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Current Issues in Native American Law

*Martha Vazquez, Moderator*

Taiawagi "Tai" Helton

Paul Frye****

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JUDGE VAZQUEZ: Okay. Well, forty-five minutes is pretty brief considering the topic that we have today. We have some very impressive speakers and their materials are in the back of the room. There will not be time for them to go over their materials but they are fabulous materials and I urge you to look them over and take them home with you. I am a newcomer to this field and I can tell you that I have learned a tremendous amount from reviewing the materials.

We decided to organize the program in a way that each speaker will have eight minutes. They are going to talk really fast and at the end of that we are going to give you some time for questions. We thought that this way you would be in a better position to understand the current conflicts in Indian Law. We are going to start with Professor Helton who is going to give us an overview of—I don’t know how you can do this in eight minutes—but he’s going to have eight minutes to give us an overview of the legal principles that affect many of the cases that we are going to deal with. Professor Helton joined the University of Oklahoma College of Law in 2001. Of course, I have to tell you he just graduated. What did you say, in 1999?

PROFESSOR HELTON: Yes.

JUDGE VAZQUEZ: He teaches environmental law, property, and Indian law, and received his J.D. from the University of Tulsa College of Law. He clerked for Judge Henry on the Court of Appeals for the Tenth
Circuit, and he earned a Master of Laws from Yale Law School. What I am going to do is simply have him proceed and then, as we go on, introduce the next speaker. If you could proceed.

PROFESSOR HELTON: Thank you. Soon after the European sovereigns finished squabbling over which would have the right to engage the indigenous peoples of North America in discussions over land and trade, the fledgling United States won international recognition. The new federal government was quick to claim that right, exclusive of the states.

First, the federal government claimed the power to regulate commerce with tribal nations through the Indian Commerce Clause of the Constitution, the first Congress passed the Trade and Intercourse Act, by which it claimed the exclusive power to take title to land possessed by Indian tribes and owned by Indian tribes. Second, in the set of cases called the Marshall Trilogy, the U.S. Supreme Court confirmed the sovereignty of tribes, which were pre-constitutional sovereign, and declared that state laws could have no effect therein. Chief Justice Marshall established the notion of "domestic dependent nations," effectively asserting that tribes had traded their power to relate with sovereigns other than the United States. Domestic dependent nation status comprises three primary principles: (1) the Diminished Tribal Sovereignty Doctrine, (2) the Federal Plenary Power Doctrine, and (3) the Trust Doctrine.

According to the Diminished Tribal Sovereignty Doctrine, tribes retain powers of inherent sovereignty, except those explicitly ceded in a treaty or explicitly taken away by Congress. A more recent Supreme

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1. U.S. CONST. art. I, § 8, cl. 3 (establishing congressional power to "regulate Commerce... with the Indian Tribes").
2. 1 Stat. 137 (1790). The current version of the Act, passed in 1834, states:
   No purchase, grant, lease, or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such a treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to the lands within such state, which shall be extinguished by treaty.
Court would later suggest that some tribal powers can be divested implicitly, but that will probably come up in later presentations.

The Plenary Power Doctrine gives Congress near-full authority over Indian affairs, subject to judicial review and certain constitutional rights. Note, however, that this is a statement of domestic law relating to Indian tribes and not a statement of tribal or international laws. Thus, it is the United States's ability to enforce its statement of the laws applying to Indian tribes that makes this effective in Indian country, not binding moral authority that international law would include.

The Trust Doctrine is a judicially created doctrine that imposes on the federal government some responsibility in using its power over tribes. The doctrine requires that Congress and the Executive use their authority for the benefit of tribes.

Being empowered to set Indian policy, the federal government has vacillated between two primary approaches to addressing the "Indian problem": segregation of Indians and non-Indians on the one hand, and assimilation of Indians into the dominant culture on the other. Supported by those with both good intent and bad, over the last three centuries, Congress has tried removal and reservations on the segregation side, and allotment and termination to further assimilation. We are now in a policy era called Self-Determination in which the federal government professes to support the self-determinative rights of indigenous peoples within its overall jurisdiction.

While federal policy over the last few centuries has shifted repeatedly, the statutes passed in any given policy era virtually have never been overruled or repealed. As a result, federal Indian law is a complex web of often-conflicting treaties, statutes, and cases. Courts are often in the difficult position of having to review a statute based on the enacting Congress's intent and policy, despite the fact that a later Congress has expressly repudiated that policy and enacted contrary legislation. Perhaps the best example of this is the General Allotment Act whose purposes included destroying the communal land mass, distributing a fraction of it among individual Indians, and transferring the remaining "surplus lands" to non-Indians. The Indian Reorganization Act of 1934 and the Indian Land Consolidation Act of 1983 were later statutes

passed to repudiate those purposes and to remedy some of the damage caused by the allotment period. Nevertheless, the General Allotment Act remains in Title 25, and as a result, in litigation concerning it, courts must determine how to apply a statute that Congress clearly no longer intends to be good law.

An understanding of federal Indian law requires a fairly nuanced understanding of the historical and political context in which litigation rises. This can be difficult work. Unfortunately, it is work for which the Supreme Court seems to have very little patience.9 Rather than exploring the specific historical circumstances that caused a particular treaty or statute to evolve as it did, the Court has been favoring increasingly bright-line, overly-simplistic rules that take constitutional doctrines out of context and apply them to very distinct cases. This gives practitioners and judges some difficulty in trying to figure out how to apply the canons of construction to an increasing number of conflicting anachronisms, but we can expect little contemplative guidance from the high Court. Finally it is reasonable to note that Indian law may well be the only field in which most practitioners and perhaps all scholars disagree with what the Supreme Court is currently doing. The oversimplified bright-line rules almost always run to the detriment of tribes,10 so we will likely spend the next few years trying to find how much of the older doctrines survive.

JUDGE VAZQUEZ: Our next speaker is Mr. Paul Frye who practices here in Albuquerque. He received his law degree from Harvard in 1977. He has done a lot of work in Indian law and practiced on the reservation for many years prior to going into private practice, where he has specialized in this field. He’s going to be addressing two significant cases in the field of Indian law: the Harkness case and the Hicks case.

MR. FRYE: Thank you, Judge. I’ll be talking about, as Judge Vazquez mentioned, the Supreme Court’s journey from Harkness v. Hyde11 in 1878 to the Hicks12 case decided by the Court last year. The general topic is tribal authority over non-member persons.

I’ll start where Professor Helton started, the Marshall trilogy. Marshall, of course, was in the thick of the revolutionary period, and fought

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10. Id. at 346.
11. 98 U.S. 476 (1878).
with Washington at Valley Forge. One of the cases of the trilogy is *Worcester v. Georgia* \(^13\) in 1831. Sam Worcester was a missionary “engaged in preaching the gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the Cherokee nation, and in accordance with the humane policy of the government of the United States, for the improvement of the Indians.” \(^14\) He was convicted in Georgia courts of violating a Georgia law that required white people, not non-Indians, but white people, to secure a state license in order to live among the Cherokees and to take an oath to defend the laws of the state of Georgia while they were there. Those laws purported to, among other things, nullify all of the laws and regulations of the Cherokee nation. If there were a case arising from some incident in Cherokee land, the only competent witnesses would be white people. Cherokees were not competent witnesses. That was part of the statutory scheme. The Court held that Worcester was wrongfully convicted in the Georgia courts and, as Professor Helton noted, Justice Marshall’s opinion said state laws have “no force” in Indian country. President Jackson, who favored a “removal” policy that we now call ethnic cleansing, was reported to say “John Marshall has made his law, now let him enforce it.” \(^15\) Then followed the Trail of Tears for the Cherokee people. \(^16\)

Forty or so years later the Court decided *Harkness v. Hyde.* \(^17\) In that case an Indian was arrested on his reservation, convicted in state court of a crime, and languished in a state facility. He petitioned for a writ of habeas corpus and said that the state court had no authority to serve process on him within his Indian country, which was reserved by treaty. And a unanimous Court, 120 years ago, said that the Indian reservation was “as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country or of a foreign State.” \(^18\) The process of the state court in the tribal territory was beyond its authority.

So we come fast forward to *Hicks* \(^19\) last year. Here’s another Indian residing on his own reservation and charged in the state court with a crime committed off the reservation. The state sheriff entered the reservation and allegedly damaged some of the property of this person. The

\(^13\) 31 U.S. 515 (1832).
\(^14\) *Id.* at 563 (McLean, J., concurring).
\(^15\) FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 83 (R. Strickland, et al., eds. 1982).
\(^16\) See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 298-99 (G. Lawrence ed. 1966).
\(^17\) 98 U.S. 476 (1878).
\(^18\) *Id.* at 478.
sheriff entered the reservation in order to serve a search warrant issued by a state court. The Indian sued the sheriff for damages in tribal court, and the Court in *Hicks* decided there was no tribal court jurisdiction over the state officer. The Court reasoned that the tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential—"I don’t know why it has to be essential but that was the Court’s test—to tribal self-government or internal relations, the right of the Indians to make their own laws and be ruled by them."

So, when I looked at these two cases, my question was how did the Court get from *Harkness*, where the Indian reservation was beyond the authority of state process, to *Hicks* where the Court determined that tribal self-government did not preclude foreign law enforcement officers from coming in and digging around in tribal citizens’ property and affairs. The larger answer to that question is in my written materials, but the short answer is that the Court arrogated unto itself unconstitutional power in 1981 in the case of *Montana v. United States*. Professor Helton adverted to the basic principles that the Court ignored in *Montana*: tribal sovereignty is inherent, and all of the aspects of tribal sovereignty are retained until Congress says otherwise.

Through 1978 there were only two aspects of tribal sovereignty that were diminished. Both of them were these fundamental premises of the European doctrine of discovery, which itself is somewhat odd. At any rate, they concern the right of the tribes to trade with other nations and the rights of tribes to convey their lands. In 1978, in the *Oliphant* case, the Court was confronted with what Vine Deloria has described as "doctrine run amok." Fifty people who were the members of the Suquamish Tribe and who represented 1.7 percent of the population of their reservation, 98.3 percent being non-members, decided that they could lawfully pass and enforce criminal laws as to all people in that reservation. Perhaps as a legal principle that was right but as a practical matter it didn’t make any sense, certainly not to the Court. The Ninth Circuit, though, had upheld the tribe’s authority. The court of appeals said that the power to enforce criminal laws against non-members was not inconsistent with the tribe’s status as a domestic dependent nation. That was the first time I had seen that phrase, and it was used in a way that supported tribal

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20. Id. at 364–65.
sovereignty. Well, the Supreme Court found otherwise. It found that such authority was inconsistent with the dependent status of that tribe, and Oliphant thus provided the third instance of an implied divestiture of tribal sovereignty.

Wheeler was also decided in 1978, and it reaffirmed tribal sovereignty with respect to criminal prosecutions of members of the prosecuting tribe.\(^{25}\) It included a seemingly innocuous statement that the areas in which implicit divestiture of tribal sovereignty have occurred are those involving the relations between an Indian tribe and non-members of the tribe, relying on Oliphant and the doctrine of discovery.\(^{26}\) But in Montana the Court twisted that statement around and said, basically, “because we have found that there are three areas of implicit divestiture and because those three areas involved non-Indians, then all tribal sovereign authority over non-Indians must be implicitly divested unless such authority is essential to internal tribal relations and the right of tribes to govern themselves.”\(^{27}\) And in that way the Court now has necessitated an ad hoc judicial balancing to determine when tribal sovereign interests have been divested as opposed to congressional action where some political safeguards protect the tribes. Since Montana, we’ve come over the last twenty years to Hicks where the Court is making judgments that are entrusted to Congress in the Constitution. Thank you.

JUDGE VAZQUEZ: Thank you. Professor Valencia-Weber teaches at the University of New Mexico School of Law. She received her law degree from Harvard, and she teaches Indian law, in addition to other courses. She is going to focus on some important language on Indian sovereignty in the Nevada v. Hicks case.

PROFESSOR VALENCIA-WEBER: I pick up after Professor Helton and Paul Frye on a particular aspect of the Hicks case, specifically where Justice Scalia asserts that “[t]he States’ inherent jurisdiction on reservations can of course be stripped by Congress.”\(^{28}\) It is a rather astounding statement to say that states have inherent state jurisdiction over tribal land. This proclamation is the focus of my paper, to be published in its full form in the University of Pennsylvania Journal of Constitution of


\(^{26}\) See id. at 326.


\(^{28}\) Nevada v. Hicks, 533 U.S. 353, 365 (2001) (citation omitted).
It extensively inquires where is the constitutional foundation and the constitutional principle for such power. This last Supreme Court pronouncement fits in with what Paul has touched on in terms of conflicting kinds of decisions and the need for reasoned principle in the cases.

If such a concept of inherent state jurisdiction existed in the history of the relationships between the indigenous sovereigns and the Europeans and then the Euro-Americans, we would be able to find it in the political dialogue from the pre-revolutionary period through the early constitutional period. The organic instruments, the journals, the records, the kind of materials you can find in Phillip Kurland's repository of everything involved in creating a constitutional nation, such as the letters of Washington, and the diaries of Madison. It is an immense storehouse to work in, but that is where I hunted.

This statement in Nevada v. Hicks has had a devastating effect in terms of immediate disorder in Indian country because now neither Indian nations nor their neighbors, cooperative non-Indian jurisdictions, know who is going to respond to an accident out there on the highway in Indian country. In these situations you need ambulances, you may need firemen, and you may need a law enforcement officer to go after an offender. In Indian country, as those of us on the ground who live in it know, there are collaborative relationships among the sovereigns, but that is not acknowledged in how the Court constructed both Hicks and Atkinson Trading Post v. Shirley. If you look at the materials attached to my presentation, analyses by Professors David H. Getches and Sara Krakoff of the more recent cases, you can understand why those of us

32. Sara Krakoff, Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty, 50 AM. U. L. REV. 1177 (2001) provides an exhaustive review of the incrementalism in the current Supreme Court's approach to Indian law that has "continued its trends of divesting tribes of jurisdiction over non-tribal members and permitting increasingly onerous forms of state regulation within tribal territorial boundaries. If these trends are not reversed, self-determination, which must include diverse forms of economic development and legal self-sufficiency, will remain elusive for tribes." Id. at 1178. Krakoff provides an in-depth analysis of cases since 1991, twenty-nine involving Indian law questions, in which twenty-three were decided against the tribes or tribal litigants. Equally valuable is David H. Getches, Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values, 86 MINN. L. REV. 267 (2001). Getches analyzes the Indian law decisions of the Burger Court (sixty-seven cases in seventeen terms) and Rehnquist Court (forty cases in fifteen terms). Id. at 280. Moreover, he reviews the three trends of the Rehnquist era that concurrently affect Indian law cases: state interests prevail; attempts to protect
working in Indian country, working in Indian law, have concern when such a statement was made in *Hicks*.

My search for the constitutional foundation focuses in one area, specifically the historical experience in building a new republic and on the most contentious issue through the whole formation: the western lands and how the western lands would be obtained from Indians, simultaneous with peaceful relationships with the tribal sovereigns. This two-part issue consistently is the most disputed substantive matter through birth of the republic. It became, ultimately in the constitutional convention, the lodestone for determining where the authority of tribes, states, and the federal government, the national center government would be set.

The western lands can be generally described at the time of the revolution, as the country lying between the Appalachian divide and the Mississippi River. Basically among the thirteen colonies, six states essentially claimed all the land from their territory to the Pacific Ocean because of the royal charters from the crown. Virginia was very aggressive about saying its crown charter entitled ownership as well as authority or jurisdiction over that land. These states’ claims roil through the republic because there were other states, specifically the northeastern states, called the “landless states,” who could not construe or argue their crown charters so expansively. The “landless states” argued, “No, that is not the case.” This disputed dialogue proved costly in the Revolutionary War and in the Articles of the Confederacy. You want to look at the authorities listed in the University of Pennsylvania paper for the scholarship on this quarrel. Thomas Perkins Abernathy, who did the most definitive study of the western lands, said that it was his sectional rivalry over the western lands that was almost fatal to the new union.


34. ABERNATHY, *supra* note 33, at 366 (“This virus of sectional rivalry would have been hazardous even in a stable, rigorous government; it was almost fatal to the new union.”).

And so through all formative periods we have this fight. If there was inherent state jurisdiction in this dialogue, how was it treated? First of all, it was always in contest between states. There are states challenging other states as to claims of title and jurisdiction over the western lands. Concurrently there was the issue of the states versus a national central power. As the union went through the revolution, the western lands served as a form of collateral for the foreign states who made loans to underwrite the cost of carrying out the war. Then, after the revolution was won, all of the "landless states" as well as the better statesmen, the leaders of the time, said: "Everybody's blood, all colonists' blood paid for that revolution. We need those western lands to build the New Republic. We need them to pay the war debt, we need them to develop the economy of the new country."

If you go through all of those materials, you will find, for instance, Madison's statements during the Constitutional Convention, when all of this conflict had roiled and endangered the Union. Thus, the western lands and relations with Indians become the test for whether the new instrument, the Constitution, would work for all issues. Does it restrict and get the states out of the subject matter they have messed up in violation of the Articles of Confederation? Will it, in fact, build an enduring nation? And the answer is all the way consistently stated: land and Indians are reserved for the national sovereign. Whether one goes from the first model offered by the Crown in the Royal Proclamation of 1763, the Articles of Confederation, and in the Constitution, the states should have no role in authority or title over Indian lands. Justice Marshall got it right in *Worcester v. Georgia* when he rejected state authority over tribal territory.35 He was construing fully the dialogue that is recorded and the decisions made by the framers.

JUDGE VAZQUEZ: Thank you. We are going to move on to some of the practical challenges that some of these cases present in litigating criminal cases on the reservation, and for that we have Mr. Samuel Winder who is an Assistant United States Attorney here in New Mexico. He handles a lot of the Navajo cases involving sexual offenses on the reservation. He also served as Special Assistant on Tribal Relations for the United States Attorney's Office and has extensive experience in this field. He is going to be talking about some of the cases that have raised

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35. 31 U.S. 515, 561 (1832) ("[t]he acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.").
practical problems in litigating and prosecuting under the Major Crimes Act.

MR. WINDER: Thank you, Judge Vazquez, and thank you for inviting me to be a part of this panel; it’s an honor to be here today. As Judge Vazquez indicated, I am an Assistant U.S. Attorney and the majority of times that I am before Judge Vazquez is at trial or at a plea hearing so it’s an interesting time to be here to discuss some of these very important issues with Judge Vazquez and the rest of the participants.

I am also a member of a tribe, the Southern Ute Tribe. My tribe was severely impacted by the General Allotment Act so I know from experience the impact of the Act. I left the U.S. Attorney’s Office for about a year to work for my tribe and then I came back. So I know full well the challenges that tribal governments face with regard to conflicting policies. Before I go any further, I hate to give the bureaucratic introduction but whatever I say does not necessarily reflect the views of the United States Attorney for the District of New Mexico or the Department of Justice. With that being said, I can go ahead and present some issues which I think will promote some healthy discussion, hopefully.

Judge Vazquez did indicate that I was going to be talking about the Major Crimes Act. I’ll touch upon that but the majority of my discussion is going to be discussing the Indian Country Crimes Act, section 1152. I agree with Professor Helton. There are tremendous nuances in the field of Indian law. As a result of that, each U.S. Attorney who has a significant amount of Indian populations has a tribal liaison. I’m the tribal liaison for the District of New Mexico, and I keep in daily contact with other tribal liaisons throughout the country with regard to issues that impact Indian country nationally and locally.

With that being said, one of the handouts that you’ll see back there is an excerpt from the *Indian Country Resources Handbook*. I can’t take credit for putting that together. Two of my colleagues, Chris Chaney and Sharon Kimball put that together so you can read all about Indian country crimes from the federal perspective by looking at that handout.

Three years ago there was a case that was prosecuted in our district involving an arson on Tesuque Pueblo and the indictment that my colleague presented . . . I’ll just read the indictment. “On or about the 22nd and 23rd day of November 1996 within the confines of Tesuque Pueblo and Santa Fe County, in the state and district of New Mexico, the defendant Rico Devon Prentiss did willfully and maliciously set fire and attempt to set fire to dwelling in violation of 18 U.S.C. § 1152 and 18 § 881.” Prentiss was convicted and he appealed. He raised an issue which he had never raised below, and that issue is whether or not the United
States must prove a negative, proving whether a person is non-Indian for purposes of section 1152 and in addition to that proving whether or not the victim was Indian as well. Under the Indian Country Crimes Act it’s an inter-racial statute. So you have to prove one or the other. This case was litigated three times before the court of appeals and the second decision, which is . . . it is cited as 256 F.3d 971, and I’m in good company because I can tell you I do concur with the concurring opinion. Judge Baldock and Judge Tacha were on the concurring opinion along with two other judges on the court of appeals holding specifically . . . I’ll read this.

With regard to whether or not there is jurisdiction under section 1152:

"[f]urthermore, unlike the Court I find no basis in § 1152’s language and structure to support a conclusion that the respect for state rights recognized in McBratney, i.e., that a crime committed by a non-Indian against a non-Indian within Indian country is a matter left to state courts, combined with § 1152 exception for offenses committed by one Indian against another Indian, together establish that the Indian/non-Indian status of a defendant and victim are elements of the crime of arson under §§ 81 & 1152. The Court in McBratney did not even purport to construe the applicable statute and its ruling finds no basis whatsoever in the language of § 1152 or its predecessor acts."  

In pure and simple terms what the judges held is that the only prerequisite is whether the incident occurred in Indian country. There should be no proof of whether or not the defendant is non-Indian.

Now when I go into federal court, I go there to prove whether or not a defendant is guilty of an offense. With regard to the issues of sovereignty, the two areas that come into play are: we have to prove whether a person is an Indian and whether or not the incident occurred in Indian country. That’s for purposes of the Major Crimes Act. Now, there is going to come a time when Sam Winder or some other AUSA is going to go into federal court and we are going to have to prove a negative. Proving whether a defendant is non-Indian . . . how are we going to prove a non-Indian is a non-Indian? Now fortunately there are going to be cases where we are going to be able to prove that easily. A person, when they are interviewed, they may say, “Look! I’m not a member of an Indian tribe,” but there will come a day, there will come a day when a person is not going to acknowledge that. If there’s a horrific capital offense that occurs, a horrific quadruple homicide . . . we just had one several weeks.

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37. United States v. Prentiss, 256 F.3d 971, 988–89 (10th Cir. 2001).
ago in New Mexico, as a DUI case, and I'm just raising the issue. What type of legislative language is the Congress going to enact?

*Duro v. Reina*, everyone knows *Duro v. Reina*. In that case the United States Supreme Court held that tribes do not have inherent authority to prosecute non-member Indians. Several . . .

JUDGE VAZQUEZ: We are about out of time.

MR. WINDER: Thank you. Several months later the Congress overruled the United States Supreme Court. I'm just affirming what the legal scholars have said. You have conflicting opinions from the courts and from the Congress. With regard to the issue of *Prentiss*, which is going to be an issue for the Tenth Circuit, for the prosecutors in our district there probably will be the same type of issue as well when this type of crime does occur. Thank you.

JUDGE VAZQUEZ: It is very important that we get to our last speaker because he is going to be addressing some comprehensive reforms or reactions to the current United States Supreme Court decisions on Indian sovereignty. I'd like to introduce you to Mr. John Echowhawk. He is a member of the Pawnee Tribe of Oklahoma. He is Executive Director of the Native American Rights Fund, which is a national American legal defense fund. He has been involved with most of the major Native American litigation since the fund was founded in 1970. He has been with that organization since it’s inception and has served as Executive Director since 1977. He is presently serving as Co-Chair of the Legislative Options Working Group of the Tribal Sovereignty Protection Initiative, a legislative effort in Congress by tribes to reaffirm the tribal sovereignty diminished by recent Supreme Court decisions.

MR. ECHOHAWK: I am pleased to have the opportunity to participate and thank you for inviting me. We heard from speakers in the opening session earlier about September 11th. On September 11 last year, tribal leadership was gathered in a meeting in Washington, D.C. to talk about an attack on their sovereignty: *Nevada v. Hicks* and the case of *Atkinson Trading Co. v. Shirley* that the Supreme Court decided right before *Hicks*. Both those cases taken together basically set clear Supreme Court precedents that establish that tribes have no jurisdiction over non-

Indians, either on non-Indian land in Indian country or now on Indian land. That’s what Hicks held. Three of the justices, O’Conner, Breyer, and Stevens, thought the majority went way too far in extending this implicit divesture doctrine to tribal lands.

So even on our tribal lands we now have no jurisdiction over non-Indians, and this is going to reap all kinds of havoc for tribes and that’s why they were gathered September 11 in Washington to try and figure out what to do. Really they don’t have any choices. That’s so important to their future that they’ve determined that they need to seek legislation in Congress to overturn this decision. This is an important issue of tribal governance and economic enhancement. Congress consistently has supported in the last generation tribal self-determination, tribal governance, tribal economic development—all of these things are endangered by this latest Supreme Court ruling. These rules relating to tribal jurisdiction are much in need of clarification as the panelists have been talking about.

So the tribal leaders have asked me and Susan Williams, an attorney in Albuquerque representing a number of Indian tribes, to chair a legislative options committee to meet with all the tribal attorneys, the tribal lobbyists and the tribal leaders about this and so we have been busy since last September 11 doing that. Just last week the tribal leaders approved this concept paper that we put together for a legislative proposal to be introduced in Congress next year in 2003 that would address tribal jurisdiction over non-Indians. We are getting ready to present this to congressional and state leaders and start discussions on this around the country, and to inject this, if need be, into the elections year this fall because the tribes, again, had no place to go but up and this is a very, very serious matter for them.

We’ve talked about how the Supreme Court has kind of changed things around a bit on us and that’s the primary goal of this legislation: to correct that and to establish that Congress, since it has constitutional authority over Indian affairs, specifically affirms tribal authority over all people on all land in Indian country, both civil and criminal. It’s made very clear that this implicit divesture doctrine is out the window, rejected by Congress as it exercises its authority under the Constitution over tribal affairs. It establishes that the tribes are the primary government in Indian country. That’s the major feature of this legislation.

We also address another problem that came up in Hicks that hasn’t been discussed in the panel so far, but was made very clear in a concurring opinion by Justice Souter, and that’s the Court’s concern about the lack of federal court review over tribal court decisions that might be rendered affecting non-Indians. We have seen in litigation the last couple of years how the Court has struggled with this issue, because essentially
federal courts have very limited review over tribal court decisions, only to decide jurisdictional and habeas corpus petitions, and that’s it. So the Court just came out in *Hicks* in this concurring opinion and said we don’t trust these tribal courts; who are they?; and we are not about to send non-Indians in there. And that’s why they changed all of Indian law related to non-Indian jurisdiction: because the federal courts and the Supreme Court couldn’t really review what we did with non-Indians in our courts. So tribal leadership, in a very difficult decision, has decided that we have to address that. If we have any chance of getting this non-Indian jurisdiction back, we have to give up another piece of our sovereignty, and we are going to have to submit our tribal court decisions to federal court review, in a very difficult decision. The tribes have put those two things together and they are going after authority over non-Indians in exchange for federal court review of tribal court decisions affecting non-Indians.

Since its controversial in Indian country, and not all tribes are ready for this, another major feature of this legislation would be an opt in provision. Each tribe has to decide for itself whether it wants to do this. If they want jurisdiction over non-Indians, then they have to be ready to submit to federal court review. Some tribes are not ready to do that. Other tribes are ready. They are ready to have their tribal court decision reviewed by federal courts now. They say what’s the problem? They have very sophisticated courts. They are ready to go. So this is an opt in situation. Not all tribes are going to be ready for this, at least now, but one of these days, they will. It’s a big change in Indian policy, and one of these days they will be ready and have that option to move ahead.

We are also looking at development of tribal government. Some of these tribal governments are never going to be able to move ahead without federal funding, so there is a tribal governmental enhancement fund in the legislative proposal. There is funding in there too for states because their taxing authority that they exercise now under these Supreme Court decisions is going to be preempted. So we propose a payment in lieu of taxes program for states that affects Indian trust lands so that the states get paid by the federal government for their inability to tax Indian trust lands.

We also encourage inter-governmental agreements. We’ve had a lot of success with that and we put that into this legislation again to show states and local governments and tribes that these issues can still be negotiated out within these parameters. So those are the major features of this legislation that we are going to start floating now all across the country. It’s something that we really need, and we will stay with it as long
as it takes. We know it’s going to take a while, but our friends in Congress have told us we have a chance. So we are moving ahead.

JUDGE VAZQUEZ: Do any of you have any questions for any of our panelists?

QUESTION: Is that going to be federal district court review? You say federal court review of tribal decisions: is this going to be in federal appellate courts or the federal district court?

MR. ECHOHAWK: Our proposal would be to have appeals to the federal courts of appeals from tribal court decisions.

QUESTION: I have a question for the whole panel. It turns out it’s right in with what you were talking about. In the context of post-September 11th, there’s a lot of talk about the need for cooperative planning, collaborative planning for addressing terrorism by a state like New Mexico where you have Indian lands and state authority. What you said about the cases throwing collaborating relationships into a setback, and somebody else said about the lack of trust in the Supreme Court that he strongly put it you know there is no recourse for deciding to go to Congress for corrective legislation. Any thoughts about what approach to take, as an inter-government agreement? A good approach to take between state governments and Indian tribes to develop the relationships necessary to access land, use of an ambulance and things like that? This is a major planning issue in New Mexico, and I’ve heard it as is in Oklahoma also.

MR. WINDER: Can I possibly respond?

JUDGE VAZQUEZ: Sure.

MR. WINDER: Several weeks ago the U.S. Attorney went down to southern New Mexico. There were arson fires on the Mescalero Apache reservation, six to ten per week. The U.S. Attorney pulled together a number of individuals from the BIA, FBI, Forest Service, and Otero and Ruidoso counties to develop a taskforce. One of the key issues was whether or not the Mescaleros would enter into cross-deputization agreements with Otero County and Lincoln County. This would have been unheard of several years ago, but the Mescalero Nation recognized the tremendous problems they are looking at, and the Tribal Council passed a resolution a couple of weeks ago where there’s a cross-
deputization agreement between the Mescalero Apache Tribe and other entities as well. It's my understanding that the only entity we are looking at right now is Governor Johnson. Once he signs on, there’s going to be an inter-governmental agreement in place. Now I’ve spoken with the U.S. Attorney and we are working on issues in other areas as well. I can tell you with regard to Hicks, that is not an issue in our district. It is not an issue.

MR. FRYE: My own view from a tribal advocate’s perspective is that many of the big hits that the tribes are taking in litigation in the Supreme Court involve the clash of states’ rights versus Indian tribal rights. If we can eliminate those clashes using cooperative agreements, and tribes are doing that, then we are eliminating the opportunities for the Court to have to choose between states and tribes. This Court is choosing states almost 100 percent of the time.

PROFESSOR VALENCIA-WEBER: As one who has been a tribal advocate and who trains students who are going to be tribal advocates, I think the Supreme Court has a view of state and tribal relations that is counterfactual to what often happens on the ground. There are hundreds, likely thousands of compacts, Memoranda of Understandings (MOUs), agreements involving tribes and states. The reality is that there simply is not enough money for any government to fund and properly provide all the services it needs for those within its boundaries. So it's not unusual that when an accident happens out there on the state highway, with agreements, it is not a question of fighting about who is going to respond and letting injured people suffer unattended.

There are a number of models available. For instance, one MOU in Oklahoma involving both the eastern and the western district involves three levels. It involves the federal attorney’s office, state agencies, the tribes and this MOU is specifically focused on crimes against children, all the federal and state offenses. When a criminal injury or endangering neglect happens to a child, you are not going to have a jurisdictional disagreement. You have in place cross-deputization of all the officers involved so someone can immediately act and rescue the child from the endangering situation. The federal authorities and the state authorities can move in to collect forensic evidence so that it is not lost for subsequent prosecutions. They sort out later where the actual prosecution is going to occur. This is especially important in Oklahoma which suffered the greatest impact from allotment, resulting in disruptive “checkboarding” and destruction of territorial integrity.
These cross-boundary jurisdictional agreements are essential. Certainly animus between states and tribal jurisdictions can and does exist. However, where you have this level of collaboration, it is totally different from the perspective one reads in the Supreme Court opinions of constant opposition. No government, especially state and tribal governments, have enough money. If you talk to the sheriffs in those remote counties, they do not even have staff and money to respond to their narrowly defined authority. So arrangements that allow proper first aid, proper protection of safety of individuals and of a population in general manifest a common concern.

JUDGE VAZQUEZ: Does anyone have any other questions or comments?

MR. WINDER: I just want to thank the two U.S. Attorneys from Oklahoma for being here. I was at a meeting in Oklahoma a couple of weeks ago, and I learned that there's a model cooperative agreement the state of Oklahoma has, and I've discussed that with the U.S. Attorney for our district and we are reviewing that.

One of the big areas is communication and trust; I just want to let you know that Judge Vasquez, she attended what we call a Navajo Nation Tour last week on the Navajo Reservation in Winter Rock, and we had four U.S. Attorneys that were there. The three U.S. Attorneys from Utah, Arizona, New Mexico and the chairman of the Native American Issues Sub-Committee, Tom Heffelfinger, out there and it was really good. There was interaction between the tribal judges and the federal district court judges. We had Judge Tacha there, and Chief Judge Parker for our district was there. It was a very rewarding time for lines of communication to be opened up between the Navajo Nation, prosecutors and the USA's as well. That's what it comes down to.

The issue of the trust responsibility, I believe in that and I believe my U.S. Attorney does as well, but public safety, from my perspective, that's what I am concerned about. If I can get into the position of developing an agreement with local entities then I am going to do that so that we can go ahead and protect the victims.

Thank you for being here.

JUDGE VAZQUEZ: Does anyone have any other comments?

MR. ECHOHAWK: I wanted to follow-up on what Sam said. Last July we had Justice O'Conner and Justice Breyer out at the Navajo Nation Tribal Courts as part of a tour of tribal courts that they took, the first U.S.
Supreme Court Justices to do that. Part of what they saw during that tour led them to advise us at the end of the tour that we had major problems created by their decisions. They could see that and they told us that we really needed to go to Congress to get this fixed. So that’s what we have done. Justice Breyer became the first Justice to appear in a national tribal leaders meeting last February, and he came in to support us in these efforts we have underway to think about legislation. So we are headed in the right direction with the support of the Supreme Court Justices because they know that the only way we are going to be able to clarify this is to get Congress to act and set down clear rules for judges and everybody else to follow. So that’s what we are going to do and try to get out of this jumbled court decision mess that they just talked about. We’ve got to lay it out.

JUDGE VAZQUEZ: Our thanks to our speakers because they spent a lot of time putting together the materials that I think you will find invaluable. Thank you all very much for coming and for working hard on your presentations.

[Applause.]