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SUPREME COURT
STATE OF WASHINGTON
2014 JAN 21 P 4: 04 *E*

NO. 88482-0

SUPREME COURT BY RONALD R. CARPENTER
OF THE STATE OF WASHINGTON
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OUTSOURCE SERVICES MANAGEMENT, LLC,

Respondent,

vs.

NOOKSACK BUSINESS CORPORATION,

Appellant.

PETITIONER NOOKSACK BUSINESS CORPORATION'S
STATEMENT OF ADDITIONAL AUTHORITIES

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Attorneys for Petitioner Nooksack Business Corporation

Petitioner Nooksack Business Corporation (“NBC”) pursuant to RAP 10.8 submits this Statement of Additional Authorities regarding the following authorities:

1. *Pueblo of Santa Ana and Tamaya Enterprises, Inc. v. Honorable Nan G. Nash; Gina Mendoza; F. Michael Hart; and Dominic Montoya*, United States District Court for the District of New Mexico, CIV Cause No. 11-957 LH/LFG (attached 9/25/13 *Memorandum Opinion and Order* and 10/2/13 *Amended Final Judgment*). This is offered for the issue of proper analysis of subject matter jurisdiction regarding claims against Indian tribes where contractual provisions waiving sovereign immunity and purporting to consent state court jurisdiction are involved.

2. RCW 37.12.160 (2012) (attached), permitting retrocession of civil and/or criminal jurisdiction “over a federally recognized Indian tribe, and the Indian country of such tribe” obtained pursuant to PL 280 and RCW 37.12.010. This is offered for the issue of the scope of PL 280 and RCW 37.12.010 regarding jurisdiction over an Indian tribe or Indian country, and to demonstrate the Washington Legislature’s modern policy to support Indian sovereignty and jurisdiction by creating a new procedure for retrocession. *See also* legislative history materials: (1) Final Bill Report ESHB 2233 C 48 L 12; (2) House Bill Report 2233; and (3) Senate

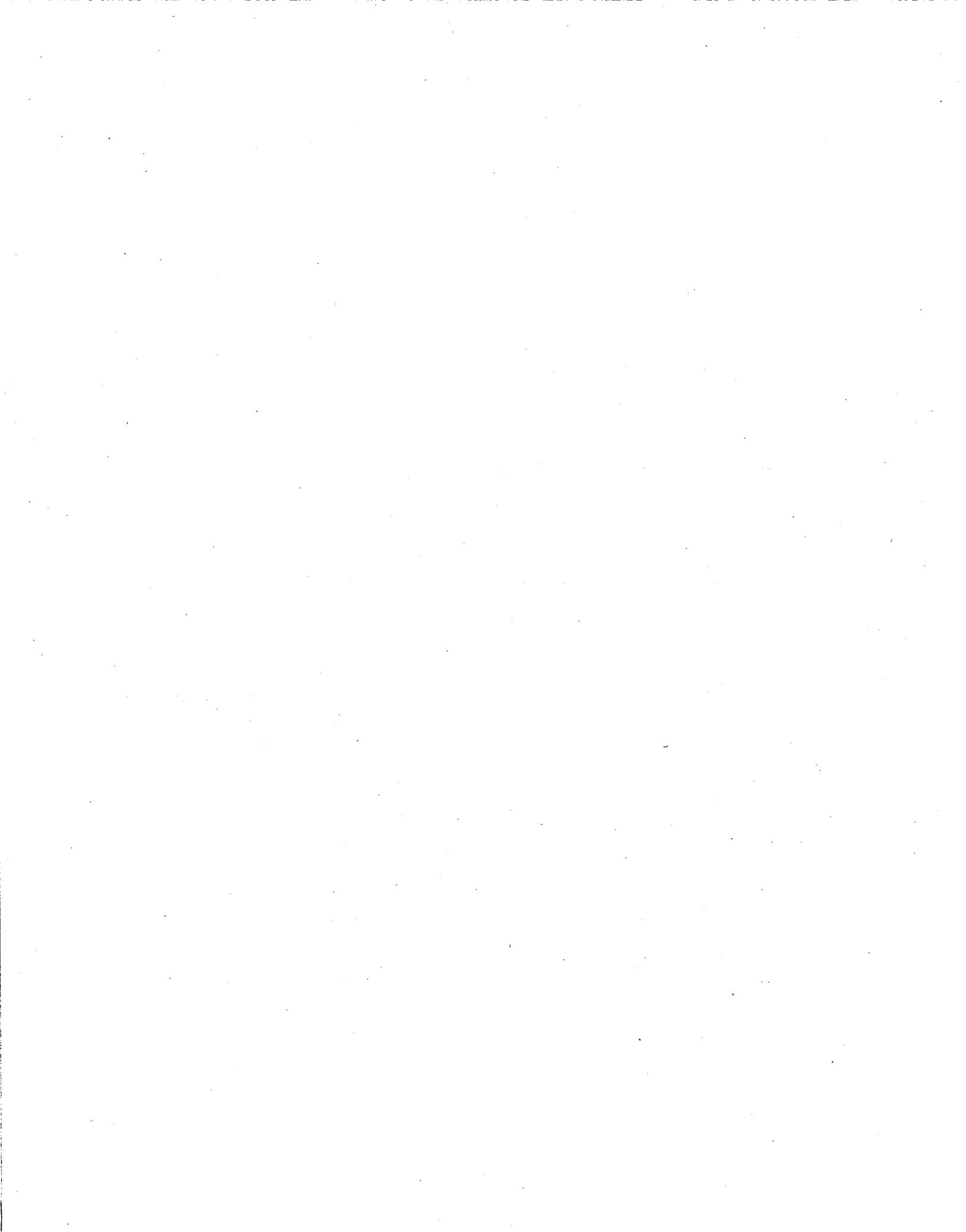
Bill Report ESHB 2233 (12/16/12) (all attached); Anderson, Robert T., *Article: Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280*, 87 Wash. L. Rev. 915 (2012) (attached).

3. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-218, note 17, 218-219, 107 S. Ct. 1083, 94 L. Ed.2d 244 (1987). NBC previously cited *Cabazon Band. NBC's Supplemental Brief* at 11. This authority also is offered on the scope of PL 280 and RCW 37.12.010 regarding jurisdiction over an Indian tribe or Indian country (at 214-218 and note 17), and on the importance of tribal gaming enterprises to tribal self-government and self-determination (at 218-219). *See also* Anderson, Robert T., *supra*, 87 Wash. L. Rev. at 932-45.

Respectfully submitted on this 21st day of January, 2014.

SCHWABE, WILLIAMSON & WYATT, P.C.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**PUEBLO OF SANTA ANA and
TAMAYA ENTERPRISES, INC.,**

Plaintiffs,

v.

CIV No. 11-957 LH/LFG

**HONORABLE NAN G. NASH, District
Judge, New Mexico Second Judicial,
Division XVII, in her Individual and Official
Capacities; GINA MENDOZA, as Personal
Representative under the Wrongful Death Act
of Michael Mendoza, Deceased; F. MICHAEL
HART, as Personal Representative under the
Wrongful Death Act of Desiree Mendoza, Deceased;
and, DOMINIC MONTOYA,**

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court for consideration of Plaintiffs' Motion for Summary Judgment (ECF No. 52) and Defendant Mendozas' Second Motion for Summary Judgment (ECF No. 73). The Court, having considered the motions, all related briefs and exhibits, and being otherwise fully advised, concludes that Plaintiffs' Motion for Summary Judgment is **granted in part and denied in part**, and that Defendant Mendozas' Second Motion for Summary Judgment is **denied**. Specifically, the Court hereby enters a declaration that the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") does not authorize an allocation of jurisdiction from tribal court to state court over a personal injury claim arising from

the allegedly negligent serving of alcohol on Indian land, and further that the New Mexico State District Court does not have jurisdiction in the case of *Gina Mendoza, Michael Hart and Dominic Montoya v. Tamaya Enterprises, Inc., d/b/a Santa Ana Star Casino*, CIV 2007-005711 (“underlying state court litigation”).

I. Allegations of the Complaint Filed in Federal Court

The Complaint in this matter (ECF No. 1) asserts federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1362 and 1343. It seeks injunctive and declaratory relief, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Specifically, Plaintiffs Pueblo of Santa Ana and Tamaya Enterprises, Inc. (collectively referred to as “Pueblo Plaintiffs” or “the Pueblo”) seek: (1) an order prohibiting New Mexico District Court Judge Nan Nash (“Defendant Nash”) from exercising jurisdiction over the case now pending before her, in violation of the Pueblo Plaintiffs’ rights under the Fourteenth Amendment of the United States Constitution (Compl., Count I); and, (2) a declaration that the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* “does not permit the shifting of jurisdiction from tribal courts to state courts over personal injury lawsuits brought against tribes or tribal gaming enterprises, for alleged wrongs arising or occurring within Indian country, and that thus the New Mexico state courts do not have jurisdiction over [the underlying state court litigation].” (Compl., Count II).

II. Undisputed Facts and Applicable Gaming Compact Language

The following facts are undisputed and germane to the strictly legal issues raised by the motions for summary judgment. Tamaya Enterprises, Inc. (“TEI”) owns and operates the Santa Ana Star Casino (“Star Casino” or “casino”). TEI is wholly owned by the Pueblo of Santa Ana.

The Pueblo of Santa Ana is a federally recognized Indian tribe. The Star Casino is located on Santa Ana Pueblo lands, within the exterior boundaries of the Pueblo.

As explained in this Court's November 9, 2012 Memorandum Opinion (ECF No. 82 at 2), pursuant to the Indian Gaming Regulatory Act, on October 2, 2001, the State of New Mexico and the Pueblo of Santa Ana entered into a Tribal-State Class III Gaming Compact ("the Compact")¹(ECF No. 51, Ex. A). It permits TEI to operate the Star Casino on behalf of the Pueblo. The negotiation process led to various provisions in the Compact.

As indicated in its title, the IGRA establishes a regulatory framework for Indian gaming. In 25 U.S.C. § 2710(d)(3)(C), the IGRA states the following, insofar as negotiation of compacts is concerned:

(C) Any Tribal-State compact negotiated under subparagraph (A)² may include provisions relating to --

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies for breach of contract;
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
- (vii) any other subjects that are directly related to the operation of gaming activities.

¹ The text of the Compact can be found at <http://www.nmgcb.org/tribal/compacts.html>.

² This subparagraph (A) states: "Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact *governing the conduct of gaming activities*. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A)(emphasis added).

Section 8 of the Compact, entitled "Protection of Visitors," reads, in pertinent part, as follows:

A. Policy Concerning Protection of Visitors. The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers such injury or loss, agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. **For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.** (emphasis added)

.....

D. Specific Waiver of Immunity and Choice of Law. The Tribe, by entering into this Compact and agreeing to the provisions of this Section, waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million (\$50,000,000) per occurrence asserted as provided in this Section. This is a limited waiver and does not waive the Tribe's immunity from suit for any other purpose. The Tribe shall ensure that a policy of insurance that it acquires to fulfill the requirements of this Section shall include a provision under which the insurer agrees not to assert the defense of sovereign immunity on behalf of the insured, up to the limits of liability set forth in this Paragraph. The Tribe agrees that in any claim brought under the provisions of this Section, New Mexico law shall govern the substantive rights of the claimant, and shall be applied, as applicable, by the forum in which the claim is heard, except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe.

E. Election by Visitor. A visitor having a claim described in this Section may pursue that claim in any court of competent jurisdiction, or in binding arbitration. The visitor shall make a written election that is final and binding upon the visitor.

.....

III. Underlying State Court Litigation

Although the procedural history of this case has been set forth in two prior opinions of this Court (*see* ECF Nos. 43 and 82), for ease of reference, the Court will now briefly summarize the most relevant aspects of this history. On July 9, 2006, Desiree Mendoza, Michael Mendoza, and Dominic Montoya attended a wedding reception at the Star Casino. According to the state court complaint subsequently filed, Desiree and Michael Montoya were over-served alcoholic beverages by TEI, resulting in a one-car accident in which Desiree and Michael were killed, and their cousin, Dominic, was injured.

The Personal Representatives for Michael Mendoza and Desiree Mendoza, and Dominic Montoya (“State Court Plaintiffs”) filed the underlying state court action against TEI only, in Bernalillo County District Court. That wrongful death suit sought imposition of liability on the Star Casino for selling or serving alcoholic beverages to intoxicated persons. It alleged that the casino’s delivery of alcohol to Michael and Desiree, while they were obviously intoxicated, was in violation of Section 184 of the Pueblo Liquor Ordinance³, and proximately caused their deaths. The casino filed a motion to dismiss for failure to state a claim upon which relief could be granted, arguing that the plaintiffs could only bring their claims in tribal court and that the state district court lacked jurisdiction. The Honorable Nan Nash granted the motion, dismissing the case.

On appeal, the New Mexico Court of Appeals disagreed, holding that Judge Nash had jurisdiction over the action based on the plain terms of Section 8(A) of the Compact. *Mendoza v. Tamaya Enterprises, Inc.*, 148 N.M. 534 (Ct. App. 2010). While acknowledging that Section

³ *See* 71 Fed. Reg. at 17,909, which provides a duty not to serve alcohol to intoxicated individuals, because of Section 191 of the Pueblo Liquor Ordinance, *id.* at 17,910. Section 191 provides that any action premised on a violation of the Pueblo Liquor Ordinance “shall be brought in the Tribal Court of the Pueblo, which court shall have exclusive jurisdiction thereof.” *Id.* at 17,910 (emphasis added).

191 of the Pueblo Liquor Ordinance provided that all actions pertaining to its violation shall be brought in tribal court, the court of appeals characterized the underlying state court litigation as being a case for “damages based on wrongful death through negligence,” as opposed to a claim under the Ordinance for breach of a duty not to sell alcohol to intoxicated individuals. *Id.* at 542. The court of appeals found that this negligence claim was covered by Section 8 of the Compact, and that entering into the Compact was an acknowledgement by the Pueblo that it waived its defense of sovereign immunity in connection with claims for compensatory damages for bodily injury or property damage, and that any claim could be brought in state district court. *Id.*

The New Mexico Supreme Court affirmed the court of appeals, finding that even though the Pueblo’s Liquor Ordinance provided for exclusive jurisdiction in tribal court, “by virtue of Section 8 of the Compact, the Pueblo unambiguously agreed to proceed in state court for claims involving injuries proximately caused by the conduct of the Casino.” *Mendoza v. Tamaya Enterprises, Inc.*, 150 N.M. 258, 263 (2011). After making this jurisdictional determination, the supreme court proceeded to the merits of the Personal Representatives’ wrongful death claims. The court ultimately concluded that the state court complaint stated sufficient facts to establish a third-party common law claim with respect to the passengers of the vehicle, as well as a patron claim with respect to the driver. *Id.* at 260-261. On June 27, 2011, the New Mexico Supreme Court remanded the case to state district court for further proceedings consistent with its opinion.

IV. Federal Court Litigation

Four months later, the Pueblo Plaintiffs filed this matter in federal court. The relief sought in the complaint is explained above. An April 10, 2012 Memorandum Opinion (ECF No. 43) addressed motions to dismiss filed by the Defendants (“Federal Court Defendants” or “non-

tribal Defendants”) in this case. In that opinion, the Honorable Bruce Black declined to conclude that the *Rooker-Feldman* doctrine⁴ barred the jurisdiction of this Court. (*Id.* at 13). He also held that the Pueblo’s claim in this litigation for injunctive relief against Judge Nash is not cognizable, but that the claim against her for prospective declaratory relief is not barred, and remains a viable claim in this lawsuit. (*Id.* at 17).

The Personal Representatives for Desiree and Michael Mendoza subsequently filed a motion for summary judgment based on the doctrines of res judicata and collateral estoppel. Judge Black’s second Memorandum Opinion held that both of these doctrines were inapplicable (ECF No. 82). Because the Pueblo was not a party to the state court litigation, Judge Black analyzed whether the Pueblo was in privity with TEI, which was a party in the underlying state court litigation. Following a lengthy analysis, Judge Black concluded that the two parties were in privity for purposes of collateral estoppel (*id.* at 9-14), insofar as the legal issues that have been raised in this federal court litigation are concerned, based on the close relationship between Tamaya and the Pueblo with respect to Compact issues, and the identity of their interests with respect to the state-court jurisdictional issue. In fact, Judge Black concluded that each entity’s interest is identical, and that this interest is the same as TEI’s interests in the underlying state court litigation. (*Id.* at 14).

In concluding that collateral estoppel nevertheless does not apply in this case, Judge Black noted that, although both the state and federal cases involve the issue of whether the state district court has subject-matter jurisdiction, the specific jurisdictional arguments raised by the Pueblo Plaintiffs in the federal litigation (*i.e.*, the legal efficacy of the tribal consent to state-court jurisdiction in Section 8 of the Compact, and the legal validity of *Doe v. Santa Clara Pueblo*,

⁴ See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

141 N.M. 269 (2007)) were not discussed by either party in the underlying state court litigation or by the New Mexico appellate courts, following Judge Nash's dismissal of the case in state district court. Accordingly, Judge Black concluded that neither of the Pueblo Plaintiffs has yet actually litigated these issues; therefore these issues, that have been raised only in the federal forum, were not "actually litigated" in the underlying state court litigation; and, it would be unfair to apply collateral estoppel to prevent the Pueblo Plaintiffs from litigating these questions in this Court. (*Id.* at 19).

Judge Black also refused to apply res judicata to preclude the claims in this litigation. His basis for this refusal was that the claim in this litigation (whether the IGRA allows states and tribes to shift jurisdiction over a visitor's personal injury suit) differs from those in the underlying state court litigation (wrongful death claims). (*Id.* at 14, 20).

Following entry of those opinions, this case was transferred to the undersigned judge on December 28, 2012.

V. Arguments of the Pueblo Plaintiffs

In this federal litigation, as set forth more fully in their Complaint, the Pueblo Plaintiffs ask this Court to enter a declaratory judgment regarding the IGRA's constraints on shifting of jurisdiction from tribal to state court. They seek a ruling that Judge Nash lacks jurisdiction to hear the underlying lawsuit.

The Pueblo Plaintiffs make the following arguments. First, they rely upon the sentinel case of *Williams v. Lee*, 358 U.S. 217 (1959), for the principle that tribal courts retain exclusive jurisdiction over lawsuits arising on tribal lands against tribes, tribal members or tribal entities. They contend that the *Williams* decision rests on the principle of inherent tribal sovereignty, and

that, absent a grant of jurisdiction by Congress, the States have no power to regulate the affairs of Indians on a reservation. (Pls.' Mot. Summ. J., ECF No. 52 at 5 (citing *Williams*, 358 U.S. at 220)). They argue that an attempted exercise of such jurisdiction by state courts directly undermines "the authority of tribal courts over Reservation affairs," and thus infringes on "the right of [the Pueblo] to govern [itself]." (*Id.* at 6 (citing *Williams*, 358 U.S. at 223)). The Pueblo Plaintiffs contend that nowhere does the IGRA expressly permit the shifting of jurisdiction over private personal injury suits to state court, and that this is the real crux of the matter. (*Id.* at 11). Specifically, they assert that no provision of the IGRA permits a transfer of jurisdiction from tribal to state courts, based upon an agreement in a compact, and that consequently the *Williams* rule of exclusive tribal jurisdiction controls.

The Pueblo Plaintiffs set forth the relevant portions of Section 8(a) of the Compact. Relying on the Report of the Senate Indian Affairs Committee,⁵ they argue that relevant legislative history shows that the IGRA jurisdiction-shifting provision is solely directed at concern over possible criminal infiltration of tribal gaming; that the state's role was strictly limited to the regulation of class III gaming; and that Congress did not intend the IGRA as an invitation to any broader assertions of state authority in Indian country. (Pls.' Mot. Summ. J., ECF No. 52 at 14-17).

They argue that the extension of state court jurisdiction, and the application of state laws, as provided by the IGRA, were not contemplated by Congress for any purposes other than the regulation of class III gaming, and that the specific terminology in 25 U.S.C § 2710(d)(3)(C) does not indicate that Congress contemplated a transfer to state courts of pre-existing tribal court jurisdiction over ordinary, private, civil causes of action that have no relation to the conduct of gaming, other than the fact that the cause of action arose on the premises of a gaming facility.

⁵ See SEN. REP. NO. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071 ("the Report").

(*Id.* at 19). They contend that the claims in the underlying state action have no bearing whatsoever on the licensing or regulation of class III gaming activities.

The Pueblo Plaintiffs' next argument is that, although in the *Doe* case the New Mexico Supreme Court was presented with the same issue which is now squarely before this Court, this Court should give that decision no deference, and should rule conversely. (Pls.' Mot. Summ. J., ECF No. 52 at 21). On the merits, they argue that the *Doe* court improperly disregarded the requirement of express congressional authority for allowing state court jurisdiction over Indian people and entities, and that an easy inference of such authority from vague passages in the IGRA legislative history ignores the strict language of the statute itself. Furthermore, the Pueblo Plaintiffs criticize the *Doe* opinion for disregarding the language in the Report that specifically warns against using the compact device to achieve any unauthorized broadening of state power in Indian Country. Finally, they stress that the New Mexico Supreme Court wrongfully rejected a canon of construction, under *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (the so-called "Indian Canon"), under which statutes are to be construed liberally in favor of Indians, with ambiguous provisions construed to their benefit. For all of these reasons, the Pueblo Plaintiffs urge this Court to disregard the *Doe* decision.

The Pueblo Plaintiffs close with the assertion that either a tribal court adjudication or arbitration will provide the State Court Plaintiffs with an effective remedy for resolution of their personal injury claims against the tribal entities in this case.

VI. Arguments of the Non-Tribal Defendants

The four non-tribal Defendants in this federal litigation are basically aligned in their arguments in favor of state court jurisdiction.⁶ These parties maintain that the IGRA contains no language that prohibits the Pueblo of Santa Ana from waiving its immunity and agreeing to the subject matter jurisdiction of the state court, pursuant to the relevant compact. It is their position that there is no applicable statute, case or rule of law that requires congressional approval for a tribe to waive sovereign immunity, and that the IGRA does not contain such a requirement. (Mendoza Defs.' Resp., ECF No. 65 at 5). They cite *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001), and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), for the proposition that tribes do not need congressional approval to waive immunity and argue that the waiver of tribal immunity in the Compact, in this instance, is exceptionally clear.

The Mendoza Defendants note the shortage of case law in this area, either in support or in opposition to their position that visitor tort and personal injury claims are within the scope of statutorily permitted areas of compact negotiations under the IGRA. (Mendoza Defs.' Resp., ECF No. 65 at 9-12). In support of their position that the IGRA permits states and tribes to negotiate jurisdictional shifting, from tribal court to state court, as it pertains to visitors' personal injury claims, they rely on the *Doe* case as well as upon *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *9 (W.D.Okla. Oct. 27, 2010).⁷

The Mendoza Defendants point out that § 2710(d)(3)(C)(vii) allows tribes to enter into compacts that could include provisions relating to "any other subjects that are directly related to

⁶ Although he did not file a separate response to the Pueblo's motion for summary judgment, on July 2, 2012, Defendant Dominic Montoya filed a notice of joinder in the response of both the Mendoza Defendants and of Defendant Nash (ECF No. 66).

⁷ These two cases, which have no precedential effect on this Court, conducted similar analyses, which, as is explained below, have been rejected by this Court in favor of its statutory construction analysis of the IGRA.

the operation of gaming activities.” They urge the Court to interpret this subparagraph to mean that “other subjects” directly related to the operation of gaming activities includes personal injury claims.

They also refer the Court to the Report of the Senate Indian Affairs Committee, arguing that the IGRA’s legislative history supports jurisdiction-shifting:

In the Committee’s view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribes and states. This is a strong and serious presumption that must provide the framework for negotiations. A tribe’s governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State’s governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State’s public policy, safety, law and other interests, as well as impacts on the State’s regulatory system, including its economic interest in raising revenue for its citizens.

1988 U.S.C.A.N. 3071, 3083.

The Mendoza Defendants argue that, because a compact is a creature of contract law, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 49 (1996), and because Section 8 is not prohibited by the IGRA, the Pueblo’s waiver of sovereign immunity is valid and meets the clarity requirements for such waivers. Accordingly, they contend that their underlying state court case is a legitimate and valid exercise of state court jurisdiction under the Compact. (Mendoza Defs.’ Resp., ECF No. 65 at 14-15). They argue that the *Williams* case and its progeny are inapplicable in the face of this authorized, valid and clear waiver of immunity, which should be upheld.

Judge Nash characterizes the Compact as a contract that was expressly authorized by federal law, which contains a waiver of immunity and submission to state-court jurisdiction in

one simple section. She argues that the Compact explicitly contemplates the allocation of jurisdiction between state and tribal courts and that, in entering into this Compact, the Pueblo had the power to agree to the jurisdiction-shifting provision in Section 8(a). (Nash Resp., ECF No. 56 at 3-6). In response to the Pueblo Plaintiffs' argument that shifting of jurisdiction to state courts, as provided for by the IGRA, was contemplated by Congress only for purposes related to regulation of class III gaming, she argues that regulation of the service of alcohol and its potentially dangerous interactions with gaming activity, are in fact, directly related to, and necessary for, the regulation of gaming activities. (*Id.* at 11).

VII. Analysis

The IGRA is a federal statute, the interpretation of which presents a federal question, suitable for determination by a federal court. It is on this basis that this Court will exercise its jurisdiction in this matter. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997). This Court recognizes that in *Doe v. Santa Clara*, the New Mexico Supreme Court ruled on the same issue now before this Court and concluded that the state district court had jurisdiction in that case. While federal courts must defer to a state court's interpretation of its own law, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), federal courts owe no deference to a state court's interpretation of a federal statute. *United States v. Miami University*, 294 F.3d 797, 811 (6th Cir. 2002). *See also Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 712-13 (10th Cir. 1989)(noting that "federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country").

Generally, absent clear federal authorization, state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country. *See COHEN'S HANDBOOK OF FEDERAL*

INDIAN LAW § 7.03[1][a][ii] at 609 (Nell Jessup Newton ed., 2012)(“COHEN’S HANDBOOK”). The seminal United States Supreme Court decision concerning state civil adjudicatory authority in Indian country is *Williams v. Lee*. See AMERICAN INDIAN LAW DESKBOOK at 266 (U.PRESS OF COLO. 2008). In *Williams*, Hugh Lee, a non-Indian, brought suit in Arizona state court against Paul Williams, who was a Navajo Indian. Williams purchased goods at Lee’s store on the reservation and failed to pay for them. Williams argued that exclusive jurisdiction lay in the tribal courts and the Supreme Court agreed. Noting that Navajo courts exercise broad criminal and civil jurisdiction, which covers suits by outsiders against Indian defendants, the Court found that it was “immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.” *Williams*, 358 U.S. at 222.

Williams stated that, unless changed by “governing Acts of Congress,” tribal courts retain exclusive jurisdiction over claims arising on tribal lands against tribes. (*Id.* at 220). Congress may authorize jurisdiction over such a suit to a state court. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)(noting that “Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights”).

The exclusive jurisdiction of tribal courts may also be shifted to state court by a valid, clear tribal waiver of immunity, under certain circumstances. “As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998)(citations omitted).⁸ At this juncture, this Court must decide if either of these prerequisites to state court jurisdiction is present in this case.

⁸ In *Kiowa Tribe*, the Supreme Court noted that “Congress has acted against the background of our decisions. It has restricted tribal immunity from suit in limited circumstances. See, e.g., 25 U.S.C. § 450f(c)(3)(mandatory liability insurance); §2710(d)(7)(A)(ii)(gaming activities).”

A. Congressional Enactment of the IGRA

The first inquiry before the Court is whether Congress, by way of the IGRA, has authorized tribes and states to agree to shifting jurisdiction from tribal court to state court, thereby allowing the state to exercise jurisdiction over tribal defendants in visitors' personal injury lawsuits arising on Indian land. For the reasons that follow, the Court concludes that the IGRA does not permit such a jurisdictional shifting.

1. Purpose of the IGRA

To consider this issue in the proper context, the Court must examine the IGRA's purpose. Its first stated purpose is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. *See* 25 U.S.C. § 2702(1). Its second stated purpose is to provide a statutory basis for the regulation of gaming by an Indian tribe, adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gambling operation, and to assure that gaming is conducted fairly and honestly by both the operator and players. *See* 25 U.S.C. § 2702(2). The third and final declared purpose of the IGRA is to declare as necessary the establishment of independent Federal regulatory authority, Federal standards and a National Indian Gaming Commission – all to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. *See* 25 U.S.C. § 2702(3). In short, the three stated purposes of the IGRA solely relate to operation, regulation and oversight of Indian gaming. *See Seminole Tribe of Florida*, 517 U.S. at 48 (“Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operating and regulation of gaming by Indian tribes.”)

2. Scope of Negotiation of Compacts Allowed Under the IGRA

The next step of this Court's analysis is to review the permissible subjects of negotiation, in determining whether the compact in question is within the confines of the IGRA.

The relevant portions of the statute state that

(C) Any Tribal-State compact negotiated under subparagraph (A)⁹ may include provisions relating to –

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [class III gaming activity];
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; . . .
- (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C)(i), (ii) and (vii).

“In determining the scope of a statute [the court] look[s] first to its language.” *United States v. Silvers*, 84 F.3d 1317, 1321 (10th Cir. 1996)(quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). According to its plain language, the scope of this section of the statute is to set forth provisions that may be negotiated, to be included in class III gaming activity compacts. The IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to the conduct of gaming activities, and are consistent with the IGRA's stated purposes.

Subparagraph (ii), the only subparagraph in this section of the statute that mentions jurisdiction, permits an allocation of jurisdiction between the State and the Indian tribe, only as necessary for the enforcement of laws and regulations of the State or Indian tribe, that are directly related to, and *necessary for, licensing and regulation* of class III gaming activities. The Court finds no justification for concluding that the IGRA intends the extension of state court

⁹ For content of subparagraph (A), see footnote 2, *supra*.

jurisdiction for any other purpose than resolution of issues involving the licensing and regulation of class III gaming. A personal injury claim arising from the negligent serving of alcohol has no bearing whatsoever on the licensing or regulation of class III gaming activities. Regulation of the service of alcohol does nothing to further the IGRA's three stated purposes.

Having read all of the legislative history cited to it by both parties, and in many other reported cases, the Court finds no support in the legislative history of the statute, sufficient to persuade it that the claim in the underlying state court litigation is within the categories of issues that may be allocated to state court jurisdiction. For each statement contained in the legislative record on one side of the issue, the Court has found a countervailing statement. For example, in the Report of the Senate Indian Affairs Committee at 3083, cited by the Mendoza Defendants, in discussing the strong and serious presumptions that must provide the framework for negotiations, such factors as "promoting public safety as well as law and order on tribal lands" are mentioned immediately prior to "realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders." Given the ambiguity and randomness of parsing through and placing absolute reliance on isolated portions of legislative history, the Court has opted instead to rely on the clear statutory language and structure of the IGRA. *See Colorado River Indian Tribes v. National Indian Gaming Comm.*, 383 F.Supp.2d 123, 139 (D.C.Cir. 2005) ("The statutory language and the structure of the IGRA are clear, and so resort to the legislative history of the statute is unnecessary.").¹⁰

Congress could have worded subparagraph (ii) in a way that obviously or necessarily included a shifting of jurisdiction over such claims as the one in the underlying state court litigation, as a permissible topic for negotiations of compacts. It did not do so. Even allowing

¹⁰ Furthermore, even if there were any ambiguity in the statute, it would have to be interpreted most favorably toward tribal interests. *Blackfeet Tribe of Indians*, 471 U.S. at 766.

that there are many issues to be resolved in negotiating compacts, the IGRA takes a narrow view of what jurisdiction shifting may occur, and the language it employs is restrictive rather than expansive.

Furthermore, despite Defendants' arguments to the contrary, this Court concludes that the fact that this statutory language does not expressly *prohibit* jurisdiction-shifting, is irrelevant. To conclude otherwise would be contrary to the explicit language of § 2710(d)(3)(C) and to the *Kiowa* case, where the Supreme Court stated that one of two prerequisites which would subject an Indian tribe to suit is "where Congress has **authorized** the suit." *Kiowa*, 523 U.S. at 754 (emphasis added). What is essential to this Court's analysis is a determination of the legal significance of what the statute actually says, i.e., what provisions may be included in class III gaming compacts. The language and structure of this section of the statute indicate that it is exhaustive, in its list as to what is permitted, as indicated even by its limitation in subparagraph (vii) to those subjects that are "directly related to the operation of gaming activities." The IGRA does not authorize states to exercise subject matter jurisdiction under the circumstances present in this case, and consequently this Court concludes that the Pueblo's exclusive jurisdiction over the claims in the underlying state court litigation must prevail.

B. Waiver of Immunity in the Compact

As the second prong of its analysis, it is incumbent on the Court to determine whether the language in Section 8 of the Compact can be construed as a legally effective waiver of immunity and an agreement, by the Pueblo, to be subject to state court jurisdiction in the underlying state court litigation.

The IGRA enacted the notion of a compact, which is essentially a contract between the states and tribes. A gaming compact is a creation of the IGRA, which determines the compact's effectiveness and permissible scope. *See Seminole Tribe of Florida*, 517 U.S. at 49. The State and Pueblo entered into the Compact, pursuant to the IGRA.

As noted above, the stated scope and purposes of the IGRA solely relate to the operation, regulation and oversight of Indian gaming. The Court's conclusion in Section VII(A) above, that the IGRA does not authorize jurisdiction-shifting in the underlying state litigation, is not affected in any way by the language of the Compact. Section 8 of the Compact is nothing more than an agreement between the parties, the negotiated scope of which is controlled by § 2710(d)(3)(C).

While there is sparse case law that addresses this precise issue, the Tenth Circuit has addressed the issue of tribal waiver of immunity under the IGRA, on a couple of occasions. The first case is *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385-1386 (10th Cir. 1997), a case filed by the Apache Tribe of the Mescalero Reservation, seeking to compel the State of New Mexico to negotiate in good faith to achieve a compact permitting class III gaming. In deciding that case, the Court noted that "it appears the majority [of cases] supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought."

This majority view (that the IGRA waived tribal sovereign immunity only in the narrow category of cases where compliance with IGRA's provisions is at issue), was mentioned again recently by the Tenth Circuit in *Santana v. Muscogee (Creek) Nation*, No. 12-5046, 2013 WL 323223 (10th Cir. Jan. 29, 2013)(*unpublished order and judgment cited pursuant to 10th Cir. R. 32.1(A)*)(holding based on Oklahoma compact that tribal immunity was not waived for civil tort suits brought in state or federal court). *Santana* quoted the above-cited language from

Mescalero and also noted that “[t]he IGRA only authorizes the extension of state jurisdiction to enforce criminal and civil laws and regulations ‘directly related to, and necessary for, the licensing and regulation’ of tribal gaming activities. 25 U.S.C. § 2710(d)(3)(C)(i).” *Santana*, 2013 WL 323223, at **2. The limited case law in the Tenth Circuit supports this Court’s restrictive interpretation of the IGRA and conclusion that a waiver of tribal sovereign immunity, in a compact entered into pursuant to the IGRA, can be valid only in the narrow category of cases where compliance with the IGRA’s provisions is at stake.¹¹

For these reasons, the non-tribal Defendants’ effort to invoke Section 8 of the Compact as a basis for state-court jurisdiction in this matter fails. “The IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA’s stated purposes. . . .” *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028-29 (9th Cir. 2010). The language in Section 8 of the Compact cannot bootstrap the claims in the underlying state court litigation as coming within the scope of § 2710(d)(3)(C)(i), (ii) or (vii). Simply put, the negotiated terms of the Compact cannot exceed what is authorized by the IGRA.

VIII. Conclusion

The Court hereby enters a declaration that the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* does not authorize an allocation of jurisdiction from tribal court to state court over

¹¹ Of course the Court is cognizant that, under other circumstances, where congressional action affecting tribal rights is not involved, the Supreme Court has recognized valid, clear tribal waivers of immunity, leading it to conclude that state courts had subject matter jurisdiction. *See* COHEN’S HANDBOOK, § 7.05[1][c] at 643-44; *C & L Enterprises*, 532 U.S. at 423 (Court found a clear waiver of tribal sovereign immunity and state court jurisdiction, based on a contract’s choice-of-law and arbitration provisions). In contrast, in this instance the Pueblo negotiated the Compact in accordance with the IGRA, and thus, there can be no clear tribal waiver of immunity for matters outside the scope of the IGRA. Notably, the Pueblo recognized the limitations of its powers to waive immunity outside the scope of the IGRA in the Compact itself, in Section 8A (“any such claim may be brought in state district court, including claims arising on tribal land, *unless* it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors’ personal injury suits to state court.” (emphasis added)).

a personal injury claim arising from the allegedly negligent serving of alcohol on Indian land and further that the New Mexico State District Court does not have jurisdiction in the case of *Gina Mendoza, Michael Hart and Dominic Montoya v. Tamaya Enterprises, Inc., d/b/a Santa Ana Star Casino*, CIV 2007-005711.

The IGRA only authorizes states to acquire limited civil jurisdiction over Indian casinos via the tribal-state compacting process for the purpose of licensing and regulating gaming activities. The limited scope for allocation of jurisdiction between the State and Indian tribe under the IGRA is narrow, confined to such issues of licensing and regulation. The underlying state court litigation does not involve issues of licensing or regulation of Indian gaming activities, or compliance in these respects, with the IGRA. For these and all reasons stated here, the Court hereby declares that that the New Mexico state court has no jurisdiction over the underlying state court litigation.

The Court specifically restricts its Declaratory Judgment to the type of personal injury claim involved in the underlying state court case (*i.e.*, a claim arising from the allegedly negligent serving of alcohol on Indian land). The Court finds it sufficient to make this limited ruling, as this limited declaration provides full relief for Plaintiffs as to the actual claim or controversy at issue. Because this Judgment falls short of the relief sought by the Pueblo Plaintiffs¹², Plaintiffs' Motion for Summary Judgment (ECF No. 52) is **granted in part and denied in part**. Furthermore, Defendant Mendozas' Second Motion for Summary Judgment (ECF No. 73) is **denied**.

¹² The relief sought by the Pueblo Plaintiffs in their motion for summary judgment is a ruling that the IGRA does not permit the shifting of jurisdiction from tribal court to state court over *all personal injury claims* arising from alleged wrongs arising or occurring within Indian Country.

WHEREFORE, IT IS HEREBY ORDERED that the above-stated partial declaratory judgment is entered and that the New Mexico State District Court does not have jurisdiction in the case of *Gina Mendoza, Michael Hart and Dominic Montoya v. Tamaya Enterprises, Inc., d/b/a Santa Ana Star Casino*, CIV 2007-005711.

IT IS FURTHER ORDERED that, because all matters in this lawsuit have been resolved, this matter is **dismissed with prejudice**.



SENIOR UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**PUEBLO OF SANTA ANA and
TAMAYA ENTERPRISES, INC.,**

Plaintiffs,

v.

CIV No. 11-957 LH/LFG

**HONORABLE NAN G. NASH, District
Judge, New Mexico Second Judicial,
Division XVII, in her Individual and Official
Capacities; GINA MENDOZA, as Personal
Representative under the Wrongful Death Act
of Michael Mendoza, Deceased; F. MICHAEL
HART, as Personal Representative under the
Wrongful Death Act of Desiree Mendoza,
Deceased; and, DOMINIC MONTOYA,**

Defendants.

AMENDED FINAL JUDGMENT¹

In accordance with FED.R.CIV.P. 58(a), the Court finds that Plaintiffs are hereby granted judgment as a matter of law, in accordance with the Memorandum Opinion and Order (ECF No. 90), filed on September 25, 2013. Specifically, in this Memorandum Opinion and Order, the Court granted partial relief to Plaintiffs, in the form of a declaratory judgment in their favor, to the effect that the Indian Gaming Regulatory Act does not authorize an allocation of jurisdiction from tribal court to state court over a personal injury claim arising from the allegedly negligent serving of alcohol on Indian land, and further that the New Mexico State District Court does not

¹ The parties filed an Unopposed Motion to Alter or Amend Judgment (ECF No. 92), under FED.R.CIV.P.59(e), and this Amended Final Judgment is entered as a result of that motion. This Amended Final Judgment supersedes the Final Judgment (ECF No. 91) previously entered by this Court, which is hereby *withdrawn* from the record in this matter.

have jurisdiction over the case of *Gina Mendoza, Michael Hart and Dominic Montoya v. Tamaya Enterprises, Inc., d/b/a Santa Ana Star Casino*, CIV 2007-005711;

The Court previously ruled that injunctive relief against Judge Nash is not cognizable (ECF No. 43). Having now adjudicated all claims for injunctive and declaratory relief raised by Plaintiffs' Complaint (ECF No. 1),

IT IS HEREBY ORDERED that final judgment is entered in favor of Plaintiffs, as specified above, and that this federal litigation is therefore dismissed.


SENIOR UNITED STATES DISTRICT JUDGE

*Rev. Code Wash. (ARCW) § 37.12.160*

ANNOTATED REVISED CODE OF WASHINGTON
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*** Statutes current through 2013 3rd special session ***

TITLE 37. FEDERAL AREAS -- INDIANS
CHAPTER 37.12. INDIANS AND INDIAN LANDS -- JURISDICTION

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 37.12.160 (2013)

§ 37.12.160. Retrocession of civil and/or criminal jurisdiction -- Process

(1) The process by which the state may retrocede to the United States all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe, must be accomplished in accordance with the requirements of this section.

(2) To initiate civil and/or criminal retrocession the duly authorized governing body of a tribe must submit a retrocession resolution to the governor accompanied by information about the tribe's plan regarding the tribe's exercise of jurisdiction following the proposed retrocession. The resolution must express the desire of the tribe for the retrocession by the state of all or any measures or provisions of the civil and/or criminal jurisdiction acquired by the state under this chapter over the Indian country and the members of such Indian tribe. Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.

(3) Upon receiving a resolution under this section, the governor must within ninety days convene a government-to-government meeting with either the governing body of the tribe or duly authorized tribal representatives for the purpose of considering the tribe's retrocession resolution. The governor's office must consult with elected officials from the counties, cities, and towns proximately located to the area of the proposed retrocession.

(4) Within one year of the receipt of an Indian tribe's retrocession resolution the governor must issue a proclamation, if approving the request either in whole or in part. This one-year deadline may be extended by the mutual consent of the tribe and the governor, as needed. In addition, either the tribe or the governor may extend the deadline once for a period of up to six months. Within ten days of issuance of a proclamation approving the retrocession resolution, the governor must formally submit the proclamation to the federal government in accordance with the procedural requirements for federal approval of the proposed retrocession. In the event the governor denies all or part of the resolution, the reasons for such denial must be provided to the tribe in writing.

(5) Within one hundred twenty days of the governor's receipt of a tribe's resolution requesting civil and/or criminal retrocession, but prior to the governor's issuance of the proclamation approving or denying the tribe's resolution, the appropriate standing committees of the state

house and senate may conduct public hearings on the tribe's request for state retrocession. The majority leader of the senate must designate the senate standing committee and the speaker of the house of representatives must designate the house standing committee. Following such public hearings, the designated legislative committees may submit advisory recommendations and/or comments to the governor regarding the proposed retrocession, but in no event are such legislative recommendations binding on the governor or otherwise of legal effect.

(6) The proclamation for retrocession does not become effective until it is approved by a duly designated officer of the United States government and in accordance with the procedures established by the United States for the approval of a proposed state retrocession.

(7) The provisions of RCW 37.12.010 are not applicable to a civil and/or criminal retrocession that is accomplished in accordance with the requirements of this section.

(8) For any proclamation issued by the governor under this section that addresses the operation of motor vehicles upon the public streets, alleys, roads, and highways, the governor must consider the following:

(a) Whether the affected tribe has in place interlocal agreements with neighboring jurisdictions, including applicable state transportation agencies, that address uniformity of motor vehicle operations over Indian country;

(b) Whether there is a tribal traffic policing agency that will ensure the safe operation of motor vehicles in Indian country;

(c) Whether the affected tribe has traffic codes and courts in place; and

(d) Whether there are appropriate traffic control devices in place sufficient to maintain the safety of the public roadways.

(9) The following definitions apply for the purposes of this section:

(a) "Civil retrocession" means the state's act of returning to the federal government the civil jurisdiction acquired over Indians and Indian country under federal Public Law 280, Act of August 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Secs. 1321-1326, and 28 U.S.C. Sec. 1360);

(b) "Criminal retrocession" means the state's act of returning to the federal government the criminal jurisdiction acquired over Indians and Indian country under federal Public Law 280, Act of August 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Secs. 1321-1326, and 28 U.S.C. Sec. 1360);

(c) "Indian tribe" means any federally recognized Indian tribe, nation, community, band, or group;

(d) "Indian country" means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(ii) All dependent Indian communities with the borders of the United States whether in the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

HISTORY: 2012 c 48 § 1.

NOTES: EDITOR'S NOTES.

This section takes effect June 7, 2012.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

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FINAL BILL REPORT

ESHB 2233

C 48 L 12

Synopsis as Enacted

Brief Description: Creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country.

Sponsors: House Committee on State Government & Tribal Affairs (originally sponsored by Representatives McCoy, Hunt, Haigh, Pedersen, Appleton, Morris, Billig, Fitzgibbon, Eddy, Sells, Tharinger, Jenkins, Hasegawa, Pollet, Wylie, Uptegrove and Roberts).

House Committee on State Government & Tribal Affairs
Senate Committee on Government Operations, Tribal Relations & Elections

Background:

History of Public Law 280 and the State's Assumption of Jurisdiction Over Indians and Indian Country.

As of the early 1950s, the federal government and Indian tribes jointly exercised criminal and civil jurisdiction over Indians and Indian country. However, in 1953 the United States Congress (Congress) enacted Public Law 280 (PL 280), partly in response to the perception that joint federal/tribal jurisdiction led to inadequate law enforcement in Indian country. Under PL 280, both criminal and civil jurisdiction over Indians and Indian country were transferred from the federal government to selected states. Other specified states were given the option to assume such jurisdiction in the future. The selected states that were granted immediate jurisdiction were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. The optional states under PL 280 were Washington, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, and Utah.

Public Law 280 also established that for a state to acquire criminal or civil jurisdiction over the Indians and Indian country within its borders, it must pass legislation explicitly assuming such jurisdiction. Washington enacted such legislation in 1963, authorizing the state to assume civil and criminal jurisdiction over Indians and Indian country within its territory. However, under this legislation the assumption of jurisdiction by the state requires the tribes' consent. Such consent requires that the tribe formally request the state to assume such jurisdiction. Upon receiving this request, the Governor must issue a proclamation affirming the state's jurisdiction over Indians and Indian country in accordance with applicable federal laws.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Although the state's 1963 legislation establishes that the state's jurisdiction over a tribe occurs only upon the request of a tribe, the statute explicitly identifies eight substantive areas of criminal and civil law over which the state retains jurisdiction even without a tribe's consent: compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles on public streets, alleys, roads, and highways.

Amendment of PL 280 and the Authorization of State Retrocession.

In 1968 the Congress amended PL 280 to include a retrocession provision authorizing a state that has previously assumed jurisdiction over Indians and Indian country to return all or some of its criminal and/or civil jurisdiction back to the federal government, subject to the approval of the United States Department of the Interior. The term "retrocession," therefore, refers to the process of a state returning its jurisdiction over an Indian tribe back to the United States government.

Civil Retrocession Under State Law Following the Amendment of PL 280.

Despite the 1968 amendment of PL 280, state law neither authorizes the state to retrocede its civil jurisdiction over Indians and Indian country nor provides any mechanism for tribes to request retrocession.

Criminal Retrocession Under State Law Following the Amendment of PL 280.

Following the amendment of PL 280, a state law was enacted providing a legal procedure by which a tribe may request the state to retrocede criminal jurisdiction over Indians and Indian country. This procedure requires the approval of the Governor and the Legislature and applies only to specific tribes identified in statute.

Under this statutory procedure, in order to request that the state retrocede its criminal jurisdiction back to the federal government, an Indian tribe must submit a resolution to the Governor expressing its desire for state retrocession of criminal jurisdiction acquired by the the state over Indians or Indian country. Upon receipt of the resolution, the Governor may issue a proclamation retroceding the state's criminal jurisdiction back to the United States. The power of the Governor to authorize criminal retrocession is discretionary. In effect, then, the Governor has veto power over any criminal retrocession proposal put forth by an Indian tribe or group. In turn, in order for retrocession to become effective, the Governor's retrocession proclamation must be submitted to a duly authorized federal officer and then approved by the Secretary of the Interior. However, the state's criminal retrocession statutes categorically prohibit the retrocession of either civil or criminal jurisdiction over the following eight areas:

- compulsory school attendance;
- public assistance;
- domestic relations;
- mental illness;
- juvenile delinquency;
- adoption proceedings;
- dependent children; and
- operation of motor vehicles on public streets, alleys, roads, and highways.

After retrocession, the federal government rather than the tribe and/or the state has jurisdiction over certain major crimes committed by Indians on Indian lands. Major crimes under the federal law include homicide, assault, rape, kidnapping, arson, burglary, and robbery, as well as other serious felonies.

Over the years, seven tribes in Washington have sought and received retrocession of state jurisdiction over criminal acts by Indians committed on tribal lands. These tribes are the Quileute, Chehalis, Skokomish, Muckleshoot, Tulalip, Swinomish, and the Colville Confederated Tribes of Washington.

Tribes that remain subject to state jurisdiction may enter into arrangements with local law enforcement agencies for providing law enforcement on tribal lands. However, tribes subject to full state criminal jurisdiction are not eligible for federal funding for law enforcement purposes. Those tribes that have sought and obtained retrocession of state jurisdiction have become eligible for federal law enforcement funding.

Governor's Retrocession Workgroup.

In June of 2011 the Governor convened a Joint Executive-Legislative Workgroup (Workgroup) in order to examine both civil and criminal tribal retrocession issues. The Workgroup was created in response to the tribal retrocession bills considered by the House and Senate during the 2011 Legislative session and consisted of a broad range of gubernatorial appointees, including:

- tribal leaders;
- legislative members from the House and Senate;
- designees from the United States Attorney's Offices for the Eastern and Western Districts of Washington;
- a designee of the Washington State Attorney General;
- professors of Indian Law from the University of Washington and Seattle University;
- state, local, and tribal law enforcement officials;
- an official from the Office of Superintendent of Public Instruction; and
- various executive branch and state agency officials.

The Workgroup conducted a series of meetings during the summer and fall, the last of which involved the consideration of legislative options.

Summary:

Overview of the Retrocession Procedure.

A three-step retrocession procedure is created in which the Governor is granted plenary power to approve or deny a proposed retrocession. The three procedural steps are as follows:

- A tribe must submit a retrocession resolution to the Governor.
- The Governor must approve or deny the retrocession through a process that includes government-to-government meetings with the tribe, as well as non-binding recommendations from the two houses of the Legislature.
- If the Governor approves of the proposed retrocession, a formal retrocession request is forwarded to the Department of the Interior, which has ultimate authority with respect to the authorization of a proposed retrocession.

Retrocession Procedure Requirements.

Before criminal and/or civil retrocession may occur, various procedural requirements must be met.

Tribal Resolution. The governing body of a tribe must pass a resolution requesting that the state retrocede back to the federal government all or part of its civil and/or criminal jurisdiction over the tribe. Before a tribe submits a retrocession resolution to the Governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.

The tribe's retrocession resolution must be forwarded to the Governor, accompanied by information about its plan regarding its exercise of jurisdiction following the proposed retrocession.

Action by Governor and Legislature. The Governor must convene a government-to-government meeting with the tribe within 90 days of receiving the retrocession resolution. The Governor must consult with elected officials from the counties, cities, and towns proximately located to the area of the proposed retrocession. Also, if the proclamation addresses issues related to the operation of motor vehicles on public roadways, then the Governor must consider whether: (1) there are interlocal agreements in place addressing the uniformity of motor vehicle operations in Indian country; (2) there is a tribal traffic policing agency that will ensure the safe operation of motor vehicles; (3) the affected tribe has traffic codes and courts in place; and (4) there are appropriate traffic control devices in place sufficient to maintain road safety.

Within 120 days of the Governor's receipt of the tribal resolution, the appropriate standing committees of the state House and Senate may conduct public hearings on the tribe's request for state retrocession. Following such public hearings, the designated legislative committees may submit non-binding, advisory recommendations to the Governor.

Within one year of her or his receipt of the retrocession resolution, the Governor must issue a proclamation, if approving the retrocession request either in whole or in part. This one-year deadline may be extended by the mutual consent of the tribe and the Governor. Also, both the tribe and the Governor have unilateral authority to extend the one year retrocession decision deadline by another six months.

Federal Action. If the Governor approves the proposed retrocession, the proclamation must be submitted to a duly designated officer of the Department of the Interior, which must then approve or deny the retrocession request. The proclamation does not become effective until it is approved by the federal government in accordance with federal retrocession procedures.

Other Provisions.

Notwithstanding the state's retrocession of criminal and/or civil jurisdiction:

- the state must retain the civil jurisdiction necessary for the civil commitment of sexually violent predators; and

- retrocession will not abate any action or proceeding filed with any court or agency of state or local government preceding the effective date of the retrocession.

These retrocession procedures:

- do not affect the validity of any retrocession procedure commenced previously under other specified statutes; and
- may be used by any tribe to complete a pending retrocession process or to obtain retrocession with respect to any civil or criminal jurisdiction retained by the state following a previously completed partial retrocession.

Other specified statutes related to retrocession are not applicable to a retrocession initiated under this act.

Votes on Final Passage:

House	54	42	
Senate	42	6	(Senate amended)
House			(House refused to concur)
Senate	42	6	(Senate amended)
House	59	38	(House concurred)

Effective: June 7, 2012

HOUSE BILL REPORT

ESHB 2233

As Passed Legislature

Title: An act relating to creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country.

Brief Description: Creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country.

Sponsors: House Committee on State Government & Tribal Affairs (originally sponsored by Representatives McCoy, Hunt, Haigh, Pedersen, Appleton, Morris, Billig, Fitzgibbon, Eddy, Sells, Tharinger, Jinkins, Hasegawa, Pollet, Wylie, Upthegrove and Roberts).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 1/18/12, 1/26/12 [DPS].

Floor Activity:

Passed House: 2/10/12, 54-42.

Senate Amended.

Passed Senate: 2/28/12, 42-6.

House Refused to Concur.

Senate Amended.

Passed Senate: 3/5/12, 42-6.

House Concurred.

Passed House: 3/6/12, 59-38.

Brief Summary of Engrossed Substitute Bill

- Creates a procedure by which the state may retrocede to the federal government criminal and/or civil jurisdiction over Indian tribes located in the State of Washington.
- Requires the state to retain the civil jurisdiction necessary for the civil commitment of sexually violent predators.
- Establishes that retrocession will not abate any action or proceeding filed with any court or agency of state or local government preceding the effective date of the retrocession.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Hunt, Chair; Appleton, Vice Chair; Darneille, Dunshee, Hurst, McCoy and Miloscia.

Minority Report: Do not pass. Signed by 4 members: Representatives Taylor, Ranking Minority Member; Overstreet, Assistant Ranking Minority Member; Alexander and Condotta.

Staff: Thamas Osborn (786-7129).

Background:

History of Public Law 280 and the State's Assumption of Jurisdiction Over Indians and Indian Country.

As of the early 1950s, the federal government and Indian tribes jointly exercised criminal and civil jurisdiction over Indians and Indian country. However, in 1953 Congress enacted Public Law 280 (PL 280), partly in response to the perception that joint federal/tribal jurisdiction led to inadequate law enforcement in Indian country. Under the PL 280, both criminal and civil jurisdiction over Indians and Indian country were transferred from the federal government to selected states. Other specified states were given the *option* to assume such jurisdiction in the future. The selected states that were granted immediate jurisdiction, i.e., the "mandatory states," were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. The so-called "optional states" under the PL 280 were Washington, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, and Utah.

The PL 280 also established that for a state to acquire criminal or civil jurisdiction over the Indians and Indian country within its borders, it must pass legislation explicitly assuming such jurisdiction. The State of Washington did exactly that in 1963 when the Legislature enacted RCW 37.12.010, authorizing the state to assume civil and criminal jurisdiction over Indians and Indian country within its territory. However, under this statute the assumption of jurisdiction by the state requires the tribes consent. Such consent requires that the tribe formally request the state to assume such jurisdiction. Upon receiving this request, the Governor must issue a proclamation affirming the state's jurisdiction over Indians and Indian country in accordance with applicable federal laws.

Although the state's 1963 legislation establishes that the state's jurisdiction over a tribe occurs only upon the request of a tribe, the statute explicitly identifies eight substantive areas of criminal and civil law over which the *state retains jurisdiction* even without a tribe's consent: compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles on public streets, alleys, roads, and highways.

Amendment of the PL 280 and the Authorization of State Retrocession.

In 1968 Congress amended the PL 280 to include a so-called "retrocession" provision authorizing a state that has previously assumed jurisdiction over Indians and Indian country to return all or some of its criminal and/or civil jurisdiction back to the federal government,

subject to the approval of the United States Department of the Interior (Interior). The term "retrocession," therefore, refers to the process of a state returning its jurisdiction over an Indian tribe back to the United States government.

Civil Retrocession Under State Law Following the Amendment of the PL 280.

Despite the 1968 amendment of the PL 280, state law neither authorizes the state to retrocede its civil jurisdiction over Indians and Indian country nor does it provide any mechanism for tribes to request retrocession.

Criminal Retrocession Under State Law Following the Amendment of the PL 280.

Following the amendment of the PL 280, the state Legislature enacted a legal procedure by which a tribe can request the state to retrocede criminal jurisdiction over Indians and Indian country. This procedure requires the approval of the Governor and the Legislature and applies only to specific tribes identified in statute.

Under this statutory procedure, in order to request that the state retrocede its criminal jurisdiction back to the federal government, an Indian tribe must submit a resolution to the Governor expressing its desire for state retrocession of criminal jurisdiction acquired by the the state over Indians or Indian country. Upon receipt of the resolution, the Governor may issue a proclamation retroceding the state's criminal jurisdiction back to the United States. The power of the Governor to authorize criminal retrocession is discretionary. In effect, then, the Governor has veto power over any criminal retrocession proposal put forth by an Indian tribe or group. In turn, in order for retrocession to become effective, the Governor's retrocession proclamation must be submitted to a duly authorized federal officer and then approved by the Secretary of the Interior. However, it should be noted that the state's criminal retrocession statutes categorically prohibit the retrocession of either civil or criminal jurisdiction over the following eight areas:

- compulsory school attendance;
- public assistance;
- domestic relations;
- mental illness;
- juvenile delinquency;
- adoption proceedings;
- dependent children; and
- operation of motor vehicles on public streets, alleys, roads, and highways.

After retrocession, the federal government rather than the tribe and/or the state has jurisdiction over so-called major crimes committed by Indians on Indian lands. Major crimes under the federal law include homicide, assault, rape, kidnapping, arson, burglary, and robbery, as well as other serious felonies.

Over the years, seven tribes in Washington have sought and received retrocession of state jurisdiction over criminal acts by Indians committed on tribal lands. These tribes are the Quileute, Chehalis, Skokomish, Muckleshoot, Tulalip, Swinomish, and the Colville Confederated Tribes of Washington.

Tribes that remain subject to state jurisdiction may enter into arrangements with local law enforcement agencies for providing law enforcement on tribal lands. However, tribes subject

to full state criminal jurisdiction are not eligible for federal funding for law enforcement purposes. Those tribes that have sought and obtained retrocession of state jurisdiction have become eligible for federal law enforcement funding.

Governor's Retrocession Workgroup.

In June of 2011 the Governor convened a Joint Executive-Legislative Workgroup (Workgroup) in order to examine both civil and criminal tribal retrocession issues. The Workgroup was created in response to the tribal retrocession bills considered by the House and Senate during the 2011 Legislative session and consisted of a broad range of gubernatorial appointees, including:

- tribal leaders;
- legislative members from the House and Senate;
- designees from the United States Attorney's Offices for the Eastern and Western Districts of Washington;
- a designee of the Washington State Attorney General;
- professors of Indian Law from the University of Washington and Seattle University;
- state, local, and tribal law enforcement officials;
- an official from the Office of Superintendent of Public Instruction; and
- various executive branch and state agency officials.

The Workgroup conducted a series of meetings during the summer and fall, the last of which involved the consideration of legislative options.

Summary of Engrossed Substitute Bill:

Overview of the Retrocession Bill.

In broadest terms, the bill creates what is, in essence, a three-step retrocession procedure in which the Governor is granted plenary power to approve or deny a proposed retrocession.

The three procedural steps are as follows:

- A tribe must submit a retrocession resolution to the Governor.
- The Governor must approve or deny the retrocession through a process that includes government-to-government meetings with the tribe, as well as non-binding recommendations from the two houses of the Legislature.
- If the Governor approves of the proposed retrocession, a formal retrocession request is forwarded to the Interior, which has ultimate authority with respect to the authorization of a proposed retrocession.

Retrocession Procedure Required Under the Bill.

More specifically, the bill includes the following procedural requirements that must be met before criminal and/or civil retrocession may occur:

- The governing body of a tribe must pass a resolution requesting that the state retrocede back to the federal government all or part of its civil and/or criminal jurisdiction over the tribe. Before a tribe submits a retrocession resolution to the Governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.

- The tribe's retrocession resolution must be forwarded to the Governor, accompanied by information about its plan regarding its exercise of jurisdiction following the proposed retrocession.
- The Governor must convene a government-to-government meeting with the tribe within 90 days of receiving the retrocession resolution.
- The Governor must consult with elected officials from the counties, cities, and towns proximately located to the area of the proposed retrocession. Also, if the proclamation addresses issues related to the operation of motor vehicles on public roadways, then the Governor must consider whether: (1) there are interlocal agreements in place addressing the uniformity of motor vehicle operations in Indian country; (2) there is a tribal traffic policing agency that will ensure the safe operation of motor vehicles; (3) the affected tribe has traffic codes and courts in place; and (4) there are appropriate traffic control devices in place sufficient to maintain road safety.
- Within 120 days of the Governor's receipt of the tribal resolution, the appropriate standing committees of the state House and Senate may conduct public hearings on the tribe's request for state retrocession. Following such public hearings, the designated legislative committees may submit non-binding, advisory recommendations to the Governor.
- Within one year of her or his receipt of the retrocession resolution, the Governor must issue a proclamation, if approving the retrocession request either in whole or in part. This one-year deadline may be extended by the mutual consent of the tribe and the Governor. Also, both the tribe and the Governor have unilateral authority to extend the one year retrocession decision deadline by another six months.
- If the Governor approves the proposed retrocession, the proclamation must be submitted to a duly designated officer of the Interior, which must then approve or deny the retrocession request. The proclamation does not become effective until it is approved by the federal government in accordance with federal retrocession procedures.

Notwithstanding the state's retrocession of criminal and/or civil jurisdiction:

- the state shall retain the civil jurisdiction necessary for the civil commitment of sexually violent predators; and
- retrocession will not abate any action or proceeding filed with any court or agency of state or local government preceding the effective date of the retrocession.

The act clarifies that:

- its provisions do not affect the validity of any retrocession procedure commenced previously under other specified statutes;
- any tribe may utilize the retrocession procedure authorized under the act in order to complete a pending retrocession process or to obtain retrocession with respect to any civil or criminal jurisdiction retained by the state following a previously completed partial retrocession; and
- other specified statutes related to retrocession are not applicable to a retrocession initiated under the authority of the act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is a bill that establishes a process by which a tribe may formally request that the Governor issue a proclamation retroceding back to the federal government the state's jurisdiction over a tribe. The Governor has veto power and the Legislature is required to hold hearings and make recommendations. This is a much better bill than that considered last year insofar as it creates a more readily understandable process. The concepts in the bill were derived from four work sessions held last year by the Workgroup. These work sessions functioned as a forum for sorting the many issues raised by retrocession.

The Yakama Nation has been working hard to reach out to surrounding communities to implement mutual aid agreements. The tribe recognizes the importance of working in tandem with adjacent jurisdictions to ensure a smoother jurisdictional transition process. The county, cities, and the tribes should work together as one community. In the past the tribe had an excellent relationship with the state patrol and the law enforcement authorities in adjacent jurisdictions. We need to establish this again. The tribe has made great strides in developing its law enforcement infrastructure. It now has a new, state of the art jail facility and juvenile detention center. In addition, the tribe has devoted considerable resources to better training for law enforcement, as well as fish and game officers. The tribe contributes a great deal to the state and local economies, and is responsible for the creation of many jobs. Also, the Yakamas are very focused on responding to truancy issues.

The Colville Tribe is a successful model for the beneficial aspects of retrocession. The Colvilles have been doing very well since retrocession, and have a close working relationship with adjacent law enforcement authorities. Retrocession has the effect of lessening the burdens on surrounding law enforcement jurisdictions.

(Other) The Washington State Association of Counties is concerned about the effects of the transition upon health-related services.

(Opposed) Yakima County is concerned about the bill, but is working with Representative McCoy regarding amendatory language. The main concern is how the transition will occur. The mechanics of how services will be transferred is a problem. The county is working on a service transition plan.

Persons Testifying: (In support) Representative McCoy, prime sponsor; Harry Smiskin, Dawn Vyvyan, George Colby, and Virgil Lewis, Yakama Nation; and Miguel Perez-Gibson and Ricky Gabriel, Colville Tribes.

(Other) Brian Enslow, Washington State Association of Counties.

(Opposed) Briahna Taylor, Yakima County.

Persons Signed In To Testify But Not Testifying: None.

SENATE BILL REPORT

ESHB 2233

As Reported by Senate Committee On:
Government Operations, Tribal Relations & Elections, February 16, 2012

Title: An act relating to creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country.

Brief Description: Creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country.

Sponsors: House Committee on State Government & Tribal Affairs (originally sponsored by Representatives McCoy, Hunt, Haigh, Pedersen, Appleton, Morris, Billig, Fitzgibbon, Eddy, Sells, Tharinger, Jinkins, Hasegawa, Pollet, Wylie, Upthegrove and Roberts).

Brief History: Passed House: 2/10/12, 54-42.

Committee Activity: Government Operations, Tribal Relations & Elections: 2/16/12 [DPA].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS

Majority Report: Do pass as amended.

Signed by Senators Pridemore, Chair; Prentice, Vice Chair; Swecker, Ranking Minority Member; Chase and Nelson.

Staff: Sam Thompson (786-7413)

Background: The 29 federally-recognized Indian tribes in Washington are subject to a complex system of federal, tribal, and state jurisdiction in Indian country. That term is defined in federal law to include land held by the federal government, tribes and tribal members both within and outside of reservations.

1953: PL 280. The federal government has delegated some of its authority over Indian country to state governments. Notably, a 1953 federal act, US Public Law 83-280 (PL 280), granted states authority to exercise state criminal and civil jurisdiction in Indian country to the same extent as elsewhere. PL 280 required some states to exercise this authority and gave other states – including Washington – the option to do so. Jurisdiction exercised by states in Indian county pursuant to PL 280 is commonly called PL 280 jurisdiction.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Under a 1957 state act, Washington asserted full PL 280 jurisdiction over 11 tribes. Later, under a 1963 state act, Washington asserted limited PL 280 jurisdiction, described below, over all other tribes and Indian country in the state.

1968: ICRA. Another federal act, the Indian Civil Rights Act of 1968 (ICRA), narrowed PL 280 jurisdiction by requiring tribal consent for any new assumption of state jurisdiction. ICRA also authorized the federal government to accept full or partial retrocession by a state of its PL 280 jurisdiction.

1969 to Present: Partial Retrocessions. The federal government has accepted offers by Washington to partially retrocede PL 280 criminal jurisdiction over seven tribes, including early retrocessions in 1969 and 1972. Since 1986, retrocessions have followed a process set in state law, enacted that year and later amended. That law authorizes the Governor to approve requests from any of seven named tribes to partially retrocede PL 280 criminal jurisdiction, contingent upon acceptance by the federal government. Five of the seven named tribes have been partially retroceded PL 280 criminal jurisdiction under this process.

Current PL 280 Jurisdiction. Washington currently exercises PL 280 jurisdiction as follows:

- *Four Tribes: Full PL 280 Jurisdiction.* Muckleshoot, Nisqually, Skokomish, and Squaxin Island. This jurisdiction also applies in certain off-reservation sites.
- *Seventeen Tribes: Limited PL 280 Jurisdiction.* Chehalis, Colville, Hoh, Kalispel, Lower Elwha Klallam, Lummi, Makah, Port Gamble S’Klallam, Puyallup, Quileute, Quinault, Shoalwater Bay, Spokane, Suquamish, Swinomish, Tulalip, and Yakama. PL 280 jurisdiction is limited to eight subject areas: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon public streets, alleys, roads and highways. This jurisdiction also applies in certain off-reservation sites.
- *Eight Tribes: Uncertain.* Cowlitz, Jamestown S’Klallam, Nooksack, Samish, Sauk-Suiattle, Snoqualmie, Stillaguamish, and Upper Skagit. Seven of these tribes were recognized by the federal government after enactment of ICRA, which, as noted above, requires tribal consent to any new assumption of PL 280 jurisdiction. None have consented to PL 280 jurisdiction, and it is uncertain whether Washington may assert PL 280 jurisdiction over them. An issue has arisen as to whether the eighth tribe, the Samish, were federally recognized prior to enactment of ICRA in 1968; in any event, the federal government formally recognized the tribe in 1996.

Interim Workgroup. A Joint Executive-Legislative Workgroup on Tribal Retrocession met in 2011 to study possible further retrocession of PL 280 jurisdiction. The workgroup considered legal and practical aspects of retrocession and discussed, but did not formally recommend, draft legislation establishing a new retrocession process.

Summary of Bill (Recommended Amendments): A new process is provided under which the state may partially or entirely retrocede PL 280 jurisdiction over a federally-recognized tribe and the Indian country of the tribe. Indian country is defined to mean land within reservations, dependent Indian communities, and Indian allotments. This definition is the same definition of Indian country in federal law.

To initiate retrocession, a tribe's authorized governing body must submit a retrocession resolution to the Governor with information about the tribe's plan for exercising jurisdiction following retrocession. The tribal resolution must express desire for partial or complete retrocession of PL 280 jurisdiction. Before a tribe submits a resolution to the Governor, the tribe and affected municipalities are encouraged to adopt agreements ensuring that the best interests of the tribe and surrounding communities are served by retrocession.

Upon receiving a tribal resolution, the Governor must, within 90 days, meet with the tribe's governing body or authorized representatives to consider the proposed retrocession. The Governor's office must consult elected officials from counties, cities, and towns near the area of the proposed retrocession.

Within one year of receiving a tribal resolution, the Governor must issue a proclamation approving or denying the proposed retrocession, in whole or in part. This deadline may be extended. Within ten days of issuing a proclamation approving a proposed retrocession, the Governor must submit it to the federal government in accordance with requirements for federal approval. If the Governor denies all or part of the proposed retrocession, reasons for the denial must be provided to the tribe in writing.

Within 120 days of the Governor's receipt of a tribal resolution, but prior to issuance of a gubernatorial proclamation approving or denying the proposed retrocession, state legislative committees may conduct public hearings to consider the proposed retrocession. Following a hearing, the committees may submit recommendations and/or comments to the Governor. The recommendations are not binding or otherwise of legal effect.

A proposed retrocession approved in a gubernatorial proclamation does not become effective until accepted in accordance with federal procedures.

A retrocession accomplished pursuant to the process does not: (1) affect the state's civil jurisdiction over the civil commitment of sexually violent predators, and the state must retain that jurisdiction notwithstanding completion of the retrocession; and (2) abate any action or proceeding filed with any court or agency of the state or local government preceding the effective date of the completion of the retrocession.

Any partial criminal retrocession commenced under the existing process is not affected. Any tribe that has commenced but not completed partial criminal retrocession under the existing process may request retrocession under the new process in lieu of completing that procedure. Any tribe that has completed partial criminal retrocession under the existing process may use the new process.

EFFECT OF CHANGES MADE BY GOVERNMENT OPERATIONS, TRIBAL RELATIONS & ELECTIONS COMMITTEE (Recommended Amendments): Clarifications and technical changes are made. A provision is added specifying that a retrocession will not abate any action or proceeding filed with any court or agency of the state or local government preceding the effective date of the retrocession.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony as Heard in Committee: PRO: Provisions now in this bill address issues that have been raised. The Yakama Nation is grateful for the efforts of legislators to pass this good bill. Yakama Nation representatives are currently negotiating memorandums of understanding with affected local governments. The Yakama Nation looks forward with hope for enactment of this bill.

CON: The Washington Farm Bureau is concerned about possible assertion of tribal jurisdiction over persons who are not members of the tribe and over land that is not land held in trust for the tribe, and seeks clarifications.

OTHER: Yakima County concerns have been addressed by three provisions that: (1) require a tribe to provide information about its plan for exercising jurisdiction following retrocession; (2) encourage a tribe and affected municipalities to adopt agreements ensuring that the best interests of the tribe and surrounding communities are served; and (3) require the Governor to consult elected officials from counties, cities, and towns near the area of the proposed retrocession. Yakima County is now neutral on this bill.

Persons Testifying: PRO: Representative McCoy, prime sponsor; Harry Smiskin, Dawn Vyvyan, George Colby, Yakama Nation.

CON: Dan Wood, WA Farm Bureau.

OTHER: Brianna Taylor, Yakima County.



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ARTICLE: NEGOTIATING JURISDICTION: RETROCEDING STATE AUTHORITY OVER INDIAN
COUNTRY GRANTED BY PUBLIC LAW 280

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BIO: * Professor of Law and Director, Native American Law Center, University of Washington School of Law; Oneida Indian Nation Visiting Professor of Law, Harvard Law School. Thanks to Joe Singer and Angela Riley for comments on early drafts. My research assistant, Dessa Dal Porto, and the UW reference librarians provided excellent help as well.

LEXISNEXIS SUMMARY:

... The United States recognized permanent reservations, and, primarily in the upper-Midwest and Pacific Northwest, the tribes reserved off-reservation hunting and fishing rights. ... Although the termination period quickly fell into disfavor, its short tenure resulted in the end of the government-to-government relationship between the United States and over seventy federally recognized Indian tribes, and transferred jurisdiction over those tribes to the states. ... Also unaffected by retrocession are crimes related to Indian gaming, which is governed by the Indian Gaming Regulatory Act of 1988 (IGRA). ... The 1963 legislation unilaterally asserted civil and criminal jurisdiction over (1) all off-reservation Indian country; (2) all reservations, not including Indians on tribal or allotted lands within "an established reservation"; and (3) Indians on tribal or allotted lands within "an established reservation" in the following eight subject matter areas: (1) Compulsory school attendance; (2) Public assistance; (3) Domestic relations; (4) Mental illness; (5) Juvenile delinquency; (6) Adoption proceedings; (7) Dependent children; and (8) Operation of motor vehicles upon the public streets, alleys, roads and highways. ... Washington, where the tribes successfully challenged the state's authority over traffic offenses under P.L. 280. ... This is especially true because there is a federal statute that expressly authorizes state jurisdiction over such on-reservation matters, but only when the tribe has consented to state jurisdiction, and the Secretary of the Interior has approved the state jurisdiction. ... Prior to 2012, Washington's retrocession laws provided that certain tribes that agreed to full state criminal and civil jurisdiction under the 1957 state law could request retrocession of some (but not all) state criminal jurisdiction. ... Professor Kevin Washburn of the University of New Mexico School of Law underlined these issues when he described the federal criminal jurisdictional patchwork in Indian country as a relic of repudiated policies - an anomaly in the self-determination era.

HIGHLIGHT: Abstract: This Article canvasses the jurisdictional rules applicable in American Indian tribal territories - "Indian country." The focus is on a federal law passed in the 1950s, which granted some states a measure of jurisdiction over Indian country without tribal consent. The law is an aberration. Since the adoption of the Constitution, federal law preempted state authority over Indians in their territory. The federal law permitting some state jurisdiction, Public Law 280, is a relic of a policy repudiated by every President and Congress since 1970. States have authority to surrender, or retrocede, the authority granted by Public Law 280, but

Indian tribal governments should be allowed to determine whether and when state jurisdiction should be limited or removed.

The Public Law 280 legislation was approved by Congress in the face of strenuous Indian opposition and denied consent of the Indian tribes affected by the Act ... The Indian community viewed the passage of Public Law 280 as an added dimension to the dreaded termination policy. Since the inception of its passage the statute has been criticized and opposed by tribal leaders throughout the Nation. The Indians allege that the Act is deficient in that it failed to fund the States who assumed jurisdiction and as a result vacuums of law enforcement have occurred in certain Indian reservations and communities. They contend further that the Act has resulted in complex jurisdictional problems for Federal, State and tribal governments.

S. Comm. on the Interior & Insular Affairs, 94th Cong., Background Rep. on Public Law 280 (Comm. Print 1975) (statement of Sen. Henry M. Jackson, Chairman).

Senator Jackson's statement accurately described the issues then and now. This Article reviews the legal history of federal-tribal-state relations in the context of Public Law 280 jurisdiction. Washington State has recently taken progressive steps that could serve as the foundation for a national model to remove state jurisdiction as a tribal option. The modern Indian self-determination policy is not advanced by adherence to termination era experiments like Public Law 280. The Article concludes that federal legislation should provide for a tribally-driven retrocession model and makes proposals to that end.

TEXT:

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INTRODUCTION

The United States was founded upon the principle of the "consent of **[*917]** the governed," ¹ although this proposition has dubious validity with respect to Indian tribes and their citizens. Despite early respect for tribal sovereignty and complete independence from state jurisdiction, the Supreme Court recognized nearly unlimited power in Congress to unilaterally alter the jurisdictional arrangements in tribal territories. ² This power over Indian tribes and their territory was exercised without the meaningful consent of the affected tribes, and thus is morally suspect. ³ Nevertheless, Congress utilized its authority to assert federal control of criminal matters in Indian country, and later to authorize some state criminal and civil jurisdiction over tribes and their territories.

In 1953, Congress passed Public Law 280 (P.L. 280), ⁴ which required six states to assert jurisdiction over Indian country, and opened the door for other states to do the same if they wished. ⁵ It provided no role for the affected tribes in state decisions to assert jurisdiction. The unilateral imposition of state jurisdiction has long been regarded as offensive to tribal governments and Indian people because the states, as opposed to the federal government, in many ways remain the "deadliest enemies" of the tribes. ⁶ In 1963, Washington State asserted jurisdiction over Indian **[*918]** country and Indian people in a complex fashion that bewilders all who enter the jurisdictional maze. ⁷ This assumption of state jurisdiction ignores the democratic consent principle and is inconsistent with modern policies promoting tribal self-determination. ⁸ The separate sovereign status of tribes, manifested in the commerce clause of the Constitution ⁹ and the foundational decisions of the Supreme Court, ¹⁰ supports continued recognition of tribal territories as areas where tribal law is paramount to the exclusion of state law. However, recognizing that Congress and the Supreme Court have in fact frequently

authorized the assertion of state authority, Indian tribes are positioned as supplicants to Congress, or the states themselves, when requesting that state jurisdiction over Indian country be withdrawn - or retroceded. Indeed, some states view their jurisdiction over Indian country as the historic norm when in fact it is a relatively recent development.

This Article outlines the legal history of federal-tribal relations, primarily in the criminal jurisdiction context, and examines in some detail the congressional authorization of state jurisdiction over Indian country nationwide and in the Washington-specific context. It reveals the extreme complexity of civil and criminal jurisdiction over Washington's Indian country, and describes recent progressive state legislation that provides tribes with a path to remove state authority, albeit dependent on the good will of the Governor of the state. The Article next reviews several options for adjusting state and tribal jurisdiction in the areas governed by the Indian Child Welfare Act and the Indian Gaming Regulatory Act. It concludes with the recommendation that Congress provide a tribally-driven option for removing state jurisdiction over Indian country. There should be a process of negotiation and information sharing with the states that obtained this non-consensual jurisdiction, but in the end a tribal request for the retrocession of state jurisdiction should be between the affected Indian tribe and the United States. The process should provide an opportunity for interest-based discussions to ensure that the exercise of criminal and civil jurisdiction in Indian country is carried out in a way **[*919]** that best serves all citizens.

Part I of this Article provides historical context for the modern jurisdictional rules applicable to Indian tribes and their territory. Part II explains the baseline criminal and civil jurisdictional rules that operate in Indian country. Part III outlines the manner and scope of P.L. 280's jurisdictional grant to the states. Part IV reviews how Washington asserted jurisdiction under P.L. 280, and reveals the complex jurisdictional scheme. Part V details the state legislation that became effective in June 2012, and established a process for the elimination of some or all state jurisdiction upon the request of an affected Indian tribe. Part VI explores the legal and policy issues implicated in what is essentially a negotiation of federal, tribal, and state sovereignty under P.L. 280's framework. It also suggests approaches to federal legislation to guide the process in a manner consistent with modern tribal self-determination policy.

I. INDIAN TRIBES ARE SOVEREIGNS RECOGNIZED UNDER FEDERAL LAW AND FREE OF STATE JURISDICTION ABSENT TRIBAL AGREEMENT OR FEDERAL LAW TO THE CONTRARY

The Indian Commerce Clause was included in the Constitution to center authority over Indian affairs in Congress and to deny state jurisdiction within Indian country absent some delegation from Congress or common law rule. In *Worcester v. Georgia*,¹¹ the Court rejected Georgia's assertion of criminal jurisdiction over a non-Indian present within the Cherokee Nation without a license required by state law.¹² Chief Justice Marshall explained that Indian tribes were quasi-independent sovereigns not subject to state jurisdiction.¹³ Now, Indian tribes, the federal government, and the states share authority within Indian country as a result of treaties, federal statutes, and federal common law. The modern definition of "Indian country," found in the federal criminal code, encompasses Indian reservations, allotments, and **[*920]** dependent Indian communities.¹⁴ The Supreme Court later ruled that this definition is also generally applicable in the civil context,¹⁵ though there are many other definitions applicable in particular situations.¹⁶

Treaty negotiations with western tribes took place as the United States gained new territory from foreign nations. Property used and occupied by Indian nations could not be transferred except by treaties or other agreements ratified by Congress.¹⁷ These tribal property rights were based on aboriginal Indian occupancy¹⁸ and were said to be as "sacred as the fee simple of the whites."¹⁹ Three hundred and sixty-seven treaties with Indian tribes were negotiated and ratified between 1778 and 1871.²⁰ The treaties furthered peaceful relations with the tribes and provided access to vast areas for non-Indian settlement.²¹ The United States recognized permanent reservations, and, primarily in the upper-Midwest and Pacific Northwest, the tribes reserved off-reservation hunting and fishing rights.²² However, when non-Indians wanted to

settle the land previously "guaranteed" to the tribes by treaty, most of the "permanent" tribal homelands were drastically reduced in size. ²³

[*921] The promise of permanent homelands also faded during the 1850s when the Senate ratified treaties with tribes that authorized the breakup of tribal lands into individual "allotments." ²⁴ The federal retreat from the consent model increased when Congress ended treaty-making in 1871. ²⁵ The policy of ending the reservation system culminated with the adoption of the General Allotment Act, ²⁶ which reduced the Indian land base from 156 million acres in 1881 to approximately forty-eight million acres in 1934. ²⁷ Congress returned to the public domain lands that were considered "surplus" to Indian needs. ²⁸ While previous reservations were generally under exclusive tribal ownership, the new policies allowed an influx of non-Indians within reservation boundaries. This resulted in a checkerboard pattern of land ownership within reservations and introduced many of today's vexing jurisdictional problems. ²⁹

Congress returned to earlier policies that supported protection of Indian land with the adoption of the Indian Reorganization Act (IRA) in 1934. ³⁰ The IRA "halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands." ³¹ This return to support of tribal self-government and a secure Indian land base was short-lived, however, as less than twenty years later, Congress adopted a resolution calling for the **[*922]** "termination" of the federal-tribal relationship with certain Indian tribes. ³² Although the termination period quickly fell into disfavor, its short tenure resulted in the end of the government-to-government relationship between the United States and over seventy federally recognized Indian tribes, and transferred jurisdiction over those tribes to the states. ³³ This state control turned the historic federal-tribal relationship on its head and states began aggressively to assert jurisdiction over Indian country through laws such as P.L. 280. ³⁴ As such, states began to view their claims of jurisdiction as the norm and viewed the presence of tribal reservations as unwanted jurisdictional enclaves that states opposed on principle, without examining the bona fide interests of the tribes or the state itself. ³⁵

The presence of substantial numbers of non-Indians within Indian country and their presence on non-tribal land increased the states' desires to assert jurisdiction over their non-Indian citizens in Indian territories. Recall, however, that it was Georgia's assertion of jurisdiction over a non-Indian's presence on the Cherokee Reservation that resulted in the categorical rule that states lacked jurisdiction within Indian country. ³⁶ Changes in federal law were necessary for states to accomplish their end. With Indian peoples no longer physically separated from the non-Indian population, and their reservations now included within the exterior boundaries of many states, local racism and jurisdictional jealousy combined to increase efforts to reduce federal protection of tribal autonomy. Nowhere is this more true than in the context of criminal jurisdiction - the focus of P.L. 280. Before launching into the P.L. 280 issues that are the focus of this Article, a review of general criminal jurisdiction rules is necessary.

[*923]

II. THE EVOLUTION OF CRIMINAL JURISDICTION IN INDIAN COUNTRY FROM EXCLUSIVE TRIBAL CONTROL TO AN INCREASED STATE ROLE IS INCONSISTENT WITH SELF-DETERMINATION AND CONSENT PRINCIPLES

Criminal jurisdiction in Indian country evolved from early acknowledgement of exclusive tribal jurisdiction over persons within aboriginal territories, to a gradual assertion of paramount federal authority over crimes involving tribal members and non-Indians. The federal government initially took a hands-off approach to intra-tribal disputes, but as the United States shifted toward assimilation, it asserted jurisdiction over major crimes between tribal members. Federal domination of criminal jurisdiction increased over time and was accompanied in 1968 by the reduction of tribal authority to impose punishments on criminal offenders in tribal court proceedings. ³⁷ While there are many problems with the assertion and implementation of federal jurisdiction and policies, most evidence points to the conclusion that the exercise of state jurisdiction in the criminal law arena has made a bad situation worse. ³⁸ Before exploring

these issues more deeply, it is useful to set out the basic scheme governing criminal jurisdiction in Indian country.

The term "Indian country" is the geographic touchstone for application of the Indian law jurisdictional rules.³⁹ The modern definition was adopted in 1948 to take policy changes and various Supreme Court decisions into account.⁴⁰ Prior to 1948, the definitions of Indian country were supplied by Congress,⁴¹ or the Supreme Court as a matter of common law.⁴² In *United States v. John*,⁴³ the Court explained that while "earlier cases had suggested a more technical and limited [*924] definition of "Indian country," it was a "more expansive scope of the term that was incorporated in the 1948 revision of Title 18."⁴⁴ The current statute defines Indian Country as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities ... and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.⁴⁵

This statute's most often applied section is that dealing with "reservation" Indian country. Of particular importance here, the reservation component expressly includes lands patented in fee simple to non-Indians and state rights-of-way within reservations as Indian country.⁴⁶ The Supreme Court noted that the reason for the unified treatment of all land within reservations was to facilitate effective law enforcement by avoiding the need to determine land status on a tract-by-tract basis to determine the bounds of federal criminal jurisdiction.⁴⁷

A.

Federal Jurisdiction over Indians in Indian Country Increased as Indian Nations Succumbed to Federal Domination

Congress first treaded lightly when passing criminal laws affecting Indians and their territory, but gradually increased federal power as the non-Indian population grew. The Trade and Intercourse Act of 1790 made crimes by non-Indians against Indian victims federal offenses.⁴⁸ Offenses by Indians against non-Indians were generally dealt with through diplomatic channels in the early days of federal-tribal relations. In 1817, Congress adopted the first version of the Indian Country Crimes Act (ICCA), which made offenses by non-Indians and Indians in Indian territory federal offenses.⁴⁹ The ICCA extends federal criminal laws that apply to areas of exclusive federal jurisdiction, such as military bases and national parks, to Indian country.⁵⁰ The ICCA has two [*925] important exceptions. First, it does not cover Indian-on-Indian crimes.⁵¹ Second, if an Indian has first been punished for a crime under tribal law, he or she may not be prosecuted under the ICCA for the same offense.⁵² The ICCA also incorporates state law crimes under the Assimilative Crimes Act (ACA)⁵³ to fill gaps in the federal criminal code.⁵⁴ Thus, if a crime committed in Indian country is not covered directly by the federal criminal code for federal enclaves, a federal prosecutor may apply state criminal law through the ICCA. The second source of modern criminal jurisdiction in Indian country is the Major Crimes Act (MCA),⁵⁵ which defines sixteen crimes as federal offenses when committed by Indians (whether the victims are Indian or not).⁵⁶ The MCA was passed in response to the Supreme Court's decision in *Ex Parte Crow Dog*.⁵⁷ There, the Court ruled that the federal government was barred from prosecuting an Indian for the murder of another tribal member because of the ICCA's Indian-on-Indian exception.⁵⁸ The incident had been dealt [*926] with under traditional Brule Sioux law, which called for a tribal council meeting, family meetings with a peacemaker, and restitution in order to restore order to the tribal community.⁵⁹ The ethnocentric non-Indian view was that such tribal justice systems were inadequate and western notions of criminal punishment should be imposed on tribes, and thus the MCA became law.

In addition, some courts have held that the United States has jurisdiction over some general federal criminal laws within Indian country.⁶⁰ These appellate court rulings have been criticized because Congress has not expressly made such offenses applicable to Indians in Indian country. Just as the MCA was necessary to reach specifically enumerated Indian-on-Indian offenses, it seems that general federal statutes should not apply in Indian country unless Congress has expressly stated its intention to do so. However, these federal appeals courts appear in agreement that such general crimes have a nationwide scope and therefore should reach into Indian country.

B. Tribes Retain Inherent Jurisdiction over Indians

Indian tribes have criminal jurisdiction over their own members and other Indians who are members of federally recognized tribes.⁶¹ Tribal sentencing authority, however, was severely limited by the Indian Civil Rights Act (ICRA), which provides that tribes may impose only a sentence of up to one year in jail and/or \$ 5000 per offense.⁶² The Tribal Law and Order Act of 2010 amended this to provide that subject to certain federal standards, tribes may sentence an Indian defendant to up to **[*927]** three years in jail and impose a \$ 5000 fine per offense.⁶³

Although the Supreme Court has never decided the issue,⁶⁴ tribes retain concurrent criminal jurisdiction over Indians with the federal government for crimes governed by the MCA and ICCA.⁶⁵ In *United States v. Wheeler*,⁶⁶ the Court held that the Double Jeopardy Clause of the Constitution did not bar federal prosecution for an offense after a tribal prosecution based on the identical conduct.⁶⁷ The Court noted that "tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests."⁶⁸ Because tribal powers may not be limited by implication, it seems apparent that concurrent tribal jurisdiction over matters covered by federal criminal statutes is not preempted.⁶⁹

In *Oliphant v. Suquamish Tribe*,⁷⁰ the Supreme Court ruled that Indian tribes have no criminal jurisdiction over non-Indian defendants on the ground that such jurisdiction had been divested through the tribes' incorporation into the United States, various other acts of Congress, and the "shared assumptions" of the three branches of the federal government.⁷¹ Despite the lack of jurisdiction, tribal police do have "authority to stop and detain a non-Indian who allegedly violates state and tribal law while traveling on a public road within a reservation until **[*928]** that person can be turned over to state authorities for charging and prosecution."⁷² Washington State law provides for cross-deputization agreements, permitting tribal law enforcement officials to enforce applicable state law.⁷³ Tribes may also cross-deputize state and federal officers under tribal laws if they wish.

C. States Have No Jurisdiction over Criminal Matters Involving Indians

State jurisdiction over Indian country is precluded by the inherent sovereignty of Indian nations,⁷⁴ and is also preempted by the MCA and the ICCA.⁷⁵ Similarly, states lack jurisdiction over crimes by non-Indians when the victim is an Indian because of the same principles. On the other hand, by common law rule, states have jurisdiction over crimes committed by non-Indians against other non-Indians within Indian country.⁷⁶ States also appear to have jurisdiction over victimless crimes committed by non-Indians when no federal or tribal interests are **[*929]** implicated.⁷⁷

Congress has used its power under the Indian Commerce Clause to authorize the exercise of state jurisdiction in haphazard fashion. Thus, New York,⁷⁸ Iowa,⁷⁹ and Kansas⁸⁰ all were authorized to exercise some jurisdiction over Indian country in those states.⁸¹ These statutes were the precursors to the most sweeping authorization of state jurisdiction ever: Public Law 280, which was adopted in the midst of the federal termination era. In addition, a number of modern land claims settlement acts contain provisions that place criminal law enforcement

authority largely in the hands of state authorities, while sometimes preserving concurrent federal and tribal jurisdiction. ⁸²

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III. P.L. 280 AUTHORIZED STATE CRIMINAL AND SOME CIVIL JURISDICTION IN INDIAN COUNTRY IN A MANNER INCONSISTENT WITH MODERN SELF-DETERMINATION POLICIES

A. The Passage of P.L. 280 Marked a Retreat from the Policy of Support for Tribal Institutions Under the IRA

After the encouragement and tangible support provided to Indian tribes in the 1934 Indian Reorganization Act, Congress quickly lapsed into a policy of assimilation and eventually into a policy of selectively terminating the government-to-government relationship with Indian tribes. ⁸³ In 1953 Congress passed House Concurrent Resolution 108, which set a goal of removing federal jurisdiction over Indian country and making Indians subject to general state law as quickly as possible. ⁸⁴ Congress implemented this policy by enacting statutes applicable to individual tribes and set out plans for effecting the termination of the federal-tribal relationship. ⁸⁵ Another prong of the termination policy came through P.L. 280, ⁸⁶ which required six states to assert criminal jurisdiction and some civil jurisdiction over the Indian country located within those states. ⁸⁷ In addition, Congress provided a disclaimer of any **[*931]** effect on any trust property, water rights, or hunting, trapping or fishing rights, including tribal regulatory power over such activities. ⁸⁸

Finally, Congress also included a provision authorizing other states to unilaterally assert criminal and/or civil jurisdiction over Indian country. ⁸⁹ The fact that this provision did not include a role for affected tribes in the process has long been viewed as morally and politically unacceptable by Indian tribes. ⁹⁰ President Eisenhower expressed great **[*932]** concern over the law's failure to obtain tribal consent to the intrusion on tribal jurisdiction in his signing statement. ⁹¹ Although Congress ultimately approved a provision in the 1968 Indian Civil Rights Act that required a state to obtain tribal consent before adopting P.L. 280, ⁹² seven states had already unilaterally asserted some measure of jurisdiction. ⁹³

B. P.L. 280's Grant of Criminal and Civil Jurisdiction Did Not Include Civil Regulatory Authority

The primary focus of P.L. 280 was to grant states criminal jurisdiction over Indian country. The legislative history makes it clear that "the foremost concern of Congress at the time of enacting PL-280 was lawlessness on the reservations and the accompanying threat to Anglos living nearby." ⁹⁴ States did not gain any authority to regulate civil activities in Indian country through P.L. 280 ⁹⁵ because Congress did not extend the full panoply of civil regulatory powers to the states, but only intended to afford Indians a judicial forum to resolve disputes among themselves and with non-Indians. ⁹⁶ This principle is clear from *Bryan v. Itasca County*, ⁹⁷ in which the county attempted to tax non-trust property within a reservation under the guise that P.L. 280 granted it authority to do so. The Court rejected Itasca County's argument that the grant of civil jurisdiction included the authority to impose taxes and regulations on non-trust property within Indian country. ⁹⁸

This interpretation of P.L. 280 was reinforced in the landmark case of *California v. Cabazon Band of Mission Indians*. ⁹⁹ In *Cabazon*, California sought to regulate bingo and various poker games on reservations under P.L. 280's criminal provisions. State law permitted **[*933]** bingo and other games, but only for charitable purposes and subject to regulations with which the tribal gaming operators refused to comply. ¹⁰⁰ California sought to enforce these regulations by punishing these violators with criminal penalties. ¹⁰¹ When determining whether California had jurisdiction to regulate gaming under the criminal provisions of P.L. 280, the Court strongly reinforced its holding in *Bryan*. ¹⁰² The Court ruled that "it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." ¹⁰³ California

argued that because it imposed criminal penalties for violations of its regulations, the case should not be analyzed under Bryan's (or P.L. 280's) civil jurisdiction rules. The Court rejected California's plea by drawing a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws. ¹⁰⁴ Conduct that is actually prohibited as a matter of state law and policy falls on the criminal side of P.L. 280's grant, while activity that is generally permitted but regulated through state laws and rules is not within P.L. 280's grant of civil jurisdiction. ¹⁰⁵ The Court rejected California's argument that because criminal penalties attached to the violation of the state regulations, it should be regarded as prohibited criminal conduct and thus subject to state jurisdiction under P.L. 280. After examining the state's gaming laws, the majority concluded that "in light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." ¹⁰⁶ The Court thus eliminated the argument that a state could simply attach criminal penalties to a regulatory program to enforce the regulations pursuant to P.L. 280.

The Court's test is easy to apply in most cases. ¹⁰⁷ For example, there is no doubt that serious crimes such as murder, assault, robbery and the like all fall on the criminal/prohibitory side of the line. In some cases, states have explicitly classified certain offenses as civil infractions rather **[*934]** than criminal offenses. This distinction was critical in an action brought by the Confederated Tribes of the Colville Reservation where the Ninth Circuit considered Washington's assertion of civil and criminal jurisdiction over activities on highways within Indian country. ¹⁰⁸ The court ruled that because the state legislature decriminalized the traffic code, those civil regulations could not be enforced through P.L. 280. ¹⁰⁹

Because state regulatory authority is not sanctioned by P.L. 280, what is left is the application of state rules of decision in civil litigation. ¹¹⁰ While state taxation, zoning, and workers' compensation laws are regulatory in nature and thus easily identified as outside of P.L. 280's grant of civil jurisdiction, ¹¹¹ other laws have proved difficult to classify. For example, a dependency proceeding leading to the involuntary termination of parental rights was characterized by the Ninth Circuit as a non-regulatory procedure akin to the adjudication of a private civil dispute over a contract or tort claim, thus falling within P.L. 280's ambit. ¹¹² But the Wisconsin Attorney General reached the opposite conclusion in an opinion years earlier. ¹¹³ The Ninth Circuit's ruling rested on the notion that a dependency proceeding is a dispute about the status of a private individual - a child - and that "child dependency proceedings are more analogous to the 'private legal disputes' that fall under a state's Public Law 280 jurisdiction than to the regulatory regimes at issue in Bryan and Cabazon." ¹¹⁴ This reasoning ignores the extreme coercive consequence of a dependency adjudication, namely removal of a child from the custody of a parent, and the possible **[*935]** termination of parental rights. Such an outcome is only possible because of the state's authority to regulate domestic relations matters as a party to an adjudication, which is far different from a state court being available to adjudicate private civil matters such as voluntary adoptions, contract disputes, or tort claims arising out of on-reservation conduct.

In addition, there are a number of jurisdictional matters unaffected by P.L. 280. First, P.L. 280 disclaims any grant of state authority to regulate or tax trust or restricted property, or to affect any treaty-protected rights including water, hunting, and fishing rights. ¹¹⁵ The civil disclaimer also precludes state probate jurisdiction over trust property and any interest therein. ¹¹⁶ Second, P.L. 280 does not affect the relative bounds of state regulatory jurisdiction under the preemption and infringement tests described by the Supreme Court in *White Mountain Apache Tribe v. Bracker*. ¹¹⁷ Under these related doctrines, federal law often preempts state regulatory jurisdiction over non-members in Indian country. Moreover, state regulatory jurisdiction over tribal members is generally preempted. ¹¹⁸ Third, issues of tribal authority over non-members on non-Indian fee land are analyzed under the Montana line of cases, which establish a presumption that there is no tribal jurisdiction absent federal delegation, or exceptional circumstances. ¹¹⁹ Because P.L. 280's jurisdictional grant does not affect these issues, they are similarly not in play when a state retrocedes any or all jurisdiction it gained under P.L. 280.

Also unaffected by retrocession are crimes related to Indian gaming, which is governed by the Indian Gaming Regulatory Act of 1988 (IGRA).¹²⁰ Three provisions of the IGRA govern gaming-related criminal activity in Indian country.¹²¹ One provision makes state **[*936]** gambling laws applicable within Indian country as a matter of federal law,¹²² but "gambling" does not include class I or II gaming as defined in IGRA, or class III gaming if conducted pursuant to a tribal-state compact.¹²³ However, IGRA explicitly confers authority to prosecute any violations of state law exclusively on the federal government, unless otherwise provided by a tribal-state compact.¹²⁴ This provision has been interpreted as preempting any state criminal jurisdiction over gaming-related matters. In *Sycuan Band of Mission Indians v. Roache*,¹²⁵ the court rejected California's argument that it retained jurisdiction to enforce state gaming laws in Indian country.¹²⁶

To summarize, in non-mandatory P.L. 280 states: (1) Indians are potentially subject to prosecution by federal authorities under the Major Crimes Act or Indian Country Crimes Act, by state authorities under the terms of a P.L. 280 assumption, and by tribal authorities under inherent tribal power; (2) non-Indians are subject to federal prosecution under the Indian Country Crimes Act, and state prosecution under the terms of a P.L. 280 assumption, or the common law rules permitting state prosecutions of non-Indian versus non-Indian crime. When considering state criminal jurisdiction under P.L. 280, one must remember to evaluate whether the particular law is simply a civil regulation dressed up with criminal penalties - and thus not enforceable under the criminal/prohibitory civil/regulatory dichotomy developed by the Supreme Court. If this were not difficult enough, the Supreme Court has permitted non-mandatory states to selectively assert jurisdiction under P.L. 280, which adds another level of complexity in those jurisdictions - such as Washington.

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IV. WASHINGTON'S JURISDICTIONAL SCHEME UNDER P.L. 280 IS CONFUSING AND INCONSISTENT WITH THE CONSENT PARADIGM

The rules governing federal, state, and tribal jurisdiction set out in Section II changed when the Washington State Legislature passed important legislation in 1957¹²⁷ and 1963.¹²⁸ The 1957 legislation followed the consent paradigm as it offered state jurisdiction over Indian country only upon request from the affected tribe. On the other hand, in 1963, the state selectively assumed jurisdiction without regard to tribal wishes.¹²⁹ Eleven tribes requested state jurisdiction pursuant to the 1957 statute, although seven tribes achieved partial retrocession of state jurisdiction.¹³⁰

Challenges to state jurisdiction came promptly. Individuals subject to state prosecutions contested the validity of the state's assertion of jurisdiction on constitutional grounds. In *State v. Paul*,¹³¹ the defendant **[*938]** challenged a prosecution under the 1957 statute on the ground that the state's enabling act and constitution disclaimed any jurisdiction over Indian lands.¹³² While Congress authorized states to amend their constitutions so that they could accept jurisdiction over Indian country under P.L. 280,¹³³ Washington failed to do so. Nevertheless, the Washington State Supreme Court upheld Washington's assertion of jurisdiction, reasoning that the state constitution need not be amended as a matter of P.L. 280 or state law.¹³⁴ In addition to the Paul litigation, the Quinault Indian Nation unsuccessfully challenged Washington's assertion of jurisdiction in federal court before the Ninth Circuit on the same state constitutional ground.¹³⁵ After a later Ninth Circuit ruling that Washington's partial assumption of jurisdiction scheme lacked a rational basis and thus violated the federal equal protection guarantee, the United States Supreme Court reversed, and also held that states with disclaimers in their constitutions were not required as a matter of federal law to amend them to assume P.L. 280 jurisdiction.¹³⁶

[*939] The 1963 legislation unilaterally asserted civil and criminal jurisdiction over (1) all off-reservation Indian country; (2) all reservations, not including Indians on tribal or allotted lands within "an established reservation"; and (3) Indians on tribal or allotted lands within "an

established reservation" in the following eight subject matter areas: ¹³⁷

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways. ¹³⁸

A threshold issue in each case involving state jurisdiction over an Indian is whether the alleged activity occurred on "tribal or allotted lands" within a "reservation" and thus is beyond the scope of state jurisdiction if not within one of the eight enumerated areas. For example, in *State v. Boyd*, ¹³⁹ the court determined that land owned by the United States Bureau of Reclamation within the Colville Reservation was not "tribal or allotted land" so that state criminal jurisdiction was permitted. ¹⁴⁰ In *State v. Pink*, ¹⁴¹ the state lacked jurisdiction over a firearms offense on a state highway right-of-way because the court found that the underlying land was held in trust by the United States for the benefit of the tribe, therefore the state's jurisdiction was limited to **[*940]** traffic offenses. ¹⁴² The court ruled in *State v. Jim* ¹⁴³ that a treaty fishing access site was a "reservation" precluding state criminal or civil jurisdiction over Indians, except for the eight areas. ¹⁴⁴ In *State v. Comenout*, ¹⁴⁵ the court upheld criminal jurisdiction over tribal members violating state law on an off-reservation allotment. ¹⁴⁶

Tribes formally recognized after P.L. 280 was amended in 1968 to require tribal consent to state jurisdiction under P.L. 280 are not subject to state jurisdiction under P.L. 280. ¹⁴⁷ In *State v. Squally*, ¹⁴⁸ the court faced the question of whether land added to the Nisqually reservation after 1968 was subject to state jurisdiction under P.L. 280. The court emphasized the Nisqually tribe's original, broad request for full state jurisdiction of its reservation under the 1957 statute and ruled that trust land added to the reservation after 1968 was subject to state jurisdiction. ¹⁴⁹ It is significant that in one instance where Congress chose **[*941]** to make P.L. 280 applicable to lands taken in trust in a P.L. 280 state after 1968 for a restored tribe it explicitly so provided. ¹⁵⁰ If the preexisting assertion of state jurisdiction under P.L. 280 extended to newly recognized tribes and Indian country, Congress's action would have been unnecessary.

Moreover, the Indian law canons of construction counsel against broadly interpreting P.L. 280 to the detriment of tribal sovereignty as "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians."¹⁵¹

If a prosecution under P.L. 280 arises anywhere within Indian country, the court must undertake an analysis of the criminal/prohibitory civil/regulatory dichotomy.¹⁵² As a threshold matter, recall that state civil jurisdiction under P.L. 280 is limited to "opening the courthouse door" and does not authorize the exercise of state regulatory jurisdiction.¹⁵³ Thus, whenever the state asserts criminal jurisdiction over an Indian, the prosecution must demonstrate that the conduct is prohibited as a matter of state law and is not actually part of a civil regulatory regime.

A significant amount of litigation has involved activity on public highways under the eighth category - operation of vehicles on public highways.¹⁵⁴ In *State v. Abrahamson*,¹⁵⁵ Division I of the Washington State Court of Appeals correctly upheld a drunk driving conviction on **[*942]** public roads on the Tulalip Indian Reservation.¹⁵⁶ Drunk driving seems clearly to fall on the criminal/prohibitory side of the P.L. 280 dichotomy. On the other hand, in the case of an individual who did not consent to a breathalyzer or blood draw test and was accordingly subject to a civil suspension of his license, another court held that "statutes that authorize evidence collection in support of prosecuting criminal cases are properly classified as criminal in nature."¹⁵⁷ While the court may be correct as to the authority to gather evidence from a defendant in support of a prosecution over which P.L. 280 grants jurisdiction, the court's reasoning as to the criminality of the implied consent statute is doubtful. This is because the only sanction for refusing a blood or breathalyzer test is a civil license suspension, and the legislature explicitly provided that refusal to comply with the implied consent statute "is designated as a traffic infraction and may not be classified as a criminal offense."¹⁵⁸ The court also inferred that the criminal/prohibitory civil/regulatory distinction mandated by the United States Supreme Court might not apply because Washington assumed jurisdiction in a more limited way than the mandatory states involved in *Cabazon and Bryan*.¹⁵⁹ This seems incorrect and inconsistent with *Confederated Tribes of the Colville Reservation v. Washington*,¹⁶⁰ where the tribes successfully challenged the state's authority over traffic offenses under P.L. 280. In *Colville*, the Ninth Circuit ruled that Washington may not regulate speeding by tribal members because speeding is not a criminal offense, but rather a civil infraction sanctioned by a fine; the court drew no distinction based on whether a state is one of the six mandatory jurisdictions under P.L. 280.¹⁶¹ However, in *Yallup* it was likely proper to use the result of the **[*943]** blood test in aid of the conviction for driving under the influence because the state has jurisdiction over Indians on public highways and the blood draw took place on fee land where the state has full P.L. 280 jurisdiction.¹⁶² The defendant was properly subject to criminal prosecution for driving under the influence, but a civil sanction for refusing a test under the implied consent statute would be of doubtful validity.

There has been much less litigation involving the other seven categories encompassed by the statute. The state asserted jurisdiction over public assistance under category (2), although no reported decisions have been located. Three of the categories - domestic relations (category 3),¹⁶³ adoption proceedings (category 6), and dependent children (category 7) - relate to family law matters and allow state courts to adjudicate matters involving family relationships.¹⁶⁴ It is more difficult to determine the jurisdiction permissible in terms of commitments for mental illness (category 4). Under the reasoning of *Doe v. Mann*, such status determinations presumably would be within state civil **[*944]** adjudicatory jurisdiction,¹⁶⁵ although the coercive effect of a civil commitment may make it fall on the civil/regulatory divide of P.L. 280 and thus beyond state jurisdiction. Adjudication of matters involving juvenile delinquency (category 5) includes criminal matters on tribal and allotted lands.¹⁶⁶ On the other hand, with regard to compulsory school attendance (category 1), one might expect state authority on trust and allotted lands within reservations to be limited, or non-existent, because regulation of school attendance seems to be a civil regulatory matter. This is especially true because there is a federal statute that expressly authorizes state jurisdiction over such on-reservation matters,

but only when the tribe has consented to state jurisdiction, and the Secretary of the Interior has approved the state jurisdiction. ¹⁶⁷ That the state's assumption of jurisdiction over the eight areas took place years before the civil regulatory/adjudicatory dichotomy was revealed by the Supreme Court in *Bryan v. Itasca County* and amplified in *Cabazon Band* ¹⁶⁸ would explain how the legislature misconceived its authority on the civil/regulatory side.

Now, anyone has to admit that this is a very complex and confusing jurisdictional scheme. Nevertheless, state and tribal officials, courts, and the public must deal with the piecemeal fashion in which state jurisdiction has been imposed. One way to deal with it would be to simply get rid of all P.L. 280 jurisdiction - something made possible by Congress.

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V. CONGRESS AMENDED P.L. 280 SO STATES MAY RETROCEDE JURISDICTION, BUT TRIBES HAVE NO FORMAL ROLE IN THE PROCESS

When P.L. 280 was passed, tribal dissatisfaction with the unilateral assertion of state jurisdiction was widespread and well documented. ¹⁶⁹ Adopted in the midst of the now-repudiated termination era, the statute and the state jurisdiction that accompanied it - most often without tribal consent - are illustrative of discredited policies inconsistent with the modern Indian self-determination policies. Washington tribes reacted to this by initiating concerted efforts in 1972 to remove state jurisdiction from their Indian country. ¹⁷⁰ When a local congressman claimed before a congressional committee that jurisdictional confusion had been solved in Washington under P.L. 280, the Vice-President of the National Congress of American Indians, Mel Tonasket, retorted, "[Congressman] Meeds made some statements that are totally false He should know better." ¹⁷¹

Like Washington tribes, national Indian organizations were consistent in their opposition to the unilateral imposition of P.L. 280 jurisdiction on tribes. ¹⁷² In one of many cases challenging the state's assertion of P.L. 280 jurisdiction, the Ninth Circuit observed that, "Indian tribes were critical of Pub. L. 280 because section 7 authorized the application of state law to tribes without their consent and regardless of their needs or circumstances." ¹⁷³ In 1968, Congress repealed the section of P.L. 280 that allowed states to acquire jurisdiction without tribal consent. It also amended the statute by providing that "the United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to [P.L. 280]." ¹⁷⁴ The President of the United States authorized the Secretary of the Interior to accept a state's retrocession after consulting with the Attorney General. ¹⁷⁵ However, the Secretary is not required to **[*946]** accept the retrocession. As a practical matter, the Secretary considers the law enforcement capacity of the tribe and the United States with respect to any retrocession in order to avoid a decrease in on-the-ground law enforcement. Also, the views of the Justice Department carry great weight because the local U.S. Attorney and FBI would have increased obligations to enforce federal criminal laws in Indian country after any retrocession. Since 1968, there have been thirty-one tribes that have fully or partially achieved state retrocession over some or all of the Indian country under their jurisdiction. ¹⁷⁶ Prior to 2012, Washington's retrocession laws provided that certain tribes that agreed to full state criminal and civil jurisdiction under the 1957 state law could request retrocession of some (but not all) state criminal jurisdiction. ¹⁷⁷ There was no provision for retrocession of civil jurisdiction. Of the eleven tribes that requested full state jurisdiction under the 1957 state law, seven requested and were granted retrocession. ¹⁷⁸

[*947] In the 2011 Washington State legislative session, Representative John McCoy introduced a bill that permitted the full or partial retrocession of state criminal jurisdiction to the United States upon an Indian tribe's request. ¹⁷⁹ The bill required the Governor to issue a proclamation retroceding state criminal jurisdiction if requested by the Indian tribe ¹⁸⁰ and acknowledged that retrocession would only become effective if accepted by a duly designated officer of the United States government." ¹⁸¹ The Secretary of the Interior is the officer designated to accept a retrocession. ¹⁸² A subsequent amendment - offered by Representative

McCoy - would have eliminated the Governor's obligation to issue a retrocession proclamation upon receipt of a request from a tribe and instead provide her with discretion to approve a retrocession petition and forward a proclamation to the Secretary of the Interior.¹⁸³ While the bill did not become law, there was tremendous interest in the proposal from tribes, the U.S. Attorney's office, and state law enforcement entities. The premise of the proposed legislation was that Indian tribes should have the choice whether to be subject to state jurisdiction, and that it was unfair for Congress to allow state jurisdiction without tribal consent.

The Governor, Speaker of the House, and President of the Senate appointed a Joint Executive-Legislative Workgroup to consider retrocession issues before the 2012 legislative session.¹⁸⁴ A letter signed by Governor Gregoire, House Speaker Frank Chopp, and Senate President Lisa Brown explained:

It became apparent that retrocession is an issue of broad importance to the tribes; federal, state and local governments; and the citizenry of Washington. It also became apparent that retrocession is not generally understood and that a coordinated and focused effort would be necessary to give the issue the **[*948]** attention it deserves and allow all affected parties an opportunity to discuss and understand potential implications.

Accordingly, we have agreed to establish a Joint Executive-Legislative Workgroup on Tribal Retrocession.¹⁸⁵

The twenty-member task force met four times between July and November for in-depth discussions of the issues and development of a draft bill. A wide variety of constituencies provided information and advice to the task force, which discussed a draft bill at its final meeting in November 2011.¹⁸⁶ As a result, members of the State House and Senate introduced identical bills at the start of the 2012 Session - House Bill 2233¹⁸⁷ and Senate Bill 6147.¹⁸⁸ The 2012 version of the bill included two major changes. First, it afforded the Governor discretion to reject a tribal petition for retrocession, and second, allowed for retrocession of civil as well as criminal jurisdiction. The new legislation was approved in the Senate on March 5, 2012 by a vote of 42-6, and in the House by a vote of 59-38 on March 6, 2012.¹⁸⁹ It became effective on June 7, 2012, ninety days after the Governor signed the bill, as provided by state law.¹⁹⁰

Washington's 2012 retrocession legislation authorizes the Governor to forward a proclamation for retrocession to the Secretary of the Interior when certain conditions are met. While previous law permitted only the partial retrocession of criminal jurisdiction and no retrocession of civil jurisdiction (and now applies to only two of the four tribes that remain subject to full state jurisdiction), the new legislation allows for retrocession of "all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe."¹⁹¹ The process is commenced by a tribal resolution and would be carried out in the following fashion:

(1) The governing body of a tribe submits a resolution to the **[*949]** Governor requesting retrocession with information regarding the tribe's plan to exercise jurisdiction after retrocession.¹⁹²

(2) Within ninety days of receiving the resolution, the Governor must convene a government-to-government meeting with the tribal governing body or its designated representatives. The Governor's office must also consult with elected officials of state political subdivisions located

near the Indian tribe's territory. ¹⁹³

(3) The Governor has one year after receiving the tribal resolution to approve or deny the request in whole or in part, although extensions may be made for any term by agreement, or unilaterally by either party for six months. Any denial of a tribal request must be supported by reasons set out in writing by the Governor. If accepted, a proclamation to that effect must be issued and forwarded on to the Secretary of the Interior within ten days. ¹⁹⁴

(4) Within 120 days of receiving the tribal resolution, but before approving it, designated standing committees of each house in the legislature must be notified, and they may have hearings and make non-binding recommendations to the Governor. ¹⁹⁵

(5) The proclamation for retrocession will not be effective until accepted by a "duly designated officer of the United States government." ¹⁹⁶

[*950]

(6) If the proclamation addresses jurisdiction over public roads, the Governor must consider: (a) whether tribal interlocal agreements exist with other jurisdictions that address uniformity of motor vehicle operations in Indian country; (b) whether there is a tribal police department to ensure safety; (c) whether the tribe has traffic codes and courts; and (d) whether there are appropriate traffic control devices in place. ¹⁹⁷

(7) The legislation contains savings clauses that reserve any state jurisdiction over civil commitment of sexually violent predators under state law, ¹⁹⁸ and ensures that cases commenced in state courts or agencies prior to the effective date of a retrocession may continue. ¹⁹⁹ It also provides that the tribes covered by the existing partial retrocession scheme would remain eligible to use that mechanism. ²⁰⁰

The Joint Executive-Legislative Work Group on Tribal Retrocession worked hard to understand the complex legal and policy issues implicated in Indian country. The task force's leadership received input from state, federal, and tribal law experts to understand how tribal desires for retrocession of state civil and criminal jurisdiction could best be accomplished, and the effects of retrocession on both Indian and non-Indian parties. Those concerns were taken into account in a fashion that provides for non-tribal input to a process that tribes may initiate and present directly to the Governor. ²⁰¹ In the end, however, the Governor **[*951]** has discretion to accept to a tribal petition.

VI. THE MODERN SELF-DETERMINATION POLICY IS INCOMPLETE WITHOUT TRIBAL AUTHORITY TO INITIATE RETROCESSION AT THE FEDERAL LEVEL

A. Washington's 2012 Retrocession Legislation Is an Excellent Model for Negotiating Jurisdiction in Indian Country

It should be apparent by now that criminal jurisdiction in Indian country is unduly complex, and does not work very well. The regime is governed by federal law, and was imposed generally without tribal consent in a piecemeal fashion. Congress found in 2010 that:

The complicated jurisdictional scheme that exists in Indian country -

(A) has a significant negative impact on the ability to provide public safety to Indian communities;

(B) has been increasingly exploited by criminals; and

(C) requires a high degree of commitment and cooperation among tribal, Federal, and State law enforcement officials[.] ²⁰²

In any given case, federal, tribal, and state police and prosecutors determine jurisdiction in Indian country based on whether an Indian is involved in a crime as defendant or victim, ²⁰³ and the nature of the offense. Indians may be federally prosecuted if they have committed an offense included in the Major Crimes Act. ²⁰⁴ Indians and non-Indians alike are subject to prosecution under the Indian Country Crimes Act, but subject to exceptions in the case of Indian-on-Indian crimes, in cases of prosecutions of Indians already punished by a tribe, or in the case of a specific treaty exception. ²⁰⁵ Non-Indian versus non-Indian crime is left to the states, ²⁰⁶ unless it is also a violation of a general federal criminal [*952] statute. ²⁰⁷ P.L. 280 added to the complexity by transferring federal criminal and civil jurisdiction to six "mandatory" states, and authorizing other states to assume criminal and civil jurisdiction at their option. ²⁰⁸ The only empirical study of the transfer of jurisdiction to the states under P.L. 280 demonstrates that it did not improve law enforcement in Indian country, and in most cases, law enforcement services and tribal-state relations declined. ²⁰⁹ As explained above in Part IV, Washington State assumed jurisdiction in a manner that passed rational basis review, but is otherwise bewildering. Moreover, the jurisdictional arrangements described above were not developed consistently with basic democratic consent principles. ²¹⁰ Rather, they were imposed upon Indian tribes by federal and state law in sporadic bursts. In recognition of this situation, the Washington State Legislature took a significant step to reduce the complexity of this arrangement by offering to surrender some of its jurisdiction in accord with tribal desires.

Washington now has an excellent system to achieve retrocession at the state and tribal level. ²¹¹ The new law has deadlines and provides an opportunity for all interested parties to have their interests heard in what are essentially negotiations between petitioning tribes and the Governor's office. Professors Goldberg and Champagne have thoroughly documented the difficulties tribes have encountered achieving retrocession in other states when the only avenue runs directly through the state legislature. ²¹² When the group retrocession for fifteen tribes in Nevada is excluded, there have only been sixteen discreet campaigns for full or partial retrocessions of state jurisdiction. ²¹³ In Nebraska, for example, the state legislature voted to retrocede most of its jurisdiction on the Omaha reservation in 1969. However, almost immediately after the Secretary of the Interior in 1970 accepted the retrocession, Nebraska sought to revoke its retrocession. ²¹⁴ The [*953] Winnebago Tribe slowly built up its governmental infrastructure and petitioned the Nebraska legislature in 1974 for retrocession of both civil and criminal jurisdiction. ²¹⁵ An expensive and bruising political battle ensued with state jurisdiction under P.L. 280 remaining intact. Ultimately, Nebraska's unicameral legislature voted to retrocede only criminal jurisdiction on the Winnebago Reservation in 1985. ²¹⁶ A political compromise had to be made by dropping the retrocession request as to civil jurisdiction, with much of the opposition based on the mistaken assumption that by retroceding civil jurisdiction, the tribe would be receiving more authority. ²¹⁷

By contrast, Washington's new approach provides a rational path for considering retrocession and its effect on all the affected parties. The legislature is not the place to work out the details of how retrocession will work for a particular tribe, the state, and the federal government. The

legislature made the major policy decision to permit full or partial retrocession to occur at the request of the tribe. It requires the Governor to act on a tribal request under a one-year deadline so that inaction alone cannot frustrate tribal wishes.²¹⁸ Moreover, "in the event the governor denies all or part of the [tribal] resolution, the reasons for such denial must be provided to the tribe in writing."²¹⁹ If the Governor issues the requested proclamation, the crucial final step is convincing the Secretary [*954] of the Interior to accept the retrocession of state jurisdiction.²²⁰

One observer of the Washington process argues that while it represents a good effort, "by placing the ultimate decision in the hands of the Governor and mandating the inclusion of non-Indian governments in the decision-making process, it does not truly place the power of consent [to state jurisdiction] back in the hands of tribes."²²¹ While it would be best for the legislature to place greater control in hands of the tribes, such an outcome is unlikely in the foreseeable future for several reasons. First, proposed legislation taking such an approach was introduced in 2011, but the sponsor soon amended it to give the Governor discretion whether to accept the proposed retrocession and the bill still failed to move out of committee.²²² Second, state and local governing bodies surrendering jurisdiction will always insist on inserting their views into the substance and manner in which their jurisdiction will be affected.²²³ The ensuing dialogue may further understanding of tribal justice systems, and lead to cooperative arrangements under state, federal, and tribal laws that allow for mutual aid agreements and cross-deputization of law enforcement officers.²²⁴ Yet, while the new legislation provides an opportunity for local government views to be considered, the legislature wisely rejected amendments that would have required the Governor to certify that certain intergovernmental agreements were actually in place.²²⁵ This is good because it allows [*955] Indian tribes to submit their retrocession petition when they feel they have adequately consulted with state and local officials and can make their case directly to the Governor.²²⁶ The consultation mandate and the possibility for legislative hearings provide opportunities to explore all issues of concern, but ultimately leave the negotiation process to the Executive Branch of state government and the petitioning Indian tribe. It also avoids giving local governments a veto. Rather, the consultation provisions help the tribal, state, and local officials think through the manner in which the shift in jurisdiction will be implemented, and the practical consequences of the changes.

In fact, the negotiation process can facilitate better relations simply due to the increased mutual understanding that develops through the process. Indeed, several commentators have noted the benefits of tribal-state negotiations in a variety of contexts. The late David H. Getches noted that "negotiated arrangements among governments concerning jurisdiction and the provision of government services on Indian reservations can give certainty and avoid the necessity of litigation."²²⁷ As stated by Professor Frank Pommersheim: "Without talk and conversation, there is no hope for the future of tribal-state relations. Yet hope must also encourage the energetic dialogue that animates and gives hope meaning in the first instance."²²⁸ The goal is "to identify those common interests that are better served by cooperation and coordination [*956] than competition and confrontation."²²⁹

At the same time, a state process is not enough. For example, it remains to be seen whether the Governor will accept a proffered tribal request for retrocession. Governors should be expected to operate in good faith, but tribes are in the position of supplicants seeking restoration of a jurisdictional scheme that was altered without tribal consent. Congressional action is therefore necessary and desirable to reverse the effects of the unilateral grant of state authority under P.L. 280.

B. Federal Law Should Be Changed to Provide a Tribally-Controlled Process for Negotiating the Balance of Jurisdiction in Indian Country

As noted at the outset of this Article, the consent of the governed has a hallowed place in the United States' system of government as well as in emerging international law pertaining to indigenous peoples' rights.²³⁰ The U.N. Declaration on the Rights of Indigenous Peoples

provides that "States shall consult and cooperate in good faith with the indigenous peoples ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." ²³¹ As the brief historic survey of federal-state-tribal relations set out in this Article reveals, the United Nations' consent paradigm has rarely been followed in federal Indian policy. One hundred and fifty years of vacillating policies has left a legacy of many moral and legal wrongs that must be undone. While it is not practically possible to undo all of the harmful policies manifested in federal Indian law in one fell swoop, the modern era has seen some encouraging steps that can serve as a platform for constructing further improvements.

President Nixon repudiated the termination policy and ushered in an era supportive of the federal-tribal relationship, announcing a new policy of "self-determination without termination." ²³² Congress followed suit with the Indian Self-Determination and Education Assistance Act of 1975, ²³³ which allows for the transfer of the administration of federal [*957] programs from the Bureau of Indian Affairs to the tribes. ²³⁴ That program was augmented by the Self-Governance Acts of 1988, ²³⁵ 1994, ²³⁶ and 2000, ²³⁷ which establish flexible block grant systems for tribal delivery of services the federal government would otherwise provide. ²³⁸ In a host of other statutes and administrative actions, the United States today encourages and supports tribal governmental institutions. ²³⁹ These modern policies hearken back to the original tribal-federal relationship that provided ample room for the exercise of tribal sovereignty within tribal territories.

While the earliest treaties reflected a desire for mutual peace and intergovernmental respect, later treaties and agreements were geared to the United States' acquisition of land. ²⁴⁰ In return, the United States provided compensation in various forms. Most important from the Indian perspective were the promises of permanent homelands and recognition of the right to continue to exist as distinct sovereign peoples. ²⁴¹ Federal intervention in internal tribal matters has a suspect doctrinal pedigree, and the Supreme Court has acknowledged as much in cases decided more than a century apart. ²⁴² In fact, Indian treaties and treaty substitutes should be accorded quasi-constitutional status as they stand as the only consent-based, and thus legitimate, source of federal authority over Indian nations. ²⁴³ The fact that the Supreme Court has [*958] upheld harsh treatment of tribal legal rights at times ²⁴⁴ does not mean that more enlightened treatment should not be forthcoming as a matter of policy.

The self-determination policy, backstopped by the federal government's trust responsibility to Indian nations, ²⁴⁵ is the way that the United States' promise of permanent tribal homelands under federal protection is manifested in the twenty-first century. The return to tribal control over criminal and civil jurisdiction in Indian country is an essential component of this move to self-determination. States' rights are greatly valued in our federal system in order to facilitate legislative experimentation and local control. Indian tribes are the third sovereign mentioned in the Constitution. The same values favoring local control by states apply with even greater force since the tribes did not have a hand in the formation of the Constitution, and thus did not voluntarily submit themselves to the jurisdiction of the national government. In the course of setting aside Georgia's claim of authority over the Cherokee Nation, Chief Justice Marshall noted that the "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." ²⁴⁶ Despite two centuries of inconsistent federal policies and actions, Chief Justice Marshall's recognition of Indian autonomy and self-government is once again at the foundation of federal policy. It has not, however, been manifested in the context of criminal jurisdiction in Indian country.

Professor Kevin Washburn of the University of New Mexico School of Law underlined these issues when he described the federal criminal jurisdictional patchwork in Indian country as a relic of repudiated policies - an anomaly in the self-determination era. "The federal Indian country criminal justice regime reflects the unilateral imposition, by an external authority, of substantive criminal norms on separate and independent communities without their consent and often against their [*959] will." ²⁴⁷ Professor Washburn concluded his analysis by

suggesting that Congress should consider an opt-out program for tribes for the removal of federal jurisdiction to be replaced by sole tribal authority.²⁴⁸ While Professor Washburn's argument has merit, an even stronger case can be made for congressional approval of legislation to authorize tribes to remove state jurisdiction granted under P.L. 280. This is not a new idea. In 1975, a bill was introduced that would have authorized tribes to directly petition the Secretary of the Interior for the retrocession of state jurisdiction acquired under P.L. 280.²⁴⁹ The states would have had no role in the Secretary's decision to accept a tribal retrocession request, and the Secretary could only reject the petition if "(1) the tribe has no applicable existing or proposed law and order code, or (2) the tribe has no plan for fulfilling its responsibilities under the jurisdiction sought to be reacquired or determined."²⁵⁰ The bill never made it out of committee, but it could serve as a starting point for congressional action today. The Tribal Law and Order Act of 2010 increased tribal authority in sentencing, thus demonstrating Congress's support for tribal courts.²⁵¹ It also allows tribes in mandatory P.L. 280 states to request the resumption of concurrent federal jurisdiction under the Major Crimes Act and Indian Country Crimes Act.²⁵² In addition, the Tribal Law and Order Act provides for appointment of tribal prosecutors to enforce federal law in federal courts against Indians and non-Indians alike.²⁵³ While none of these provisions address the problem of unwanted state jurisdiction, it demonstrates federal support for tribal wishes regarding enhanced federal law enforcement.

Another approach short of tribally-mandated retrocession, suggested by Professors Duane Champagne and Carole Goldberg,²⁵⁴ would be to **[*960]** utilize the Indian Child Welfare Act (ICWA) model, which permits partial retrocession of state P.L. 280 jurisdiction in child custody matters.²⁵⁵ In ICWA, a tribal petition to the Secretary of the Interior initiates the retrocession process and the Secretary has limited discretion to reject the petition.²⁵⁶ Moreover, if a tribal petition is denied, the Secretary must help the tribe cure any defects in the tribal plan to reassume exclusive jurisdiction.²⁵⁷ This is an effective approach as it explicitly targets jurisdiction conferred by P.L. 280 and similar statutes. While the Secretarial-approval role is somewhat paternalistic, the petitioning tribe is generally in control of the process, and Congress provided substantive standards to cabin the Secretary's discretion.²⁵⁸ The affected state has no formal role in the process.

The Indian Gaming Regulatory Act (IGRA)²⁵⁹ provides yet another model for intergovernmental cooperation in general, and respecting P.L. 280 jurisdiction in particular. Under IGRA, casino-style gaming on Indian lands is prohibited unless an Indian tribe has reached an agreement (compact) with the state where the land is located.²⁶⁰ It allows Indian tribes to initiate negotiations in order to reach a tribal-state compact that would govern the terms of the gaming.²⁶¹ If the process **[*961]** does not yield a compact, a judicially or administratively supervised arbitration process is imposed.²⁶² While this model is not perfect,²⁶³ it has resulted in the greatest economic development in Indian country in the history of the United States.²⁶⁴ The premise of IGRA was that Indian tribes had a right to be free of state jurisdiction with respect to gaming activities. The statute codifies that right while also providing for some state involvement in the way gaming would occur. This has allowed tribes and states to develop relatively harmonious relationships pursuant to these intergovernmental compacts. The statute sets out items that may be included in a compact.²⁶⁵ It also enumerates certain matters that may not be the subject of negotiations, for example, states may not condition their agreement on a tribal concession to state taxation.²⁶⁶ IGRA expressly provides for the "allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of" state or tribal laws directly related to "licensing and regulation of [gaming]."²⁶⁷ The criminal law enforcement provisions of IGRA preempt state gaming laws but authorize compact provisions to make state law applicable.²⁶⁸ Tribal-state compacts in Washington generally provide that Indian tribes shall be the primary enforcement and regulatory authorities respecting Indian gaming, but also authorize state enforcement of some state gambling laws.²⁶⁹ This Article does not **[*962]** advocate a P.L. 280 retrocession approach that would require state agreement to remove the state jurisdiction granted by P.L. 280. Rather, the compacting model simply provides an example of tribal-state cooperation in criminal law enforcement matters when such negotiations are authorized under federal law. It is interesting that many of

the Washington gaming compacts provide for a limited role of state law enforcement - especially with respect to non-Indians. Presumably, this is because an exclusive tribal and federal regime might create a practical vacuum for minor criminal offenses committed by non-Indians. Tribal criminal jurisdiction over such offenses would be barred by the Oliphant rule,²⁷⁰ and prosecution of minor crimes by non-Indians is often a low priority for federal prosecutors, or may fail for other reasons.²⁷¹ A successful negotiation process allows the parties to step back from wooden, doctrinal positions and instead to focus on the substantive law enforcement issues at hand, and how best to implement an effective system in tribal territories.

The foregoing statutory schemes offer useful concepts for tribal removal of unwanted state jurisdiction that should be part of a new approach to P.L. 280 retrocession pursuant to federal law. While imposing state jurisdiction on sovereign tribes without informed consent was bad policy and morally wrong, Congress should not simply oust state jurisdiction unilaterally. Instead, a better approach is one that melds the ideas of encouraging negotiations and compacting as in IGRA, with ultimate power in the tribes to petition the Secretary for a full or partial removal of state jurisdiction as provided in ICWA. Consultation with the affected state should be mandated at a minimal level to encourage intergovernmental cooperation without imposing undue burdens or delay on the petitioning tribe. Authorization of inter-governmental compacts akin to IGRA may not be needed in all states, but if included as an option, it would remove all doubt regarding the possibilities and legality of voluntary intergovernmental arrangements. Time for negotiations allows consideration of reliance interests, which are established by the manner in which law enforcement and service delivery is now carried out by tribal, state and federal authorities. Moreover, the sheer complexity of the P.L. 280 jurisdictional scheme counsels in favor of a deliberate process in which the affected governments can assess the effect of retrocession on their resources and constituents. Any new retrocession process must be developed in consultation with Indian [*963] tribes and affected parties. The purpose of any substantive requirements should simply look to an explanation of how retroceded jurisdiction would be replaced. We live in the era of tribal self-determination. It is time that tribes be given the option to remove that relic of the termination era - P.L. 280.

CONCLUSION

This Article provides the reader with background information in the field of federal Indian law and explains the complexities of criminal jurisdiction in Indian country. It demonstrates that the independence of the Indian tribes at the time of the United States' formation was well accepted, and treaty making with the tribes was consistent with their quasi-independent status after their involuntary incorporation into the United States. The immunity of Indian tribes and their members from state jurisdiction has a pedigree stretching back to the adoption of the Constitution. P.L. 280 altered that situation in a dramatic way by granting states jurisdiction without following the democratic consent principle. As Senator Jackson noted in 1975, "the Public Law 280 legislation was approved by Congress in the face of strenuous Indian opposition and denied consent of the Indian tribes affected by the Act The Indian community viewed the passage of Public Law 280 as an added dimension to the dreaded termination policy."²⁷²

The complexity that resulted from the ill-conceived grant of authority to the states by P.L. 280 actually decreased the effectiveness of law enforcement in Indian country. The federal government repudiated termination in 1970 in favor of the policy of tribal self-determination, which continues, but P.L. 280's intrusion into Indian country remains. Washington State assumed P.L. 280 jurisdiction in an extremely complex fashion and generally without the consent of Indian tribes. The denial of tribal consent to the jurisdictional scheme on both the federal and state levels is inconsistent with the notion that the consent of the people is a bedrock principle of democracy in the United States.

The Article goes on to describe how Washington developed a state retrocession statute that provides tribes with an innovative avenue to remove unwanted state jurisdiction. Washington's P.L. 280 retrocession law marks a progressive step toward recognizing tribal sovereignty and

self-determination, but it does not go far enough because it still denies tribes the power to remove jurisdiction asserted unilaterally. Congress [*964] should consider and pass legislation authorizing tribes to remove state jurisdiction obtained under P.L. 280. Models that vest that power in the tribes, but include opportunities for negotiated cooperative schemes, are set out in the final section of the Article. Such approaches allow Indian tribes the opportunity to develop arrangements that best promote effective justice services and law enforcement in their jurisdictions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law > Delinquency & Dependency > Dependency Proceedings 

Governments > Federal Government > U.S. Congress 

Governments > Native Americans > General Overview 

FOOTNOTES:

¹n1. The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. - That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"); Wash. Const. art. I, § 1 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."); *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) ("The Constitution is based on a theory of original, and continuing, consent of the governed.").

²n2. Compare *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (Georgia has no jurisdiction over non-Indians within Cherokee Reservation), with *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) ("Tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in ... a guardianship and to pertinent constitutional restrictions.""). See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) ("Long ago the Court departed from Mr. Chief Justice Marshall's view that "the laws of [a state] can have no force' within reservation boundaries") (quoting *Worcester*, 31 U.S. at 520). See generally Cohen's Handbook of Federal Indian Law § 6.01, at 499-514 (Nell J. Newton, Robert Anderson et al. eds., 2005) [hereinafter Cohen]. The 2012 edition of Cohen's Handbook of Federal Indian Law was released as this Article was in the final editing stages. While the page numbering has changed, most of the section numbers remain the same and are included here for ease of reference.

³n3. For a detailed examination of these consent principles, see Richard B. Collins, *Indian Consent to American Government*, 31 *Ariz. L. Rev.* 365 (1989), and Matthew L.M. Fletcher, *Tribal Consent*, 8 *Stan. J. C.R. & C.L.* 45 (2012).

⁴n4. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

⁵n5. *Id.*

⁶n6. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where they [Indians] are found are often their deadliest enemies.").

⁷n7. The Supreme Court upheld this complex arrangement in *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

⁸n8. See generally Cohen, *supra* note 2, § 1.07, at 97-113.

⁹n9. U.S. Const. art. I, § 8, cl. 3.

¹⁰n10. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Calif. L. Rev. 1573, 1577-81 (1996) (describing the foundational principles of federal Indian law).

¹¹n11. 31 U.S. (6 Pet.) 515 (1832).

¹²n12. *Id.* at 559-61; see generally Cohen, *supra* note 2, § 6.01[2], at 501-03.

¹³n13. "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Worcester*, 31 U.S. at 559-61. Earlier, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court ruled that the Cherokee Nation was not a foreign nation within the meaning of Article III of the Constitution and thus could not invoke the Supreme Court's original jurisdiction to challenge Georgia's laws purporting to regulate the Nation.

¹⁴n14. 18 U.S.C. § 1151 (2006).

¹⁵n15. See *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

¶n16. See *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1293 (D.C. Cir. 2000) (surveying various definitions of "reservation").

¶n17. 25 U.S.C. § 177 (2006).

¶n18. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); see also Cohen, *supra* note 2, § 15.04[2], at 971 ("The Court described the tribal interest in land variously, as a 'title of occupancy,' 'right of occupancy,' and right of possession ... "). The common shorthand term for these property rights is "aboriginal title." See *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-34 (1985); *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 669 n.5, 676 (1974).

¶n19. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). Of course, the Supreme Court in 1955 created a gaping hole in the fabric of aboriginal title when it held that "unrecognized Indian title" in southeast Alaska was not protected by the Just Compensation Clause of the Fifth Amendment. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); see Joseph Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in *Indian Law Stories* 229 (Carole Goldberg et al. eds., 2011).

¶n20. Francis Paul Prucha, *American Indian Treaties* 1 (1994).

¶n21. See, e.g., Act of June 5, 1850, ch. XVI, 9 Stat. 437 (authorizing the President "to appoint one or more commissioners to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains; also, for obtaining their assent and submission to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories and of the United States").

¶n22. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

¶n23. For example, Congress confiscated the Black Hills of South Dakota through an "agreement" that amounted to a taking of the tribe's recognized title to the land in violation of the Fifth Amendment. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 377-83 (1980).

¶n24. See Treaty with the Duwamish et al., art. 7, 12 Stat. 927 (1855); Treaty with the Omahas, art. 1, 10 Stat. 1043 (1854).

¶n25. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as 25 U.S.C. § 71 (2006)) ("No

Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty"). Existing treaty rights were not impaired. *Id.* The United States continued to negotiate agreements with Indian tribes, which were then ratified by Congress. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908) (construing agreement with the tribes of the Fort Belknap Reservation).

¶n26. General Allotment (Dawes) Act of 1887, 24 Stat. 388. The Dawes Act gave the President authority to divide communal tribal lands into individual parcels to be held by tribal members. These "allotments" were protected from taxation and could not be sold without the consent of the Secretary of the Interior for a period of twenty-five years. After that they were to be held in fee simple status. 25 U.S.C. § 348 (2006). See generally Cohen, *supra* note 2, § 1.04, at 75-84.

¶n27. Cohen, *supra* note 2, § 1.04, at 78-79.

¶n28. See, e.g., *Solem v. Bartlett*, 465 U.S. 463 (1984).

¶n29. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962); Judith V. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L.J.* 1 (1995).

¶n30. Wheeler-Howard Act, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§461-79); see Cohen, *supra* note 2, § 1.05, at 86-88.

¶n31. *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). Today, Indian land holdings are estimated at 55.4 million acres, with approximately 44.4 million owned by tribes and eleven million held in the form of individual allotments. Cohen, *supra* note 2, § 15.01, at 965, § 16.03[4][a], at 1048.

¶n32. H.R. Con. Res. 108, 83d Cong. (1953) (directing the Secretary of the Interior to recommend tribes for termination); see Cohen, *supra* note 2, § 1.06, at 95. In general, "[termination] would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled." Richard M. Nixon, *Special Message to Congress on Indian Affairs* (July 8, 1970), H.R. Doc. 91-363, at 1. But see *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (termination of Menominee Indian Tribe did not abrogate tribal rights to hunt and fish free of state regulation).

¶n33. See Cohen, *supra* note 2, § 1.06, at 95.

³⁴n34. See *infra* Part III.

³⁵n35. Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 249 (2005).

³⁶n36. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

³⁷n37. See Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709 (2006) (giving an insightful and descriptive critique of the adverse effects of federal policies in the criminal justice area). Tribal sentencing authority was limited to six months in jail and a \$ 500 fine per offense, Pub. L. No. 90-284, § 202(7), 82 Stat. 77 (1968), and now stands at one year in jail and a \$ 10,000 fine, with the option to increase the penalties to three years per offense with a \$ 15,000 fine, provided certain conditions are met. 25 U.S.C. § 1302 (2006).

³⁸n38. Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law* 280, at 200 (2012) [*hereinafter* *Captured Justice*].

³⁹n39. See generally Cohen, *supra* note 2, § 3.04, at 182-99.

⁴⁰n40. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (2006)).

⁴¹n41. Act of June 30, 1834, ch. 161 § 1, 4 Stat. 729.

⁴²n42. *United States v. John*, 437 U.S. 634, 649 n.18 (1978) (citing *Bates v. Clark*, 95 U.S. 204 (1877)); see Cohen, *supra* note 2, § 3.04[2][b], at 184-88.

⁴³n43. 437 U.S. 634.

⁴⁴n44. *Id.* at 649 n.18.

⁴⁵n45. 18 U.S.C. § 1151 (2006) (emphasis added).

⁴⁶ See *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (rejecting the State of Washington's argument that the words "notwithstanding the issuance of any patent" extends only to land patented to an Indian).

⁴⁷ *Id.* at 358-59.

⁴⁸ Trade and Intercourse Act of 1790, ch. 34, § 5, 1 Stat. 137, 138.

⁴⁹ Act of Mar. 3, 1817, § 1, 3 Stat. 383 (codified as amended at 18 U.S.C. § 1152 (2006)).

⁵⁰ The geographic jurisdictional reach of the statute is set out in 18 U.S.C. § 7. The federal crimes made applicable include most felonies and a wide variety of offenses related to the subject matter of federal enclaves. See, e.g., 18 U.S.C. § 32 (destruction of aircraft); 18 U.S.C. § 2251 (sexual exploitation of children in federal territories).

⁵¹ 18 U.S.C. § 1152. Victimless crimes such as adultery also are not covered by the ICCA. *United States v. Quiver*, 241 U.S. 602, 605-06 (1916); see Cohen, *supra* note 2, § 9.02[1][c][iii], at 735-36 (citing and criticizing several lower court cases that have not followed *Quiver*).

⁵² 18 U.S.C. § 1152. An exception for Indians who had been punished by the local law of their tribe was added in 1854. Act of Mar. 27, 1854, § 3, 10 Stat. 270.

⁵³ 18 U.S.C. § 13.

⁵⁴ See *Williams v. United States*, 327 U.S. 711, 719 (1946) (assuming that the ACA was subsumed within the ICCA); Cohen, *supra* note 2, § 9.02[1][c][ii], at 734.

⁵⁵ 18 U.S.C. § 1153.

⁵⁶ The Major Crimes Act reads:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous

weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

⁵⁷ 109 U.S. 566 (1883); see Sidney L. Haring, *Crow Dog's Case, American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* 134-40 (1994); Cohen, *supra* note 2, § 9.02[1][e] at 742.

⁵⁸ *Ex Parte Crow Dog*, 109 U.S. at 572. While the ICCA and the MCA provide the substantive law for federal prosecutions in Indian country, at the sentencing stage the United States Sentencing Guidelines serve as a guide to the court. 18 U.S.C. § 3551 (2006); see Cohen, *supra* note 2, § 9.02[2][h], at 747-49. "The Federal Death Penalty Act of 1994 conditionally eliminated the death penalty for Native American defendants prosecuted under the Major Crimes Act or the General Crimes Act, subject to the penalty being reinstated by a tribe's governing body." *United States v. Gallaher*, 608 F.3d 1109, 1110 (9th Cir. 2010) (citing 18 U.S.C. § 3598).

⁵⁹ See Haring, *supra* note 57, at 110, 119, 141.

⁶⁰ See, e.g., *United States v. Smith*, 387 F.3d 826, 829 (9th Cir. 2004) (holding that 18 U.S.C. § 1513(b), which bars retaliation against a federal witness, applies to crimes committed by and against Indians in Indian country); *United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994) (holding that the federal conspiracy statute, 18 U.S.C. § 371, "is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country").

⁶¹ *United States v. Lara*, 541 U.S. 193, 210 (2004) (upholding congressional restoration of tribal criminal jurisdiction over non-member Indians); *United States v. Wheeler*, 435 U.S. 313, 331-32 (1978) (recognizing inherent tribal jurisdiction over tribal members).

⁶² Indian Civil Rights Act, Pub. L. No. 90-284, § 202, 82 Stat. 77 (1968) (tribes were originally limited to imposing penalties of six months in jail and a \$ 500 fine per offense) (codified as amended at 25 U.S.C. § 1302 (2006)). The 1986 amendments increased the penalties. Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (1986).

¶n63. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(a), 124 Stat. 2279 (relevant portions codified at 25 U.S.C. §§1302 (a)(7), (b) (Supp. IV 2010)). Tribes are permitted to stack sentences for separate offenses up to a total of nine years and \$ 15,000 in fines. *Id.*

¶n64. *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990).

¶n65. *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995).

¶n66. 435 U.S. 313.

¶n67. *Id.*; see also *Talton v. Mayes*, 163 U.S. 376 (1896) (tribal prosecution for murder not subject to the dictates of the Bill of Rights on the ground that tribes are separate sovereigns and not arms of the federal government).

¶n68. *Wheeler*, 435 U.S. at 332.

¶n69. See *Cohen*, *supra* note 2, § 2.02, at 119-20.

¶n70. 435 U.S. 191 (1978).

¶n71. *Id.* at 210-11. For a critical analysis of the historical record relied upon by the Court, see Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 *Minn. L. Rev.* 609 (1979). The *Oliphant* ruling was extended by the Supreme Court to bar tribal jurisdiction not only over non-Indians, but also over Indians who are members of other tribes. *Duro v. Reina*, 495 U.S. 676 (1989). Congress reversed the Court's ruling when it amended the Indian Civil Rights Act to restore the inherent criminal jurisdiction of all federally recognized tribes over "all Indians" in the governing tribe's territory. 25 U.S.C. § 1301(2) (2006).

¶n72. *State v. Schmuck*, 121 Wash. 2d 373, 376, 850 P.2d 1332, 1333 (1993); cf. *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997) ("We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law."); see also *State v. Eriksen (Eriksen III)*, 172 Wash. 2d 506, 259 P.3d 1079 (2011) (holding that the stop-and-detain rule does not extend to tribal police officers who stop and detain non-Indians on state land outside of an Indian reservation, even when the stop is based on probable cause occurring within reservation boundaries); Kevin Naud, Jr., Comment, *Fleeing East from Indian Country: State v. Erickson and Tribal Inherent Sovereign*

Authority to Continue Cross-Jurisdictional Fresh Pursuit, 87 Wash. L. Rev. 1251, 1272-74 (2012) (discussing Eriksen III).

¶n73. See Wash. Rev. Code § 10.92.020 (2010). The Washington State statute provides that:

Tribal police officers under subsection (2) of this section shall be recognized and authorized to act as general authority Washington peace officers. A tribal police officer recognized and authorized to act as a general authority Washington peace officer under this section has the same powers as any other general authority Washington peace officer to enforce state laws in Washington, including the power to make arrests for violations of state laws.

Id. § 10.92.020(1). The second section of the statute contains provisions related to training and insurance requirements and concludes with a provision mandating arbitration if an affected county and tribe cannot reach a cross-deputization agreement after a tribal request that conforms to the statutory requirements. Id. § 10.92.020(2). Both tribal and state police may be certified to enforce federal law within Indian country. 25 U.S.C. § 2804 (2006). State officers may be so authorized only if the affected Indian tribe does not object. Id. § 2804(c).

¶n74. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); cf. *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (federal government had no jurisdiction to prosecute Indian for murder of another Indian absent affirmative grant from Congress).

¶n75. Cohen, *supra* note 2, § 9.03[1], at 754.

¶n76. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

¶n77. Cohen, *supra* note 2, § 9.03[1], at 754-55. These are crimes that do not involve an Indian victim, individual Indian defendant, or tribal property.

¶n78. Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (2006)) (grant of criminal jurisdiction over all reservations in state, but subject to savings clause excepting state authority over "hunting and fishing rights as guaranteed them by agreement, treaty, or custom," and preempting any state fish and game licensing requirements).

¶n79. Act of June 30, 1948, ch. 759, 62 Stat. 1161 (grant of criminal jurisdiction over Sac and Fox Reservation; concurrent federal jurisdiction reserved).

⁸⁰Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (2006)) (grant of criminal jurisdiction over all reservations, including trust and restricted allotments in Kansas; concurrent federal jurisdiction reserved); see *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (construing the Kansas grant as including concurrent state jurisdiction over crimes covered by the federal Major Crimes Act).

⁸¹For a discussion of these statutes and authorities construing them, see Cohen, *supra* note 2, § 6.04, at 581-84.

⁸²See, e.g., Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, 108 Stat. 4632 (codified at 25 U.S.C. § 1776); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (codified at 25 U.S.C. § 1771) (state granted jurisdiction with no mention of tribal or federal jurisdiction); Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (codified at 25 U.S.C. §§1751-60) (state granted jurisdiction with no mention of tribal or federal jurisdiction); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§1721-35) (state granted jurisdiction subject to exception for internal matters), construed in *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (codified at 25 U.S.C. §§1701-16) (state granted jurisdiction).

⁸³Cohen, *supra* note 2, §§1.05-.06, at 85-97; see also Wilkinson, *supra* note 35, at 1-89.

⁸⁴H.R. Con. Res. 108, 83d Cong. (1953). Although this policy was eroded in the 1960s and was repudiated by President Nixon in 1970, Congress did not formally revoke it until 1988. 25 U.S.C. § 2501(f) ("Congress repudiates and rejects House Concurrent Resolution 108 of the 83d Congress and any policy of unilateral termination of Federal relations with any Indian nation."). See generally Cohen, *supra* note 2, § 1.07, at 97-113.

⁸⁵The court in *Ute Distribution Corp. v. United States*, 938 F.2d 1157, 1159 n.1 (10th Cir. 1991), observed that:

These tribes included: the Southern Paiutes of Utah (Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (repealed 1980) (formerly codified at 25 U.S.C. §§741-760); the Alabama and Coushatta Indians of Texas (Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. §§721-728); sixty-one tribes and bands in western Oregon (Act of Aug. 13, 1954, ch. 773, 68 Stat. 724 (repealed 1977 with respect to Siletz Tribe) (codified as amended at 25 U.S.C. §§691-708); the Klamaths of Oregon (Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (repealed 1978 with respect to Modoc Tribe) (codified as amended at 25 U.S.C. §§564-564x); the Menominee Tribe of Wisconsin (Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. §§891-902); and the mixed-blood Utes of the Uintah and Ouray Reservations in Utah).

Id.

¶n86. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006) and 28 U.S.C. § 1360 (2006)).

¶n87. Congress also provided that the Major Crimes Act and Indian Country Crimes Act would no longer be applicable in the six mandatory states. 18 U.S.C. § 1162. In 2010, however, Congress gave Indian tribes authority to request the application of those statutes by making a request to the Attorney General. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221 (b), 124 Stat. 2272 (codified at 18 U.S.C. § 1162(d) (Supp. I 2010)). Regulations implementing the statute can be found at 28 C.F.R. § 50.25 (2012). In the preamble to the Rule, the Justice Department stated that: "As indicated above, the Department concludes that the United States has concurrent jurisdiction over General Crimes Act and Major Crimes Act violations in areas where States have assumed criminal jurisdiction under 'optional' Public Law 280." 76 Fed. Reg. 76,037, 76,039 (Dec. 6, 2011). The Eighth Circuit reached the same conclusion in *United States v. High Elk*, 902 F.2d 660 (8th Cir. 1990). But see *United States v. Burch*, 169 F.3d 666 (10th Cir. 1999) (holding that statute incorporating voluntary assumption component of P.L. 280 preempted federal jurisdiction under MCA). *United States v. Johnson*, No. CR80-57MV (W.D. Wash. May 13, 1980) (holding that the Major Crimes Act did not apply to prosecution over which Washington State assumed jurisdiction). The United States appealed, but withdrew its appeal before a decision on the merits. *United States v. Johnson*, No. 80-1391 (July 23, 1980). For a critical examination of the issue, see Cohen, *supra* note 2, § 6.04[3][d], at 567-68.

¶n88. The criminal jurisdiction disclaimer provides in full:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall 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.

18 U.S.C. § 1162(b) (2006).

The civil jurisdiction counterpart provides:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

28 U.S.C. § 1360(b) (2006).

⁸⁹ Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588, 590 ("The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.").

⁹⁰ Carole E. Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 544-46 (1975); see David M. Ackerman, Cong. Research Serv., Background Report on Public Law 280, at 22 (94th Cong. 1st Sess. (1975) [hereinafter Public Law 280] (describing opposition of the Colville and Yakima Tribes of Washington because of "a fear of inequitable treatment in the State courts and fear that extension of State law to their reservations would result in the loss of various rights"); see also *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 489 n.33 (1979) (noting Yakima opposition to state jurisdiction since 1952).

⁹¹ *Captured Justice*, supra note 38, at 11 (citing Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (1996)).

⁹² See Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280*, in *The Indian Civil Rights Act at Forty* 247, 247 (Carpenter, Fletcher, Riley eds., 2012) [hereinafter *Searching for an Exit*].

⁹³ Cohen, supra note 2, § 6.03[a], at 544-45 n.308.

⁹⁴ Public Law 280, supra note 90, at 541.

⁹⁵ *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976).

⁹⁶ *Bryan*, 426 U.S. at 388-91.

⁹⁷ 426 U.S. 373. For a history of the litigation, see Kevin K. Washburn, *How a \$ 147 County Tax Notice Helped Bring Tribes More Than \$ 200 Billion in Indian Gaming Revenue: The Story of Bryan v. Itasca County*, in *Indian Law Stories* 421 (Carole Goldberg et al. eds., 2011).

⁹⁸ *Id.* at 390.

¶n99. 480 U.S. 202 (1987).

¶n100. *Id.* at 205-06.

¶n101. *Id.*

¶n102. See generally *id.*

¶n103. *Id.* at 208.

¶n104. *Id.* at 209.

¶n105. *Id.* at 209-10 (footnote omitted).

¶n106. *Id.* at 211.

¶n107. See generally Cohen, *supra* note 2, § 6.04[3][b], at 546-53.

¶n108. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991).

¶n109. *Id.* at 148; see also Cohen, *supra* note 2, § 6.04[3][b], at 549 n.346.

¶n110. State law is "applicable only as it may be relevant to private civil litigation in state court." *Cabazon*, 480 U.S. at 208. Rules of decision can be the common law rules utilized in private tort or contract litigation, or the statutes that provide substantive law for the resolution of such disputes.

¶n111. See Cohen, *supra* note 2, § 6.04[3][b], at 548; cf. *Gobin v. Snohomish Cnty.*, 304 F.3d 909 (9th Cir. 2002) (holding that county lacked zoning authority over Indian fee land within

Indian country).

¶n112. *Doe v. Mann*, 415 F.3d 1038, 1058-59 (9th Cir. 2005). In *Comenout v. Burdman*, 84 Wash. 2d 192, 525 P.2d 217 (1974), the court upheld state jurisdiction over child dependency matters under the 1963 statute, but it is important to note that the case was decided prior to the criminal-prohibitory/civil-regulatory dichotomy in *Bryan v. Itasca County*, 426 U.S. 373 (1976).

¶n113. 70 Op. Att'y Gen. Wis. 237, 241, 246-48 (1981). But see *In re Commitment of Burgess*, 665 N.W.2d 124, 132 (Wis. 2003) (involuntary commitment of an individual, who is found to be a "sexually violent person" under chapter 980, is "civil" rather than "criminal" based on the purposes of the chapter to provide treatment and to protect the public). See *Burgess v. Watters*, 467 F.3d 676 (7th Cir. 2006) (declining to issue habeas corpus petition despite doubts that involuntary commitment scheme was within P.L. 280's jurisdictional grant).

¶n114. *Mann*, 415 F.3d at 1059.

¶n115. 28 U.S.C. § 1360(b) (2006) (civil); 18 U.S.C. § 1162(b) (2006) (criminal). The full text of both disclaimers is quoted in note 88, *supra*.

¶n116. 28 U.S.C. § 1360(b); 18 U.S.C. § 1162(b).

¶n117. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) (evaluating preemption of state jurisdiction over non-Indian conducting business with Indian tribe by balancing the relative federal, tribal, and state interests in light of traditional notions of tribal independence from states).

¶n118. *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 764 (1985) (state taxation of Indians in Indian country generally preempted); see *Cohen*, *supra* note 2, § 6.03, at 520-37. Of course, as noted above, P.L. 280 alters these doctrines to the extent it opens the courthouse door to adjudicate civil causes of action in state courts and to apply state law to resolve such disputes.

¶n119. *Montana v. United States*, 450 U.S. 544 (1981); see also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Cohen*, *supra* note 2, § 6.02[2], at 515-20.

¶n120. 25 U.S.C. §§2701-21 (2006). See generally *Cohen*, *supra* note 2, § 12, at 857-88.

¶n121. 18 U.S.C. §§1166-68.

¶n122. 18 U.S.C. § 1166(a) ("Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.").

¶n123. 18 U.S.C. § 1166(c). Definitions of gaming classes can be found at 25 U.S.C. § 2703 (6)-(8) (2006). Class III gaming is commonly known as casino-style gaming and is the most lucrative and prevalent form of gaming nationally and in Washington.

¶n124. "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, [unless a tribal-state compact provides otherwise]." 18 U.S.C. § 1166(d) (2006). The compacting process related to the allocation of state and tribal jurisdiction is governed by 25 U.S.C. § 2710(d)(3)(C) (2006).

¶n125. 54 F.3d 535 (9th Cir. 1994).

¶n126. *Id.* at 539-40.

¶n127. 1957 Wash. Sess. Laws 941, ch. 240. The operative section of that statute is carried forward at Wash. Rev. Code § 37.12.021 (2010):

Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he or she shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: PROVIDED, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

Id.

¶n128. 1963 Wash. Sess. Laws 346, ch. 36 (codified at Wash Rev. Code § 37.12.010); see also M. Brent Leonhard, Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based

Grounds, 47 Gonz. L. Rev. 663, 704-12 (2012) (discussing the 1957 and 1963 statutes).

¶n129. See *infra* notes 137-68 and accompanying text for details about the 1963 statute.

¶n130. The eleven are: Muckleshoot, Squaxin Island, Nisqually, Skokomish, Suquamish (Port Madison), Tulalip Tribes, Quinault Indian Nation, Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation, Swinomish Tribal Community, and Confederated Tribes of the Colville Reservation. 1 Nat'l Am. Indian Court Judges Ass'n, *Justice and the American Indian: The Impact of Public Law 280 upon the Administration of Criminal Justice on Indian Reservations* 78-81 (1974). The Swinomish and Colville requests for state jurisdiction were made after 1963, and thus under that statute, which carried forward most of the voluntary consent provisions of the 1957 statute. See Colville Business Council Res. 1965-4 (Jan. 13, 1965) (full jurisdiction, except fish and game regulation) (on file with Washington Law Review); Swinomish Indian S. Res. (Mar. 23, 1963) (criminal jurisdiction only) (on file with Washington Law Review). The 1963 version dropped the requirement for the Yakima, Colville, and Spokane tribes that any assumption be approved by a two-thirds vote at a tribal referendum. Cf. 1963 Wash. Sess. Laws 346, ch. 36; 1957 Wash. Sess. Laws 941, ch. 240. See *infra* note 178 for the seven tribes that achieved partial state jurisdiction.

¶n131. 53 Wash. 2d 789, 337 P.2d 33 (1959).

¶n132. The state's enabling act provided:

That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States

Act of Feb. 22, 1889, 25 Stat. 676 (emphasis added). It was mirrored in the state constitution. Wash. Const. art. 26.

¶n133. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590 ("Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act.").

¶n134. Paul, 53 Wash. 2d at 794, 337 P.2d at 37.

¶n135. *Quinault Indian Nation v. Gallagher*, 368 F.2d 648, 657-58 (9th Cir. 1966). The Quinault case is interesting for the fact that a group purporting to be the tribal council requested full state jurisdiction in 1958, and the state promptly assumed jurisdiction. Almost immediately, a petition signed by sixty-eight members repudiated the original request. *Id.* at 652. The Washington State Supreme Court later upheld the assumption per the original request. *State v. Bertrand*, 61 Wash. 2d 333, 341, 378 P.2d 427, 432 (1963). Other cases challenging Washington's mode of assumption are *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P.2d 590 (1969), *Tonasket v. State*, 84 Wash. 2d 164, 525 P.2d 744 (1974), and *Comenout v. Burdman*, 84 Wash. 2d 192, 199, 525 P.2d 217, 221 (1974). As early as 1972 there was a statewide tribal effort in Washington to obtain the retrocession of state jurisdiction under P.L. 280. See *State Indian-Rights Leaders Ask Control Over Reservations*, *Seattle Times*, Sept. 14, 1972, at A5 [hereinafter *Indian-Rights Leaders Ask Control*]; *Leaders of 30 State Tribes Agree on Goals for Indians*, *Seattle Times*, Sept. 16, 1972, at A11. For a detailed discussion of tribal objections to P.L. 280, see *Searching for an Exit*, *supra* note 92, at 247-49, 263-64.

¶n136. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 493, 500-02 (1979), *rev'g* 552 F.2d 1332 (9th Cir. 1977). The panel decision was prompted by an earlier en banc remand to determine the equal protection issue. 550 F.2d 443 (9th Cir. 1977) (en banc).

¶n137. This is a paraphrase of Wash. Rev. Code § 37.12.010 (2010). The verbatim text provides:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following [eight areas]

Id. For the enumerated eight areas, see *infra* text accompanying note 138.

¶n138. Wash. Rev. Code § 37.12.010. As set out in *supra* note 136, the Supreme Court upheld this scheme in the face of an equal protection challenge.

¶n139. 109 Wash. App. 244, 34 P.3d 912 (2001).

¶n140. *Id.* at 252, 34 P.3d at 916.

¶n141. 144 Wash. App. 945, 185 P.3d 634 (2008).

¶n142. *Id.* at 955, 185 P.3d at 639. The court rejected state jurisdiction because "the State has not shown that the Quinault Tribe relinquished its interest in the land." *Id.* The state was not attempting a prosecution for a traffic offense, but for unlawful possession of a firearm - a crime that did not involve "operation of motor vehicles upon ... [public] highways." *Id.* at 956, 185 P.3d at 639. The court distinguished *Somday v. Rhay*, 67 Wash. 2d 180, 184, 406 P.2d 931, 934 (1965), which upheld full state jurisdiction over a highway right-of-way running across fee simple non-Indian land. The court reasoned that because the tribe had surrendered its entire interest in the surface and subsurface, the state could rely on its blanket assertion of jurisdiction over Indians on non-Indian fee lands.

¶n143. 173 Wash. 2d 672, 273 P.3d 434 (2012).

¶n144. *Id.* at 685, 273 P.3d at 440; see also *State v. Sohapp*, 110 Wash. 2d 907, 757 P.2d 509 (1988) (holding that state did not have jurisdiction over an "in-lieu" fishing site that was created under federal law to replace Indian fishing grounds developed by construction of the Bonneville Dam). These cases could both have been decided on the alternative ground that P.L. 280's disclaimer of jurisdiction over treaty fishing rights precluded state jurisdiction. That is, assuming P.L. 280 applied in full, it does not authorize jurisdiction over Indian treaty fishing rights. 18 U.S.C. § 1162(b) (2006). Another ground for denying state jurisdiction is based on the fact that the reservation Indian country was established after 1968 when tribal consent was made a prerequisite to state assumptions of jurisdiction. See *infra* note 147 and accompanying text. Moreover, state fish and game laws are part of a civil/regulatory regime and thus beyond P.L. 280's grant. *Cohen*, *supra* note 2, § 18.03[2][b], at 1126-27. Any state jurisdiction over treaty hunting, fishing, or gathering activity by Indians, whether on or off-reservation, must conform to the "conservation necessity standards" set out by the U.S. Supreme Court. *Id.*, § 18.04[3][b], at 1143-46; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979).

¶n145. 173 Wash. 2d 235, 267 P.3d 355 (2011).

¶n146. *Id.* at 239, 267 P.3d at 357.

¶n147. Pub. L. No. 90-284, §§402, 406, 82 Stat. 79 (1968) (codified at 25 U.S.C. §§1322(a), 1326 (2006)); see *Cohen*, *supra* note 2, § 6.04[3][f][ii], at 577-78.

¶n148. 132 Wash. 2d 333, 343, 937 P.2d 1069, 1074 (1997).

¶n149. Similarly, in *State v. Cooper*, 130 Wash. 2d 770, 928 P.2d 406 (1996), the court ruled that state jurisdiction extended to off-reservation allotments that were in existence when the non-consensual 1963 law passed. The court stated: "We assume, without deciding, that the

subsequent establishment of a new Indian reservation vitiates the pre-existing RCW 37.12.010 assumption of state jurisdiction with respect to Indian lands within the boundaries of the new reservation." *Id.* at 781 n.6, 928 P.2d at 411 n.6 (emphasis in original). The court elaborated: "Four reservations were formed after 1968, and their membership never elected to come under state jurisdiction. The Jamestown-Klallam, Nooksack, Sauk Suiattle and Upper Skagit reservations are not subject to RCW 37.12.010." *Id.* (citing Pamela B. Loginsky, Criminal Jurisdiction Issues, in Wash. State Bar Ass'n, Continuing Legal Educ. Comm. & Indian Law Section, Perspectives on Indian Law, at 4-8 (1992)). The list should also include the Stillaguamish, Cowlitz, and Snoqualmie Tribes, who were formally acknowledged after 1968, and whose reservations were similarly established after 1968. The Cowlitz Tribe does not yet have a reservation.

¶n150. 25 U.S.C. § 715d (authorizing state jurisdiction over Coquille Tribe in Oregon - a mandatory P.L. 280 state).

¶n151. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976); see Cohen, *supra* note 2, § 6.04[3][f][ii], at 577-78; Leonhard, *supra* note 128, at 712-14.

¶n152. See *supra* Part III.B. This would include the state's assertion of jurisdiction over off-reservation trust lands and allotments as well as fee lands within reservations. See Cohen, *supra* note 2, § 6.04[3][b], at 546-53 for a detailed discussion of the scope of jurisdiction granted by P.L. 280.

¶n153. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991); see *Captured Justice*, *supra* note 38, at 17-18 (discussing Washington jurisdictional scheme).

¶n154. See cases cited *supra* note 141 and *infra* notes 155, 157, 160, 162.

¶n155. 157 Wash. App. 672, 238 P.3d 533 (2010).

¶n156. *Id.* at 685, 238 P.3d at 539.

¶n157. *State v. Yallup*, 160 Wash. App. 500, 508, 248 P.3d 1095, 1099 (2011).

¶n158. Wash. Rev. Code § 46.63.020 (2010). The legislature made a long list of exceptions to the rule, but did not include § 46.20.308(2)(a), which is the implied consent suspension statute. See *id.* At the same time, the court cited *Abrahamson*, 157 Wash. App. 672, 238 P.3d 533, which held that the state did have jurisdiction over the underlying drunk driving offense.

Id.

¶n159. Yallup, 160 Wash. App. at 506, 248 P.3d at 1098.

¶n160. 938 F.2d 146 (9th Cir. 1991).

¶n161. Id. at 147-48. It is important to remember that P.L. 280's grant of civil jurisdiction only opened the courthouse door to private civil disputes. Thus, state courts may entertain personal injury lawsuits involving Indians arising within reservations on public highways. *McCrea v. Denison*, 76 Wash. App. 95, 885 P.2d 856 (1994). Moreover, under Washington Superior Court Rule 82.5(b), state courts may defer to tribal court jurisdiction. Wash. Sup. Ct. R. 82.5(b). That rule, adopted in 1995, provides:

Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.

Id.

¶n162. Yallup, 160 Wash. App. at 503, 248 P.3d at 1097. When a state officer wishes to conduct a search in territory where the state lacks jurisdiction under P.L. 280, the proper recourse is to obtain a warrant from the tribal court. Cf. *South Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004).

¶n163. In *Estate of Cross*, 126 Wash. 2d 43, 50, 891 P.2d 26, 29 (1995), the Washington State Supreme Court responded to a certified question from the United States Tax Court ruling that "community property law is included under domestic relations [for purposes of P.L. 280 jurisdiction]." Interestingly, the court noted that "the United States Tax Court must make a factual inquiry as to whether any tribal custom existed and if so whether the customs contradict or supplement Washington community property law." Id. at 49-50, 891 P.2d at 29. The court did not consider other objections based on federal law. Id. at 49, 891 P.2d at 28-29. Of course, P.L. 280 expressly denies the application of state law or state jurisdiction to distribution of trust or restricted property in probate proceedings or otherwise. 25 U.S.C. § 1322(b) (2006).

¶n164. Prior to assumption of jurisdiction, it was clear that juvenile courts lacked jurisdiction to enter dependency and delinquency determinations involving Indian children within Indian country. See *State ex rel. Adams v. Superior Court*, 57 Wash. 2d 181, 356 P.2d 985 (1960). *Adams* was a companion case to *In re Colwash*, 57 Wash. 2d 196, 356 P.2d 994 (1960). After

the 1963 assumption of jurisdiction, the court in *Comenout v. Burdman*, 84 Wash. 2d 192, 201, 525 P.2d 217, 222 (1974), upheld state jurisdiction over child dependency matters. The case was decided before the U.S. Supreme Court developed the civil/regulatory limitation on state jurisdiction in *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976). If viewed as a civil regulatory proceeding due to the coercive effect on parental rights, jurisdiction over such matters may no longer be with the state. See *supra* notes 112 and 114 and the accompanying discussion of *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). In any event, the exercise of any state jurisdiction in child custody proceedings must take place in conformity with the Indian Child Welfare Act, 25 U.S.C. §§1901-63 (2006).

¶n165. See *supra* notes 112 and 114 and accompanying text for a discussion of *Doe v. Mann*, 415 F.3d 1038.

¶n166. Juvenile courts have exclusive jurisdiction under Washington law over matters "relating to juveniles alleged or found to have committed offenses, traffic or civil infractions, or violations as provided in RCW 13.40.020 through 13.40.230[.]" Wash. Rev. Code § 13.04.030(1)(e) (2010). To the extent that a juvenile has committed a traffic or civil infraction, state court jurisdiction would not exist because the state's authority is limited to criminal jurisdiction and does not include civil regulatory authority. *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991).

¶n167. 25 U.S.C. § 231 (2006). The implementing regulations at 25 C.F.R. § 273.52 (2012) refer to P.L. 280 as if it conferred similar authority, but the regulation was adopted in 1975 and thus predates the decision in *Bryan v. Itasca Cnty.*, 426 U.S. 373, which made it clear that civil regulatory jurisdiction was not granted by P.L. 280. See *Cohen*, *supra* note 2, § 6.04[5][a], at 586; cf. *Colwash*, 57 Wash. 2d at 198-99, 356 P.2d at 996 (holding that state jurisdiction over truancy matters under 25 U.S.C. § 231 would not extend to dependency proceeding).

¶n168. See *Captured Justice*, *supra* note 38, at 17-18 (discussing Washington's jurisdictional scheme).

¶n169. See *Leonhard*, *supra* note 128, at 698-701.

¶n170. See *Indian-Rights Leaders Ask Control*, *supra* note 135.

¶n171. David Suffia, *Indian Leader Says Meeds Lied About Effects of Policing*, *Seattle Times*, May 31, 1978, at G7. Mr. Tonasket was also the Chairman of the Confederated Tribes of the Colville Reservation. *Id.*

¶n172. 1 Am. Indian Policy Review Comm'n, *Final Report to Congress*, 205-06 (1977) (discussing events leading to a draft retrocession bill introduced in 1975 by Senator Henry

Jackson).

¶n173. *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979).

¶n174. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (2006)).

¶n175. Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968).

¶n176. Searching for an Exit, *supra* note 92, at 265-66; Captured Justice, *supra* note 38, at 166. There are 170 tribes in the lower forty-eight states that are subject to state authority under P.L. 280. Carole Goldberg & Duane Champagne, Native Nation Law & Policy Ctr., Final Report: Law Enforcement and Criminal Justice Under Public Law 280, at 9-11 (2007) [hereinafter Final Report], available at <http://cdn.law.ucla.edu/SiteCollectionDocuments/centers%20and%20programs/native%20nations/pl280%20study.pdf>. The Federal Register announcements accepting retrocession are as follows:

(1) full civil and criminal jurisdiction: fifteen Nevada tribes, 40 Fed. Reg. 27,501 (June 30, 1975); Ely Indian Colony, 53 Fed. Reg. 5837 (Feb. 26, 1988); Menominee, 41 Fed. Reg. 8516 (Feb. 27, 1976); Burns Paiute, 44 Fed. Reg. 26,169 (May 4, 1979); Omaha, 35 Fed. Reg. 16,598 (Oct. 16, 1970); Santee Sioux, 71 Fed. Reg. 7994 (Feb. 15, 2006);

(2) criminal retrocession only: Umatilla, 46 Fed. Reg. 2195 (Jan. 8, 1981), Winnebago, 51 Fed. Reg. 24,234 (July 2, 1986); Bois Forte Band of Chippewa, 40 Fed. Reg. 4026 (Jan. 27, 1975); and

(3) partial criminal retrocession: Confederated Salish and Kootenai Tribes, 60 Fed. Reg. 33,318 (June 27, 1995); seven Washington tribes listed in *infra* note 178.

¶n177. The current statute, Wash. Rev. Code § 37.12.120 (2010), provides:

Whenever the governor receives from the confederated tribes of the Colville reservation or the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, or Tulalip tribe a resolution expressing their desire for the retrocession by the state of all or any measure of the criminal jurisdiction acquired by the state pursuant to RCW 37.12.021 over lands of that tribe's reservation, the governor may, within ninety days, issue a proclamation retroceding to the United States the criminal jurisdiction previously acquired by the state over such reservation. However, the state

of Washington shall retain jurisdiction as provided in RCW 37.12.010. The proclamation of retrocession shall not become effective until it is accepted by an officer of the United States government in accordance with 25 U.S.C. Sec. 1323 (82 Stat. 78, 79) and in accordance with procedures established by the United States for acceptance of such retrocession of jurisdiction. The Colville tribes and the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, and Tulalip tribes shall not exercise criminal or civil jurisdiction over non-Indians.

Id.

[¶]n178. The Muckleshoot, Squaxin Island, Skokomish, and Nisqually Indian tribes remain subject to full state jurisdiction. The seven tribes who achieved limited retrocession are: Tulalip Tribes, 65 Fed. Reg. 75,948 (Dec. 5, 2000) and 65 Fed. Reg. 77,905 (Dec. 13, 2000); Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation, and Swinomish Tribal Community, 54 Fed. Reg. 19,959 (May 9, 1989); Confederated Tribes of the Colville Reservation, 52 Fed. Reg. 8372 (Mar. 17, 1987); Suquamish (Port Madison), 37 Fed. Reg. 7353 (Apr. 13, 1972); Quinault Indian Nation, 34 Fed. Reg. 14,288 (Aug. 30, 1969).

[¶]n179. H.B. 1773, 62d Leg., Reg. Sess. (Wash. 2011).

[¶]n180. Id. § 3.

[¶]n181. Id. § 4.

[¶]n182. See Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968).

[¶]n183. H.B. 1773, H. Amd. 343, 62d Leg., Reg. Sess. (Wash. 2011).

[¶]n184. See Final B. Rep., E.S.H.B. 2233, 62d Leg., Reg. Sess., at 3 (Wash. 2012). For information about the task force see <http://www.leg.wa.gov/jointcommittees/JELWGTR/Pages/default.asp> x. The Task Force included the author of this Article and Professor Douglas Nash of Seattle University School of Law as academic advisors.

[¶]n185. Letter from Christine O. Gregoire, Frank Chopp & Lisa Brown to Eric Johnson, Exec. Dir., Wash. State Ass'n of Cntys., (May 26, 2011) (on file with Washington Law Review).

[¶]n186. Joint Executive-Legislative Workgroup on Tribal Retrocession, Wash. State Legislature, <http://www.leg.wa.gov/JointCommittees/JELWGTR/Documents/2011-11-16/Agenda.pdf> (Nov. 16, 2011). The agendas for all four meetings reveal the wide array of witnesses who assisted

the Task Force. Wash. State Legislature, *supra*, at <http://www.leg.wa.gov/jointcommittees/JELWGTR/Pages/default.aspx> (last visited Nov. 4, 2012).

¹⁸⁷ H.B. 2233, 62d Leg., Reg. Sess. (Wash. 2012).

¹⁸⁸ S.B. 6417, 62d Leg., Reg. Sess. (Wash. 2012).

¹⁸⁹ Final B. Rep., E.S.H.B. 2233, 62d Leg., Reg. Sess., at 5 (Wash. 2012).

¹⁹⁰ E.S.H.B. 2233, 62d Leg., Reg. Sess., at 5 (Wash. 2012) (codified at Wash. Rev. Code §§37.12.160-.180 (2012)).

¹⁹¹ Wash. Rev. Code § 37.12.160(1).

¹⁹² *Id.* § 37.12.160(2) ("The resolution must express the desire of the tribe for the retrocession by the state of all or any measures or provisions of the civil and/or criminal jurisdiction acquired by the state under this chapter over the Indian country and the members of such Indian tribe. Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.").

¹⁹³ *Id.* § 37.12.160(3).

¹⁹⁴ *Id.* § 37.12.160(4).

¹⁹⁵ *Id.* § 37.12.160(5).

¹⁹⁶ *Id.* § 37.12.160(6). This section also refers to "procedures established by the United States for the approval of a proposed state retrocession." *Id.* There are no formal procedures aside from the delegation of authority from the President to the Secretary of the Interior, who must consult with the United States Attorney General before accepting a retrocession and publishing the determination in the Federal Register. Here is the Executive Order:

By virtue of the authority vested in me by section 465 of the Revised Statutes (25 U.S.C. 9) [§ 9 of this title] and as President of the United States, the Secretary of the Interior is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President or of any other officer of the United States, any and all authority conferred upon the United States by section 403(a) of the Act of April 11, 1968, 82 Stat. 79 (25 U.S.C. 1323(a)) [subsection (a) of this section]: Provided, That acceptance of retrocession of all or any measure of civil or criminal jurisdiction, or both, by the Secretary hereunder shall be effected by publication in the Federal Register of a notice which shall specify the jurisdiction retroceded and the effective date of the retrocession: Provided further, That acceptance of such retrocession of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General.

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Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 23, 1968); 25 U.S.C.A. § 1323 Note.

ⁿ197. Wash. Rev. Code § 37.12.160(8). This section was the last amendment to the bill. An earlier Senate amendment would have required the Governor (and in some cases other state agencies) to certify that actions and agreements on the foregoing matters (including inter-local agreements) were actually in place. E.S.H.B. 2233, S. Amd. 153, 62d Leg., Reg. Sess. (Wash. 2012). The House refused to concur in the Senate version and a Senate substitute bill was passed to provide that the Governor should simply consider the issues in making her decision on a retrocession proclamation. E.S.H.B. 2233, S. Amd. 282, 62d Leg., Reg. Sess. (Wash. 2012). This version passed the Senate on March 5, 2012 and the House concurred on March 6, 2012. H.B. Rep. E.S.H.B. 2233, 62d Leg., Reg. Sess., at 1 (Wash. 2012).

ⁿ198. Wash. Rev. Code § 37.12.170(1).

ⁿ199. Id. § 37.12.170(2).

ⁿ200. Id. § 37.12.180. The preexisting partial retrocession is available for the two tribes that have not utilized the partial retrocession process - Skokomish and Muckleshoot. Id. § 37.12.100. Curiously, that statute does not extend to the other two tribes that requested full P.L. 280 jurisdiction under the 1957 statute: Squaxin Island and Nisqually. Id.

ⁿ201. Id. § 37.12.160(2) ("Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process."); id. § 37.12.160(8) (recommending state and local input regarding "the operation of motor vehicles upon the public streets, alleys, roads, and highways" after retrocession).

ⁿ202. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4), 124 Stat. 2262.

¶n203. See supra Part II.A. For a discussion of the factors bearing on whether an individual is an Indian for federal jurisdictional purposes, see *United States v. Bruce*, 394 F.3d 1215, 1223-27 (9th Cir. 2005) and Bethany R. Berger, "Power Over this Unfortunate Race": Race, Politics and Indian Law in *United States v. Rogers*, 45 Wm. & Mary L. Rev 1957 (2004).

¶n204. 18 U.S.C. § 1153 (2006); see supra Part II.A.

¶n205. 18 U.S.C. § 1152.

¶n206. *United States v. McBratney*, 104 U.S. 621 (1881).

¶n207. See *United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994) (holding that the federal conspiracy statute, 18 U.S.C. § 371, "is a federal criminal statute of nationwide applicability, and therefore applies equally to everyone everywhere within the United States, including Indians in Indian country").

¶n208. See supra Part III.

¶n209. See Final Report, supra note 176.

¶n210. See supra note 1 and accompanying text.

¶n211. The approach originally advanced would be better as it would put the Washington tribes in control of whether and how much jurisdiction should be retroceded by the state, albeit subject to the discretion of the Secretary of the Interior to accept or reject the proffered retrocession.

¶n212. Searching for an Exit, supra note 92, at 264-68; *Captured Justice*, supra note 38, at 168.

¶n213. Searching for an Exit, supra note 92, at 266.

¶n214. Captured Justice, *supra* note 36, at 169-70.

¶n215. *Id.* at 171.

¶n216. *Id.* at 172-74; see Gabriela Stern, Senators Give Winnebagos Jurisdiction, *Omaha World-Herald*, Jan. 17, 1986 (recounting rancor and racism is the legislative effort to retrocede jurisdiction). The headline from the *Omaha World-Herald* is premised on the common misconception that retrocession of state jurisdiction bestows additional governmental powers on affected tribes. It does not. Rather, it simply removes concurrent state jurisdiction.

¶n217. Control of Civil Matters Called Next Logical Step, *Omaha World-Herald*, July 21, 1985. The article quotes one opponent:

"With civil retrocession, they would have the rule of the land,' Freese said. "For example, they could put a \$ 500,000 tax on a tavern business, and you either pay it or you go out of business. They could tax white-owned real estate. It could completely ruin the value of real estate.'

Id. The statement is absolutely incorrect as a matter of law. Tribal authority to tax non-members and their property is governed by a federal common law test unaffected by the application of P.L. 280. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (striking down Navajo Nation's tax on non-Indian fee simple property).

¶n218. Wash. Rev. Code § 37.12.160(4) (2012). There is no guarantee that a Governor will grant a given retrocession petition, but one should expect good faith efforts to reach an accord.

¶n219. *Id.* We will soon be able to see how this process plays out as the Confederated Tribes and Bands of the Yakama Reservation submitted retrocession resolutions to the Governor of Washington in July 2012. Letter from Confederated Tribes and Bands of the Yakama Nation to Governor Christine Gregoire (July 16, 2012) (attaching Yakama Tribal Council Resolutions T-117-12 and T-036-12) (on file with Washington Law Review).

¶n220. It would be useful if the Department of the Interior developed at least some guidelines for determining whether to accept a petition for retrocession. As it stands now, it is entirely an ad hoc process. See *infra* notes 254-58 and accompanying text for a reasonable approach under the Indian Child Welfare Act.

¶n221. Leonhard, *supra* note 128, at 721. Nevada is the only state to offer unconditional retrocession to any tribe that had not consented to state jurisdiction. Nev. Rev. Stat. § 41.430

(2011); see *Captured Justice*, supra note 38, at 184-87 (discussing Nevada's retrocession scheme in general and problems encountered by the Ely Colony); *Acceptance of Offer to Retrocede Jurisdiction*, 40 Fed. Reg. 27,501 (June 24, 1975).

²²² H.B. 1773, H. Amd. 343, 62d. Leg., Reg. Sess. (Wash. 2011).

²²³ There was little (if any) overt opposition to the retrocession as the Task Force worked through the various issues. More typical were concerns expressed by the Washington State Association of Counties and the Kitsap County Prosecuting Attorney's Office. Both were interested in ensuring efficient and coordinated service and law enforcement delivery after any retrocession. Memorandum from Russell D. Hauge, Kitsap Prosecuting Attorney, to Sarah Lambert, Legislative Assistant, Tribal Retrocession Work Group (Nov. 2, 2011) (on file with Washington Law Review); Letter from Wash. State Ass'n of Cntys. to Representative McCoy and Retrocession Work Group (Oct. 10, 2011) (on file with Washington Law Review).

²²⁴ See Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 *Tulsa L. Rev.* 553, 592 (2012) (discussing the virtues of intergovernmental cooperation).

²²⁵ Compare E.S.H.B. 2233, S. Amd. 2233-S.E AMS ENGR S4848.E § 1(8) (passed Senate on Feb. 28, 2012), with E.S.H.B. 2233, S. Amd. 282, 2233-S.E AMS PRID S5296.1 § 1(8) (passed Senate on Mar. 5, 2012). The engrossed Senate Bill of Feb. 28, 2012 contained the mandatory certification language, which was rejected by the House and followed by the "striker" language of March 5, 2012. A complete history of the bill's amendments can be found at <http://dlr.leg.wa.gov/billsummary/default.aspx?bill=2233&year=2011>.

²²⁶ If state agencies and local entities were left completely out of the process, they could be expected to weigh in with their opposition at the stage when the Secretary of the Interior deliberates whether to accept the retrocession petition. Cf. Letter from Russell D. Hauge, Kitsap Prosecuting Attorney, to Governor Christine Gregoire (Sept. 14, 2012) (on file with Washington Law Review) (suggesting that the U.S. Attorney would not have adequate resources to prosecute non-Indians if state authority over non-Indian versus Indian crimes were no longer subject to state authority).

²²⁷ David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 *Rev. Const. Stud.* 120, 143 (1993). Dean Getches also canvassed other federal efforts to encourage tribal-state compacting over jurisdictional matters. *Id.* at 145-47; see also Cohen, supra note 2, § 6.05, at 589.

²²⁸ Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 *S.D. L. Rev.* 239, 276 (1991); see also Robert T. Anderson, *Indian Water Rights, Practical Reasoning and Negotiated Settlements*, 98 *Cal. L. Rev.* 1133, 1134 (2010) (discussing how uncertainty in the

water rights area "has created an environment in which creative, practical solutions to conflicts have emerged in the Indian water settlements approved by Congress"); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 Ga. L. Rev. 365, 373 (1994) ("Tribal-state negotiations can be comprehensive, instead of piecemeal, as is inherent in case-by-case litigation.").

¶n229. Hanna, Deloria & Trimble, *supra* note 223. This Article provides a comprehensive history of the efforts in the modern era to reach cooperative agreements in a wide variety of areas of concern to tribes and local non-Indian governments.

¶n230. See *supra* note 1 and accompanying text.

¶n231. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

¶n232. H.R. Doc. No. 91-363, at 2 (1970).

¶n233. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in 25 U.S.C. §§450-450n, §§455-458e (2006)).

¶n234. Cohen, *supra* note 2, § 22.02, at 1346-49.

¶n235. Indian Self-Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (1988).

¶n236. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250.

¶n237. Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868 (2000).

¶n238. 25 U.S.C. §§458aa-458aaa-18.

¶n239. See, e.g., Native American Business Development, Trade Promotion, and Tourism Act of 2000, P.L. 106-464, 114 Stat. 2012 (codified at 25 U.S.C. § 4301(6)) ("The United States

has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes."); Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (affirming the federal trust responsibility to Indian tribes). An exhaustive discussion of federal programs supporting tribal self-government and economic development can be found in Cohen, *supra* note 2, § 22, at 1335-1413.

¶n240. See Cohen, *supra* note 2, § 102[1], at 16-17.

¶n241. *Id.* § 1.03[6][a], at 64-65.

¶n242. Compare *United States v. Kagama*, 118 U.S. 375 (1886) (rejecting the Constitution's Indian Commerce Clause as a basis for federal jurisdiction over criminal jurisdiction in Indian country), with *United States v. Lara*, 541 U.S. 193, 201 (2004) ("Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'").

¶n243. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 406-17 (1993). As set out in the text accompanying *supra* note 1, the consent principle is foundational to federal, state, and international law.

¶n244. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding unilateral abrogation of Indian treaty despite promise that it would not be changed without the consent of three-fourths of adult male Indians).

¶n245. In *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), the Supreme Court concluded that the United States "has charged itself with moral obligations of the highest responsibility and trust." *Id.*

¶n246. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

¶n247. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779, 782 (2006). Professor Washburn was confirmed by the Senate as the Assistant Secretary of Indian Affairs on September 21, 2012. 158 Cong. Rec. S6685 (daily ed. Sept. 21, 2012); Press Release, Dept. of Interior, *Salazar Applauds Senate Confirmation of Kevin Washburn as Interior's Assistant Secretary for Indian Affairs* (Sept. 22, 2012), available at <http://www.doi.gov/news/pressreleases/Salazar-Applauds-Senate-Confirmation-of-Kevin-Washburn-as-Interiors-Assistant-Secretary-for-Indian-Affairs.cfm>.

¶n248. Washburn, *supra* note 247, at 853.

¶n249. Indian Law Enforcement Improvement Act of 1975, S. 2010, 94th Cong. (1975).

¶n250. *Id.* § 103(c).

¶n251. See *supra* note 63 and accompanying text.

¶n252. 18 U.S.C. § 1162(d) (2006); see *supra* note 86.

¶n253. 25 U.S.C. § 2810(d) (2006); 28 U.S.C. § 543 (2006).

¶n254. Professors Goldberg and Champagne are two of the leading authorities on P.L. 280 and authors of the only empirical study on the effects of P.L. 280. Final Report, *supra* note 176.

¶n255. Searching for an Exit, *supra* note 92, at 268-69. The ICWA of 1978 provides substantive and procedural protection for the benefit of Indian tribes and Indian families. Chief among these are provisions mandating the transfer of child custody proceedings from state to tribal courts at the request of a tribe or Indian custodian. 25 U.S.C. § 1911 (2006); see *Miss. Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989).

¶n256. 25 U.S.C. § 1918 ("Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction."). Implementing regulations are found at 25 C.F.R. pt. 13 (2012).

¶n257. 25 U.S.C. § 1918(c) ("If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.").

¶n258. *Id.* § 1918(b)(1) ("The Secretary may consider, among other things: (i) whether or not

the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe; (ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe; (iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multiracial occupation of a single reservation or geographic area.").

¶n259. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§2701-21).

¶n260. 25 U.S.C. § 2710(d)(1). Casino style gaming is defined as "class III gaming" in IGRA. See 25 U.S.C. § 2703.

¶n261. *Id.* § 2710(d).

¶n262. See *id.* § 2710(d)(7); 25 C.F.R. §§291.7-.11; Final Rule, Class III Gaming Procedures, 65 Fed. Reg. 17,535, 17,536 (Apr. 12, 1999) (explaining process).

¶n263. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (holding that judicial supervision aspect may be barred by state sovereign immunity because Congress lacks power to waive state immunity pursuant to the Commerce Clause). A regulatory avenue was developed in response to the Supreme Court's ruling. 25 C.F.R. pt. 291.

¶n264. See Washburn, *supra* note 95, at 422 ("Indian gaming is simply the most successful economic venture ever to occur consistently across a wide range of Indian reservations.").

¶n265. 25 U.S.C. § 2710(d)(3)(C).

¶n266. *Id.* § 2710(d)(4).

¶n267. *Id.* § 2710(d)(3)(C)(i)-(ii).

¶n268. 18 U.S.C. § 1166(d) (2006) ("The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal

jurisdiction with respect to gambling on the lands of the Indian tribe.").

²⁶⁹. See, e.g., Tribal-State Compact for Class III Gaming Between the Snoqualmie Indian Tribe and the State of Washington, § 9, Wash.-Snoqualmie Tribe, Apr. 4, 2002, available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Snoqualmie%20Indian%20Tribe/snoqualmiecomp040402.pdf>. All Tribal-State compacts are available from the National Indian Gaming Commission at http://www.nigc.gov/Reading_Room/Compacts.aspx. Washington also has a progressive tribal cross-deputization statute. Wash. Rev. Code § 10.92.020 (2010); see also *supra* note 73.

²⁷⁰. See text at *infra* notes 70-71.

²⁷¹. Washburn, *supra* note 37, at 713-15.

²⁷². S. Comm. on the Interior & Insular Affairs, 94th Cong., Background Rep. on Public Law 280 (Comm. Print 1975) (statement of Sen. Henry M. Jackson, Chairman).



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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2014, I caused to be served the foregoing **STATEMENT OF ADDITIONAL AUTHORITIES** on the following parties at the following addresses by U.S. Mail, postage first class:

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