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INDIAN LAW—JURISDICTION—"CLOSING THE DOOR TO FEDERAL COURT" —*Santa Clara Pueblo v. Martinez*, 436 US 49 1978.

Julia Martinez and her daughter Audrey sued the Santa Clara Pueblo and its governor in federal district court[1] to have parts of a tribal ordinance governing membership[2] declared violative of the "equal protection" clause of the Indian Civil Rights Act,[3] and to enjoin defendants from enforcing it. Defendants resisted jurisdiction, contending that federal courts cannot take cognizance of intratribal controversies, particularly membership disputes.[4] Plaintiffs asserted that Section 1302(8) of the Act impliedly authorized a federal cause of action to secure enforcement of civil rights under Section 1343(4), Title 28 of the United States Code.[5] Relying

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1. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975).
2. *Id.* at 6. Ordinance of 1939:
   Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
   1. ***
   2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
   3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
   4. ***
3. 25 U.S.C. § 1302 (1976) (originally enacted as act of April 11, 1968, P.L. 90-284, Title II, § 202, 82 Stat. 77). [hereinafter referred to as "Act"]
   No Indian tribe in exercising powers of self-government shall—
   (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
   (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
   (3) subject any person for the same offense to be twice put in jeopardy;
   (4) compel any person in any criminal case to be a witness against himself;
   (5) take any private property for a public use without just compensation;
   (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
   (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
   (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
   (9) pass any bill or attainder or *ex post facto law*; or
   (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
4. Martinez v. Santa Clara Pueblo, *supra* note 1, at 7. *See also* Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957).
5. 28 U.S.C. § 1343(4) (1976) (originally enacted as an amendment in Act of September 9, 1957, P.L. 85-315, Part III, § 121, 71 Stat. 637):
   The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

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on precedent from other circuits,[6] the district court took jurisdiction under Section 1343(4). The court proceeded to address the merits of the "equal protection" claim, and ultimately granted plaintiffs the relief sought. On appeal, the Tenth Circuit agreed, without extended discussion, to jurisdiction under Section 1343(4), but proceeded to reverse the lower court on the merits.[7] On certiorari, the Supreme Court reversed on the issue of jurisdiction without reaching the merits.[8] Justice Marshall for the majority held that in light of the legislative history of the Act, it was impossible under the prevailing test to imply a federal cause of action beyond the Act's explicit remedial provision of habeas corpus.[9]

THE LAW AS IT WAS

Prior to passage of the Indian Civil Rights Act it was generally settled law that a federal court did not have jurisdiction over the powers of self-government exercised by an Indian tribe.[10] While Congress, pursuant to its plenary authority over the Indians,[11] had periodically vested the federal courts with jurisdiction over certain Indian activities,[12] it had been the long-standing rule of the Supreme Court that a federal statute would not be read as giving the federal courts jurisdiction over Indian affairs unless there was a clear expression of Congressional intent to that effect.[13] The only real challenge to this general proposition came in a Ninth Circuit case which held that a tribe was a federal instrumentality,[14] and so a federal court had jurisdic-

(1) ***
(2) ***
(3) ***
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

6. *E.g.*, Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968).
7. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).
8. Santa Clara Pueblo v. Martinez, 46 U.S.L.W. 4412 (U.S. May 15, 1978) (No. 76-682).
9. *Id.* at 4418.
10. *See* Talton v. Mayes, 163 U.S. 376 (1896).
11. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); in commenting on the nature of plenary congressional power over Indian affairs at 565: ". . . the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."
12. *E.g.*, 18 U.S.C. § 1153 (1976) (originally enacted as the Indian Appropriation Act of March 3, 1885, c. 341, § 9, 23 Stat. 362). This legislation gave the United States jurisdiction over certain major crimes committed by one Indian against another in Indian country: ". . . and the said courts are hereby given jurisdiction in all such cases."
13. *See* Ex Parte Crow Dog, 109 U.S. 556, 571-2 (1883).
14. Colliflower v. Garland, 342 F.2d 369, 378-9 (9th Cir. 1965).

tion to hear a habeas corpus petition to test a tribal detention. But this logic, resting as it did on the premise that a tribe was merely an arm of the federal sovereign, never prevailed beyond the limited fact situation of the case. The weight of the law persisted in regarding Indians as members of "distinct, independent political communities."[15] Prior to passage of the Act, and a major factor in provoking the legislation, the Court had reiterated that the Constitution did not govern tribal action,[16] and thus there was no federal jurisdiction over alleged constitutionally prohibited behavior practiced by a tribe in relation to its members.

The Act provided explicitly for one form of federal review, that being habeas corpus.[17] However, actions not involving the personal detention of the plaintiff soon flooded the federal district courts. Lack of jurisdiction was consistently argued as a threshold bar to federal review.[18] The usual argument was that in providing for only one remedial procedure in federal court for securing to an Indian his civil liberties as a member of the tribe, the drafters of the Act had foreclosed any other means of review, and that to imply a cause of action from the legislation would be against established precedent.[19] In spite of this argument the courts, if not initially then on appeal, were unanimous in finding that they had jurisdiction over claims brought under the Act.[20] It was felt that a general federal cause of action under the Act could be implied,[21] because it could not be supposed that Congress

15. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).
16. Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959).
17. 25 U.S.C. § 1303 (1976) (originally enacted as Act of April 11, 1968, P.L. 90-284, Title II, § 203, 82 Stat. 78).

> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

18. Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157, 1159 (D. Wyo. 1970).
19. *See* Ex Parte Crow Dog, *supra* note 13.
20. A certain thicket in judicial thinking bears discussion at this point. There appears to have been some confusion on the part of the courts as to what exactly "jurisdiction" meant. A number of cases were dismissed for lack of jurisdiction merely because the plaintiff failed to state a claim. *E.g., Slattery v. Arapahoe Tribal Council*, 453 F.2d 278, 281-2 (10th Cir. 1971). In fact, such action on the part of a court amounts to taking jurisdiction, since a dismissal for failure to state a claim is a decision on the merits. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Other courts felt they had jurisdiction in part because the Act was read as having waived the sovereign immunity of the tribe. *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 202 (9th Cir. 1973). Again the *Bell* lesson is missed. Sovereign immunity does not bar subject matter jurisdiction; in fact it immunizes a party from the otherwise existing jurisdictional reach of the court.
21. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n.13 (1968): cited for proposition that an appropriate remedy may be implied from legislative language declaratory of rights, in order to carry out congressional purposes.

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would create such fundamental rights for the Indian without intending that he have recourse to a federal forum to secure those rights.[22] The precise statutory basis for assuming jurisdiction was alternatively felt to be Section 1331(a) ("federal question")[23] or Section 1343(4),[24] although the latter provision quickly emerged as the favored authority.

None of the courts that considered the merits of an equal protection claim under the Act were unmindful of Congress' great concern that a certain degree of political and social autonomy be reserved to the Indian tribes. The courts uniformly required an exhaustion of tribal remedies before allowing a plaintiff to plead his case in a federal forum.[25] In ruling on the merits of a civil rights claim the trend was decidedly in favor of developing analytic standards that weighed heavily in favor of tribal custom instead of purely reflecting the "bag and baggage" of federal case law developed on comparable points in the U.S. Constitution.[26]

THE COURT'S REASONING

In addressing the jurisdictional issue raised by *Martinez* the Court first observed that, in deference to notions of tribal sovereignty and plenary congressional authority over Indian affairs, it would be loathe to imply a federal cause of action under the Act in the absence of a clear indication of legislative intent.[27] With this caveat, the Court then applied the prevailing test[28] for determining whether or not to imply a cause of action from the language of a statute. In applying

22. *E.g.*, Dodge v. Nakai, *supra* note 6, at 26.
23. *E.g.*, Loncassion v. Leekity, 334 F. Supp. 370, 372 (D.N.M. 1971).
24. *Supra* note 5.
25. *E.g.*, *Charles O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir. 1973): immediate review was available if delay would unnecessarily compound the alleged deprivation of a civil right.
26. *E.g.*, McCurdy v. Steel, 353 F. Supp. 629, 632-3 (D. Utah 1973).
27. Santa Clara Pueblo v. Martinez, *supra* note 8, at 4415.
28. *Id.* n.10. The test was comprehensively set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975):

> First, is the plaintiff "one of the class for whose *special* benefit the statute was enacted," (citation omitted)—that is, does the statute create a federal right in favor of the plaintiff?
> Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (citation omitted)
> Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? (citations omitted)
> And finally, is the cause of action one traditionally relegated to state [or tribal] law, in an area basically the concern of the states [or tribes], so that it would be inappropriate to infer a cause of action based solely on federal law?

the test, the Court framed the dispositive point as whether or not the implication of a federal cause of action under the Act comported with the underlying purposes of the legislative scheme.[29] The Court identified two equally important goals which motivated passage of the Act: protection of the individual Indian from arbitrary treatment by the tribe, and the strengthening of the tribe itself in the cultural, political and judicial sense.[30] With these two goals in mind, the Court examined the legislative history of the Act and concluded that Congress' omission from the final legislative package of a federal cause of action to secure rights enumerated under the Act was deliberate.[31] In so concluding, the Court could not agree with the lower courts that the rights bestowed by the Act were thus rendered unenforceable, for it asserted that the tribal courts[32] themselves were well-equipped to adjudicate claims under the Act, and that preference for this forum served the congressional aim of strengthening tribal institutions.[33]

ANALYSIS

The Supreme Court's reasoning on the jurisdictional issue is refreshingly clear and so compelling as to raise critical questions about the propriety of the lower federal courts in assuming jurisdiction over claims brought by individual Indians under the Indian Civil Rights Act. In assuming jurisdiction, the lower federal courts were remiss in two respects: first, they did not carefully examine the legislative history of the Act in order to conclude whether a federal cause of action ought to be inferred; and, second, they gave inordinate weight to the congressional goal of securing civil rights to individual Indians at the expense of giving deserved consideration to the equally prominent congressional

29. Santa Clara Pueblo v. Martinez, *supra* note 8, at 4415.
30. *Id.*
31. *Id.*
32. *Note:* While the term "tribal court" is a term of art among Indian law experts, it is used throughout this case note in its generic sense. Technically, there are thought to be three different types of Indian court systems: a Court of Indian Offenses is structured according to regulations promulgated by the Secretary of the Interior; a Traditional Court is a tribal judicial system operating as it did in pre-Columbian times; a Tribal Court is a court of Indian design as distinguished from being modelled after Department of Interior recommendations, but it is of recent vintage compared with a Traditional Court, and is not regarded as a primeaval tribal judicial system.
33. Santa Clara Pueblo v. Martinez, *supra* note 8, at 4416.

wish to see the tribes thrive as functioning political-judicial units.

Briefly, the legislative history of the Act reveals early proposals for broad federal review of both civil and criminal disputes arising under the Act, giving way later to a limited federal review of claims arising in the criminal context only. Subsequent to exploratory hearings on the constitutional rights of American Indians which commenced in 1961 under the direction of the Senate Judiciary Committee, and which lasted nearly three years,[34] Senator Sam Ervin introduced legislation in the first session of the 89th Congress which included two provisions of especial interest: S.962[35] provided for *de novo* review in federal court of any criminal conviction before a tribal court wherein it was alleged that an individual had been deprived of any constitutional right secured to him by S.961;[36] S.963[37] would have permitted the Attorney General to institute actions in federal court to redress tribal deprivations of civil rights in either the civil or criminal context. This latter proposal was the only one which would have allowed for federal review of intratribal civil disputes. As reported out of committee, S.963 was dropped altogether because of strong opposition by the tribes.[38] Aside from this

34. Constitutional Rights of the American Indian: Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st & 2d Sess. (1961-1962), 88th Cong., 1st Sess. (1963). [Hereinafter referred to as "1961 Hearings"]

35. S.962, 89th Cong., 1st Sess.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) in any criminal action hereafter commenced in an Indian court against any individual wherein an individual is convicted by the court and deprived of a constitutional right, he shall have a right of appeal to the United States district court for the district and division embracing the place wherein such individual was prosecuted.
(b) Upon the filing of the notice of appeal with the clerk of the United States district court, the appeal shall be placed on the trial docket for trial de novo in the United States district court, ***

36. S.961, 89th Cong., 1st Sess.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution.

37. S.963, 89th Cong., 1st Sess.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Attorney General is authorized and directed to receive and investigate any written complaint filed with him by any Indian or by any person or agency acting in behalf of any Indian alleging that such Indian has been deprived of a right conferred upon citizens of the United States by the laws and Constitution of the United States. If, on the basis of such investigation, he determines that such Indian has been deprived of any such constitutional right, the Attorney General shall bring such criminal or other action as he deems appropriate to vindicate and secure such right to such Indian.

38. Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,

brief flirtation with S.963 and entertainment of a substitute offered by the Department of the Interior,[39] the legislative history of the Act is without any discussion devoted to the idea of federal review of civil disputes that might arise. Insofar as the hearings dealt with tribal disparagement of individual rights,[40] it was almost exclusively within the province of criminal procedure. And in spite of Congress' grave concern with deprivation of civil rights in criminal cases, the broad federal review originally contemplated by S.962 itself ultimately emerged in final enactment as a simple habeas corpus provision.[41] So a careful scrutiny of the legislative genesis of the Act impeaches a cavalier assumption of jurisdiction of the sort that was prevalent in the lower federal judiciary prior to the *Martinez* case, and squarely supports the Supreme Court's reasoning.

The lower federal courts also uniformly failed to consider the subtle distinction raised by the Supreme Court that "providing a federal forum for issues arising under Section 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself."[42] In its evaluation of the impact of the Act the Court perceived the interest of the tribe itself in relation to two distinguishable aspects of the legislation: reme-

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Summary Report of Hearings and Investigations: Constitutional Rights of the American Indian, 89th Cong., 2d Sess. 26 (1966); the comments at 15 of one witness with reference to S.963:

> This [bill] would in effect subject the tribal sovereignty of self-government to the federal government. . . . This bill by its broad terms, would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member of a tribe would not be satisfied with an action by the council, it would allow them to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action.

39. Constitutional Rights of the American Indian: Hearings on S.961-968 and S.J. Res. 40 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 317-18 (1965): the proposed Interior Department substitute in effect would have set up the Department as a screening agent between an aggrieved Indian and the federal district court. The Acting Secretary of the Interior described the proposal thusly:

> In addition, the bill gives the American Indian a right to appeal to the Secretary of the Interior in civil and criminal actions taken by the tribal government which result in an infringement of the Indian's rights guaranteed by this bill. In the case of criminal proceedings, as well as other actions, including civil actions, the bill gives a right to appeal a decision of the Secretary to federal district courts.

40. Two other broad areas of congressional inquiry were entitlement to federal benefits and the emotion-laden question of deprivation of Constitutional rights at the hands of state authorities.
41. S.962 as reported out of committee (*supra* note 37) was reintroduced as S.1843 in the first session of the 90th Congress. As reintroduced, the de novo review provision of the original S.962 was supplemented with a habeas corpus provision. As reported out of committee and as ultimately passed, only the habeas corpus provision survived.
42. Santa Clara Pueblo v. Martinez, *supra* note 8, at 4415.

dial and substantive. While the tribal courts were bound by the Act to protect individual rights, they were to be protected from disintegrative federal case law by being the sole adjudicators of those rights. In contrast, the lower federal courts in assuming jurisdiction under the Act regarded the rights secured therein as unenforceable if separated from the benefit of federal protection.[43] Following from this faulty premise, the conclusion that Congress silently authorized a federal cause of action is not so surprising. The flaw in reasoning by the lower courts was in failing to emphasize the imperative of tribal autonomy to the same extent that they emphasized the need to vindicate individual rights, and in failing to appreciate the direct interference with tribal policy choices that resulted in their ruling on civil rights claims.

The Court's ruling is a radical departure from the settled case law in the area. That the Court has made a policy statement of great import is evident from the fact that it needn't have gone as far as it did. The Court could have reversed on the merits, with a reprimand to the court of appeal for not applying an equal protection standard deferential enough to Indian tribal autonomy. The Court could have pronounced what that standard was to be, in clear terms, for the future guidance of the lower federal judiciary. Instead, the Court took a "meat cleaver" approach to the threshold jurisdictional issue that the lower courts had become used to hurdling with ease.

All manner of claims under the Act are now off-limits to the federal courts. Typical of claims that are now to be resolved in the tribal courts, if at all, is the validity under the Act's equal protection clause of enrollment requirements[44] and residency requirements for candidates for public office,[45] and the validity under the Act's due process clause of a tribe's consideration of a liquor license application.[46] The Supreme Court has endorsed the competency of tribal courts to safeguard Section 1302 rights.[47] But as a practical matter it is unlikely that this will happen in the context of civil

43. Loncassion v. Leekity, *supra* note 23, at 372-3.
44. *E.g.*, Martinez v. Santa Clara Pueblo, *supra* note 1.
45. *E.g.*, Howlett v. Salish & Kootenai Tribes of Flathead Reservation, 529 F.2d 233 (9th Cir. 1976).
46. *E.g.*, Berry v. Arapahoe & Shoshone Tribes, 420 F. Supp. 934 (D. Wyo. 1976).
47. Santa Clara Pueblo v. Martinez, *supra* note 8, at 4416.

disputes where federal review is no longer available. Particularly litigious areas would involve questions of due process with regard to the taking of property, and of course the Act's equal protection clause. The reason why civil rights of this nature will seldom be vindicated is that there is little distinction in fact in most tribes between the legislative, executive and judicial functions.[48]

The Pueblos of New Mexico offer an example of a tribal system wherein all power emanates from one source, the caciques or holy men. "Their ability stands out and it shows them off and, naturally, they are recognized as leaders."[49] These elders select the council members who promulgate policy, and who sit as judge and jury in judicial matters.[50] Although other tribes may appear to have delineated these political tasks, the usual pervasive influence of a tribal council in selecting executive and judicial officers works against a conclusion of tripartite government as non-Indian Americans understand that term. As a result, where the executive branch of a tribe resists a claim under the Act it is unlikely that its wishes will be contradicted by the tribal court. Even if a tribal court were to choose to independently review a claim under the Act, while it is bound by substantive provisions there is no body of case law it must follow other than that which it cares to promulgate.

The full effect of the *Martinez* decision is not likely to be felt for a number of years to come, as the tribes begin to develop economically, and to interface with the non-Indian community on a more sophisticated level. As a general proposition, to the extent that individual Indians share the collective bearing of the tribe they would not be expected to challenge tribal practices for the obvious reason that they would tend to not regard them as invidious. But the Act protects "persons" from tribal action,[51] not just Indians in par-

48. 1961 Hearings, *supra* note 33, at 165 (statement of Homer B. Jenkins, Chief, Branch of Tribal Programs, Bureau of Indian Affairs, Department of the Interior):

> In some instances there is actually little separation of power. Usually power is completely vested in a tribal council. The notion of executive authority or judicial responsibility apart from legislative authority has not yet fully emerged.

49. Amendments to the Indian Bill of Rights: Hearing Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 13 (1969) (statement of Domingo Montoya, Zia Pueblo).
50. *Id.* at 12-15.
51. Act, *supra* note 3.

ticular. As the tribes build up more complex regulatory infrastructures, affecting Indians and non-Indians alike, the likelihood that a non-Indian will perceive one of his individual rights to have been abridged by some tribal practice will increase.

Courts have already held that incident to their retained tribal sovereignty the tribes possess broad authority to tax activity within the reservation,[52] regulate economic development and land use within the reservation,[53] and otherwise govern the behavior of outsiders who come on the reservation.[54] In exercising these broad sovereign functions, the tribes will undoubtedly infringe upon Anglo sensitivities to civil rights in ways that would not be felt by Indians. It is when actions under the Act are increasingly brought by non-Indians before the tribal forum that the true import of the *Martinez* decision will be felt. For in these cases the constituency of the tribal court will have extended beyond tribal ethnocentrism. Called upon to mete out justice to non-Indians, the competency of the tribal courts to safeguard Section 1302 rights will be fairly tested.

CONCLUSION

For now, however, the *Martinez* case stands as an expression of judicial faith in the capabilities of the tribe to govern itself and those few outsiders that come within its sovereign prerogative. The Court has once again acted out its historic role as guarantor of tribal sovereignty, this time as against the pretensions of its own judicial family.

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52. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958).
53. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).
54. Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976).