

TRIBAL SOVEREIGN IMMUNITY

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED FOURTH CONGRESS
SECOND SESSION
ON
TRIBAL SOVEREIGN IMMUNITY

SEPTEMBER 24, 1996
WASHINGTON, DC



U.S. GOVERNMENT PRINTING OFFICE

35-542 CC

WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-054225-1



3 6105 062 099 135

COMMITTEE ON INDIAN AFFAIRS

JOHN McCAIN, Arizona, *Chairman*
DANIEL K. INOUE, Hawaii, *Vice Chairman*

FRANK MURKOWSKI, Alaska	KENT CONRAD, North Dakota
SLADE GORTON, Washington	HARRY REID, Nevada
PETE V. DOMENICI, New Mexico	PAUL SIMON, Illinois
NANCY LANDON KASSEBAUM, Kansas	DANIEL K. AKAKA, Hawaii
DON NICKLES, Oklahoma	PAUL WELLSTONE, Minnesota
BEN NIGHTHORSE CAMPBELL, Colorado	BYRON L. DORGAN, North Dakota
CRAIG THOMAS, Wyoming	
ORRIN G. HATCH, Utah	

STEVEN J.W. HEELEY *Majority Staff Director/Chief Counsel*
PATRICIA M. ZELL, *Minority Staff Director/Chief Counsel*

CONTENTS

	Page
Statements:	
Allen, W. Ron, President, National Congress of American Indians	68
Anderson, Robert T., Associate Solicitor, Division of Indian Affairs, Department of the Interior	8
Anoatubby, Bill, Governor, Chickasaw Nation	59
Becker, Daniel, Esquire	53
Cagey, Henry, Chairman, Lummi Nation	57
Coleman, Jennifer A., Esquire	38
Dawson, Marlene, Council Member at Large, Whatcom County, WA	36
Dorgan, Hon. Byron L., U.S. Senator from North Dakota	13
Endreson, Douglas B.L., Esquire, Sonosky, Chambers, Sachse and Endreson	28
Gorton, Hon. Slade, U.S. Senator from Washington	3
Hatch, Donald C., Jr., Vice Chairman, Tulalip Tribes Of Washington	66
Inouye, Hon. Daniel K., U.S. Senator from Hawaii, vice chairman, Committee on Indian Affairs	1
Johnson, James J., Esquire, Olympia, WA	45
Long, Lawrence, Chief Deputy Attorney General, South Dakota	14
Marcussen, Lana E., Esquire	40
Metcalf, Hon. Jack, U.S. Representative from Washington	5
Pressler, Hon. Larry, U.S. Senator from South Dakota	6
Simon, Hon. Paul, U.S. Senator from Illinois	5
Smith, Darrel, Mobridge, SD	43
Swaney, Rhonda R., Chairwoman, Confederated Salish and Kootenai Tribes of the Flathead Nation, Pablo, MT	53
Taken Alive, Jesse, Chairman, Standing Rock Sioux Tribe	60
Williams, Susan M., Esquire, Gover, Stetson and Williams, P.C., Albuquerque, NM	22
Yazzie, Herb, Attorney General, Navajo Nation	63

APPENDIX

Prepared statements:	
Allen, W. Ron	563
Anderson, Marge, Chief Executive, Mille Lacs Band of Ojibwe (with attachments)	569
Anderson, Robert T. (with attachments)	83
Anoatubby, Bill	396
Bourland, Gregg J., Tribal Chairman, Cheyenne River Sioux Tribe (with attachments)	582
Burns, Conrad, U.S. Senator from Montana	74
Cagey, Henry (with attachments)	362
Clinton, Robert N.	606
Clower, W. Dewey, President, NATSO, Inc.	75
Congdon, Robert	620
Coleman, Jennifer A. (with attachments)	277
Davis, Sam, Mayor, Parker, AZ	75
Dawson, Marlene (with attachments)	217
Dorgan, Hon. Byron L., U.S. Senator from North Dakota	73
Endreson, Douglas B.L. (with attachments)	197
Hatch, Donald C., Jr.	558
Hill, James D., Esquire, Assistant Professor, School of Justice Studies, Arizona State University	632
Johnson, James M., Esquire (with attachments)	337
Johnson, Wesley	620

IV

	Page
Prepared statements—Continued	
Jordan, Derril B., Attorney General, Seneca Nation (with attachments)	639
Long, Lawrence (with attachments)	88
Marcussen, Lana E., Esquire	78
Murphy, Virgil, President, Stockbridge-Munsee Community Band of Mo- hican Indians	655
Oneida Indian Nation	77
Pico, Anthony, Tribal Chairman, Viejas Band of Kumeyaay Indians	659
Pommersheim, Frank, Professor of Law, School of Law, University of South Dakota	663
Risling, Dale Sr., Chairman, Hoopa Valley Indian Tribe, California	668
Shields, Caleb, Chairman, Assiniboine and Sioux Tribes, Fort Peck Res- ervation	675
Smith, Darrel (with attachments)	321
Sunchild, John R., Chairman, Chippewa Cree Tribe	683
Swaney, Rhonda R.	357
Taken Alive, Jesse	79
Teller, John, Chairman, Menominee Indian Tribe, Wisconsin	686
Whitefeather, Bobby, Chairman, Red Lake Band of Chippewa Indians	693
Williams, Susan M. (with attachments)	131
Yazzie, Herb (with attachments)	410
Young, Dora S., Principal Chief, Sac and Fox Nation	706
Additional material submitted for the record:	
Letters with attachments to:	
Committee on Indian Affairs	710
Domenici, Hon. Pete V., U.S. Senator from New Mexico	748
Gorton, Hon. Slade, U.S. Senator from Washington	749
Inouye, Hon. Daniel K., U.S. Senator from Hawaii, Vice Chairman, Com- mittee on Indian Affairs	879
McCain, Hon. John, U.S. Senator from Arizona, Chairman, Committee on Indian Affairs	887
Miscellaneous letters, position papers, Jeff Kent interview chain of own- ership, court cases, Lummi Nation response to testimony of Marlene Dawson, et cetera	916

Senator INOUE. I have learned a long time ago that once you recess, it is almost impossible to get everyone back again. While I realize lunch is upon us, I would like to stay here until we finish.

Senator CONRAD. Then I will forego questions of this panel.

Senator INOUE. Well, ladies and gentlemen, I thank you once again.

And I will now call upon the next panel. The Chair of the Confederated Salish and Kootenai Tribes of Flathead Nation, Pablo, MT, Rhonda S. Swaney; the Chairman of the Lummi Business Council, Bellingham, WA, Henry Cagey; Bill Anotubby, the Governor of the Chickasaw Nation of Oklahoma; the Chairman of Standing Rock Sioux Tribe of South Dakota and of North Dakota, Jesse Taken Alive; the President of the Navajo Nation Council of Window Rock, AZ, Albert Hale; the Vice Chairman of the Tulalip Tribes of Washington, Donald Hatch; and the President of the National Congress of American Indians, W. Ron Allen.

I have been advised that there is a slight change. We have Herb Yazzie, the Attorney General of the Navajo Nation.

May I now call upon the Chairwoman of the Confederated States, Rhonda Swaney.

STATEMENT OF RHONDA R. SWANEY, CHAIRWOMAN, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION, PABLO, MT, ACCOMPANIED BY DANIEL BECKER, ESQUIRE

Ms. SWANEY. Good morning, Chairman and members of the committee.

I'm honored today to represent the Salish and Kootenai Tribes of the Flathead Reservation of Montana in presenting testimony to you concerning tribal civil jurisdiction in Indian country and tribal sovereign immunity.

I'm accompanied today by my attorney, Daniel Becker. And if we have any legal questions following my testimony, he will assist me in answering those questions.

We would like to offer today some of the many examples of how an inclusive, creative approach to tribal protection of the rights of all citizens living on or near reservations and the implementation of successful dispute resolution mechanisms offer alternatives to unnecessary legislation intended to correct a perceived problem. Perception is one of the major limitations of all of us legislators. We focus on a complaint, dispute, or problem, based on our personal experiences, our knowledge or our feelings. This committee is attempting to deal with the perception that non-tribal members living on or near reservations have no civil remedies because of tribal sovereign immunity. That's simply not the truth.

I would share with you our tribe's perspective of the rights of all people living on or near reservations, and the resolution of conflicts between, among those people and a tribal government. Tribal governments all over the Nation, whether they're traditional or reorganized forms of government, are all too familiar with the distrust, anger and fear associated with lost property or property rights. For example, my forefathers, by agreement made in good faith with the Federal Government, ceded, relinquished and conveyed to the Unit-

ed States property outside an area that we reserved for our exclusive use.

As with every treaty made, the U.S. Government broke nearly all the promises made in the treaty, including the right to use the reserved area exclusively. By 1934, only 75 years after the treaty ratification, we have lost approximately 66 percent of our reserved land base. Today we own about 60 percent. But we represent only about 30 percent of the population.

We realize that the traditional ways of protecting our property and property rights have not worked. And so we turned to innovative means of protecting, preserving and enhancing our homeland. This approach benefits all the residents of the reservation. It also provides all types of civil remedies, and provides for governmental participation by non-tribal members.

The primary responsibility of any government is to regulate the conduct and the activities permitted within the government's jurisdiction. On the Flathead Reservation, we've taken steps to protect the health, safety of persons on the reservation, and to encourage productive enterprise, while attempting to protect natural resources. We've also taken many steps to ensure that non-members have the opportunity to play an active role in the promulgation and implementation of government regulations and ordinances.

Let me tell you about some other things we've done and are doing. First of all, I'd like to talk about two ordinances: the shoreline protection ordinance and the aquatic lands conservation ordinance. The shoreline protection ordinance is an ordinance intended to regulate the kind of construction that takes place below the high water mark in Flathead Lake. As a result of a challenge the tribes made about development of a commercial breakwater and dock, constructed by a non-Indian in Flathead Lake, the Ninth Circuit Court affirmed that the tribes owned the bed and banks of the south half of Flathead Lake. They determined that the Flathead Nation had not been disestablished, and they determined that the tribes were the ones to rightfully exercise regulatory authority over structures constructed below the high water mark.

The tribe's regulatory authority in this ordinance is exercised by a seven member board. Three of them are non-members and four are tribal members. The board also oversees implementation of the aquatic lands conservation ordinance, which regulates construction in riparian and wetlands on the reservation. It also acts in conjunction with the Army Corps of Engineers dredge and fill permitting program.

Again, that board representatives containing both non-members and members, actually implement the tribes regulatory authority.

We also have a Flathead Lake fisheries comanagement plan, because our ownership extends only to the middle of the lake, we manage Flathead Lake fisheries pursuant to an agreement between the tribes and the Montana Department of Fish, Wildlife and Parks.

We've also, as a result of litigation, reached agreement with the State of Montana as to regulation of non-member hunting and fishing on the reservation. All reservation residents who are non-members have to buy a tribal permit to hunt and fish tribal resources.

But tribal, State and Federal officers all enforce the regulations, citing violators into courts of appropriate jurisdiction.

We also operate the reservation utility, an electrical utility. We serve over 16,000 meters, which represents most of the businesses and homes on the reservation. When we took over operation of the utility, pursuant to a self-determination contract, we instituted an independent utility board to manage the utility, and we instituted a consumer council to represent consumer interests. Both entities contain non-member representatives and tribal representatives. And it was a first that a consumer council be given equal power to the utility board in recommending rate changes.

Actually, the Federal Government conducts the rate changing or rate change process. But it's pursuant to recommendations made by both of these entities and the tribal council.

We also have a tribal administrative procedures ordinance which sets forth a process by which administrative decisions can be challenged by any affected party. The law judge hearing most of these cases is a non-member attorney. Several years ago, our tribes withdrew from concurrent criminal misdemeanor jurisdiction with the State of Montana over tribal members committing offenses on the reservation. This decision came about because we had an extremely high percentage of tribal members incarcerated in the State prison. Actually, we represent about 1 percent of the State population, but our tribal member inmate population is 60 percent of the Indian inmate total—which is about 40 percent of the inmate total.

The cooperative agreement reached between the tribes, States and local governments implementing the retrocession provides for cross-citation authority, stop and detain provisions, and emergency powers. Anticipating the increased work load connected with this retrocession, we took steps with tribal funds before retrocession took place to improve and expand our tribal court system. We have an independent prosecutor's office, a separate defender's office, an expanded legal services program, and adult-juvenile probation services. Most of the attorneys working in each of these different offices are all non-member attorneys.

We also provide civil representation to individuals meeting our representation guidelines. And we provide criminal representation in all matters where people face a criminal charge in our tribal court system.

We've also instituted and expanded our appellate court. We have a full panel consisting of three attorney justices and two lay justices. The three attorney justices, including the chief justice, have been non-members and the two lay justices tribal members. Additionally, each side in an appeal has a right to recuse one justice without stating cause. We feel this is a method to provide additional fair and impartial decision making.

We also have an instituted regulation development process. Whenever regulations asserting jurisdiction over non-tribal members and members are adopted, we adopt a fully inclusive public comment process. We include notice and hearing. And the kind of regulations that we promulgate are water quality standards, hunting and fishing and recreation regulations, migratory water fowl regulations, shoreline protection regulations, aquatic lands conservation ordinance regulations, and many more.

Over the years we've also developed many environmental initiatives, including establishment of a 90,000 acre wilderness, minimum in-stream flow protections, establishment of water quality standards for the reservation, closures for grizzly bear, bull trout, nesting water fowl, elk, bighorn sheep, and other species that have been reintroduced. We've accomplished redesignation of air quality to class 1 status.

All of these kinds of initiatives protected and improved the quality of life for all reservation residents. Consequently, the property values for non-members on our reservation have substantially increased. In fact, they've appreciated at about the rate of 15 percent the last 4 or 5 years.

We also have a governmental immunity ordinance. Section 2 of the ordinance contains limited waivers of immunity for injunctive, declaratory or mandamus relief. And it allows waivers for such things as infringement of any civil or constitutional right of an individual arising under the tribal constitution or the Indian Civil Rights Act; for specific waiver of immunity by resolution or ordinance, and judicial review of the governmental implementation of those ordinances; for intervention as a party in a lawsuit, except for counterclaims; for agreements with the United States which require us to purchase liability insurance, and then we consent to waiver of liability up to the policy limit; when we enter into agreements expressly waiving sovereign immunity and when an agent or officer of the tribe, acting within the scope of authority of his position, causes serious personal injury or death through negligently breaching a duty of care owed to another individual.

Finally, section 2 of the ordinance contains a provision that addresses situations where we've chartered tribally owned businesses. Those businesses operate pursuant to direction given by an independent board of directors which include non-members, and all articles of incorporation include sue and be sued provisions.

While there are many more stories we could share, we believe that the examples given here indicate that an inclusive, rather than exclusive, approach to tribal civil jurisdiction works. Additionally, our experience has shown that tribal civil jurisdiction is not something that needs to be fixed. More to the point, the solution proposed by section 329 would virtually eliminate all these creative and inclusive methods. This would occur, because there would be no incentive for non-tribal members to work within our administrative and judicial processes.

A waiver of any government's sovereign immunity, whether it's tribal, State or Federal government, would result in judicial chaos by authorizing any one person or entity to file frivolous lawsuits that could virtually bring justice to a standstill.

Although it's possible to find anecdotal stories that justify extreme remedial responses, as you've been asked to do today, we believe that cooperative examples cited in our testimony prove that tribal and Federal laws as they presently exist already provide sufficient authority to protect interests of all concerned parties. We appreciate the efforts of this committee to examine allegations and to hear from tribal witnesses, and we look forward to working with you on this and future matters.

Thanks very much for the opportunity to present these comments today. And we will be submitting more detailed testimony for the record.

[Prepared statement of Ms. Swaney appears in appendix.]

Senator INOUE. All right, thank you very much, Ms. Swaney.

May I now call upon Chairman Cagey.

STATEMENT OF HENRY CAGEY, CHAIRMAN, LUMMI NATION

Mr. CAGEY. Yes; thank you, Mr. Chairman.

My name is Henry Cagey, Chairman of the Lummi Nation. And I'm here today to express some concerns that the committee has about I guess due process for Indians and non-Indians on the Lummi Reservation.

The hearing today is really, it's not simply a question on due process. But really it's a whether or not the tribe is really competent enough to do the things a government needs to do in working for its people. And some of our people have really traced these arguments back to some of the Pope's legal arguments back to the 1500's. And the non-Indian acquisition of the Indians lacking self-governance capacity is over 460 years old. The whole problem is based on the Government's reliance on the doctrines of conquest and discovery, which are legal fictions created for the benefit of non-Indians.

Speaking in a more contemporary vein, the tribe has four points that we'd like to make to the committee. First, our rights began not with treaties, but with the historic fact that the Lummi people have never been conquered, nor have they relinquished their inherent sovereignty. Second, the treaties are bilateral agreements between the Indian nations and the United States, and cannot unilaterally be altered. Third, the government-to-government relationship between the Indian tribes and the United States is embedded in the U.S. Constitution.

Permit me to refer to Concurrent Resolution No. 76, in which it states:

The Congress—hereby reaffirms the constitutionally recognized government-to-government relationship with Indian tribes which historically have been the cornerstone of the Nation's official Indian policy.

Last, I'd like to quote from the Treaty of Point Elliott that

the reservations were set apart for the exclusive use of Indians, nor shall any white man be permitted to reside upon the same without permission of the said tribes and the Superintendent or his agents.

Reflecting on some of the things that we're doing at home, as you heard a previous witness, Sue Williams stated that the tribe is doing different things with due process for Indians and non-Indians on the reservation. We have a water and sewer board in place that is elected by the resident of the reservation, Indian and non-Indian, which has three members from the tribe and two members from the reservation.

For the last 14 years now we've had only two appeals, one of which was Marlene Dawson herself, a non-Indian resident and also a county council member. And she did stipulate that the hearings were fair and in accordance with due process.

Other areas that we're working with in due process is that the tribe does have a permitting process in natural resources, which include licensing, a hearing in tribal courts for citations, availability

CONFEDERATED SALISH AND KOOTENAI TRIBES
TRIBAL SOVEREIGN IMMUNITY AND CIVIL JURISDICTION
TESTIMONY BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE
SEPTEMBER 24, 1996

Good morning Chairman McCain, Vice-Chairman Inouye, and Members of the Committee. I am honored to represent the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana in presenting testimony to you today concerning Tribal sovereign immunity, how it affects the rights of non-Indians residing on and off Indian reservations, and the fair and impartial resolutions of the legal conflicts involving those individuals and Indian Tribes. I am accompanied by the Tribes' Managing Attorney, Daniel Decker and we will offer some of the many examples of how an inclusive, creative approach to Tribal protection of the rights of all citizens living on and near Indian reservations and implementation of successful dispute resolution mechanisms, offer alternatives to unnecessary legislation intended to correct a perceived problem.

Perception is one of the major limitations of all of us legislators. We focus on a complaint, dispute or problem based on our personal experiences, our knowledge, and our feelings. This Committee is attempting to deal the perception that non-tribal members living on or near reservations have no civil remedies because of tribal sovereign immunity. Nothing can be further from the truth. I will share with you our Tribes' perspective of the rights of all people living on or near an Indian reservation and the resolution of conflicts among those people and a Tribal government.

Tribal governments all over the nation, whether traditional or "reorganized" forms of government, are all too familiar with the distrust, anger, and fear associated with lost property or property rights. For example, my forefathers, by agreement made in good faith with the federal government, ceded, relinquished and conveyed to the United States, property outside an area reserved for the exclusive use and benefit of the Flathead Nation's members. As with every treaty made, the United States government broke nearly all promises made in that treaty, including the right to use the reserved area exclusively. By 1934, only 75 years after the treaty ratification, the Tribes of the Flathead Nation had lost approximately 66% of the 1,250,000 acre reserved land base. Today, while we own about 60% of the land, we represent only about 30% of the total Reservation population. Realizing that the traditional ways of protecting our property and property rights had not worked, the Flathead Nation turned to innovative, progressive means of protecting, preserving, and enhancing our homeland. Our approach benefits all the residents of the Flathead Reservation, which provides all types of civil remedies and opportunities for governmental participation by non-tribal members.

A primary responsibility of any government is to regulate the conduct and activities permitted within the government's jurisdiction. A tribal government is no different. On the Flathead Reservation we have taken steps to protect the health and safety of persons on the

Flathead Nation Testimony
September 24, 1996
Page 2

reservation and to encourage productive enterprise while protecting natural resources. Such government action will necessarily impact the activities permitted on the Reservation. In recognition of the fact that many non-tribal members live on the Flathead Reservation, the Tribal government has taken many steps to ensure that non-members have an opportunity to play an active role in the promulgation and implementation of government regulations and ordinances. Let me tell you about some of the things we've done and are doing.

1. Shoreline Protection Ordinance - As environmentally sensitive Tribes we realized that then uncontrolled growth of residential and commercial developments along Flathead Lake threatened the near pristine water quality. Tribal challenge of the development of one large earth-filled commercial breakwater and dock resulted in a 9th Circuit Court decision affirming the Tribes' ownership of the beds and banks of the south half of Flathead Lake, the determination that the Flathead Reservation had not been disestablished, and the determination that the Tribes rightfully exercised regulatory authority over structures extending below the high water mark of the lake. The Tribes' regulatory authority is exercised by a seven member Board consisting of Tribal members and non-Tribal members. Board vacancies are advertised and members selected by the Tribal Council.

2. Aquatic Lands Conservation Ordinance - The Aquatic Lands Conservation Ordinance exercises regulatory authority (in conjunction with the Army Corps of Engineers/Environmental Protection Agency Dredge and Fill Permitting Program) over construction taking place in riparian and wetlands on the Reservation. The Shoreline Protection Board referenced above, containing both non-Tribal members and Tribal members, exercises the regulatory authority of the ordinance.

3. Flathead Lake Fisheries Co-Management Plan - The Tribal Fisheries Program and the Montana State Department of Fish, Wildlife and Parks co-manage Flathead Lake fisheries pursuant to a plan approved by both the State of Montana and the Confederated Salish and Kootenai Tribes.

4. Hunting and Fishing Cooperative Agreement - This litigation settlement agreement regulates non-member hunting and fishing on the Flathead Reservation. All non-member reservation residents must buy a Tribal permit to hunt and fish the Tribal resources allowed for harvest. Tribal, State and Federal officers all enforce the regulations, citing violators into courts of appropriate jurisdiction. Neither the Tribes nor the State relinquished jurisdiction by signing this agreement.

5. MVP Utility Board and Consumer Board - We manage an electric utility serving over 16,000 meters representing most Reservation homes and businesses. When taking over operation and management of the

Flathead Nation Testimony
September 24, 1996
Page 3

utility from the Bureau of Indian Affairs pursuant to a Self-Determination Contract, the Tribes instituted an independent utility board to manage the utility and a consumer council to represent consumer interests. Both entities contain non-member and Tribal member representatives. The consumer council was a "first" for the utility and has equal power to the utility board in recommending rate changes to the Tribal Council for consideration in a public, federal rate making process. Local operation of the utility by the Tribes has much improved customer service and public relations.

6. Tribal Administrative Procedures Ordinance - This administrative appeals ordinance sets forth a process by which administrative decisions may be challenged by any affected party. The administrative law judge hearing most cases is a non-member attorney.

7. Criminal Misdemeanor Retrocession from Concurrent Jurisdiction and Accompanying Tribal Court Expansion - Several years ago the Confederated Salish and Kootenai Tribes withdrew from concurrent criminal misdemeanor jurisdiction with the State of Montana over tribal members committing offenses on the Reservation. The extremely high percentage of Salish Kootenai Tribal members incarcerated in the State prison prompted this action by the Council. The cooperative agreement between the Tribes and State and local governments implementing the retrocession, provides for cross-citation authority, stop-and-detain provisions and emergency powers.

8. Tribal Court Improvement and Expansion - In anticipation of the increased workload connected with exclusive criminal misdemeanor jurisdiction, the Tribes utilized Tribal funds to greatly expand and improve our court system. The improvements are outlined below:

- a. Development of an independent Prosecutor's Office. All prosecutors must be licensed to practice law. Currently, all prosecutors are non-members.
- b. Establishment of separate Defender's Office. This office represents all people facing a criminal charge in Tribal Court. All attorneys working in this office are non-members.
- c. Expanded Legal Services Program. This program provides representation in civil cases to individuals meeting representation guidelines. Office staff currently consists of four attorneys and one advocate. Three of the attorneys are non-members.
- d. Adult and Juvenile Probation Services and Community Service Placements.

Flathead Nation Testimony
September 24, 1996
Page 4

9. Tribal Appellate Court Organization and Expansion - The Tribes established and then expanded an appellate court to which trial court decisions may be appealed. The full panel consists of three attorney justices and two lay justices. The three attorney justices (including the Chief Justice), have been non-members and the two lay judges Tribal members. Two attorney justices and one lay justice sit on each appeal. Reconsideration is heard en banc. Each side in the appeal has the right to recuse one justice in each appeal without stating cause. This provides additional opportunity for fair and impartial decisions.

10. Regulation Development Comment Process - Whenever regulations asserting civil jurisdiction over non-Tribal members must be adopted or updated pursuant to a Tribal Ordinance, a fully inclusive public comment process is conducted. Regulations developed pursuant to this process, which includes notice and hearing, are those such as Tribal Water Quality Standards; Hunting, Fishing and Recreation Regulations; Migratory Waterfowl Regulations; Shoreline Protection Regulations; Aquatic Lands Conservation Ordinance Regulations; Request for Class I Air Quality Redesignation and many others.

11. Environmental Initiatives - The Tribes developed many environmental initiatives over the years including: establishment of a 90,000 acre wilderness; minimum instream flow protection; establishment of water quality standards; closures for grizzly bear, bull trout, nesting waterfowl, elk, big horn sheep, and reintroduced native species protection; and redesignation of air quality to Class I status. All these initiatives protected and improved the quality of life for all Reservation residents, everyone benefited.

12. Governmental Immunity Ordinance - The Confederated Tribes adopted a Tribal Governmental Immunity Ordinance in 1995. Section 2 of the ordinance contains limited waivers of immunity for injunctive, declaratory or mandamus relief for Tribal government infringement of any civil or constitutional right of an individual arising under the Tribal Constitution, Bylaws, or the Indian Civil Rights Act; for specific waiver of sovereign immunity by resolution or ordinance, or for judicial review of governmental implementation of the resolution or ordinance; when the Council authorizes intervention as a party in a lawsuit (except for counter-claims); in the case of agreements with the United States which require the Tribes to purchase liability insurance, and thereby consent to waiver up to the policy limit; when the Council enters into an agreement expressly waiving immunity, setting out procedures for remedies in a default or breach situation; and when an officer, agent, or employee of the Tribes, acting within the scope of authority, allegedly causes serious personal injury or death through negligently breaching a duty of care owed to another. These limited waivers provide opportunity for individuals,

Flathead Nation Testimony
September 24, 1996
Page 5

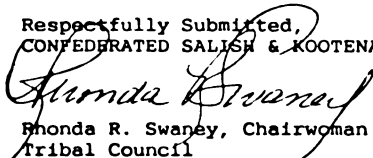
governments, and other parties, to obtain fair and impartial decisions. Where we have chartered tribally owned businesses, those businesses operate pursuant to direction given by an independent board of directors (including non-members). All articles of incorporation include "sue and be sued" provisions.

While there are many more stories we could share, we believe the examples given indicate that an inclusive rather than exclusive approach to Tribal civil jurisdiction works. Additionally, our experiences show that Tribal civil jurisdiction is not something that needs to be fixed. More to the point, the "solution" proposed by Section 329 could virtually eliminate all these creative and inclusive methods that work. This would occur because there would be no incentive for non-tribal members to work within our administrative and judicial processes. A waiver of any government's sovereign immunity - be that government tribal, state or federal - would result in judicial chaos by authorizing any one person or entity to file frivolous lawsuits that would virtually bring justice to a standstill.

Although it is possible to find anecdotal stories that seemingly justify extreme remedial responses, we hope that through the cooperative examples cited in our testimony the Committee can see that tribal and federal laws as they presently exist already provide sufficient authority to protect the interests of all concerned parties. We appreciate the efforts of this Committee to fully examine allegations and to hear from tribal witnesses and we look forward to working with you on this and future matters.

Thank you very much for the opportunity to present these comments today. We will be submitting more detailed testimony for the record.

Respectfully Submitted,
CONFEDERATED SALISH & KOOTENAI TRIBES



Rhonda R. Swaney, Chairwoman
Tribal Council