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NO. 67050-6-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

OUTSOURCE SERVICES MANAGEMENT, LLC,

Respondent,

vs.

NOOKSACK BUSINESS CORPORATION,

Appellant.

NOOKSACK BUSINESS CORPORATION'S
PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF PETITIONERS	1
II. CITATION TO COURT OF APPEALS DECISION.....	1
III. ISSUE PRESENTED FOR REVIEW	1
IV. STATEMENT OF THE CASE.....	3
A. A contractual dispute between an arm of the Nooksack Tribe and an out-of-state lender resulted in the lender suing the tribally-chartered corporation in Superior Court	3
B. The Superior Court denied the tribal corporation's motion to dismiss for lack of subject matter jurisdiction	3
C. The Court of Appeals affirmed the determination of subject matter jurisdiction based exclusively on the tribal corporation's waiver of sovereign immunity in the contract documents	5
V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	6
A. The Decision conflicts with federal and Washington statutes and decisional law where (1) Washington never assumed civil jurisdiction over the Nooksack Indian reservation, (2) parties cannot confer subject matter jurisdiction, and (3) no analysis was performed whether the assumption of jurisdiction interferes with tribal self- government.	6
B. The Decision raises issues of substantial public interest concerning subject matter jurisdiction of civil disputes involving Indian tribes that this Court should decide.	17
VI. CONCLUSION.....	18
VII. APPENDIX	
A. Court of Appeals' Decision	
B. U.S. Supreme Court Decision <i>Washington v. Confederated Bands and Tribes of the Yakima Indian Nation</i>	
C. U.S. Supreme Court Decision <i>C&L Enterprises</i>	
D. Washington Supreme Court Decision <i>Powell v. Farris</i>	
E. Public Law 280 (25 U.S.C. § 1322)	
F. RCW 37.12.010	
G. Article 26, Constitution of the State of Washington	

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976).....	10, 13
<i>C & L Enters. Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.</i> , 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001)....	2, 11, 12, 15
<i>Dougherty v. Dep't of Labor & Indus.</i> , 150 Wn.2d 310, 76 P.3d 1183 (2003).....	13
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 480 U.S. 9 (U.S. 1987).....	18
<i>Kennerly v. District Court of Montana</i> , 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971).....	10
<i>Kiowa Tribe of Oklahoma v. Manufacturing Technologies</i> , 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998).....	12, 15
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164, 93 S. Ct. 1257; 36 L. Ed. 2d 129 (1973).....	10, 13, 14
<i>Powell v. Farris</i> , 94 Wn.2d 782, 620 P.2d 525 (1980).....	2, 7, 10, 11, 17
<i>Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County</i> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	13
<i>State v. Cooper</i> , 130 Wn.2d 770, 928 P.2d 406 (1996).....	9
<i>State v. Jim</i> , 173 Wn.2d 672,679, 273 P.3d 434 (2012).....	10
<i>Tonasket v. State</i> , 84 Wn.2d 164, 525 P.2d 744 (1974).....	9
<i>Washington v. Confederated Bands and Tribes of the Yakima Indian Nation</i> , 439 U.S. 463, 99 S. Ct. 704, 58 L. Ed. 2d 740 (1979) (App B)...	passim

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Wesley v. Schneckloth</i> , 55 Wn.2d 90, 346 P.2d 658 (1959).....	13
<i>Williams v. Lee</i> , 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).	2, 8, 11, 18
<i>Wright v. Colville</i> , 159 Wn.2d 108, 147 P.3d 1275 (2006).....	14, 15, 17
 STATUTES	
25 U.S.C. § 1322 (PL 280)	6, 7, 8, 9, 10, 11, 17
25 U.S.C. § 1322(b) (PL 280).....	15
RCW 37.12.010	6, 7, 8, 9, 10
RCW 37.12.021	9
 OTHER AUTHORITIES	
Article 26 of the Washington Constitution	2, 8, 9, 10, 19
CR 12(b)(1).....	5
CR 12(b)(2).....	5
CR 12(b)(6).....	5
RAP 13.1(a) and 13.3(a)(1)	1
RAP 13.4(b)(1)	6, 12
RAP 13.4(b)(4)	6, 17
Vetter, William V., <i>Essay: Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction</i> , 36 Ariz. L. Rev. 169, 185-86 (1994).....	14

I. IDENTITY OF PETITIONERS

Petitioner Nooksack Business Corporation (“NBC”) petitions pursuant to RAP 13.1(a) and 13.3(a)(1) for discretionary review of a decision terminating review. NBC is a tribally-chartered corporation of the Nooksack Tribe. This litigation concerns a contractual dispute regarding loans to operate the Nooksack River Casino in Deming, Whatcom County, Washington. The casino is within the boundaries of the Nooksack Reservation. The parties and Court of Appeals agree that NBC is an arm of the Tribe entitled to the sovereign immunity of the Nooksack Tribe. *See Decision* at 8 note 27.

II. CITATION TO COURT OF APPEALS DECISION

NBC seeks review of the published January 14, 2013, decision of Division One of the Washington Court of Appeals, No. 67050-6-I (App. A) affirming state court subject matter jurisdiction. This ruling terminated review.

III. ISSUE PRESENTED FOR REVIEW

Do Washington courts have subject matter jurisdiction to hear a dispute initiated by an out-of-state lender against an arm of the Nooksack Tribe without regard to where the suit arose or whether the assumption of subject matter jurisdiction would interfere with the Tribe’s self-

governance, where ownership of tribal personal property located on the reservation is at issue and based solely on a waiver of sovereign immunity contained in the loan documents at issue?

The following sub-issues are presented for review:

A. What authorizes state subject matter jurisdiction over this civil dispute arising in Indian country when (1) Article 26 of the Washington Constitution disclaimed authority over Indian country, (2) Washington never assumed civil jurisdiction over the Nooksack Indian reservation through PL 280, and (3) no other act of Congress provides jurisdiction?

B. Should Washington courts decline subject matter jurisdiction here because to assume it would interfere with the Tribe's self-governance, a question that the Court of Appeals should have reached pursuant to *Powell v. Farris* and *Williams v. Lee* but did not?

C. Does the Decision misconstrue federal case law such as *C&L Enterprises* regarding jurisdiction when it assumes that evaluation of a state court's subject matter jurisdiction to hear a dispute involving a tribe and arising on Indian lands can turn solely on a contractual waiver of sovereign immunity and when that assumption conflicts with (1) the black letter law of this state that subject matter jurisdiction cannot be conferred by agreement and (2) the principle that subject matter jurisdiction over disputes arising in Indian country requires express authority from Congress?

D. Did the Court of Appeals misinterpret PL 280 and impermissibly extend state court jurisdiction when it held that solely based on the contractual waiver of sovereignty state courts could adjudicate the lender's claims to personal property of the Tribe located on the reservation when PL 280 expressly reserves such authority from the states?

E. Did the lender fail to dispute that the action arose in Indian country, or, if the lender adequately disputed the issue, did

the action arise in Indian country, questions that the Court of Appeals should have reached but did not?

IV. STATEMENT OF THE CASE

This case concerns a fundamental issue of state jurisprudence: the extent of state court subject matter jurisdiction over a civil dispute involving an Indian tribe and its property that arose on the reservation, including the state court's right to adjudicate possession of tribal personal property located on the reservation. The trial court denied NBC's motion to dismiss for lack of subject matter jurisdiction. On discretionary review, the Court of Appeals affirmed. Division I held that, even if the claim arose on the reservation, by virtue of a contractual waiver of sovereign immunity by the tribe on the tribal corporation's behalf the state court possessed subject matter jurisdiction. This holding is unparalleled in any state or federal decision.

A. A contractual dispute between an arm of the Nooksack Tribe and an out-of-state lender resulted in the lender suing the tribally-chartered corporation in Superior Court

NBC is a tribally-chartered corporation of the Nooksack Tribe, which operates a casino in Deming, Washington, within the boundaries of the Nooksack Reservation. *Decision* at 2. NBC agreed to a \$15,315,856 loan from BankFirst, a South Dakota bank, on December 21, 2006. *Id.* Respondent Outsource Services Management, LLC, is a loan servicer

purportedly acting on behalf of the Federal Depository Insurance Corporation as a receiver for BankFirst. CP 380; CP 382 ¶ 10. For purposes of this review, OSM and BankFirst are synonymous. They are referred to as “the lender.”

It is uncontested that the loan documents were executed, performed and breached by NBC on the Nooksack Tribe’s reservation, they concern the operation of the tribal casino on reservation land and facilitate the employment of numerous tribal members on reservation land, the casino revenues are obtained on reservation land, the personal property collateral is on reservation land, NBC’s offices are on the reservation and the proceeds of the enterprise are for the welfare and governance of the Tribe.

The loan documents included a limited waiver of sovereign immunity contained in a forum selection clause. *Decision* at 2. In these provisions, NBC consented to arbitration or to be sued in three alternative venues, in the following order of priority: (1) the United States District Court for the Western District of Washington, (2) any state court of general jurisdiction, or, (3) “only if none of the foregoing courts shall have jurisdiction,” in tribal court. *Decision* at 12.

The lender declared default in January 2009. *Decision* at 2. The lender filed a lawsuit against NBC in Whatcom County Superior Court. *Decision* at 3, 6. The lender sought money damages and the personal

property of NBC pledged as security that sits on reservation land. *Id.* See also CP 380-37.

B. The Superior Court denied the tribal corporation's motion to dismiss for lack of subject matter jurisdiction

Nooksack Business Corporation moved under CR 12(b)(1), (b)(2) and (b)(6) to dismiss the complaint. *Decision* at 3. The trial court denied the motion. *Id.* The trial court certified the order to the Court of Appeals and stayed the litigation pending appellate review. *Decision* at 3.

C. The Court of Appeals affirmed the determination of subject matter jurisdiction based exclusively on a waiver of sovereign immunity in the contract documents

Division I of the Court of Appeals accepted discretionary review. *Ruling* July 16, 2012. On January 14, 2013, Division I issued a published opinion affirming the denial of the motion to dismiss on the ground that the Tribe's waiver of NBC's sovereign immunity in the loan documents justified the assertion of subject matter jurisdiction by Washington courts. The Court of Appeals on *de novo* review concurred with the trial court and the lender that where the cause of action arose was irrelevant. *Decision* at 14 ("Nor does it matter where the cause of action arose.").

This decision terminated review.

V. **ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

This Court should review the pivotal issue of subject matter jurisdiction presented here. This Court should define the intersection between this state's subject matter jurisdiction and Indian law. The subject matter jurisdiction analysis contained in the published Decision is fundamental to Washington jurisprudence and presents issues of first impression. The Decision conflicts with federal and state law (RAP 13.4(b)(1)). The case also raises issues of substantial public interest concerning Washington courts' ability to entertain civil disputes involving Indian tribes (RAP 13.4(b)(4)). The complex issues transcend this single case and require the Court's examination.¹

A. **The Decision conflicts with federal and Washington statutes and decisional law where (1) Washington never assumed civil jurisdiction over the Nooksack Indian Reservation, (2) parties cannot confer subject matter jurisdiction, and (3) no analysis was performed whether the assumption of jurisdiction interferes with tribal self-government.**

This Court should accept review under RAP 13.4(b)(1). The Decision fails to properly apply 25 U.S.C. § 1322 (known as "Public Law

¹ NBC seeks review whether dismissal was proper for lack of subject matter jurisdiction. It does not seek review of the *Decision* at 20 to 33 concerning the enforceability of the loan documents under the Indian Gaming Regulation Act.

280” or “PL 280”) (App. E) and RCW 37.12.010 (App. F), and conflicts with decisional law establishing the contours of subject matter jurisdiction where Indian tribes and lands are concerned. This Court should accept review to reconcile the parameters of Public Law 280, RCW 37.12.010 and case law. By accepting review, this Court will have the opportunity to establish the proper subject matter jurisdiction analysis for civil disputes arising in Indian country that involve out-of-state non-Indians and Indian tribes and tribal property.

Conflicts with existing law support review. In holding that Washington courts have subject matter jurisdiction over this civil dispute based solely on NBC’s waiver of sovereignty without regard to whether the dispute arose in Indian country or whether the assertion of jurisdiction infringes on tribal self-government, and regardless that the dispute concerns title to tribal property on the reservation, the Court of Appeals’ decision conflicts with (1) the United States Supreme Court’s *Washington v. Confederated Bands and Tribes of the Yakima Nation* decision, which held that the Washington Constitution disclaims authority over Indian country and that Washington successfully reclaimed only partial authority by enactment of RCW 37.12.010, (2) RCW 37.12.010, which the parties agree does not reclaim authority pertinent to this dispute, and (3) this Court’s *Powell v. Farris* decision, citing the United States Supreme

Court's *Williams v. Lee* decision, setting forth an analysis for subject matter jurisdiction in the absence of PL 280 jurisdiction that the Court of Appeals did not follow. The Decision also conflicts with the plain language of PL 280, which reserves from the states all disputes concerning possession of tribal property on Indian lands.

Article 26 of the Constitution of the State of Washington contains Washington's disclaimer over lands "owned or held by any Indian or Indian tribes," reserving Indian lands to "the absolute jurisdiction and control of the congress of the United States." Article 26 (App. G). This provision was a condition of statehood. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 479-80, 99 S. Ct. 704, 58 L. Ed. 2d 740 (1979) (App B).

The scope of this provision and the acts necessary to reclaim jurisdiction were litigated in the 1970s, culminating in the United States Supreme Court decision *Yakima Indian Nation, supra*. The United States Supreme Court noted that "[t]he Washington Constitution contains a disclaimer of authority over Indian country." 439 U.S. at 474. That Court went on to hold that Washington successfully reclaimed *limited* jurisdiction over Indian lands offered by Congress through PL 280 by enactment of RCW 37.12.010. *Id.* at 484-92. In so holding, the United States Supreme Court deferred to this Court's decisions such as in

Tonasket v. State, 84 Wn.2d 164, 525 P.2d 744 (1974), which held that Washington could reclaim the authority disclaimed in Article 26 by legislative amendment.

Through RCW 37.12.010, thus, Washington assumed jurisdiction offered through PL 280, though only some of it. The “checkerboard jurisdiction” to which Washington agreed was challenged in the *Yakima Indian Nation* case. Washington defended its right to assume only partial jurisdiction. *Yakima Indian Nation*, 439 U.S. at 493-99. The United States Supreme Court accepted Washington’s position, rejecting the challenge and leaving intact Washington’s assertion of only the specific areas of jurisdiction listed in RCW 37.12.010(1)-(8). *Id.* at 492. “Washington has done no more than refrain from exercising the full measure of allowable jurisdiction without consent of the tribe affected.” *Id.* at 495. The Nooksack Tribe has not agreed to any more extensive jurisdiction.²

The Court of Appeals and the parties agree that Washington did

² Washington’s statute requires that tribes consent to jurisdiction by tribal resolution expressing the tribe’s desire for state jurisdiction. RCW 37.12.021. The governor must then issue a proclamation to that effect. *Id.* Under the Washington statute, therefore, an individual defendant such as NBC may not unilaterally confer jurisdiction upon the state. The Nooksack Tribe has not consented to Washington’s assumption of subject matter jurisdiction over general civil disputes related to transactions occurring within the boundaries of the Nooksack Reservation. *See State v. Cooper*, 130 Wn.2d 770, 774, 928 P.2d 406 (1996) (“The Nooksack Tribe has not consented to the assumption of state jurisdiction.”).

not obtain jurisdiction over this dispute through PL 280 and RCW 37.12.010. According to NBC, jurisdiction is not established under PL 280 and the Washington statute because it undisputed that Washington never invoked PL 280 jurisdiction applicable to the Nooksack Tribe for this civil dispute, nor has the Tribe consented, as discussed above. The Court of Appeals adopted the lender's view that PL 280 and RCW 37.12.010 are irrelevant because PL 280 does not offer the requisite jurisdiction in the first place, ruling that any jurisdiction obtained through PL 280 applies only to individual Indians, not tribes. *See Decision* at 17-18, citing dicta in *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102; 48 L. Ed. 2d 710 (1976). Though their rationales differ, both approaches conclude that PL 280 and RCW 37.12.010 do not establish the necessary jurisdiction. This conclusion supports a finding that no jurisdiction exists, not a finding that jurisdiction does exist.³

³ If NBC is correct that PL 280 offered the jurisdiction which Washington has not invoked, the inquiry is over because jurisdiction offered by PL 280 can only be invoked through PL 280. *See Kennerly v. District Court of Montana*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971).

If the lender and Division I are correct, this should end the inquiry on the basis that Congress has never offered the states civil jurisdiction over Indian *tribes* concerning civil actions arising in Indian country. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 178-79, 93 S. Ct. 1257; 36 L. Ed. 2d 129 (1973) (“[T]he admitted absence of either civil or criminal jurisdiction [pursuant to PL 280] would seem to dispose of the case.”); *State v. Jim*, 173 Wn.2d 672,679, 273 P.3d 434 (2012) (“State jurisdiction over Indian country is codified at RCW 37.12.010.”). At a minimum, this Court's *Powell* decision mandates consideration whether the assertion of jurisdiction would infringe on the Tribe's self-governance.

If the legacy of Article 26, PL 280, *Yakima Indian Nation* and RCW 37.12.010 do not establish a lack of civil jurisdiction of this dispute which arose in Indian country (which they do), Washington courts only may exercise jurisdiction after a determination that the assumption of jurisdiction will not infringe the right of the Nooksack Tribe to make its own laws and be ruled by them. “It is well settled that even without the jurisdiction conferred by Congress in Public Law 280, the state may exercise some jurisdiction over some reservation conduct.” *Powell v. Farris*, 94 Wn.2d 782, 620 P.2d 525 (1980) (App. D). Where the State has not “assumed jurisdiction under Public Law 280,” Washington courts next should analyze “whether the assertion of state jurisdiction would infringe the right of the . . . Tribe of Indians to make their own laws and be ruled by them.” *Id.* at 886-87. *See also Williams v. Lee*, 358 U.S. 217, 219-220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). The Court of Appeals refused to conduct this analysis on the basis that the waiver of sovereign immunity alone was sufficient to justify jurisdiction. This approach conflicts with *Powell* and *Williams v. Lee*.

The Decision also conflicts with the United States Supreme Court cases such as *C & L Enters. Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) (App. C), which the Decision takes out of context to impute reasoning and

conclusions that are absent.⁴ The Court of Appeals misreads *C&L Enterprises* to establish that if a tribe waives sovereignty, state subject matter jurisdiction is a foregone conclusion. *See Decision* at 10-15. The case nowhere states this. This leap is unsupported where the United States Supreme Court in *C&L Enterprises* analyzes not subject matter jurisdiction but whether a waiver of sovereign immunity for off-reservation conduct had in fact been made. State subject matter jurisdiction was not at issue in *C&L Enterprises* (presumably because the cause of action arose off-reservation and, therefore, no basis existed to challenge state subject matter jurisdiction). *See C&L Enterprises*, 532 U.S. at 414, 423 (dispute arose from construction work regarding “off-reservation, nontrust [tribal] property”).⁵ The Court of Appeals acknowledges that it reads the *C&L Enterprises* analysis of waiver of sovereign immunity “as an aspect of subject matter jurisdiction” “although

⁴ RAP 13.4(b)(1) does not expressly include as a basis for review a conflict with Federal decisional law. Because Washington is subject to and follows federal law where Indian land or tribes are involved as a matter of federal supremacy, however, federal law constitutes Washington law. A conflict with United States Supreme Court decisions in these circumstances, therefore, should justify review under RAP 13.4(b)(1).

⁵ *See also Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (also examining exclusively the issue of sovereign immunity where the suit concerned undisputed off-reservation commercial conduct).

these words appear nowhere in the opinion.” *Decision* at 14. The Decision, therefore, rests on a reading of federal case law that is not express. This Court should scrutinize it.

The Decision is the first in the nation, federal or state, to hold that state courts can hear civil disputes between a tribe and non-Indians based solely on a tribe’s contractual waiver of sovereign immunity regardless of where the dispute arose and regardless whether the assumption of jurisdiction interferes with tribal self-governance.

This holding is not only novel and beyond the scope of the federal decisions cited by the Court of Appeals, it conflicts with two principles. First, that subject matter jurisdiction cannot be conferred by agreement or act of the parties. *Skagit Surveyors & Eng’rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) (subject matter jurisdiction does not turn on agreement, stipulation, or estoppel); *Wesley v. Schneckloth*, 55 Wn.2d 90, 93–94, 346 P.2d 658 (1959); *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 319, 76 P.3d 1183 (2003). Second, that jurisdiction over Indian tribes and lands is reserved to the federal government absent an express grant of jurisdiction to the states. *McClanahan v. Arizona State Tax Comm’n*, *supra*, 411 U.S. 164; *Bryan v. Itasca County*, *supra*, 426 U.S. at 377 n.2 (federal government has “plenary and exclusive power” “to deal with Indian tribes” and “to

regulate and protect the Indians and their property against interference even by a state.”). Moreover, “the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.” *McClanahan* at 172 (citations deleted).

The Decision suffers from an unjustified approach: it assumes subject matter jurisdiction and concludes that sovereign immunity is no bar. A proper analysis, one that comports with the “modern trend” identified in *McClanahan*, would affirmatively identify the federal source of state subject matter jurisdiction over an Indian tribe and its property beyond the fact that the Washington courts are courts of general jurisdiction able to hear contract disputes.⁶

The Decision candidly admits that exact details of its reasoning are missing, stating that it need not determine if “waiver of tribal sovereign

⁶ One commentator, cited by this Court in *Wright v. Colville*, 159 Wn.2d 108, 115, 147 P.3d 1275 (2006), agrees with NBC that a sovereign immunity analysis is no replacement for a subject matter jurisdiction analysis. Vetter, William V., *Essay: Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 185-86 (1994) (“Tribal immunity is not the only problem for persons wishing to bring suit against an Indian individual or entity. A waiver of immunity does not grant jurisdiction, even if the waiver names a specific court. The question of the right to sue (immunity) is distinct from the question of jurisdiction.”).

immunity must be exclusively characterized as an element of subject matter jurisdiction.” *Decision* at 15-16. The Court of Appeals states that it makes no difference if “other courts treat tribal sovereign immunity as something not of the same character of subject matter jurisdiction.” *Id.* at 15.⁷ Because the Court of Appeals treats *C&L Enterprises* and *Kiowa* as holding that “suits against a tribal entity may proceed where either Congress authorizes such suits or the entity waives sovereign immunity” (without sufficient basis as already argued), the Court fails to fully develop its analysis.

Finally, the Decision conflicts with the plain language of PL 280 when it concludes that subject matter jurisdiction is proper as to the lender’s claims to tribal personal property located on the reservation also on the basis of the waiver. *See Decision* at 18. Where property rights are concerned, PL 280 reserves from the states the ability to adjudicate the right to possession of “personal property” “held in trust” or “subject to a restriction against alienation” “belonging to . . . any Indian tribe.” *See* 25 U.S.C. § 1322(b).⁸ The holding of the Court of Appeals that NBC’s waiver

⁷ In *Wright v. Colville*, 159 Wn.2d 108, 111, 147 P.3d 1275 (2006), both the majority and dissent analyzed sovereign immunity as an aspect of *personal* jurisdiction, but the concurrence asserted it was an aspect of subject matter jurisdiction. 159 Wn.2d at 117-18.

⁸ This portion of PL 280 reads:

Nothing in this section shall authorize the alienation,

of sovereign immunity impacts this provision of express federal law, *see Decision* at 18, supports review.

Additionally, the Court of Appeals adopted the lender's position that it is irrelevant whether the action arose in Indian country. NBC argued and demonstrated in its original motion and its briefing to the Court of Appeals that the action did arise in Indian country. NBC also argued to the appellate court that the lender never disputed that issue before the trial court, did not meet its burden to show otherwise as plaintiff in order to establish jurisdiction and has waived that issue. The Court of Appeals did not reach these issues. Resolution of this case likely will require this Court to decide whether the lender preserved that issue or to decide that issue.

The Decision treads new water. This Court should enter those waters and provide analysis and instruction on these significant issues where conflicts with controlling law exist.

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.

25 U.S.C. § 1322(b) (emphasis added).

B. **The Decision raises issues of substantial public interest concerning subject matter jurisdiction of civil disputes involving Indian tribes that this Court should decide.**

This Court should accept review under RAP 13.4(b)(4). The case involves issues of substantial public interest concerning this Court's subject matter jurisprudence where Indian tribes and lands are concerned. The published Decision should not be the last word on the proper analysis to find subject matter jurisdiction or the scope of such jurisdiction when a tribe is sued in state court by an out-of-state entity for breach of contract.

As already noted, the Court of Appeals acknowledged that it reached its holding without express precedent on point and without an exact understanding of how sovereign immunity and subject matter jurisdiction relate. NBC has identified in Sections III and V.A numerous legal issues that merit this Court's attention. Even if the Court disagrees that conflicts are present, which it should not, the Court should conclude that the issues are of substantial public interest. Additional guidance is needed that warrants this Court's consideration.

The Court of Appeals, as already noted, failed to reach the issue whether the assumption of subject matter jurisprudence would interfere with tribal self-governance, which is indispensable if state courts are to assume jurisdiction over disputes arising in Indian country where PL 280 does not apply. *Powell, supra; Yakima Indian Nation, supra* (state law

reaches within the exterior boundaries of an Indian reservation only if it would not infringe “on the right of reservation Indians to make their own laws and be ruled by them.”), citing *Williams v. Lee*, 358 U.S. at 219-220. See *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 147 P.3d 1275 (2006) (Madsen concurring) (discussing governmental function of tribal corporation that should not be disturbed by state interference). See also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (U.S. 1987) (“If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.”) (underline added). The issue of interference with tribal self-government is significant to the public, including the tribes located in Washington.

This Court should accept review as a reflection of this Court’s continuing interest and attention to important points of law affecting Indian tribes in Washington.

VI. CONCLUSION

This Court should accept review and decide if the tribally-chartered corporation NBC is subject to the general jurisdiction of Washington courts for this civil suit by a foreign, non-Indian lender where the cause of action arose on the reservation. The published Decision conflicts with Washington and federal law. It fails to offer a reasoned

analysis explaining how a Tribe's waiver of sovereign immunity can impact the subject matter jurisdiction of Washington courts. Subject matter jurisdiction cannot be conferred by parties. No other case, federal or state, holds that waiver of sovereign immunity establishes subject matter jurisdiction in a state court of general jurisdiction over a civil dispute arising on a reservation that involves a tribe. Article 26, in fact, disclaims subject matter jurisdiction. No Washington statute accepts it. This Court should proscribe the proper analysis.

This Court should review the significant issues concerning jurisdiction because the ramifications are widespread and fundamental to the state's relationship with Indian tribes, and, therefore, important to the public.

Review is justified.

Respectfully submitted on this 13th day of February, 2013.

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APPENDIX

APPENDIX - A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OUTSOURCE SERVICES
MANAGEMENT, LLC,

Respondent,

v.

NOOKSACK BUSINESS
CORPORATION,

Appellant.

No. 67050-6-I

DIVISION ONE

PUBLISHED

FILED: January 14, 2013

Cox, J. — This is a breach of contract action by Outsource Services Management, LLC (OSM) against Nooksack Business Corporation (NBC), a tribal corporation of the Nooksack Indian Tribe.¹ The Whatcom County Superior Court denied NBC's omnibus motion to dismiss based on CR 12(b)(1), (2), and (6).

Because NBC expressly waived its sovereign immunity in this action on contract, we hold that the superior court has subject matter jurisdiction of this case. Moreover, the loan and other agreements between these parties are not "management contracts," which are void and unenforceable under the provisions of the Indian Gaming Regulatory Act. Accordingly, the superior court has personal jurisdiction over NBC. Finally, NBC has not met its burden to show that OSM has "fail[ed] to state a claim upon which relief can be granted." We affirm.

¹ We adopt the naming conventions of the parties.

No. 67050-6-1/2

The material facts are not in dispute. NBC is a tribally-chartered corporation of the Nooksack Tribe. NBC operates the Nooksack River Casino in Deming, Whatcom County, Washington. The casino is within the boundaries of the Nooksack Reservation.

In December 2006, NBC obtained a loan of \$15,315,856 from BankFirst, a bank located in South Dakota. The loan agreement and other documents evidencing the transaction are dated December 21, 2006. The loan proceeds were used to retire a \$8,129,694 construction loan, pay for the \$1,895,019 purchase of refurbished gaming equipment for the casino, and finance improvements to the casino building.

The loan is a limited recourse obligation of NBC, enforceable against certain security that NBC pledged to the bank. The security includes all of the gaming equipment in the casino and certain proceeds from gaming at the casino. The loan agreement contained an explicit waiver of sovereign immunity.

In January 2009, NBC failed to make a monthly payment then due under the terms of the loan agreement. BankFirst declared that failure an event of default. But it did not immediately enforce its rights under the loan and other agreements.

Instead, NBC, BankFirst, and the Nooksack Tribe executed the first of three, successive forbearance agreements, the first of which is dated January 30, 2009. After execution of the first forbearance agreement by the parties, BankFirst was placed in receivership by the Federal Depository Insurance

No. 67050-6-1/3

Corporation. Thereafter, OSM succeeded to the interest of BankFirst. NBC, OSM, and the Nooksack Tribe executed the next two forbearance agreements.

Under the forbearance agreements, NBC acknowledged that it was in default under the terms of the loan agreement. It again expressly waived its sovereign immunity from suit. BankFirst and, later, OSM agreed to forbear exercising the lender's rights under the loan agreement, subject to certain terms and conditions. NBC failed to make the payments required under each of the forbearance agreements.

In February 2011, OSM commenced this action against NBC for breach of the loan agreement. NBC moved for dismissal of all claims under Civil Rule (CR) 12(b)(1), (b)(2), and (b)(6). NBC argued that the superior court lacked subject matter and personal jurisdiction to hear the claim. NBC also claimed that OSM failed to state a claim upon which relief could be granted.

The trial court denied NBC's motion. In its amended written order on the motion, the court also certified its order for interlocutory review under CR 54(b) and stayed this action, pending resolution of any appeal.

NBC's timely amended notice of appeal followed.²

STANDARD OF REVIEW

A CR 12(b)(1) motion to dismiss challenges the court's subject matter jurisdiction over the case. When a Washington Court Rule is substantially similar

² RAP 2.2(d).

to a present Federal Rule of Civil Procedure, we may look to the interpretation of these federal rules for guidance.³ We do so here.

A challenge to FRCP 12(b)(1), may be either facial or factual.⁴ In the former case, the sufficiency of the pleadings is at issue.⁵ In the latter, the trial court must weigh evidence to resolve disputed jurisdictional facts.⁶ Once challenged, the party asserting subject matter jurisdiction bears the burden of proof on its existence.⁷

Where a court dismisses a 12(b)(1) motion "based on a factual challenge . . . the appellate court will accept the factual determination that underpins the decision unless it is clearly erroneous."⁸ But, "[w]hen the court [denies] a facial challenge, based on the complaint alone or the complaint supplemented by undisputed facts gleaned from the record, the existence of subject matter jurisdiction is a question of law that the appellate court reviews de novo."⁹

A CR 12(b)(2) motion to dismiss challenges a court's personal jurisdiction. The trial court, in making its determination as to the existence of personal jurisdiction, has discretion to rely on written submissions, or it may hold a full

³ Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992).

⁴ JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, § 12.39[4], at 12-45 (3d ed. 2006).

⁵ Id.

⁶ Id.

⁷ Id. at 12-48.

⁸ Id. at § 12.30[5], at 12-49.

⁹ Id. at 12-48.1 to 12-49.

evidentiary hearing.¹⁰ Once challenged, the party asserting personal jurisdiction bears the burden of proof to establish its existence.¹¹

If the trial court has ruled on personal jurisdiction based on the pleadings and the undisputed facts before it, its determination is a question of law that this court reviews de novo.¹²

A CR 12(b)(6) motion to dismiss, claims the opposing party has failed to state a claim upon which relief can be granted. We treat such a motion as a motion for summary judgment “when matters outside the pleading are presented to and not excluded by the court.”¹³ When reviewing an order of summary judgment, we engage in the same inquiry as the trial court.¹⁴ Thus, we consider the facts in the light most favorable to the nonmoving party.¹⁵ Summary judgment is only appropriate if there is no genuine issue of material fact.¹⁶

Here, the trial court relied on the pleadings, loan agreement, forbearance agreements, and other loan documents when it denied NBC’s CR 12(b)(1), (b)(2) and (b)(6) motions. Thus, de novo review of both the 12(b)(1) and (b)(2) decisions is appropriate. Because the court relied on documents outside of the

¹⁰ Id. at § 12.31[5], at 12-55.

¹¹ Id. at § 12.31, at 12-54.

¹² Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996).

¹³ Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985).

¹⁴ Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002) (citing Wilson v. Steinbach, 96 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

¹⁵ Indoor Billboard/ Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

¹⁶ Id.

No. 67050-6-1/6

pleadings when it denied the 12(b)(6) motion, we review the denial of this motion as a denial of summary judgment.

SUBJECT MATTER JURISDICTION

Constitutional Authority

NBC argues that the trial court erroneously concluded that it has subject matter jurisdiction of this breach of contract case. We disagree and hold that the superior court has subject matter jurisdiction of this action.

Whether Whatcom County Superior Court has subject matter jurisdiction of this action is generally a question whether the superior court has authority to decide this type of case.¹⁷ The supreme court recently considered the question of subject matter jurisdiction in ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Commission.¹⁸

Jurisdiction, as the ZDI court explained, "describe[s] the fundamental power of courts to act."¹⁹ Article IV of the Washington Constitution vests Washington's superior courts with "original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."²⁰ This jurisdiction is a matter of law.²¹

¹⁷ Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 315, 76 P.3d 1183 (2003) (quoting 77 AM. JUR. 2D Venue § 1, at 608 (1997)).

¹⁸ 173 Wn.2d 608, 268 P.3d 929 (2012).

¹⁹ Id. at 616.

²⁰ Id. (alteration in original) (quoting Shoop v. Kittitas County, 149 Wn.2d 29, 37, 65 P.3d 1194 (2003)).

²¹ Id. at 617.

As ZDI made clear, however, "jurisdiction" is "often used to mean something other than the fundamental power of courts to act."²² Thus, "Sometimes 'jurisdiction' means simply the place or location where a judicial proceeding shall occur. Where jurisdiction describes the forum or location of the hearing, it is generally understood to mean venue."²³

In contrast to venue or other meanings of "jurisdiction," subject matter jurisdiction "is a particular type of jurisdiction, and it critically turns on 'the type of controversy.' 'If the type of controversy is within the [court's] subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction."²⁴

Here, NBC does not dispute that the superior court generally has subject matter jurisdiction to decide a breach of contract case. The state constitution generally provides such authority to the superior courts of this state.²⁵

Rather, NBC argues that the court lacks subject matter jurisdiction here because NBC is a tribal corporation of the Nooksack Indian Tribe and the breach of contract cause of action arose on the Nooksack Reservation.²⁶ We now turn to that argument.

²² Id.

²³ Id.

²⁴ Id. at 617-18 (quoting Dougherty, 150 Wn.2d at 315-16); Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994)).

²⁵ WASH. CONST. art. IV, § 4.

²⁶ Appellant's Opening Brief at 15, et seq.

Tribal Sovereign Immunity

NBC's subject matter jurisdiction argument is premised on the assertion that, even if a tribal entity waives sovereign immunity, such a waiver does not provide jurisdiction to a state court. We disagree.

We first note that both parties concede that the sovereign immunity of the Nooksack Indian Tribe extends to NBC, its tribally-chartered corporation.²⁷ This mutual concession is consistent with federal law.

Under federal law, Indian tribes have sovereign immunity.²⁸ This immunity also extends to "tribal agencies and instrumentalities as extensions of tribal government."²⁹ Such sovereign immunity is meant to protect the tribes as "distinct, independent political communities" and allows them to retain their "original natural rights' in matters of local self-government."³⁰ Thus, a state may not assert authority in Indian country if that would infringe "on the right of reservation Indians to make their own laws and be ruled by them."³¹ This immunity consequently touches on the jurisdiction of a court to hear a case,

²⁷ Report of Proceedings (Mar. 25, 2011) at 9-10.

²⁸ Auto. United Trades Org. v. State, 175 Wn.2d 214, 229-30, 285 P.3d 52 (2012); Wright v. Colville Tribal Enter. Corp. 159 Wn.2d 108, 112, 147 P.3d 1275 (2006) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)).

²⁹ Id. at 112.

³⁰ Santa Clara Pueblo, 436 U.S. at 55 (quoting Worcester v. State of Ga., 31 U.S. 515, 559, 6 Pet. 515, 8 L. Ed. 483 (1832)).

³¹ Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

though whether it actually affects a court's subject matter or personal jurisdiction is not clear.³² Nor is this distinction determinative of the outcome in this case.

Analysis to determine whether state courts have jurisdiction differs if a party is a tribal entity rather than an individual Indian. Thus, in Santa Clara Pueblo v. Martinez,³³ the United States Supreme Court examined both a tribe's amenability to suit and the amenability of an individual tribal member.³⁴ There, the question whether an individual tribal officer could be sued in federal court depended on whether subjecting the dispute to a non-tribal forum constitutes an infringement of the tribe's sovereignty.³⁵ But, when considering whether a tribe was subject to suit outside the reservation, the question revolved around whether it had waived its sovereign immunity.³⁶

As the Santa Clara Pueblo court concluded, in the case of a tribal entity, whether a court has jurisdiction where a party is entitled to tribal sovereign immunity is a question of federal law that depends on either congressional

³² See Lewis v. Norton, 424 F.3d 959, 961 (9th Cir. 2005) (reviewing the district court's dismissal for lack of subject matter jurisdiction where tribe asserted sovereign immunity); E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297, 1302 (10th Cir. 2001) ("Tribal sovereign immunity is a matter of subject matter jurisdiction."); Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla., 692 F.3d 1200, 2012 WL 3740402, at * 3 (11th Cir. 2012) (addressing the question of whether the district court properly dismissed the case for lack of subject matter jurisdiction due to tribal sovereign immunity). But see In re Prairie Island Dakota Sioux, 21 F.3d 302, 304 ("Sovereign immunity, however, is not the same character as subject matter jurisdiction."); J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd., 842 F. Supp. 2d 1163, 1170 (concluding that "the question of whether the tribes' sovereign immunity bars J.L. Ward from bringing suit . . . is a jurisdictional issue separate from subject matter jurisdiction").

³³ 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

³⁴ Id. at 58-59.

³⁵ Id.

³⁶ Id. at 58.

authorization or an express waiver of the immunity by the party.³⁷ In Wright v. Colville Tribal Enterprise Corp., our state supreme court recognized this principle, noting that sovereign immunity “protects a tribal corporation owned by a tribe and created under its own laws, absent *express waiver of immunity by the tribe* or Congressional abrogation.”³⁸

This recognition is consistent with Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,³⁹ in which the United States Supreme Court held that the Kiowa Tribe could not be sued in state court as it had *not* waived its sovereign immunity.⁴⁰ Specifically, the Court stated that “[a]s 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.*”⁴¹

More recently, the United States Supreme Court adhered to the principle articulated in Kiowa in its decision in C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma.⁴² There, C & L, a non-Indian, sought to enforce its rights under its contract with the tribe.⁴³ It first pursued arbitration, as the contract provided.⁴⁴ The arbitrator made an award in favor of C & L.⁴⁵ The

³⁷ Auto. United Trades Org., 175 Wn.2d at 229-30; Wright, 159 Wn.2d at 111-12 (emphasis added) (citing Kiowa Tribe, 523 U.S. at 754).

³⁸ 159 Wn.2d at 111-12 (emphasis added) (citing Kiowa Tribe, 523 U.S. at 754).

³⁹ 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998).

⁴⁰ Id. at 759-60.

⁴¹ Id. at 754 (emphasis added); see also Bradley v. Crow Tribe of Indians, 315 Mont. 75, 67 P.3d 306, 310 (Mont. 2003) (holding that the state court had subject matter jurisdiction where a tribe had waived its sovereign immunity).

⁴² 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).

⁴³ Id. at 415-16.

⁴⁴ Id. at 416.

⁴⁵ Id.

No. 67050-6-I/11

company then sought to enforce the award in state court.⁴⁶ Whether the state court had authority to enforce the award was at issue.⁴⁷ That, in turn, required determining whether the tribe had waived its sovereign immunity.⁴⁸

The United States Supreme Court considered the contract between the Potawatomi and C & L. The arbitration clause provided for enforcement of the award according to American Arbitration Association Rules.⁴⁹ These rules provided for entry of the award in "any federal or state court having jurisdiction thereof."⁵⁰ The Court noted that "[t]o relinquish its immunity, a tribe's waiver must be 'clear.'"⁵¹ It also stated that once an abrogation of tribal immunity is found to have been expressed unequivocally, the suit in state court can proceed.⁵² The Court then held that the arbitration provision there was sufficiently clear to waive the tribe's sovereign immunity and make it amenable to suit in state court.⁵³

Here, as the parties concede, NBC, as a tribally-chartered business, had sovereign immunity from suit. The question as demonstrated by C & L and Kiowa is whether it expressly waived that immunity. Paragraph 8.26 of the loan agreement states that it did:

the Borrower hereby expressly grants to the Lender and all persons entitled to benefit from any Loan Document an *irrevocable limited*

⁴⁶ Id.

⁴⁷ Id. at 414.

⁴⁸ Id. at 418.

⁴⁹ Id. at 414-15.

⁵⁰ Id. at 415 (internal quotation marks omitted).

⁵¹ Id. at 418 (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)).

⁵² Id.

⁵³ Id. at 422-23.

waiver of its sovereign immunity from suit or legal process with respect to any Claim. In furtherance of this waiver, the Borrower hereby consents with respect to any Claim: . . . (B) to be sued in (i) the United States District Court for Western District of Washington . . . (ii) any court of general jurisdiction in the State (including all courts of the State to which decisions of such courts may be appealed), and (iii) only if none of the foregoing courts shall have jurisdiction, or only to permit the compelling of arbitration in accordance with Section 8.27, or the enforcement of any judgment, decree or award of any foregoing court or any arbitration permitted by Section 8.27, all tribal courts and dispute resolution processes of the Tribe. The Borrower hereby expressly and irrevocably waives any application of the exhaustion of tribal remedies or abstention doctrine and any other law, rule, regulation or interpretation that might otherwise require, as a matter of law or comity, that resolution of a Claim be heard first in a tribal court or any other dispute resolution process of the Tribe.^[54]

There is nothing ambiguous about NBC's express limited waiver of sovereign immunity for purposes of this loan transaction under the above terms of the loan agreement. In fact, this express waiver is even clearer than that approved by the United States Supreme Court in C & L. There, the Court concluded that the agreement to arbitrate necessarily meant a consent to the jurisdiction of state courts, where an arbitration award could be enforced.⁵⁵ Here, there is not only an express limited waiver of sovereign immunity, but a concomitant agreement that the venue of any suit on a "Claim" would be in state, federal, or tribal court.

We note that similar waivers of sovereign immunity are contained in all three forbearance agreements. Thus, NBC expressly waived sovereign immunity throughout the course of this loan.

⁵⁴ Clerk's Papers at 446 (emphasis added).

⁵⁵ C & L, 532 U.S at 422-23.

In sum, NBC, by virtue of the provisions in the loan and other agreements that it signed, expressly waived its sovereign immunity to suit on any "claim" in state court. As the trial court properly concluded in its denial of NBC's omnibus motion to dismiss, "Washington state courts have subject matter jurisdiction over breach-of-contract claims against tribes if the tribe consents to the civil jurisdiction of the state of Washington as permitted by federal law."⁵⁶ Because NBC waived its sovereign immunity—both in the loan agreement and the following three forbearance agreements, the superior court has subject matter jurisdiction to decide this breach of contract case.⁵⁷

NBC's jurisdiction argument is premised on the assertion that the material facts here are that this is a civil suit by a non-Indian against an Indian, arising in Indian country. Consequently, it argues, the analysis outlined by the United States Supreme Court in Williams v. Lee applies here.⁵⁸ This assertion is incorrect.

Williams is both factually and legally distinguishable from this case. There, a non-Indian operated a general store on the Navajo Indian Reservation.⁵⁹ He sued an Indian couple in Arizona state court.⁶⁰ The question before the United States Supreme Court was whether the state court had jurisdiction over

⁵⁶ Clerk's Papers at 8.

⁵⁷ See id. at 584 ("Subject to the limitation on recourse in the other Loan Documents, each of the Borrower and the Tribe hereby expressly grants to the Lender and all Persons entitled to benefit from this Agreement an irrevocable limited waiver of its sovereign immunity from suit or legal process with respect to any Claim.").

⁵⁸ 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

⁵⁹ Id. at 217.

⁶⁰ Id. at 218.

this suit, between *individual* Indians and a non-Indian.⁶¹ The court concluded that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves."⁶²

Here, we are faced with a case concerning a tribal entity, not an individual Indian. Consequently, the concerns regarding tribal sovereignty as expressed in Williams do not apply. Nor does it matter where the cause of action arose. The tribe *explicitly waived its sovereignty*. The applicable line of United States Supreme Court cases addresses whether a tribal entity may waive its sovereign immunity and submit to state court jurisdiction. These cases have held that tribal entities may do so, and these holdings have neither abrogated nor touched on the Court's holding in Williams.

NBC next attempts to distinguish C & L and Kiowa by arguing that these cases decided whether the tribe waived its sovereign immunity, not whether the state court had subject matter jurisdiction.⁶³ This argument is unconvincing.

As we explained earlier in this opinion, some courts treat tribal sovereign immunity as an aspect of subject matter jurisdiction. Thus, the United States Supreme Court's analysis of waiver of sovereign immunity of the tribe in C & L may be viewed as an aspect of subject matter jurisdiction, although these words appear nowhere in the opinion.

⁶¹ Id.

⁶² Id. at 223.

⁶³ Appellant's Opening Brief at 26.

To the extent other courts treat tribal sovereign immunity as something not of the same character as subject matter jurisdiction, NBC fails to explain why that distinction makes any difference to the outcome in this case. We fail to see any difference in the outcome based on that potential distinction.

NBC also attempts to distinguish C & L on the basis that the activities in that case took place off the Indian reservation. That factual distinction is not material. The dispositive issue in that case was the tribe's waiver of sovereign immunity. The fact that activities took place off the reservation did not enter into the United States Supreme Court's analysis. For the same reason, where the activities in this loan transaction occurred is immaterial to our analysis.

In sum, there is no material distinction between the Kiowa and C & L line of cases and the reasoning that we apply to this case. Those cases hold that suits against a tribal entity may proceed where either Congress authorizes such suits or the entity waives sovereign immunity.⁶⁴ As we explained earlier, NBC expressly waived that immunity in the loan agreement and other documents. Thus, our state courts have jurisdiction over this suit.

NBC also relies on Cohen v. Little Six, Inc.,⁶⁵ a Minnesota court of appeals decision. It argues that waiver of sovereign immunity and subject matter jurisdiction should not be conflated.⁶⁶ But, as we previously stated in this opinion, this case does not require us to determine whether waiver of tribal sovereign immunity must be exclusively characterized as an element of subject

⁶⁴ See C & L, 532 U.S. at 418-19; see also Kiowa, 523 U.S. at 754-55.

⁶⁵ 543 N.W.2d 376 (Minn. App. 1996).

⁶⁶ Appellant's Reply Brief at 2.

No. 67050-6-1/16

matter jurisdiction. It makes no difference here. If it is properly characterized as an element of subject matter jurisdiction, then NBC has expressly waived the immunity. Thus, the superior court has subject matter jurisdiction to decide the case based both on its constitutional authority to decide breach of contract cases and the express waiver of tribal immunity. If, on the other hand, sovereign immunity is properly characterized as something else, NBC has failed to persuade us that there is any difference in the outcome to this case because of that different characterization.

In any event, as we previously observed, C & L and Cohen echo the principle that a tribe may waive its sovereign immunity and consent to suit in state court if it does so expressly and unequivocally.⁶⁷ That is the principle that we apply in this case.

NBC also argues that "Public Law 280" ("P.L. 280") demonstrates that this state's superior court lacked jurisdiction over this suit.⁶⁸ In response, OSM argues that P.L. 280 does not control whether subject matter jurisdiction exists in this action. We agree with OSM.

"Through what is commonly known as . . . P.L. 280 . . . Congress provided to certain states broad jurisdiction over criminal offenses committed in Indian country, and limited jurisdiction over civil causes of action arising in Indian country."⁶⁹ Washington is one of these states.⁷⁰ Though NBC argues that P.L.

⁶⁷ Cohen, 543 N.W. 2d at 379 (citations omitted).

⁶⁸ 25 U.S.C.A. § 1322

⁶⁹ K2 Am. Corp. v. Roland Oil & Gas, LLC, 653 F.3d 1024, 1027-28 (9th Cir. 2011), cert. denied, 132 S. Ct. 1098 (2012).

⁷⁰ RCW 37.12.010(1)-(8).

280 applies to tribes and individual Indians, that argument is belied by the statute.

“Our primary duty in interpreting any statute is to discern and implement the intent of the legislature.”⁷¹ When a legislature uses different words in the same statute, we presume it intends those words to have different meanings.⁷²

Here, it is clear from the language of Public Law 280, codified at 25 U.S.C. § 1322, that there is a distinction between “Indians” and “Indian tribes.” The statute reads:

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which *Indians* are parties

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.⁷³

Under the statute, Congress limited its consent to States over civil causes of action to “Indians.” By its own terms, the statute also mentions “Indian tribes.” We must presume that these terms mean different things. Thus, Congress did not intend for P.L. 280 to apply to tribes or tribal entities, only individual Indians.

This interpretation has been confirmed by the supreme court in Bryan v. Itasca County.⁷⁴ There, the United States Supreme Court concluded that “there

⁷¹ State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing Nat’l Elec. Contractors Ass’n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)).

⁷² Koenig v. City of Des Moines, 158 Wn.2d 173, 182, 142 P.3d 162 (2006).

⁷³ (Emphasis added.)

⁷⁴ 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976).

No. 67050-6-1/18

is notably absent any conferral of state jurisdiction over the *tribes themselves* under P.L. 280.⁷⁵ State courts may obtain jurisdiction over tribes not through P.L. 280, but through the tribe's own waiver of sovereign immunity. That is what occurred here.

NBC, in its reply, fails to persuasively distinguish the language of P.L. 280 or the Court's interpretation of it in Bryan. Instead, NBC argues that P.L. 280 is relevant here on the basis of another subsection of the law: property of the tribal corporation. It appears to claim that sovereign immunity also extends to the property of the immune sovereign, and that the waiver which appeared in the loan documents did not waive this protection.

The waiver in question applies to any "Claim," which is further defined in the loan agreements as "*any* dispute, claim or controversy between the parties hereto arising out of or relating in any way to this Agreement or any other Loan Document or any actions contemplated to be taken in accordance herewith or therewith."⁷⁶ This definition is sufficiently broad to include a waiver of the tribal corporation's sovereignty as well as the sovereign protection of its property. Thus, NBC's argument is unpersuasive.

Finally, NBC argues that the loan and other agreements do not express its consent—express or implied—to subject matter jurisdiction.⁷⁷ Based on the plain

⁷⁵ Id. at 388-89; see also, Cohen, 543 N.W.2d at 381 ("While Public Law 280 applies to actions involving 'Indians,' this grant of jurisdiction does not apply to Indian *tribes*.").

⁷⁶ Clerk's Papers at 396 (emphasis added).

⁷⁷ Appellant's Opening Brief at 23.

language of paragraph 8.26 of the loan agreement that we quoted above, this argument is untenable.

NBC specifically argues that the language we quoted above recognizes that the listed venues may not have subject matter jurisdiction. From this, NBC correctly argues that mere consent to be sued in a particular court does not alone confer subject matter jurisdiction over a suit.⁷⁸ NBC then concludes that a forum selection clause cannot, by itself, confer subject matter jurisdiction on a court.⁷⁹

First, whether the language on which NBC relies suggests the parties recognized that the listed venues may not have subject matter jurisdiction is irrelevant. Whether a court has jurisdiction is not decided on the basis of what the parties may have thought. Either a court has subject matter jurisdiction or it does not, regardless of what the parties to a case may think.

Second, consent to be sued in a particular forum does not confer jurisdiction, as we have just acknowledged. Likewise, a forum selection clause, by itself, does not create subject matter jurisdiction. But neither of these two considerations controls here. That is because NBC expressly waived its sovereign immunity for purposes of this loan transaction.

For these reasons, we reject NBC's argument that the language of paragraph 8.26 is anything other than what the plain language states: an express limited waiver of sovereign immunity by NBC and an agreement as to the possible venues of any action arising from the loan and other agreements.

⁷⁸ Wesley v. Schneckloth, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959).

⁷⁹ Barnett v. Hicks, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992).

In its opening brief, NBC suggests, an alternative argument for dismissal, under CR 12(b)(3): dismissal for improper venue. We need not address this claim because the trial court did not deal with it, nor, on appeal, does either party fully elaborate on it.

PERSONAL JURISDICTION

NBC next argues that the trial court lacked personal jurisdiction over it because the loan and other agreements are void and unenforceable under the Indian Gaming Regulatory Act (IGRA). We disagree.

IGRA

In passing IGRA, Congress "sought to develop" a regulatory framework "that would protect tribes from unscrupulous contractors and criminals but would not unnecessarily interfere with the tribes' sovereignty or economic self-sufficiency."⁸⁰ Thus, Congress stated in IGRA's declaration of policy that it was meant "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."⁸¹ IGRA was also intended "to ensure that the Indian tribe is the primary beneficiary of the gaming operation."⁸²

IGRA established a National Indian Gaming Commission within the Department of the Interior.⁸³ Under IGRA, "[a]n Indian tribe may enter into a management contract for the operation of a class III gaming activity if such

⁸⁰ Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 687 (7th Cir. 2011).

⁸¹ 25 U.S.C. § 2702(1) (1988).

⁸² Id. § 2702(2).

⁸³ Id. § 2704(a).

contract has been submitted to, and approved by, the Chairman.⁸⁴ Class III facilities provide blackjack, roulette, slot machines and other games in which a gambler plays against "the house."⁸⁵

Management Contracts

We first note that the loan in question here included language that expressly stated that NBC would manage the casino and that NBC would have managerial control.⁸⁶ Further, before agreeing to the second forbearance agreement, tribal counsel for NBC provided an opinion letter confirming that the agreement was "a valid agreement of the Borrower and the Tribe" and consequently did not constitute a management contract under IGRA.⁸⁷ Such opinion letters are common in commercial loan transactions like this one.⁸⁸

The existence of such letters or disclaimers in a particular loan transaction is not, by itself, dispositive of legal questions arising from such transactions. But it is noteworthy that NBC fails to persuasively explain why it now argues that the loan and other agreements constitute management contracts under IGRA when

⁸⁴ Id. § 2710(d)(9).

⁸⁵ Id. §§ 2703(7)(B); 2703(8), Wells Fargo Bank, 658 F.3d at 688.

⁸⁶ Clerk's Papers at 448.

⁸⁷ Id. at 630.

⁸⁸ See Haw. 2000 Report Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions, 22 U. HAW. L. REV. 327 (2000); Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992) (corporation alleged legal malpractice and misrepresentation in an attorney's drafting of an opinion letter to secure a loan for construction on tribal land); Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. Withumsmith Brown P.C., 692 F.3d 283 (3d Cir. 2012) ("In connection with the transaction, Bayonne provided Nuveen with an . . . opinion letter."); Fortress Sys., LLC v. Bank of West, 559 F.3d 848, 850 (8th Cir. 2009) ("The terms of the commitment letter were subject to the approval and execution of formal loan documents, [and] the production of satisfactory opinion letters by legal counsel.").

its tribal counsel expressly represented to the lender, on behalf of NBC, that these agreements were not management contracts. In any event, we proceed to analyze this argument, making our own independent decision whether it has any merit.

As the Seventh Circuit noted in Wells Fargo v. Lake of the Torches Economic Development Corp.,⁸⁹ whether a contract between a tribe and another constitutes a management contract "is, fundamentally, a question of statutory interpretation" and must begin with the language of IGRA.⁹⁰

IGRA defines a management contract as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation."⁹¹ Additionally, it defines a "primary management official" as a person who has authority "to set up working policy for the gaming operation."⁹²

The pronouncements of the National Indian Gaming Commission (NIGC) through its NIGC Bulletin also provide guidance for what constitutes management.⁹³ Management activities include "planning, organizing, directing, coordinating, and controlling . . . all or part of a gaming operation."⁹⁴

⁸⁹ 658 F.3d 684 (7th Cir. 2011).

⁹⁰ Id. at 693.

⁹¹ 25 C.F.R. § 502.15.

⁹² Id. § 502.19(b)(2).

⁹³ Wells Fargo Bank, N.A. v. Sokaogon Chippewa Cmty., 787 F. Supp. 2d 867, 878 (E.D. Wis. 2011).

⁹⁴ Id. (quoting NIGC Bulletin 94-5, available at www.nigc.gov/Reading_Room/Bulletins/Bulletin_No._1994-5.aspx).

As the Lake of the Torches court concluded, there is no clear indication in the language of IGRA itself whether Congress intended to include contracts with third parties "whose primary, or only, role is to infuse capital into a gambling operation."⁹⁵ But, it noted that the NIGC's pronouncements indicated that such agreements were constrained by IGRA's rules, and it held that such an agreement could constitute a management agreement.⁹⁶

Further buttressing this analysis is the legislative purpose of IGRA. Congress's stated goal in enacting IGRA was "to provide a comprehensive regulatory framework for gaming operations by Indian tribes that would promote tribal economic self-sufficiency and strong tribal governments."⁹⁷ A primary concern underlying the legislation was that "Indian tribes be the primary beneficiaries of fair and honest gaming operations."⁹⁸

There is a general concern that the participation of *any* party in the actual management of a tribal gaming facility—whether through a traditional contract to oversee the daily operations of the facility or through a financing scheme that permits the provider of funding intermittently to interject itself in the management decisions of the facility to ensure the security of its investment—should be subject to the Chairman's scrutiny and approval as a management contract.^[99]

Under IGRA, where an Indian tribe enters "into a management contract for the operation and management of" of its class II or III gaming activity, the tribe must submit the agreement to the Chairman of the Indian Gaming Regulatory

⁹⁵ Lake of the Torches, 658 F.3d at 694, 697.

⁹⁶ Id.

⁹⁷ Id. at 694.

⁹⁸ Id.

⁹⁹ Id. at 697 (emphasis in original).

No. 67050-6-1/24

Commission for his or her approval.¹⁰⁰ A management contract that has not been approved by the Chairman is void.¹⁰¹ But there is no authority to suggest that an agreement that is not approved by the Chairman is void, provided that it is not a management contract. Thus, lack of Commission approval is only material if an agreement constitutes a management contract.

Courts may look to all documents that constitute the agreement between a tribe and another party when assessing whether it constitutes a management contract.¹⁰²

In Wells Fargo Bank, N.A. v. Sokaogon Chippewa Community,¹⁰³ a federal district court held that the trust indenture between Wells Fargo and the tribe did not constitute a management agreement under IGRA.¹⁰⁴ There, the Sokaogon Chippewa Community issued \$19.165 million in bonds pursuant to a trust indenture between the Sokaogon and Wells Fargo.¹⁰⁵ The agreement authorized Wells Fargo, as the Trustee for the bondholders, to act on their behalf.¹⁰⁶ Each document representing an agreement between Wells Fargo and the Sokaogon contained a waiver of sovereign immunity.¹⁰⁷

¹⁰⁰ 25 U.S.C. §§ 2711(a)(1), 2710(d)(9).

¹⁰¹ 25 C.F.R. § 533.7.

¹⁰² U.S. ex rel. Bernard v. Casino Magic Corp., 293 F.3d 419, 423 (8th Cir. 2002).

¹⁰³ 787 F. Supp. 2d 867 (E.D. Wis. 2011).

¹⁰⁴ Id. at 870.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ Id. at 870-71.

As part of that loan agreement, the Sokaogon were required to pay the Trustee a monthly portion of the principal and interest on the Bonds.¹⁰⁸ The Sokaogon also had to spend "at least 1 million every two years for capital improvements to the Casino Facility [and] . . . deposit \$41,667 into a Capital Expenditure Fund each month."¹⁰⁹ To secure the bonds, Wells Fargo had a first priority lien on "all right, title and interest in and to the Gross Revenue of the Casino Facility remaining after payment of Operating Expenses of the Casino Facility."¹¹⁰

After complying with the terms of the agreement for two years, the Sokaogon failed to make the required payments.¹¹¹ After Wells Fargo sued the Sokaogon, the tribe moved for dismissal based on the alleged lack of subject matter and personal jurisdiction and on the alleged failure of Wells Fargo to state a claim for relief.¹¹² The tribe argued that the indenture/loan agreement constituted an unauthorized management agreement under IGRA and was consequently void.¹¹³

The federal district court disagreed. The court emphasized that the agreement did not confer any management responsibilities on the Trustee with respect to the Tribe's gaming operations.¹¹⁴ The court highlighted seven factors

¹⁰⁸ Id. at 871.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id. at 871-72.

¹¹² Id. at 870.

¹¹³ Id. at 872.

¹¹⁴ Id. at 879.

No. 67050-6-1/26

the National Indian Gaming Commission had noted would be indicative of a management contract:

- * Maintenance of adequate accounting procedures and preparation of verifiable financial reports on a monthly basis;

- * Access to the gaming operation by appropriate tribal officials;

- * Payment of a minimum guaranteed amount to the tribe;

- * Development and construction costs incurred or financed by a party other than the tribe;

- * Term of contract that establishes an ongoing relationship;

- * Compensation based on percentage fee (performance);

and

- * Provision for assignment or subcontracting of responsibilities.⁽¹¹⁵⁾

Then, the court concluded that the agreement did not confer any of the listed responsibilities on Wells Fargo with respect to the Sokaogon's gaming operation.¹¹⁶

The district court did note that the agreement required the Tribe to take certain actions—(1) appoint a receiver in case of default; (2) provide a certain level of income to service the debt; (3) hire an independent consultant if it fell behind in its payments; (4) make monthly deposits into a "Capital Expenditure" account; and (5) spend at least a certain amount on casino capital expenditures.¹¹⁷ But, the court emphasized that despite these requirements, the

¹¹⁵ Id. at 879.

¹¹⁶ Id.

¹¹⁷ Id. at 877-79.

No. 67050-6-1/27

tribe was free to make the principal business decisions for the casino.¹¹⁸ Wells Fargo never usurped the tribe's control.¹¹⁹

Here, NBC's casino includes Class III gaming.¹²⁰ Five documents constitute the relevant agreements between NBC and the lender for purposes of the issues before us: the loan agreement, the springing depository agreement, and the three forbearance agreements. Notwithstanding the disclaimer contained in the loan agreement and the letter from NBC's tribal counsel opining that the documents do not constitute management contracts, the language of the agreements supports this conclusion as well.¹²¹

Here, as in Sokaogon, OSM "was not responsible for the maintenance of accounting procedures or preparation of financial reports."¹²² Nor did the loan documents provide for a minimum payment to NBC, or require it to incur or finance development or construction costs.¹²³ And, unlike in Sokaogon, there was no "[p]rovision for assignment or subcontracting of responsibilities."¹²⁴

In this case, as in Sokaogon, the agreement granted OSM a security interest in certain proceeds from the casino. But, notably, this security interest in "Pledged Revenues" excluded the casino's "Daily Cash-on-Hand Requirements," as they were defined in the agreement. Likewise, "Pledged Revenues" are expressly subject to the "prior application of [such revenues] to pay Operating

¹¹⁸ Id. at 881-82.

¹¹⁹ Id.

¹²⁰ Clerk's Papers at 7-8.

¹²¹ Id. at 448, 614-15.

¹²² Sokaogon, 787 F. Supp. 2d at 879.

¹²³ Id.

¹²⁴ Id.

No. 67050-6-1/28

Expenses."¹²⁵ As the NIGC's opinion letter stated in Sokaogon, "[e]xcluding operating expenses from gaming revenues in which a party is granted a security interest ensures that the secured party cannot manage the gaming facility should the tribe default."¹²⁶

It is undisputed that under the terms of the agreements, NBC, in its sole discretion, determined its Operating Expenses. The requirement that it certify the amount of such expenses does nothing to change that. Thus, NBC had the sole managerial ability to manage cash for its day-to-day operations and to determine and pay its operating expenses without interference by OSM.

In the event of a default, NBC was required to first deposit all gross revenues in the "Pledged Assets" account. But the amount needed by NBC for operating expenses was immediately transferred to an "Operating Account" by the depository. Thus, even in the event of a default, the loan agreement provided that NBC would be able to allocate and *manage* its own operating expenses. And such expenses were payable prior to allocation to OSM's pledged revenues.

NBC points to several provisions in the loan documents to support its argument that they are management contracts.¹²⁷ These provisions do not support NBC's argument.

NBC claims that the definition of "Operating Expenses" includes only current expenses and excludes aged accounts. According to it, this provision

¹²⁵ Clerk's Papers at 457, 545.

¹²⁶ Sokaogon, 787 F. Supp. 2d at 879 (alteration in original).

¹²⁷ Appellant's Opening Brief at 36-39.

No. 67050-6-1/29

functionally operated as management control by the lender over how and when operating expenses are paid. This argument is not persuasive.

“Operating Expenses” are defined in the springing depository agreement and loan agreement as:

the **current expenses** of operation, maintenance and repair of the Facilities, as determined consistently with [generally accepted accounting principles], excluding capital expenditures and excluding those items expressly excluded below, but including Permitted Tribal Gaming Commission Expenses. **Operating Expenses shall include, without limitation**, prizes, wages, salaries and bonuses to personnel, **the cost of materials and supplies used for current operation and maintenance**, security costs, utility expenses, trash removal, cost of goods sold (other than with respect to tribal crafts sold in the gift shop), advertising, insurance premiums, rental payments for real or personal property (other than capital lease payments).^[128]

There is nothing in the plain language of this definition to suggest that “current expenses” excludes past due accounts. There is no definition of the term in the documents. And the breadth of specific items included within the scope of that term does nothing to exclude past due accounts from this type of expense.

NBC makes the same argument based on the definition of “Operating Budget.” But this argument is no more persuasive than the one based on the definition of “Operating Expenses.” In sum, there is nothing in either definition to suggest that OSM exercises any managerial control over which of NBC’s creditors or debts is paid.

A related argument that NBC advances is that OSM exercises managerial control by virtue of the express terms in the Third Forbearance Agreement.

¹²⁸ Clerk’s Papers at 535.

No. 67050-6-1/30

Specifically, the argument is based on a revised definition of "Operating Expenses" in that agreement:

The definition . . . will not, in any event, include past due accounts ***payable of the Borrower which may be paid in accordance with clause (vi) (below)***

...

(vi) . . . the Depository shall transfer to the Secured Obligations Account (and to the applicable sub-account related to the Note and the other Loan Documents) from and to the extent of amounts in the Pledged Revenues Account an amount equal to the amount of all accrued and unpaid interest on, and any unpaid principal of, the Note, any accrued and unpaid Servicing Fees, any due and unpaid late charges and any other unpaid fees, costs and expenses payable by the Borrower ***in connection with the Loan Documents***^[129]

Contrary to NBC's assertion, this revised definition is not an exercise of managerial control of payments to NBC's creditors. The emphasized language in the above quotation makes clear that the provision applies only to the delinquent loan that is the subject of this action, not any other debt of NBC. This is not managerial control in the IGRA sense, as illustrated by omission in NBC's brief of the first emphasized text in the above quotation.

NBC further asserts that the deposit of its "gross revenues" into OSM-controlled accounts in the event of default makes NBC the de facto manager of NBC's casino operations. This assertion is factually and legally incorrect.

First, in the event of default, NBC does not deposit "gross revenues" into OSM-controlled accounts. As we previously explained, "Daily Cash-on-Hand Requirements" are expressly excluded from "Pledged Revenues." And

¹²⁹ Clerk's Papers at 642-43.

No. 67050-6-1/31

“Operating Expenses” take priority over allocation of funds to the “Pledged Revenues” account. NBC thus has exclusive managerial control over both of these portions of “gross revenues.”

Second, NBC fails to explain why the mere deposit of its funds, as is required when it is in default under the terms of the loan agreement, constitutes managerial control by OSM. More than an assertion is required, particularly where such measures are commonly required when a commercial loan of this type is in default.

NBC heavily relies on Wells Fargo v. Lake of the Torches Economic Development Corp., where the Seventh Circuit held that the bond indenture in question constituted a management contract.¹³⁰ But, that case is distinguishable.

There, the Seventh Circuit emphasized several factors that contributed to the agreement’s status as a management contract.¹³¹ It highlighted that **gross revenues** from the Casino had to be deposited daily in a trust fund, giving Wells Fargo “ultimate control over withdrawals.”¹³² But, as we have explained above, that is not the case here.

The Seventh Circuit also noted that the agreement limited the casino’s capital expenditures, unless the tribe received consent from Wells Fargo.¹³³ Here, in the event of a default, the loan agreement did require that NBC **notify** OSM of its daily expenses. And later, under the forbearance agreements, NBC

¹³⁰ 658 F.3d 684, 702 (7th Cir. 2011).

¹³¹ Id. at 697-99.

¹³² Id. at 698.

¹³³ Id.

No. 67050-6-1/32

had to provide a written restructuring plan and other financial projections to OMS. But, unlike in Lake of the Torches, the agreement did not require that NBC obtain **approval** from OSM regarding the amount of those expenses.

Most notable, in Lake of the Torches, if the tribe fell behind in payments, the agreement required it to "retain an Independent management consultant," approved by the bondholder representative, to make recommendations as to how to improve cash flow.¹³⁴ The tribe was also not able to remove or replace the Casino's general manager, controller, or executive director for any reason without the consent of 51 percent of the bondholders.¹³⁵ At no time did OSM have any such control over NBC's expenditures or decisions.

In its reply brief, NBC makes several new arguments regarding the second forbearance agreement. Because issues raised for the first time in reply are "too late to warrant consideration," we need not address NBC's arguments.¹³⁶

FAILURE TO STATE A CLAIM

NBC finally argues that OSM fails to state a claim upon which relief could be granted because the loan and other agreements are void and unenforceable under IGRA. We again disagree.

Our review of a trial court's CR 12(b)(6) motion depends on whether it considered matters outside the pleadings in making its ruling.¹³⁷ Where it did, we

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

¹³⁷ Sea-Pac Co., Inc., 103 Wn.2d at 802.

No. 67050-6-1/33

review the 12(b)(6) motion as a summary judgment motion and the facts are viewed in the light most favorable to the nonmoving party.¹³⁸

Here, the trial court examined the loan documents in addition to the pleadings. Thus, we review its order de novo as we would a summary judgment order.¹³⁹

The underlying premise of NBC's argument is that the loan and other agreements are void and unenforceable. We previously discussed in this opinion why these agreements are neither void nor unenforceable under IGRA.

NBC makes no other argument why OSM fails to state a breach of contract claim in the complaint. Accordingly, we reject this argument as unsubstantiated in the record before us.

SUMMARY

To summarize, we hold that the superior court has subject matter jurisdiction of this action on a contract against a tribal entity that has waived its sovereign immunity for purposes of this loan transaction. The court also has personal jurisdiction over the tribal entity because the loan documents are not unapproved management contracts under IGRA. That is because they are not management contracts under the law. NBC has failed to show that OSM has failed to state a claim to relief.

¹³⁸ Id.
¹³⁹ Id.

No. 67050-6-1/34

We affirm the amended order denying the omnibus motion to dismiss.

Cox, J.

WE CONCUR:

Speer, J.

Leach, C. J.

APPENDIX - B

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439 U.S. 463, *; 99 S. Ct. 740, **;
58 L. Ed. 2d 740, ***; 1979 U.S. LEXIS 55

WASHINGTON ET AL. v. CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION

No. 77-388

SUPREME COURT OF THE UNITED STATES

439 U.S. 463; 99 S. Ct. 740; 58 L. Ed. 2d 740; 1979 U.S. LEXIS 55

October 2, 1978, Argued
January 16, 1979, Decided

SUBSEQUENT HISTORY: Petition For Rehearing Denied February 26, 1979.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: 552 F.2d 1332, reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant state challenged an order from the United States Court of Appeals for the Ninth Circuit, which, at the request of appellee Indian tribe, reversed the district court, ruling that Chapter 36, Wash. Rev. Code § 37.12.010 (1976), which obligated the state to assume jurisdiction over Indians and Indian territory subject to certain conditions, was unconstitutional in that it violated the Equal Protection Clause of U.S. Const. amend. XIV.

OVERVIEW: After the federal government passed Pub. L. 280, 67 Stat. 588-90 (1953), the state enacted Chapter 36, Wash. Rev. Code § 37.12.010 (1976), to assume civil and criminal jurisdiction over Indians and Indian territory within the state, subject to the title status of the property on which the offense or transaction occurred and upon the nature of the subject matter. The tribe challenged the statutory and constitutional validity of the statute, but the Court, contrary to the finding of the court of appeals, found the statute valid. The Court ruled that the state was not required by the federal enabling legislation to pass a state constitutional amendment in order to pass the statute and that therefore the state had met the procedural requirements. The Court also ruled that the state had not flouted the will of Congress when it enacted a "checkerboard" pattern of jurisdiction. The Court also found that the Equal Protection Clause had not been violated because the land-tenure classification made by the state was neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power.

OUTCOME: The Court reversed the judgment of the court of appeals, ruling that the state law in question did not violate the Equal Protection Clause.

CORE TERMS: reservation, tribe, disclaimer, tribal, jurisdictional, partial, enabling acts, assumption of jurisdiction, state law, classification, state jurisdiction, legislative action, criminal jurisdiction, subject-matter, authorize, amend, constitutional amendment, assume jurisdiction, impediment, barrier, treaty, legislative history, proviso, organic law, territory, mandatory, Public Law, geographic, obligate, bind

LEXISNEXIS® HEADNOTES HideGovernments > Native Americans > Authority & Jurisdiction **HN1**  See Wash. Rev. Code § 37.12.010 (1976). *Shepardize*: Restrict By HeadnoteGovernments > Native Americans > Authority & Jurisdiction **HN2**  Under the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe on the right of reservation Indians to make their own laws and be ruled by them. More Like This Headnote | *Shepardize*: Restrict By HeadnoteGovernments > Native Americans > Authority & Jurisdiction Governments > Native Americans > Property Rights **HN3**  The basic terms of Pub. L. 280, 67 Stat. 588-90 (1953), which was the first federal jurisdictional statute of general applicability to Indian reservation lands, are well known. To five states it effected an immediate cession of criminal and civil jurisdiction over Indian country, with an express exception for the reservations of three tribes. Pub. L. 280, §§ 2 and 4. To the remaining states it gave an option to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent of the tribes that would be affected. States whose constitutions or statutes contained organic law disclaimers of jurisdiction over Indian country were dealt with in Pub. L. § 6. The people of those States were given permission to amend "where necessary" their state constitutions or existing statutes to remove any legal impediment to the assumption of jurisdiction under the Act. All others were covered in Pub. L. § 7. More Like This Headnote | *Shepardize*: Restrict By HeadnoteGovernments > Native Americans > Authority & Jurisdiction **HN4**  See 18 U.S.C.S. § 1162. *Shepardize*: Restrict By HeadnoteGovernments > Native Americans > Authority & Jurisdiction **HN5**  See 28 U.S.C.S. § 1360.Civil Procedure > Appeals > Reviewability > Preservation for Review **HN6**  The prevailing party is free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered in the district court or the court of appeals. More Like This Headnote | *Shepardize*: Restrict By HeadnoteGovernments > State & Territorial Governments > Statehood **HN7**  25 Stat. 676 (1889) provides that be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided. More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Taxation 

Governments > State & Territorial Governments > Statehood 

HN8  25 Stat. 676 (1889) provides in part that the delegates to the conventions elected as provided for in this act shall meet at the seat of government of the Territories of Dakota, Montana, and Washington after organization, shall declare, on behalf of the people of the proposed states of North Dakota, South Dakota, Montana, and Washington, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and states governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said states. More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Authority & Jurisdiction 

Governments > Native Americans > Property Rights 

Governments > State & Territorial Governments > Statehood 

HN9  25 Stat. 676 (1889) provides in part that the people inhabiting the proposed states of North Dakota, South Dakota, Montana, and Washington 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. More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Authority & Jurisdiction 

HN10  The procedural requirements of Pub. L. 280, 67 Stat. 588-90 (1953), must be strictly followed. More Like This Headnote

Governments > Legislation > Interpretation 

Governments > Native Americans > General Overview 

HN11  Ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians. More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Authority & Jurisdiction 

HN12  Section 6 of Pub. L. 280, 67 Stat. 588-90 (1953), does not require disclaimer states to amend their constitutions to make an effective acceptance of jurisdiction. More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Authority & Jurisdiction 

HN13  A state that has accepted the jurisdictional offer in Pub. L. 280, 67 Stat. 588-90

(1953), in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the states in 1953. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Equal Protection](#) > [Level of Review](#) 

[Constitutional Law](#) > [Equal Protection](#) > [Scope of Protection](#) 

HN14  A state statute must be sustained against an Equal Protection Clause attack if the classifications it employs rationally further the purpose identified by the state. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments](#) > [Native Americans](#) > [Authority & Jurisdiction](#) 

HN15  The unique legal status of Indian tribes under federal law permits the federal government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments](#) > [Native Americans](#) > [Authority & Jurisdiction](#) 

HN16  Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Equal Protection](#) > [Level of Review](#) 

HN17  Under conventional Equal Protection Clause criteria, legislative classifications are valid unless they bear no rational relationship to the state's objectives. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Equal Protection](#) > [Scope of Protection](#) 

HN18  State legislation does not violate the Equal Protection Clause merely because the classifications it makes are imperfect. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Equal Protection](#) > [Scope of Protection](#) 

[Governments](#) > [Native Americans](#) > [Authority & Jurisdiction](#) 

HN19  Wash. Rev. Code § 37.12.010 (1976), does not offend the Equal Protection Clause. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Equal Protection](#) > [Scope of Protection](#) 

[Governments](#) > [Native Americans](#) > [Authority & Jurisdiction](#) 

HN20  Checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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SYLLABUS

Section 6 of Pub. L. 280 authorizes the people of States whose constitutions or statutes contain organic law disclaimers of jurisdiction over Indian country to amend "where necessary" their constitutions or statutes to remove any legal impediment to assumption of such jurisdiction under the Act, notwithstanding the provision of any Enabling Act for the admission of the State, but provided that the Act shall not become effective with respect to such assumption of jurisdiction until the people of the State have appropriately amended their state constitution or statutes as the case may be. In § 7 of Pub. L. 280, Congress gave the consent of the United States "to any other State . . . 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." The State of Washington's Constitution contains a disclaimer of authority over Indian country, and hence the State is one of those covered by § 6. In 1963, after the Washington Supreme Court in another case had held that the barrier posed by the disclaimer could be lifted by the state legislature, the legislature enacted a statute (Chapter 36) obligating the State to assume civil and criminal jurisdiction over Indians and Indian territory within the State, subject only to the condition that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands unless the affected tribe so requested. Appellee Yakima Nation, which did not make such a request, brought this action in Federal District Court challenging the statutory and constitutional validity of the State's partial assertion of jurisdiction on its Reservation. The Tribe contended that the State had not complied with the procedural requirements of Pub. L. 280, especially the requirement that the State first amend its constitution; that, in any event, Pub. L. 280 did not authorize the State to assert only partial jurisdiction within an Indian reservation; and that Chapter 36, even if authorized by Congress, violated the equal protection and due process guarantees of the Fourteenth Amendment. The District Court rejected both the statutory and constitutional claims and entered judgment for the State. The Court of Appeals, while rejecting the contention that Washington's assumption of only partial jurisdiction was not authorized by Congress, reversed, holding that the "checkerboard" jurisdictional system produced by Chapter 36 had no rational foundation and therefore violated the Equal Protection Clause. *Held*:

1. Section 6 of Pub. L. 280 does not require disclaimer States to amend their constitutions to make an effective acceptance of jurisdiction over an Indian reservation, and any Enabling Act requirement of this nature was effectively repealed by § 6. Here, the Washington Supreme Court, having determined that for purposes of the repeal of the state constitutional disclaimer legislative action is sufficient and the state legislature having enacted legislation obligating the State to assume jurisdiction under Pub. L. 280, it follows that the State has satisfied the procedural requirements of § 6. Pp. 478-493.
2. Once the requirements of § 6 have been satisfied, the terms of § 7 govern the scope of jurisdiction conferred upon disclaimer States. Statutory authorization for the partial subject-matter and geographic jurisdiction asserted by Washington is found in the words of § 7 permitting option States to assume jurisdiction "in such manner" as the people of the State shall "by affirmative legislative action, obligate and bind the State to assumption thereof." The phrase "in such manner" means at least that an option State can condition the assumption of full jurisdiction on an affected tribe's consent. Here, Washington has offered to assume full jurisdiction if a tribe so requests. The partial jurisdiction asserted on the reservations of nonconsenting tribes reflects a responsible attempt to accommodate both state and tribal interests and is consistent with the concerns that underlay the adoption of Pub. L. 280. Accordingly, it does not violate the terms of § 7. Pp. 493-499.
3. The "checkerboard" pattern of jurisdiction ordained by Chapter 36 is not on its face invalid under the Equal Protection Clause. Pp. 499-502.

(a) The classifications based on tribal status and land tenure implicit in Chapter 36 are not "suspect" so as to require that they be justified by a compelling state interest nor does Chapter 36 abridge any fundamental right of self-government. Pp. 500-501.

(b) Chapter 36 is valid as bearing a rational relationship to the State's interest in providing protection to non-Indian citizens living within a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands, the land-tenure classification being neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Pp. 501-502.

COUNSEL: Slade Gorton, Attorney General of Washington, argued the cause for appellants. With him on the briefs were Malachy R. Murphy, Deputy Attorney General, and Jeffrey C. Sullivan.

James B. Hovis argued the cause and filed a brief for appellee.

Louis F. Claiborne argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General McCree, Assistant Attorney General Moorman, Peter R. Steenland, Jr., Carl Strass, and Neil T. Proto. *

* Michael Taylor, Robert L. Pirtle, and Robert D. Dellwo filed a brief for the Confederated Tribes of the Colville Reservation et al. as amici curiae.

JUDGES: STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 502.

OPINION BY: STEWART

OPINION

[*465] [***746] [**743] MR. JUSTICE STEWART delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3A] [3A] In this case we are called upon to resolve a dispute between the State of Washington and the Yakima Indian Nation over the validity of the State's exercise of jurisdiction on the Yakima Reservation. In 1963 the Washington Legislature obligated the State to assume civil and criminal jurisdiction over Indians and Indian territory within the State, subject only to the condition [**744] that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands without the request of the Indian tribe affected. Ch. 36, 1963 [***747] Wash. Laws. ¹ The Yakima Nation [*466] did not make such a request. State authority over Indians within the Yakima Reservation was thus made by Chapter 36 to depend on the title status of the property on which the offense or transaction occurred and upon the nature of the subject matter.

FOOTNOTES

¹ The statute, codified as ^{HN1} Wash. Rev. Code § 37.12.010 (1976), provides: "Assumption of criminal and civil jurisdiction by state. 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 R. C. W. 37.12.021 [tribal consent] have been invoked, except for the following:

"(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:
Provided further, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."
 The statute will be referred to in this opinion as Chapter 36.

The Yakima Nation brought this action in a Federal District Court challenging the statutory and constitutional validity of the State's partial assertion of jurisdiction on its Reservation. The Tribe contended that the federal statute upon which the State based its authority to assume jurisdiction over the Reservation, Pub. L. 280, ² imposed certain procedural requirements, with which the State had not complied -- most notably, a requirement that Washington first amend its own constitution -- and that in any event Pub. L. 280 did not **[*467]** authorize the State to assert only partial jurisdiction within an Indian reservation. Finally, the Tribe contended that Chapter 36, even if authorized by Congress, violated the equal protection and due process guarantees of the Fourteenth Amendment.

FOOTNOTES

² Act of Aug. 15, 1953, 67 Stat. 588-590. For the full text of the Act, see n. 9, *infra*.

The District Court rejected both the statutory and constitutional claims and entered judgment for the State. ³ On appeal, the contention **[***748]** that Washington's assumption of only partial jurisdiction was not authorized by Congress was rejected by the Court of Appeals for the Ninth Circuit, sitting en banc. The en banc court then referred the case to the original panel for consideration of the remaining issues. *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 550 F.2d 443 (*Yakima* **[**745]** I). ⁴ The three-judge **[*468]** panel, confining itself to consideration of the constitutional validity of Chapter 36, concluded that the "checkerboard" jurisdictional system it produced was without any rational foundation and therefore violative of the Equal Protection Clause of the Fourteenth Amendment. Finding no basis upon which to sever the offending portion of the legislation, the appellate court declared Chapter 36 unconstitutional in its entirety, and reversed the judgment of the District Court. *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 552 F.2d 1332 (*Yakima* II).

FOOTNOTES

³ The complaint also contained other claims that were decided adversely to the plaintiff by the District Court. After extensive discovery and the entry of a pretrial order, the District Court granted partial summary judgment in favor of the State on several of these claims. On the question of compliance with Pub. L. 280, the District Court held that it was bound by the

decision of the Court of Appeals for the Ninth Circuit in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, 655-658, which had determined that the State of Washington could accept jurisdiction under Pub. L. 280 without first amending its constitution and that Washington's jurisdictional arrangement did not constitute an unauthorized partial assumption of jurisdiction. The District Court also rejected the claim that Chapter 36 was facially invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The question of the constitutional validity of Chapter 36 as applied to the Yakima Reservation was reserved for a hearing and factual determination. After a one-week trial, the District Court found that the appellee had not proved "that the state or county have discriminated . . . to deprive any Indian or the plaintiff Tribe of any service or protection, resource or asset afforded under the same state law to other citizens or similar geographic location." The complaint was then dismissed.

The opinion of the District Court is unreported.

4 The en banc hearing was ordered by the Court of Appeals *sua sponte* after the original panel had heard argument. This hearing was limited to the question whether that court's earlier partial-jurisdiction holding in *Quinault Tribe of Indians v. Gallagher, supra*, should be overruled. A majority of the en banc panel agreed with the result in *Quinault*, finding no statutory impediment to the assumption of partial geographic and subject-matter jurisdiction. 550 F.2d, at 448. Five judges dissented. *Id.*, at 449.

[***LEdHR4A] [4A]The State then brought an appeal to this Court. In noting probable jurisdiction of the appeal, we requested the parties to address the issue whether the partial geographic and subject-matter jurisdiction ordained by Chapter 36 is authorized by federal law, as well as the Equal Protection Clause issue. 435 U.S. 903.⁵

FOOTNOTES

5 The three-judge appellate court's equal protection decision was based upon the disparity created by Chapter 36 in making criminal jurisdiction over Indians depend upon whether the alleged offense occurred on fee or nonfee land. 552 F.2d, at 1334-1335. The court found this criterion for the exercise of state criminal jurisdiction facially unconstitutional. The appellate court found it unnecessary, therefore, to reach the Tribe's contention that the eight statutory categories of subject-matter jurisdiction are vague or its further contention that the *application* of Chapter 36 deprived it of equal protection of the laws. 552 F.2d, at 1334.

[***LEdHR4B] [4B]In its motion to affirm, filed here in response to the appellants' jurisdictional statement, the Yakima Nation invoked in support of the judgment "each and every one" of the contentions it had made in the District Court and Court of Appeals, but limited its discussion to the equal protection rationale relied upon by the appellate court. In its brief on the merits the Tribe has addressed -- in addition to those subjects implicit in our order noting probable jurisdiction, see n. 20, *infra*, one issue that merits brief discussion. The Tribe contends that Chapter 36 is void for failure to meet the standards of definiteness required by the Due Process Clause of the Fourteenth Amendment, asserting that the eight subject-matter categories over which the State has extended full jurisdiction are too vague to give tribal members adequate notice of what conduct is punishable under state law. This challenge is without merit. As the District Court observed, Chapter 36 creates no new criminal offenses but merely extends jurisdiction over certain classes of offenses defined elsewhere in state law. If those offenses are not sufficiently defined, individual tribal members may defend against any prosecutions under them at the time such prosecutions are brought. See *Younger v. Harris*, 401 U.S. 37. The eight subject-matter areas are themselves defined with reasonable clarity in language no less precise than that commonly accepted in federal jurisdictional statutes in the same field. See *United States v. Mazurie*, 419 U.S. 544.

The District Court's ruling that Chapter 36 is not void for vagueness under the Due Process Clause of the Fourteenth Amendment was therefore correct.

[*469] I

[*749]** The Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered "one nation" and that specified lands located in the Territory of Washington would be set aside for their exclusive use. The treaty was ratified by Congress in 1859. 12 Stat. 951. Since that time, the Yakima Nation has without interruption maintained its tribal identity.

The Yakima Reservation is located in the southeastern part of the State of Washington and now consists of approximately 1,387,505 acres of land, of which some 80% is held in trust by the United States for the Yakima Nation or individual members of the Tribe. The remaining parcels of land **[**746]** are held in fee by Indian and non-Indian owners. Much of the trust acreage on the Reservation is forest. The Tribe receives the bulk of its income from timber, and over half of the Reservation is closed to permanent settlement in order to protect the forest area. The remaining lands are primarily agricultural. **[*470]** There are three incorporated towns on the Reservation, the largest being Toppenish, with a population of under 6,000.

The land held in fee is scattered throughout the Reservation, but most of it is concentrated in the northeastern portion close to the Yakima River and within the three towns of Toppenish, Wapato, and Harrah. Of the 25,000 permanent residents of the Reservation, 3,074 are members of the Yakima Nation, and tribal members live in all of the inhabited areas of the Reservation. ⁶ In the three towns -- where over half of the non-Indian population resides -- members of the Tribe are substantially outnumbered by non-Indian residents occupying fee land.

FOOTNOTES

⁶ These are the membership figures given by the District Court. The United States, in its *amicus curiae* brief, has indicated that more than 5,000 tribal members live permanently on the Reservation and that the number increases during the summer months.

Before the enactment of the state law here in issue, the Yakima Nation was subject to ^{HN2} the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worcester v. Georgia*, 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 219-220. ⁷ As **[***750]** a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly **[*471]** provided that State laws shall apply." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-171.

FOOTNOTES

⁷ These abstract principles do not and could not adequately describe the complex jurisdictional rules that have developed over the years in cases involving jurisdictional clashes between the States and tribal Indians since *Worcester v. Georgia* was decided. For a full treatment of the subject, see generally M. Price, *Law and the American Indian* (1973); U.S. Dept. of Interior, *Federal Indian Law* (1958).

Public Law 280, upon which the State of Washington relied for its authority to assert jurisdiction over the Yakima Reservation under Chapter 36, was enacted by Congress in 1953 in part to deal with the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County*, 426 U.S. 373, 379; H. R. Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953). ^{HN3} The basic terms of Pub. L. 280, which was the first federal jurisdictional statute of general applicability to Indian reservation lands, ⁸ are well known. ⁹ *****751** To five States it effected **[*472]** an *****748** immediate cession of criminal and civil jurisdiction over Indian country, with an express exception for the reservations of three tribes. Pub. L. 280, §§ 2 and 4. ¹⁰ To the remaining **[*473]** States it gave an option to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent *****752** of the tribes that **[*474]** would be affected. States whose constitutions or statutes contained organic law disclaimers of jurisdiction over Indian country were dealt with in § 6. ¹¹ The people of those States were given permission to amend "where necessary" their state constitutions or existing statutes to remove any legal impediment to the assumption of jurisdiction under the Act. All others were covered in § 7. ¹²

FOOTNOTES

⁸ See Price, *supra* n. 7, at 210. Before 1953, there had been other surrenders of authority to some States. See, e. g., 62 Stat. 1224, 25 U. S. C. § 232 (New York), 64 Stat. 845, 25 U. S. C. § 233 (New York); 54 Stat. 249 (Kansas); 60 Stat. 229 (North Dakota); and 62 Stat. 1161 (Iowa). Public Law 280, however, was the first federal statute to attempt an omnibus transfer.

⁹ The Act provides in full:

"AN ACT

"To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

^{HN4} "1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

"SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected

California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

“(b) 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.

“(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.”

“SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

HNS* “§ 1360. State civil jurisdiction in actions to which Indians are parties.”

“SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

“§ 1360. State civil jurisdiction in actions to which Indians are parties

“(a) Each of the States listed in the following table shall have jurisdiction over civil causes of

action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) 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.

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

"SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

"SEC. 6. 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: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"SEC. 7. 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."

¹⁰ See n. 9, *supra*. The five States given immediate jurisdiction were California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added to this group in 1958. Act of Aug. 8, 1958, 72 Stat. 545, codified at 18 U. S. C. § 1162, 28 U. S. C. § 1360.

¹¹ See n. 9, *supra*.

¹² See n. 9, *supra*.

The Washington Constitution contains a disclaimer of authority over Indian country, ¹³ and the State is, therefore, one of those covered by § 6 of Pub. L. 280. The State did not take any action under the purported authority of Pub. L. 280 until 1957. In that year its legislature enacted a statute which obligated the State to assume criminal and civil jurisdiction over any Indian reservation within the State at the request of the tribe affected. ¹⁴ Under this legislation state jurisdiction was requested by and extended to several Indian tribes within the State. ¹⁵

FOOTNOTES

¹³ Wash. Const., Art. XXVI, para. 2.

¹⁴ Wash. Rev. Code, ch. 37.12 (1976).

¹⁵ For a detailed discussion of the Washington history under Pub. L. 280, see 1 National American Indian Court Judges Assn., *Justice and the American Indian: The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations* (1974).

[*475] In one of the first prosecutions brought under the 1957 jurisdictional scheme, an Indian defendant whose tribe had consented to the extension of jurisdiction challenged its validity on the ground that the disclaimer clause in the state constitution had not been amended in the manner allegedly required by § 6 of Pub. L. 280. *State v. Paul*, 53 Wash. 2d 789, 337 P. 2d 33. The Washington Supreme Court rejected the argument, construing the state constitutional provision to mean that the barrier posed by the disclaimer could be lifted by the state legislature. ¹⁶

FOOTNOTES

¹⁶ The Washington Supreme Court relied upon a previous decision in which it had rejected a challenge to Washington legislation permitting taxation of property leased from the Federal Government. *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P. 2d 838. The *Boeing* legislation was challenged on the ground that the State had failed to

remove by amendment a constitutional disclaimer of authority to tax federal property, and the Washington court held in *Boeing* that legislative action was sufficient.

In 1963, Washington enacted Chapter 36, the law at issue in this litigation.¹⁷ The most significant feature of the new statute was its provision for the extension of at least some jurisdiction over all Indian lands within the State, whether or not the affected tribe gave its consent. Full criminal and civil jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved. Except for eight categories of law, however, state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested. The eight jurisdictional categories of state law that were thus extended to all parts of **[**749]** every Indian reservation were in the areas of compulsory school attendance, public assistance, domestic relations, **[*476]** **[***753]** mental illness, juvenile delinquency, adoption proceedings, dependent children, and motor vehicles.¹⁸

FOOTNOTES

¹⁷ See n. 1, *supra*.

¹⁸ See nn. 1 and 5, *supra*.

The Yakima Indian Nation did not request the full measure of jurisdiction made possible by Chapter 36, and the Yakima Reservation thus became subject to the system of jurisdiction outlined at the outset of this opinion.¹⁹ This litigation followed.

FOOTNOTES

¹⁹ Those tribes that had consented to state jurisdiction under the 1957 law remained fully subject to such jurisdiction. Wash. Rev. Code § 37.12.010 (1976). Since 1963 only one tribe, the Colville, has requested the extension of full state jurisdiction. 1 National American Indian Court Judges, *supra* n. 15, at 77-81. The Yakima Nation, ever since 1952 when its representatives objected before a congressional committee to a predecessor of Pub. L. 280, see n. 33, *infra*, has consistently contested the wisdom and the legality of attempts by the State to exercise jurisdiction over its Reservation lands. See *ibid*.

II

[LEdHR5A]** [5A] **[**LEdHR6A]** [6A] **[**LEdHR7A]** [7A] **[**LEdHR8A]** [8A] The Yakima Nation relies on three separate and independent grounds in asserting that Chapter 36 is invalid. First, it argues that under the terms of Pub. L. 280 Washington was not authorized to enact Chapter 36 until the state constitution had been amended by "the people" so as to eliminate its Art. XXVI which disclaimed state authority over Indian lands.²⁰ **[*477]** Second, it contends that Pub. L. 280 does **[**750]** not authorize a State **[***754]** to extend only partial jurisdiction over an Indian reservation. Finally, it asserts that Chapter 36, even if authorized **[*478]** by Pub. L. 280, violates the Fourteenth Amendment of the Constitution. We turn now to consideration of each of these arguments.

FOOTNOTES

²⁰ **[**LEdHR5B]** [5B] **[**LEdHR6B]** [6B] Washington strenuously argues that this question is not properly before the Court. We think that it is. The Yakima Indian Nation has pressed this issue throughout the litigation. In its motion to dismiss or affirm, the alleged invalidity of Washington's legislative assumption of jurisdiction was presented as a basis upon

which the judgment below should be sustained. See n. 5, *supra*. As ~~HN6~~ the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-436; *Dandridge v. Williams*, 397 U.S. 471, 475, and n. 6. Moreover, the disclaimer issue was implicit in the subjects the parties were requested to address in our order noting probable jurisdiction of this appeal. 435 U.S. 903. Cf. *Gent v. Arkansas*, 384 U.S. 937; *Zicarelli v. New Jersey State Comm'n*, 401 U.S. 933.

[*LEdHR7B]** [7B] **[***LEdHR8B]** [8B] Washington also contends that this Court's summary dismissals in *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P. 2d 590, appeal dismissed, 397 U.S. 316; *Tonasket v. State*, 84 Wash. 2d 164, 525 P. 2d 744, appeal dismissed, 420 U.S. 915; and *Comenout v. Burdman*, 84 Wash. 2d 192, 525 P. 2d 217, appeal dismissed, 420 U.S. 915, should preclude reconsideration of the disclaimer issue here. In those cases, it had been argued that Washington's statutory assumption of jurisdiction was ineffective under Pub. L. 280 and invalid under the state constitution because of the absence of a constitutional amendment eliminating Art. XXVI. In each case, the Washington Supreme Court rejected both the state constitutional and the federal arguments. On appeal from each, the appellants questioned the validity of the state court's conclusion that under the federal statute no constitutional amendment was required. Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks v. Miranda*, 422 U.S. 332, 343-345, in the sense that they rejected the "specific challenges presented in the statement of jurisdiction" and left "undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176. They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits, *Edelman v. Jordan*, 415 U.S. 651, 670-671; *Richardson v. Ramirez*, 418 U.S. 24, 53. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, see, e. g., *Mandel v. Bradley*, *supra*, necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 309 n. 1; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14. We do so in this case. The question that Washington asks us to avoid or to resolve on the basis of *stare decisis* has never received full plenary attention here. It has been the subject of extensive briefing and argument by the parties. It has provoked several, somewhat uncertain, opinions from the Washington courts, see n. 27, *infra*, whose ultimate judgments were the subjects of summary dismissals here. Finally, it is an issue upon which the Executive Branch of the United States Government has recently changed its position diametrically, as explained in its *amicus* brief and oral argument in this case.

III

[*LEdHR1B]** [1B] **[***LEdHR9A]** [9A] **[***LEdHR10A]** [10A] **[***LEdHR11A]** [11A] **[***LEdHR12A]** [12A] We first address the contention that Washington was required to amend its constitution before it could validly legislate under the authority of Pub. L. 280. If the Tribe is correct, we need not consider the statutory and constitutional questions raised by the system of partial jurisdiction established in Chapter 36. The Tribe, supported by the United States as *amicus curiae*,²¹ argues that a requirement for popular amendatory action is to be found in the express terms of § 6 of Pub. L. 280 or, if not there, in the terms of the Enabling Act that admitted Washington to the Union.²² The **[*479]** argument can best be understood in the context of the specific statutory provisions involved.

FOOTNOTES

²¹ The United States has fully briefed the constitutional amendment question and the

question whether partial jurisdiction is authorized by Pub. L. 280. Its position on the equal protection holding of the Court of Appeals is equivocal.

22

*****LEdHR11B** [11B] *****LEdHR12B** [12B]The Tribe also contends that under its 1855 Treaty with the United States, 12 Stat. 951, it was guaranteed a right of self-government that was not expressly abrogated by Pub. L. 280. The argument assumes that under our cases, see, e. g., *Menominee Tribe v. United States*, 391 U.S. 404, treaty rights are preserved unless Congress has shown a specific intent to abrogate them. Although we have stated that the intention to abrogate or modify a treaty is not to be lightly imputed, *Id.*, at 413; *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160, this rule of construction must be applied sensibly. In this context, the argument made by the Tribe is tendentious. The treaty right asserted by the Tribe is jurisdictional. So also is the entire subject matter of Pub. L. 280. To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do. The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280.

A

The Enabling Act under which Washington, along with the States of Montana, North Dakota, and South Dakota, gained entry into the Union, was passed in 1889. ²³ ****751** Section 4 of *****755** that ***480** Act required the constitutional conventions of the prospective new States to enact provisions by which the people disclaimed title to lands owned by Indians or Indian tribes and acknowledged that those lands were to remain "under the absolute jurisdiction and control of" Congress until the Indian or United States title had been extinguished. The disclaimers were to be made "by ordinances irrevocable without the consent of the United States and the people of said States." Washington's constitutional convention enacted the disclaimer of authority over Indian lands as part of Art. XXVI of the state constitution. ²⁴ That Article, captioned "Compact with ***481** the United States," is prefaced with the statement -- precisely tracking the language of the admitting statute -- that "the following ordinance shall be irrevocable without *****756** the consent of the United States and the people of [the State of Washington]." Its substantive terms mirror the language used in the enabling legislation.

FOOTNOTES

²³ Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. The Act provides:

HN7 "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

....

HNB "SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories . . . after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United

States and the people of said States:

....

HNS "Second. 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. . . ."

Other admitting Acts requiring a disclaimer of authority over Indian lands are Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Oklahoma); Act of June 20, 1910, ch. 310, 36 Stat. 557 (Arizona and New Mexico). The language of these Acts is virtually the same as that of 25 Stat. 676.

24 Article XXVI reads as follows:

"COMPACT WITH THE UNITED STATES

"The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

....

"Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, 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 and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe."

We have already noted that two distinct provisions of Pub. L. 280 are potentially applicable to States not granted an immediate cession of jurisdiction. The first, § 6, without question applies to Washington and the seven other States admitted into the Union under enabling legislation requiring organic law disclaimers similar to that just described. This much is clear from the legislative history of Pub. L. 280, ²⁵ as well as from the express language of § 6. That section provides

"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 **[**752]** provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately

amended their State constitution or statutes as the case may be."

FOOTNOTES

²⁵ See H. R. Rep. No. 848, 83d Cong., 1st Sess. (1953). According to this report accompanying H. R. 1063 (the House version of Pub. L. 280) "[examination] of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington." H. R. Rep. No. 848 at 6.

All other States were covered by § 7. In that section Congress gave the consent of the United States

"to any other State . . . to assume jurisdiction at such [*482] time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

These provisions appear to establish different modes of procedure by which an option State, depending on which section applies to it, is to accept the Pub. L. 280 jurisdictional offer. The procedure specified in § 7 is straightforward: affirmative legislative action by which the State obligates and binds itself to assume jurisdiction. Section 6, in contrast, is delphic. The only procedure mentioned is action by the people "to amend . . . their State constitutions or existing statutes, as the case may be" to remove any legal impediments to the assumption of jurisdiction. The phrase "where necessary" in the main clause suggests that a requirement for popular -- as opposed to legislative -- action must be found if at all in some source of law independent of Pub. L. 280. The proviso, however, has a different import.

B

The proper construction to be given to the single inartful sentence in § 6 has provoked chapters of argument from the parties. The Tribe and the United States urge that notwithstanding the phrase "where necessary," [***757] § 6 should be construed to mandate constitutional amendment by disclaimer States. It is their position that § 6 operates not only to grant the consent of the United States to state action inconsistent with the terms of the enabling legislation but also to establish a distinct procedure to be followed by Enabling Act States. To support their position, they rely on the language of the proviso and upon certain legislative history of § 6. ²⁶

FOOTNOTES

²⁶ See n. 35, *infra*, and accompanying text.

In the alternative, the Tribe and the United States argue that popular amendatory action, if not compelled by the terms of § 6, is mandated by the terms of the Enabling Act of [*483] Feb. 22, 1889, ch. 180, § 4. Although they acknowledge that Congress in § 6 did grant the "consent of the United States" required under the Enabling Act before the State could remove the disclaimer, they contend that § 6 did not eliminate the need for the "consent of the people" specified in the Enabling Act. In their view, the 1889 Act -- if not Pub. L. 280 -- dictates that constitutional amendment is the only valid procedure by which that consent can be given.

The State draws an entirely different message from § 6. It contends that the section must be construed in light of the overall congressional purpose to facilitate a transfer of jurisdiction to those option States willing to accept the responsibility. Section 6 was designed, it says, not to

establish but to remove legal barriers to state action under the authority of Pub. L. 280. The phrase "where necessary" in its view is consistent with this purpose. It would construe the word "appropriately" in the proviso to be synonymous with "where necessary" and the entire section to mean that constitutional amendment is required only if "necessary" as a matter of state law. The Washington Supreme Court having found that legislative action is sufficient to grant the "consent of the people" to removal of the disclaimer in Art. XXVI of the state constitution,²⁷ the State argues that **[**753]** the procedural **[*484]** requirements of § 6 have been fully satisfied. It finds the Enabling Act irrelevant since in its view § 6 effectively repealed any federal-law impediments in that Act to **[***758]** state assertion of jurisdiction under Pub. L. 280.²⁸

FOOTNOTES

²⁷ The validity of Chapter 36 was first challenged in the federal courts in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (CA9). In *Quinault*, the Court of Appeals for the Ninth Circuit held that under § 6 and the Enabling Act the consent of the people to removal of the disclaimer need only be made in some manner "valid and binding under state law." *Id.*, at 657. Relying on the Washington Supreme Court's holding in *State v. Paul*, 53 Wash. 2d 789, 337 P. 2d 33, that legislative action would suffice, it concluded that Washington's assumption of jurisdiction was valid. When Chapter 36 was first challenged in the state courts, the Washington Supreme Court reaffirmed its holding in *State v. Paul*. See *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P. 2d 590; *Tonasket v. State*, 84 Wash. 2d 164, 525 P. 2d 744. See also n. 16, *supra*. In *Makah*, the Court reasoned, as it had in *Paul*, that the makers of the Washington Constitution intended that for purposes of Art. XXVI "the people would speak through the mouth of the legislature." 76 Wash. 2d, at 490, 457 P. 2d, at 593. In addition, it relied on *Quinault* for the proposition that under § 6 the constitutional disclaimer need be removed only by a method binding under state law. In *Tonasket*, the Washington court reaffirmed this reasoning. It also relied on the alternative ground that the disclaimer in Art. XXVI could be construed not to preclude "criminal and civil regulation" on Indian lands and therefore would not stand as a barrier to state jurisdiction. 84 Wash. 2d, at 177, 525 P. 2d, at 752.

²⁸ The State asserts as well that the Washington constitutional disclaimer does not pose any substantive barrier to state assumption of jurisdiction over fee and unrestricted lands within the reservation. In light of our holding that Washington has satisfied the procedural requirements for repealing the disclaimer, we need not consider the scope of this state constitutional provision.

C

[*LEdHR13]** [13] **[***LEdHR14]** [14] From our review of the statutory, legislative, and historical materials cited by the parties, we are persuaded that Washington's assumption of jurisdiction by legislative action fully complies with the requirements of § 6. Although we adhere to the principle that ^{HN10} the procedural requirements of Pub. L. 280 must be strictly followed, *Kennerly v. District Court of Montana*, 400 U.S. 423, 427; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S., at 180, and to the general rule that ^{HN11} ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians, see, e. g., *Bryan v. Itasca County*, 426 U.S., at 392, those principles will not stretch so far as to permit us to find a federal requirement affecting the manner in which the States are to modify their organic legislation on the basis of materials that are essentially speculative. Cf. *Board of County Comm'rs v. United States*, 308 U.S. 343, 350-351. The language of § 6, its legislative **[*485]** history, and its role in Pub. L. 280 all clearly point the other way.

We turn first to the language of § 6. The main clause is framed in permissive, not mandatory, terms. Had the drafters intended by that clause to require popular amendatory action, it is unlikely that they would have included the words "where necessary." As written, the clause suggests that the substantive requirement for constitutional amendment must be found in some

source of law independent of § 6. The basic question, then, is whether that requirement can be found in the language of the proviso to § 6 or alternatively in the terms of the Enabling Act.

We are unable to find the procedural mandate missing from the main clause of § 6 in the language of the proviso. That language in the abstract could be read to suggest that constitutional amendment is a condition precedent to a valid assumption of jurisdiction by disclaimer States. When examined in its context, however, it cannot fairly be read to impose such a condition. Two considerations prevent this reading. First, it is doubtful that Congress -- in order to compel disclaimer States to amend their constitutions by popular vote -- would have done so in a provision the first clause of which consents to that procedure "where necessary" and the proviso to which indicates that the procedure is to be followed if "appropriate." Second, the reference to **[**754]** popular amendatory action in the proviso is not framed as a description of the procedure the States must follow to assume jurisdiction, but instead is written as a condition to the effectiveness of "the provisions of" Pub. L. 280. When it is recalled that the only substantive provisions of the Act -- other than those arguably to be found in § 7 -- accomplish an immediate transfer of **[***759]** jurisdiction to specifically named States, it seems most likely that the proviso was included to ensure that § 6 would not be construed to effect an immediate transfer to the disclaimer group of option States. The main clause removes a federal-law barrier **[*486]** to any new state jurisdiction over Indian country. The proviso suggests that disclaimer States are not automatically to receive jurisdiction by virtue of that removal. Without the proviso, in the event that state constitutional amendment were not found "necessary," ²⁹ § 6 could be construed as effecting an immediate cession. Congress clearly wanted all the option States to "obligate and bind" themselves to assume the jurisdiction offered in Pub. L. 280. ³⁰ To **[*487]** be sure, constitutional amendment was referred to as the process by which this might be accomplished in disclaimer States. But, given the distinction that Congress clearly drew between those States and automatic-transfer States, this reference can hardly be construed to require that process.

FOOTNOTES

²⁹ Disclaimer States have responded in diverse ways to the Pub. L. 280 offer of jurisdiction. See Goldberg, Pub. L. 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 546-548, 567-575 (1975). Only one -- North Dakota -- has amended its constitution. Art. 16, N. D. Const., amended by Art. 68, June 24, 1958 (1957 N. D. Laws, ch. 403; 1959 N. D. Laws, ch. 430).

³⁰ In *Kennerly v. District Court of Montana*, 400 U.S. 423, we emphasized the need for the responsible jurisdictions to "[manifest] by political action their willingness and ability to discharge their new responsibilities." *Id.*, at 427. *Kennerly* involved an attempt by the state courts of Montana to assert civil jurisdiction over a transaction that occurred within reservation boundaries. The tribe had requested state jurisdiction, but the State had not obligated itself to assume it. The case was litigated on the theory that § 7 was applicable. We held that the State must comply with the § 7 requirement of "affirmative legislative action." 400 U.S., at 427. Two of our other cases involving Pub. L. 280 also illustrate the need for responsible action under the federal statute. In *Williams v. Lee*, 358 U.S. 217, we held that the State of Arizona -- one of the disclaimer States -- could not validly exercise jurisdiction over a civil action brought by a non-Indian against an Indian for a transaction that occurred on the Navaho Reservation. We relied on the traditional principle that a State may not infringe the right of reservation Indians "to make their own laws and be ruled by them" without an express authorization by Congress. *Id.*, at 220. In *Williams*, the State had not attempted to comply with § 6: the state court had taken jurisdiction without state statutory or constitutional authorization. A similar situation obtained in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164. There we held that Arizona could not, by simple legislative enactment, tax income earned by a Navaho from reservation sources. The tax statute at issue was not framed as a measure obligating the State to assume responsibility under Pub. L. 280.

Before turning to the legislative history, which, as we shall see, accords with this interpretation of § 6, we address the argument that popular amendatory action, if not a requirement of Pub. L. 280, is mandated by the legislation admitting Washington to the Union. This argument requires that two assumptions be made. The first is that § 6 eliminated some but preserved other Enabling Act barriers to a State's assertion of jurisdiction over Indian country. The second is that the phrase "where necessary" in the main clause of § 6 was intended to refer to those federal-law barriers that had been preserved. Only if each of these premises is accepted does the Enabling Act have any possible application.

Since we find the first premise [***760] impossible to accept, we proceed no further. Admitting legislation is, to be sure, the only source of law mentioned in the main clause of § 6 and might therefore be looked to as a referent for the phrase "where necessary" in the clause. This reading, however, is not tenable. It supplies no satisfactory answer to the question why Congress -- in order to [**755] give the consent of the United States to the removal of state organic law disclaimers -- would not also have by necessary implication consented to the removal of any procedural constraints on the States imposed by the Enabling Acts. The phrase "[notwithstanding] the provisions of any Enabling Act" in § 6 is broad -- broad enough to suggest that Congress when it referred to a possible necessity for state constitutional amendment did not intend thereby to perpetuate any such requirement in an Enabling Act. Even assuming that the phrase "consent of the people" in the Enabling Act must be construed to preclude consent by legislative action -- and the Tribe and the United States have offered [*488] no concrete authority to support this restrictive reading of the phrase -- ³¹ we think it obvious that in the "notwithstanding" clause of § 6 Congress meant to remove any federal impediments to state jurisdiction that may have been created by an Enabling Act.

FOOTNOTES

³¹ There is, for example, nothing in the legislative history of the Enabling Act to indicate that the "consent of the people" could be given only by a process of constitutional amendment. The scant legislative record of the Enabling Act is devoted to a debate over the wisdom of splitting the Dakota Territory into two States and of admitting both immediately to the Union. In none of these debates was there any extended discussion of the Indian land disclaimer or any indication that the "consent of the people" to removal of the disclaimer could not be given by the people's representatives in the legislature. See Adverse Reports of the House Committee on the Territories, May 1886 and Feb. 1888, annexed to H. R. Rep. No. 1025, 50th Cong., 1st Sess., 19-25 (1888). See also, e. g., 19 Cong. Rec. 2804, 2883, 3001, 3117 (1888); 20 Cong. Rec. 801, 869 (1889). The only explicit references to the disclaimer of authority over Indian lands are found in H. R. Rep. No. 1025, *supra*, at 8-9 (calling attention to fact that by the terms of the bill large Indian reservations in the Dakota Territory "remain within the exclusive control and jurisdiction of the United States") and in 19 Cong. Rec. 2832 (1888) (Oklahoma Delegate objecting to the disclaimer).

The legislative history of Pub. L. 280 supports the conclusion that § 6 did not of its own force establish a state constitutional amendment requirement and did not preserve any such requirement that might be found in an Enabling Act. Public Law 280 was the first jurisdictional bill of general applicability ever to be enacted by Congress. It reflected congressional concern over the law-and-order problems on Indian reservations and the financial burdens of continued federal jurisdictional responsibilities on Indian lands, *Bryan v. Itasca County*, 426 U.S. 373. It was also, however, without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's. ³² [*489] See [***761] H. R. Rep. No. 848, 83d Cong., 1st Sess. (1953). See also Hearings on H. R. 459, H. R. 3235, and H. R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 82d Cong., 2d Sess. [**756] (1952) (hereinafter 1952 Hearings). The failure of Congress to write a tribal-consent provision into the transfer provision applicable to option States as well as its failure to consult with the tribes during the final deliberations on Pub. L. 280

provide ample evidence of this. ³³

FOOTNOTES

³² That policy was formally announced in H. R. Con. Res. 108, 67 Stat. B132, approved on July 27, 1953, the same day that Pub. L. 280 was passed by the House. 99 Cong. Rec. 9968 (1953). As stated in H. R. Con. Res. 108, the policy of Congress was "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship. . . ."

This policy reflected a return to the philosophy of the General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388, as amended, 25 U. S. C. § 331, popularly known as the Dawes Act, a philosophy which had been rejected with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984.

In *Bryan v. Itasca County*, 426 U.S. 373, the Court emphasized that Pub. L. 280 was not a termination measure and should not be construed as such. Our discussion here is not to the contrary. The parties agree that Pub. L. 280 reflected an assimilationist philosophy. That Congress intended to facilitate assimilation when it authorized a transfer of jurisdiction from the Federal Government to the States does not necessarily mean, however, that it intended in Pub. L. 280 to terminate tribal self-government. Indeed, the Tribe has argued that even after the transfer tribal courts retain concurrent jurisdiction in areas in which they formerly shared jurisdiction with the Federal Government. This issue, however, is not within the scope of our order noting probable jurisdiction, see n. 20, *supra*, and we do not decide it here.

³³ These features of Pub. L. 280 have attracted extensive criticism. See generally Goldberg, *supra* n. 29. Indeed, the experience of the Yakima Nation is in itself sufficient to demonstrate why the Act has provoked so much criticism. In 1952, in connection with the introduction of bills that proposed a general jurisdictional transfer, see 1952 Hearings, a representative of the Yakimas testified that the Tribe was opposed to the extension of state jurisdiction on the Yakima Reservation. He stated:

"The Yakima Indians . . . feel that in the State Courts they will not be treated as well as they are in the Federal courts, because they believe that many of the citizens of the State are still prejudiced against the Indians.

"They are now under the Federal laws and have their own tribal laws, customs, and regulations. This system is working well and the Yakima Tribe believes that it should be continued and not changed at this time." *Id.*, at 84-85.

In 1953, when the Indian Affairs Subcommittee of the House Committee on Indian Affairs considered the final version of Pub. L. 280, the Committee was again aware that the Yakima Nation opposed state jurisdiction. The House Report accompanying H. R. 1063 contains a letter from the Department of the Interior listing the Tribe as among those opposed to "being subjected to State jurisdiction" and having a "tribal law-and-order organization that functions in a reasonably satisfactory manner." H. R. Rep. No. 848, 83d Cong., 1st Sess., 7 (1953). Had Washington been included among the mandatory States, it is thus quite possible that the Yakima Reservation would have been excepted.

[*490] Indeed, the circumstances surrounding the passage of Pub. L. 280 in themselves fully bear out the State's general thesis that Pub. L. 280 was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States. Public Law 280 originated in a series of individual bills introduced in the 83d Congress to transfer jurisdiction to the five willing States which eventually were covered in §§ 2 and 4. ³⁴ H. R. Rep. No. 848, *supra*. Those bills were

consolidated into H. R. 1063, which was referred to the House Committee on Interior and Insular Affairs for consideration. Closed hearings on the bills were held before the Subcommittee on Indian Affairs [***762] on June 29 and before the Committee on July 15, 1953.³⁵ During the opening session on June 29, [*491] Committee Members, counsel, and representatives of the Department of the Interior discussed various proposals designed to give H. R. 1063 general applicability. June 29 Hearings 1-22. It rapidly became clear that the Members favored a general bill. *Ibid.* At this point, Committee counsel noted that several States "have constitutional prohibitions against jurisdiction." *Id.*, at 23. There followed some discussion of the manner in which these States should be treated. On July 15, a version of § 6 was proposed. July 15 Hearings 6. After further discussion of the disclaimer problem, the "notwithstanding" clause was added, *id.*, at 9, and the language eventually enacted as § 6 was approved by the Committee that day. The speed and the context alone suggest that [**757] § 6 was designed to remove an obstacle to state jurisdiction, not to create one. And the discussion at the hearings, which in essence were markup sessions, makes this clear.³⁶

FOOTNOTES

³⁴ Similar bills had been introduced in the 82d Congress, and in public hearings held on those the idea of a general transfer was discussed at length. See 1952 Hearings.

³⁵ See unpublished transcript of Hearings on H. R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (June 29, 1953), and unpublished transcript of Hearings on H. R. 1063 before the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (July 15, 1953) (hereinafter cited as June 29 Hearings and July 15 Hearings, respectively). The transcripts of these hearings were first made available to this Court by the United States during the briefing of *Tonasket v. Washington*, 411 U.S. 451. They were again supplied in *Bryan v. Itasca County*, *supra*, and for this appeal have been reproduced in full in the Appendix to Brief for Appellee. These hearings, along with the House Report on H. R. 1063 as amended, H. R. Rep. No. 848, *supra*, and the Senate Report, which is virtually identical, S. Rep. No. 699, 83d Cong., 1st Sess. (1953), constitute the primary legislative materials on Pub. L. 280.

³⁶ On July 15, Committee counsel presented an amendment which was eventually to become § 6. He explained the effect of the amendment as follows:

"[The] legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply first to the eight states having constitutional or organic law impediments and would grant consent of the United States for them to remove such impediments and thus to acquire jurisdiction.

"The other amendment would apply to any other Indian states . . . who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction." July 15 Hearings 4.

Immediately after the proposed § 6 was read to the Subcommittee, the Chairman, Congressman D'Ewart, commented:

"I do not think we have to grant permission to a state to amend its own statutes." July 15 Hearings 7.

Committee counsel replied:

"Mr. D'Ewart, I believe the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act and it may be unnecessary, but by some state courts it may be interpreted as being necessary." *Ibid.*

The version of § 6 read to the Committee Members by counsel contained no reference to the

Enabling Acts but merely granted consent for the States to remove existing impediments to the assertion of jurisdiction over Indians. It was suggested that in order effectively to authorize the States to modify their organic legislation the clause should be more specific. This suggestion resulted in the proposal of the "notwithstanding" clause. The following exchange then took place:

"[Committee counsel]: I believe that clause 'notwithstanding any provisions of the Enabling Act' for such states might well be included. It would make clear that Congress was repealing the Enabling Act.

"[Congressman Dawson]: To give permission to amend their constitution.

"[Committee counsel]: I think that would help clarify the intent of the committee at the present time and of Congress if they favorably acted on the legislation." *Id.*, at 9.

The next day, July 16, the Committee filed its report on the substitute bill. H. R. Rep. No. 848, *supra*. The Report explains that § 6 would

"give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws."

The Committee hearings thus make clear an intention to remove any federal barriers to the assumption of jurisdiction by Enabling Act States. They also make clear that that consent was not to effect an immediate transfer of jurisdiction.

[*492] While [***763] some Committee Members apparently thought that § 6 States, as a matter of state law, would have to amend their constitutions in order to remove the disclaimers found there,³⁷ [*493] there is no indication that the Committee intended to impose any such requirement.³⁸

FOOTNOTES

³⁷ See June 29 Hearings 23; July 15 Hearings 6-11.

³⁸ The House passed the bill without debate on July 27, 1953. 99 Cong. Rec. 9962-9963. In the Senate, the bill was referred to the Committee on Interior and Insular Affairs. *Id.*, at 10065. That Committee held no hearings of its own, and it reported out the bill two days later without amendment. *Id.*, at 10217. The bill received only brief consideration on the Senate floor before it was passed on August 1, 1953. *Id.*, at 10783-10784.

[***LEdHR9B] [9B] [***LEdHR10B] [10B] We conclude that ^{HN12} § 6 of Pub. L. 280 does not require disclaimer States to amend their constitutions to make an effective acceptance of jurisdiction. We also conclude that any Enabling Act requirement of this nature was effectively repealed by § 6. If as a matter of state law a constitutional amendment is required, that procedure must -- as a matter of state law -- be followed. And if under state law a constitutional amendment is not required, disclaimer States must still take positive action before Pub. L. 280 jurisdiction can become effective. The Washington Supreme Court having determined that for purposes of the repeal of Art. XXVI of the Washington Constitution legislative action is sufficient,³⁹ and appropriate state legislation [**758] having been enacted, it follows that the State of Washington has satisfied the procedural requirements of § 6.

FOOTNOTES

39 The Tribe has intimated that the Washington Supreme Court's holding is incorrect. However, the procedure by which the disclaimer might be removed or repealed -- Congress having given its consent -- is as we have held a question of state law.

IV

*****LEdHR2B** [2B] We turn to the question whether the State was authorized under Pub. L. 280 to assume only partial subject-matter and geographic jurisdiction over Indian reservations within the State. ⁴⁰

FOOTNOTES

40 Both parties find support for their positions on this issue in the legislative history of the amendments to Pub. L. 280 in Title IV of the Indian Civil Rights Act of 1968, 82 Stat. 73. The 1968 legislation provides that States that have not extended criminal or civil jurisdiction to Indian country can make future extensions only with the consent of the tribes affected. 25 U. S. C. §§ 1321 (a), 1322 (a). The amendments also provide explicitly for partial assumption of jurisdiction. *Ibid.* In addition, they authorize the United States to accept retrocessions of jurisdiction, full or partial, from the mandatory and the § 7 States. 25 U. S. C. § 1323 (a). Section 7 itself was repealed with the proviso that the repeal was not intended to affect any cession made prior to the repeal. 25 U. S. C. § 1323 (b). Section 6 was re-enacted without change. 25 U. S. C. § 1324.

We do not rely on the 1968 legislation or its history, finding the latter equivocal, and mindful that the issues in this case are to be determined in accord with legislation enacted by Congress in 1953.

494** The argument that Pub. L. 280 does not permit this scheme of partial jurisdiction relies primarily upon **764** the text of the federal law. The main contention of the Tribe and the United States is that partial jurisdiction, because not specifically authorized, must therefore be forbidden. In addition, they assert that the interplay between the provisions of Pub. L. 280 demonstrates that § 6 States are required, if they assume any jurisdiction, to assume as much jurisdiction as was transferred to the mandatory States. ⁴¹ Pointing out that 18 U. S. C. § 1151 defines Indian country for purposes of federal jurisdiction as including an entire reservation notwithstanding "the issuance of any patent," they reason that when Congress in § 2 transferred to the mandatory States "criminal jurisdiction" over "offenses committed by or against Indians in the Indian country," it meant that all parts of Indian country were to be covered. Similarly, they emphasize that civil jurisdiction of comparable scope was transferred to the mandatory ***495** States. They stress that in both §§ 2 and 4, the consequence of state assumption of jurisdiction is that the state "criminal laws" and "civil laws of . . . general application" are henceforth to "have the same force and effect within . . . Indian country as they have elsewhere within the State." Finally, the Tribe and the United States contend that the congressional purposes of eliminating the jurisdictional hiatus thought to exist on Indian reservations, of reducing the cost of the federal responsibility for jurisdiction on tribal lands, and of assimilating the Indian tribes into the general state population are disserved by the type of checkerboard arrangement permitted by Chapter 36.

FOOTNOTES

41 Since entire reservations were exempted from coverage in three of the mandatory States, the Tribe and the United States concede that the option States could probably assume jurisdiction on a reservation-by-reservation basis. The United States also concedes that the word "or" in § 7 might be construed to mean that option States need not extend both civil and criminal jurisdiction.

*****LEdHR15** [15]We agree, however, with the State of Washington that statutory authorization for the state jurisdictional arrangement is to be found in the very words of § 7. That provision permits option States to assume jurisdiction "in such manner" as the people of the State shall "by affirmative legislative action, obligate and bind the State to assumption thereof." Once the requirements of § 6 have been satisfied, the terms of § 7 appear to govern the scope of jurisdiction conferred upon disclaimer States. The phrase "in such manner" in § 7 means at least that any option State can condition the assumption of full jurisdiction on the consent of an affected tribe. And here Washington has done no more than refrain from exercising the full measure of allowable jurisdiction without consent of the tribe affected.

****759** Section 6, as we have seen, was placed in the Act to eliminate possible organic law barriers to the assumption of jurisdiction by disclaimer States. The Tribe and the United States acknowledge that it is a procedural, not a substantive, section. The clause contains only one reference of relevance to the partial-jurisdiction question. This is the phrase "assumption of civil and criminal jurisdiction in accordance with the provisions of this Act." As both parties recognize, this phrase necessarily leads to other "provisions" of the Act for ***496** clarification of the substantive scope of the jurisdictional *****765** grant. The first question then is which other "provisions" of the Act govern. The second is what constraints those "provisions" place on the jurisdictional arrangements made by option States.

The Tribe argues as an initial matter that § 7 is not one of the "provisions" referred to by § 6. It relies in part upon the contrast between the phrase "assumption of civil and criminal jurisdiction" in § 6 and the disjunctive phrase "criminal offenses or civil causes of action" in § 7. From this distinction between the "civil and criminal jurisdiction" language of § 6 and the optional language in § 7, we are asked to conclude that § 6 States must assume full jurisdiction in accord with the terms applicable to the mandatory States even though § 7 States are permitted more discretion. We are unable to accept this argument, not only because the statutory language does not fairly support it, but also because the legislative history is wholly to the contrary. It is clear from the Committee hearings that the States covered by § 6 were, except for the possible impediments contained in their organic laws, to be treated on precisely the same terms as option States. ⁴²

FOOTNOTES

⁴² See June 29 and July 15 Hearings.

Section 6, as we have seen, was essentially an afterthought designed to accomplish the limited purpose of removing any barrier to jurisdiction posed by state organic law disclaimers of jurisdiction over Indians. All option States were originally treated under the aegis of § 7. ⁴³ The record of the Committee hearings makes clear that the sole purpose of § 6 was to resolve the disclaimer problem. ⁴⁴ Indeed, to the extent that the Tribe and the United States suggest that disclaimer States stand on a different footing from all other option States, their argument makes no sense. It would ascribe to Congress an ***497** intent to require States that by force of organic law barriers may have had only a limited involvement with Indian country to establish the most intrusive presence possible on Indian reservations, if any at all, and at the same time an intent to allow States with different traditions to exercise more restraint in extending the coverage of their law.

FOOTNOTES

⁴³ See *ibid.*

⁴⁴ See, e. g., July 15 Hearings 4.

The Tribe and the United States urge that even if, as we have concluded, all option States are ultimately governed by § 7, the reference in that section to assumption of jurisdiction "as provided for in [the] Act" should be construed to mean that the automatic-transfer provisions of §§ 2 and 4 must still apply. The argument would require a conclusion that the option States stand on the same footing as the mandatory States. This view is not persuasive. The mandatory States were consulted prior to the introduction of the single-state bills that were eventually to become Pub. L. 280. All had indicated their willingness to accept whatever jurisdiction Congress was prepared to transfer. This, however, was not the case with the option States. Few of those States had been consulted, and from the June 29 and July 15 hearings it is apparent that the drafters were primarily concerned with establishing a *****766** general transfer scheme that would facilitate, not impede, future action by other States willing to accept jurisdiction. It is clear that the all-or-nothing approach suggested by the Tribe would impede even the most responsible and sensitive jurisdictional arrangements designed *****760** by the States. To find that under Pub. L. 280 a State could not exercise partial jurisdiction, even if it were willing to extend full jurisdiction at tribal request, would be quite inconsistent with this basic history.

The language of § 7, which we have found applicable here, provides, we believe, surer guidance to the issue before us. ⁴⁵ ***498** The critical language in § 7 is the phrase permitting the assumption of jurisdiction "at such time and in such manner as the people of the State shall . . . obligate and bind the State to assumption thereof." Whether or not "in such manner" is fully synonymous with "to such extent," the phrase is at least broad enough to authorize a State to condition the extension of full jurisdiction over an Indian reservation on the consent of the tribe affected.

FOOTNOTES

⁴⁵ The 1968 amendments, which re-enacted § 6 without change as 25 U. S. C. § 1324 but repealed § 7, 25 U. S. C. § 1323 (b), and added substantive jurisdictional provisions covering "any State," see 25 U. S. C. §§ 1321, 1322, suggest that in the future the scope of jurisdiction for all States is to be the same.

The United States argues that a construction of Pub. L. 280 which permits selective extension of state jurisdiction allows a State to "pick and choose" only those subject-matter areas and geographical parts of reservations over which it would like to assume responsibility. Congress, we are told, passed Pub. L. 280 not as a measure to benefit the States, but to reduce the economic burdens associated with federal jurisdiction on reservations, to respond to a perceived hiatus in law enforcement protections available to tribal Indians, and to achieve an orderly assimilation of Indians into the general population. That these were the major concerns underlying the passage of Pub. L. 280 cannot be doubted. See *Bryan v. Itasca County*, 426 U.S., at 379.

But Chapter 36 does not reflect an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress. To the contrary, the State must assume total jurisdiction whenever a tribal request is made that it do so. Moreover, the partial geographic and subject-matter jurisdiction that exists in the absence of tribal consent is responsive to the law enforcement concerns that underlay the adoption of Pub. L. 280. State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on nontrust lands. The law enforcement hiatus that preoccupied the 83d Congress has to that extent been eliminated. On trust and restricted lands within the reservations ***499** whose tribes have not requested the coverage of state law, jurisdiction over crimes by Indians is, as it was when Pub. L. 280 was enacted, shared by the tribal and Federal Governments. To the extent that this shared federal and tribal responsibility is inadequate to preserve law and order, the tribes need only request and they will receive the protection of state law.

The State of Washington in 1963 *****767** could have unilaterally extended full jurisdiction

over crimes and civil causes of action in the entire Yakima Reservation without violating the terms of Pub. L. 280. We are unable to conclude that the State, in asserting a less intrusive presence on the Reservation while at the same time obligating itself to assume full jurisdictional responsibility upon request, somehow flouted the will of Congress. ^{HN13} ¶ A State that has accepted the jurisdictional offer in Pub. L. 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. For Congress surely did not deny an option State the power to condition its offer of full jurisdiction on tribal consent.

V

[***LEdHR3B] [3B] Having concluded that Chapter 36 violates neither the procedural nor the substantive terms of Pub. L. 280, we turn, finally, [**761] to the question whether the "checkerboard" pattern of jurisdiction applicable on the reservations of nonconsenting tribes is on its face invalid under the Equal Protection Clause of the Fourteenth Amendment. ⁴⁶ The Court of Appeals [**500] for the Ninth Circuit concluded that it is, reasoning that the land-title classification is too bizarre to meet "any formulation of the rational basis test." 552 F.2d, at 1335. The Tribe advances several different lines of argument in defense of this ruling.

FOOTNOTES

⁴⁶ The Court of Appeals did not disturb the finding of the District Court that Chapter 36 had not been applied on the Yakima Reservation to discriminate against the Tribe or any of its members. The District Court found that the governmental legal services available to the Tribe and its members were not significantly different from those offered to other rural and city residents of Yakima County. It also concluded that the distinctions drawn between non-Indians and Indians in the statute were not motivated by a discriminatory purpose. In view of these findings, our inquiry here is limited to the narrow question whether the distinctions drawn in Chapter 36 on their face violate the Equal Protection Clause of the Fourteenth Amendment.

First, it argues that the classifications implicit in Chapter 36 are racial classifications, "suspect" under the test enunciated in *McLaughlin v. Florida*, 379 U.S. 184, and that they cannot stand unless justified by a compelling state interest. Second, it argues that its interest in self-government is a fundamental right, and that Chapter 36 -- as a law abridging this right -- is presumptively invalid. Finally, the Tribe argues that Chapter 36 is invalid even if reviewed under the more traditional equal protection criteria articulated in such cases as *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307. ⁴⁷

FOOTNOTES

⁴⁷ The Court of Appeals limited its holding to the land-tenure classification. The Tribe, in support of the judgment, has argued that the Chapter 36 classifications based on the tribal status of the offender and on whether a juvenile is involved are also facially invalid. In our view these status classifications of Chapter 36 are indistinguishable from the interrelated land-tenure classification so far as the Equal Protection Clause is concerned.

[***LEdHR16] [16] [***LEdHR17] [17] We agree with the Court of Appeals to the extent that its opinion rejects the first two of these arguments and reflects a judgment that ^{HN14} ¶ Chapter 36 must be sustained [***768] against an Equal Protection Clause attack if the

classifications it employs "rationally [further] the purpose identified by the State." *Massachusetts Bd. of Retirement v. Murgia*, *supra*, at 314. It is settled that ^{HN15} "the unique legal status of Indian tribes under [*501] federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535, 551-552. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub. L. 280. And many of the classifications made by Chapter 36 are also made by Pub. L. 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, e. g., *United States v. McBratney*, 104 U.S. 621. For these reasons, we find the argument that such classifications are "suspect" an untenable one. The contention that Chapter 36 abridges a "fundamental right" is also untenable. It is well established that ^{HN16} Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. See, e. g., *United States v. Wheeler*, 435 U.S. 313. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power. ⁴⁸

FOOTNOTES

⁴⁸ This is not to hold that Pub. L. 280 was a termination measure. Whether there is concurrent tribal and state jurisdiction on some areas of the Reservation is an issue we do not decide. See n. 32, *supra*.

[**762] [***LEdHR18] [18] [***LEdHR19] [19] The question that remains, then, is whether the lines drawn by Chapter 36 fail to meet conventional Equal Protection Clause criteria, as the Court of Appeals held. ^{HN17} Under those criteria, legislative classifications are valid unless they bear no rational relationship to the State's objectives. *Massachusetts Bd. of Retirement v. Murgia*, *supra*, at 314. ^{HN18} State legislation "does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect." [*502] *Dandridge v. Williams*, 397 U.S. 471, 485. Under these standards we have no difficulty in concluding that ^{HN19} Chapter 36 does not offend the Equal Protection Clause.

The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction. See *Seymour v. Superintendent*, 368 U.S. 351; *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463. Chapter 36 is fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands. The land-tenure classification made by the State is neither an irrational [***769] nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Indeed, many of the rules developed in this Court's decisions in cases accommodating the sovereign rights of the tribes with those of the States are strikingly similar. See, e. g., *United States v. McBratney*, *supra*; *Draper v. United States*, 164 U.S. 240; *Williams v. Lee*, 358 U.S. 217; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164. In short, ^{HN20} checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution.

For the reasons set out in this opinion, the judgment of the Court of Appeals is reversed.

It is so ordered.

DISSENT BY: MARSHALL

DISSENT

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

For over 140 years, the Court has resolved ambiguities in statutes, documents, and treaties that affect retained tribal sovereignty in favor of the Indians. ¹ This interpretive principle [*503] is a response to the unique relationship between the Federal Government and the Indian people, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). More fundamentally, the principle is a doctrinal embodiment of "the right of [Indian nations] to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), a right emphatically reaffirmed last Term in [*763] *United States v. Wheeler*, 435 U.S. 313, 322-330 (1978). Although retained tribal sovereignty "exists only at the sufferance of Congress," *id.*, at 323, the States may not encroach upon an Indian nation's internal self-government until Congress has unequivocally sanctioned their presence within a reservation. See *ibid.*; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-169, 172-173; *Worcester v. Georgia*, 6 Pet. 515, 554, 557, 561 (1832); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (MARSHALL, J., dissenting).

FOOTNOTES

¹ *E. g.*, *Worcester v. Georgia*, 6 Pet. 515, 580-582 (1832) (McLean, J., concurring); *The Kansas Indians (Wan-zop-e-ah v. Board of Comm'rs of the County of Miami)*, 5 Wall. 737, 760 (1867); *Jones v. Meehan*, 175 U.S. 1, 11-12 (1899); *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Carpenter v. Shaw*, 280 U.S. 363, 366-367 (1930); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353-354 (1941); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 n. 2 (1968); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173-175, and n. 13 (1973); *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976).

While the Court in its discussion of the disclaimer issue professes to follow this settled principle of statutory [***770] interpretation, *ante*, at 484, it completely ignores the rule when addressing Washington's assertion of partial jurisdiction. In my view, the language and legislative history of Pub. L. 280 do not unequivocally authorize States to assume the type of selective geographic and subject-matter jurisdiction that Washington asserted in 1963. ² Because our precedents compel [*504] us to construe the statute in favor of the Indians, I respectfully dissent.

FOOTNOTES

² Since I would invalidate Washington's jurisdictional arrangement on this ground, I need not address the disclaimer issue. For present purposes I will assume that Washington was not required to amend its constitutional disclaimer of authority over Indian lands before it could exercise power over the Reservation.

As is evident from the majority opinion, the text of Pub. L. 280 does not on its face empower States to assert partial geographic or subject-matter jurisdiction over Indian reservations. ³ The statute refers without limitation to "criminal" and "civil" jurisdiction. Nevertheless, because States could have conditioned their exercise of full jurisdiction on the consent of affected tribes, *ante*, at 495, 498, and because Pub. L. 280 would have permitted Washington to extend full jurisdiction over the Yakima Indian Reservation without consulting the Tribe, *ante*, at 499, the Court concludes that the States can unilaterally assert less than full jurisdiction.

FOOTNOTES

³ It may be that the disjunctive language of § 7 allows option States to exercise either criminal or civil jurisdiction. See *ante*, at 496-497, and n. 41. And perhaps extension of jurisdiction reservation by reservation is also permissible. See *ante*, at 494 n. 41. But neither of these questions is posed by this case. The issue presented here is whether the language of Pub. L. 280 authorizes any patchwork jurisdictional arrangement that suits the States' peculiar interests.

I agree that Pub. L. 280 permits option States to refuse jurisdiction absent the consent of the Indians, and that prior to the 1968 amendments of the Act, ⁴ Washington could have unilaterally extended full jurisdiction over the Reservation. But the majority does not explain how the statutory language governing exercise of *full* jurisdiction allows the States to exercise piecemeal jurisdiction. That Washington has done no more than "refrain from exercising the full measure of allowable jurisdiction," *ante*, at 495, raises but does not answer [*505] the critical question whether Pub. L. 280 sanctions this jurisdictional arrangement.

FOOTNOTES

⁴ These amendments prohibit States from exercising further jurisdiction over Indian reservations after 1968 without tribal consent. 25 U. S. C. §§ 1321 (a), 1322 (b), 1326.

The sparse legislative history of Pub. L. 280, like the statutory language, says nothing about the propriety of partial jurisdictional schemes. In light of the expressed reluctance of at least one State to assume the financial burden that jurisdiction over Indian territory entails, ⁵ this silence is particularly instructive. [***771] Although selective assertion of jurisdiction within reservations [**764] would obviously ameliorate such fiscal concerns, at no point in the congressional deliberations was it advanced as a solution. Rather, Congress permitted the option States to refrain from exercising full jurisdiction until they could meet their financial obligations. ⁶ The legislative focus was clearly on full-fledged assumption of jurisdiction. ⁷

FOOTNOTES

⁵ See Hearings on H. R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 8-10, 14-15 (1953) (hereinafter 1953 Subcommittee Hearings); Hearings on H. R. 1063 before the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 3, 7, 13, 17 (1953) (hereinafter 1953 Committee Hearings); H. R. Rep. No. 848, 83d Cong., 1st Sess., 7 (1953).

⁶ See 1953 Committee Hearings 13; H. R. Rep. No. 848, *supra*, at 6-7.

⁷ See, e. g., 1953 Subcommittee Hearings 3, 4, 5, 7, 17; 1953 Committee Hearings 3, 8; 99 Cong. Rec. 10782-10783 (1953) (statement of Sen. Thye; letter from Gov. Anderson to Sen. Thye).

To disregard this legislative focus and allow assumption of partial jurisdiction undermines an important purpose behind Pub. L. 280. In enacting the statute, Congress sought to eliminate the serious "hiatus in law-enforcement authority" on Indian reservations, H. R. Rep. No. 848, *supra* n. 5, at 6, which was attributable in large part to the division of law enforcement functions among federal, state, and Indian authorities. ⁸ It intended to accomplish this goal by granting [*506] to the States the authority previously exercised by the Federal Government, thereby simplifying the administration of law on Indian reservations. See 1953 Subcommittee Hearings

7. Washington's complex jurisdictional system, dependent on the status of the offender, the location of the crime, and the type of offense involved, by no means simplifies law enforcement on the Yakima Reservation. Cf. 1 National American Indian Court Judges Assn., *Justice and the American Indian: The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations 6-13* (1974). To the contrary, it exacerbates the confusion that the statute was designed to redress.

FOOTNOTES

⁸ See H. R. Rep. No. 848, *supra*, at 5-6; 1953 Subcommittee Hearings 2-3, 21-22; Hearings on H. R. 459, H. R. 3235 and H. R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 82d Cong., 2d Sess., 14 (1952) (statement of Rep. D'Ewart); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535, 541-543 (1975).

Had Congress intended to condone exercise of limited subject-matter jurisdiction on a random geographic basis, it could have easily expressed this purpose. See *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976); *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S., at 173-175, and n. 13; *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Creek County Comm'rs v. Seber*, 318 U.S. 705, 713 (1943). Indeed, it did so in the 1968 amendments to the Act when it authorized partial criminal or civil jurisdiction by subject matter, geography, or both, but only with the Indians' consent. 25 U. S. C. §§ 1321 (a), 1322 (a). ⁹ I [***765] am unwilling to [*507] presume [***772] that Congress' failure in 1953 to sanction piecemeal jurisdiction in similar terms was unintentional. In any event, it is indisputable that the statute does not unambiguously authorize assertion of partial jurisdiction. If we adhere more than nominally to the practice of resolving ambiguities in favor of the Indians, then Washington's jurisdictional arrangement cannot stand.

FOOTNOTES

⁹ The legislative history of the 1968 amendments provides further evidence that Congress in 1953 did not unambiguously sanction assertion of selective jurisdiction. There were numerous conflicting opinions on whether the new provisions authorizing States to assume partial jurisdiction effected a change in the law. In 1965, the Department of the Interior had intimated that partial assumption of criminal jurisdiction was a novel idea when it recommended partial jurisdiction in civil matters, but concluded that "extension of criminal jurisdiction to the States on a piecemeal basis needs to be considered further." Hearings on Constitutional Rights of the American Indian before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 321 (1965) (letter from Frank J. Barry, Acting Secy. of the Interior, to Sen. Eastland). This letter also noted that the Department of Justice was opposed to selective extensions of criminal jurisdiction because of the likelihood of unnecessary confusion in the enforcement of criminal laws. *Ibid.*

However, in 1968, Assistant Secretary of the Interior Harry R. Anderson believed that authority to assume piecemeal jurisdiction was implicit in Pub. L. 280. Hearings on H. R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess., 25 (1968) (letter to Rep. Wayne N. Aspinall). By contrast, Congressman Aspinall, who played a fundamental role in drafting Pub. L. 280, stated that the new partial-jurisdiction provisions substantially altered prior law. 114 Cong. Rec. 9615 (1968). Similarly, Arthur Lazarus, an attorney representing six Tribes, argued that "[one] of the major objections to Public Law 280 is its 'all or nothing' approach, requiring States to assume all jurisdiction on Indian reservations if any jurisdiction is desired." 1968 Hearings, *supra*, at 116. Deputy Attorney General Warren Christopher was noncommittal on the reading of prior law. *Id.*, at 28 (letter to Rep. Aspinall).

This subsequent legislative consideration of the precise issue before us sheds light on the

intent of Congress in 1953. See *Mattz v. Arnett*, 412 U.S. 481, 505 n. 25 (1973); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 472-475 (1976); *Bryan v. Itasca County*, 426 U.S., at 386. Given the congressional and executive equivocation, the Court's apparent certainty is unfounded.

Accordingly, I dissent.

REFERENCES

16 Am Jur 2d, Constitutional Law 534; 41 Am Jur 2d, Indians 63-68

28 USCS 1360 note

US L Ed Digest, Constitutional Law 488; Courts 733

ALR Digests, Constitutional Law 427; Courts 340

L Ed Index to Annos, Equal Protection of the Laws; Jurisdiction

ALR Quick Index, Equal Protection of Law; Jurisdiction

Federal Quick Index, Equal Protection of the Laws; Jurisdiction

Annotation References:

Precedential weight of Supreme Court's memorandum decision summarily affirming lower federal court judgment on appeal or summarily dismissing appeal from state court. 45 L Ed 2d 791.

Supreme Court's application of vagueness doctrine to noncriminal statutes or ordinances. 40 L Ed 2d 823.

In

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APPENDIX - C

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532 U.S. 411, *, 121 S. Ct. 1589, **;
149 L. Ed. 2d 623, ***; 2001 U.S. LEXIS 3374

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C & L ENTERPRISES, INC., PETITIONER v. CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

No. 00-292

SUPREME COURT OF THE UNITED STATES

532 U.S. 411; 121 S. Ct. 1589; 149 L. Ed. 2d 623; 2001 U.S. LEXIS 3374; 69 U.S.L.W. 4290; 2001 Cal. Daily Op. Service 3375; 2001 Daily Journal DAR 4145; 2001 Colo. J. C.A.R. 2225; 14 Fla. L. Weekly Fed. S 219

March 19, 2001, Argued
April 30, 2001, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF OKLAHOMA, SECOND DIVISION.

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner contractor sued respondent Indian tribe in state court to enforce an arbitration award. The Court of Civil Appeals of Oklahoma, Second Division, determined that respondent was immune from suit and dismissed the case. Petitioner contractor's petition for writ of certiorari to the state appellate court was granted regarding the impact of the arbitration agreement on respondent's plea of immunity from suit.

OVERVIEW: Respondent and petitioner entered into a commercial, off-reservation contract in which petitioner agreed to install a room on a building owned by respondent. The contract contained an arbitration clause and a choice-of-law clause. Before petitioner commenced performance, respondent decided to change the roofing material and retained another company to install the roof. Petitioner submitted an arbitration demand, and the arbitrator rendered an award in favor of petitioner. The state district court confirmed the arbitration award, but the state appellate court dismissed petitioner's case based on respondent's sovereign immunity. On certiorari review, the supreme court reversed the judgment. Respondent waived its immunity from suit in state court when it expressly agreed (1) to arbitrate disputes with petitioner relating to the contract, (2) to the governance of Oklahoma law, and (3) to the enforcement of arbitral awards "in any court having jurisdiction thereof."

OUTCOME: Judgment was reversed because respondent waived its sovereign immunity from petitioner's suit by clearly consenting to arbitration and to the enforcement of arbitral awards in state court.

CORE TERMS: tribe's, arbitration, immunity, arbitration clause, waived, sovereign immunity, tribal, arbitration award, arbitral, competent jurisdiction, off-reservation, arbitrator, waiver of immunity, contractual, consented, ambiguous, waive, contractor, federally, arbitrate,

immune, roof, Oklahoma Uniform Arbitration Act, applicable law, construction industry, jurisdiction to enforce, suit to enforce, real world, choice-of-law, sovereign's

LEXISNEXIS® HEADNOTES

 Hide

Civil Procedure > Federal & State Interrelationships > Choice of Law > Forum & Place 

Civil Procedure > Alternative Dispute Resolution > Judicial Review 

HN1  See Okla. Stat. tit. 15, § 802.B (1993).

Civil Procedure > Alternative Dispute Resolution > Judicial Review 

HN2  Oklahoma's Uniform Arbitration Act defines "court" as any court of competent jurisdiction of the state. Okla. Stat. tit. 15, § 802.B (1993). More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Authority & Jurisdiction 

Governments > Native Americans > Tribal Sovereign Immunity 

HN3  Indian tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Authority & Jurisdiction 

Governments > Native Americans > Tribal Sovereign Immunity 

HN4  To abrogate tribal immunity, Congress must "unequivocally" express that purpose. Similarly, to relinquish its immunity, a tribe's waiver must be "clear." More Like This Headnote | *Shepardize*: Restrict By Headnote

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview 

Civil Procedure > Alternative Dispute Resolution > Judicial Review 

HN5  See Okla. Stat. tit. 15, § 802.A (1993).

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SYLLABUS

Respondent, a federally recognized Indian Tribe, proposed and entered into a standard form construction contract with petitioner C & L Enterprises, Inc. (C & L), for the installation of a roof

on a Tribe-owned commercial building in Oklahoma. The property in question lies outside the Tribe's reservation and is not held by the Federal Government in trust for the Tribe. The contract contains two key provisions. First, a clause provides that "all . . . disputes . . . arising out of . . . the Contract . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association The award rendered by the arbitrator . . . shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." The referenced American Arbitration Association Rules provide: "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." Second, the contract includes a choice-of-law clause that reads: "The contract shall be governed by the law of the place where the Project is located." Oklahoma has adopted a Uniform Arbitration Act, which instructs that "the making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." The Act defines "court" as "any court of competent jurisdiction of this state." After execution of the contract but before C & L commenced performance, the Tribe decided to change the roofing material specified in the contract. The Tribe solicited new bids and retained another company to install the roof. C & L, claiming that the Tribe had dishonored the contract, submitted an arbitration demand. The Tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. It notified the arbitrator, however, that it had several substantive defenses to C & L's claim. The arbitrator received evidence and rendered an award in favor of C & L. The contractor filed suit to enforce the award in the District Court of Oklahoma County, a state court of general, first instance, jurisdiction. The Tribe appeared in court for the limited purpose of moving to dismiss the action on the ground that, as a sovereign, it was immune from suit. The District Court denied the motion and entered a judgment confirming the award. The Oklahoma Court of Civil Appeals affirmed. While the Tribe's certiorari petition was pending here, this Court decided *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 140 L. Ed. 2d 981, 118 S. Ct. 1700, holding that an Indian tribe is not subject to suit in a state court -- even for breach of contract involving off-reservation commercial conduct -- unless "Congress has authorized the suit or the tribe has waived its immunity," *id.*, at 754, 760. On remand for reconsideration in light of *Kiowa*, the Court of Civil Appeals held that the Tribe here was immune from suit on its contract with C & L. Although noting that the arbitration agreement and the contract language as to judicial enforcement seem to indicate the Tribe's willingness to expose itself to suit on the contract, the court concluded that the Tribe had not waived its suit immunity with the requisite clarity. The court therefore instructed the trial court to dismiss the case.

Held: By the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of C & L. Like *Kiowa*, this case arises out of the breach of a commercial, off-reservation contract by a federally recognized Indian Tribe. C & L does not contend that Congress has abrogated tribal immunity in this setting. The question presented is whether the Tribe has waived its immunity. To relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905. The construction contract's arbitration provision and related prescriptions lead to the conclusion that the Tribe in this case has waived its immunity with the requisite clarity. The arbitration clause requires resolution of all contract-related disputes between the parties by binding arbitration; ensuing arbitral awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof." For governance of arbitral proceedings, the clause specifies American Arbitration Association Rules, under which "the arbitration award may be entered in any federal or state court having jurisdiction thereof." The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question is the Oklahoma state court in which C & L filed suit. By selecting Oklahoma law ("the law of the place where the Project is located") to govern the contract, the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act, which prescribes that, when "an agreement . . . provides for arbitration in" Oklahoma, jurisdiction to enforce the agreement vests in "any court of competent jurisdiction of this state." On any sensible reading of the Act, the District Court of Oklahoma County, a local court of general jurisdiction, fits that statutory description. This Court rejects the Tribe's contention that an arbitration clause is not a waiver of immunity from suit, but simply a

waiver of the parties' rights to a court trial of contractual disputes. Under the clause, the Tribe recognizes, the parties must arbitrate. The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. Also rejected is the Tribe's assertion that a form contract, designed principally for private parties who have no immunity to waive, cannot establish a clear waiver of tribal suit immunity. In appropriate cases, this Court applies the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. That rule is inapposite here for two evident reasons. First, the contract is not ambiguous. Second, the Tribe did not find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on the Tribe. Pp. 5-11.

Reversed and remanded.

COUNSEL: John D. Mashburn argued the cause for petitioner.

Gregory S. Coleman argued the cause for Texas, et al., as amici curiae, by special leave of court.

Michael Minnis argued the cause for respondent.

Gregory G. Garre argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: GINSBURG, J., delivered the opinion for a unanimous Court.

OPINION BY: GINSBURG

OPINION

[**628] [**1592] [*414] JUSTICE GINSBURG delivered the opinion of the Court.

[**LEdHR1A] [1A] In *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 140 L. Ed. 2d 981, 118 S. Ct. 1700 (1998), this Court held that an Indian tribe is not subject to suit in a state court -- even for breach of contract involving off-reservation commercial conduct -- unless "Congress has authorized the suit or the tribe has waived its immunity." *Id.*, at 754. This case concerns the impact of an arbitration agreement on a tribe's plea of suit immunity. The document on which the case centers is a standard form construction contract signed by the parties to govern the installation of a foam roof on a building, the First Oklahoma Bank, in Shawnee, Oklahoma. The building and land are owned by an Indian Tribe, the Citizen Potawatomi Nation (Tribe). The building is commercial, and the land is off-reservation, nontrust property. The form contract, which was proposed by the Tribe and accepted by the contractor, C & L Enterprises, Inc. (C & L), contains an arbitration clause.

The question presented is whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards "in any court having jurisdiction thereof." We hold that, by the clear import of the arbitration clause, the [**629] Tribe is amenable to a state-court suit to enforce an arbitral award in favor of contractor C & L.

I

Respondent Citizen Potawatomi Nation is a federally recognized Indian Tribe. In 1993, it entered into a contract with petitioner C & L for the installation of a roof on a Shawnee, Oklahoma, building owned by the Tribe. The building, [*415] which housed the First Oklahoma Bank, is

not on the Tribe's reservation or on land held by the Federal Government in trust for the Tribe.

The contract at issue is a standard form agreement copyrighted by the American Institute of Architects. The Tribe proposed the contract; details not set out in the form were inserted by the Tribe and its architect. Two provisions of the contract are key to this case. First, the contract contains an arbitration clause:

"All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable **[**1593]** law in any court having jurisdiction thereof." App. to Pet. for Cert. 46.

The American Arbitration Association Rules to which the clause refers provide: "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." American Arbitration Association, Construction Industry Dispute Resolution Procedures, R-48(c) (Sept. 1, 2000).

Second, the contract includes a choice-of-law clause that reads: "The contract shall be governed by the law of the place where the Project is located." App. to Pet. for Cert. 56. **HN1** Oklahoma has adopted a Uniform Arbitration Act, which instructs that "the making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." Okla. Stat., Tit. 15, § 802.B **[*416]** (1993). **HN2** The Act defines "court" as "any court of competent jurisdiction of this state." *Ibid.*

After execution of the contract but before C & L commenced performance, the Tribe decided to change the roofing material from foam (the material specified in the contract) to rubber guard. The Tribe solicited new bids and retained another company to install the roof. C & L, claiming that the Tribe had dishonored the contract, submitted an arbitration demand. The Tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. It notified the arbitrator, however, that it had several substantive defenses to C & L's claim. On consideration of C & L's evidence, the arbitrator rendered an award in favor of C & L for \$ 25,400 in damages (close to 30% of the contract price), plus attorney's fees and costs.

Several weeks later, C & L filed suit to enforce the arbitration award in the District Court of Oklahoma County, a state court of general, first **[***630]** instance, jurisdiction. The Tribe appeared specially for the limited purpose of moving to dismiss the action on the ground that the Tribe was immune from suit. The District Court denied the motion and entered a judgment confirming the award.

The Oklahoma Court of Civil Appeals affirmed, holding that the Tribe lacked immunity because the contract giving rise to the suit was "between an Indian tribe and a non-Indian" and was "executed outside of Indian Country." *Id.*, at 14 (citation omitted). The Oklahoma Supreme Court denied review, and the Tribe petitioned for certiorari in this Court.

While the Tribe's petition was pending here, the Court decided *Kiowa*, holding: **HN3** "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." 523 U.S. at 760. *Kiowa* reconfirmed: "An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." **[*417]** *Id.*, at 754. Thereafter, we granted the Tribe's petition in this case, vacated the judgment of the Court of Civil Appeals, and remanded for reconsideration in light of *Kiowa*. 524 U.S. 901, 141 L. Ed. 2d 136, 118 S. Ct. 2058 (1998).

On remand, the Court of Civil Appeals changed course. It held that, under *Kiowa*, the Tribe here was immune from suit on its contract with C & L, despite the contract's off-reservation subject

matter. App. to Pet. for Cert. 4-5. The court then addressed whether the Tribe had waived its immunity. "The agreement of [the] Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction," the court observed, "seem to indicate a willingness on [the] Tribe's part to expose itself to suit on the contract." *Id.*; at 7. But, the court quickly added, "the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression." *Ibid.* Concluding that the Tribe had not waived its suit immunity with the requisite **[**1594]** clarity, the appeals court instructed the trial court to dismiss the case. The Oklahoma Supreme Court denied C & L's petition for review.

Conflicting with the Oklahoma Court of Civil Appeals' current decision, several state and federal courts have held that an arbitration clause, kin to the one now before us, expressly waives tribal immunity from a suit arising out of the contract. See *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 661 (CA7 1996) (clause requiring arbitration of contractual disputes and authorizing entry of judgment upon arbitral award "in any court having jurisdiction thereof" expressly waived Tribe's immunity); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) (same); *Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 703 P.2d 502 (Ct. App. 1985) (same). But cf. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (CA9 1989) (clause requiring arbitration of contractual disputes did not expressly waive Tribe's immunity). **[*418]** We granted certiorari to resolve this conflict, 531 U.S. 956, 121 S. Ct. 377, 148 L. Ed. 2d 291 (2000), and now reverse.

[*631]** II

Kiowa, in which we reaffirmed the doctrine of tribal immunity, involved an off-reservation, commercial agreement (a stock purchase) by a federally recognized Tribe. The Tribe signed a promissory note agreeing to pay the seller \$ 285,000 plus interest. The note recited: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." 523 U.S. at 753-754. The Tribe defaulted, the seller sued on the note in state court, and the Tribe asserted sovereign immunity. We upheld the plea. Tribal immunity, we ruled in *Kiowa*, extends to suits on off-reservation commercial contracts. *Id.*, at 754-760. The Kiowa Tribe was immune from suit for defaulting on the promissory note, we held, because "Congress had not abrogated [the Tribe's] immunity, nor had petitioner waived it." *Id.*, at 760.

Like *Kiowa*, this case arises out of the breach of a commercial, off-reservation contract by a federally recognized Indian Tribe. The petitioning contractor, C & L, does not contend that Congress has abrogated tribal immunity in this setting. The question presented is whether the Tribe has waived its immunity.

[*LEdHR1B]** [1B] **[***LEdHR2]** [2] ^{HN4} To abrogate tribal immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399, 47 L. Ed. 2d 114, 96 S. Ct. 948 (1976)). Similarly, to relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991). We are satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award.

The construction contract's provision for arbitration and related prescriptions lead us to this conclusion. The arbitration **[*419]** clause requires resolution of all contract-related disputes between C & L and the Tribe by binding arbitration; ensuing arbitral awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof." App. to Pet. for Cert. 46. For governance of arbitral proceedings, the arbitration clause specifies American Arbitration Association Rules for the construction industry, *ibid.*, and under those Rules, "the arbitration award may be entered in any federal or state court having jurisdiction thereof," American Arbitration Association, Construction Industry Dispute Resolution Procedures, R-48(c) (Sept. 1, 2000).

[*LEdHR3A]** [3A] The contract's choice-of-law clause makes it plain enough that a "court having jurisdiction" to enforce the award in question **[**1595]** is the Oklahoma state court in

which C & L filed suit. By selecting Oklahoma law ("the law of the place where the Project is located") to govern the contract, App. to Pet. for Cert. 56, the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act, *id.* at 46 ("judgment may be entered upon [the arbitration award] in accordance with applicable law"); Okla. Stat., Tit. 15, § 802.A (1993) (*HNS*) "This act shall apply to . . . a provision in a written contract to submit to arbitration any controversy [***632] thereafter arising between the parties." ¹

[***LEdHR3B] [3B]

FOOTNOTES

¹ The United States, as *amicus* supporting the Tribe, urges us to remain within the "four corners of the contract" and refrain from reliance on "secondary sources." Brief for United States as *Amicus Curiae* 19, and n. 7. The American Arbitration Association Rules and the Uniform Arbitration Act, however, are not secondary interpretive aides that supplement our reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself.

[***LEdHR4] [4] [***LEdHR5A] [5A]The Uniform Act in force in Oklahoma prescribes that, when "an agreement . . . provides for arbitration in this state," *i.e.*, in Oklahoma, jurisdiction to enforce the agreement vests in "any court of competent jurisdiction of this [*420] state." § 802.B. On any sensible reading of the Act, the District Court of Oklahoma County, a local court of general jurisdiction, fits that statutory description. ²

[***LEdHR5B] [5B]

FOOTNOTES

² The United States argues that the Oklahoma Uniform Arbitration Act is inapplicable in this case because it does not reach all arbitrations properly held in Oklahoma, but only those in which the agreement explicitly "provides for arbitration in [Oklahoma]." Tr. of Oral Arg. 47-48 (referring to § 802.B). No Oklahoma authority is cited for this constricted reading of an Act that expressly "applies to . . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties." § 802.A. We decline to attribute to the Oklahoma lawmakers and interpreters a construction that so severely shrinks the Act's domain.

[***LEdHR1C] [1C]In sum, the Tribe agreed, by express contract, to adhere to certain dispute resolution procedures. In fact, the Tribe itself tendered the contract calling for those procedures. The regime to which the Tribe subscribed includes entry of judgment upon an arbitration award in accordance with the Oklahoma Uniform Arbitration Act. That Act concerns arbitration in Oklahoma and correspondingly designates as enforcement forums "courts of competent jurisdiction of [Oklahoma]." *Ibid.* C & L selected for its enforcement suit just such a forum. In a case involving an arbitration clause essentially indistinguishable from the one to which the Tribe and C & L agreed, the Seventh Circuit stated:

"There is nothing ambiguous about the language [of the arbitration clause]. The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law.

.....

"The [tribal immunity] waiver . . . is implicit rather than explicit only if a waiver of sovereign

immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that." *Sokaogon*, 86 F.3d at 659-660.

[*421] That cogent observation holds as well for the case we confront. ³

FOOTNOTES

³ Instructive here is the law governing waivers of immunity by foreign sovereigns. Cf. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759, 140 L. Ed. 2d 981, 118 S. Ct. 1700 (1998) ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries."). "Under the law of the United States . . . an agreement to arbitrate is a waiver of immunity from jurisdiction in . . . an action to enforce an arbitral award rendered pursuant to the agreement" Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b)(ii) (1987).

[***LEdHR6] [6]The Tribe strenuously urges, however, that an arbitration clause simply "is not a waiver of immunity from suit." Brief for Respondent 13. The phrase in the clause providing for enforcement of arbitration [**1596] awards "in any court having jurisdiction [***633] thereof," the Tribe maintains, "begs the question of what court has jurisdiction." *Id.*, at 22. As counsel for the Tribe clarified at oral argument, the Tribe's answer is "no court," on earth or even on the moon. Tr. of Oral Arg. 32-33. No court -- federal, state, or even tribal -- has jurisdiction over C & L's suit, the Tribe insists, because it has not expressly waived its sovereign immunity in any judicial forum. *Ibid.*; cf. *Sokaogon*, 86 F.3d at 660 (facing a similar argument, Seventh Circuit gleaned that counsel meant only a statement to this effect will do: "The tribe will not assert the defense of sovereign immunity if sued for breach of contract."). ⁴

FOOTNOTES

⁴ Relying on our state sovereign immunity jurisprudence, the United States maintains that "courts must be especially reluctant to construe ambiguous expressions as consent by a Tribe to be sued in state court." Brief for United States as *Amicus Curiae* 23; see also *id.*, at 25 (arguing that a State's generalized consent to suit, without an express selection of the forum in which suit may proceed, "should be construed narrowly as the State's consent to be sued in its *own* courts of competent jurisdiction, and not its consent to be subjected to suits in *another* sovereign's courts") (citing, e.g., *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 90 L. Ed. 862, 66 S. Ct. 745 (1946) (State statute authorizing suits against State in "any court of competent jurisdiction" did not waive State's immunity from suit in federal court)). But in this case, as we explained *supra*, at 6-7, the Tribe has plainly consented to suit in Oklahoma state court. We therefore have no occasion to decide whether parallel principles govern state and tribal waivers of immunity.

[*422] Instead of waiving suit immunity in any court, the Tribe argues, the arbitration clause waives simply and only the parties' rights to a court trial of contractual disputes; under the clause, the Tribe recognizes, the parties must instead arbitrate. Brief for Respondent 21 ("An arbitration clause is what it is: a clause submitting contractual disputes to arbitration."). The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. See *Eyak*, 658 P.2d at 760 ("We believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed."); *Val/Del*, 145 Ariz. at 565, 703 P.2d at 509 (because the Tribe has "agreed that any dispute would be arbitrated and the result entered

as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity"); cf. *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (CA8 1995) (agreement to arbitrate contractual disputes did not contain provision for court enforcement; court nonetheless observed that "disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense").⁵

FOOTNOTES

⁵ The Tribe's apparent concession -- that the arbitration clause embodies the parties' agreement to resolve disputes through arbitration -- is not altogether consistent with the Tribe's refusal to participate in the arbitration proceedings.

[*423] [*LEdHR1D] [1D] [***LEdHR7] [7] [***LEdHR8A] [8A]**The Tribe also asserts that a form contract, designed principally for private parties who have no **[***634]** immunity to waive, cannot establish a clear waiver of tribal suit immunity. Brief for Respondent 20; Tr. of Oral Arg. 27-28. In appropriate cases, we apply "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995) (construing form contract containing arbitration clause). That rule, however, is inapposite **[**1597]** here. The contract, as we have explained, is not ambiguous. Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe. Cf. *United States v. Bankers Ins. Co.*, 245 F.3d 315, 2001 U.S. App. LEXIS 4924, No. 00-1342, 2001 WL 293669, *3 (CA4, 2001), (where federal agency prepared agreement, including its arbitration provision, sovereign immunity does not shield the agency from engaging in the arbitration process).⁶

[*LEdHR8B] [8B]**

FOOTNOTES

⁶ The Tribe alternatively urges affirmance on the grounds that the contract is void under 25 U.S.C. § 81 and that the members of the Tribe who executed the contract lacked the authority to do so on the Tribe's behalf. These issues were not aired in the Oklahoma courts and are not within the scope of the questions on which we granted review. We therefore decline to address them.

* * *

[*LEdHR1E] [1E]**For the reasons stated, we conclude that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit. The judgment of the Oklahoma Court of Civil Appeals is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

REFERENCES

41 Am Jur 2d, Indians 9, 10

L Ed Digest, Indians 32

L Ed Index, Arbitration and Award; Indians

Annotation References:

Validity, under Federal Constitution, statutes, and treaties, of state or local tax as affected by its imposition on Indians, their property or activities, or in connection with an Indian reservation-- Supreme Court cases. 73 L Ed 2d 1506.

In

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APPENDIX - D

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94 Wn.2d 782, *; 620 P.2d 525, **;
1980 Wash. LEXIS 1417, ***

Allen D. Powell, Appellant, v. Harold Farris, Respondent

No. 46949

SUPREME COURT OF WASHINGTON

94 Wn.2d 782; 620 P.2d 525; 1980 Wash. LEXIS 1417

December 4, 1980

CASE SUMMARY

PROCEDURAL POSTURE: Appellant non-Indian challenged the judgment of the Superior Court for Pierce County (Washington), which dismissed for lack of jurisdiction over subject matter the action appellant brought for a dissolution of a partnership with appellee Indian and for an accounting. The appellate court certified the question to the court pursuant to Wash. Rev. Code § 2.06.030 and Wash. R. App. P. 4.2.

OVERVIEW: Appellant and appellee entered into a partnership with a third-party who was non-Indian. The purpose of the business relationship was to establish a smokeshop on the Puyallup Indian Reservation. The agreement provided that the third-party would deed certain property to appellee on the condition that he would arrange for restoration of Indian trust land status. Appellant was to provide the initial capital to establish the business. When the tribe revoked the license because of non-Indian participation, appellant sought to dissolve the partnership and to recover one-third of the profits. The court held that its sole issue was whether the state court had jurisdiction over the subject matter of an action for dissolution of a partnership and an accounting where appellee was an enrolled tribal Indian, appellant was a non-Indian, and the accounting was sought from proceeds of a business located on tribal trust land and licensed by the tribal council. The court concluded that state court jurisdiction over this matter would not infringe the sovereignty of the tribe. It was not asserted that the tribe had an interest in regulating a contract made off the reservation.

OUTCOME: The court vacated the order of dismissal and remanded to the trial court for further proceedings.

CORE TERMS: reservation, tribe's, tribal, partnership, accounting, Public Law, dissolution, infringe, own laws, state jurisdiction, smokeshop, matter jurisdiction, Indian Law, sovereignty, cigarette, assumed jurisdiction, tribal land, trust land, Acts of Congress, state action, state taxes, broad discretion, order of dismissal, assume jurisdiction, general store, principally, personally, equitable, depending, infringed

LEXISNEXIS® HEADNOTES

≡ Hide

Governments > Native Americans > Authority & Jurisdiction 

HN1 State power over Indians on a reservation is limited to the power granted by Congress in 25 U.S.C.S. § 1322. More Like This Headnote

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Property Rights

Governments > Native Americans > Taxation

HN2 Even without the jurisdiction conferred by Congress in Pub. L. No. 280, the state may exercise some jurisdiction over some reservation conduct. In particular, it may impose its laws on reservation conduct involving only non-Indians. It may, for example, impose a tax on a non-Indian's personal property held on tribal land. It may impose a tax on non-Indian customers of Indian retailers doing business on the reservation. An individual Indian who is off the reservation is subject to the laws of the State of Washington to the same extent that a non-Indian or alien is so subject. More Like This Headnote | *Shepardize*: Restrict By Headnote

Governments > Native Americans > Authority & Jurisdiction

HN3 The test for whether to allow state assertions of jurisdiction when a non-Indian brought an action against a reservation Indian is, absent governing Acts of Congress, whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. The state can protect its interest up to the point where tribal self-government would be affected. More Like This Headnote | *Shepardize*: Restrict By Headnote

Business & Corporate Law > General Partnerships > Dissolution & Winding Up > Dissolution > General Overview

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

HN4 Partnership dissolution is a common law form of action ordinarily heard in state courts of general jurisdiction. More Like This Headnote | *Shepardize*: Restrict By Headnote

Civil Procedure > Equity > General Overview

HN5 Since an accounting is an equitable action, the trial court has broad discretion to grant or deny it depending on all the facts and circumstances. What property may be levied upon to satisfy such a judgment is a question for the trial court. More Like This Headnote

HEADNOTES / SYLLABUS

Show

COUNSEL: *Hoff & Cross, Neil J. Hoff, and Geoffrey C. Cross*, for appellant.

Christopher R. Boutelle, for respondent.

JUDGES: En Banc. Williams, J. Utter, C.J., and Rosellini, Stafford, Brachtenbach, Horowitz, and Hicks, JJ., concur. Dolliver J. (dissenting).

OPINION BY: WILLIAMS

OPINION

[*783] [525]** In March 1977, appellant Allen Powell, respondent Harold Farris, and one Frank LePonis entered into a business relation with the purpose of establishing a smokeshop on the Puyallup Indian Reservation. It was contemplated that cigarette sales and certain gambling operations were to be the mainstay of the business. The parties' partnership agreement provided that LePonis, a non-Indian, would deed certain real property to respondent, an enrolled member of the Puyallup Tribe of Indians, on condition that respondent arrange for restoration of Indian **[***3]** trust land status to the property. Appellant, also a non-Puyallup Indian, was to provide the initial capital to establish the business. Each party was to share equally in the anticipated profits.

There is no dispute that the business was duly registered with the Puyallup Tribe, that all necessary paperwork was filed according to the tribal rules, and that required tribal taxes were paid. In March of 1978, however, the tribal council revoked the smokeshop's business license because of the inclusion of a nonenrolled Puyallup Indian in the venture, a circumstance not permitted by the tribe's business code. After **[**526]** appellant and LePonis (who is not a party to this litigation) left the business, the tribal council renewed the business license, and respondent has been operating the business since that time.

[*784] Appellant then brought an action in Pierce County Superior Court for a dissolution of the partnership and for an accounting, seeking a one-third interest in the profits and assets of the smokeshop. Upon respondent's motion, the trial court dismissed the case for lack of subject matter jurisdiction. The Court of Appeals determined that the matter involved **[***4]** fundamental and urgent issues of broad public import and certified the case to us pursuant to RCW 2.06.030 and RAP 4.2. We vacate the order of dismissal and remand to the trial court for further proceedings.

The sole issue we must decide at this stage of the proceedings is whether the state court has jurisdiction over the subject matter of an action for dissolution of a partnership and an accounting where the defendant is an enrolled tribal Indian, the plaintiff is a non-Indian, and the accounting is sought from proceeds of a business located on tribal trust land and licensed by the tribal council. ¹ In deciding this question, we think it may be helpful to set forth a few of the principles governing assertions of state power over the affairs of Indians and Indian tribes on federal reservations.

FOOTNOTES

¹ Parenthetically, it may be added that jurisdiction over the person of respondent is not at issue here. Respondent was personally served outside the exterior boundaries of the Puyallup Reservation; in fact, he asserted a counterclaim and thus waived any possible defense of lack of in personam jurisdiction. RCW 4.28.020.

[*5] [1]** It is by now axiomatic that ^{HN1} state power over Indians on a reservation is limited to the power granted by Congress in 25 U.S.C. § 1322 (1976) (originally enacted as Act of August 15, 1953, ch. 505, § 7, 67 Stat. 590, commonly known as Public Law 280). Public Law 280 authorized Washington and some other states to assume jurisdiction over "civil causes of action" and "criminal offenses" occurring on a reservation. 67 Stat. 590. Pursuant to that grant of authority, the Washington legislature enacted RCW 37.12, in which the state bound itself to exercise "criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state" in accordance with Public Law 280. RCW 37.12.010. The statute **[*785]** specified that tribal consent was necessary for the assumption of state jurisdiction except in certain specified areas not applicable here. RCW 37.12.010, .021. Moreover, Public Law 280 did not confer on any state the authority to tax or encumber any Indian property or deprive any Indian or tribe of hunting or fishing rights, and the statute

specifically disclaimed such power. *Chief Seattle Properties, Inc. v. Kitsap County* [***6] , 86 Wn.2d 7, 14, 541 P.2d 699 (1975); 67 Stat. 589; RCW 37.12.060.

Respondent argues that since Washington in RCW 37.12.010 has not asserted jurisdiction over the Puyallup Tribe as to a cause of action for dissolution and accounting, and since the tribe has not consented to additional jurisdiction pursuant to RCW 37.12.021, the superior court has no jurisdiction over the subject matter of this action. The response to this assertion is not quite so uncomplicated.

It is well settled that ^{HN2} even without the jurisdiction conferred by Congress in Public Law 280, the state may exercise some jurisdiction over some reservation conduct. In particular, it may impose its laws on reservation conduct involving only non-Indians. It may, for example, impose a tax on a non-Indian's personal property held on tribal land. *Chief Seattle Properties, Inc.*, at 18. It may impose a tax on non-Indian customers of Indian retailers doing business on the reservation. *Washington v. Confederated Tribes*, 447 U.S. 134, 159, 65 L. Ed. 2d 10, 32, 100 S. Ct. 2069 (1980); *Moe v. Confederated Sallsh & Kootenai Tribes*, 425 U.S. 463, 48 L. Ed. 2d 96, 96 S. Ct. 1634 (1976).

It is equally clear that an [***7] individual Indian who is off the reservation is subject to the laws of the State of Washington to the same extent that a non-Indian or alien is so [**527] subject. *State v. Williams*, 13 Wash. 335, 339, 43 P. 15 (1895); United States Department of the Interior, *Federal Indian Law* 363 (1958); see also 1 *Studies in American Indian Law* 241 (R. Johnson ed. June 9, 1970) (unpublished study in Washington State Law Library).

[*786] The more difficult question arises in situations where, as here, both Indians and non-Indians are involved in a dispute which may have an impact on tribal property. In 1959, the United States Supreme Court addressed this issue in *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959). In that case the court set aside a judgment by a court in a state which had not assumed jurisdiction under Public Law 280. The judgment had authorized a non-Indian to sue an Indian in state court to recover on a debt which had been entered into on the reservation. In denying a right of recovery to the non-Indian, the court explained that permitting the action would infringe on the tribal sovereignty of reservation Indians. *Williams*

[***8] *v. Lee*, *supra* at 220. ^{HN3} The test for whether to allow state assertions of jurisdiction in such circumstances was stated as follows:

Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Williams v. Lee, *supra* at 220. The court later refined the infringement test as follows:

It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. See also *Organized Village of Kake v. Egan*, 369 U.S., at 75-76 [7 L. Ed. 2d 573, 82 S. Ct. 562 (1962)]. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973). See also *Washington v. Confederated Tribes*, *supra* at 156.

We come then to deciding, where the [***9] State has not assumed jurisdiction under Public Law 280, whether the assertion of state jurisdiction would infringe the right of the Puyallup Tribe of Indians to "make their own laws and be [*787] ruled by them." *Williams v. Lee*, *supra* at 220. We are of the opinion that it would not.

[2] The parties concur that the contract in this case was executed off the reservation. By its terms the parties agreed to establish a business on the reservation, although at the time of contracting the real property involved was not tribal trust property; indeed, one of the explicit conditions of the agreement was that respondent would procure trust status for the land on which the business was to be located. While part of the performance of the contract occurred on the reservation, the promise of appellant to provide capital and of LePonis to convey the land could have been performed elsewhere. The record does not specify.

The relief sought by appellant is simply a dissolution of the partnership established pursuant to the contract. ^{HN4} Partnership dissolution is a common law form of action ordinarily heard in state courts of general jurisdiction. Moreover, it is not asserted that **[***10]** a tribe has an interest in regulating a contract made off the reservation.

Under these circumstances, we cannot say that state court jurisdiction over this matter would infringe the sovereignty of the tribe. The business is still in existence, and the parties do not dispute that it meets the requirements of the tribe's business code. There is nothing to indicate the tribe cannot continue to tax and otherwise regulate the smokeshop. Indeed, that the tribe retains its regulatory authority is shown by its denial of the business permit because of appellant's participation and its subsequent reinstatement of the permit after he had been asked to leave the reservation. Thus, any dissolution of the partnership created by this contract will have little or no effect **[**528]** on the tribe's continuing authority over the business. *Williams v. Lee, supra; Washington v. Confederated Tribes, supra* at 156. The effect of a state court judgment would simply be to declare that the partnership is dissolved.

[3] As to the accounting, appellant merely seeks a money judgment from respondent personally. ^{HN5} Since an accounting is an equitable action, **[***11]** **[*788]** *Koehler v. Wales*, 16 Wn. App. 304, 309, 556 P.2d 233 (1976), the trial court has broad discretion to grant or deny it depending on all the facts and circumstances. See, e.g., *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 113 P.2d 845 (1941); *Port of Walla Walla v. Sun-Glo Producers, Inc.*, 8 Wn. App. 51, 504 P.2d 324 (1972). What property may be levied upon to satisfy such a judgment is a question for the trial court upon remand. ²

FOOTNOTES

² This disposition makes it unnecessary for us to consider respondent's claim that the contract is unenforceable because of illegality. This is a proper question for the trial court to address on remand.

The order of the dismissal is vacated, and the cause is remanded to Pierce County Superior Court for further proceedings not inconsistent with this opinion.

DISSENT BY: DOLLIVER

DISSENT

Dolliver J. (dissenting)

Do the courts of the State of Washington have jurisdiction over the business activities of a member of an Indian tribe when such activities are conducted on trust lands and are within the **[***12]** boundary of an Indian reservation? Contrary to the views expressed by the majority, I do not believe such jurisdiction exists, and, therefore, dissent.

Subject matter jurisdiction is "the authority of the court to hear and determine the class of actions to which the case belongs. . . . A court lacking such jurisdiction may do nothing other than enter an order of dismissal." (Citations omitted.) *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), the Supreme Court, quoting from the United States Department of the Interior, *Federal Indian Law* 845 (1958), said "'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'" It is conceded that defendant is a tribal Indian on an Indian [*789] reservation and that even though Public Law 280 authorized Washington to assume jurisdiction over certain matters, the state has never implemented the federal act, vis-a-vis the Puyallup Tribe.

In *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959), [***13] the Supreme Court laid down the rationale for the rule on state jurisdiction: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, at 220.

Given the clear language of *McClanahan*, the circumstances of this case and the fact that the actions brought by plaintiff, if allowed, would obviously infringe on the right of the Puyallup Tribe to make its own laws and be ruled by them, I would think the matter to be ended and the dismissal of the trial court upheld.

The majority, believing otherwise, begins its analysis by pointing to what it calls a "refine [ment]" of the *Williams* test which it claims is found in *McClanahan* and in *Washington v. Confederated Tribes*, 447 U.S. 134, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980). *McClanahan* involved the imposition of state taxes upon a member of an Indian tribe living on a reservation. No consent was given by the tribal member. The court did not rely upon *Williams*, stating that it applied principally to situations involving non-Indians (the exact case here). *Confederated* [***14] *Tribes* said the application of the state cigarette tax to non-Indian purchases of cigarettes on an Indian reservation did not infringe on the right of the [**529] reservation Indians to "make their own laws and be ruled by them." The real nexus of *Confederated*, of course, was not non-Indian against Indian but rather the application of the tax laws of the State of Washington to an activity on an Indian reservation. I see nothing in either *McClanahan* or *Confederated* which in any way either weakens or refines *Williams* as it applies to this case.

Next the majority finds comfort in that the contract was executed off the reservation. I fail to see the relevance of [*790] this fact. The majority says at page 787 "it is not asserted that a tribe has an interest in regulating a contract made off the reservation." But, surely, that is not what this case is about. It is about a non-Indian asserting state jurisdiction over a member of an Indian tribe on a matter the subject of which is on an Indian reservation. That the contract was made off the reservation is immaterial to the *Williams* test. The action in this case, just as in *Williams*, arises because [***15] of the activities of a retail operation on the Indian reservation.

The majority says the exercise of state jurisdiction here would not infringe on the sovereignty of the tribe or lessen the tribe's ability to tax and otherwise regulate the smokeshop. Again, this is irrelevant to the issue. *Williams v. Lee*, *supra*, was an action to collect for goods on credit sold by Lee, a non-Indian, who operated a general store on the Navajo Indian Reservation, to Williams, a Navajo Indian. As in this case, the exercise of state jurisdiction would not have prevented the Navajo Indian Tribe from "tax[ing] and otherwise regulat[ing]" the general store. The majority asserts this bringing of the action for partnership dissolution and accounting to be talismanic on the question of jurisdiction. I fail to see, however, where this type of action provides subject matter jurisdiction any more than an action to collect for goods sold on credit did in *Williams v. Lee*, *supra*.

I can understand the interest of the plaintiff in attempting to bring this suit in state courts.

However, he made the agreement with a Puyallup Indian to take part in the operation of the business on the Puyallup [***16] reservation. The situation in which the plaintiff now finds himself may be one for which he is entitled to redress, but it cannot be through the courts of this state. If this seems harsh, the remedy is with the Congress which alone can grant jurisdiction by the state over Indians on Indian reservations. *Williams v. Lee, supra*.

I dissent.

In

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APPENDIX - E

*** Current through PL 112-283, with a gap of 112-239, approved 1/15/13 ***

TITLE 25. INDIANS
CHAPTER 15. CONSTITUTIONAL RIGHTS OF INDIANS
JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

Go to the United States Code Service Archive Directory

25 USCS § 1322

§ 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property. 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.

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

History:

(April 11, 1968, P.L. 90-284, Title IV, § 402, 82 Stat. 79.)

APPENDIX - F

Rev. Code Wash. (ARCW) § 37.12.010

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*** Statutes current through 2012 Second 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) § 37.12.010 (2012)

§ 37.12.010. Assumption of criminal and civil jurisdiction by state

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:

- (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: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

HISTORY: 1963 c 36 § 1; 1957 c 240 § 1.

APPENDIX - G

Wash. Const. Art. XXVI

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*** Statutes current through 2012 Second Special Session. ***

CONSTITUTION OF THE STATE OF WASHINGTON

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Wash. Const. Art. XXVI (2012)

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, 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 and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided,* That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2013, I caused to be served the foregoing **PETITION FOR REVIEW** on the following parties at the following address:

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by:

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Averil Rothrock
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