, it could be a violation of the federal trust responsibility.
\textsuperscript{414} The American Indian Policy Review Commission was established by Congress in 1975 to study Indian concerns, desires, and conditions and report back to Congress. The Commission had five Indian members and six members of Congress. Its full report comprises several volumes and deals with every area of Indian social and economic conditions and law. See, AIPRC, supra note 282.
\textsuperscript{415} Id. at 338.
\textsuperscript{416} Getches, ed., supra note 276, at 603-604.
As in Canada, the United States policy toward Indian lands has been one of federal control with little attention to Indian wishes. A little-supervised federal agency, the BIA exercised complete control over Indian lands even after Congress placed much of that control in the various tribes. Resource development on Indian lands was largely for non-Indian benefit; water, if not water rights, as well as most mining proceeds was given to non-Indians. The policy differed from Canada's in two notable respects. First, the United States policy makers' fascination with the Indian as yeoman farmer led to two instructive, though dismally unsuccessful, experiments with individual Indian ownership of Indian lands and other assets. Second, the United States Congress returned substantial Indian power over Indian lands with the Indian Reorganization Act. It was not until recently that Congress, after much Indian prodding, actually reduced the BIA's control, several decades after reducing its authority.

C. State Powers Over Indian Lands

States have limited power over Indian lands largely because the United States has generally been unwilling to relinquish control and protection of the Indian land base. The only statute giving any authority over Indian lands to states was Public Law 280, passed in 1953. The law specifically exempted "alienation, encumbrance, or taxation of any real or personal property, including water rights," belonging to any Indians subject to United States-imposed restraints on alienation. This exemption included all tribal lands. Public Law 280 further limited possible state power by forbidding state "regulation of the use of any such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto." These limitations were consistent with the legislative purpose to bring "law and order" to the reservation without sacrificing federal control over most civil matters.

Public Law 280 came after the Indian Reorganization Act; Indian tribes had the federally recognized power to regulate land use. A tribe with detailed land use regulations at Public Law 280's passage was free of state control over

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417 The federal government provides some aid in this regard. It assisted the Klamath tribe of Oregon, for e.g., in litigating its rights to water for game preservation in United States v. Adair, supra note 401. It provides limited support for water rights litigation through funding for the Legal Services Corporation directed toward Indian legal services and through the Indian Land and Natural Resources Section of the United States Department of Justice.

418 The allotment and termination periods represent notable exceptions to this federal policy.


421 Id.

422 See Bryan v. Itasca County, supra note 275, at 389-92.
its lands.\textsuperscript{423} Also, any tribal land use regulation promulgated after its passage pre-empts state land use regulation under the canon of Indian statutory construction that ambiguities in Indian statutes are interpreted in favour of Indians.\textsuperscript{424} In the Ninth Circuit, “encumbrances” is defined to include state restrictions on Indian property use.\textsuperscript{425} States, then, may only regulate tribal land use in the absence of tribal regulations and in the far West cannot restrict land use at all.\textsuperscript{426}

D. Indian Land Use Powers

The Indians of the United States have retained fairly broad powers over Indian lands, though many do not fully exercise their powers.\textsuperscript{427} Tribes can prevent land alienation and lease.\textsuperscript{428} Tribes can regulate land allotment among tribal members and regulate land use.\textsuperscript{429} Armed with the presumption that a reservation of land included all subsurface and timber rights,\textsuperscript{430} Indians assert a federally recognized power to regulate reservation resource development.\textsuperscript{431} Some tribes may make short-term leases without obtaining the Secretary’s approval.\textsuperscript{432} Several tribes have successfully sought Department of the Interior cancellation of leases that would have created major reservation development.\textsuperscript{433}

As the BIA pulls back from control of Indian land, Indian land powers can fill the vacuum. Yet the Secretary’s statutory power over renewable leases and the already granted long-term leases limit Indian control of ongoing

\textsuperscript{423} Id.
\textsuperscript{424} Id. at 392.
\textsuperscript{426} An interesting exception involves tribal regulation of non-Indian hunting and fishing on land held in fee by non-Indians within the borders of the reservation. The states may regulate such non-Indian use provided it does not directly affect the political integrity, security, or the health and welfare of the tribe. Montana v. United States, 450 U.S. 544 at 558 (1981).
\textsuperscript{427} Tribes are often reluctant to pass land use ordinances because of the uncertainty of BIA approval. See AIPRC, supra note 282, at 188-89.
\textsuperscript{428} 25 U.S.C. §415 (1976). Once land is leased, tribes have difficulty knowing whether the BIA is enforcing the terms of the lease. The BIA regularly fails to enforce mineral lease contracts. AIPRC, Task Force 7, Report on Reservation and Resource Development and Protection (1977) at 139-40 [hereinafter cited as TF7].
\textsuperscript{429} Control over mineral development is increasingly important as mineral development grows on mineral-rich reservations. Many tribes have agreed to mineral exploitation. See e.g., Lomayaktewa v. Hathaway, 520 F. 2d 1324 (9th Cir. 1975) cert. denied Susankewa v. Kleppe, 425 U.S. 903 (1976); 47 Fed. Reg. 13, 590 (1982). (Notice of Draft Environmental Impact Statement by Dept. of Interior for coal mining on Zuni Reservation, New Mexico.)
\textsuperscript{430} Id.; supra note 426.
\textsuperscript{431} Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976). The Court here was attempting to undo harm done by the General Allotment Act of 1887, 24 Stat. 388. The Act had provided for allotment of tribal lands in fee to individual tribal members. This practice was ceased upon passage of the Indian Reorganization Act.
\textsuperscript{432} See Cohen, supra note 113, at 736.
The BIA’s primary criterion in reviewing leases for renewal is the maintenance of a fair return to Indian lessors, not Indian desires regarding land uses that are unrelated to profit. The Indians’ lack of independent information regarding potential lessees and the effects of leasing, and the BIA’s reluctance to change its policies, will force many Indians to continue to rely on the BIA to make leasing decisions.

Tribes are hampered by difficulty of access to funds. This problem forces tribes to compromise tribal priorities in exchange for funding reservation development. The story of Indian dealings with the Economic Development Administration (EDA) is illustrative. A major priority of the EDA was to promote development on Indian reservations. Under EDA procedures, initial planning for development was done by the tribal council. Plans were then subject to an EDA determination based on priorities that Indians have had no part in setting. After that, the plan was subject to review by the state adjacent to or surrounding the Indian reservation. So in reality, Indians, without independent means, had to choose to develop what EDA with state consultation had decided they should develop. Often this has meant building tourist facilities on isolated reservations, facilities that have fared poorly due to poor planning and EDA mismanagement. Contributing to the problem is the fact that the BIA holds Indian funds in trust and regularly has not made funds available to the tribes.

Indians have power over water in and adjacent to reservations sufficient to the full development of reservation agriculture which may be used for other development as well under the Winters doctrine. Indians could undertake water impoundment and diversion projects on the reservation, but to do so would disturb the use of downstream non-Indian users who had purchased water rights from the United States. Western states’ political leaders would once again clamour for Indian scalps as they saw the complex system of appropriative water rights partially crumble. If western appropriators were sufficiently threatened, they would introduce legislation in Congress to sharply limit Indian water rights. As Indian political strength is no match for the combined power of the western states, the legislation would likely succeed, limiting Indian development to levels far below that available to non-Indians. The reason that such a scenario is unlikely to develop is monetary: most Indians require federal assistance to build water projects. Congress need only deny ap-

434 TF7, supra note 428, at 48.
437 Tribes cannot pledge trust funds as collateral, see Colville Confederated Tribes v. Walton, supra note 402; tribes have trouble getting at tribal trust funds controlled by the BIA. AIPRC, supra note 282, at 359.
438 See TF7, supra note 428, at 154.
439 Id. at 155-59.
440 Supra note 406, at 43.
441 TF7, supra note 428, at 123.
442 See AIPRC, supra note 282, at 359.
443 See text accompanying notes 398-401 and 407-411, supra.
444 Supra note 276.
propriations for water development to preserve the rights of non-Indian users, a much cheaper (and politically safer) solution than building water projects or buying water rights.

Political realities may force tribes to trade unspecified reserved rights for a much smaller amount of actually delivered water. The Navajo tribe struck such a deal in the late 1950s. As with so many other agreements, the non-Indians have not kept their part of the bargain. Twenty years later, the Navajo Indian Irrigation Project remains unfinished.\textsuperscript{445} The situation recaptures the classic dilemma of this "community of strangers surrounded by a dominant, aggressive people."\textsuperscript{446} If Indians actively assert their rights, stronger competing interests simply pass legislation to defeat those rights. No sooner do Indians learn the rules than the rules are changed, preserving the power of the stronger elements of the society.

Indians have a great deal of theoretical power over tribal land use. Many tribes regulate land use; many have substantial water rights as well as rights to timber and subsurface resources. Tribes' real power, however, is sharply limited. Most of the productive reservation lands are tied up in leases arranged by the BIA. Tribes have difficulty obtaining funds for development according to tribal priorities. The lack of funds, coupled with political weakness relative to states and large corporations, sharply decreases tribes' power to realize their theoretical rights to water and to control reservation land use.

\textbf{VI. CONCLUSION}

As a comparison of policies, this paper begins around the time of Canadian Confederation, a moment that corresponds to the end of the United States treaty-making period. By this time, most Indians in the United States were settled on reservations. The Canadian government had yet to make treaties with the Indians North and West of Ontario. From this time forward each federal government would seek to assert total control over Indian self-government and land use. The United States' move westward occurred slightly earlier than did Canada's; the United States took control of most Indian tribes earlier. With Indians safely placed on reservations, the United States adopted a policy of destroying tribal culture which led to the assimilative policy expressed in allotment of Indian lands. Congress allowed the BIA a free hand in substituting "American" for tribal culture and in carrying out the allotment policy. By the 1880s, the BIA had total control over life on the reservation.

The Canadian federal government had made some effort to control internal Indian affairs before the 1880s by which time treaties were in place with most native peoples. Parliament gave the DIA near-total control of Indian government, just as the United States allotment policy began in earnest. Parliament placed the Indian Affairs Agents at the head of band councils and, in an apparently contradictory measure, imposed elective government on the bands. Shortly thereafter, the Dominion government gave up most Indian water rights by failing to seek licences for Indian uses under its new water ap-
propriation law. The Canadian system of total DIA control over Indians, with no real progress toward assimilation, was to continue through the 1960s. Parliament then reduced DIA control by removing Agents from the band councils but this measure did little to reduce DIA control of Indian bands.

The United States policy, on the other hand, swung sharply between building limited Indian autonomy and rapid assimilation. The Congress adopted a detailed statute for reduction of BIA control and a corresponding increase in Indian autonomy with the Indian Reorganization Act of 1934. The Act expressed a policy of gradual assimilation by allowing Indians to organize governments and to assume some measure of self-government if they would do so on a government model approved by the United States. Tribal government powers included veto power over land-use decisions. The BIA retained a large measure of control over Indian government by writing its authority over tribes into tribal constitutions. Twenty years after Indian reorganization, Congress adopted termination, a policy of rapid assimilation whereby Congress ended federal supervision over several tribes. Congress also acted to reduce federal control at this time by giving states some jurisdiction over Indian tribes.

The late 1960s saw a return to a policy of gradual assimilation coupled with Congressional promotion of Indian autonomy. Congress imposed United States' civil rights protections on the tribes while ordering the BIA to permit tribes to make contracts for services. Tribes asserted more control over reservation land use, water rights, and self government; the BIA grip on the tribes loosened.

At the same time, a Canadian Indian outcry resulted in some federal government attention to Indian desires for control of reservation government and land use. The Canadian policy of assimilation developed. The DIA removed its Agents from the reservation and stopped forcing the elective mode of government on Indian bands; the DIA, within its discretion, permitted more band control of municipal matters. While Indians have discussed and proposed statutory changes, the Indian Act, and so DIA control, remains basically unchanged.

The experiences of both nations are instructive. Until recently, Canadian Indian policy and practice during the last century has remained fairly static. Rigid DIA control resulted in the inability of most bands to govern themselves even to the limited extent of a municipality. Neither Indian assimilation nor autonomy was fostered. United States Indian policy has varied a great deal more than Canadian during the last century and provides several enlightening experiments. As in Canada, the United States destroyed tribal self-government. For several decades, it did little to develop a substitute tribal government, leaving Indians under the control of the BIA. The vacuum left by the collapse of traditional tribal government and life styles remained unfulfilled by United States government and business standards when the United States allotted most tribal lands to individual Indians in fee. In retrospect, it is not surprising that allotment failed. Most Indians did not want individual land ownership. Even if they had earnestly wanted to be small farmers, they would have had great difficulty given quality of the land, racism, and their lack of training, business acumen, and support.

The termination policy was the United States' second experiment in rapid assimilation. Again, the affected tribes, but for a few members, had little sense
of life beyond the reservation. Members of tribes proposed for termination were ill-equipped to deal with white society. The federal government had protected them from market forces and the attendant development of the work ethic. The federal government made virtually no effort to determine Indian desires and little effort to train Indians for becoming mainstream Americans. When termination came, most individual shares of tribal assets were gone within months. Termination, as did allotment, failed as an assimilation measure.

The United States' second policy experiment of the last century was that of self-determination. It began with the Indian Reorganization Act in the 1930s, was interrupted by the Termination Policy of the 1950s, and was resumed in the 1960s, culminating to date with the Indian Self-Determination and Education Act of 1975. A policy of self-determination failed initially because of the degree of BIA control allowed under the Indian Reorganization Act, although it shows signs of success under the Indian Self-Determination Act. The Indians of the United States, at least those with intact reservations, are making significant strides toward assimilation. This assimilation is not yet direct. It is happening at a distance from mainstream society, taking the form of tribal governments on a municipal BIA superintendency model, tribal courts following United States-style codes and procedures, and increasing Indian exploitation, albeit through major corporations, or natural resources.

The United States experience indicates that governments must act according to Indian desires if any policy other than one of apartheid and Indian degradation is to succeed. It is a fundamental principle of Canadian and American government that people should have a major voice in their destinies. It is the tragedy of both the United States and Canadian Indian policies that they have so rarely incorporated this principle.

So to the question, what sovereignty remains in Indians of Canada and the United States? Unless covert Indian governments exist, Canadian Indians retain little if any sovereignty. A minority of bands retain traditional government methods; this power to determine the form of self-government is an attribute of sovereignty. However, the Minister's control over actual decisions makes this but a ghost of past power.

On paper, Indians in the United States who retain reservations have inherent retained sovereignty. The tribes determine membership and regulate domestic relations; tribal courts have civil jurisdiction and intra-Indian misdemeanor jurisdiction on the reservation. In large measure, they can govern themselves. But unless the BIA ceases to review tribal ordinances and Congress increases tribal jurisdiction these exercises of sovereignty will only constitute practice in preparation for the eventual absorption of Indians into United States society.