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American Indian Influence on the United States Constitution and Its Framers

Robert J. Miller

PATHFINDER: TRIBAL, FEDERAL, AND STATE COURT SUBJECT MATTER JURISDICTIONAL BOUNDS: SUITS INVOLVING NATIVE AMERICAN INTERESTS

*John W. Gillingham**

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* J.D., 1990, University of Missouri at Columbia; B.A., 1974, St. Andrews Presbyterian College.

I. Introduction

The purpose of this research guide is to provide the inquirer with an exhaustive list of sources by which one may grasp the intricacies of subject matter jurisdictional "rules" that have developed between Native American tribal courts and their state and federal counterparts. This work focuses solely on whether a tribal, federal, or state tribunal has either original, exclusive, or concurrent subject matter jurisdiction to hear causes of action involving Native American interests.

In *Security State Bank v. Pierre*,[1] one state court noted,

> In view of the complexity of jurisdiction questions involving Indian reservations and the number of cases that this Court is receiving, we will detail the stipulated facts with the thought that somewhere in the federal appellate process the final authority will be able to more clearly understand the perplexity of state jurisdictional problems and the near impossibility of their solution due to prior federal decisional case law.[2]

Jurisdictional clarity within the tribal/federal relationship is an equally illusive commodity given the inconsistent and perplexing case law

1. 511 P.2d 325 (Mont. 1973).
2. *Id.* at 326.

alluded to above and the interplay of individual treaties, general federal legislation, and tribe specific federal statutes. The recent U.S. Supreme Court decision in *Duro v. Reina*[3] and the legislation[4] enacted to counter the Court's holding represents the dynamic nature of this area of law.

The unique status of the relationship between the federal government and the Indian nations has provided the animus for the germination of this complex body of law. In order to reconcile the existence of disparate jurisdictional findings, one must, as a threshold consideration, realize that Congress has assumed plenary power over Indian affairs.[5] Consequently, Congress has directed the destiny of Indian nations in conformity with prevailing political sentiments reflecting, in many instances, hostility to the continued existence of tribal nations. Despite the subservient position of Indian tribes, Indian nations are viewed as independent sovereigns whose internal power does not flow from the federal government. Essentially, the tribes remain separate peoples in control of their own internal affairs, yet subject to Congress which functions as guardian and overseer.

The major variables contributing to the current "maze" of the jurisdictional framework have been the shifting policies of the United States Congress coupled with surprising Supreme Court decisions that appear to defy the logic of prior holdings. As congressional policy toward Native Americans has vacillated, so has the legislation enacted to realize those policies. Throughout the tribal/United States relationship, Congress has attempted to, in varying degrees, either affirm the sovereign nature of the tribes and thereby encourage the viability of the tribal nations, or initiate policies aimed at assimilating Indians into the mainstream of American society. During the period in which Congress focused primarily on the recognition of tribal entities, legislation emphasized excluding jurisdiction of the federal and state courts over actions occurring on Indian lands. Conversely, legislation promulgated during an assimilative era was directed at maximizing state and federal jurisdiction, sometimes nearly negating tribal jurisdiction.

Initially, Congress and the federal judiciary affirmed and encouraged the independent status of Indian tribes through treaties and confirming case law.[6] However, the late 1800s presented significant challenges to the continued viability of the Indian nations. During this time, Con-

3. 495 U.S. 676 (1990).

4. Act of Nov. 5, 1990, 104 Stat. 1852 (codified at 25 U.S.C. § 1301 (Supp. III 1991)).

5. *See, e.g.*, Anderson v. Gladden, 293 F.2d 463 (9th Cir. 1961) (holding that Congress has the power to abrogate treaties unilaterally); Crain v. First Nat'l Bank, 324 F.2d 532 (9th Cir. 1963) (holding that Congress may negate tribal status on its own motion).

6. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

gress initiated an "allotment" program designed to grant reservation land to individual Indians and, in time, subject them to the same laws and responsibilities as other United States citizens.[7] The realization of this policy resulted in the substantial diminution of Indian country and a disenfranchisement of Indian communities. Congress reversed this policy in 1934 with the Indian Reorganization Act[8] but then returned to this hostile stance in the 1950s by adopting a policy of "termination," whereby Indian tribes were disbanded and their lands sold. During this era, Public Law 280 was passed,[9] granting certain states, and affording other states, the option to unilaterally secure jurisdiction over disputes arising in Indian country. However, in the late 1960s congressional policy changed again. Congress decided to reaffirm the independence of Indian nations and consequently passed legislation reflecting this attitude, including provisions allowing for the retrocession of jurisdiction previously acquired under Public Law 280 and by requiring tribal consent to state exercise of broad-based jurisdiction. Substantive embodiments of this congressional reaffirmance of the integrity of tribal self-governance and cultural viability may also be found in the Indian Self-Determination and Education Assistance Act of 1974[10] and the American Indian Religious Freedom Act.[11] One predictable manifestation of contemporary congressional philosophy has been the concomitant reaffirmation of the viability of tribal courts as appropriate forums for the resolution of disputes.[12] These acts reflect the "current" congressional perspective, but history cautions against relying upon the continued vitality of this stance. Nevertheless, this checkerboard history has provided a myriad of jurisdictional statutes, treaties, and case law that reflect the vagaries of the times in which they were instituted.

Despite the fact that resolution of a specific jurisdictional question may be an arduous task, general parameters have emerged. Federal statutory law (post-1871) and the case law interpreting this body of law have provided direction, and lack thereof, for discerning which tribunals have jurisdiction over which causes of action. Given the complexity of the subject matter, this guide, along with the requisite examination of the federal statutes and federal case law, relies heavily upon law review articles that examine the various areas of jurisdiction

7. *See* General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 349 (1988)).

8. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988)).

9. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. 1360 (1988)).

10. 25 U.S.C. §§ 450-450n (1988 & Supp. III 1991).

11. Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (1988)).

12. *See, e.g.*, 25 U.S.C. § 1301 (amended to allow jurisdiction over all "Indians").

in detail. Examination of the federal statutes will provide the broad foundation of the inquiry, and the law review articles and case law will, it is hoped, guide the researcher in solving the specific jurisdictional query.

A competent search for the correct jurisdictional "answer" will, in most instances, require that the researcher answer the following threshold queries:

(1) Where did the cause of action/offense occur (within or outside of Indian country)?

(2) What is the racial status of the plaintiff/victim?

(3) If the cause of action involves a reservation Indian, is that party a member of *that* reservation or a member of another tribe?

(4) What is the subject matter of the suit?

(5) Are there any extant treaties in force that define the jurisdictional bounds of the instant case (not likely given the "last in time" rule that provides priority to the last enacted between treaties/federal statutes in case of conflicting standards)?

(6) Is there a specific federal statute conferring jurisdiction to the state where the cause of action arose (besides Public Law 280)?

(7) Was the state afforded jurisdiction, or did the state assume jurisdiction, under Public Law 280?

(8) If jurisdiction was acquired by the state under Public Law 280, did the state subsequently retrocede this acquisition?

(9) Is there a tribal code that either confers or denies jurisdiction in the tribal court over this cause of action or as to these parties?

Further considerations involve the ramifications of filing in alternate forums where concurrent jurisdiction is present (conflict of law concerns, etc.), whether service of process has to be performed in Indian country, and, if successful, will execution of the judgments occur in Indian country? Delineation of the factors involved in solving a jurisdictional puzzle underscores the fact specific nature of this endeavor.

The measure of jurisdictional autonomy accorded Indian nations has corresponded to the level of sovereignty recognized by Congress. Due to the intertwined nature of the subject matter, a section presenting law reviews on this topic has been included in the "overview" materials.

Given the confusion generated by inconsistency within the federal legislature and judiciary, an overview of the history of tribal/United States jurisdictional development is provided. This section is critical

to comprehension of the development of the subject matter and therefore should not be dismissed lightly. The statutes and case law presented in this section have formed the bases of the jurisdictional bounds at issue, and comprehension of their development will aid the researcher in understanding what, at first impression, appear to be irreconcilable jurisdictional determinations.

Hopefully, this guide will provide the researcher with the resources necessary to clarify what has been, and remains to be, a dynamic and variable field of law.

II. Definitions, Overview Materials

A. Definitions

1. Indian

Curiously, though legislation has been proposed, no federal statute defines who occupies the status of "Indian" for general jurisdictional purposes. However, definitions of "Indian" exist in other contexts and these may be helpful, arguably analogized, for the purpose of constructing a definition for jurisdictional purposes.

Sanapaw v. Smith, 335 N.W.2d 425 (Wis. Ct. App. 1983). *Sanapaw* addressed whether the circuit court had concurrent subject matter jurisdiction in an action by an enrolled member of the Menominee Indian Tribe and a tribal employer to recover from another tribal member for damage sustained in an off reservation assault. The controlling consideration here revolved around whether the defendant was a "non-Indian" for jurisdictional purposes at the time the action was commenced. The court reasoned that the relevant factors for determining an individual's status include racial status, habits and lifestyle, and one's place of residence.

Law and Order on Indian Reservations - Jurisdiction, 25 C.F.R. § 11.2(c) (1989). This regulation defines "Indian" for the purpose of jurisdiction before the Court of Indian Offenses as "any person of Indian descent who is a member of any recognized Indian tribe now under federal jurisdiction . . . ."

25 U.S.C. § 345 (1988) — for land allotment purposes.

25 U.S.C. § 302 (1988) — for educational allotments.

25 C.F.R. § 32.1 (1989) — for educational benefits.

25 C.F.R. § 34.3 (1989) — for vocational training.

Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938); *People v. Carmen*, 273 P.2d 521, 525 (1954). These cases employed a totality of the circumstances approach to whether "Indian" status attaches.

See also section II.K.3, *Jurisdiction over Nonmember Indians Within Indian Country*, in this guide.

21 *Words and Phrases* 290-94 (1964) — further cases defining "Indian."

2. Indian Country

18 U.S.C. § 1151 (1988) — definition of Indian country.

Donnelly v. United States, 228 U.S. 243, 243 (1913). *Donnelly* defined Indian country as including not only lands which were originally possessed by Native Americans, but also land lawfully set aside for Indians out of the public domain which were not previously occupied by Indians.

United States v. Sandoval, 231 U.S. 28, 48 (1913). The Court found that even land held in communal fee simple ownership by the Pueblo Indians was considered Indian land for the purpose of subjecting the land to legislation promulgated by the United States Congress.

Beardslee v. United States, 387 F.2d 280, 286-87 (8th Cir. 1967). The Eighth Circuit held that land remains Indian country for federal jurisdictional purposes even when the land in question was owned by a non-Indian where the site was within the original borders of the reservation.

Marvin J. Sonosky, *State Jurisdiction Over Indians in Indian Country*, 48 N.D.L. Rev. 551 (1972). The author focuses on cases interpreting which land encompasses "Indian Country" for jurisdictional purposes.

21 *Words and Phrases* 294-305 (1964) — further cases defining "Indian Country."

3. Indian Tribe

William W. Quinn, Jr., "Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83," 17 *Am. Indian L. Rev.* 37 (1992). Quinn discusses which segment of the federal government has power to confer tribal status, as well as the process and the prerequisites for tribal recognition.

L.R. Weatherhead, "What is an 'Indian Tribe' — The Question of Tribal Existence," 8 *Am. Indian L. Rev.* 1 (1980). The author discusses the requisites of tribal designation.

United States v. Washington, 641 F.2d 1368 (9th Cir. 1981). The Ninth Circuit held that merely claiming that one's ancestors were members of a tribe that signed a treaty is not sufficient to confer tribal status. There needs to be evidence of a continuous, distinct, and cohesive Indian cultural or political community for Indian tribe status to attach.

Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979). The First Circuit held that given the disparate circumstances confronting groups of Native Americans throughout the United States, a broad and flexible definition of Indian tribe must be maintained. Addition-

ally, a liberal construction of which groups comprise Indian tribes is warranted where federal benefits and protections are concerned. However, here the plaintiff Indian tribe has the burden of proving its existence as a tribe where the plaintiff is asserting that tribal land was taken illegally.

Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). The First Circuit held that federal recognition as a tribe is not a prerequisite to tribal status under the Federal Nonintercourse Act.[13] Here, the State of Maine had recognized this group as a tribe for various purposes.

25 C.F.R. § 83 (1989) — presents criteria to "establish" tribal status for tribes that have not previously been officially recognized by the federal government.

21 *Words and Phrases* 308-10 (1964) — contains cases defining "Indian tribe."

4. The Five Civilized Tribes

This phrase refers to the Cherokee, Choctaw, Creek, Chickasaw, and Seminole nations.

B. Statistics; Population, Reservation Acreage, Major Tribes by State, Etc.

The World Almanac and Book of Facts 1989, at 417 (Merle S. Hoffman ed. 1989). The *Almanac* gives statistics as delineated above concerning existing tribes.

United States Bureau of the Census, *Statistical Abstract of the United States* tbl. 34, at 31 (105th ed. 1985) — states that Indians comprise 1,420,400 of the total United States population of 226,546,000. Thus, Indians are approximately .62% of the U.S. population.

C. Treatises Addressing Policy and Jurisdictional Ramifications

Felix S. Cohen's Handbook of Federal Indian Law (Five Rings 1986) (reprint of Univ. of N.M. photo. reprint 1971) (1942). Cohen was the foremost authority of his time on Indian law and policy. Contemporary policies and the shaping of jurisdictional bounds were, in part, a reflection of his influence. This work provides a comprehensive and enduring overview of Indian law through the date of the original's first printing in 1942.

Felix S. Cohen's Handbook of Federal Indian Law (Rennard Strickland et al. eds., 1982). This edition is an update and complete revision of Cohen's 1942 *Handbook*. The 1982 edition adopts a philosophy similar to the original *Handbook*, although the content and format are completely different.

13. 25 U.S.C. § 177 (1988).

Linda Medcalf, *Law and Identity: Lawyers, Native Americans, and Legal Practice* (1978). Medcalf's book is primarily concerned with prevailing attitudes and the manner in which various viewpoints impinge upon the attorney/Indian relationship and the realization of Native American legal objectives. Chapters 3 and 5 apply to the instant subject matter in that the author undertakes this discussion in the context of "The Quest for Sovereignty" and "The Native American Bill of Rights" respectively.

Samuel J. Brakel, *American Indian Tribal Courts: The Costs of Separate Justice* (1978). Brakel presents a brief history of the history and jurisdiction of tribal courts and then proceeds to examine specific tribal legal systems (Standing Rock, Navajo, Blackfeet). He concludes with recommendations for maximizing the efficacy of tribal court systems.

D. Casebooks

Robert N. Clinton, Nell J. Newton & Monroe E. Price, *American Indian Law* (3rd ed. 1991) — latest cases and materials.

David H. Getches & Charles F. Wilkinson, *Cases on Federal Indian Law* (2d ed. 1986). Getches and Wilkinson cover the full gamut of Indian law including the requisite jurisdictional section. This work is best suited to the law student/attorney, given the casebook format.

E. Nutshell[s]

William C. Canby, Jr., *American Indian Law in a Nutshell* (2d ed. 1988). Canby follows the traditional "nutshell" format in presenting the "essence" of the law in issue. This work contains a historical overview providing a concise, though somewhat cursory, presentation of the development of United States government policy and its consequent effect upon the jurisdictional bounds between the tripartite system of tribunals. The work dedicates substantial resources to the division of jurisdiction as currently understood and is most helpful as a quick reference guide to the basic jurisdictional "rules." Particularly helpful in this regard are the jurisdictional charts presenting a general breakdown of criminal and civil jurisdiction on pages 142 and 170 respectively.

F. Professional Manuals

American Indian Lawyer Training Program, Inc., *Manual of Indian Law* (4th ed. 1978). This manual provides a concise recitation of jurisdictional bounds as understood through the date of publication. All propositions are supported by case law; therefore, it is especially suited for law students and attorneys. Given the concise format, this work is helpful as a quick reference source.

G. Reporter

Indian Law Reporter (Am. Indian Law. Training Program). Published since 1973, this reporter is an extremely useful tool in providing contemporary updates on relevant legislation and cases. Volumes are bound by year, with a complete index, and are found in most law libraries.

H. Law Review Symposiums on Indian Law Involving Jurisdictional Materials

"Indian Law Symposium," 31 *Ariz. L. Rev.* 191-446 (1989).
"Symposium on Indian Law," 54 *Wash. L. Rev.* 475-668 (1979).
"Indian Law Forum," 22 *Kan. L. Rev.* 337-487 (1974).
Symposium, 33 *Mont. L. Rev.* 187-320 (1972).
Symposium, 48 *N.D. L. Rev.* 529-750 (1972).
Symposium, 10 *Ariz. L. Rev.* 553-755 (1968).

I. Tribal Sovereignty and Jurisdiction

1. United States

Clifford M. Lytle, Comment, "The Supreme Court, Tribal Sovereignty and Continuing Problems of State Encroachment Into Indian Country," 8 *Am. Indian L. Rev.* 65 (1980). This comment stresses the seminal cases affecting a state's capacity to assert jurisdiction in Indian country.

Stephen Lafferty, Comment, "Tribal Sovereignty and the Claims of Non-Indians Under the Indian Civil Rights Act," 9 *Am. Indian L. Rev.* 289 (1981). The author explores the ability, or lack thereof, of a non-Indian plaintiff to sue an Indian tribe by claiming that the tribe contravened rights guaranteed under the Indian Civil Rights Act in the aftermath of seeming tribal immunity protection afforded by *Santa Clara Pueblo v. Martinez.*[14]

S.J. Bloxham, "Tribal Sovereignty: An Analysis of *Montana v. United States*," 8 *Am. Indian L. Rev.* 175 (1980). Bloxham takes issue with the holding in *Montana* whereby the state is afforded regulation of hunting/fishing rights involving non-Indians on reservation land.

Frank Pommersheim, "The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction," 31 *Ariz. L. Rev.* 329 (1989). Pommersheim discusses the jurisdictional implications of *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*[15] and *Iowa Mutual Ins. Co. v. LaPlante*[16], which affirm tribal courts as the primary forums for adjudication of

14. 436 U.S. 49 (1978).
15. 471 U.S. 845 (1985).
16. 480 U.S. 9 (1987).

civil actions that arise in Indian country, in that one must exhaust tribal court remedies once a suit has been filed in tribal court. A party cannot circumvent a tribal proceeding merely by filing concurrently in federal court. The author notes language in *Iowa Mutual* contending that "tribal authority over activities of non-Indians on reservation land is an important part of tribal sovereignty."[17] This commentator suggests that the scope of tribal court jurisdiction in civil matters involving non-Indians has been extended given the decisions above, and he presents an analytical framework for discerning whether the tribal court has jurisdiction to hear a particular suit focusing on subject matter, personal, and territorial jurisdictional issues.

2. Canada

Wilcomb Washburn, *Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian* (1971). Part IV, section 5 addresses the status of Canadian Indians.

Richard H. Bartlett, "The Indian Act of Canada," 27 *Buffalo L. Rev.* 581, 603-08 (1978). The author traces the historical relationships between the 565 bands of native peoples of Canada with the government of Canada. Within this discussion, the pages cited above address the jurisdictional bases that have emerged.

J. Law Reviews Providing Jurisdictional Overview

1. Generally

James E. Murphy, Note, "Jurisdiction: The McBratney Decisions - A Pattern of Inconsistency," 3 *Am. Indian L. Rev.* 149 (1975). The author discusses the manner in which, historically and contemporarily, the decision in *McBratney* has been used to assert state court jurisdiction in Indian country.

Kent Frizzell, "Evolution of Jurisdiction in Indian Country," 22 *Kan. L. Rev.* 341 (1974). This article provides a brief historical overview and examines the policy presumptions and legislation of the Nixon presidency.

Indian Civil Rights Task Force, Comment, "Development of Tripartite Jurisdiction in Indian Country," 22 *Kan. L. Rev.* (1974). This comment catalogues and discusses the seminal cases and legislation that have shaped contemporary jurisdiction through 1974.

Wiliam H. Kelly, "Indian Adjustment and the History of Indian Affairs," 10 *Ariz. L. Rev.* 559 (1968). Kelly provides a general history of Indian affairs from the resettlement period of the late 1800s through 1968. The article is helpful in gaining a sense of the various paths

17. *Id.* at 18.

taken by the federal government in its attempt to define its relationship to, and the continued viability of, Indian nations. A rudimentary grasp of the vacillations of federal policy is critical to understanding the jurisdictional inconsistencies.

Charles F. Wilkinson and Eric R. Briggs, "The Evolution of the Termination Policy," 5 *Am. Indian L. Rev.* 139 (1977). The authors chronicle the policy and effects of the termination era, during which time 109 tribes were terminated and, therefore, ceased to exist as legal entities.

Nell Jessup Newton, "Federal Power Over Indians: Its Sources, Scope, and Limitations," 132 *U. Pa. L. Rev.* 195 (1984). Newton provides extensive coverage of the power relationships between the United States and tribal entities with significant devotion to jurisdictional issues.

Karl J. Kramer, Comment, "The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations," 1986 *Wis. L. Rev.* 989. This comment argues that United States Supreme Court decisions affecting jurisdiction over Indian matters and parties reflect a sensitivity to the political climate and the degree to which tribal activities impinge upon non-Indian interests and persons adjoining Indian country. The author proffers statistical data to bolster his hypothesis.

Philip Lee Fetzer, "Jurisdictional Decisions in Indian Law: The Importance of Extralegal Factors in Judicial Decision Making," 9 *Am. Indian L. Rev.* 253 (1981). Fetzer proffers, in the absence of other justifiable criteria to explain inconsistent decisions on Indian jurisdictional questions, correlations between "outside" influences and jurisdictional holdings. Compare with Comment, "The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations," 1986 *Wis. L. Rev.* 989.

2. Criminal Jurisdiction

William V. Vetter, "A New Corridor For The Maze: Tribal Criminal Jurisdiction and Nonmember Indians," 17 *Am. Indian L. Rev.* 349 (1992). Vetter analyzes criminal jurisdiction through examination of *Oliphant*, *Wheeler*, and *Duro*. The article emphasizes that while new congressional legislation will subject nonmember Indians to jurisdiction, non-Indians are exempt.

Kevin Meisner, Comment, "Modern Problems of Criminal Jurisdiction in Indian Country," 17 *Am. Indian L. Rev.* 175 (1992). This overview was written prior to the Supreme Court decision in *Duro*; however, an addendum to the comment offers options for dealing with nonmember crimes on the reservation in light of *Duro*.

Robert N. Clinton, "Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective," 17 *Ariz. L. Rev.* 951 (1975). The author competently provides extensive treatment of the history of criminal jurisdiction from 1776 through 1975. Major headings of the article are as follows: "The Treaty Period: 1776-1871," "The Statutory Period: 1871-Date," "Indian Criminal Jurisdiction in the Supreme Court: The 19th Century Experience," "*Crow Dog* and *Kagama*: Jurisdiction Over Intra-Indian Crime," and "Jurisdictional Problems in the Late 19th Century." Clinton observes the complex, nonintegrated manner in which this body of law has unfolded. See also Clinton's followup article, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze," 18 *Ariz. L. Rev.* 503 (1976).

Tim Vollman, Comment, "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendant's Rights in Conflict," 22 *Kan. L. Rev.* 387 (1974). The author discusses the right, or lack thereof, of Indian defendants to receive jury instructions on, or to plead to, lesser included offenses in federal court under *Keeble v. United States*.[18]

Charles T. DuMars, Comment, "Indictment Under the Major Crimes Act — An Exercise in Unfairness and Unconstitutionality," 10 *Ariz. L. Rev.* 696 (1968). The author argues that Indians receive unfair treatment under the act for various reasons including, among other considerations, differing standards for the proof of evidence contingent upon where, within the same reservation, the act occurred.

Larry A. Burns, Note, "Criminal Jurisdiction: Double Jeopardy in Indian Country," 6 *Am. Indian L. Rev.* 395 (1978). The author describes the potential for double jeopardy given the ramifications of *United States v. Wheeler*,[19] where an Indian was convicted of disorderly conduct by a tribal court and subsequently charged, in the federal courts, in reference to the same incident, with carnal knowledge of a female under the age of 16.

Noma D. Gurich & R. Steven Haught, Note, "Criminal Jurisdiction Over Indian Schools: Chilocco Indian School, An Example of Jurisdictional Confusion," 6 *Am. Indian L. Rev.* 217 (1978). The author discusses the complexities of criminal jurisdiction over Indian schools in general with special focus on the peculiarities of the Chilocco Indian School in Oklahoma.

3. Civil Jurisdiction

Sandra Hansen, "Survey of Civil Jurisdiction in Indian Country 1990," 16 *Am. Indian L. Rev.* (1991). Hansen provides a historical introduction which leads into a discussion of the basics of civil juris-

18. 412 U.S. 205 (1973).
19. 435 U.S. 313 (1978).

diction, involving a wide spectrum of interests including divorce, children, probate, water rights, taxation, etc.

Allison M. Dussais, Note, "Tribal Court Jurisdiction over Civil Disputes Involving Non-Indians: An Assessment of *National Farmers Union Ins. Co. v. Crow Tribe of Indians* and a Proposal for Reform," 20 *U. Mich. J.L. Ref.* 217 (1986). The author argues for increased jurisdiction power for tribal courts in this area, proposing a procedure which utilizes the Department of Interior, whereby a tribe could apply for exclusive jurisdiction over certain reservation-based civil causes of action.

William C. Canby, Jr., "Civil Jurisdiction and the Indian Reservation," 1973 *Utah L. Rev.* 206. Canby, author of *American Indian Law in a Nutshell*, summarizes jurisdictional issues arising within Indian country through 1973.

John F. Sullivan, Comment, "State Civil Power Over Reservation Indians," 33 *Mont. L. Rev.* 291 (1972). This comment explains state jurisdiction over civil actions when the events precipitating the cause of action occur on Indian land and one of the parties is an Indian.

James L. Huemoeller, Note, "State Jurisdiction on Indian Reservations, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)," 13 *Land & Water L. Rev.* 1035 (1978). This commentator traces state/tribal court jurisdictional history and explores the implications of *Moe*. The author asserts that allowing states to require Indians to tax non-Indian customers on cigarette sales and authorizing the states to collect the taxes withheld signals a breakdown in the burgeoning reassertion of Indian sovereignty that has seen a diminution of the imposition of state jurisdiction in Indian country.

4. Jurisdiction Over Juveniles

Joseph E. Mudd, "Indian Juveniles and Legislative Delinquency in Montana," 33 *Mont. L. Rev.* 233, 236-39 (1972). The author gives a brief overview of state court jurisdiction involving Indians generally and applies this scheme to Indian juvenile defendants.

Michael J. O'Brien, Comment, "Children: Indian Juveniles in the State and Tribal Courts of Oregon," 5 *Am. Indian L. Rev.* 343 (1977). This comment discusses jurisdictional questions in juvenile matters, but its dominant focus is a comparative study of Indian juvenile criminal behavior in Oregon (comparing various Indian reservations, Oregon non-Indian juveniles, and juveniles in the United States generally). See also *Blackwolf v. District Court*, 158 Mont. 523, 493 P.2d 1293 (Mont. 1972). The *Blackwolf* court held that the juvenile court did not have jurisdiction over alleged acts of delinquency by enrolled Indians within the exterior boundaries of the reservation, despite the fact that the tribal court had "remanded" the proceedings to juvenile court pursuant to a reservation code provision. This holding was

premised upon the fact that the state had not accepted jurisdiction through affirmative legislation and the requisite special tribal election. See also 25 U.S.C. §§ 1321-1326 (1988).

K. Ancillary Considerations

1. Service of Process

Exercise of subject matter jurisdiction is obviously hampered if service of process may not be obtained over the parties to the suit. This question arises regarding the viability of service of process issued by a state court against Indian defendants living within Indian country. Courts have split on the question.

Compare *State Securities, Inc. v. Anderson*, 506 P.2d 786 (N.M. 1973) (service of process within Indian country upheld) with *Francisco v. State*, 556 P.2d 1 (Ariz. 1976) (service in Indian country invalid).

In *Francisco v. State*, 556 P.2d 1 (Ariz. 1976), an Indian petitioner brought a special action to determine whether the state court abused its discretion in denying the petitioner's motion to dismiss, on grounds of lack of personal jurisdiction, an action brought against him by the State in the name of an Indian woman to determine the petitioner's alleged paternity of the woman's child. The court held that the State had no authority to extend application of its laws to the Indian reservation which had been set aside, by executive order, for the exclusive use and occupancy of the Indian tribe. The court's holding was based on the fact that the State had neither amended its constitution nor passed appropriate legislation to confer upon itself jurisdiction over the reservation pursuant to Indian Civil Rights Act of 1968,[20] nor had the State acquired the requisite consent of the Indian tribe to do so. Therefore, the deputy sheriff was without authority to make services of process while validly within the boundaries of the reservation. See also Indian Civil Rights Act of 1968, §§ 401-406, 25 U.S.C. §§ 1321-1326 (1988).

2. Enforcement of Judgments

The power of a particular tribunal to hear a cause of action is likewise emasculated if the judgments issued as a result of suit are not enforceable. Again, this situation arises when enforcement of state court judgments is attempted on the reservation. The courts are split on this issue.

Compare *Little Horn State Bank v. Stops*, 555 P.2d 211 (Mont. 1977) (enforcement was permitted) with *Annis v. Dewey County Bank*, 335 F. Supp. 113 (D.S.D. 1971) (enforcement was denied).

20. 25 U.S.C. §§ 1301-1303 (1988).

3. Jurisdiction Over Non-Member Indians Within Indian Country

Indians from another tribe that reside on a reservation historically have been accorded, for jurisdictional purposes, a status commensurate with the other members of that reservation. However, recent developments have now clouded this previously clear line.

See section II(J)(2) of this pathfinder for law review articles addressing criminal activity of nonmembers or non-Indians on reservation property.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). The Court allowed a state tax upon nonmember Indians purchasing commodities on the reservation.

United States v. Wheeler, 435 U.S. 313 (1978). Language in the Court's opinion continually referred to tribal jurisdiction over its "members." The scope encompassed by the assertion of state court jurisdiction over nonmember Indians is, to date, in transition.

Karl J. Erhart, Comment, "Jurisdiction Over Non-Member Indians on Reservations," 1980 *Ariz. St. L.J.* 727. The author utilizes treaties, statutes, and the equal protection clause to conclude that, for jurisdictional purposes, non-member Indians on reservations should be treated like non-Indians.

4. Conflict of Laws

The exercise of jurisdiction may become an empty source of power if the legal framework of a foreign legal system is imposed upon one's tribunal. This concern is particularly relevant for tribal courts when customary law departs, in many instances, from the legal bases in state and federal courts.

Kevin Gover, Note, "Jurisdiction: Conflict of Law and the Indian Reservation: Solutions to Problems in Indian Civil Jurisdiction," 8 *Am. Indian L. Rev.* 361 (1980). The author devotes most of his article to a discussion of subject matter and personal jurisdiction suggesting, inter alia, that tribal codes need to be updated to assert jurisdiction over non-Indians where appropriate, and states need to accept/define areas where exclusive tribal jurisdiction resides.

Catherine B. Stetson, Note, "Conflict of Laws: The Plurality of Legal Systems: An Analysis of 25 U.S.C. §§ 1901-63, The Indian Child Welfare Act," 8 *Am. Indian L. Rev.* 333 (1980). The author acknowledges the multi-system (federal/tribal/state) influences that shaped the Child Welfare Act, while pointing out clarifications and further ambiguities presented by promulgation of the legislation.

John T. Mashier, Comment, "Conflicts Between State and Tribal Law; The Application of Full Faith and Credit Legislation to Indian Tribes," 1981 *Ariz. St. L.J.* 801. The author uses the Uniform Commercial Code and tribal commercial laws to argue that tribal laws in

such matters should be given full faith and credit. The author relies on the statutory language in 28 U.S.C. § 1738 (1988) to buttress his argument.

See also Robert Berk, Note, "Indian Law - State Preempted From Enforcing its Hunting and Fishing Regulations Against Non-Indians on the Reservation — *New Mexico v. Mescalero Apache Tribe*, 103 S.Ct. 2378 (1983)," 1984 *Ariz. St. L.J.* 191. This note gives a historical overview by way of case law wherein tribal and state law have conflicted concerning reservation hunting and fishing regulations addressing non-Indians on the reservation. The author explains the balancing test that has emerged to discern which law prevails and discusses the application of this test by the United States Supreme Court in *Mescalero*.

5. Exhaustion of Tribal Remedies

The exercise of jurisdiction is meaningless if a party can bring the same action in another court system and thereby circumvent the original proceeding. In *Iowa Mutual Ins. Co. v. LaPlante*,[21] the federal court refused to hear a diversity case when a commensurate action was pending in the tribal court. The plaintiff (defendant in the tribal court) was required to exhaust the remedies available in the tribal court system before seeking relief in the federal system.[22] This deference to the tribal system, where an Indian is suing a non-Indian, is arguably transferable to the state context as well. However, the Court's language in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*[23] casts doubt on this application.

L. Treaties

Charles J. Kappler, *Indian Affairs, Laws, and Treaties* (1904) — the definitive compilation on the subject.

M. Tribal Courts

The exercise of jurisdiction obviously assumes that there exists an appropriate judicial system through which to process the jurisdiction. Judicial systems reflect the cultural makeup of the society in which they function. Not surprisingly, tribal court laws and procedures reflect the disparity between the cultural foundations of mainstream America and the Indian nations. The following materials reflect issues that have arisen at a time when tribal courts are gaining more recognition and responsibility.

21. 480 U.S. 9 (1987).
22. *Id.*
23. 467 U.S. 138, 148 (1984) (*Fort Berthold I*).

Chief Justice Tom Tso, "The Process of Decision Making in Tribal Courts," 31 *Ariz. L. Rev.* 225 (1989). Chief Justice Tso concentrates on the Navajo tribal court system; the court's organization and independence from Navajo political influence is stressed. Tso also engages in a comparative scrutiny of Navajo customary law and the Anglo-American counterpart.

M. Allen Core, Note, "Tribal Sovereignty: Federal Court Review of Tribal Court Decisions — Judicial Intrusion into Tribal Sovereignty," 13 *Am. Indian L. Rev.* 175 (1988). The author traces federal case law that has both upheld and defeated tribal court jurisdiction. This note contends that tribal sovereignty is intruded upon when federal courts circumvent the tribal court system.

Jesse C. Trentadue, "Tribal Court Jurisdiction Over Collection Suits by Local Merchants and Lenders: An Obstacle to Credit for Reservation Indians?," 13 *Am. Indian L. Rev.* 1 (1987). Along with a concise delineation of the significant legislation that has defined the tripartite (United States/tribal/state) jurisdictional relationship, this article discusses attorney and creditor perceptions of the tribal court system. The author uses North Dakota's experience to draw the conclusion that Indians are being denied extension of substantive credit and developmental funds due to the perceptions and realities of litigation in tribal courts in the instance of default.

Gordon K. Wright, Note, "Recognition of Tribal Court Decisions in State Courts," 37 *Stan. L. Rev.* 1397 (1985). The author argues that full faith and credit should be granted to tribal court decisions (two states already do) conditioned upon institution of certain reform measures.

Robert A. Williams, Jr., "The Discourses of Sovereignty in Indian Country," 11 *Indian L. Support Center Rep.*, Sept. 1988, at 1. This article supports the idea that tribal courts will function to define the future of Indian tribal sovereignty.

25 C.F.R. §§ 11.22, 11.22c (1992) — sets forth the BIA [Bureau of Indian Affairs] Code for the Courts of Indian Offenses. The Code recommends that jurisdiction over non-Indians attach only by stipulation of the parties.

Peter W. Birkett, Note, "Indian Tribal Courts and Procedural Due Process: A Different Standard?," 49 *Ind. L.J.* 721 (1974). The author addresses the disparity between due process protections afforded under the United States Constitution and the Indian Civil Rights Act of 1968. See also Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 *Harv. L. Rev.* 1343 (1969).

Michael N. Deegan, Note, "Closing the Door to Federal Court — *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)," 14 *Land & Water L. Rev.* 625 (1979). The author examines the reaffirmation of tribal court dominion over intertribal disputes. In *Martinez*, the federal

courts refused jurisdiction to hear a tribal membership dispute despite the fact that the cause of action was allegedly violative of the Indian Civil Rights Act.

Tiane L. Sommer, Note, "Exhaustion of Tribal Remedies Required for Habeas Corpus Review Under the Indian Civil Rights Act," 11 *Am. Indian L. Rev.* 57 (1983). This note argues in favor of the exhaustion of tribal remedies section incorporated into this act.

N. Encyclopedias

42 C.J.S. *Indians* §§ 1, 2, 67, 72, 75, 79, 85-87 (1944). These sections include definitions of Indian and Indian land as well as civil and criminal jurisdiction in the various court systems.

41 Am. Jur. 2d *Indians* §§ 14, 15, 16, 55-58, 60, 139-42, 157, 158, 160-62 (1968). This set provides the same basic treatment as C.J.S., but has a seperate section on tribal courts.

III. Public Law 280

A. Introduction

The initial enactment of Public Law 280[24] expressly granted criminal and civil jurisdiction over Indians within Indian country to five states;[25] Alaska was subsequently added by amendment. This act also allowed any other state to assume jurisdiction over Indian land within the state's borders.[26] This substantial transfer of power was legitimized under Congress' plenary power to regulate Indian affairs, and Indian consent to the assumption was not required. Dissatisfaction with the implementation of the act emerged within the states given the prospect of enforcing jurisdiction in Indian country without the benefit of revenues from the reservation to fund the effort. Likewise, there was predictable indignation expressed by the Indian nations at the relinquishment of jurisdictional power without their consent.[27] Consequently, fifteen years later, Congress revised the act with provisions allowing the states to retrocede jurisdiction back to the federal government and providing stipulations that any further assumption of jurisdiction would be premised upon the consent of the Indian nation in issue.[28] Understandably, there have been no assumptions of juris-

24. Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1988) (civil jurisdiction) and 28 U.S.C. § 1360 (1988) (criminal jurisdiction).

25. California, Minnesota, Nebraska, Oregon, and Wisconsin.

26. 18 U.S.C. § 1162 (1988).

27. *See Hearing on H.R. 459, H.R. 3235 and H.R. 3264 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs on State Legal Jurisdiction in Indian Country*, 82nd Cong., 2d Sess., 11 at 14 (1952) (statement of Frank George, First Vice President, National Congress of American Indians).

28. 25 U.S.C. §§ 1321-1326 (1988).

diction since the 1968 revisions. The mere fact that jurisdiction was granted under this statute, much less the conflicting jurisprudence delineating the exact scope of this grant, has contributed to the current legal maze.

Research of a jurisdictional question necessarily entails inquiry into whether the state in question has been granted, or has retroceded, jurisdiction under the relevant statute. To complicate matters further, Congress has also legislated specific grants of jurisdiction over Indians to states through isolated statutes.

Carole E. Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 *UCLA L. Rev.* 535 (1975). The author speaks to the implications of state assumption of jurisdiction under Public Law 280, including the financial burdens placed upon the state in the instance of acceptance. Resources also are dedicated to an examination of case law that has defined the jurisdictional bounds conferred under the statute.

B. States Granted Jurisdiction

Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin currently are named in the Act, but some reservations within certain of these states are exempted.

C. Optional State Assumption of Jurisdiction

A number of states exercised this option.

Florida: Fla. Stat. Ann. § 285.16 (1989). Subsections 285.17-.18 reserved certain social service and police powers in the Seminole and Miccosukee tribes.

Idaho: Idaho Code § 67-5101 to 67-5103 (1989) — limited jurisdiction.

Montana: Mont. Rev. Code Ann. §§ 83-801 to 83-806 (1989) — selected tribes.

Washington: Wash. Rev. Code Ann. §§ 37.12.010-.070 (1989). Assumption was later restored to the Quileute, Chehalis, Swinomish, and Colville tribes (via retrocession) as to criminal jurisdiction under §§ 37.12.100-.140.

Nevada: Nev. Rev. Stat. § 41.430 (1989) — now amended to remove jurisdiction where consent of the tribe is not present.

D. Criminal Jurisdiction Under Public Law 280

Assumption of criminal jurisdiction under Public Law 280 afforded the state the same authority to exercise jurisdiction over crimes within the reservation as it previously had outside reservation borders. Public Law 280 criminal jurisdiction assumption extinguishes application of 18 U.S.C. §§ 1152-1153, thereby leaving the state courts open to try all crimes, regardless of the party's race or the locus of the precipitating

event. Concurrent tribal court jurisdiction exists but is limited by deference to state law and the sentencing limits (one year/$50,000) imposed upon tribal courts by the Indian Civil Rights Act of 1968.[29]

Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified at 28 U.S.C. § 1360 (1988)) (criminal jurisdiction). See the full text of this statute in section X(D)(3) of this guide (appendix).

Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301-1303 (1988 & Supp. III 1991)).

1. Areas Exempt from State Assumption of Jurisdiction (Criminal)

28 U.S.C. § 1360(b) (1988) (criminal jurisdiction). See the full text of this statute in section X(D)(15) of this guide. Applicability of this section of the Act to criminal jurisdiction has had the effect of protecting treaty rights and preserving Indian trust property.

E. Civil Jurisdiction Under Public Law 280

Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified at 28 U.S.C. § 1360 (1988)) (civil jurisdiction). See the full text of this statute in section X(D)(3) of this guide (appendix).

1. Areas Exempt from State Assumption of Jurisdiction (Civil)

18 U.S.C. § 1162(b) (1988) (civil jurisdiction). See the full text of this statute in section X(D)(3) of this guide.

a) Encumbrance of Property

Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). The Ninth Circuit construed "encumbrance" as used in the exemption section of this act to preclude application of zoning regulations to Indian reservation trust property. But see *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971). The district court narrowly construed "encumbrance" as operative only when the title to Indian trust property is imperiled.

Snohomish County v. Seattle Disposal Co., 425 P.2d 22 (Wash. 1967). "Encumbrance" was here defined as any state action which has the effect of reducing the value of Indian trust property.

25 C.F.R. § 1.4 (1992) — asserts that the states cannot regulate leased trust land except as authorized by regulations adopted by the Secretary of Interior.

29. 25 U.S.C. §§ 1301-1303 (1988 & Supp. III 1991). These limits apply to criminal sentencing only.

b) Hunting And Fishing Rights

The federal government has consistently upheld the right of Native Americans to hunt and fish pursuant to treaties establishing the reservation as against state attempts to regulate this area. However, the federal government's plenary power has been exercised to abrogate treaty hunting and fishing rights when conservation concerns have arisen.[30]

See 18 U.S.C. § 1162(b) (1988). This exemption from assumption of state jurisdiction states that nothing in the grant 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."

Shelley D. Turner, "The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, The Effect of European Contact and the Continuing Right to Observe a Way of Life," 19 *N.M. L. Rev.* 377 (1989). The author provides a historical overview that includes analysis of contemporary cases.

Laurie Reynolds, "Indian Hunting and Fishing Rights: The Risk of Tribal Sovereignty and Preemption," 62 *N.C. L. Rev.* 743 (1984). The author appraises cases on hunting and fishing rights as they demonstate the tensions between tribal sovereignty and state/federal legislation.

John J. McLoone, Comment, "Hunting and Fishing Rights," 10 *Ariz. L. Rev.* 725 (1968). This comment focuses primarily on *Department of Game v. Puyallup Tribe*[31] and other cases discussing the jurisdiction of state courts regarding hunting and fishing rights.

F. State Retrocession of Jurisdiction to the Federal Government

Retrocession by the state of jurisdiction over Indian country and parties acquired under Public Law 280 is possible under 25 U.S.C. § 1323(a) (1988). However, Indian nations are not able to initiate directly the retrocession process; their only recourse in this regard is to petition either the state legislature or the Secretary of the Interior to exert influence upon the state to institute retrocession legislation.

Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 79 (codified at 25 U.S.C. § 1323(a) (1988)). See the full text of this statute in section X(d)(7) of this guide (appendix).

Exec. Order No. 11,435, 50 Fed. Reg. 17,339 (1968) — empowers the Secretary of the Interior to either accept or deny the proposed retrocession.

30. *See, e.g.*, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979), *modified*, Washington v. United States, 444 U.S. 816 (1979) (fishing); United States v. Dion, 476 U.S. 734 (1986) (hunting).

31. 391 U.S. 392 (1968).

United States v. Lawrence, 595 F.2d 1149 (9th Cir. 1979). The Ninth Circuit held that validity of the Secretary's acceptance of the retrocession posited by the state is a matter of federal law. Therefore, acceptance by the Secretary validates the retrocession.

Omaha Tribe of Nebraska v. Village of Walthill, 460 F.2d 1327 (8th Cir. 1972). The Eighth Circuit held retrocession in this case to be valid even though the acceptance by the Secretary of Interior deviated from that offered by the state.

G. States That Have Retroceded Jurisdiction

Nebraska: 35 Fed. Reg. 16,598 (1970) — affected only portions of the Omaha reservation within Thurston County.

Nevada: 40 Fed. Reg. 27,501 (1975) — affected various tribes.

Minnesota: 40 Fed. Reg. 4,026 (1975) — affected Boise Fort reservation.

Washington: 34 Fed. Reg. 14,288 (1969) — affected the Quinalt reservation.

Washington: 37 Fed. Reg. 7,353 (1972) — affected Port Madision reservation.

Wisconsin: 41 Fed. Reg. 8,516 (1976) — affected the Menominee tribe.

IV. Criminal Jurisdiction Within Indian Country

A. Introduction

Criminal subject matter jurisdiction within Indian reservations has crystallized to a greater degree than has civil jurisdiction within Indian country.[32] The reason for increased clarity revolves around definitive federal statutes and case law which define broad areas of jurisdiction. This does not imply that all jurisdictional tensions between the three tribunals have been solved, nor that the inquiry is simplistic,[33] but simply that this area is, relatively speaking, more clearly defined. The following analysis of criminal jurisdiction assumes that Public Law 280 is not operative; further, there are crimes that are national in scope that transcend state and reservation borders[34] that have not been factored in to the analysis.

B. Federal, Tribal, and State Court Jurisdiction — Criminal

1. Major Crimes

a) Indian Defendant and Indian Victim

Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (1988)). The Act, which

32. *See, e.g.*, 18 U.S.C. § 1153 (1988).
33. For example, Public Law 280 inquiry still attaches.
34. For example, treason and mail theft.

represented an unfavorable reaction to *Ex parte Crow Dog*, 109 U.S. 556 (1883), established federal jurisdiction over six major crimes. Exclusive federal jurisdiction is present if the alleged perpetrator is a Native American, regardless of whether the act was committed against an Indian or non-Indian. Further, it is irrelevant whether the crime was committed on- or off-reservation. No immunity was granted to Indians who had been tried for the same crime in a tribal court, therefore inferring that the federal courts were assuming exclusive jurisdiction over these crimes. Even though it is arguable that the federal courts share jurisdiction with tribal courts over the listed crimes, the tribal court's limited sentencing power effectively has relegated the tribal courts to misdemeanor actions in the criminal sphere. The Act implicitly left jurisdiction over lesser offenses within the purview of the tribal courts. The list of major crimes covered now numbers thirteen.

Act of June 25, 1948, ch. 645, 62 Stat. 827 (codified as amended at 18 U.S.C. § 3242 (1988)). The Act supplements section 1153, stating that "[a]ll Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

Robert N. Clinton, "Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective," 17 *Ariz. L. Rev.* 951 (1975). The author competently provides extensive treatment of the history of criminal jurisdiction from 1776 through 1975. Major headings of the article are as follows: "The Treaty Period: 1776-1871," "The Statutory Period: 1871-Date," "Indian Criminal Jurisdiction in the Supreme Court: The 19th Century Experience," "*Crow Dog* and *Kagama*: Jurisdiction Over Intra-Indian Crime," and "Jurisdictional Problems in the Late 19th Century." Clinton observes the complex, nonintegrated manner in which this body of law has unfolded. See also Clinton's followup article, "Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze," 18 *Ariz. L. Rev.* 503 (1976).

Tim Vollmann, "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendant's Rights in Conflict," 22 *Kan. L. Rev.* 387 (1974). Vollmann discusses the right, or lack thereof, of Indian defendants to receive jury instructions on, or to plead to, lesser included offenses in federal court under *Keeble v. United States*, 412 U.S. 205 (1973).

Charles T. DuMars, Comment, "Indictment Under the Major Crimes Act - An Exercise in Unfairness and Unconstitutionality," 10 *Ariz. L.*

Rev. 691 (1968). The author argues that Indians receive unfair treatment under the act for various reasons including, among other considerations, differing standards for the proof of evidence contingent upon where, within the same reservation, the act occurred.

Larry A. Burns, Note, "Criminal Jurisdiction: Double Jeopardy in Indian Country," 6 *Am. Indian L. Rev.* 395 (1978). The author describes the potential for double jeopardy given the ramifications of *United States v. Wheeler*,[35] where an Indian was convicted of disorderly conduct by a tribal court and subsequently charged in the federal court, in reference to the same incident, with carnal knowledge of a female under the age of 16.

b) Indian Defendant and Non-Indian Victim

See (a) above, as the analysis is commensurate.

c) Non-Indian Defendant and Indian Victim

Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified as amended at 18 U.S.C. § 3242 (1988)). The Act calls for exclusive jurisdiction in the federal courts for crimes of this nature. Intra-racial crimes between Indians committed on Indian land are specifically exempted under this statute. For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

Assimilative Crimes Act, Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717 (codified as amended in 18 U.S.C. § 13 (1988)). The Act applies state criminal law to supplement areas where there is no federal criminal statute specifically addressing the action in question. Specifically, this enactment makes criminal offenses committed in any place under the jurisdiction of the United States, "not prohibited or provided for by any law of the United States, subject to punishment in accordance with the laws of the state in which such place is situated." Given that this statute is tied to 18 U.S.C. § 1152, discussed *supra*, it applies only to inter- and not intra-racial crimes.

Williams v. United States, 327 U.S. 711 (1946). The Court affirmatively held that the Assimilative Crimes Act was applicable to this category of criminal activity through reference to 18 U.S.C. § 1152. However, the Act may not be used to allow application of conflicting state law when Congress has a pre-existing statute defining the offense in question. See *infra Victimless or Consensual Crimes* in section IV(C) of this guide.

d) Non-Indian Defendant and Non-Indian Victim

Though the plain language of 18 U.S.C. § 1153 includes this area of crime and, therefore, suggests federal court jurisdiction, judicial

35. 435 U.S. 313 (1978).

activism in the area has reserved criminal actions by non-Indians against other non-Indians for exclusive state court adjudication.

United States v. McBratney, 104 U.S. 621 (1881). The Court held that the State of Colorado, and not the federal courts, had exclusive jurisdiction to hear a case where a non-Indian is accused of murdering another non-Indian in Indian country. This was contrary to precedent which placed jurisdiction of non-Indian-versus-non-Indian crime within the exclusive province of the federal courts. The Court based this result on Congress' failure to require a disclaimer of jurisdiction over Indian land within its territory in Colorado's Enabling Act. Implicitly, this could have foreshadowed the assumption of state jurisdiction over Indian country, due to the mere lack of a disclaimer provision in the state's enabling act. Subsequent holdings have confined *McBratney* to non-Indian-versus-non-Indian crimes.

Draper v. United States, 164 U.S. 240 (1896). As with *McBratney*, this Court held that Montana state courts, and not the federal courts, have jurisdiction to hear a murder case involving a non-Indian victim and a non-Indian defendant. What is noteworthy is the fact that the reasoning relied on in justifying the *McBratney* decision (lack of a disclaimer in Colorado's Enabling Act) was not present in *Draper*, as Montana's Enabling Act *did* contain a disclaimer. Accord *New York* ex rel. *Ray v. Martin*, 326 U.S. 496 (1946).

2. Other Crimes

a) Indian Defendant and Indian Victim

Non-major crimes are specifically excluded from jurisdiction granted to the federal courts under 18 U.S.C. § 1152. Consequently, when a minor crime is alleged involving only Indians, the tribal courts have exclusive jurisdiction.

Duro v. Reina, 495 U.S. 676 (1990). The Supreme Court held that the tribal court could not assert jurisdiction over a nonmember Indian even though the defendant was a Native American, and the alleged act occured on the reservation.

Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified as amended at 18 U.S.C. § 3242 (1988)). Intraracial crimes between Indians committed on Indian land are specifically exempted under this statute. For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

b) Indian Defendant and Non-Indian Victim

Federal and tribal courts share concurrent jurisdiction over this category of crime under 18 U.S.C. § 1152.

Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified as amended at 18 U.S.C. § 3242 (1988)). For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

c) Non-Indian Defendant and Indian Victim

Given that tribal courts are devoid of jurisdiction to try a non-Indian for crimes of any nature under *McBratney*[36] and its progeny, the federal courts have exclusive jurisdiction over these actions under 18 U.S.C. § 1152.

Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified as amended at 18 U.S.C. § 3242 (1988)). For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

d) Non-Indian Defendant and Non-Indian Victim

Long-standing case law precedent has carved out exclusive state court jurisdiction in this area.

United States v. McBratney, 104 U.S. 621 (1881). See *supra* section IV(B)(1)(d) of this guide.

Draper v. United States, 164 U.S. 240 (1896). See *supra* section IV(B)(1)(d) of this guide.

Paul S. Volk, Note, "The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes by and Against Reservation Indians," 20 *New Eng. L. Rev.* 247 (1984-85). The author delineates the contemporary implications of removal from the tribal courts of criminal jurisdiction over non-Indians committing offenses in Indian country. The consequences discussed include the prevailing lack of enforcement by state and federal courts and the propagation of the assumption that tribal courts are inferior in their capacity to dispense equitable criminal justice to non-Indians.

Carol A. Mitchell, Note, "*Oliphant v. Schlie*: Tribal Criminal Jurisdiction of Non-Indians," 38 *Mont. L. Rev.* 339 (1977). The author examines the implications of *Oliphant*.

T. Christopher Kelly, Note, "Indians — Jurisdiction — Tribal Courts Lack Jurisdiction Over Non-Indian Offenders — *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)," 1979 *Wis. L. Rev.* 537. The author provides a comprehensive casenote addressing the policy considerations at tension in the decision and the practical consequences of the holding.

36. *See supra* § IV(B)(1)(d) of this guide.

C. Victimless or Consensual Crimes

1. Committed by Indians

These crimes usually will be defined by state law. However, these crimes are not "assimilated" under 18 U.S.C. § 13, when both the plaintiff and the defendant are Indians. In this case, jurisdiction should reside exclusively in the tribal courts. However, when non-Indians are involved, state court jurisdiction may attach.

Compare *United States v. Wheeler*, 435 U.S. 313 (1978), with the general proposition as stated *supra*.

United States v. Quiver, 241 U.S. 602 (1916). Prosecution for adultery involving Indians lies within the jurisdiction of tribal courts.

United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950). This court allowed state court jurisdiction over an Indian defendant regarding operation of a slot machine where the defendant procured a tribal license for the machine. This holding is unusual, and the case would probably be decided differently today. See *Wheeler* above.

2. Committed by Non-Indians

See section IV(B)(2)(d) of this guide. Analysis is the same.

V. Criminal Jurisdiction Outside of Indian Country

Indians are amenable to state court jurisdiction for crimes committed off the reservation and within the state's boundaries in the same fashion as are residents of that state. This conclusion attaches even when the crime involves an offense by one Indian against another Indian as long as the act took place off the reservation.

Petition of Fox, 376 P.2d 726 (Mont. 1962). The Montana Supreme Court held that the state court had jurisdiction over this check forgery case, even though the check was obtained from an Indian agency office and the check belonged to a member of the tribe, because the allegedly forged check was cashed outside of the reservation.

State v. La Barge, 291 N.W. 299 (Wis. 1940). A Chippewa Indian was held to be subject to state court jurisdiction, concerning violation of hunting laws on land outside of the reservation but within land ceded to the tribe by treaty.

Ex Parte Moore, 133 N.W. 817 (S.D. 1911). State court jurisdiction was upheld even though both parties are Indians.

Compare *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). State court jurisdiction was upheld here even though the Indian defendant never physically left Indian country. The defendant was held constructively to have been present outside Indian country for the purpose of this offense — he was shooting from within Indian country at a government official outside of the reservation.

VI. Civil Jurisdiction

A. Introduction

Precise delineation of the jurisdictional bounds of civil subject matter jurisdiction within Indian country is virtually impossible. The main source of the conflict revolves around the degree to which state courts have jurisdiction over causes of action that arise within the reservation. Various analytical constructs have been proffered and utilized by the courts to determine when a state court may assert power over reservation based causes of action; the history of the tribal/state court relationship chronicles a sustained effort on the part of the state to assert jurisdiction. Though federal statutes have clarified the subject matter bounds between the tribal and state courts as to certain areas of law, the bulk of civil jurisdiction is determined by case law "tests" that are subject to broad interpretation. As always, the researcher must inquire whether Public Law 280 has conferred jurisdiction in the first instance.

Williams v. Lee, 358 U.S. 217, 219-20 (1959). *Williams* is the seminal case in the area of state civil jurisdiction over Indians in Indian country. The Court denied state courts jurisdiction to hear a claim by a Non-Indian against an Indian for the purchase price of goods sold on the reservation. The court established the oft-quoted analysis as involving the query whether "*the state action infringed on the right of [the] reservation Indian to make their own laws and be ruled by them.*" This analytic approach subsequently has been termed the "infringement" analysis. This case holds that a non-Indian may not assert a civil cause of action against an Indian in state court for a transaction that occurred within Indian country.

Kake Village v. Egan, 369 U.S. 60 (1962). This case alleges to restrict the *Williams* infringement test. The Court in *Kake Village* asserted that a state may assume civil jurisdiction as long as the exercise of jurisdiction does not *directly interfere with tribal government*. However, most courts employ the *Williams* test in a broader fashion.

Kennerly v. District Court of Montana, 400 U.S. 423 (1971). In *Kennerly*, the Court appears to break with the *Williams* infringement analysis to ask simply whether the state in issue had been granted jurisdiction by federal statute or treaty (e.g., by Public Law 280). If the state had not been granted jurisdiction explicity by one of these vehicles, the state could not exercise civil jurisdiction where a non-Indian plaintiff was suing an Indian defendant for a cause of action that arose in Indian country. This position would grant an even larger measure of deference to tribal forums than would *Williams*, however. As stated above, the language in *Williams* provides the analytical frame for most recent opinions.

McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973). The Court clarified the instances where infringement analysis is appropriate and affirmed *Kennerly* by stating that the balancing of state and tribal interest is appropriate only when the state is asserting jurisdiction over *non-Indians* in Indian country. If state courts are to have jurisdiction over Indian defendants where the plaintiff is a non-Indian and the cause of action arose in Indian territory, then authority for this exercise of power must be grounded in an express grant of jurisdiction by either federal statute or treaty.

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) (*Fort Berthold II*). The Court held that Indian tribes and individual Indian plaintiffs have a right to sue non-Indians in state court, regardless of whether the cause of action arose on or off the reservation. Consequently, the state court may not deny jurisdiction.

Indian Civil Rights Task Force, "Development of Tripartite Jurisdiction in Indian Country," 22 *Kan. L. Rev.* 351 (1974). This article catalogues and discusses the seminal cases and legislation that have shaped contemporary jurisdiction through 1974.

Sandra Hansen, "Survey of Civil Jurisdction in Indian Country 1990," 16 *Am. Indian L. Rev.* (1991). Hansen provides a historical introduction which leads into a discussion of the basics of civil jurisdiction, involving a wide spectrum of interests including divorce, children, probate, water rights, taxation, etc.

B. Federal

1. General

Indians have access to the federal courts for redress in a civil action if the action entails a federal question or the parties have diversity of citizenship. Given that, for diversity purposes, an Indian is deemed a "citizen" of the state in which he or she resides, an Indian may not sue a non-Indian of the same state upon diversity jurisdiction. Also, the amount in controversy ($50,000.01) requirement must be satisfied. Finally, federal courts will require a defendant in a tribal action to exhaust tribal court remedies once suit is pending before the tribal court.

Act of Mar. 3, 1911, ch. 231, § 24, para. 1, 36 Stat. 1091 (codified at 28 U.S.C. § 1331 (1988)). The Act addresses "federal question" basis for assertion of jurisdiction by federal district courts. Given the specific grant of jurisdiction to the federal judiciary in federal question matters involving Indian tribes, see 28 U.S.C. § 1362 (1988). This section confers jurisdiction to federal district courts to hear federal question suits brought by individual Native Americans.

Act of Oct. 10, 1966, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (1988)). The Act specifically authorizes the tribe to bring suit on federal

question grounds in the federal district court. See the full text of this statute in the appendix to this guide. For the legislative history of this act, see *H.R. Rep. No. 1507*, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3145, and *S. Rep. No. 2040*, 89th Cong., 2d Sess. (1966). The reports state that the purpose of this act is to provide that "the district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Act of Mar. 3, 1911, ch. 231, § 24, para. 1, 36 Stat. 1091 (codified at 28 U.S.C. § 1332 (1988)) — general diversity of citizenship statute.

Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974). The Eighth Circuit held that neither federal question nor diveristy jurisdiction may be invoked on sole ground that the cause of action arose in Indian country or due to the fact that one party is an Indian and the other non-Indian, where both reside in the same state and the cause of action arose under state law.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). A federal court refused to hear a diversity case when a commensurate action was pending in the tribal court. The district court, as a matter of comity, will stay proceedings so that the tribal court may determine jurisdiction in the particular case. This deference to the tribal system, where an Indian is suing a non-Indian, is arguably transferable to the state context as well. However, the Court's language in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*[37] casts doubt on this application. See also *Wellman v. Chevron, Inc.*, 815 F.2d 577 (9th Cir. 1987).

2. Divorce, Adoption, Child Custody, and Probate

The federal courts are courts of limited jurisdiction. Therefore, Congress must grant courts jurisdiction by statute and in conformity with Article III of the United States Constitution. The Congress has not conferred jurisdiction on the federal courts over divorce, adoption and child custody, or probate proceedings. However, the federal government, through the Department of the Interior, does oversee probate of trust properties.

Act of June 25, 1910, ch. 431, 36 Stat. 855 (codified as amended at 25 U.S.C. § 372 (1988 & Supp. III 1991)). The Act grants power to the Department of Interior to oversee probate of trust properties.

25 C.F.R. § 152; 43 C.F.R. § 4 (1989) — regulations giving force to 25 U.S.C. § 372.

Antonina Vaznelis, "Probating Indian Estates: Conqueror's Court Versus Decedent Intent," 10 *Am. Indian L. Rev.* 287 (1982). Vaznelis

37. 467 U.S. 138, 148 (1984) (*Fort Berthold I*).

explores the history and existing problems confronting subject matter jurisdiction in Native American probate cases. A helpful practitioners guide (concise table) appears at page 306.

C. State

1. General

The general rules of jurisdiction under *Williams*[38] establish that state courts have no power to hear suits brought by non-Indians against Indians for civil causes of action that arise on the reservation. Consequently, it follows, *a fortiori*, that state courts have no jurisdiction to hear civil suits that arise between Indians within Indian country. Given that state courts are without subject matter jurisdiction to hear cases such as these that arguably infringe upon reservation Indians' "right to make their own laws and be governed by them," parties cannot consent to the state court's jurisdiction. Finally, Indians may sue non-Indians in state court regarding actions that have their genus on the reservation.

Williams v. Lee, 358 U.S. 217, 219-20 (1959). See *supra* section VII(A) of this guide.

Liberty v. Jones, 782 P.2d 369 (Mont. 1989). The Montana Supreme Court held that state courts did not have jurisdiction over cause of action in tort involving an Indian plaintiff and defendant when action arose on the reservation.

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) (*Fort Berthold II*). The Court held that Indian plaintiffs may sue non-Indians in state court, regardless of whether the cause of action arose on or off the reservation.

Johnson v. Kerr-McGee Oil Indus., Inc., 631 P.2d 548 (Ariz. Ct. App. 1981). The court of appeals held that a wrongful death action may be heard in state court where the decedent was an Indian working for a non-Indian corporation operating in Indian country.

Security State Bank v. Pierre, 511 P.2d 325 (Mont. 1973). The Montana Supreme Court held that a state court may not commence a cause of action where the nonmember plaintiff seeks recovery from cause of action arising within the reservation. This case provides an excellent history and analysis of the jurisdictional parameters between Montana and the tribes within its borders.

William C. Canby, Jr., "Civil Jurisdiction and the Indian Reservation," 1973 *Utah L. Rev.* 206. Canby, author of *American Indian Law in a Nutshell*, summarizes jurisdictional issues arising within Indian country through 1973.

John F. Sullivan, Comment, "State Civil Power Over Reservation Indians," 33 *Mont. L. Rev.* 291 (1972). The author explains state jurisdiction over civil actions when the events precipitating the cause of action occur on Indian land and one of the parties is an Indian.

38. *See supra* § VII(A) of this guide.

James L. Huemoeller, Note, "State Jurisdiction on Indian Reservations, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)," 13 *Land & Water L. Rev.* 1035 (1978). This note traces state/tribal court jurisdictional history and then explores the implications of *Moe*. The commentator asserts that allowing states to require Indians to tax non-Indian customers on cigarette sales and authorizing the states to collect the taxes withheld signals a breakdown in the burgeoning reassertion of Indian sovereignty.

Thomas J. Lynaugh, "Developing Theories of State Jurisdiction Over Indians: The Dominance of Preemption Analysis," 38 *Mont. L. Rev.* 63 (1977). Lynaugh primarily discusses *Moe v. Confederated Salish and Kootenai Tribes*[39] and *Fisher v. District Court*,[40] to assert that the Supreme Court has displaced the "balancing doctrine" of *Williams* with a preemption analysis. The preemption analysis asks whether the state has been conferred jurisdiction under a federal statute or treaty, or whether the exercise of jurisdiction infringes upon tribal interests sufficiently so as to outweigh the states' interest in asserting jurisdiction.

2. Divorce

Jurisdictional queries concerning divorce actions have traditionally focused upon the residence of the parties. Courts addressing jurisdiction over divorce actions involving Indians also consider the domicile of the parties involved. Generally, state courts are without subject matter jurisdiction to hear divorce actions when both parties to the divorce are Indians and live within the outside borders of the reservation. These actions lie exclusively within the purview of tribal court jurisdiction. Conversely, even when the action is between Indians, when both parties reside outside of Indian country, state courts may grant the divorce decree.[41]

Additionally, state courts may entertain a divorce action between non-Indians if both reside on Indian land. When one of the Indian spouses resides off the reservation and the other within Indian country, the tribal and state courts arguably have concurrent jurisdiction. Less settled is the situation involving interracial divorce. The infringement analysis of *Williams* would seem to dictate that state courts should not allow a non-Indian to use the state courts to terminate a union with an Indian living on the reservation. However, courts traditionally have focused upon the plaintiff's residence in divorce actions when discerning their capacity to hear the case. This area of the law is not

39. 425 U.S. 463 (1976).

40. 424 U.S. 382 (1976).

41. William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 227-29.

defined, and disparate jurisdictional holdings have been obtained.

Leon v. Numkena, 689 P.2d 566 (Ariz. Ct. App. 1984). The court of appeals held that the tribal court had jurisdiction to hear a divorce and custody case where the defendant is a member of tribe and subject to personal jurisdiction; the state court must recognize the tribal court's holding.

Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982). *Sheppard* involved divorce proceedings between a non-Indian husband and an Indian wife.

Lonewolf v. Lonewolf, 657 P.2d 627 (N.M. 1982). The New Mexico Supreme Court held that an Indian husband submitted to jurisdiction of state court when he filed a counterclaim; his wife was a non-Indian. But see Revised Law and Order Code of the Colorado River Indian Tribes (Ariz.) ch. 2, § 1 (1989), which allows for tribal court jurisdiction in divorce actions when either defendant resides on the reservation.

3. Adoption and Child Custody

This area of subject matter jurisdiction is pervasively covered[42] by the Indian Child Welfare Act of 1978.[43] This act provides for exclusive tribal court jurisdiction over adoption and child custody when the child resides on the reservation and when the child is a ward of the tribal court. Even when the Indian child resides off reservation, and, therefore, state courts are capable of hearing the action, the tribe or parents of the child have the option to have the proceeding transferred to the tribal court in foster care placement and termination of parental rights actions. This act reflects the obvious preference for placement of Indian children with adult Indian parents or guardians in an attempt to preserve the cultural integrity of Indian nations.

Act of Nov. 8, 1978, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1988)). See especially 25 U.S.C. §§ 1902-1921 (1988).

Diane Allbaugh, Note, "Tribal Jurisdiction over Indian Children: *Mississippi Band of Choctaw Indians v. Hollyfield*," 16 *Am. Indian L. Rev.* 533 (1989). Allbaugh gives an overview of tribal jurisdiction regarding Indian children welfare cases, culminating in an analysis of the impact of the Supreme Court's decision in the instant case. The Choctaw tribal court was held to have exclusive jurisdiction over adoption proceedings of Indian children, even though the natural parents of the child made a conscious decision to have the child off-reservation.

Joan Heifetzer Hollinger, "Beyond the Best Interest of the Tribe: The Indian Child Welare Act and the Adoption of Indian Children,"

42. Excepting custody decisions within divorce. *See supra* § VI(E) of this guide.

43. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1988)).

66 *U. Det. L. Rev.* 451 (1989). For jurisdiction materials, see pages 460-61, 481-91.

See also Indian Child Welfare Act of 1978, § 101(a), (c), (d), 25 U.S.C. § 1911(a), (c), (d) (1988); Ind. Code § 34-1-57-25 (1982).

Bruce Davies, "Implementing the Indian Child Welfare Act," 16 *Clearinghouse Rev.* 179 (1982). The author discusses the background, major provisions, policies, application, and acceptance of the act, concluding that it is a valuable piece of legislation.

Jesse Trentadue and Myra A. DeMontigny, "The Indian Child Welfare Act of 1978: A Practitioners Perspective," 62 *N.D.L. Rev.* 487 (1986). The authors assert that the dictates of the Act are not being observed in practice. This work explains the requisites of compliance, including jurisdictional and procedural matters.

4. Probate

State courts entertain probate actions where Indian decedents were domiciled off the reservation and where non-Indian decedents were domiciled on the reservation and the heirs of the non-Indian are non-Indian. Other combinations potentially call into play the *Williams* infringement test (e.g., when a non-Indian decedent resided on reservation and left Indian heirs), but pragmatically, many tribal courts assert jurisdiction only when the decedent is a member of that particular tribe.[44]

William C. Canby, Jr., "Civil Jurisdiction and the Indian Reservation," 1973 *Utah L. Rev.* 206, 229-32. Canby covers probate jurisdiction. See *supra* section II(J)(2)).

William C. Canby, Jr., *American Indian Law in a Nutshell* 156-57 (1989). Canby provides nutshell coverage of this subject. See *supra* section II(E).

D. Tribal

1. General

Williams established that tribal courts have exclusive jurisdiction over suits against Indians[45] arising in Indian country. Tribal courts share concurrent jurisdiction with state courts when an Indian sues another Indian for an action arising outside Indian country; when an Indian sues a non-Indian in Indian country; and, arguably under *Williams*, when a non-Indian brings an action against an Indian for a cause of action arising outside the reservation. The state courts have exclusive jurisdiction over non-Indian-versus-non-Indian suits regard-

44. *See, e.g.*, NAVAJO TRIB. CODE tit. 7, § 253(3) (Supp. 1984-85).

45. *See* discussion *supra* section II(K)(3) of this guide (member/nonmember controversy).

less of where they arise and over actions by Indians against non-Indians arising off the reservation.

See *supra* section VI(C)(1) of this guide for applicable cases and law reviews.

See also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). The Court held that a tribal court may decide its own jurisdiction in the first instance and that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . [and] [c]ivil jurisdiction over such activities presumptively lies in the tribal courts. . . ."

Guardianship of M. Sasse, 363 N.W.2d 209, 211 (S.D. 1985). The South Dakota Supreme Court held that the threshold jurisdictional test to determine whether a state court has subject-matter jurisdiction to hear a civil action between enrolled members of an Indian tribe is whether the state court action infringes on the right of reservation Indians to make their own laws and be ruled by them.

Richard B. Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," 54 *Wash. L. Rev.* 479 (1979). The article focuses on the authority of Indian tribes to make and enforce (through tribal courts) civil laws applicable to non-Indians within Indian country after *Oliphant*.

2. Divorce, Adoption and Child Custody, and Probate

See supra sections VI(C)(2) (divorce), VI(C)(3) (adoption and child custody), and VI(C)(4) (probate) of this guide. The analysis and relevant materials are covered in those sections.

E. Indian Child Custody Within Divorce

Application of Bertelson, 617 P.2d 121 (Mont. 1980). *Bertelson* is an interesting case that involves a child custody dispute regarding a part-Indian child, a non-Indian mother, and Indian paternal grandparents of the Chippewa Cree Tribe. The court afforded extensive jurisdictional treatment to this unique fact pattern.

Barbara Atwood, "Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity," 36 *UCLA L. Rev.* 1051 (1989). The article states that, given that the Indian Child Welfare Act of 1978 does not apply to "an award, in a divorce proceeding, of custody to one of the parents,"[46] the appropriate forum for the resolution of Indian child custody disputes between parents is an open, emotional, and complicated jurisdictional area. This author provides comprehensive treatment of the subtleties of this subject and, along with reviewing the basic jurisdictional parameters between the tribal and state courts, contends that where the state and tribal courts have concurrent juris-

46. 25 U.S.C. § 1903 (1988).

diction, that comity should be exercised in recognizing the foreign decree. Additionally, commensurate with prevailing policy objectives, the author asserts that the tribal courts should be granted preferred status in the instance of concurrent jurisdiction.

VII. Water Rights Forums

The federal courts had exclusive jurisdiction to adjudicate water rights until the "McCarren" amendment vested concurrent jurisdiction in state courts.

Act of July 10, 1952, ch. 651, tit. II, § 208(a)-(c), 66 Stat. 560 (codified at 43 U.S.C. § 666 (1988)). The Act allows joinder of the U.S. in adjudication of water rights.

Winters v. United States, 207 U.S. 564 (1908). *Winters* established that Native Americans had implied reserved water rights. Here, the Indians had implied rights to water necessary for irrigation.

State v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 712 P.2d 754 (Mont. 1985). The Montana Supreme Court held that state courts must follow federal law respecting substantive Indian and federal rights reserved under federal law. However, the cause of action may be heard in state court.

Western States Water Council, *Indian Water Rights in the West; Study for the Western Governors Association* (1984). This work focuses on the quantity of Indian water rights and the methods used to quantify those rights.

Richard L. Foreman, *Indian Water Rights: A Public Policy and Administrative Mess* (1981). The main body of this work contains annotations of the significant Native American water rights cases, and an appendix includes a chronology of the major cases in this area.

VIII. Disputes over Property Held in Trust for Native Americans

Federal courts have exclusive jurisdiction of disputes over property held in trust for Indians under 25 U.S.C. §§ 345-346 (1988) and 28 U.S.C. § 1353 (1988).

Department of Public Works v. Agli, 472 F. Supp 70 (D.C. Alaska 1979). The district court confirmed that state courts do not have jurisdiction to adjudicate rights to possession or ownership of interests in property held in trust for Alaska natives.

IX. History of Major Federal Legislation, Reports, and Case Law Defining Subject Matter Jurisdiction; Congressional Assumption of Power Under the Constitution

Proclamation of King George III of Oct. 7, 1763, 4 *Indian Affairs, Laws and Treaties* 1172 (Charles J. Kappler ed., 1924). The procla-

mation reserved power to regulate Indian affairs in the Crown, not with the colonists.

U.S. Const. art. I, § 8, cl. 3. Congress assumed plenary power over Indian tribes via this clause, which authorized Congress to regulate trade with Indians. It remains the foundation of Congress' power to date.

U.S. Const. art. II, § 2, cl. 2. This clause authorizes the president to make treaties with Native Americans. Though relevant through the late 1800s when many treaties were negotiated, federal statutory law has replaced the treaty process as the means to determine the U.S./ Native American relationship. Many of the treaties contained jurisdictional provisions, but some were not well defined as to particular application. See, especially, Treaty with the Miami Indians, June 5, 1854, art. 9, 10 Stat. 1097.

Act of July 22, 1790, ch. 33, §§ 5-6, 1 Stat. 138. The Act provided a federal forum applying state and territorial criminal law against non-Indians who trespassed on Indian land.

Act of May 19, 1796, ch. 30, §§ 4, 6, 1 Stat. 470-71. The Act added penalties for robbery, larceny, trespass, and murder to the Act of July 22, 1790.

Act of Mar. 3, 1817, ch. 92, §§ 1-3, 3 Stat. 383. The Act provided jurisdiction to the federal courts over offenses committed *by* Indians. However, this law excluded crimes committed by Indians against other Indians on Indian land and did not negate any prior jurisdictional relationships established by treaty. This statute was a precursor to 18 U.S.C. § 1153 (1988).

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). In this case, Justice Marshall characterized the Cherokees as "a distinct political society separated from others, capable of managing its own affairs and governing itself." Specifically, he stated, the tribes were "domestic dependent nations" occupying a unique status. This proclamation reflected a period affirming the sovereignty of Indian nations.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Again, in *Worcester*, Marshall described the Cherokee nation as "a distinct community, occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force . . . .*" (emphasis added).

United States v. Rogers, 45 U.S. (4 How.) 567, 571 (1846). In *Rogers*, Justice Taney recharacterized the status of Indian nations in terms embracing a diminished sense of sovereignty. Taney stated that Indian land was "assigned to them [Indians] by the United States, as a place of domicile for the tribe [which] they hold and occupy . . . with the assent of the United States, *and under their authority*. Further, Taney asserted that "Indian tribes residing within the territorial limits of the United States *are subject to their authority*, and where the country occupied by them is not within the limits of one of the states,

Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian" (emphasis added) (an obvious departure from *Worcester*).

Developments in 1861 — Congress conditioned admittance of territories into statehood upon inclusion of disclaimer provisions in the state's enabling act disclaiming any state jurisdiction over Indian lands within its boundaries, thus reserving the same to federal and tribal courts. See, especially, Mont. Const. art. I; Ariz. Const. art. 20, para. 4; Alaska Const. art. XII, § 12.

Developments in 1871 — The treaty period ended. See 25 U.S.C. § 71 (1988).

United States v. McBratney, 104 U.S. 621 (1881). Contrary to precedent granting jurisdiction over non-Indian versus non-Indian crime within the exclusive province of the federal courts, the Court in *McBratney* held that the State of Colorado, not the federal courts, had exclusive jurisdiction to hear a case where a non-Indian was accused of murdering another non-Indian in Indian country. The court based this result on Congress' failure to require a disclaimer of jurisdiction over Indian land within its territory in Colorado's Enabling Act. Implicitly, this could have foreshadowed the assumption of state jurisdiction over Indian country due to the mere lack of a disclaimer provision in the state's enabling act. Subsequent holdings have confined *McBratney* to non-Indian versus non-Indian crimes.

Ex parte Crow Dog, 109 U.S. 556 (1883). The Court affirmed the longstanding rule that federal (and, of course, state) courts lacked jurisdiction to try an Indian for the murder of another Indian on Indian land.

Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (1988)). The Act, which represented an unfavorable reaction to *Crow Dog*, established federal jurisdiction over six major crimes. Exclusive federal jurisdiction is present if the alleged perpetrator is a Native American, regardless of whether the act was committed against an Indian or a non-Indian. Further, it is irrelevant whether the crime was committed on- or off-reservation. No immunity was granted to Indians who had been tried for the same crime in a tribal court, therefore, inferring that the federal courts were assuming exclusive jurisdiction over these crimes. However, the Act implicitly left jurisdiction over lesser offenses within the purview of the tribal courts. The list of major crimes covered now numbers thirteen.

United States v. Kagama, 118 U.S. 375 (1886). The Court in *Kagama* upheld federal jurisdiction over a murder case involving an Indian defendant and an Indian victim in a suit challenging the constitutionality of the Major Crimes Act. Rather than base U.S. authority on U.S. Const. art. I, § 8, cl. 3, the Court found congressional power to allocate

jurisdiction to the federal courts as incident to the nature of the Indian/United States relationship, wherein the tribal nations are characterized as "wards" of the United States in need of protection from potentially hostile neighboring states. This decision undermined the sweeping state jurisdictional implications of *Rogers* and *McBratney*.

General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. § 349 (1988)). The Act manifested Congress' attempt to terminate Indian reservations. The law provided for the allotment of reservation land to individual Indians. The land was to be held in trust by the government for twenty-five years, then conveyed to the individual after that time. The jurisdictional effect of this process was that the Indian so allotted, or Indians who severed their tribal relationship, became citizens of the United States, subject, therefore, to the jurisdiction of state and federal courts in the same fashion as other United States citizens. The net effect of the program, outside jurisdictional implications, was the diminution of Indian country from 138 million acres to 48 million acres (20 million of which were either desert or semi-desert lands).

United States v. LeBris, 121 U.S. 278 (1887). Despite the fact that Minnesota's Enabling Act did not contain a disclaimer provision denying jurisdiction over Indian country, contrary to the implication derived from *McBratney* that the absence of a disclaimer conceivably vests jurisdiction in the state, the Court held in *LeBris* that Indian reservations within Minnesota are deemed Indian country subject to federal liquor statutes.

United States v. Thomas, 151 U.S. 577 (1894). The Court held that federal courts had jurisdiction in an Indian-versus-Indian murder case, despite the fact that Wisconsin did not have a disclaimer clause.

Draper v. United States, 164 U.S. 240 (1896). Like *McBratney*, this Court held that Montana state courts, not the federal courts, have jurisdiction to hear a murder case involving a non-Indian victim and a non-Indian defendant. What is noteworthy is the fact that the reasoning relied on in justifying the *McBratney* decision (lack of a disclaimer in Colorado's Enabling Act) was not present in *Draper*, as Montana's Enabling Act *did* contain a disclaimer.

Talton v. Mayes, 163 U.S. 376 (1896). The Court upheld a *tribal court* conviction of an Indian for the murder of another Indian occurring in Indian country against an assertion that the defendant did not receive constitutional protections afforded by the Bill of Rights. This decision would seem to confirm concurrent jurisdiction (tribal/federal) over major crimes committed by Indians against Indians on Indian land. This case also established that tribal governments are not mandated to extend United States constitutional guarantees to Native Americans.

Assimilative Crimes Act of 1898, ch. 576, § 2, 30 Stat. 717 (codified as amended at 18 U.S.C. § 13 (1988)). The Act applied state criminal law to supplement areas where there was no federal criminal statute specifically addressing the action in question. Specifically, this enactment

made "criminal offenses committed in any place under the jurisdiction of the United States, not prohibited or provided for by any law of the United States, subject to punishment in accordance with the laws of the state in which such place is situated . . . ."

Brookings Institution, Institute for Government Research, *The Problem of Indian Administration* (1928). This report delineated the failures of the allotment act and provided the impetus for the Indian Reorganization Act of 1934.

Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-497 (1988 & Supp. III 1991)). The Act reflected a direct reversal of congressional policy, in that the purpose of the Act was to stabilize tribal governments and end the alienation of Indian lands.

Developments in the 1940s — Congressional enactments granted certain states jurisdiction over particular reservations. See Act of June 25, 1948, ch. 645, 62 Stat. 827 (Kansas); Act of May 31, 1946, ch. 279, 69 Stat. 229 (North Dakota); Act of June 20, 1948, ch. 759, 62 Stat. 1161 (Iowa); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1988) (New York); Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (California).

H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). Congressional tradewinds shifted to a policy of "termination," the aim of which is to "as rapidly as possible . . . 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 [and] to end their status as wards of the United States . . . ." As a result of this policy, many tribes were simply terminated and their lands sold. See, especially, Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099, (codified at 25 U.S.C. § 741 (1988)) (Utah); *DeCoteau v. District County Court*, 420 U.S. 425 (1975). *DeCoteau* illustrates the effect of termination upon the Lake Traverse Indian Reservation in South Dakota.

Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161-1162, 25 U.S.C. §§ 1321-1322, 28 U.S.C. 1360 (1988)). The Act granted state civil and criminal jurisdiction to California, Nebraska, Minnesota, Oregon, Wisconsin, and Alaska (in 1958). Certain reservations in Minnesota and Oregon were not affected. The Act allowed other states to assume jurisdiction over tribes through legislative enactment. Tribal consent to assumption of jurisdiction by the state was not required.

Martinez v. Southern Ute Tribe, 273 F.2d 731 (10th Cir. 1959). The Tenth Circuit held that suits may not be brought in the federal court system merely because one of the parties is a Native American. However, Indian tribes have the right to bring federal question and diversity actions in the federal courts under 28 U.S.C. § 1362 (1988)). See also Eunice A. Eichelberger, Annotation, "United States District Court Jurisdiction

of Action Brought by Indian Tribe Under 28 USCS § 1362," 65 *A.L.R. Fed.* 649 (1981).

Williams v. Lee, 258 U.S. 217, 219-20 (1959). Williams is the seminal case in the area of state civil jurisdiction over Indians in Indian country. The Court denied state courts jurisdiction to hear a claim by a Non-Indian against an Indian for the purchase price of goods sold on the reservation. The court established the oft-quoted analysis as involving the query whether "the state action infringed on the right of the reservation Indians to make their own laws and be governed by them?" This analytic approach, subsequently termed the "infringement" analysis, is the dominant "test" currently employed by the judiciary.

Kake Village v. Egan, 369 U.S. 60 (1962). This case alleges to restrict the *Williams* infringement test. The Court in *Kake Village* asserted that a state may assume civil jurisdiction as long as the exercise of jurisdiction does not *directly interfere with tribal government.*

Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201-03, 82 Stat. 77-78 (codified as amended at 25 U.S.C. §§ 1301-1303 (1988 & Supp. III 1991)). The ICRA revised Public Law 280 to require tribal consent to state assumption of jurisdiction. The Act also provided a mechanism for states to retrocede jurisdiction they had acquired under Public Law 280. See 25 U.S.C. § 1323(a) (1988). However, the act also limits tribal courts sentences (in criminal, not civil, cases) to one year's imprisonment, $50,000, or both, thereby effectively relegating tribal court criminal dockets to hearing misdemeanor offenses.

"Proposed Recommendations Relating To The American Indians," Message From The President, 91st Cong., 2d Sess., 116 *Cong. Rec.* 23,258 (1970). President Nixon proffered what remains contemporary federal policy toward Indian nations. Nixon recognized and declared that the government's prior termination policy was ill advised, and he reaffirmed the federal government's trust responsibility while affirming and encouraging Indian autonomy. Examples of legislation passed that was designed to implement this vision of United States/Native American relations include Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1453, 1461-1469, 1481-1498, 1511, 1512, 1521-1524, 1541-1543 (1988 & Supp. III 1991); Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450, 450a (1988); American Indian Policy Review Commission, 25 U.S.C. § 174 (1988)).

Kennerly v. District Court, 400 U.S. 423 (1971). The Court appeared to break with the *Williams* infringement analysis to ask simply whether the state in issue had been granted jurisdiction by federal statute (e.g., by Public Law 280) or treaty. If the state had not been granted jurisdiction by one of these vehicles explicitly, then the state could not exercise civil jurisdiction where a non-Indian plaintiff was suing an Indian defendant for a cause of action that arose in Indian country.

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973). The Court clarified the instances where infringement analysis is appropriate and affirmed *Kennerly* by stating that the balancing of state and tribal interest is appropriate only when the state is asserting jurisdiction over *non-Indians* in Indian country. If state courts are to have jurisdiction over Indian defendants where the plaintiff is a non-Indian and the cause of action arose in Indian territory, authority for this exercise of power must be grounded in an express grant of jurisdiction by either federal statute or treaty.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court held that tribal courts lack criminal jurisdiction over non-Indians. This is now black letter law.

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) (*Fort Berthold II*). The Court held that Indian tribes and individual Indian plaintiffs have a right to sue non-Indians in state court, regardless of whether the cause of action arose on or off the reservation. Consequently, the state court may not deny jurisdiction.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). The Supreme Court upheld a lower federal court decision to refuse to hear a diversity case when a commensurate action was proceeding in the tribal court. This deference to the tribal system, where an Indian is suing a non-Indian, is arguably transferable to the state context as well. However, the Supreme Court's language in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*[47] casts doubt on this application).

Duro v. Reina, 495 U.S. 676 (1990). The Supreme Court held that the tribal court could not assert jurisdiction over a nonmember Indian even though the defendant was a Native American, and the alleged act occured on the reservation. But see Act of Nov. 5, 1990, 104 Stat. 1892 (codified at 25 U.S.C. § 1301 (Supp. III 1991)). The Act affirmed tribal court jurisdiction over nonmember Indians by inclusive language in § 1301(2), (3), (4).

X. Appendix: Federal Statutes of General Scope and Interpretive Materials

A. Policy

1. Act of Jan. 4, 1975, 88 Stat. 2203 (codified at 25 U.S.C. § 450 (1988))

Congressional statement of findings.

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and

47. 467 U.S. 138, 148 (1984) (*Fort Berthold I*).

resulting responsibilities to, American Indian people, finds that-

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that-

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

Savings Provisions. Provided that:

"Nothing in this Act shall be construed as —

"(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

"(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to Indian people." Severability. Section 211 of Pub.L. 100-472 provided that: "If any provision of this Act or the application thereof to any Indian tribe, entity, person or circumstance is held invalid, neither the remainder of this Act, nor the application of any provisions herein to other Indian tribes, entities, persons, or circumstances, shall be affected thereby."

For the legislative history of this act, see *H.R. Rep. No. 1600*, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7775, and *S. Rep. No. 682, S. Rep. No. 762*, 93rd Cong., 2d Sess. (1974).

B. Indian Country

1. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1988))

> Indian country defined.
>
> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

C. Assimilative Crimes Act

1. Act of July 7, 1898, ch. 576, § 2, 30 Stat. 717, 18 U.S.C. § 13 (1988)

> Laws of states adopted for areas within federal jurisdiction.
>
> (a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
>
> (b) For purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, Territory, Possession or District, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special

maritime and territorial jurisdiction of the United States.

D. Jurisdictional Statutes

1. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1152 (1988))

> Laws governing.
>
> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

2. Act of Mar. 3, 1985, ch. 341, § 9, 23 Stat. 385 (codifed at 18 U.S.C. § 1153 (1988))

> Offenses committed within Indian country.
>
> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

Amendment of Sexual Abuse Provisions. Public Law 99-646, § 87(c)(5), 100 Stat. 3623, directed that this section be amended (A) in the first paragraph, by striking out "rape, involuntary sodomy, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape," and inserting in lieu thereof "a felony under chapter 109A,"; and (B) in each of the second and third paragraphs, by striking out "involuntary sodomy." This amendment was incapable of literal execution in view of the earlier amendment of this section by Public Law 99-303, May 15, 1986, 100 Stat. 438.

1988 Amendment. Subsection (a) of Public Law 100-690 substituted "a felony under chapter 109A" for "rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape."

Indian Civil Rights Task Force Memorandum, *Reform of the Federal Criminal: Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess., pt. X, at 7452-58 (1974). This memorandum suggested that tribal courts share concurrent jurisdiction with the federal courts over the crimes enumerated in this act.

Joan Kirshberg, Annotation, "What Constitutes Assault 'Resulting in Serious Bodily Injury' Within the Special Maritime or Territorial Jurisdiction of the United States for Purposes of 18 U.S.C.S. § 113(f), Providing Punishment for Such Act," 55 *A.L.R. Fed* 895 (1981). The author provides added definition for the crime of "assault resulting in serious bodily injury" (a crime actionable in federal court under the Major Crimes Act as above). This annotation (and pocket part) cites numerous cases involving Indian defendants.

3. Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 588 (18 U.S.C. § 1162 (1988))

> State jurisdiction over offenses committed by or against Indians in the Indian country.
>
> (a) Each of the States or Territories 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 or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have

the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory	Indian Country Affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
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.

(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 as areas over which the several States have exclusive jurisdiction.

For the legislative history of this act, see *H.R. Rep. No. 848*, 83rd Cong., 1st Sess. (1953), and *S. Rep. No. 699*, 83rd Cong., 1st Sess. (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409. The Senate Report stated that the purpose of this act was "withdrawal of Federal responsibility for Indian affairs wherever practicable . . . and . . . termination of the subjection of Indians to federal laws applicable to Indians as such."

4. Act of June 25, 1948, ch. 645, 62 Stat. 827 (codified at 18 U.S.C. § 3242 (1988))

> Indians committing certain offenses; acts on reservations.
>
> All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

For the legislative history of this act, see *H.R. Rep. No. 352*, 81st Cong., 1st Sess. (1949), and *S. Rep. No. 303*, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 *U.S. Code Cong. Serv.* 1248.

5. Act of Apr. 11, 1968, 82 Stat. 78 (codified at 25 U.S.C. § 1321 (1988))

> Assumption by State of criminal jurisdiction.
>
> (a) Consent of United States; force and effect of criminal laws. The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed 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 any such offense committed elsewhere within the State, and the criminal laws of such State 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, and use of property; hunting, trapping, or fishing.
>
> 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.

For the legislative history of this act, see *S. Rep. No. 721*, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, and *H.R. Rep. No. 473*, 90th Cong., 2d Sess. (1968).

6. Act of Apr. 11, 1968, 82 Stat. 79 (codified at 25 U.S.C. § 1322 (1988))

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.

For the legislative history of this act, see *S. Rep. No. 721*, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, and *H.R. Rep. No. 473*, 90th Cong., 2d Sess. (1968).

7. Act of Apr. 11, 1968, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (1988))

Retrocession of jurisdiction by State.

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18, section 1360 of title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

For the legislative history of this act, see *S. Rep. No. 721*, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, and *H.R. Rep. No. 473*, 90th Cong., 2d Sess. (1968) .

8. Act of Apr. 11, 1968, 82 Stat. 79 (codified at 25 U.S.C. § 1324 (1988))

Amendment of State constitutions or statutes to remove legal impediment; effective date.

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 or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter 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.

For the legislative history of this act, see *S. Rep. No. 721*, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, and *H.R. Rep. No. 473*, 90th Cong., 2d Sess. (1968).

9. Act of Apr. 11, 1968, 82 Stat. 80 (codified at 25 U.S.C. § 1325 (1988))

> Abatement of actions.
>
> (a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.
>
> (b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

For the legislative history of this act, see *S. Rep. No. 721*, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, and *H.R. Rep. No. 473*, 90th Cong., 2d Sess. (1968).

10. Act of Apr. 11, 1968, 82 Stat. 80 (codified at 25 U.S.C. § 1326 (1988))

> Special election.
>
> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

For the legislative history of this act, see *S. Rep. No.* 721, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, and *H.R. Rep. No. 473*, 90th Cong., 2d Sess. (1968).

11. Act of Nov. 8, 1978, 92 Stat. 3071 (codified at 25 U.S.C. § 1911 (1988))

Indian tribe jurisdiction over Indian child custody proceedings.

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

For the legislative history of this act, see *H.R. Rep. No. 1386*, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 7630, and *S. Rep. No. 597*, 95th Cong., 2d Sess. (1977).

12. Act of Nov. 8, 1978, 92 Stat. 3074 (codified at 25 U.S.C. § 1918 (1988))

Reassumption of jurisdiction over child custody proceedings.

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession.

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over

limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval. If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

For the legislative history of this act, see *H.R. Rep. No. 1386*, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 7530, and *S. Rep. No. 597*, 95th Cong., 2d Sess. (1977). The House Report stated that the purpose of this act is to establish minimum federal standards for the removal of Indian children from their families and, therefore, to encourage stability and security of Indian tribes. See also *S. Rep. No. 597*, 95th Cong., 2d Sess. (1977).

13. Act of Nov. 8, 1978, 92 Stat. 3074 (codified at 25 U.S.C. § 1919 (1988))

Agreements between States and Indian tribes.

(a) Subject coverage:

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected. Such agreements may be revoked by either party upon one hundred and eighty days written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed

jurisdiction, unless the agreement provides otherwise.

For the legislative history of this act, see *H.R. Rep. No. 1386*, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 7530, and *S. Rep. No. 597*, 95th Cong., 2d Sess. (1977).

14. Act of Nov. 8, 1978, 92 Stat. 3075 (codified at 25 U.S.C. § 1920 (1988))

> Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception.
>
> Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

For the legislative history of this act, see *H.R. Rep. No. 1386*, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 7530, and *S. Rep. No. 597*, 95th Cong., 2d Sess. (1977).

15. Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified at 28 U.S.C. § 1360 (1988))

> 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 |
> | --- | --- |
> | Alaska | All Indian country within the State |

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

(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.

For the legislative history of this act, see *H.R. Rep. No. 848*, 83d Cong., 1st Sess. (1953), and *S. Rep. No. 699*, 83d Cong., 1st Sess., *reprinted in* 1953 U.S.C.C.A.N. 2409.

16. Act of Oct. 10, 1966, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (1988))

Indian tribes.

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

For the legislative history of this act, see *H.R. Rep. No. 1507*, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3145, and *S. Rep. No. 2040*, 89th Cong., 2d Sess., (1966). The Senate Report stated that the purpose of this act is to "provide that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the controversy arises

under the Constitution, laws, or treaties of the United States." This provision applies without regard to jurisdictional amount specified in 28 U.S.C. § 1331(a).

Eunice A. Eichelberger, Annotation, "United States District Court Jurisdiction of Action Brought by Indian Tribe Under 28 U.S.C.S. § 1362," 65 *A.L.R. Fed.* 649 (1981).

17. Act of Nov. 5, 1990, 104 Stat. 1852 (codified at 25 U.S.C. § 1301 (Supp. III 1991)).

> (2)"powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.