

## [3] Public Law 280

## [a] History of Public Law 280 and Amendments

In 1953, Congress enacted Public Law 83-280,<sup>43</sup> a statute delegating to five,<sup>44</sup> later six,<sup>45</sup> states jurisdiction over most crimes and many civil matters throughout most of the Indian country within their borders. The Act offered any other state the option of accepting the same jurisdiction.<sup>46</sup> Ten of the optional states acted to accept some degree of jurisdiction under the Act's provisions, although some of these enactments were later repealed or found to be invalid.<sup>47</sup> An amendment to

1991). A state law and tribal ordinance that accepted Public Law 280 jurisdiction over "public welfare" was limited to economic assistance to the needy, and read to exclude claims relating to the general welfare of the community, such as extortion of a public official. *Liberty v. Jones*, 782 P.2d 369 (Mont. 1989). And a state law and tribal ordinance that accepted Public Law 280 jurisdiction over domestic relations and over care of the infirm was read to exclude state jurisdiction over a suit against an Indian for medical expenses incurred by her spouse. *Balyeat Law, PC v. Pettit*, 967 P.2d 398 (Mont. 1998). *But see State v. Barros*, 957 P.2d 1095 (Idaho 1998) (requiring courts to narrowly construe state laws extending jurisdiction into Indian country, but finding that state law allowing jurisdiction over offenses on highways encompassed off-highway arrests for those offenses); *State v. Squally*, 937 P.2d 1069 (Wash. 1997) (interpreting state's assumption of jurisdiction pursuant to tribal consent to encompass lands acquired after 1968 and not included in pre-1968 tribal resolution indicating its consent); *State v. Cooper*, 928 P.2d 406 (Wash. 1996) (interpreting state's assumption of full nonconsensual jurisdiction outside established reservations to encompass trust allotments that constitute federally defined Indian country).

<sup>43</sup> Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note). For a detailed analysis of Public Law 280, see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535 (1975).

<sup>44</sup> California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation). *See* 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a).

<sup>45</sup> Alaska Territory was added by Pub. L. No. 85-615, § 1, 72 Stat. 545 (1958) (codified at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a)). Alaska became a state in 1959. The Act was subsequently amended to authorize concurrent criminal jurisdiction over the Annette Islands Reservation by the Metlakatla Indian Community. Pub. L. No. 91-523, § 1, 84 Stat. 1358 (1970) (codified at 18 U.S.C. § 1162(a)).

<sup>46</sup> Pub. L. No. 90-284, Act of Apr. 11, 1968, 82 Stat. 73, 78-80 (repealing and reenacting Pub. L. No. 83-280, Act of Aug. 15, 1953, § 7, 67 Stat. 588) (codified as amended at 25 U.S.C. §§ 1321-1322). States that had disclaimed jurisdiction over Indian lands in their constitutions as a condition of admission to statehood were authorized to amend their constitutions or statutes to remove legal impediments to jurisdiction. Act of Aug. 15, 1953, § 6, 67 Stat. 588 (codified as amended at 25 U.S.C. § 1324).

<sup>47</sup> Arizona accepted jurisdiction over air and water pollution only. *Ariz. Rev. Stat.* §§ 36-1801, 36-1865 (air pollution provision renumbered in 1987, as *Ariz. Rev. Stat.* § 49-561). The state subsequently repealed both the provision concerning water pollution (repealed by *Ariz. Laws* 1986, § 19, Subsec. B (1987)) and air pollution (repealed by *Ariz. Laws* 2003, § 4 (2003)). Because this jurisdiction was almost entirely regulatory in nature, it was probably invalid under the principles of *Bryan v. Itasca County*, 426 U.S. 373 (1976); *see* § 6.04[3][b][ii]. Florida assumed full Public Law 280 jurisdiction. *Fla. Stat.* § 285.16. Idaho accepted jurisdiction over seven subject areas and full Public Law 280 jurisdiction with tribal consent. *Idaho Code* §§ 67-5101-67-5103. Iowa assumed



Public Law 280 in 1968 made subsequent assumptions of jurisdiction subject to Indian consent in a special election.<sup>48</sup> Only one state acceptance has occurred since the amendment, and no tribes in that state have consented to the state's jurisdiction.<sup>49</sup> However, in several post-1968 federal statutes affording restoration or federal recognition to individual tribes and settling particular jurisdictional conflicts, Congress has specified that the state must exercise civil and criminal jurisdiction "as if [that] state had assumed such jurisdiction with the consent of the tribe" under Public Law 280 as amended in 1968.<sup>50</sup> Congress has also passed special legislation affording federal recognition and providing that "[n]otwithstanding the provision relating to a special election in [the 1968 amendments to Public Law 280], the reservation [shall be] subject to State jurisdiction to the

civil jurisdiction over the Sac and Fox Reservation, Tama County. Iowa Code §§ 1.12-1.14; *see also* § 6.04[4][b] (delegation of partial criminal jurisdiction to Iowa in earlier statute). In Montana, the governor was empowered to proclaim state criminal or civil jurisdiction at the request of any tribe and with the consent of affected counties. Tribal consent was revocable within two years of the governor's proclamation. Mont. Code §§ 2-1-301-2-1-306. The Confederated Salish and Kootenai Tribes consented to jurisdiction under this provision, some of which was subsequently retroceded by the state. Nevada originally accepted full Public Law 280 jurisdiction, but permitted individual counties to exclude themselves from acceptance of jurisdiction. This provision was amended in 1971 to require tribal consent. A 1973 amendment provided for retrocession, except for those tribes already subject to the Act who consented to continue. Nev. Rev. Stat. § 41.430. Jurisdiction now has been retroceded for all reservations. North Dakota accepted civil jurisdiction only, subject to tribal or individual consent. N.D. Cent. Code §§ 27-19-01 to 27-19-13. Both the condition of tribal acceptance, N.D. Cent. Code §§ 27-19-02, and the condition of individual acceptance, N.D. Cent. Code §§ 27-19-05, 27-19-06, have been declared invalid under federal law. Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877 (1986) (tribal acceptance); Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975) (individual acceptance). South Dakota assumed jurisdiction only over criminal offenses and civil causes of action arising on highways, and conditioned acceptance of full Public Law 280 jurisdiction on federal government reimbursement for the cost of the additional jurisdiction assumed. S.D. Codified Laws §§ 1-1-12-1-1-21. This acceptance of only the most financially lucrative form of state jurisdiction was ruled invalid in *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990). Utah has a post-1968 statute accepting jurisdiction when tribes consent. Utah Code §§ 9-9-201-9-9-213. No tribe has consented. Washington assumed full Public Law 280 jurisdiction over non-Indians and over Indians on fee land. Jurisdiction over Indians on trust land was limited to eight subject areas, unless a tribe consents to full Public Law 280 jurisdiction. Wash. Rev. Code §§ 37.12.010, 37.12.021, 37.12.030, 37.12.040, 37.12.050, 37.12.070.

<sup>48</sup> 25 U.S.C. § 1326. Enrolled Indians within the affected area of Indian country must accept state jurisdiction by a majority vote of adults voting at a special election called by the Secretary, the tribal council, or 20% of the enrolled adults. Congress substituted the new mechanism for accepting Public Law 280 in optional states but preserved all jurisdiction previously acquired pursuant to the mechanism it replaced.

<sup>49</sup> In 1971, Utah passed legislation accepting jurisdiction subject to subsequent tribal consent. Utah Code §§ 9-9-201-9-9-213.

<sup>50</sup> *See, e.g.*, Pub. L. No. 100-89, 101 Stat. 666, 668 (1987) (codified at 25 U.S.C. § 1300g-4(f) (Ysleta del Sur), & 25 U.S.C. § 736 (Alabama Coushatta)) (jurisdiction conferred on Texas over both tribes). In restoring the Coquille Tribe, which was located in Oregon, a mandatory Public Law 280 state, Congress specified that the state "shall exercise criminal and civil jurisdiction" in accordance with the mandatory provisions of Public Law 280. 25 U.S.C. § 715d.



maximum extent provided in [Public Law 280, as amended].”<sup>51</sup> Finally, Congress has passed settlement or tribal recognition acts since 1968 that simply announce the existence of state civil and criminal jurisdiction, without alluding to Public Law 280 or the general requirement of Indian consent.<sup>52</sup> These post-1968 laws imposing state jurisdiction can be understood as the product of agreement with the Indian nations,<sup>53</sup> or as a response to the recognition of tribal governments that had not yet developed law enforcement or court systems.

The 1968 amendment to Public Law 280 also expressly allows states to partially assume jurisdiction limited to some geographic or subject areas,<sup>54</sup> and permits states to retrocede (return) to the federal government all or part of the jurisdiction they had previously assumed under Public Law 280.<sup>55</sup> No other material changes in the Act were made by Congress until 2010, when Congress left state jurisdiction unchanged, but added the possibility of concurrent federal criminal jurisdiction under specified conditions.<sup>56</sup> References in this Chapter to “Public Law 280” generally mean both the 1953 Act and the 1968 amendments.

## **[b] Scope of Delegated Jurisdiction**

### **[i] State Jurisdiction Authorized by Public Law 280**

Where applicable, Public Law 280 grants states “jurisdiction over offenses” committed by or against Indians and “civil causes of action” to which Indians are parties, and provides that state “criminal laws” and “civil laws that are of general application to private persons or private property” have the same force and effect in Indian country as they have elsewhere within the state.<sup>57</sup> Yet the consequence of Public Law 280 has *not* been to subject Indian nations to the full range of state law.<sup>58</sup> The statute itself identifies several subject areas where state law does not apply. In addition, judicial interpretations of the grant of jurisdiction have adopted

<sup>51</sup> Connecticut Indian Land Claims Settlement Act of 1983, 25 U.S.C. § 1755 (conferring jurisdiction on state of Connecticut over Mashantucket Pequot Tribe).

<sup>52</sup> See, e.g., Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. § 1708(a); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1725(a).

<sup>53</sup> See *Charles v. Charles*, 701 A.2d 650, 655 n.15 (Conn. 1997).

<sup>54</sup> 25 U.S.C. §§ 1321(a) (criminal jurisdiction), 1322(a) (civil jurisdiction) (state may assume “such measure of jurisdiction . . . within . . . Indian country or any part thereof as may be determined by such State”). No provision was made in the original Act for partial assumptions, although several states took less than the full scope of jurisdiction offered.

<sup>55</sup> 25 U.S.C. § 1323. Tribal consent to retrocession is not required, although the Secretary of the Interior presumably would have an obligation to consult with the affected tribe before accepting a state’s offer to retrocede. See § 6.04[3][g].

<sup>56</sup> In 2010, Congress further amended Public Law 280 to allow tribes to request federal criminal jurisdiction in addition to the state jurisdiction authorized under Public Law 280. Tribal Law and Order Act of 2010, Pub. L. No. 111-211 § 221, 124 Stat. 2258 (2010). For further discussion of this change, see § 6.04[3][d][i].

<sup>57</sup> 18 U.S.C. § 1162(a); 25 U.S.C. §§ 1321(a), 1322(a); 28 U.S.C. § 1360(a).

<sup>58</sup> Carole Goldberg-Ambrose, *Public Law 280: From Termination to Self-Determination*, in



a narrow understanding of the scope of applicable state law. Finally, federal statutes enacted subsequent to Public Law 280 have carved out additional subject areas where state law may not be enforced.

### [ii] States Not Granted Regulatory and Taxing Jurisdiction

The federal grant of jurisdiction to the states under Public Law 280 excludes significant subject areas, particularly in the regulatory and tax fields.<sup>59</sup> The Act expressly precludes state taxing and certain other exercises of jurisdiction over trust and restricted Indian property, as well as jurisdiction over federally protected Indian hunting and fishing rights.<sup>60</sup> A possible inference from these exceptions and from the general terms of the Act<sup>61</sup> was that all other jurisdiction is delegated by the Act.<sup>62</sup> But in *Bryan v. Itasca County*,<sup>63</sup> the Supreme Court rejected this construction and concluded that Public Law 280 did not confer on the states any new taxing jurisdiction over Indian country. It therefore invalidated a state property tax on unrestricted Indian property located in a reservation subject to Public Law 280.<sup>64</sup> The Court's rationale also precluded new state regulatory jurisdiction generally.<sup>65</sup> The Court reached this conclusion in *Bryan* after finding the language and legislative history of Public Law 280 ambiguous.<sup>66</sup> In enacting the original statute, Congress's primary concern was with law and order in Indian country, and civil jurisdiction was something of an afterthought.<sup>67</sup> In view of these

American Indian Policy and Cultural Values: Conflict and Accommodation 39 (Jennie Joe ed., American Indian Studies Center 1986).

<sup>59</sup> One state court has rejected the argument that the references to civil and criminal jurisdiction in Public Law 280, coupled with the failure to mention juvenile jurisdiction, indicate that states did not receive jurisdiction over juvenile proceedings. *State v. Spotted Blanket*, 955 P.2d 1347 (Mont. 1998). Because the Supreme Court has generally prescribed a narrow reading of the scope of state jurisdiction under Public Law 280, *see* § 6.04[3][b][i], states that characterize juvenile proceedings as distinct from civil and criminal matters may have difficulty defending the exercise of jurisdiction over Indian youth within Indian country.

<sup>60</sup> 18 U.S.C. § 1162(b); 25 U.S.C. §§ 1321(b), 1322(b); 28 U.S.C. § 1360(b).

<sup>61</sup> *See* § 6.04[3][b][i].

<sup>62</sup> Compare Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1165–1166 (1990) (explaining that, in light of the Act's termination era roots, Public Law 280 could be read as a "clear congressional diminishment of tribal sovereignty"), with Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1662 (1998) (arguing that acknowledging Public Law 280 was passed in termination era "does not foreclose an interpretation of Public Law 280 that provides for concurrent tribal and state jurisdiction").

<sup>63</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976).

<sup>64</sup> *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976). For an in-depth history of the litigation that led to the *Bryan* decision, *see* Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 Minn. L. Rev. 919 (2008).

<sup>65</sup> *Bryan v. Itasca County*, 426 U.S. 373, 388–390 (1976).

<sup>66</sup> *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

<sup>67</sup> *See* *Bryan v. Itasca County*, 426 U.S. 373, 379–387 (1976); S. Rep. No. 83-699 (1953). *See*



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S. Rep. No. 83-699 (1953). See

factors, the Indian law canons of construction,<sup>68</sup> and the movement of federal Indian policy away from assimilation since 1953, the Court interpreted the scope of Public Law 280's delegation narrowly, treating the grant of civil jurisdiction as confined to private lawsuits such as those based on tort or contract claims.

*Bryan's* statements about the absence of state regulatory jurisdiction were confirmed when the Supreme Court decided *California v. Cabazon Band of Mission Indians* in 1987.<sup>69</sup> *Cabazon* rejected California's effort to apply its laws regulating the game of bingo to an Indian nation. The Court drew a distinction between criminal laws that are "prohibitory" and laws that are "regulatory," holding that the latter are not included in Public Law 280's authorization of state jurisdiction.<sup>70</sup> If a state law is fundamentally regulatory in nature, it may not be applied to Indians within Indian country even if it contains criminal penalties for violations.<sup>71</sup> The Court explained that "if the intent of a state law is generally to prohibit certain conduct," it falls within Public Law 280's grant of state jurisdiction, but "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and thus falls outside Public Law 280's grant of state jurisdiction.<sup>72</sup> The Court noted that the "shorthand test is whether the conduct at issue violates the State's public policy."<sup>73</sup> Because many forms of gambling were permitted under California law, and the state even sponsored a lottery, the Court concluded that California "regulates rather than prohibits gambling in general and bingo in particular."<sup>74</sup>

When it introduced the prohibitory/regulatory distinction in *Cabazon*, the Court acknowledged that it was not creating a "bright-line rule,"<sup>75</sup> and noted that the state laws governing a particular realm of activity would have to be "examined in detail before they can be characterized as regulatory or prohibitory."<sup>76</sup> Nonetheless, the Court expressed some confidence that courts could effectively manage this line-drawing process, pointing to lower federal courts' apparent success in applying a similar distinction under the Indian Country Crimes Act.<sup>77</sup> Subsequent case law, issued largely by state courts, has demonstrated that the Court's

generally Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 542-544 (1975).

<sup>68</sup> See Ch. 2, § 2.02.

<sup>69</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>70</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987).

<sup>71</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987).

<sup>72</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

<sup>73</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

<sup>74</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987).

<sup>75</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987).

<sup>76</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987).

<sup>77</sup> See Ch. 9, § 9.02[1].



confidence was misplaced.<sup>78</sup>

With respect to some quintessentially administrative regimes, such as land use and workers' compensation, the courts have had little difficulty applying the regulatory/prohibitory distinction set forth in *Bryan* and *Cabazon*.<sup>79</sup> In contrast, judicial efforts to characterize laws dealing with traffic violations, fireworks, child welfare, and hunting and fishing, among other subject areas, have produced contradictory and confusing results.<sup>80</sup> For example, some courts have found that state laws restricting the sale and use of fireworks are regulatory for purposes of Public Law 280,<sup>81</sup> and others have declared them prohibitory.<sup>82</sup> The attorney general of Wisconsin has opined that involuntary proceedings to terminate parental rights are regulatory.<sup>83</sup> Yet the Idaho courts have called their comparable laws prohibitory.<sup>84</sup> Courts have also reached conflicting results in deciding whether state laws that address traffic violations such as speeding, and state laws

<sup>78</sup> For an example of a court struggling to determine whether laws penalizing possession of marijuana are regulatory or prohibitory, see *State v. LaRose*, 673 N.W.2d 157 (Minn. Ct. App. 2003). A more recent Minnesota case generated three separate opinions from the state's Supreme Court, demonstrating how difficult it can be to determine whether a state predatory offender registration law is prohibitory or regulatory for purposes of Public Law 280. *State v. Jones*, 729 N.W.2d 1 (Minn. 2007). Minnesota's Supreme Court Justices have also split on the question of how to characterize state laws penalizing driving with a revoked license, as they have attempted to apply the test used in that state, which is whether the penalized activity triggers "heightened public safety concerns." See *State v. Losh*, 755 N.W.2d 736 (Minn. 2009).

<sup>79</sup> For zoning cases, see *Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 532 (9th Cir. 1987), *aff'd in part & rev'd in part sub nom. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975). For workers' compensation cases, see *Middletown Rancheria v. Workers' Comp. Appeals Bd.*, 71 Cal. Rptr. 2d 105 (Ct. App. 1998); *Tibbetts v. Leech Lake Reservation Bus. Comm.*, 397 N.W.2d 883 (Minn. 1986). Not all administrative systems are found to be regulatory for Public Law 280 purposes, however. In *State v. Jones*, 729 N.W.2d 1 (Minn. 2007), a plurality of the Minnesota Supreme Court treated as "criminal/prohibitory" rather than "civil/regulatory" a state law that required certain predatory offenders to register their addresses with appropriate authorities. Even though the registration process involved an administrative bureaucracy, and even though courts had denied the statutory scheme was "punitive" in several other legal contexts, the plurality opinion insisted that the law fell into the criminal/prohibitory category. For discussion of the problem of characterizing state sex offender registration laws under Public Law 280, see Brian P. Dimmer, Comment, *How Tribal-State Cooperative Agreements Can Save the Adam Walsh Act from Encroaching Upon Tribal Sovereignty*, 92 Marq. L. Rev. 385, 401-404 (2008); Timothy J. Droske, *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country*, 101 Nw. U. L. Rev. 897 (2007).

<sup>80</sup> See generally Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333 (1999); Emma Garrison, *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. Gender Race & Just. 449 (2004).

<sup>81</sup> *State v. Cutler*, 527 N.W.2d 400 (Wis. Ct. App. 1994) (unpublished table decision).

<sup>82</sup> *Quechan Indian Tribe v. McMullen*, 984 F.2d 304 (9th Cir. 1993).

<sup>83</sup> 70 Op. Wis. Att'y Gen. 237 (1981).

<sup>84</sup> *Idaho v. Marek*, 777 P.2d 1253 (Idaho Ct. App. 1989).



that penalize driving with a revoked or suspended driver's license or without proof of insurance should be treated as regulatory or prohibitory.<sup>85</sup> These different outcomes serve no valid purpose of federalism. Even though Public Law 280 delegated jurisdiction to states with different laws, Congress prescribed uniformity in the categories of law, *i.e.*, prohibitory rather than regulatory, that states could apply within Indian country.

The source of these judicial difficulties appears to be some conflicting signals from *Cabazon* itself. First, the Court used both narrow and broad language to define the distinction between state regulatory and prohibitory laws. The narrower, or more specific, definition provides that "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory."<sup>86</sup> The Court then offered a relatively broad definition, stating "[t]he shorthand test is whether the conduct at issue violates the State's public policy."<sup>87</sup> Because these tests often dictate contrary results, state and lower federal courts applying the regulatory/prohibitory distinction have been able to select the formulation that best supports a particular outcome. Courts that characterize state laws as regulatory usually stress that the conduct in question is a subset of a larger, permissible category of conduct. For example, speeding is a subset of driving, or shooting a deer out of season is a subset of hunting. If the subset of outlawed conduct is small relative to the entire class of activity,<sup>88</sup> courts are likely to find the state law regulatory. In contrast, courts that find state laws to be prohibitory

<sup>85</sup> Compare *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502 (D.S.D. 1989), judgment vacated, 900 F.2d 1164 (8th Cir. 1990) (South Dakota's speeding statute is prohibitory), and *State v. Warden*, 906 P.2d 133 (Idaho 1995) (Idaho traffic infraction laws are criminal), with *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991) (Washington speeding laws are regulatory). Compare also *State v. Losh*, 755 N.W.2d 736 (Minn. 2008) (Minnesota's prohibition on driving with a revoked license is criminal where the reason for revocation was driving while impaired), and *St. Germaine v. Cir. Ct.*, 938 F.2d 75 (7th Cir. 1991) (Wisconsin's prohibition on operating motor vehicle with suspended license is criminal), with *State v. Johnson*, 598 N.W.2d 680 (Minn. 1999) (Minnesota's law prohibiting driving after license revocation for failure to provide proof of insurance is regulatory). State and federal courts seem to agree that the offense of driving without proof of insurance is regulatory. *Craig v. James*, 19 Indian L. Rep. 3111 (E.D. Wash., 1992); *State v. Stone*, 572 N.W.2d 725 (Minn. 1997). But state courts have treated as prohibitory the offenses of driving under the influence of alcohol, *State v. Couture*, 587 N.W.2d 849 (Minn. App. 1999); reckless driving, *Harrison v. State*, 784 P.2d 681 (Alaska Ct. App. 1989); and driving after cancellation of a license as inimical to public safety, *State v. Busse*, 644 N.W.2d 79 (Minn. 2002).

<sup>86</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

<sup>87</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

<sup>88</sup> For example, there may be many exceptions to the prohibited conduct. See *Twenty-Nine Palms Band of Mission Indians v. Wilson*, 925 F. Supp. 1470, 1475 (C.D. Cal. 1996) (state laws governing boxing are civil/regulatory because, *inter alia*, "California law permits several levels of boxing not subject to regulation by the Boxing Act"), vacated on other grounds, 156 F.3d 1239 (9th Cir. 1998) (unpublished table decision). Cf. *State v. Robinson*, 572 N.W.2d 720 (Minn. 1997) (state laws against underage consumption of liquor are prohibitory because there are very few exceptions to ban on such drinking).



usually focus on the fact that state "public policy" opposes the specific conduct in question,<sup>89</sup> often losing sight of the fact that violating any statute would in some sense violate the public policy of the state. One commentator has suggested that public policy "is often used as an excuse for courts that do not want tribes to have exclusive authority [because of] the criminal or regulatory importance of the law to the state."<sup>90</sup>

A second reason why the *Cabazon* Court offers confusing signals is because it fails to draw a clear line between its analysis of state gambling laws under Public Law 280 and its separate preemption analysis. A law that is regulatory under a Public Law 280 analysis may nevertheless apply on a reservation if it affects non-Indians and survives the Court's preemption/infringement test.<sup>91</sup> According to this test, state regulation will be preempted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."<sup>92</sup> Traditional notions of Indian sovereignty and the congressional goal of Indian self-government form the backdrop for this balancing of governmental interests. Some state and lower federal courts applying the regulatory/prohibitory distinction under Public Law 280 have mistakenly drifted into this kind of balancing analysis, which invites consideration of factors that have no place in interpreting Public Law 280. Thus, for example, courts have erroneously taken into account whether tribal enforcement mechanisms operate as an alternative to state jurisdiction,<sup>93</sup> whether the state law seeks to raise revenue at the expense of tribal efforts to achieve self-sufficiency,<sup>94</sup> and whether tribal and state jurisdiction can coexist

<sup>89</sup> See, e.g., *St. Germaine v. Circuit Ct.*, 938 F.2d 75 (7th Cir. 1991); *Jones v. State*, 936 P.2d 1263 (Alaska Ct. App. 1997).

<sup>90</sup> Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333, 1358 (1999).

<sup>91</sup> See § 6.01[3]. With respect to state jurisdiction over Indians, Public Law 280 itself normally determines the outcome of applying the preemption test. If a state has not assumed jurisdiction under Public Law 280, it may not acquire jurisdiction over Indians independent of that Act. See § 6.04[3][e]. However, when non-Indian activities are involved, as in gaming, the state may claim jurisdiction via the preemption/infringement test applied outside the Public Law 280 context. See § 6.03[2].

<sup>92</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

<sup>93</sup> See *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146, 149 (9th Cir. 1991); *State v. Stone*, 557 N.W.2d 588, 589 (Minn. Ct. App. 1996), *aff'd*, 572 N.W.2d 725 (Minn. 1997); *In re Burgess*, 665 N.W.2d 124, 132 (Wis. 2003). In response to a petition for a writ of habeas corpus, the Seventh Circuit declined to upset the involuntary commitment of Burgess as a sexually violent person under state law. *Burgess v. Watters*, 467 F.3d 676 (7th Cir. 2006). Although the Seventh Circuit did not agree with the Wisconsin Supreme Court's view that the state proceeding was criminal/prohibitory, it found some basis for concluding that the proceeding was civil adjudicative, and thus within the state's jurisdiction under Public Law 280.

<sup>94</sup> See *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502, 1512 (D.S.D. 1989); *People v. Lowry*, 34 Cal. Rptr. 2d 382, 385 (App. Dep't Super. Ct. 1994).



effectively.<sup>95</sup>

Absent clarification from Congress, the better approach is to focus on the nature of the regulated conduct in relation to other unregulated forms of conduct. If the subset of outlawed conduct is small relative to the entire class of activity, the law is regulatory in nature and outside the scope of state jurisdiction under Public Law 280. Moreover, the Supreme Court's approach in *Cabazon* suggests that the general category of conduct should be defined as comprehensively as possible.<sup>96</sup> Only when the specific conduct outlawed under state law presents substantially different or heightened public policy concerns associated with risks of grave harm to persons or property should the courts find a state law prohibitory and thus within the scope of state jurisdiction conferred by Public Law 280.<sup>97</sup> This analysis effectuates the impulse behind *Cabazon*, which sought to protect tribal sovereignty from state interference by limiting state jurisdiction. *Cabazon* in turn took its inspiration from congressional policy, which, since 1968, has been to limit Public Law 280 and protect tribal sovereignty by requiring tribal consent before states may acquire any further jurisdiction. Accordingly, when it is unclear whether state laws are regulatory or prohibitory, courts should follow the canons of construction and deny state jurisdiction under Public Law 280.<sup>98</sup>

A related but separate line-drawing problem presented by Public Law 280 has been the distinction between state judicial proceedings that are regulatory in nature and those that constitute private civil actions. *Bryan v. Itasca County*<sup>99</sup> held that only the latter fall within Public Law 280's grant of civil authority to the state. As with the regulatory/prohibitory distinction, courts have struggled with this regulatory/private civil action dichotomy.<sup>100</sup> The dividing line is inevitably

<sup>95</sup> See *St. Germaine v. Circuit Ct.*, 938 F.2d 75, 77-78 (7th Cir. 1991); *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146, 149 (9th Cir. 1991); *State v. Stone*, 557 N.W.2d 588, 591-592 (Minn. Ct. App. 1996), *aff'd*, 572 N.W.2d 725 (Minn. 1997).

<sup>96</sup> Thus, *Cabazon* considered not only the activity of high-stakes bingo, but also compared this prohibited activity to the more general conduct of gambling, including lotteries and horse racing. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987). Similarly, courts should compare driving with a suspended license to the more general conduct of driving. Invariably, some judgment is involved in determining the similarity or relatedness of all forms of conduct within a general category. The Minnesota Court of Appeals, for example, has found that being a convicted felon in possession of a firearm is significantly different from possession of a firearm by citizens in general. *State v. Roy*, 761 N.W.2d 883, 888-889 (Minn. Ct. App. 2009).

<sup>97</sup> See *State v. Lasley*, 705 N.W.2d 481 (Iowa 2005) (construing state-specific federal law authorizing state criminal jurisdiction in light of *Bryan* and *Cabazon*, and determining that state law prohibiting sale of cigarettes to minors is prohibitory). Minnesota's Supreme Court seems to have determined that any conceivable public safety concern can transform a state law into one that is criminal for purposes of Public Law 280. See *State v. Losh*, 755 N.W.2d 736, 746-749 (Minn. 2009) (Meyer, J., dissenting) (pointing out that regardless of the basis for license revocation, the specific offense of driving with a revoked license does not implicate any significant public safety concerns).

<sup>98</sup> See § 6.04[2].

<sup>99</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976).

<sup>100</sup> The Wisconsin Supreme Court has found that the state's laws mandating involuntary



obscure, because adjudication of civil controversies normally entails the application of a body of legal rules that regulate private conduct. Furthermore, some state regulation reflects public refinement or incorporation of private actions, such as nuisance or contract claims. Some of the most confounding cases have been initiated by state or local government entities, implicating state services such as civil commitment proceedings brought by mental health agencies; petitions by social services agencies to terminate parental rights; and suits by counties on behalf of children against their noncustodial parents to establish paternity, collect reimbursement for state welfare payments, and obtain future support. Courts have had to assess whether the civil suit is a mere appendage to an essentially regulatory proceeding, or whether it is more akin to a private lawsuit.

For example, in suits by local governments to obtain reimbursement for welfare payments, courts in different Public Law 280 states have arrived at opposite conclusions regarding the proper characterization of these matters as regulatory or civil actions and hence disagreed on whether state jurisdiction is authorized. On the one hand, courts that have found the proceedings to be regulatory, and thus outside state jurisdiction, have stressed the “public, regulatory character” of the agency acting to recoup the welfare payments and obtain support orders, the extent of state interest in and control over the proceeding, and the resemblance between the collection scheme and taxation because of assessment of collection charges.<sup>101</sup> On the other hand, courts that have found that these proceedings involve private civil actions, and thus resolved this issue in favor of state jurisdiction, have pointed out that “the test is one of substance rather than form,” and that the presence of a government party should not automatically transform the action into a regulatory matter if the suit is essentially a suit on behalf of a private party.<sup>102</sup> These same courts have dismissed as irrelevant the existence of additional administrative methods for collecting child support, and have analogized collection charges to ordinary court costs for private parties.<sup>103</sup> Finally, the

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commitment for sexually violent persons are civil adjudicative rather than regulatory, and thus within the state’s Public Law 280 jurisdiction. *In re Burgess*, 665 N.W.2d 124, 132–133 (Wis. 2003). According to the Wisconsin Supreme Court, the proceeding affects private rights and status, and therefore is more akin to a proceeding to adjudicate insanity than to a taxing or zoning law. In response to a petition for a writ of habeas corpus, the Seventh Circuit declined to upset the involuntary commitment. *Burgess v. Watters*, 467 F.3d 676 (7th Cir. 2006). The Seventh Circuit stated there are “strong arguments” that the Wisconsin law falls outside the “limited grant of civil jurisdiction” in Public Law 280, noting the characterization of such proceedings as “regulatory” in other contexts and the involvement of the state as a party. Nevertheless, under the federal habeas corpus statute, federal courts may not issue the writ unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). Applying this standard, the Seventh Circuit concluded that the Wisconsin Supreme Court’s characterization of the proceeding as civil adjudicative was not “unreasonable.”

<sup>101</sup> *State Dep’t of Human Servs. v. Whitebreast*, 409 N.W.2d 460, 463–464 (Iowa 1987).

<sup>102</sup> *County of Inyo v. Jeff*, 277 Cal. Rptr. 841, 845 (Ct. App. 1991).

<sup>103</sup> *Becker County Welfare Dep’t v. Bellcourt*, 453 N.W.2d 543 (Minn. Ct. App. 1990).



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courts that have allowed these suits in state court under Public Law 280 have noted the absence of tribal courts with jurisdiction over child support cases,<sup>104</sup> a consideration that should have no bearing on the determination of whether Public Law 280 authorized state jurisdiction.

There is no neat, surgical way to separate regulatory matters from private civil suits for purposes of Public Law 280. In matters susceptible to opposing conclusions, however, the Indian law canons of construction suggest that courts should deny state jurisdiction.<sup>105</sup> On this basis, for example, the Wisconsin attorney general has determined that suits brought by state agencies to terminate parental rights are regulatory and thus outside state jurisdiction.<sup>106</sup> The Ninth Circuit, in contrast, has found the same proceedings to be adjudicative, despite the active involvement of state regulatory agencies in evaluating parental conduct and managing efforts at family reunification.<sup>107</sup> Nevertheless, as a practical matter, states shouldering the burden of federal obligations to provide services to reservation Indians are going to feel disposed to assert jurisdiction over associated matters so long as no tribal court or other appropriate tribal forum exists.

### [iii] Local Laws Are Inapplicable

Public Law 280 provides that civil laws of the state "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."<sup>108</sup> The Supreme Court has interpreted this language to mean that state courts have jurisdiction only over private civil actions and claims that are prohibitory in nature, but they do not have jurisdiction over state laws that are regulatory in nature.<sup>109</sup> In *Santa Rosa Band v. Kings County*,<sup>110</sup> the Ninth Circuit held that the Act applies only to the civil laws of the state itself, and does not subject Indian country to local regulation by a county.<sup>111</sup> According to the *Santa Rosa* court,

<sup>104</sup> *County of Inyo v. Jeff*, 277 Cal. Rptr. 841, 843 n.4 (Ct. App. 1991); *Becker County Welfare Dep't v. Bellcourt*, 453 N.W.2d 543, 544 (Minn. Ct. App. 1990); see also *In re Burgess*, 665 N.W.2d 124, 132 (Wis. 2003) (upholding state jurisdiction to hear civil proceedings for commitment of sexually violent persons).

<sup>105</sup> See Ch. 2, § 2.02.

<sup>106</sup> 70 Op. Wis. Att'y Gen. 237 (1981). According to the attorney general, the fact that the state initiated the suit and the existence of a large administrative system to address child abuse and neglect rendered the matter regulatory rather than a civil action.

<sup>107</sup> *Doe v. Mann*, 415 F.3d 1038, 1066 (9th Cir. 2005). The Ninth Circuit determined that application of the Indian law canons was unnecessary, because Congress had already weighed tribal sovereignty interests in the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911, which addresses state jurisdiction over involuntary proceedings. The Ninth Circuit's reading of ICWA is questionable. See Ch. 11, § 11.03.

<sup>108</sup> 25 U.S.C. § 1322(c); 28 U.S.C. § 1360(a).

<sup>109</sup> See § 6.04[3][b][ii].

<sup>110</sup> *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975).

<sup>111</sup> *Santa Rosa Band v. Kings County*, 532 F.2d 655, 659-664 (9th Cir. 1975); cf. *California v.*



"Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state."<sup>112</sup> Under this scheme, the tribe would have the power "to regulate matters of local concern within the area of its jurisdiction."<sup>113</sup>

This decision is consistent with the language and purpose of Public Law 280. It would substantially undermine tribal institutions to deprive them of the governmental authority of even small municipalities. Thus, Public Law 280 preserves a significant role for tribal governments in matters of local concern.<sup>114</sup> Most local laws would be deemed regulatory in any event, and for that independent reason, would fall outside the scope of state jurisdiction conferred by Public Law 280. But since the regulatory/prohibitory distinction has been difficult for courts to apply, the availability of this alternative ground for denying application of state law has proven useful for the courts.<sup>115</sup>

The language of Public Law 280 conferring criminal jurisdiction on the state differs from the language conferring civil jurisdiction in that there is no requirement on the criminal side that state laws enforced against reservation Indians be of "general application to private persons or private property . . . elsewhere within the state."<sup>116</sup> Public Law 280 simply states that "the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State."<sup>117</sup> Whether this language will be read to include county and municipal criminal ordinances has not been determined by the courts.

#### [iv] Internal Tribal Matters

Some types of private civil litigation touch on fundamental matters of tribal organization and membership, such as challenges to tribal elections<sup>118</sup> and suits to

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Cabazon Band of Mission Indians, 480 U.S. 202, 212 n.11 (1987) (noting that "it is doubtful that Pub. L. 280 authorizes the application of any local laws to Indian reservations," but stating that it was not necessary to resolve that question).

<sup>112</sup> Santa Rosa Band v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975).

<sup>113</sup> Santa Rosa Band v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975).

<sup>114</sup> See Bryan v. Itasca County, 426 U.S. 373, 389 n.14 (1976).

<sup>115</sup> See, e.g., Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987); United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (rejecting application of local zoning laws and building codes); Zachary v. Wilk, 219 Cal. Rptr. 122 (Ct. App. 1985) (rejecting application of local rent control ordinances under Public Law 280).

<sup>116</sup> 25 U.S.C. § 1322(a); 28 U.S.C. § 1360(a).

<sup>117</sup> 18 U.S.C. § 1162(a); 25 U.S.C. § 1321(a).

<sup>118</sup> Bowen v. Doyle, 880 F. Supp. 99, 115 (W.D.N.Y. 1995) ("These [state court] Orders purport to decide who may serve on the Nation's Council; to direct when the Council, as constituted by the State Court, is to meet and how it is to conduct its business; to void actions taken by the Council and the President at a prior meeting of the Council; and to compel the Seneca Tribal Police to enforce the State Court's Orders against the President of the Nation.").



establish paternity.<sup>119</sup> When these suits have been filed in state court pursuant to Public Law 280 or similar federal statutes authorizing state jurisdiction, defendant tribal members have argued that state jurisdiction should not exist because Congress never envisioned that state courts would become enmeshed in internal tribal affairs normally subject to exclusive tribal jurisdiction.<sup>120</sup> Intrusions of this sort, they argue, should only be permitted when Congress has expressly authorized them, and Public Law 280 provides no such congressional endorsement.

At least one court has accepted these arguments, in a case involving a disputed tribal election.<sup>121</sup> Other courts have been less receptive to limiting state jurisdiction in domestic relations cases, indicating that Public Law 280 encompasses all matters of domestic relations involving tribal members, so long as they are raised in a private civil action.<sup>122</sup> In addressing these questions, state courts have taken into account the existence of a tribal court or other forum,<sup>123</sup> a factor that does little to contribute to an analysis of the state's public policy. To resolve these cases, courts may want to distinguish internal matters with political implications for the tribe, such as elections or qualification for membership from general domestic relations, finding only the latter within state jurisdiction under Public Law 280.<sup>124</sup> The failure of Public Law 280 to authorize suits against tribes

<sup>119</sup> See *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 889 (1986).

<sup>120</sup> See *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995); *County of Inyo v. Jeff*, 277 Cal. Rptr. 841 (Ct. App. 1991); *State Dep't of Human Servs. v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987).

<sup>121</sup> *Bowen v. Doyle*, 880 F. Supp. 99, 115 (W.D.N.Y. 1995).

<sup>122</sup> See e.g., *Charles v. Charles*, 701 A.2d 650 (Conn. 1997) (upholding state jurisdiction over action for dissolution of marriage); *State Dep't of Human Servs. v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987). *But cf.* *St. Germaine v. Chapman*, 505 N.W.2d 450 (Wis. Ct. App. 1993) (declining to exercise Public Law 280 jurisdiction over domestic abuse injunction involving tribal members when tribe had its own domestic abuse ordinance and means of enforcement). In *Estate of Cross v. Comm'r*, 891 P.2d 26 (Wash. 1995), the Washington Supreme Court opined that Public Law 280 enabled the state to apply its community property laws to income earned by a tribal member on the reservation. The Internal Revenue Service had sought a ruling from the court on this matter in order to assess income tax. In the absence of a private civil action, however, it is doubtful that state rather than tribal law of marital property should have applied to this income.

<sup>123</sup> See, e.g., *Bowen v. Doyle*, 880 F. Supp. 99, 115 (W.D.N.Y. 1995) (noting the Seneca Nation operated a Peacemaker Court that had attempted to assert jurisdiction over the same dispute); *County of Inyo v. Jeff*, 277 Cal. Rptr. 841, 843 n.4 (Ct. App. 1991) (noting the Bishop Paiute/Shoshone Tribe did not have a forum with jurisdiction over the dispute).

<sup>124</sup> A California Court of Appeal found that the civil jurisdiction provision of Public Law 280 was primarily intended to redress lack of adequate Indian forums for resolving private legal disputes involving reservation Indians, and thus does not extend to suits alleging wrongful disenrollment from the tribe. *Lamere v. Superior Court*, 31 Cal. Rptr. 3d 880 (Ct. App. 2005). The court reasoned that such actions are not private legal disputes between reservation Indians, but rather go to the heart of tribal sovereignty. *Id.* at 883. A separate basis for state courts to decline to resolve such claims is that state law creates no cause of action for wrongful disenrollment from an Indian tribe.



or to waive tribal sovereign immunity<sup>125</sup> reinforces the view that states were not to become involved in tribal politics. It is difficult to imagine that Congress enacted Public Law 280 to afford a state forum for political matters that have no reference points in state law and which go to the heart of tribal self-government.

If a state court should insist on taking jurisdiction over internal tribal matters, the court would be obliged to heed Public Law 280's dictate that state courts hearing civil actions involving tribal members are required to apply tribal laws, including customary laws, whenever they are "not inconsistent with any applicable civil law of the State."<sup>126</sup> Because state law has no place governing internal tribal matters such as political or membership disputes, tribal law would not be inconsistent with state law as to those issues. Of course, the very inapplicability of state law is a strong argument in favor of denying state courts jurisdiction under Public Law 280 in the first place.

#### [v] Public Law 280 Does Not Authorize Suits Against Indian Nations

The civil jurisdiction provision of Public Law 280 allows states to hear "civil causes of action between Indians or to which Indians are parties."<sup>127</sup> Because this language refers only to individual Indians and does not mention suits against Indian nations, tribal defendants sued in Public Law 280 states have argued that the states lack jurisdiction altogether. Alternatively, they have asserted that tribal sovereign immunity survives the federal authorization of state jurisdiction. Their claim of no state jurisdiction is premised on the requirement that authorizations be express.<sup>128</sup> Their assertion of sovereign immunity rests on the doctrine that waivers must be clearly expressed and strictly construed.<sup>129</sup>

State and federal authorities have supported both tribal positions. With respect to lack of state jurisdiction, the Supreme Court's opinion in *Bryan v. Itasca County*<sup>130</sup> observes that "there is notably absent [from Public Law 280] any conferral of state jurisdiction over the tribes themselves."<sup>131</sup> The Supreme Court has also stated that Public Law 280 does not waive Indian nations' sovereign immunity. As the Court stated in *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering, P.C.*:

<sup>125</sup> See § 6.04[3][b][v].

<sup>126</sup> 25 U.S.C. § 1322(c); 28 U.S.C. § 1360(c).

<sup>127</sup> 28 U.S.C. § 1360(a).

<sup>128</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976).

<sup>129</sup> See Ch. 7, § 7.05[1].

<sup>130</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976).

<sup>131</sup> *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976) *accord* *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828, 842 (Ct. App. 1999); *Seminole Tribe of Fla. v. Houghtaling*, 589 So.2d 1030 (Fla. Dist. Ct. App. 1991), *aff'd sub nom. Houghtaling v. Seminole Tribe of Fla.*, 611 So.2d 1235 (Fla. 1993); *Meier v. Sac & Fox Tribe*, 476 N.W.2d 61 (Iowa 1991); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996) (state court jurisdiction under Public Law 280 does not extend to "tribal entities").



Public Law 280 certainly does not constitute a "governing Act of Congress" which validates . . . interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance.<sup>132</sup>

#### [vi] Statutory Exceptions

Public Law 280 excepts from its authorization jurisdiction that would affect Indian trust or restricted property, as well as jurisdiction over certain federally protected Indian hunting, fishing, and trapping rights.<sup>133</sup> These exceptions demonstrate that Congress did not intend to sever its overall trust relationship with Indian nations affected by Public Law 280 or to render itself liable for taking Indian property.<sup>134</sup> As these exceptions constitute statutes "passed for the benefit of dependent Indian tribes," they "are to be liberally construed, doubtful expressions being resolved in favor of the Indians."<sup>135</sup> Broad application of these exceptions is also consistent with their expansive language and with Congress's evident intent to maintain an exclusive tribal-federal relationship with regard to matters essential for tribal survival.<sup>136</sup>

One proviso of Public Law 280 precludes application of state laws that would allow for the "alienation, encumbrance, or taxation" of Indian trust or restricted property.<sup>137</sup> This same exception also prohibits application of state regulatory laws to trust or restricted property "in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto," and denies state courts jurisdiction "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."<sup>138</sup> When states and local governments first invoked Public Law 280 as

<sup>132</sup> *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 892 (1986); *accord Val/Del Inc. v. Super. Ct.*, 703 P.2d 502, 508 n.2 (Ariz. Ct. App. 1985); *Middletown Rancheria v. Workers' Comp. Appeals Bd.*, 71 Cal. Rptr. 2d 105 (Ct. App. 1998); *Gross v. Omaha Tribe*, 601 N.W.2d 82 (Iowa 1999); *Silva v. Ysleta Del Sur Pueblo*, 28 S.W.3d 122, 124-125 (Tex. Ct. App. 2000). Insofar as tribal officers and enterprises share in an Indian nation's sovereign immunity, Public Law 280 does nothing to disturb that protection. *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828 (Ct. App. 1999).

<sup>133</sup> 28 U.S.C. § 1360(b); 18 U.S.C. § 1162(b).

<sup>134</sup> This feature of Public Law 280 stands in notable contrast with the termination statutes. *See* Ch. 1, § 1.06.

<sup>135</sup> *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *see also* *Hoopa Valley Tribe v. Blue Lake Forest Prods.*, 143 B.R. 563 (N.D. Cal. 1992), *aff'd*, 30 F.3d 1138 (9th Cir. 1994); *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980); *Boisclair v. Super. Ct.*, 801 P.2d 305, 312-313 (Cal. 1990).

<sup>136</sup> *Boisclair v. Super. Ct.*, 801 P.2d 305, 310 (Cal. 1990).

<sup>137</sup> 18 U.S.C. § 1162(b); 25 U.S.C. §§ 1321(b), 1322(b); 28 U.S.C. § 1360(b).

<sup>138</sup> 18 U.S.C. § 1162(b); 25 U.S.C. §§ 1321(b), 1322(b); 28 U.S.C. § 1360(b).



authority to apply zoning and other regulatory laws to trust lands, tribes raised this proviso as a defense. After lower courts offered different responses,<sup>139</sup> the issue was swept aside by the Supreme Court's decision in *Bryan v. Itasca County*,<sup>140</sup> which precluded all state regulatory jurisdiction under the Act, without regard to the particular terms of the proviso.

After *Bryan*, most questions concerning the scope of the trust property exception have arisen in the context of private litigation. When interests in trust property are acknowledged to be the basis for the lawsuit, the proviso clearly operates to bar state jurisdiction. Thus, for example, state jurisdiction under Public Law 280 does not encompass unlawful detainer actions, *i.e.*, evictions,<sup>141</sup> quiet title or ejectment actions,<sup>142</sup> or suits to establish the existence of a state easement,<sup>143</sup> where reservation or trust allotments are involved. The exception applies to all forms of trust property, including shares in a trust account,<sup>144</sup> personal property held in trust,<sup>145</sup> and property subject to exemptions from alienability by section 16 of the Indian Reorganization Act.<sup>146</sup> Not only are state courts unable to hear these cases, but state law may not be applied to disputes of these types when they find their way into federal court via bankruptcy proceedings or otherwise.<sup>147</sup>

The exception should also apply when the purpose of a private lawsuit is to test whether property is in fact Indian trust or restricted property. For example, in

<sup>139</sup> Compare *Santa Rosa Band v. Kings County*, 532 F.2d 655, 664-668 (9th Cir. 1975) (zoning laws excluded on trust land by this proviso) with *People v. Rhoades*, 90 Cal. Rptr. 794 (Ct. App. 1970) (allowing application of state fire break law to trust land). The Interior Department has long viewed state land use laws as inapplicable to Indian trust lands without federal authorization. See Op. Sol. Int., M-36768 (Feb. 7, 1969); Op. Sol. Interior, 58 Interior Dec. 52 (1942).

<sup>140</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976).

<sup>141</sup> *Minnesota Chippewa Tribal Hous. Auth. v. Reese*, 978 F. Supp. 1258 (D. Minn. 1997); *All Mission Indian Hous. Auth. v. Silvas*, 680 F. Supp. 330, 332 (C.D. Cal. 1987). The absence of state jurisdiction has given rise to a jurisdictional vacuum on reservations where tribes have not created their own court systems to hear eviction actions, because most federal courts have concluded that these actions do not arise under federal law. *Minnesota Chippewa Tribal Hous. Auth. v. Reese*, 978 F. Supp. 1258 (D. Minn. 1997); *Round Valley Indian Hous. Auth. v. Hunter*, 907 F. Supp. 1343 (N.D. Cal. 1995); see Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1431 (1997).

<sup>142</sup> *Alaska v. Agli*, 472 F. Supp. 70 (D. Alaska 1979).

<sup>143</sup> *Heffle v. State*, 633 P.2d 264 (Alaska 1981).

<sup>144</sup> *Ollestead v. Native Vill. of Tyonek*, 560 P.2d 31 (Alaska 1977).

<sup>145</sup> *Calista Corp. v. Mann*, 564 P.2d 53 (Alaska 1977).

<sup>146</sup> See Ch. 4, § 4.04[3][a]; *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 925 P.2d 246 (Alaska 1996).

<sup>147</sup> *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980); *Hoopa Valley Tribe v. Blue Lake Forest Prods.*, 143 B.R. 563 (N.D. Cal. 1992), *aff'd*, 30 F.3d 1138 (9th Cir. 1994).



to trust lands, tribes raised this different responses,<sup>139</sup> the issue in *Bryan v. Itasca County*,<sup>140</sup> under the Act, without regard to

scope of the trust property question. When interests in trust property are involved in a lawsuit, the proviso clearly denies state jurisdiction under Public Law 280, *i.e.*, evictions,<sup>141</sup> quiet title actions, the existence of a state court action are involved. The exception for shares in a trust account,<sup>144</sup> is not subject to exemptions from Public Law 280. Not only are state courts not to be applied to disputes of trust property via bankruptcy proceedings

of a private lawsuit is to test the title to property. For example, in

5, 664-668 (9th Cir. 1975) (zoning ordinance), 90 Cal. Rptr. 794 (Ct. App. 1972). The Interior Department has long held that it cannot act without federal authorization. See *Interior Dec. 52* (1942).

Supp. 1258 (D. Minn. 1997); All rights reserved. Cal. 1987). The absence of state court jurisdiction where tribes have not created a trust is a federal question. Federal courts have concluded that Public Law 280, *Tribal Hous. Auth. v. Reese*, 978 F.2d 1138 (9th Cir. 1992), *aff'd*, 10 F.3d 1138 (9th Cir. 1994). *See also* *Hunter v. Hunter*, 907 F. Supp. 1343 (D. Minn. 1995), *and the Problem of Lawlessness* (1997).

1977).

Fisheries, 925 P.2d 246 (Alaska

1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980), *aff'd*, 563 P.2d 1138 (9th Cir. 1977).

*Boisclair v. Superior Court*,<sup>148</sup> the California Supreme Court rejected state jurisdiction over a declaratory judgment action to affirm a private or public easement for a road across tribal trust land, in which the plaintiff argued and the tribe denied that the road had lost its trust status.<sup>149</sup> The fact that one possible outcome of the lawsuit was a finding that the land was trust land, and hence no easement could have been created, was sufficient to defeat state jurisdiction. If a state court could reject the existence of trust property altogether, then it could too easily circumvent the prohibition on impairing those property rights.

Likewise, the exception should be applied to deny state jurisdiction when the effect of state litigation on trust property is indirect rather than direct. In *Hoopa Valley Tribe v. Blue Lake Forest Products, Inc.*,<sup>150</sup> for example, a secured creditor of a bankrupt purchaser of tribal logs contended with the tribe over proceeds of the bankrupt's sale of the logs. At issue in this federal proceeding was whether state law should govern the relative rights of the contending parties. The federal court held that Public Law 280's trust property proviso prevented application of state law, even though technically the creditor's claim was against the non-Indian bankrupt's sale proceeds, not against the logs, which were the trust property in question. The court stated that "it is at least arguable that enforcing a state law lien so as to give the Bank priority over the Tribe in proceeds from logs as to which title, under federal law, never left the United States in trust for the Tribe (and where the logs, themselves, no longer exist), is the 'effective' alienation of tribal trust property."<sup>151</sup>

In state court domestic relations lawsuits under Public Law 280, special care is needed to avoid direct or indirect effects on trust property in violation of 28 U.S.C. § 1360(b). A state court order in a marital dissolution case may not divide trust property belonging to one or both of the spouses.<sup>152</sup> More difficult issues arise,

<sup>148</sup> *Boisclair v. Super. Ct.*, 801 P.2d 305, 312-314 (Cal. 1990).

<sup>149</sup> *See also* *Inland Casino Corp. v. Super. Ct.*, 10 Cal. Rptr.2d 497 (Ct. App. 1992) (foreclosure of mechanic's lien on property that arguably was trust property). *But see* *Jacobs v. Jacobs*, 405 N.W.2d 668 (Wis. Ct. App. 1987) (including tribal members' home in property division upon marriage dissolution, even though trust status of house was in dispute). The *Jacobs* court was eager to assert state jurisdiction over the property division because the tribe had no tribal court that could provide an alternative forum at the time. Nonetheless, it was improper for a state court to determine whether the house involved was completely separable from the trust land on which it was located.

<sup>150</sup> *Hoopa Valley Tribe v. Blue Lake Forest Prods.*, 143 B.R. 563 (N.D. Cal. 1992), *aff'd*, 30 F.3d 1138 (9th Cir. 1994).

<sup>151</sup> *Hoopa Valley Tribe v. Blue Lake Forest Prods.*, 143 B.R. 563, 568 (N.D. Cal. 1992), *aff'd*, 30 F.3d 1138 (9th Cir. 1994). *But see* *Jacobs v. Jacobs*, 405 N.W.2d 668 (Wis. Ct. App. 1987), in which the court included the value of what was arguably trust property in determining property division at the dissolution of the marriage of two tribal members. While the court did not directly divide the property in question, it valued the property and determined an offset from other property.

<sup>152</sup> *In re Marriage of Wellman*, 852 P.2d 559, 563 (Mont. 1993). Such an order would conflict with the federal government's direct interest in the property. Although *Wellman* did not involve a reservation subject to Public Law 280, the court determined that the trust property proviso of 28



however, when the state court seeks to take the value of trust property into account in ordering a property distribution, spousal support, or child support. Ordinarily, the state court hearing a divorce action should resolve property distribution issues without regard to the value of the trust property, leaving matters associated with the trust property to a tribal court.<sup>153</sup> When support is at issue, a state court may not seize trust property to secure the payment of support obligations. When a divorcing spouse's sole income is from trust property, it may seem tantamount to a seizure—and hence an indirect impairment of rights to trust property—to base support obligations on that income stream. At least one lower court has held, however, that so long as the support obligation is strictly separated from the source of payment, there is no violation of section 1360(b).<sup>154</sup>

Public Law 280 also excepts from its authorization jurisdiction that would “deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.”<sup>155</sup> The scope of this exception depends on identification of the rights protected by “treaty, agreement, or statute,” and the Supreme Court has declined an opportunity to provide a definitive interpretation.<sup>156</sup> Supplying a definition has become less essential, however, since the Court determined in *Bryan and Cabazon* that regulatory laws are excluded from a state's Public Law 280 jurisdiction.<sup>157</sup> Nearly all state hunting and fishing laws establish a permitting system, making

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U.S.C. § 1360(b) was preemptive and controlling.

<sup>153</sup> *In re Marriage of Wellman*, 852 P.2d 559 (Mont. 1993). In *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982), the court ordered the non-Indian spouse compensated for his share of the community contributions that had gone into acquisition of trust property. This order did not require a valuation or indirect distribution of the property itself. *But see Jacobs v. Jacobs*, 405 N.W.2d 668 (Wis. Ct. App. 1987) and *Landauer v. Landauer*, 975 P.2d 577 (Wash. Ct. App. 1999), in which the courts valued and ordered an offsetting property allocation with respect to a house located on trust land, regardless whether it considered the house to be trust property. The reasoning in *Jacobs* suffers from a failure to differentiate federal preemption in an Indian context from ordinary preemption, as well as from an overemphasis on the assimilationist objectives of Public Law 280. The court also erred in assuming that Public Law 280's objective of affording a forum for suits against Indians in Indian country invariably overcomes tribes' interests in controlling the disposition of Indian property. While this argument has extra force in situations such as *Jacobs*, in which the relevant tribe (Stockbridge-Munsee) had no court at that time that could divide the trust property, a tribe's interest in avoiding adjudication by an outside sovereign remains potent even under those circumstances. Since *Jacobs* was decided, the Stockbridge-Munsee Tribe has established its own court system with domestic relations jurisdiction.

<sup>154</sup> *In re Marriage of Purnel*, 60 Cal. Rptr. 2d 667 (Ct. App. 1997). Notably, this case involved a tribe without a court system. *See also In re Marriage of Jacobsen*, 18 Cal. Rptr. 3d 162 (Ct. App. 2004) (state court exercising Public Law 280 jurisdiction is not required to apply tribal law prohibiting use of tribal per capita distributions for spousal support to nonmembers, when tribal law is inconsistent with state law).

<sup>155</sup> 18 U.S.C. § 1162(b); 25 U.S.C. § 1321(b).

<sup>156</sup> *See Mattz v. Arnett*, 412 U.S. 481, 483 (1973).

<sup>157</sup> *See* § 6.04[3][b][i].



them regulatory rather than prohibitory.<sup>158</sup> It would also be contrary to the language and purpose of Public Law 280 preserving the jurisdictional status quo on the excepted matters to permit any state regulation or control of Indian fishing or hunting.<sup>159</sup>

### [c] Concurrent Tribal/State Jurisdiction and Exhaustion of Tribal Remedies

The nearly unanimous view among tribal courts,<sup>160</sup> state courts,<sup>161</sup> lower federal courts,<sup>162</sup> state attorneys general,<sup>163</sup> the Solicitor's Office for the Department of the Interior,<sup>164</sup> and legal scholars<sup>165</sup> is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched. This conclusion flows naturally from the Indian law canons of construction, which establish that federal statutes should not be interpreted to remove tribal government powers unless the statutes expressly so provide.<sup>166</sup> Public Law 280 did not

<sup>158</sup> Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333, 1347 (1999); see also Quechan Indian Tribe v. McMullen, 984 F.2d 304, 307 (9th Cir. 1993) (characterizing hunting and fishing as a "regulatory schem[e]" because "a person who wants to hunt or fish merely has to pay a fee and obtain a license"). But see Jones v. State, 936 P.2d 1263 (Alaska Ct. App. 1997). The exceptional cases may be those in which taking of animals is prohibited because of concerns about endangered species. See State v. Billie, 497 So.2d 889 (Fla. Dist. Ct. App. 1986). In those cases, state regulation may be permitted, regardless of treaty or other guarantees to the tribes, for the limited purpose of conservation. Further issues arise when state laws regarding possession of firearms are applied to individuals exercising federally protected hunting rights. Assuming such laws are criminal in nature, and therefore generally permissible under Public Law 280, they may not be applied if the consequence is to impair such hunting rights. See State v. Roy, 761 N.W.2d 883 (Minn. Ct. App. 2009) (avoiding the issue by making a questionable finding against the existence of such a right). See generally Ch. 18, § 18.03[2][b].

<sup>159</sup> Generally, states lack jurisdiction to regulate Indian fishing or hunting on reservations. See Ch. 18, § 18.02. But see Puyallup Tribe v. Dep't of Game, 433 U.S. 165 (1977) (indicating that in some circumstances states may regulate reservation fishing if necessary for conservation of species).

<sup>160</sup> Southern Ute Tribe v. Frost, 19 Indian L. Rep. 6132 (S. Ute. Tr. Ct. 1992).

<sup>161</sup> Fawcett v. Fawcett, 13 Indian L. Rep. 5063 (Alaska Super. Ct. 1986); State v. Schmuck, 850 P.2d 1332 (Wash. 1993); Teague v. Bad River Band of the Lake Superior Chippewa Indians, 665 N.W.2d 899 (Wis. 2003).

<sup>162</sup> TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676, 685 (5th Cir. 1999); Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 562 (9th Cir. 1991); Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990); Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1195, 1205 (C.D. Cal. 1998); Confederated Tribes of the Colville Reservation v. Beck, 6 Indian L. Rep. F8 (E.D. Wash. 1979).

<sup>163</sup> Op. Att'y Gen. Neb. No. 48 (1985); Op. Att'y Gen. Wis. 237, 243 (1981).

<sup>164</sup> Op. Sol. Int., M-6907 (Nov. 14, 1978).

<sup>165</sup> Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627 (1998); Timothy Carr Seward & Carole Goldberg-Ambrose, *Tribal Courts in California: Hope for the Future*, in Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* 141-171 (American Indian Studies Center 1997).

<sup>166</sup> See Ch. 2, § 2.02.



specifically extinguish any tribal court jurisdiction, and the legislative history reflects no such congressional intent. Indeed, the primary purpose of Public Law 280 was to improve law enforcement within Indian country,<sup>167</sup> which suggests that Congress would not want to eliminate any functioning or potentially effective criminal jurisdiction. Federal policy since the passage of Public Law 280 has only reinforced this reading of congressional intent, as Congress has weighed in heavily in favor of tribal self-government and tribal court development as means of addressing community safety issues in Indian country.<sup>168</sup> Although the Bureau of Indian Affairs has used Public Law 280 as an excuse for declining to fund law enforcement and tribal court development for affected tribes,<sup>169</sup> a growing number of tribes have been taking advantage of concurrent jurisdiction.<sup>170</sup>

The only doubts about Congress's intent derive from two 1970 amendments to Public Law 280. One described state criminal jurisdiction for mandatory states as "exclusive,"<sup>171</sup> and the other characterized the jurisdiction of the Metlakatla Indian Community in Alaska as "concurrent" with the state's.<sup>172</sup> Opponents of concurrent jurisdiction in Public Law 280 states have argued that the reference to "exclusive" jurisdiction precludes concurrent tribal jurisdiction. The preferable reading of this amendment is that it is intended to exclude only federal jurisdiction.<sup>173</sup> The description of Metlakatla's jurisdiction as "concurrent" could be read to imply that *only* Metlakatla may exercise jurisdiction, leaving all other tribes without concurrent authority. A more likely explanation for this language can be found in the unique circumstances of the Metlakatla's reservation, however. Because it was unclear whether that community's territory constituted "Indian country,"<sup>174</sup> the drafters may have believed that the reference to concurrent jurisdiction was necessary to establish tribal jurisdiction.<sup>175</sup>

<sup>167</sup> See § 6.04[3][a].

<sup>168</sup> Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 Regent U. L. Rev. 139, 170–175 (2010); Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1658 (1998).

<sup>169</sup> See Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280*, at 113–122 (Carolina Academic Press 2012). Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1418 (1997).

<sup>170</sup> Examples include the Yurok, Karuk, and Hoopa Valley Tribes in California, the Intertribal Court of Southern California, the Stockbridge-Munsee and Ho-Chunk Tribes in Wisconsin, and the Shakopee Mdewakanton Sioux Community in Minnesota.

<sup>171</sup> Pub. L. No. 91-523, 84 Stat. 1358 (1970) (codified at 18 U.S.C. § 1162(c)).

<sup>172</sup> Pub. L. No. 91-523, §§ 1, 2, 84 Stat. 1358 (1970) (codified at 18 U.S.C. § 1162(a)–(c), 28 U.S.C. § 1360(a)). The interpretation of this language is discussed in Andy Harrington, *Exclusive of What? The Historical Context of the 1970 "Metlakatla" Amendment to PL 280*, 23 Alaska L. Rev. 1 (2006).

<sup>173</sup> Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1673–1679 (1998).

<sup>174</sup> See H.R. Rep. No. 91-1545 (1970).

<sup>175</sup> The matter may be unique because of the peculiar history of the Metlakatla Reservation. The



The consensus about concurrent tribal and state jurisdiction under Public Law 280 has developed relatively recently, leaving both sets of courts and law enforcement officers with the task of developing principles of coexistence and comity.<sup>176</sup> In criminal cases, the double jeopardy clause of the Constitution<sup>177</sup> and the Indian Civil Rights Act<sup>178</sup> permit multiple prosecutions so long as the prosecutions are carried out by separate sovereigns.<sup>179</sup> The Supreme Court has held that Indian nations are separate from the federal government for this purpose,<sup>180</sup> and the same reasoning dictates that Indian nations are separate sovereigns from the states.<sup>181</sup>

Nevertheless, about half of the states have enacted laws that either limit or extinguish the power of their own state to prosecute a defendant after another sovereign or government has already done so.<sup>182</sup> While these laws typically fail to mention Indian nations as among those sovereigns whose prior exercise of

reservation was established by statute for the Metlakatla Indians, who had recently migrated from Canada. Act of March 3, 1891, § 15, 26 Stat. 1095 (codified at 25 U.S.C. § 495); see *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 48 (1962). In *United States v. Booth*, 161 F. Supp. 269 (D. Alaska 1958), a territorial judge held that the reservation was not Indian country within the meaning of 18 U.S.C. § 1151. The reasoning of that case is extremely doubtful. The *Booth* case was cited uncritically in *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 51 (1962). The matter was further confused by the fact that the Metlakatlans, isolated on their island reservation, had in fact exercised internal criminal jurisdiction over minor crimes for many years. The tortured history of the Metlakatla makes it difficult to derive any general inference from that amendment. Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1676 n.282 (1998).

<sup>176</sup> Cross-deputization agreements can be helpful in allocating overlapping law enforcement responsibilities. *See* Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280*, at 141-163 (Carolina Academic Press 2012). *see also* *State v. Manypenny*, 662 N.W.2d 183 (Minn. Ct. App. 2003) (these agreements are consistent with Public Law 280), *aff'd* *State v. Manypenny*, 682 N.W.2d 143 (Minn. 2004) (finding that Public Law 280 does not preempt tribal-state cooperative agreements and legislation authorizing tribal police to serve as state peace officers for purposes of making on-reservation arrests under state law). In the absence of such agreements, costly and time-consuming litigation can erupt between states and Indian nations. *See, e.g.,* *Cabazon Band of Mission Indians v. Smith*, 388 F. 3d 691 (9th Cir. 2004) (conflict over tribal police use of light bars on vehicles while chasing suspects between geographically separated parts of the reservation).

<sup>177</sup> U.S. Const. amend. VI.

178 25 U.S.C. § 1302(a)(3).

<sup>179</sup> *Bartkus v. Illinois*, 359 U.S. 121 (1959) (United States Constitution); *Ramos v. Pyramid Lake Tribal Ct.*, 621 F. Supp. 967 (D. Nev. 1985) (Indian Civil Rights Act).

<sup>180</sup> *United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>181</sup> Ramos v. Pyramid Lake Tribal Ct., 621 F. Supp. 967 (D. Nev. 1985); Booth v. State, 903 P.2d 1079, 1085 (Alaska Ct. App. 1995); People v. Morgan, 785 P.2d 1294 (Colo. 1990).

<sup>182</sup> Laurie L. Levenson, *Double Trouble: Under What Circumstances Can a Defendant Be Prosecuted for the Same Act Under Different Statutory Provisions?* Los Angeles Law., June 1999, at 40, 42. For a thoughtful analysis of the double jeopardy issues that may arise under Public Law 280, see Ross Naughton, *State Statutes Limiting the Dual Sovereignty Doctrine: Tools for Tribes to Reclaim Criminal Jurisdiction Stripped by Public Law 280?*, 55 UCLA L. Rev. 489 (2007).



criminal jurisdiction will bar the state's own prosecution, most state courts have interpreted general statutory language referring to "territories," "jurisdictions," or "governments" to include tribes.<sup>183</sup> The only state court to conclude otherwise relied heavily on inferences from the statute's failure to mention tribes. Yet in cases involving other governments besides tribes, statutory silence as to those governments did not carry as much weight.<sup>184</sup>

The more informal procedures used in tribal court and the less frequent specification of imprisonment as punishment may present state courts with the question of whether a prior tribal proceeding actually constituted a criminal prosecution. Respect for tribal traditions and practices for achieving public safety and community well-being suggests that states should strive to characterize tribal court proceedings in the same way as the Indian nations themselves.

In civil cases, concurrent tribal and state jurisdiction under Public Law 280 leads to the possibility of each disputant racing to litigate in the forum of choice.<sup>185</sup> Public Law 280 does not give state courts the power to restrict the exercise of tribal jurisdiction, even when the first litigant to file chooses state court.<sup>186</sup> If each sovereign is under some obligation to respect the judgments of the other,<sup>187</sup> then the first forum to reach a judgment will determine the outcome, regardless of the duration or extent of completion of the parallel proceeding.<sup>188</sup> If the sovereigns do not view themselves as under any compulsion to respect one another's judgments, the litigants may be subjected to conflicting and mutually inconsistent orders.<sup>189</sup>

One state court in a mandatory Public Law 280 state has indicated that states

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<sup>183</sup> *Booth v. State*, 903 P.2d 1079, 1086 (Alaska Ct. App. 1995) ("territories"); *People v. Morgan*, 785 P.2d 1294 (Colo. 1990) ("jurisdictions"); *Hill v. Eppolito*, 772 N.Y.S.2d 634 (App. Div. 2004) ("jurisdictions"). *But see* *State v. Moses*, 37 P.3d 1216 (Wash. 2002) ("jurisdictions"). California's double jeopardy statute refers to "another . . . territory of the United States," Cal. Penal Code § 656, a term that has been interpreted in some contexts to include Indian tribes. *See* Ch. 7, § 7.07[2][b].

<sup>184</sup> *State v. Moses*, 37 P.3d 1216, 1217-1219 (Wash. 2002).

<sup>185</sup> *Teague v. Bad River Band of the Lake Superior Chippewa Indians*, 612 N.W.2d 709 (Wis. 2000). In a Public Law 280 state, state and tribal courts with concurrent jurisdiction might choose to apply different bodies of law to the dispute. State courts are directed to apply tribal law, but only if that law does not conflict with state law. In the *Teague* case, for example, the Wisconsin state court was prepared to apply Wisconsin law regarding the validity of a contract made between the tribal gaming corporation and one of its employees.

<sup>186</sup> *Teague v. Bad River Band of the Lake Superior Chippewa Indians*, 612 N.W.2d 709, 717-718 (Wis. 2000). Some states may provide that their own courts must decline jurisdiction if a prior suit involving the same dispute and litigants was previously filed in another court with concurrent jurisdiction, such as a tribal court. *Matsch v. Prairie Island Indian Cmty.*, 567 N.W.2d 276, 278 (Minn. Ct. App. 1997).

<sup>187</sup> *See* Ch. 7, § 7.07.

<sup>188</sup> *See* *Teague v. Bad River Band of the Lake Superior Chippewa Indians*, 665 N.W.2d 899 (Wis. 2003) (Crooks, J., concurring).

<sup>189</sup> *See* *Balyeat Law, PC v. Pettit*, 967 P.2d 398, 408 (Mont. 1998).



and Indian nations would do well to establish protocols to govern situations of overlapping suits filed in both state and tribal court systems, much as the federal and state governments have done for matters within concurrent jurisdiction. In *Teague v. Bad River Band of the Lake Superior Chippewa Indians*,<sup>190</sup> the Supreme Court of Wisconsin initially refused to enforce a tribal judgment because of lack of coordination and consultation between the state and tribal courts over allocation of jurisdiction regarding two overlapping suits in tribal and state court.<sup>191</sup> The Wisconsin high court then took the extraordinary action of remanding for a conference between the two court systems. Following remand, a state appellate court and the Chippewa tribal courts actually drafted and agreed to protocols.<sup>192</sup> Even after availing themselves of the procedures and criteria set forth in the protocol, however, the two court systems still could not resolve their differences, and neither would agree to withdraw its judgment. Accordingly, the Supreme Court of Wisconsin resumed jurisdiction over the case, invoked the doctrine of comity, and found that the state court should respect the tribal judgment.<sup>193</sup>

Judge-made doctrine may also function to limit conflicts. One valuable source of guidance is the doctrine of exhaustion of tribal remedies that has been crafted by the Supreme Court for situations in which Indian nations and the United States share authority over the same matters. According to this doctrine of comity, federal courts will normally decline to invoke their federal question or diversity jurisdiction until the litigants have presented the issues and obtained a resolution from the tribal court system.<sup>194</sup> Some legal issues, such as the extent of tribal jurisdiction, will remain for possible relitigation in federal court; even then, the federal court will grant some deference to the tribal court's underlying findings of fact.

The federal exhaustion doctrine is designed to avoid interference with Indian

<sup>190</sup> *Teague v. Bad River Band of the Lake Superior Chippewa Indians*, 612 N.W.2d 709, 720 (Wis. 2000).

<sup>191</sup> The state court action had been filed first, but the tribal court action had gone to judgment first.

<sup>192</sup> Tribal/State Protocol for the Judicial Allocation of Jurisdiction Between the Four Chippewa Tribes of Northern Wisconsin and the Tenth Judicial District of Wisconsin (2001), cited in Carol Tebben, *Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin*, 26 Am. Indian L. Rep. 177, 194-196 (2001-2002). In 2005, the twelve counties of Wisconsin's Ninth Judicial District and five Indian bands with reservations within the district established a similar protocol. For a description of its workings, see Beth Ermatinger Hanan & William H. Levit, Jr., *Wisconsin's Experience in Allocating Jurisdiction between State and Tribal Courts*, 45 Court Rev. 20, 23 (2008).

<sup>193</sup> *Teague v. Bad River Band of the Lake Superior Chippewa Indians*, 665 N.W.2d 899 (Wis. 2003); cf. *Parry v. Haendiges*, 458 F. Supp. 2d 90, 96 (W.D.N.Y. 2006) (applying similar comity analysis to exercise of concurrent jurisdiction under 25 U.S.C. § 233, conferring civil jurisdiction on state of New York).

<sup>194</sup> See Ch. 7, § 7.04[3].



nations' self-government and to afford federal courts the benefits of tribal consideration of matters within the tribes' realm of special expertise.<sup>195</sup> Arguably, this doctrine embodies a federal common law of deference to tribal courts that binds state and federal courts.<sup>196</sup> Even if the doctrine is not binding on state courts as a matter of federal common law, however, the same considerations of comity and efficiency that animate the federal exhaustion doctrine counsel in favor of state courts establishing an identical rule of deference.

A growing number of state courts have embraced such an exhaustion doctrine, requiring plaintiffs to bring their claims to tribal court even though the state may possess concurrent jurisdiction under Public Law 280.<sup>197</sup> Most of the state cases exemplifying this development have involved suits against tribal entities or officers, with attendant issues of sovereign immunity and privilege. Exhaustion in the name of respect for tribal self-government is particularly appropriate in these cases. But just as the federal exhaustion doctrine has been applied to private lawsuits,<sup>198</sup> so arguably should the state exhaustion doctrine. Respect for an Indian nation's power of self-government implies that the tribe should have primary responsibility for activities that occur within its boundaries, and therefore a state court possessing concurrent jurisdiction under Public Law 280 should stay its hand pending exhaustion of tribal remedies. Two intermediate state appellate courts have rejected this view in personal injury actions against tribal members.<sup>199</sup> These courts emphasize the state's interest in ensuring full compensation of injured persons, the fact that Public Law 280 was designed to make a forum available for private suits against Indians, and the absence of any state (as opposed to federal) power to review tribal decisions regarding their jurisdiction. Yet these opinions fail to acknowledge that Public Law 280 was enacted at a time when most of the affected tribes lacked their own court systems. Given the Indian law canons of construction,<sup>200</sup> and the subsequent development of congressional policies favoring tribal self-determination and tribal courts,<sup>201</sup> it is proper to read Public Law 280 as incorporating a state exhaustion requirement where tribal courts exist.<sup>202</sup>

<sup>195</sup> See Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz. L. Rev. 329 (1989).

<sup>196</sup> *Drumm v. Brown*, 716 A.2d 50, 60-63 (Conn. 1998).

<sup>197</sup> See, e.g., *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 381 n.3 (Minn. Ct. App. 1996), *aff'd*, 561 N.W.2d 889 (Minn. 1997); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996); see also *Drumm v. Brown*, 716 A.2d 50 (Conn. 1998) (limiting exhaustion requirement to situations in which parallel proceeding is pending in tribal court).

<sup>198</sup> See Ch. 7, § 7.04[3].

<sup>199</sup> *Lemke v. Brooks*, 614 N.W.2d 242 (Minn. Ct. App. 2000); *McCrea v. Denison*, 885 P.2d 856 (Wash. Ct. App. 1994).

<sup>200</sup> See Ch. 2, § 2.02.

<sup>201</sup> See Ch. 1, § 1.07.

<sup>202</sup> The Alaska Supreme Court refused to apply the tribal exhaustion doctrine in a contract



courts the benefits of tribal special expertise.<sup>195</sup> Arguably, deference to tribal courts that is not binding on state courts and the considerations of comity and doctrine counsel in favor of exhaustion.

Such an exhaustion doctrine, even though the state may not sue against tribal entities or their privilege. Exhaustion is particularly appropriate in these cases as been applied to private law doctrine. Respect for an tribe's boundaries, and therefore Public Law 280 should stay intermediate state appellate courts against tribal members.<sup>199</sup> Providing full compensation of a dispute designed to make a forum of any state (as opposed to their jurisdiction. Yet these laws enacted at a time when tribal courts. Given the Indian law development of congressional courts,<sup>201</sup> it is proper to read the requirement where tribal

*Analyzing Issues of Tribal Jurisdiction*

(Minn. Ct. App. 1996), *aff'd*, 2002 WL 284 (Minn. 1996); see also requirement to situations in which

*Crea v. Denison*, 885 P.2d 856

exhaustion doctrine in a contract

Apart from state judge-made law mandating exhaustion, state rules of court in Public Law 280 states increasingly allow for transfer of cases from state to tribal court where concurrent jurisdiction exists and specified conditions support the transfer. A pending tribal court action is not required. Both Wisconsin and Washington have adopted such rules.<sup>203</sup>

#### [d] Relationship of Public Law 280 to Other Federal Indian Country Statutes

##### [i] Indian Country Criminal Laws

The original version of Public Law 280 provided that the Major Crimes Act<sup>204</sup> and the Indian Country Crimes Act<sup>205</sup> would not apply in areas of Indian country specified in Public Law 280 (*i.e.*, to the so-called "mandatory tribes"). In 1970, this provision was amended to clarify that "states shall have exclusive jurisdiction" with respect to the offenses covered by those two federal Indian country statutes on the reservations included in the mandatory states.<sup>206</sup> By implication, other federal Indian country criminal laws remain in force.<sup>207</sup> To the extent these laws are exclusive of state jurisdiction over the same subject, they remain exclusively federal under Public Law 280.<sup>208</sup>

Public Law 280 was amended by the Tribal Law and Order Act of 2010 to provide that tribes may ask the United States to reassume jurisdiction under 18

dispute, reasoning that a clause in the contract authorized parties to sue in state court, and expressing concern that there was no evidence that a functioning tribal court existed. *Nenana Fuel Co. Inc. v. Native Vill. of Venetie*, 834 P.2d 1229 (Alaska 1992); see also *Larriev v. Morigeau*, 602 P.2d 563 (Mont. 1979) (declining to apply exhaustion doctrine, but decided before the Supreme Court articulated federal court exhaustion requirement).

<sup>203</sup> See Sup. Ct. Order No. 07-11-2008 WI 114, issued July 31, 2008, eff. Jan. 1, 2009, Wis. Stat. 801.54; Wash. Court Rule 82.5(b). For an application of the Wisconsin rule, which became a statute, see *Kroner v. Oneida Seven Generations Corp.*, 801 N.W.2d 350 (Wis. Ct. App. 2011).

<sup>204</sup> 18 U.S.C. §§ 1153, 3242; see Ch. 9, § 9.02[2].

<sup>205</sup> 18 U.S.C. § 1152; see Ch. 9, § 9.02[1].

<sup>206</sup> Pub. L. No. 91-523, 84 Stat. 1358 (1970) (codified at 18 U.S.C. § 1162(c)); see Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 Am. U. L. Rev. 1627, 1673-1679 (1998).

<sup>207</sup> See Ch. 9, § 9.01; see also *United States v. Guassac*, 169 F.3d 1188 (9th Cir. 1999) (offense of theft from a tribal organization, 18 U.S.C. § 1163, applies in California, a mandatory Public Law 280 state). *A fortiori*, federal laws of general applicability, which operate regardless of the location of the offense are unaffected by Public Law 280. See, e.g., *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998).

<sup>208</sup> The Indian country liquor laws are not exclusive. *Ft. Belknap Indian Cmty. v. Mazurek*, 43 F.3d 428 (9th Cir. 1994). With enactment of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., federal criminal jurisdiction over tribal gaming became exclusive. *Sycuan Band of Mission Indians v. Roache*, 38 F.3d 402, 407 (9th Cir. 1994), *amended*, 54 F.3d 535 (1995); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 652 (W.D. Wis. 1990). Some of the other federal criminal statutes applicable to Indian country are exclusive as to Indians but concurrent as to other persons. See Ch. 9, § 9.02[1].



U.S.C. §§ 1152 (the Indian Country Crimes Act) and 1153 (the Major Crimes Act).<sup>209</sup> The Attorney General is allowed to accept or deny the request, but the state's agreement is not required. Where the Attorney General grants such a request, state jurisdiction remains, so there is three-way concurrent criminal jurisdiction—tribal, state, and federal. State duties to provide law enforcement and criminal justice services to Indian country under Public Law 280 are not diminished. This amendment is a partial response to the concern of some Public Law 280 tribes that state agencies have not been sufficiently responsive to the criminal justice needs in Indian country.<sup>210</sup> Because the amendment does not require tribes to request that the United States accept concurrent jurisdiction to prosecute “all” violations of 18 U.S.C. §§ 1152 and 1153, it is reasonable to interpret the amendment as permitting tribes to request and the Attorney General, after consultation with the tribe, to consent to assumption of concurrent federal jurisdiction over a limited set of crimes or over crimes within a limited geographic portion of the tribe's Indian country.<sup>211</sup>

This 2010 amendment to Public Law 280 clearly applies to the territory of the “mandatory” tribes specified in 18 U.S.C. § 1162, where Public Law 280, as originally enacted, expressly removed federal criminal jurisdiction under 18 U.S.C. §§ 1152 and 1153. It is not so clear, however, that the original version of Public Law 280 removed federal criminal jurisdiction under sections 1152 and 1153 from the portions of Indian country where states opted for jurisdiction under 25 U.S.C. § 1321.<sup>212</sup> Thus, although the Tribal Law and Order Act has a parallel provision authorizing restoration of federal criminal jurisdiction for the “optional” tribes,<sup>213</sup> this provision was arguably unnecessary, and may have been included merely as a fail-safe, in case federal jurisdiction was found to be otherwise unavailable in the optional states.<sup>214</sup>

A close reading of Public Law 280 suggests that the law did not remove federal jurisdiction under sections 1152 and 1153 for the optional tribes. Removal of federal criminal jurisdiction is expressly provided in the portion of Public Law 280 mandating criminal jurisdiction for designated states,<sup>215</sup> but not mentioned in the provision allowing other states to opt for jurisdiction. Nonetheless, courts have struggled to determine whether federal criminal jurisdiction under the Major

<sup>209</sup> Act of July 29, 2010, Pub. L. No. 111-211, Title II, § 221, 124 Stat. 2279 (codified at 18 U.S.C. § 1162(d) and 25 U.S.C. § 1321(a)(2)).

<sup>210</sup> See Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280*, at 67-92 (Carolina Academic Press 2012).

<sup>211</sup> For the procedure implementing this provision of the Tribal Law and Order Act, see 76 Fed. Reg. 76,037 (2011).

<sup>212</sup> See § 6.04[3][a].

<sup>213</sup> 25 U.S.C. § 1321(a)(2).

<sup>214</sup> This is the position adopted by the United States Department of Justice in rules implementing the Tribal Law and Order Act. See 76 Fed. Reg. 76,037 (2011).

<sup>215</sup> 18 U.S.C. § 1162(c).



Crimes Act and the Indian Country Crimes Act remains in force, either as exclusive or concurrent jurisdiction, on reservations in states that exercised the option to assume Public Law 280 jurisdiction or in states that received jurisdiction under statutes similar to Public Law 280.<sup>216</sup> The legislative history of Public Law 280 is regrettably unenlightening.

Although the most reasonable reading of Public Law 280 points to continued federal criminal jurisdiction under sections 1152 and 1153 in the optional states, at least three different and mutually exclusive readings are conceivable. Federal criminal jurisdiction under the Major Crimes Act and the Indian Country Crimes Act either (1) disappears in the optional states, just as it does by statutory prescription in the mandatory states; (2) remains, but operates concurrently with state (and tribal) jurisdiction; or (3) remains, and continues to preempt state jurisdiction over the same offenses, leaving these Public Law 280 states with jurisdiction only over minor offenses between Indians. Remarkably, federal and state decisions can be found to support each of these distinct and incompatible choices.

The first alternative, *i.e.*, no federal criminal jurisdiction under the two primary Indian country statutes in optional states, is reflected in the Tenth Circuit's opinion in *United States v. Burch*.<sup>217</sup> Colorado had convicted a member of the Southern Ute Indian Tribe for the crime of manslaughter committed within the town of Ignacio on the Southern Ute reservation. A special federal law enacted in 1984 had provided for state jurisdiction within that town "as if" the state had assumed jurisdiction under Public Law 280 as amended in 1968.<sup>218</sup> On a petition for a writ of habeas corpus, defendant argued that the offense was within exclusive federal jurisdiction under the Major Crimes Act, noting that Congress had not disavowed jurisdiction, which normally operates to preempt state criminal authority. The Tenth Circuit rejected this position, holding instead that the introduction of Public Law 280 had eliminated federal criminal jurisdiction over the same offense, and therefore *state* jurisdiction was exclusive. Without carefully probing the statutory differences in treatment of mandatory and optional states, without discussing the Indian law canons of construction,<sup>219</sup> and without examining opposing author-

<sup>216</sup> See § 6.04[4]. In some federal statutes that delegated criminal jurisdiction to states, Congress expressly stated that the Major Crimes Act and the Indian Country Crimes Act were to remain in force. *See, e.g.*, Pub. L. 80-846, 62 Stat. 1161 (1948) (criminal jurisdiction conferred on state of Iowa); 18 U.S.C. § 3243 (criminal jurisdiction conferred on state of Kansas). A question remained whether the federal jurisdiction mentioned in these statutes was exclusive or concurrent. In *Negonsott v. Samuels*, 507 U.S. 99 (1993), the Supreme Court found in favor of concurrent jurisdiction. Other federal statutes providing for state criminal jurisdiction in Indian country fail to mention whether federal criminal jurisdiction will continue under sections 1152 and 1153. *See, e.g.*, 25 U.S.C. § 232 (criminal jurisdiction to New York, enacted before Public Law 280).

<sup>217</sup> *United States v. Burch*, 169 F.3d 666 (10th Cir. 1999).

<sup>218</sup> Pub. L. No. 98-290, § 5, 98 Stat. 202 (1968).

<sup>219</sup> *See* Ch. 2, § 2.02.



ity,<sup>220</sup> the court asserted that optional states would acquire exactly the same jurisdiction as their mandatory counterparts. The absence of support for this pronouncement is striking. All the Tenth Circuit could muster to bolster its declaration of exclusive state jurisdiction was language in the House and Senate reports indicating that the United States would retain its "existing jurisdiction" everywhere within the reservation boundaries except incorporated municipalities such as Ignacio, where the state would exercise authority.<sup>221</sup> The court's interpretation of these statements is hardly the only logical reading, however. It is equally consistent with these statements to conclude that Congress envisioned a regime of exclusive federal jurisdiction in the unincorporated areas ("existing jurisdiction") and concurrent federal and state jurisdiction within the municipalities.

In *United States v. High Elk*,<sup>222</sup> a federal district court in South Dakota adopted this second alternative of concurrent federal and state jurisdiction over crimes identified in the Major Crimes Act and the Indian Country Crimes Act. South Dakota had attempted to assume optional Public Law 280 jurisdiction that was limited to state highway rights-of-way within Indian country. Because this assumption of jurisdiction was conditioned on federal reimbursement for costs of the additional state responsibility, a cloud of invalidity hung over state prosecutions.<sup>223</sup> Before the Eighth Circuit ruled on this question, rejecting the state's authority,<sup>224</sup> the federal district judge in *High Elk* was confronted with the question of federal criminal jurisdiction under the Major Crimes Act over a vehicular homicide that occurred on a state highway within a reservation. The district judge reasoned that even if the state had properly acquired Public Law 280 jurisdiction, the federal court could proceed with its prosecution because Major Crimes Act jurisdiction would survive Public Law 280, albeit as concurrent rather than exclusive jurisdiction.<sup>225</sup> In the court's view, the Major Crimes Act was "an integral part of federal criminal jurisdiction in Indian country for over a century," and "[s]uch a policy of long standing is not to be discarded absent a clear legislative mandate."<sup>226</sup> Public Law 280's noteworthy silence on the subject of continuing federal criminal jurisdiction in optional states left the court to conclude

<sup>220</sup> *E.g.*, *United States v. High Elk*, 715 F. Supp. 285 (D.S.D. 1989); *Idaho v. Marek*, 736 P.2d 1314 (Idaho 1987); *Idaho v. Major*, 725 P.2d 115 (Idaho 1986).

<sup>221</sup> *United States v. Burch*, 169 F.3d 666, 670 (10th Cir. 1999).

<sup>222</sup> *United States v. High Elk*, 715 F. Supp. 285 (D.S.D. 1989), *aff'd*, 902 F.2d 660 (8th Cir. 1990); *see also* *State v. Hoffman*, 804 P.2d 577 (Wash. 1991); *State v. Bertrand*, 378 P.2d 427 (Wash. 1963).

<sup>223</sup> *See In re Hankins' Petition*, 125 N.W.2d 839 (S.D. 1964).

<sup>224</sup> *See Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990).

<sup>225</sup> *United States v. High Elk*, 715 F. Supp. 285, 287 (D.S.D. 1989), *aff'd*, 902 F.2d 660 (8th Cir. 1990).

<sup>226</sup> *United States v. High Elk*, 715 F. Supp. 285, 287 (D.S.D. 1989), *aff'd*, 902 F.2d 660 (8th Cir. 1990).



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that jurisdiction should continue concurrent with any properly assumed state jurisdiction. In an oblique reference, the district judge acknowledged that this analysis might contradict the canon of construction requiring ambiguous legislative enactments to be interpreted in favor of Indians.<sup>227</sup> Without further reflection, however, the court approved a regime in which Indians would be subject to federal, state, and tribal prosecutions for the same offense. While this scheme might be justified as furthering the law enforcement objectives of Public Law 280, it is not clear that multiplying sources of law enforcement responsibility results in reduced criminal activity. If both the federal government and the state no longer perceive themselves as shouldering the job of Indian country law enforcement, each set of authorities might pass its responsibilities onto the others, leaving Indian country with no service at all.<sup>228</sup>

Statements by the Idaho courts suggest that they have chosen the third alternative of retained *and* exclusive federal jurisdiction under the Major Crimes Act and the Indian Country Crimes Act in optional Public Law 280 states.<sup>229</sup> Without any appreciable analysis of the interplay between federal criminal statutes and Public Law 280, the Idaho Supreme Court simply assumed the continued operation of exclusive federal jurisdiction notwithstanding state efforts to assume criminal authority. The upshot of this approach is that federal jurisdiction is delegated to the optional states under Public Law 280 only for less serious offenses committed by one Indian against another.

In Idaho, where the state elected to exercise Public Law 280 jurisdiction over a very limited range of subjects absent tribal consent,<sup>230</sup> the consequences of adopting this alternative may not be very momentous. There is minimal overlap between applicable federal criminal offenses and the criminal jurisdiction that the state has attempted to assert.<sup>231</sup> In other optional states that have attempted to

<sup>227</sup> For an argument in favor of continued federal criminal jurisdiction in states that have received delegated jurisdiction, see Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 Harv. J. Legis. 497, 521 (1990).

<sup>228</sup> Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 Harv. J. Legis. 497, 519-522 (1990) (addressing implications of silence about federal Indian country criminal jurisdiction in 25 U.S.C. § 232, which delegated jurisdiction to state of New York).

<sup>229</sup> Idaho v. Marek, 736 P.2d 1314, 1319 (Idaho 1987); Idaho v. Major, 725 P.2d 115, 121, 122 (Idaho 1986). Neither of these cases involved a direct conflict between federal and state criminal jurisdiction. In *Marek*, the defendant was charged with two offenses. The court determined that one was a federally defined offense that was not within the state's assumption of jurisdiction under Public Law 280, and the other was within the state's assumption of Public Law 280 jurisdiction but not a federal offense. In *Major*, the court concluded that the offense with which the defendant was charged was neither a federal offense nor an offense covered by the state's assumption of Public Law 280 jurisdiction.

<sup>230</sup> See Idaho Code § 67-5101.

<sup>231</sup> Idaho limited its nonconsensual jurisdiction under Public Law 280 to compulsory school



assume more sweeping criminal jurisdiction, the third alternative would significantly limit the role of state law enforcement. Yet this alternative has much to recommend it. It limits the number of jurisdictions that may prosecute Indians for on-reservation crimes, thereby focusing the attention of authorities responsible for law enforcement regarding particular crimes within Indian country. Especially since Congress could not anticipate the vigor with which optional states would exercise their Public Law 280 jurisdiction, it is reasonable to retain primary federal accountability for most crimes. The federal trust responsibility and canons of construction also suggest that federal involvement and control should be maintained vis-à-vis the states unless Congress has clearly withdrawn that role.

### [ii] Indian Child Welfare Act

In 1978, Congress enacted the Indian Child Welfare Act (ICWA),<sup>232</sup> which lays out the jurisdictional scheme for voluntary and involuntary child welfare proceedings involving Indian children.<sup>233</sup> In the case of off-reservation Indian children, the Act promotes transfer of cases from state to tribal court.<sup>234</sup> When Indian children are domiciled or residing on a reservation or are wards of a tribal court, the Act mandates exclusive tribal jurisdiction "except where such jurisdiction is otherwise vested in the State by existing Federal law."<sup>235</sup> Public Law 280 is the most prominent of these federal laws that vest jurisdiction in the states. The Indian Child Welfare Act also establishes a procedure for tribes to petition the federal government to reassume exclusive jurisdiction over child welfare matters where they have lost such jurisdiction as a result of prior federal statutes (such as Public Law 280) authorizing state jurisdiction within Indian country.<sup>236</sup>

Because Public Law 280 authorizes state jurisdiction only over criminal proceedings and private lawsuits, not regulatory matters, ICWA's reference to concurrent state jurisdiction over on-reservation children should be similarly limited. Courts have had great difficulty drawing distinctions among these types of legal actions, however;<sup>237</sup> and those difficulties have produced varied outcomes from state to state regarding the characterization of involuntary child welfare proceedings. Thus, for example, the Wisconsin Attorney General has opined that involuntary state proceedings to terminate parental rights or to place children in temporary foster care are regulatory, and therefore such proceedings involving

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attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; insanities and mental illness; public assistance; domestic relations; and operation of motor vehicles on state or locally maintained roads. With tribal consent, Idaho has also acquired jurisdiction over some offenses covered by the Major Crimes Act, such as kidnapping. Idaho Code § 67-5101.

<sup>232</sup> 25 U.S.C. § 1901 et seq.

<sup>233</sup> See Ch. 11, *Indian Child Welfare Act*.

<sup>234</sup> 25 U.S.C. § 1911(b).

<sup>235</sup> 25 U.S.C. § 1911(a).

<sup>236</sup> 25 U.S.C. § 1918; 25 C.F.R. §§ 13.11–13.16; see Ch. 11, § 11.03.

<sup>237</sup> See § 6.04[3][b][iii].



alternative would significantly. This alternative has much to do with the fact that states may prosecute Indians for crimes committed on Indian country. Especially in states which optional states would not be reasonable to retain primary responsibility and canons of government and control should be retained. Early withdrawn that role.

Act (ICWA),<sup>232</sup> which lays out involuntary child welfare proceedings of off-reservation Indian children to tribal court.<sup>234</sup> When children are wards of a tribal court, except where such jurisdiction is provided by law.<sup>235</sup> Public Law 280 grants jurisdiction in the states. The ICWA allows for tribes to petition the court over child welfare matters or federal statutes (such as Indian country).<sup>236</sup>

jurisdiction only over criminal matters, ICWA's reference to children should be similarly applied. In actions among these types of cases, produced varied outcomes in involuntary child welfare proceedings. General has opined that the rights or to place children in such proceedings involving

dependent, neglected, and abused children; and operation of motor vehicles. In Idaho, Idaho has also acquired jurisdiction, such as kidnapping. Idaho Code

on-reservation children remain within exclusive tribal jurisdiction under ICWA, regardless of any tribal reassumption petition.<sup>238</sup> According to this view, the involuntary proceedings are regulatory in nature because they form part of a broader state regulatory scheme for children's services. In Wisconsin, therefore, concurrent state civil jurisdiction pursuant to Public Law 280 is confined to voluntary state proceedings for foster care, relinquishment, or adoptive placement of on-reservation Indian children, which are more in the nature of private civil actions. In a case arising in California, however, the Ninth Circuit has found that involuntary child welfare proceedings fall within Public Law 280's grant of civil jurisdiction because they are essentially a determination of the Indian child's status, and thus a civil adjudication rather than an exercise of state regulatory power.<sup>239</sup> Under that decision, tribes and states have concurrent jurisdiction over all ICWA proceedings, voluntary or involuntary. In reaching this conclusion, the Ninth Circuit relied heavily on the fact that ICWA allows tribes to petition for reassumption of exclusive jurisdiction.<sup>240</sup>

The Ninth Circuit mistakenly reasoned that there would be no point to ICWA's provision allowing Public Law 280 tribes to reassume exclusive jurisdiction if those tribes already possessed exclusive jurisdiction due to the regulatory nature of involuntary child welfare proceedings. Indeed, tribes have welcomed ICWA's provision for reassumption of jurisdiction as the first federal statute that allows Indian nations to take the initiative to remove federally authorized state authority.<sup>241</sup> Even if Public Law 280 is interpreted as not authorizing state jurisdiction over involuntary child welfare proceedings, however, reassumption is necessary for tribes to acquire exclusive jurisdiction over voluntary proceedings, which are civil adjudicative proceedings, and therefore within states' Public Law 280 jurisdiction. In addition, because ICWA became law less than two years after the Supreme Court's decision in *Bryan v. Itasca County*,<sup>242</sup> reassumption may have been regarded as a useful means of dispelling uncertainty about whether particular state child welfare proceedings were regulatory, and hence outside the state's jurisdiction under Public Law 280. Especially in light of the broad purpose of

<sup>238</sup> 70 Op. Att'y Gen. Wis. 237 (1981). *But cf.* *Idaho v. Marek*, 777 P.2d 1253, 1256 (Idaho Ct. App. 1989) (suggesting that child dependency proceedings are not regulatory for purposes of Public Law 280). The statutes of Idaho and Washington accepting Public Law 280 jurisdiction purport to cover child dependency, abuse, and neglect proceedings, and at least one case has upheld state jurisdiction over involuntary proceedings based on these provisions. Idaho Code § 67-5101; Wash. Rev. Code § 37.12.010; *Comenout v. Burdman*, 525 P.2d 217, 222 (Wash. 1974). These statutes, and the cases applying them, were enacted and decided before *Bryan v. Itasca County* and *California v. Cabazon Band of Mission Indians* elaborated the distinction between regulatory and prohibitory laws as well as the distinction between regulatory proceedings and private civil lawsuits. See § 6.04[3][b][iii]. Hence, their continued validity is doubtful.

<sup>239</sup> *Doe v. Mann*, 415 F.3d 1038, 1058-1061 (9th Cir. 2005).

<sup>240</sup> See 25 U.S.C. § 1918.

<sup>241</sup> See § 6.04[3][g].

<sup>242</sup> *Bryan v. Itasca County*, 426 U.S. 373 (1976); see § 6.04[3][b][iii].



ICWA, which is to restore primary tribal authority over child welfare matters,<sup>243</sup> it makes little sense to use ICWA as the basis for resolving an interpretive question under Public Law 280 in favor of state jurisdiction.

Some states initially interpreted the reassumption provision in ICWA to mean that absent a successful petition, tribes in Public Law 280 states lack jurisdiction over child welfare matters altogether.<sup>244</sup> The better reading, and the one adopted by the Secretary of the Interior, the Ninth Circuit, and the Alaska Supreme Court, is that reassumption operates to make tribal jurisdiction exclusive rather than concurrent in child welfare proceedings, and to avoid burdensome litigation over the domains of tribal and state courts in child welfare cases.<sup>245</sup>

The need for tribal courts or other types of justice systems in Public Law 280 states, as well as funding to support social welfare services for involuntary child welfare proceedings, is obvious where tribes in Public Law 280 states have exclusive jurisdiction. Historically, tribes in these states have not received their appropriate share of federal support for development of justice systems.<sup>246</sup> ICWA includes a provision allowing tribes to enter into agreements with states regarding jurisdiction over child custody proceedings, however, "including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes."<sup>247</sup> These agreements can enable sharing of resources and intergovernmental cooperation with respect to the placement of Indian children.

### [iii] Indian Gaming Regulatory Act

Tribal gaming is subject to comprehensive federal regulation through the Indian Gaming Regulatory Act of 1988 (IGRA).<sup>248</sup> Although IGRA does not mention Public Law 280, IGRA operates to oust delegated state jurisdiction under that Act

<sup>243</sup> See Ch. 11, § 11.01.

<sup>244</sup> See, e.g., *Native Vill. of Nenana v. State*, 722 P.2d 219 (Alaska 1986), *overruled*, *In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (Public Law 280 divested tribes of jurisdiction over matters involving the custody of Indian children, and therefore state jurisdiction was exclusive unless a Public Law 280 tribe successfully petitioned to reassume jurisdiction under terms of ICWA.).

<sup>245</sup> *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991). At the time ICWA was adopted, courts had not yet established that tribal jurisdiction survived Public Law 280. It is now the consensus among lower federal courts as well as many state courts that Public Law 280 left tribal jurisdiction intact. See § 6.04[3][c]. Hence, there is no reason for Indian nations to file reassumption petitions in order to obtain concurrent or referral jurisdiction. *State v. Native Vill. of Tanana*, 249 P.3d 734 (Alaska 2011) (reassumption provision of ICWA does not bar tribal concurrent or transfer jurisdiction in the absence of reassumption); *In re M.A.*, 40 Cal. Rptr. 3d 439 (Ct. App. 2006) (same).

<sup>246</sup> See Carole Goldberg-Ambrose & Duane Champagne, *A Second Century of Dishonor: Federal Inequities and California Tribes* (report prepared for the Advisory Council on California Indian Policy 1996), <http://www.aisc.ucla.edu/ca/Tribes.htm>.

<sup>247</sup> 25 U.S.C. § 1919(a).

<sup>248</sup> 25 U.S.C. § 2701 et seq.; see Ch. 12, *Indian Gaming*.



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because it is a more recent statute that asserts exclusive federal control. Thus, for example, IGRA's provision for exclusive federal jurisdiction over tribal violations of state gaming laws precludes state criminal enforcement of those laws, notwithstanding Public Law 280.<sup>249</sup> Also, IGRA establishes exclusive federal jurisdiction over civil actions involving Indian gaming and gaming contract disputes, thereby supplanting any civil jurisdiction over private lawsuits that states might have acquired over such matters under Public Law 280.<sup>250</sup>

Although IGRA removes some state jurisdiction authorized under Public Law 280, it may also create a new source of delegated state jurisdiction outside of Public Law 280. IGRA authorizes states and Indian nations to enter into compacts associated with the operation of certain forms of tribal gaming known as Class III gaming.<sup>251</sup> The statute provides that compacts may include provisions concerning “the application of the criminal and civil laws and regulations of the Indian tribe or the State” related to gaming, as well as “the allocation of criminal and civil jurisdiction between the State and the Indian tribe” necessary to enforce such laws and regulations, remedies for breach of contract, and other gaming-related matters.<sup>252</sup> Thus, a Class III gaming compact may give rise to state jurisdiction that otherwise would be preempted because of noncompliance with Public Law 280.<sup>253</sup>

### [e] Preemptive Effect of Public Law 280

The impact of Public Law 280 has been felt in states other than those named in the Act or accepting jurisdiction under its terms. Because all states were given the opportunity to acquire criminal jurisdiction over offenses by and against Indians, as well as civil jurisdiction over actions to which Indians are parties, Congress arguably intended the specific methods provided in Public Law 280 as the sole means by which states could assert jurisdiction.<sup>254</sup> Furthermore, the exceptions to state jurisdiction laid out in Public Law 280 could reasonably serve, *a fortiori*, as limitations on other states' claims to jurisdiction over the excepted subjects.

<sup>249</sup> *Sycuan Band of Mission Indians v. Roache*, 38 F.3d 402, 407 (9th Cir. 1994), *amended*, 54 F.3d 535 (1995); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645 (W.D. Wis. 1990).

<sup>250</sup> *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828 (Ct. App. 1999).

<sup>251</sup> 25 U.S.C. § 2710(d).

<sup>252</sup> 25 U.S.C. § 2710(d)(3)(C).

<sup>253</sup> See § 6.04[3][e]. The Supreme Court of New Mexico has upheld the validity of a tribal-state compact that the court interpreted as tribal consent to state court civil jurisdiction for the limited purpose of hearing personal injury claims by visitors to tribal casinos. *Doe v. Santa Clara Pueblo*, 154 P.3d 644 (N.M. 2007). The state had not accepted jurisdiction over such claims in accordance with the procedures specified in Public Law 280. See also *Cossey v. Cherokee Nation Enters., LLC*, 212 P.3d 447 (Okla. 2009) (entry into a tribal-state gaming compact under IGRA may limit the preemptive effect of Public Law 280).

<sup>254</sup> See *Kennerly v. Dist. Ct.*, 400 U.S. 423 (1971).



Accordingly, when non-Public Law 280 states have asserted jurisdiction in Indian country, their failure to assume jurisdiction pursuant to the Act has been cited as an indication that the state lacked the jurisdiction it claimed.<sup>255</sup>

In civil and criminal proceedings against Indians arising within Indian country, many courts have denied state jurisdiction on the ground that the state had not accepted Congress's invitation to take jurisdiction under Public Law 280.<sup>256</sup> Once state jurisdiction is deemed preempted by Public Law 280, it makes no difference whether the exercise of that jurisdiction would pass any test based on infringement of tribal sovereignty.<sup>257</sup> Similarly, several courts in non-Public Law 280 states have concluded that any lawsuit encompassed by the exceptions to Public Law 280 is necessarily beyond their jurisdiction.<sup>258</sup>

The preemptive effect of Public Law 280 is inapplicable to actions that states had authority to decide before 1953, when Public Law 280 was enacted. As the Supreme Court has stated, "Pub. L. 280's requirements simply have no bearing on jurisdiction lawfully assumed prior to its enactment."<sup>259</sup> Examples of state jurisdiction left untouched by Public Law 280 include jurisdiction over suits by tribes against non-Indians arising in Indian country,<sup>260</sup> and jurisdiction over suits against Indians arising outside Indian country.<sup>261</sup> Because Public Law 280 does

<sup>255</sup> See, e.g., *Fisher v. Dist. Ct.*, 424 U.S. 382, 388 (1976); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 177-178 (1973); *South Dakota v. Cummings*, 679 N.W.2d 484, 488 (S.D. 2004).

<sup>256</sup> See, e.g., *Seneca-Cayuga Tribe v. State*, 874 F.2d 709 (10th Cir. 1989); *Langley v. Ryder*, 778 F.2d 1092, 1096 (5th Cir. 1985); *Tohono O'Odham Nation v. Schwartz*, 837 F. Supp. 1024 (D. Ariz. 1993); *Schaghticoke Indians v. Potter*, 587 A.2d 139 (Conn. 1991); *In re Estate of Big Spring*, 255 P.3d 121 (Mont. 2011); *Lewis v. Sac & Fox Hous. Auth.*, 896 P.2d 503 (Okla. 1994).

<sup>257</sup> See § 6.03[2]. But see *Cossey v. Cherokee Nation Enters., LLC*, 212 P.3d 447, 452-454 (Okla. 2009) (limiting Public Law 280's preemptive effect in a case involving interpretation of a tribal-state gaming compact entered into pursuant to IGRA).

<sup>258</sup> *Richardson v. Malone*, 762 F. Supp. 1463 (N.D. Okla. 1991); *In re Marriage of Wellman*, 852 P.2d 559 (Mont. 1993); *Ahboah v. Hous. Auth. of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983).

<sup>259</sup> *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 151 n.11 (1984). Some states have used this reasoning to support jurisdiction over claims involving tribal members within Indian country that was of doubtful validity even before Public Law 280 came into being. See, e.g., *State v. Zaman*, 946 P.2d 459, 461 (Ariz. 1997) (suit by state on behalf of tribal member against non-Indian); *Wildcatt v. Smith*, 316 S.E.2d 870 (N.C. Ct. App. 1984) (suit by one Indian against another at time when no tribal court existed). Whether Public Law 280 preempts state jurisdiction over such suits depends on whether the state would have had jurisdiction had Public Law 280 never been enacted.

<sup>260</sup> *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984). These cases would often be within concurrent state and tribal jurisdiction. See Ch. 7, §§ 7.02-7.03.

<sup>261</sup> *Jicarilla Apache Tribe v. Bd. of County Comm'rs*, 883 P.2d 136 (N.M. 1994). Before the Supreme Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), state courts disagreed about whether Public Law 280 preempts state authority to arrest an Indian on the reservation for an off-reservation offense. Compare *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990) (state's action



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not differentiate between member and nonmember Indians for purposes of conferring state jurisdiction, its preemptive effect should arguably extend to Indians in both categories.<sup>262</sup> However, there is also authority suggesting that nonmember Indians are equivalent to non-Indians for purposes of state jurisdiction,<sup>263</sup> which would mean that states had some jurisdiction over those individuals even before Public Law 280 was enacted.<sup>264</sup>

The preemptive effect of Public Law 280 extends to methods of acquiring state jurisdiction as well as the exercise of that jurisdiction. Even a tribal resolution consenting to state jurisdiction will be ineffective if the requirements of Public Law 280 have not been met.<sup>265</sup> In *Kennerly v. District Court*, the Supreme Court invalidated Montana's jurisdiction over an action on a debt by a non-Indian against a tribal member, despite a tribal resolution, because jurisdiction had not been obtained in conformity with Public Law 280.<sup>266</sup> The Court held that Public Law 280 was a "governing act of Congress" that preempted other means of acquiring jurisdiction.<sup>267</sup> In keeping with the Indian law canons of construction,<sup>268</sup> the procedural requirements of Public Law 280 have been interpreted

treated as on-reservation exercise of jurisdiction, and hence preempted) *with State v. Lupe*, 889 P.2d 4 (Ariz. Ct. App. 1994) (state's action treated as exercise of off-reservation jurisdiction, and therefore not preempted). In supporting state jurisdiction in *Hicks*, the Supreme Court did not discuss the Public Law 280 preemption issue. Subsequent to *Hicks*, the South Dakota Supreme Court rejected a state claim of authority to pursue an Indian onto the reservation to effect an arrest for an off-reservation offense, thereby implicitly reconfirming the state court's previous position in *Spotted Horse* concerning the preemptive effect of Public Law 280. *State v. Cummings*, 679 N.W.2d 484, 486-487 (S.D. 2004). For a fuller discussion of *Hicks*, see Ch. 4, § 4.02[3][c][ii].

<sup>262</sup> Cf. *Topash v. Comm'r of Revenue*, 291 N.W.2d 679 (Minn. 1980). *In contrast see Minnesota v. R.M.H.*, 617 N.W.2d 55 (Minn. 2000), in which the Minnesota Supreme Court determined that Public Law 280 did not authorize the state to exercise jurisdiction over nonmember Indians, but proceeded to find jurisdiction based on a balancing of state, tribal, and federal interests. In a strong dissent, three justices pointed out that the analysis under Public Law 280 should have ended the inquiry, given the preemptive effect of that statute on all state exercise of jurisdiction over Indians within Indian country. *Id.* at 65-67.

<sup>263</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160 (1980).

<sup>264</sup> See *Wacondo v. Concha*, 873 P.2d 276, 278 (N.M. Ct. App. 1994) (allowing state court jurisdiction over suit brought by member of Jemez Pueblo against member of Taos Pueblo and member of Zia Pueblo for conduct occurring in Jemez Indian country).

<sup>265</sup> Whether a state assumption of jurisdiction pursuant to tribal consent prior to enactment of Public Law 280 is valid and, if so, whether it remains effective after Public Law 280, is a question the United States Supreme Court left open in *Fisher v. District Court*, 424 U.S. 382, 388 n.12 (1976).

<sup>266</sup> *Kennerly v. Dist. Ct.*, 400 U.S. 423, 427 (1971).

<sup>267</sup> *Kennerly v. Dist. Ct.*, 400 U.S. 423, 426-427 (1971). The state had not taken affirmative steps to assert jurisdiction as required by the Act, and the tribe had not consented in accordance with the post-1968 procedure specified in the Act. See 25 U.S.C. §§ 1322(a), 1326.

<sup>268</sup> See Ch. 2, § 2.02.



strictly for preemption purposes.<sup>269</sup>

### [f] Methods of Assuming Jurisdiction

#### [i] Jurisdiction Assumed Between 1953 and 1968

Public Law 280 presented several problems regarding what state actions were necessary to comply with the Act during the period between its enactment and the amendments of 1968 requiring Indian consent. Most of these problems have been resolved by the courts or clarified in the 1968 amendments.<sup>270</sup> Challenges to the procedures for acquiring Public Law 280 jurisdiction have also been raised by tribes subjected to post-1968 laws prescribing state jurisdiction “as if” the terms of Public Law 280, as amended, had been satisfied.

Section 6 of the original Act gave the consent of the United States to any state to amend “where necessary” its state constitution or statutes to remove “any legal impediment” to the assumption of jurisdiction under the Act.<sup>271</sup> The same section also removed the barrier of “the provisions of any Enabling Act for the admission of a State.” The basis for this section was that the eleven states admitted to the Union between 1889 and 1959 were required to disclaim jurisdiction over Indian lands as a condition of their admission.<sup>272</sup> Each state complied by insertion of an appropriate disclaimer in its state constitution, and these disclaimers cannot be repealed without federal consent.<sup>273</sup>

Seven so-called “disclaimer” states acted legislatively to accept some jurisdiction under Public Law 280 without amending their state constitutions.<sup>274</sup> The issue arose whether these actions were invalid, because section 6 required these states to amend their constitutions to acquire jurisdiction under the statute. In *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*,<sup>275</sup> the

<sup>269</sup> See *Schaghticoke Indians v. Potter*, 587 A.2d 139 (Conn. 1991); *Ahboah v. Hous. Auth. of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983). But see *Doe v. Santa Clara Pueblo*, 154 P.3d 644 (N.M. 2007) (finding that Public Law 280’s procedural requirements do not apply to tribal-state compacts made under the Indian Gaming Regulatory Act of 1988 (IGRA), and providing for state jurisdiction over personal injury claims by visitors to tribal casinos); *Cossey v. Cherokee Nation Enters., LLC*, 212 P.3d 447, 452–454 (Okla. 2009) (finding that IGRA created an alternate process for securing tribal consent to state jurisdiction through compacting); see also § 6.04[3][d][iii]. Public Law 280 does not preempt state laws that leave underlying jurisdictional arrangements undisturbed, and merely authorize cooperative agreements between states and tribes that enlist tribal police officers in enforcing state law. *State v. Manypenny*, 682 N.W.2d 143 (Minn. 2004).

<sup>270</sup> 25 U.S.C. § 1326.

<sup>271</sup> Act of Aug. 15, 1953, § 6, 67 Stat. 590 (codified as amended at 25 U.S.C. § 1324).

<sup>272</sup> These states are North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, New Mexico, and Alaska.

<sup>273</sup> See, e.g., Wash. Const. Art. 26(2).

<sup>274</sup> These states are Arizona, Idaho, Montana, North Dakota, South Dakota, Utah, and Washington. However, Arizona’s assumption was limited to control of air and water pollution, regulatory matters outside the scope of the state’s power under Public Law 280. See § 6.04[3][b][ii].

<sup>275</sup> *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463 (1979).



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Supreme Court held that amendment is not required by federal law.<sup>276</sup> Removal of this impediment to Public Law 280 jurisdiction of state constitutional disclaimers was found to be solely a question of state law.<sup>277</sup> State courts have concluded that state constitutional amendments are unnecessary.<sup>278</sup>

Litigants in two of the mandatory Public Law 280 states contended that these states must enact legislation accepting the jurisdiction before it would be valid, but the courts rejected the argument.<sup>279</sup> It is clear, however, that the Act's requirement of "affirmative legislative action" by the optional states precluded any valid assumption by these states by other means prior to 1968.<sup>280</sup> Under the Act as amended in 1968, the state action required to assume jurisdiction appears to be solely a question of state law.<sup>281</sup>

Another issue under the original Act was whether actions by optional states to assume part but not all of the jurisdiction offered by Public Law 280 were valid.<sup>282</sup> The 1968 amendment expressly authorizes partial assumptions, but the wording of the original Act left uncertainties. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, the Supreme Court sustained Washington's statute taking partial Public Law 280 jurisdiction, against challenges that the scheme was inconsistent with Public Law 280 and so irrational as to violate

<sup>276</sup> *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 484-493 (1979).

<sup>277</sup> *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 483 n.27, 493 n.39 (1979).

<sup>278</sup> See *Idaho v. Marek*, 736 P.2d 1314 (Idaho 1987); *State v. Dist. Ct.*, 496 P.2d 78 (Mont. 1972); *State v. Hook*, 476 N.W.2d 565 (N.D. 1991). South Dakota's assumption of partial Public Law 280 jurisdiction was invalidated on other grounds. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990). Two other disclaimer states, Arizona and Utah, have passed partial legislative assumptions which have not been challenged in court. An attempt to amend the state constitution failed in Wyoming. See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 547 (1975).

<sup>279</sup> *Anderson v. Gladden*, 188 F. Supp. 666 (D. Or. 1960), *aff'd*, 293 F.2d 463 (9th Cir. 1961); *Robinson v. Sigler*, 187 N.W.2d 756 (Neb. 1971); *Anderson v. Britton*, 318 P.2d 291 (Or. 1957); see *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 471-472, 497 (1979). The *Anderson* and *Robinson* decisions also rejected constitutional challenges to Public Law 280.

<sup>280</sup> See *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 493 (1979); *Kennerly v. Dist. Ct.*, 400 U.S. 423 (1971).

<sup>281</sup> The only federal procedural requirement now appears to be tribal consent by referendum. 25 U.S.C. §§ 1321, 1322, 1326; see *Kennerly v. Dist. Ct.*, 400 U.S. 423, 428-430 (1971).

<sup>282</sup> Partial assumptions were made in several forms: over some areas of Indian country, depending on Indian or local county consent; over some legal subjects; and over nontrust lands but not trust lands. Another tack was assumption conditioned on federal reimbursement for the cost. See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 553-558 (1975).



constitutional guarantees of equal protection.<sup>283</sup> Critical to the Court's decision, however, was the fact that Washington had agreed to take full civil and criminal jurisdiction with tribal consent. The United States had contended that selective Public Law 280 assumptions would violate the intent of Congress to reduce federal law enforcement financial burdens in Indian country, because a state could reject burdensome areas of jurisdiction and select only lucrative ones. Because of Washington's tribal consent provision, the Court was satisfied that the state had manifested sufficient willingness to undertake the full responsibilities associated with jurisdiction in Indian country. In contrast, South Dakota's partial assumption has been found invalid<sup>284</sup> because it asserted authority only over the revenue-rich realm of law enforcement and civil actions arising on state highways, conditioning full jurisdiction on federal reimbursement.<sup>285</sup> This attempt to accept highly selective Public Law 280 jurisdiction neither addressed Congress's concerns about improving reservation law enforcement nor indicated the state's willingness to assume the burdens of jurisdiction.

### **[ii] Jurisdiction Assumed After 1968**

Passage of the 1968 amendments requiring Indian consent for all future delegations under Public Law 280 has raised questions about the validity of state jurisdiction over later-recognized tribes, later-established state offenses, and later-acquired reservation lands in Public Law 280 states. Must there be Indian consent in accordance with the amendments before Public Law 280 applies to those tribes, offenses, or lands? State courts have answered this question in the negative, while recognizing that their own state laws may impose additional consent requirements.<sup>286</sup> These state court decisions may go too far in denying a consent requirement, especially when after-recognized tribes or broad new realms of offenses are involved.<sup>287</sup> When either mandatory or optional states agreed to the delegations, they assumed responsibility for law enforcement based on existing conditions, including the number of reservations, range of offenses, and extent of Indian country. The states may not be equipped or willing to assume a broadened responsibility. Furthermore, if a tribe recognized after 1968 is

<sup>283</sup> *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 493-499 (1979).

<sup>284</sup> *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990).

<sup>285</sup> S.D. Codified Laws Ann. §§ 1-1-12-1-1-21.

<sup>286</sup> See *State v. McCormack*, 793 P.2d 682 (Idaho 1990) (upholding jurisdiction to apply new procedures and increased penalties established after 1968, when those do not constitute "substantial change" in law); *State v. Squally*, 937 P.2d 1069 (Wash. 1997) (jurisdiction over 30 acres added to reservation after 1968 in optional state); *State v. Cooper*, 928 P.2d 406, 410-411 (Wash. 1996) (jurisdiction over tribe recognized after 1968 in optional state).

<sup>287</sup> State jurisdiction over additions of trust land to existing reservations may be justifiable to avoid an unmanageable patchwork of authorities. Cf. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976) ("Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach [to jurisdiction] within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.").



subjected to Public Law 280 jurisdiction that was assumed before the consent requirement, basic participatory values are thwarted. In an optional Public Law 280 state, that tribe would not have had the incentive or standing to oppose the state's original assumption of jurisdiction. It is noteworthy that in some post-1968 statutes recognizing individual tribes in Public Law 280 states, Congress has declared that the state shall exercise jurisdiction "in accordance with Public Law 280,"<sup>288</sup> which would appear unnecessary if after-recognized tribes automatically become subject to the Act.

A special set of procedural problems has emerged in states such as Connecticut and Texas, where tribes were recognized in federal laws that provided for state jurisdiction as if the tribe had consented to jurisdiction under the 1968 amendments to Public Law 280. It has not always been clear whether these statutes dispensed with the need for tribal consent to state jurisdiction. Under the Connecticut Indian Land Claims Settlement Act of 1983,<sup>289</sup> for example, statutory language applicable to the Mashantucket Pequot Tribe discarded the special election requirement of the 1968 amendments to Public Law 280, but the Settlement Act still tied state jurisdiction to a provision in those amendments that anticipated Indian consent, prompting one criminal defendant to claim that the state could not exercise jurisdiction until the affected Indians voted to accept it. The Connecticut Supreme Court rejected this claim,<sup>290</sup> and later applied its same reasoning to state civil jurisdiction under the Settlement Act.<sup>291</sup> In reaching these results, the Connecticut Supreme Court may not have given adequate deference to the Indian law canons of construction.<sup>292</sup> Other recent congressional acts providing for tribal recognition and land settlement have been more explicit about the immediate authorization of state jurisdiction, suggesting that Congress knows how to be definitive in dispensing with consent requirements.<sup>293</sup>

### [g] Retroceding Jurisdiction

As originally enacted, Public Law 280 made no provision for states to return any jurisdiction to the United States. The question received almost no attention during the debates on the Act and similar bills that had been introduced earlier. Responding to Indian dissatisfaction with state jurisdiction and states' unhappiness over the financial burdens of law enforcement in Indian country, Congress amended Public Law 280 in 1968. The 1968 amendments provided for retroces-

<sup>288</sup> See, e.g., Pub. L. 101-42, § 6, 103 Stat. 92 (1989) (restoring Coquille Indian Tribe of Oregon).

<sup>289</sup> 25 U.S.C. § 1755.

<sup>290</sup> *State v. Spears*, 662 A.2d 80, 91 (Conn. 1995).

<sup>291</sup> *Charles v. Charles*, 701 A.2d 650, 653 (Conn. 1997).

<sup>292</sup> See Ch. 2, § 2.02.

<sup>293</sup> When restoration of recognition was provided to one tribe in a mandatory Public Law 280 state, Congress announced that "[t]he State shall exercise criminal and civil jurisdiction within the boundaries of the reservation in accordance with [Public Law 280]." Pub. L. 101-42, § 6, 103 Stat. 92 (1989) (restoring Coquille Indian Tribe of Oregon).



sions of “all or any measure of the criminal or civil jurisdiction, or both,” acquired by both mandatory and optional states pursuant to the provisions of Public Law 280 as it existed prior to the amendments.<sup>294</sup> Curiously, Congress failed to provide any means for retroceding post-1968 state assumptions of jurisdiction,<sup>295</sup> although the flexible terms of the amended Act may allow tribes or states to condition their respective consents to jurisdiction on the future possibility of retrocession. Retrocession provisions are also lacking in the post-1968 recognition and land settlement acts that authorize state jurisdiction as if the affected Indians had consented under Public Law 280.<sup>296</sup>

The President has delegated authority to the Secretary of the Interior to accept a state’s offer to relinquish full or partial jurisdiction under the Act after consultation with the Attorney General.<sup>297</sup> Full or partial retrocessions have been accepted for more than 30 reservations covered by Public Law 280 or statutes linked to Public Law 280.<sup>298</sup> Public Law 280’s provision for retrocession requires no particular form of state action to initiate a return of jurisdiction. Both an apparently valid governor’s proclamation<sup>299</sup> and a resolution of a state legislature<sup>300</sup> have been found sufficient for federal purposes.<sup>301</sup> Furthermore, the

<sup>294</sup> 25 U.S.C. § 1323.

<sup>295</sup> For a history of the 1968 amendments to Public Law 280, including the consideration of retrocession, see Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280, in Forty Years of the Indian Civil Rights Act: History, Tribal Law, and Modern Challenges* (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds., 2011).

<sup>296</sup> The explanation for the absence of retrocession language in these statutes may be that state jurisdiction is conferred “as if” it had been obtained pursuant to Public Law 280 as amended in 1968 to require tribal consent. These 1968 amendments authorized retrocession only for the reservations that had been subjected to state jurisdiction in the 1953–1968 period, when consent was not required. In one exceptional case, Congress allowed for retrocession as part of the restoration of federal recognition to the Coquille Tribe of Oregon. Congress provided that “[r]etrocession of [state jurisdiction] may be obtained pursuant to section 403 of the Act of April 11, 1968.” 25 U.S.C. § 715d.

<sup>297</sup> Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (1968). Retrocession does not become effective until it has been accepted by the Secretary of the Interior. *State v. Wabashaw*, 740 N.W.2d 583, 590–591 (Neb. 2007).

<sup>298</sup> 71 Fed. Reg. 7994 (2006) (Santee Sioux); 65 Fed. Reg. 75,948 & 77,905 (2000) (Tulalip); 60 Fed. Reg. 33,318 (1995) (Salish-Kootenai); 54 Fed. Reg. 19,959 (1989) (Confederated Tribes of the Chehalis Reservation, Quileute Reservation and the Swinomish Tribal Community); 53 Fed. Reg. 5837 (1988) (Ely Colony); 52 Fed. Reg. 8372 (1987) (Colville); 51 Fed. Reg. 24,234 (1986) (Winnebago); 50 Fed. Reg. 34,555 (1985) (Pascua Yaqui Reservation); 46 Fed. Reg. 2195 (1981) (Umatilla Reservation); 41 Fed. Reg. 8516 (1976) (Menominee Reservation); 40 Fed. Reg. 27,501 (1975) (fifteen Nevada reservations); 40 Fed. Reg. 4026 (1975) (Nett Lake Reservation); 37 Fed. Reg. 7353 (1972) (Port Madison Reservation); 35 Fed. Reg. 16,598 (1970) (Omaha Reservation); 34 Fed. Reg. 14,288 (1969) (Quinault Reservation).

<sup>299</sup> *United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979).

<sup>300</sup> *Omaha Tribe v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff’d*, 460 F.2d 1327 (8th Cir. 1972).



Secretary may accept less than all the jurisdiction offered by a state, thereby requiring the state to retain the rest.<sup>302</sup> By selective acceptance, the Secretary can respond to tribal preferences concerning jurisdiction. Selective acceptance also provides an opportunity to assure that the resulting jurisdictional scheme is workable and does not return to the federal government the most burdensome law enforcement tasks while leaving the state with the most lucrative.

Although Secretarial consultation may provide tribes with some influence over the retrocession decision, the statute gives Indian nations no power to initiate retrocessions or to veto those initiated by states.<sup>303</sup> This denial of initiative to Indian nations is a serious flaw in the statutory scheme. Recent court decisions confirming that tribes possess concurrent jurisdiction, coupled with more frequent deference by state courts to their tribal counterparts, may render retrocession a less compelling need for some tribes. Amendments to Public Law 280 through the Tribal Law and Order Act of 2010 may lessen the need for tribes to retrocede and pave the way for retrocession by allowing Public Law 280 tribes to request

<sup>301</sup> The Secretary's interpretation of the effectiveness of the Act is controlling, and the Secretary's acceptance of jurisdiction will not be set aside subsequently based on questions about the validity of the offer. *Omaha Tribe v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972); *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971). This reliance on federal determinations to validate retrocession contrasts notably with the legal principles applied to assumptions of jurisdiction, in which state requirements control. See § 6.04[3][f][i]. State rather than federal law will control, however, when the question is whether a retroceding state saved jurisdiction over pending cases involving pre-retrocession offenses. With respect to pre-retrocession offenses, the federal government has put no resources into prosecutions, and thus has no interest in upholding its exercise of jurisdiction. *Tyndall v. Gunter*, 681 F. Supp. 641 (D. Neb. 1987), *aff'd*, 840 F.2d 617 (8th Cir. 1988); see also *United States v. Strong*, 778 F.2d 1393 (9th Cir. 1985).

<sup>302</sup> *Omaha Tribe v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972).

<sup>303</sup> The legislative history of the retrocession provision of the 1968 amendments to Public Law 280 is analyzed in Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280*, in *Forty Years of the Indian Civil Rights Act: History, Tribal Law, and Modern Challenges* (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds., 2011). States are under no obligation to condition their actions on tribal consent, although some have done so. A number of state assumptions under the original Act were conditioned on tribal consent. See § 6.04[3][f][i]. The only state to authorize Public Law 280 jurisdiction since 1968, Utah provided that Indian nations have the right to initiate full or partial retrocessions. 1971 Utah Laws 539, § 7 (codified at Utah Code Ann. § 9-9-207). The effectiveness of the provision is uncertain, because the Secretary only has express authority to accept retrocessions of jurisdiction assumed under Public Law 280 as it existed before 1968. See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535, 559 n.112 (1975). In view of the fact that no tribe has consented to Utah's jurisdiction, the issue is probably moot. One tribe in a mandatory Public Law 280 state, the Timbisha Shoshone Tribe in California, was afforded the opportunity for a kind of retrocession when its first reservation was established in 2000. Pub. L. No. 106-423, 114 Stat. 1875, § 7 (2000) (providing that three years after passage of the Act, Public Law 280 shall cease applying to the reservation "upon the certification by the Secretary, after consultation with the Attorney General, that the law enforcement system in place for such lands will be adequate to provide for the public safety and the public interest").



restoration of federal criminal jurisdiction under the Indian Country Crimes Act and the Major Crimes Act.<sup>304</sup> Nevertheless, state jurisdiction still works at cross purposes to many native forms of dispute resolution and social control, and Public Law 280 still operates to diminish the flow of federal support for tribal law enforcement and court development. The absence of provision for tribally initiated retrocession thus contradicts the concept of consensual, government-to-government relations. Even tribes that initially consented to state jurisdiction should be empowered to reclaim their exclusive authority and to reinstate shared jurisdiction with the United States if conditions change.<sup>305</sup>

One section of the Indian Child Welfare Act of 1978,<sup>306</sup> authorizes tribes affected by Public Law 280 or any other federal delegation statute to “reassume” jurisdiction over child custody proceedings.<sup>307</sup> Under Public Law 280, Indian nations lost no jurisdiction,<sup>308</sup> and states acquired no authority over involuntary child welfare matters if they are considered regulatory in nature because of state agencies’ involvement in evaluating the parents and their homes.<sup>309</sup> Hence, the main function of the reassumption provision should be to restore exclusive rather than concurrent tribal jurisdiction over voluntary child welfare proceedings, which are private civil actions and therefore covered by Public Law 280. Tribes may also employ the reassumption process to erase any doubts or resolve conflicts about their exclusive or concurrent jurisdiction.<sup>310</sup> A reassumption is initiated by submitting a petition to the Secretary that includes a plan for exercising jurisdiction. The Secretary has authority to approve or reject the petition and to accept all or part of the jurisdiction sought by a tribe based on specified criteria.<sup>311</sup>

#### [4] Other Statutes Applicable to Specific Locations

##### [a] New York

Before 1942, the state of New York regularly exercised or claimed the right to exercise jurisdiction over the New York reservations,<sup>312</sup> but a federal court

<sup>304</sup> See § 6.04[3][d][1].

<sup>305</sup> For an empirical study of tribal experiences with retrocession and the views of reservation residents and non-tribal officials on the desirability of retrocession, see Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280* (Carolina Academic Press 2012).

<sup>306</sup> 25 U.S.C. § 1901 et seq.

<sup>307</sup> 25 U.S.C. § 1918; 25 C.F.R. Pt. 13; see § 6.04[3][d][ii].

<sup>308</sup> See § 6.04[3][c].

<sup>309</sup> 70 Op. Att’y Gen. Wis. 237 (1981). *But see* Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005) (combination of Public Law 280 and the Indian Child Welfare Act gives state courts concurrent jurisdiction with tribal courts over involuntary child welfare proceedings involving on-reservation children). See generally § 6.04[3][d][ii].

<sup>310</sup> 25 C.F.R. § 13.1(b).

<sup>311</sup> 25 U.S.C. § 1918(b).

<sup>312</sup> See *Hearings on S. 1683, S. 1686, S. 1687 Before the Subcomm. on Indian Affairs of the S. Comm. on Interior & Insular Affairs*, 80th Cong. 13 (1948); J. Whipple, Report of Special