Motion for Leave to File Brief as Amicus Curiae and Brief of Native Am. Rights Fund, as Amicus Curiae, *Rincon Band of Mission Indians v. Cnty. of San Diego*, 495 F.2d 1 (9th Cir. 1974) (71-1927) (Monroe E. Price, Robert S. Pelcyger, and David H. Getches, Native American Rights Fund).

NO. 71-1927

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RINCON BAND OF MISSION INDIANS,

Appellants,

v.

COUNTY OF SAN DIEGO, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NATIVE AMERICAN RIGHTS FUND, AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF

AS AMICUS CURIAE

The Native American Rights Fund respectfully moves the Court, pursuant to Rule 29 of the Federal Rules of Appellate Procedure, for an order granting leave to file the attached brief amicus curiae in the above-captioned case. The appellees, the County of San Diego and the Sheriff of the County of San Diego, have refused to consent to the filing of the brief. The appellant, the Rincon Band of Mission Indians, has granted its consent to the filing of the brief amicus curiae. Their letters accompany this motion.

The Native American Rights Fund (herein referred to as the "Fund") is a private, non-profit corporation, organized for the purpose of, and dedicated to, protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance. The Fund appears herein and submits this brief amicus curiae because of its general interest in the subject of tribal sovereignty, particularly as it relates to conflicts between federal, state, and tribal jurisdiction.

The Fund by this motion is seeking leave to file its brief some six days subsequent to the filing of appellant's brief. Accordingly, the Fund seeks an order of the Court, also pursuant to Rule 29 of the Federal Rules of Appellate Procedure, granting leave for this later filing. The small delay was occasioned by the additional time required to examine the appellant's Opening Brief after it was filed in order to avoid unnecessary repetition, since the interests of the Fund and of the appellant overlap to some extent. However, it appears that none of the parties would be prejudiced by the filing of the Fund's brief at the present time.

The Fund is supported principally by private grants and contributions. It is also the recipient of a grant from the federal Office of Economic Opportunity to provide technical assistance in the area of Indian law to legal services programs throughout the country. The Fund participates as amicus curiae in this case because of the broad importance and impact which the decision will have on Indians and Indian tribes in all of the states in which Public Law 280 applies.

During the past year, the Fund has participated in an amicus capacity in three cases before the Supreme Court. In Affiliated Ute Citizens of the State of Utah v. United States, No. 70-78, the Supreme Court granted the Fund's motion for leave to file a brief on the merits as amicus curiae. In two other cases, Agua Caliente Band of Mission Indians v. County of Riverside, No. 71-183 and Goham v. State of Nebraska, No. 71-293, the Fund filed a brief in support of the petitions for a writ of certiorari. Both of these latter cases involved the interpretation and application of Public Law 280, which is the principal statute involved in this case.

This case presents issues of substantial and particular importance to the Fund and to clients represented by the Fund throughout the United States. The Fund's attached brief presents a position concerning the status of tribal communities throughout the country under Public Law 280 which is not presented by the other parties to the proceedings. While the particular and proper concern of the Rincon Band of Mission Indians is to uphold the validity of its own ordinance in order that it can proceed with its economic development program, the Fund is interested in the broader issue involved in defining the political status of all Indian tribes in Public Law 280 states. Consequently, the Fund presents a viewpoint to the Court which is different from that of the other parties.

In resolving the specific issue involved in this case, it is desirable, indeed imperative, for the Court to consider the broad impact its decision will have in defining the governmental role of Indian tribes under Public Law 280.

For the foregoing reasons, the Fund requests that its motion for leave to file the accompanying brief amicus curiae be granted.

Respectfully submitted,

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NATIVE AMERICAN RIGHTS FUND

By ____________________________
Robert S. Pelcyger

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NO. 71-1927

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APPEAL FROM THE UNITED STATES DISTPICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF NATIVE AMERICAN RIGHTS FUND,

AS AMICUS CURIAE

ARGUMENT

PUBLIC LAW 280 DID NOT TERMINATE TRIBAL SOVEREIGNTY. THE RINCON BAND'S ORDINANCE MUST BE GIVEN FULL FORCE AND EFFECT ON THE RINCON RESERVATION.

A. The critical language of three sections of Public Law 280 specifically preserves tribal sovereignty.

This case is of particular importance because the result here will, for all practical purposes, define the extent of Indian tribal sovereignty in all Public Law 280 states. If the reasoning of the District Court is followed, the governmental responsibility of all Indian tribes in Public Law 280 states will have ceased.

Nothing in Public Law 280 compels such a disastrous result. Indeed, in at least three provisions of the Act, Congress went out of its way to preserve an important place for the exercise of tribal sovereignty. The lower court's interpretation of these sections, 18 U.S.C. § 1162(a), and 28 U.S.C. §§ 1360(a) and 1360(c), renders the language of Congress superfluous and meaningless.[1]

Section 1162(a) qualifies the grant of criminal jurisdiction over Indian country to the State of California by providing specifically that state criminal laws

> shall have the same force and effect within such Indian country as they have elsewhere within the State. (emphasis added)

Similarly, the civil counterpart, § 1360 of Title 28, provides that

> those civil laws of [California] that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. (emphasis added).

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[1] Public Law 280 must be read as a whole. The sections of the Act now codified as 18 U.S.C. § 1162(a) and 28 U.S.C. §§ 1360(a) and 1360(c) reinforce each other and lead to the same conclusion. The District Court's erroneous interpretation of the statute stems in part from its consideration of these sections in isolation rather than in relation to one another. See, e.g., United States v. McClure, 305 U.S. 472 (1939).

Section 1360(c) provides that

> any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, <u>if not inconsistent with any applicable civil law of the State</u>, be given full force and effect in the determination of civil causes of action pursuant to this section. (emphasis added)

These sections of Public Law 280 clearly reveal on their face an intention to limit state jurisdiction in Indian country to general laws applicable throughout the state and to preserve a governing role for tribal authorities roughly comparable to that enjoyed by the political subdivisions of the state. The District Court's narrow and tortured construction of these provisions cannot withstand close scrutiny.

The District Court acknowledged that the limiting language of §§ 1162(a) and 1360(a) appears to contradict the view that the laws of the state's political subdivisions were made applicable to Indian country. However, the Court then proceeded to explain away this apparent contradiction, stating, "it is more reasonable to conclude that this phrase was inserted to assure equal treatment of the Indians with all other citizens and not to exempt Indian lands from local laws." 324 F.Supp. at 375. In so doing, the Court violated a cardinal principle of statutory construction,[2]

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[2]The District Court cited this same principle later in its opinion, 324 F.Supp. at 376.

that whenever possible courts should avoid an interpretation which renders part of the statute superfluous.[3]

Indians in California, in common with other citizens, are assured and guaranteed equal, non-discriminatory treatment at the hands of the state by virtue of the Fourteenth Amendment to the United States Constitution. The limiting language of §§ 1162(a) and 1360(a) was not necessary to assure equal treatment to Indians.[4] The only reasonable, non-superfluous construction of the language of the Act is that it means what it says, that the only laws of the state made applicable within Indian country are laws that apply generally elsewhere within the state, that the local laws of the state's political subdivisions are specifically excluded from the grant of jurisdiction to the state.[5]

Section 1.4 of 25 C.F.R. strongly reinforces this interpretation of §§ 1162(a) and 1360(a). This Interior Department regulation assumes that the laws and ordinances

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[3]For a recent application of this principle in an Indian context see Rockbridge v. Lincoln, 449 F.2d 567 at 571 (9th Cir. 1971).

[4]Indeed, as shown in Appellant's Opening Brief, pp. 11-13, the District Court's interpretation of these provisions of the statute actually has the effect of placing Indians in a unique position of inequality.

[5]The state-local distinction, so obvious on the face of Public Law 280, was acknowledged by the state court in County of San Bernardino v. La Mar, 271 Cal.App.2d 718, 76 Cal.Rptr. 547 (1969).

of the state's political subdivisions were not made applicable to Indian country by Public Law 280. As the Supreme Court stated in Udall v. Tallman, 380 U.S. 1 (1965),

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers and agency charged with its administration. (380 U.S. at 16)

The District Court's treatment of § 1360(c) similarly disregards the specific language of the statute. The Rincon Band's ordinance is not "inconsistent with any applicable civil law of the State,"[6] and must therefore be given full force and effect. Instead, the District Court ruled that the Band's ordinance was pre-empted by the San Diego County ordinance. In so doing, the District Court held, in effect, that so far as governmental responsibility was concerned, the Rincon Indian Reservation was just like all other unincorporated areas within San Diego County. The Rincon Band itself was left with the same authority as any other landowner, no more, no less. This construction makes § 1360(c) into a meaningless provision.

In addition to disregarding the plain meaning of § 1360(c), the District Court's reasoning was predicated

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[6]The phrase, "civil law of the State," obviously refers back to the law of general application language of §§ 1162(a) and 1360(a). As noted above, footnote 1, the District Court erred in considering the relevant provisions of Public Law 280 in isolation rather than as interrelated parts of a single enactment.

upon mistaken premises. Prior to the passage of Public Law 280, the Rincon Band enjoyed a sovereign status comparable at least to that of a state in the federal system. Williams v. Lee, 358 U.S. 217 (1959). The relevant question therefore is whether Public Law 280 stripped tribal authorities not only of their status akin to "state" sovereignty, but also of the power and authority enjoyed by the state's political subdivisions. In other words, the issue, properly framed, is not whether Congress vested Indian tribes in Public Law 280 states with governing authority comparable to that exercised by political subdivisions, but rather whether Congress acted unmistakably and affirmatively to strip Indian tribes not only of their "state" sovereignty, but of the last vestiges of any governing authority.

Grants of jurisdiction to states over Indian country must be construed narrowly and precisely. Kennerly v. District Court, 400 U.S. 423 (1971). As stated by Mr. Justice Black for a unanimous court in Williams v. Lee, supra,

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it. (358 U.S. at 223)

In at least three sections of Public Law 280, Congress has carefully preserved a meaningful sphere of governmental activity for Indian tribes. The Rincon ordinance clearly fits within the area reserved for the exercise of tribal jurisdiction. The District Court's tortured and decidedly anti-Indian interpretation of these sections must be rejected.

B. Public Law 280 is not a termination statute.

The District Court incorrectly interpreted Public Law 280 as a termination statute. In the 1950's, Congress took a two-pronged approach to the question of increasing state jurisdiction over reservations. The general statute, Public Law 280, described subject matter areas where the states would have power. More particular statutes, generally called Termination Acts, identified individual reservations where federal supervision would be concluded and the federal source of tribal power ended. San Diego's treatment of the Rincon Band's government converts Public Law 280 from a jurisdiction-sharing statute to a termination statute. The case of the Menominees is illustrative.

In 1953, when Public Law 280 was originally passed, Wisconsin, like California, became a mandatory recipient of jurisdiction over Indian country within its borders. The Menominee Tribe, originally excepted from the Act, was included in 1954. All that occurred was that the state was authorized to exert certain legislative power and enforcement of a sort which had previously been exerted exclusively by the federal government. As to Menominee, however, the Congress decided to go further and eliminate federal supervision altogether, 25 U.S.C. §§ 891, et seq. The status of the Menominee government afterwards was to be determined by state law, although certain treaty rights remained federally protected. See Menominee Tribe v. United States, 391 U.S. 404 (1968).

Termination legislation destroyed the reservation as a political entity, denying it future governmental powers flowing from its special federal relationship. When the Menominee legislation became effective in 1961, there was no longer a Menominee Tribe, only a Menominee County. San Diego County treats the Rincon Band and the Rincon Reservation as an undistinguished mass within its unincorporated territory. But the Reservation's status is at least the equivalent of an incorporated community and is so as a matter of federal law. See, e.g., Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969).

Congress quite clearly was not eliminating the tribe as a political entity in the legislation here applicable. 28 U.S.C. § 1360(c), taken by itself, is sufficient to demonstrate that Congress intended for tribal authorities in Public Law 280 states to continue to exercise vital governmental functions. When Congress has wanted to terminate tribal governmental responsibility, as in the case of the Menominees, it has enacted specific legislation to accomplish that result. It has not relied on Public Law 280.

From a policy point of view, it makes no sense for the state's political subdivisions to exercise control over the Indian lands within their boundaries. Because Indian lands enjoy certain tax advantages, see, e.g., Squire v. Capoeman, 351 U.S. 1 (1956) and Agua Calienta Tribe of Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), petition for a writ of certiorari filed August 6, 1971, 40 L.W. 3079, it can be expected that the state's political subdivisions will use what authority they have to discourage development on Indian lands owing not so much to hostility as to natural economic rivalry. The holding of the court below would enable the state's political subdivisions to control through various devices whether any development takes place on Indian reservations. For example, San Diego County might decide to limit growth in the North County area by relegating Indian and adjacent lands to permanent greenbelt status. Nothing could frustrate more completely the dominant federal policy of encouraging and promoting the economic development of Indian reservations.

Public Law 280 was not an invitation to chaos. Nor was the substitution of limited state for federal authority a sign to destroy decades of hard work to preserve and define tribal sovereignty and to promote the development of Indian lands. It certainly did not leave to local determination the respect to be paid to tribal government.

C. <u>The President, the Congress and the courts have rejected the policies of transferring jurisdiction over Indian country to states without Indian consent and of ending the unique status and rights of Indian tribes</u>.

The District Court's opinion is also out of step with the latest pronouncements of the President, the Congress and the courts.

In his July 8, 1970 Message to Congress (1970 U.S. Code, Cong. and Admin. News, p. 2965), President Nixon denounced the termination policy of the 1950's in the most forceful terms, referring to it as "wrong," "morally and legally unacceptable," and "clearly harmful."

In 1968, Congress amended Public Law 280 to provide specifically for Indian consent as a condition precedent to the assumption of state jurisdiction. 25 U.S.C. § 1326. <u>See</u> <u>Kennerly v. District Court, supra</u>. Congress also made it possible for states that had previously acquired Public Law 280 jurisdiction to retrocede it back to the federal government. 25 U.S.C. § 1323(a). In so doing, Congress not only renounced the policy of transferring civil and criminal jurisdiction to states without Indian consent, but also recognized that the policy embodied in Public

Law 280 had been a failure.[7]

In two recent decisions, the Supreme Court has exhibited a marked reluctance to expand state jurisdiction over Indian country and to extinguish by implication long protected Indian rights. Menominee Tribe v. United States, supra; Kennerly v. District Court, supra.

Thus, the effect of the District Court's decision is to turn the clock back two decades by embracing and carrying out a policy that has now been rejected by all three branches of government. Surely this kind of counter-productive result should be avoided if at all possible. Fortunately, there is nothing either on the face of Public Law 280 or in its legislative history[8]

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[7]On December 11, 1971, the Senate passed Senate Concurrent Resolution 26. This statement of national Indian policy specifically replaces the termination policy embodied in House Concurrent Resolution 108, 83rd Congress (August 1, 1953). It proclaims

> That it is the sense of Congress that . . . improving the quality and quantity of social and economic development efforts for Indian people and maximizing opportunities for Indian control and self-determination shall be a major goal of our national Indian policy. (emphasis added)

Senate Concurrent Resolution 26 is now pending in the House of Representatives along with similar statements of national Indian policy, e.g., House Concurrent Resolution 95, introduced by members of the House.

[8]The legislative history of Public Law 280 demonstrates that the overwhelming concern of Congress, the affected states, and the affected Indian tribes was with

that compels the conclusion that tribal governments would drop out and be replaced by the state's political subdivisions. Indeed, as we have shown and as the District Court's opinion itself demonstrates, it is possible to arrive at that conclusion only by reading certain key language out of the Act.

CONCLUSION

The Rincon Band's ordinance involved in this proceeding seeks to authorize certain activities on the Rincon Reservation that are permitted by state law and take place in incorporated areas of San Diego County. It is not any more difficult for the County to tolerate this activity on the Rincon Reservation than any other place within the County limits, nor does it create any unique law enforcement problems. Unless Public Law 280 is read to eliminate the Rincon Band as the governing authority of the Rincon Reservation, the principle of comity between governments requires that the Rincon ordinance be given full force and effect.

(footnote 8 continued)

"law and order." The absence of state jurisdiction combined with the financial inability of the tribes to provide their own law enforcement machinery lead to a law and order crisis on many reservations. See, e.g., Hearings Before the House Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee, 82d Cong., 2d Sess., February 28 and 29, 1952, Serial No. 11. Public Law 280 should be interpreted in this light, without attributing to Congress an intent to extinguish any Indian rights not essential to achieve that limited purpose. Menominee Tribe v. United States, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 7, 1972, there was sent by first class mail a copy of the following document: MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NATIVE AMERICAN RIGHTS FUND, AS AMICUS CURIAE. Copies of said document were mailed to the following:

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