IDAHO TRIBAL-STATE COURT BENCH BOOK 2014 EDITION

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I. Purpose

With the re-invigoration of the Idaho Tribal-State Court Forum in the fall of 2012, Idaho Supreme Court Chief Justice Roger S. Burdick appointed the Forum Co-Chairs, Honorable Gaylen Box, Senior Judge and Honorable Fred Gabourie, Jr., Ret. Former Chief Judge of the Kootenai Tribe with experience in many of the Tribal Courts in Idaho. During the Forum meeting on March 20, 2013, the participants resolved to develop an up-to-date bench book.

The purpose of the Idaho Tribal-State Court Bench Book (2014) is to provide a usable resource to judges in Tribal Courts and State Courts in the administration of justice.[1] The Bench Book is also a resource for legal practitioners and litigants in these court systems to understand the jurisdictional issues, boundaries, and cooperation that occur with neighboring jurisdictions and community interactions.[2]

II. Tribal Courts and State Courts in Idaho

A. Tribal Courts Overview (Alphabetically)

In Idaho, there are five major federally-recognized Tribal Nations with tribal court systems. The Coeur d'Alene Tribe in Benewah and Kootenai County, the Kootenai Tribe in Boundary County, the Nez Perce Tribe in Nez Perce County, the Shoshone-Bannock Tribes in Bannock, Bingham, Caribou, and Power Counties have established court systems, and the Shoshone-Paiute Tribes of the Duck Valley Reservation in Owyhee County, Idaho and Elko County, Nevada. The sixth federally-recognized Tribal Nation is the Northwestern Band of Shoshone Nation with two official offices - one in Pocatello, Idaho and one in Brigham City, Utah. The Bench Book is extremely relevant to all areas throughout the state as issues may arise off-reservation impacting on-reservation matters. The Bench Book is especially important in and near the districts where Tribes are located due to jurisdictional concerns and differing legal concepts that apply to Native Americans.

The Coeur d'Alene Tribal Court

[1] The foundation of this 2014 edition is based upon the Idaho Tribal-State Bench Book 1997 edition by Mr. Douglas Nash, a member of the Nez Perce Tribe and the Idaho State Bar; Judge Schilling, Judge Fred Gabourie, Sr., and Chief Justice of the Idaho Supreme Court Chas F. McDevitt.

[2] Special thanks to the University of Idaho College of Law students who served as Research Assistants to Professor EagleWoman in drafting sections of the Bench Book: Alicia Derry (2013), Shanna Knight (2012), Micah Runnels (2012), and Ashley Ray (2014).

The Coeur d'Alene Tribal Court hears general civil and criminal cases for adult and juvenile proceedings within their jurisdiction. The Law and Order Administrator supervises the Court directly to ensure efficiency in operations. The Administrator reports to the Law and Order Committee which, is ultimately overseen by Tribal Council.

The Court also employs a Chief Judge as well as an Associate Judge to hear all cases. Each judge currently handles a specific caseload, as determined by the Chief Judge. The Judges rely first on the Coeur d'Alene Tribal Code, as well as relevant State and Federal laws in all proceedings. Appeals are heard by a three judge panel. The three judge panel is comprised of judges pro tempore.

The Coeur d'Alene Tribal Court also employs a prosecutor and a public defender to serve as advocates for tribal members and tribal interests in criminal matters. The prosecutor and public defender work closely with the Tribe's probation department. The Tribe employs two probation officers to work with juveniles and adults. The Tribe also employs a civil attorney to assist tribal members with their legal needs. The civil attorney's office works closely with the Tribal Child Support and Child Welfare offices.

When outside counsel intends to appear before the Coeur d'Alene Tribal Court counsel must be approved to practice by the Tribal Court. Counsel must submit to the Clerk's Office: a letter requesting permission to practice in the Coeur d'Alene Tribal Court, submit proof of admittance to a state bar, and a twenty-five dollar fee. The Tribal Code also has a spokesperson provision in § 1-24.01 which allows lay persons to represent a party in a proceeding. The spokesperson must also be approved by the Tribal Court and should submit a letter requesting permission to the Clerk's Office.

The Kootenai Tribal Court

The Tribal Court of the Kootenai Tribe of Idaho was established by the Judiciary Act, Kootenai Law and Order Code Chapter 2. The Kootenai Tribal Court currently hears cases two times per month. The caseload consists of primarily civil cases, but the Court also hears criminal cases within its jurisdiction. The Court operates with one Chief Judge, appointed by the Tribal Council pursuant to the Judiciary Act. If the Chief Judge is disqualified from a case, the Chief Judge or Tribal Council can call an Associate Judge into service. If there are no Associate Judges available, the Chief Judge may request a Visiting Judge from a neighboring tribe hear the matter before the Court. The Visiting Judge must be approved by Tribal Council.

Judges are appointed to two year terms and may be reappointed. Judges may only be suspended or removed from office pursuant to the Judiciary Act, which requires a majority vote of the full Tribal Council membership and cause. Causes sufficient for removal or suspension are conduct determined by the Tribal Council to demonstrate the judge's inability to properly perform the duties of office, including failure to uphold the law of the Tribe, excessive use of intoxicants, immoral behavior, conviction of any offense involving moral turpitude, use of official position for personal gain, desertion of office or failure to perform duties.

Appeals from decisions of the Tribal Court are heard before one judge who did not originally hear the case. If it is not possible for any reason to assign the case to a judge of the Tribal Court, the services of a judge from the Northwest Tribal Court Judges Association or other competent judge may be appointed. Appeals are limited to issues arising under the Indian Civil Rights Act.

The Kootenai Tribe is represented by the Tribal Attorney for civil matters and Tribal

Prosecuting Attorney for criminal matters. Professional attorneys may represent parties before the Court, provided they are admitted to practice before the Court and are members in good standing of any bar of the United States, State, Territory, or insular possession of the United States. Non-attorneys are also eligible to represent parties, provided they are admitted to practice before the Court, are Kootenai Tribe citizens twenty-one years of age or older or are twenty-one years of age or older and take an oath that they are familiar with Kootenai laws and customs, have never been convicted of a felony and pay a $25 fee.

The Nez Perce Tribal Court

The Nez Perce Tribal Court hears criminal and civil cases within their jurisdiction. The Court currently employs one Chief Judge who oversees the operation of the Court. The Chief Judge is overseen by the Nez Perce Law and Order Executive Director, who is overseen by the Nez Perce Law and Order Subcommittee. The Subcommittee hears suggestions and consequently develops policies for the operation of the Court system to be approved by the Tribal Executive Committee. Since there is one judge, the Court utilizes judges pro tempore as needed. The Appellate Court is comprised of a three judge panel of judges pro tempore who did not hear the case at the trial level. The panel is randomly chosen by the Chief Judge.

The Nez Perce Tribe employs both a prosecutor and a public defender. The Tribe also employs two probation officers, as well as one probation tracker, who work with the Tribal Court on juvenile and adult cases. The Tribe also employs an attorney as part of the Child Support Enforcement Program. The Child Support Enforcement Program is not exclusive to tribal members. Anyone living and/or working on the Reservation can apply for services.

The Nez Perce Tribal Court has its own membership policies too. To practice before the Tribal Court attorneys must be barred by a U.S. state. To obtain membership to practice in the Nez Perce Tribal Court the attorney must: submit a fifty dollar fee, be eligible to practice law, promise to follow the court rules, and cannot have any criminal convictions. The Chief Judge reviews all requests and, if approved, the attorney will take an oath and receive a certificate to practice. Annual membership dues are twenty-five dollars. Attorneys can also appear pro hac vice but must pay a fifty dollar fee and be approved by the Court.

The Shoshone-Bannock Tribal Court

The Shoshone-Bannock Tribes have an extensive court system which hears roughly 4,000 criminal and civil cases per year. The Court is also "the oldest continuously operating court system in Idaho."[3] The Fort Hall Business Council has ultimate oversight over the Shoshone-Bannock Tribal Court as provided in the Constitution and Bylaws of the Shoshone-Bannock Tribes and the Court Administrator has oversight over Court staff. The judiciary is appointed by the Fort Hall Business Council and consists of one Chief Judge, two Associate Judges, trial judges, and three appellate judges. Appeals are generally heard by a single appellate judge; however, in certain circumstances appellate cases are heard by a three judge panel.

The Shoshone-Bannock Tribes also employ a public defender, prosecutor, and probation officers who handle both adult and juvenile matters. The Court also utilizes process servers, bailiffs, and numerous other support staff to assist in the administration of the Court. The Court

[3] http://www.shoshonebannocktribes.com/shoshone-bannock-courts.html

engages in specialty areas by employing a Consumer Advocate and maintaining Elder & Vulnerable Adult Protection Services. Additionally, in 2010, construction was completed on the Shoshone-Bannock Tribal Justice Center. This facility houses the Court, Tribal police, and a corrections facility for juveniles and adults. The corrections facility focuses on healing and reducing recidivism rates amongst juveniles with their Tribal Transformations Program, which emphasizes rehabilitation.

The Shoshone-Bannock Tribal Court implements a Tribal Bar exam, as well as Tribal Bar membership. Attorneys who are not members of the Shoshone-Bannock Tribes must pay a two-hundred dollar fee for the exam. Once admitted to practice, there is a yearly membership fee of one-hundred and seventy-five dollars. The Tribal Court also allows lay advocates to represent individuals in a matter before the Court, so long as they are licensed through the Tribal Court process, and approved to practice before the Court.

The Shoshone-Bannock Tribal Court also provides services to the Northwestern Shoshone Nation tribal members who reside on the Fort Hall Reservation. The Northwestern Shoshone Nation has a Tribal Council comprised of tribal members located in Idaho, and have Tribal Offices located in Pocatello and Brigham City, Utah.

The Shoshone-Paiute Tribal Court

The Shoshone-Paiute Tribal Court is unique because the reservation boundaries are within both Idaho and Nevada. Therefore, in certain circumstances, the Court can exercise its jurisdiction over both Idaho and Nevada citizens. The Tribal Court and its predecessor court operated by the Bureau of Indian Affairs dates back several decades, at least as early as the 1920s. The Court hears both civil and criminal cases. The Shoshone-Paiute Tribes are also in their second year of a three year grant to fund a drug court. The drug court is housed in a separate facility and has the capacity to serve both adults and juveniles.

The Tribal Court employs a Chief Judge who oversees the court. The Court also maintains a position for an Associate Judge; however, that position is currently vacant. Judges pro tempore are utilized when needed, and judges may not be lay judges. There is also a tribal prosecutor, but no public defender. Thus, with grant funding, both Idaho and Nevada have provided attorneys to defend tribal members who meet eligibility requirements. Appeals to the Tribal Court are handled in two ways; in certain instances the appeal can be heard by an associate or pro tempore judge or the appeal is sent to the Intertribal Court of Appeals in Reno, Nevada.

There is no bar exam requirement to practice before the Shoshone-Paiute Tribal Court. However, an attorney must submit a letter of intent to the Court. The Chief Judge will approve or deny an application. There is also a one hundred dollar yearly membership fee to maintain eligibility to practice before the Court.

B. State Courts Overview

Idaho's trial courts are divided by counties into seven geographical districts.[4] Each district has District Judges and Magistrate Judges. District Judges hear felony cases, civil cases when the amount in controversy exceeds $10,000, and appeals from the Magistrate Division. The Magistrate Judges generally hear misdemeanor cases, small claims, probate cases, family law cases, and other civil cases with less than $10,000 in dispute. Idaho also has a Bankruptcy District Court that sits in Boise, Coeur d'Alene, Jerome, Moscow, and Pocatello and has jurisdiction over all Idaho Counties.

Idaho has numerous specialty courts as well. The Bench Book is particularly important not only for the districts where tribes are located, but for specialty courts as well. Due to the nature of the controversies addressed in specialized courts, differing federal statutes can apply to a Native American perpetrators or victims in different circumstances. Therefore, the Bench Book is very important for specialty courts for determining jurisdiction and applicable legal standards.

Idaho's specialty courts primarily address controversies that are the result of substance abuse and/or mental health issues. There are numerous adult felony drug courts serving the following counties in the following districts: District 1: Benewah, Bonner, Kootenai, Shoshone; District 2: Clearwater, Latah, Lewis, Nez Perce; District 3: Adams, Canyon, Gem, Payette, Washington; District 4: Ada, Elmore; District 5: All counties; District 6: Bannock, Caribou, Franklin; District 7: Bingham, Bonneville, Butte, Custer, Fremont, Jefferson, Lemhi, Madison, Teton.

Idaho's misdemeanor/DUI Courts are located in Canyon, Caribou, Bingham, Bonneville, Elmore, Jefferson, Oneida, Madison, Power, and Teton counties. Courts dealing specifically with DUIs are located in Ada, Canyon, Bannock, Kootenai, Nez Perce, Shoshone and Twin Falls Counties. There are also a significant number of courts addressing juvenile substance abuse. Juvenile drug courts are located in Ada, Canyon, Bannock, Bingham, Bonneville, Jefferson, Madison, Mini-Cassia, and Twin Falls counties.

Child protection drug courts are located in Bannock, Bonneville, Nez Perce and Twin Falls counties as well. Of the seven districts, the third, fourth, fifth, sixth, and seventh districts all have Domestic Violence Courts. Adult mental health courts are located in Ada, Bannock, Bingham, Bonneville, Canyon, Clearwater, Fremont, Jefferson, Kootenai, Latah, Madison, Mini-Cassia, Nez Perce, and Twin Falls counties. Juvenile mental health courts are located in Bonneville, Fremont, Jefferson, and Madison counties. Idaho also has three established Veterans Courts in Ada, Bannock, and Canyon County. Bonneville County has engaged in the Wood Pilot

[4] District 1: Benewah, Bonner, Boundary, Kootenai, & Shoshone Counties
District 2: Clearwater, Idaho, Latah, Lewis, & Nez Perce Counties
District 3: Adams, Canyon, Gem, Owyhee, Payette, & Washington Counties
District 4: Ada, Boise, Elmore, & Valley Counties
District 5: Blaine, Camas, Cassia, Gooding, Jerome, Lincoln, Minidoka, & Twin Falls Counties
District 6: Bannock, Bear Lake, Caribou, Franklin, Oneida, & Power Counties
District 7: Bingham, Bonneville, Butte, Clark, Custer, Fremont, Jefferson, Lemhi, Madison, & Teton Counties

Project which is a dual diagnosis (mental health and substance abuse) program. Idaho also has one water court responsible for adjudicating all water rights in Idaho. This court is the Snake River Basin Adjudication (SRBA) Court in Twin Falls.

III. Civil Jurisdiction Involving Tribal Lands

In determining the civil jurisdiction of tribal governments and the state government, the first factor to consider is the land status of the event giving rise to the cause of action. The federal legal definition of Indian country was codified in 1948 in the federal criminal statutes at 18 U.S.C. § 1151 (1953). The term "Indian country" includes: "(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."[5] This definition has been upheld to apply in both the criminal and the civil jurisdiction context in the U.S. Supreme Court decision, *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993).[6]

A. Land Status of Tribal Nations in Idaho

For the Tribal Nations in Idaho, the landholdings vary depending on the history of interaction with federal officials. The Indian country for each of the five Tribal Nations in Idaho will be discussed. This will not be an exhaustive identification of tribal lands as the Tribes are engaged in re-purchasing land in the tribal aboriginal territory and consolidating landholdings within tribal boundaries.

1. Treaty Recognized Indian Reservations

In the early years of the United States, the policies of Great Britain were emulated in establishing relationships with Native Americans. The British had entered into treaty-making and political agreements to secure alliances with Tribal Nations on the eastern seaboard. The United States officially adopted this process and entered into its first treaty with the Delaware Nation in 1778.[7] In the treaty-making process, tribal leaders sought to reserve part of their

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[5] 18 U.S.C. §1151.

[6] This case involved the assertion by the Oklahoma Tax Commission that the state had the authority to tax motor vehicles of tribal members residing on restricted allotments. The U.S. Supreme Court cited to 18 U.S.C. §1151 with approval in rejecting the Oklahoma attempt at taxing tribal members within Indian country. "But our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.' Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." 508 U.S. at 123.

[7] *See* Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13 *available at:* http://digital.library.okstate.edu/kappler/Vol2/treaties/del0003.htm.

homeland for current and future generations and to secure fair payment to allow U.S. citizens to settle as neighbors on their homelands. U.S. officials did not often engage in fair dealings in the treaty-making process and often viewed treaties as the most expedient way to dispossess Native Americans of their lands.[8] Many historical accounts support a U.S. policy view of temporary reservation lands for Tribal Nations, contrary to the view of reservation permanency by the tribal communities.

a. Nez Perce Tribe: Nez Perce Reservation

Over a period of several years, the Nez Perce Tribe entered into three successive treaties and one agreement with the United States. The first was the 1855 Walla Walla Treaty negotiated on the U.S. side by the Washington Territorial Governor and Indian agent, Isaac Stevens.[9] Under the 1855 Treaty, the Nez Perce tribal leadership reserved approximately 7.5 million acres and allowed the U.S. to purchase approximately 5.5 million acres.[10] This Treaty was slow in being ratified allowing for further encroachment on the Nez Perce homelands by the ratification date of March 8, 1859. With gold found on tribal homelands in the1860s, the intrusion of miners in the area and other settlers led U.S. officials to pressure the Nez Perce Tribe into a second treaty,[11] the Treaty of 1863.[12] "In all, the 1863 treaty ceded away more than ninety percent of the magnificent 8 million acre Nez Perce Reservation created in 1855, leaving some 750,000 acres east of Lewiston."[13] A third treaty[14] entered into on August 13, 1868 provided allotments to some of the Nez Perce tribal members living outside the boundaries of the reservation. In 1871, the federal government ceased the practice of treaty-making with Indian tribes. However, a new federal policy of assimilation, resulted in the surveying of the Nez Perce Reservation and the allotment of parcels to individual tribal members. According to an Allotment Agreement between the United States and the Nez Perce in 1893, "surplus" lands within the reservation were opened for non-Indian settlement. This agreement resulted in the checkerboard nature of land ownership within the reservation today.

b. Shoshone-Bannock Tribes: Fort Hall Reservation

A series of ratified and unratified treaties with the United States is part of the historical record for the Shoshone-Bannock Tribes beginning in 1863.[15] In determining the present-day

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[8] *See* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW Chapter Three, 74-139 (West Publishing Company 6th ed. 2011).

[9] Treaty with the Nez Percés, July 11, 1855, 12 Stats., 957, Ratified Mar. 8, 1859 *available at*: http://digital.library.okstate.edu/kappler/Vol2/treaties/nez0702.htm.

[10] *See* BACKGROUND INFORMATION OF THE NEZ PERCE TRIBE 5 (NPT 1995).

[11] *Id*. at 6.

[12] Treaty with the Nez Percés, June 9, 1863, 14 Stats. 647, Ratified April 17, 1867 available at: http://digital.library.okstate.edu/kappler/Vol2/treaties/nez0843.htm.

[13] Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe,* 34 IDAHO L. REV. 435, 442 (1998).

[14] *See* Treaty with the Nez Percés, Aug. 13, 1868, 15 Stats., 693, Ratified Feb. 16, 1869 available at: http://digital.library.okstate.edu/kappler/Vol2/treaties/nez1024.htm.

[15] For a list of the ratified and unratified treaties, see Treaty Timeline, Official Site of the Shoshone-Bannock Tribes web site available at: http://www.shoshonebannocktribes.com/shoshone-bannock-history.html.

landbase, the first federal government action was an Executive Order recognizing 1.8 million acres in 1867 as the homeland for various tribal bands of the Shoshone and Bannock peoples.[16] This was followed by the formal ratification of the 1868 Fort Bridger Treaty.[17] When the lands were surveyed under federal authority errors reduced the landbase to 1.2 million acres.[18] Federal pressure led to further land cessions resulting in a contemporary landbase of 544,000 acres, greatly reduced from the original reservation acreage.[19] The Shoshone-Bannock Tribes have retained 97% of the landbase in tribal governmental or tribal member ownership within the reservation boundaries.[20]

2. Executive Order Reservations and Reservation by Federal Statute

In 1871, a rider to an appropriations bill was passed in the U.S. Congress signaling the end of federal treaty-making with Tribal Nations and thus, treaty recognized Indian reservations.[21] The language of the rider was as follows:

> Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore, lawfully made and ratified with any such Indian nation or tribe.[22]

From 1871 to the present, Indian reservations may be federally-recognized through an act of Congress or by the U.S. President's Executive Order authority.

a. Coeur d'Alene Tribe: Coeur d'Alene Reservation

The Coeur d'Alene Tribe's original landbase consisted of approximately five million acres. With gold discovered in the 1860s by non-Indians in the tribal homeland, President Andrew Johnson attempted to establish a reservation in the 1860s. The proposed reservation did not include the tribal fisheries located at Lake Coeur d'Alene or on the St. Joe River, therefore it

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[16] *See* Executive Orders Relating to Indian Affairs – Idaho, Coeur d'Alene Reserve (including language on the Shoshone and Bannocks Reservation) available at: http://digital.library.okstate.edu/kappler/Vol1/html_files/IDA0835.html#id

[17] *See* Treaty with the Eastern Shoshoni and Bannock, U.S.-Shoshone-Bannock, July 3, 1868, 15 Stat. 673 available at: http://digital.library.okstate.edu/kappler/Vol2/treaties/sho1020.htm

[18] *See* Statement of Fort Hall Business Council Chairman Nathan Small, Senate Committee on Indian Affairs Field Hearing on "Strengthening Self-Sufficiency: Overcoming Barriers to Economic Development in Native Communities" 2 (Aug. 17, 2011), available at: http://www.shoshonebannocktribes.com/elements/documents/public-affairs/Written-testimony-of-Chairman-Nathan-Small-of-Shoshone-Bannock-Tribes-before-SCIA-on-economic-dev-(8-17-11).pdf.

[19] *Id.*

[20] *Id.*

[21] *See* Act of Mar. 3, 1871, ch. 20, 16 Stat. 544 (codified as amended at 25 U.S.C. §71).

[22] FELIX S. COHEN ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §1.03[9] at 70 (Nell Jessup Newton et. al eds., LEXIS NEXIS 2012 ed.)[hereinafter COHEN'S HANDBOOK].

was rejected by tribal leadership.[23] With no negotiated treaty in place at the time of the 1871 congressional policy prohibiting further treaty-making with Indian Tribes, the reservation was formally established by Executive Order in 1873.[24] President Ulysses S. Grant issued the order which was viewed as a compromise by the tribal leadership. A series of three land cession agreements followed as the federal government sought tribal land to use for agricultural purposes, timber, mineral resources and for non-Indian settlement. The landbase by 1894 had been reduced to 345,000 acres.

b. Shoshone-Paiute Tribes: Duck Valley Reservation

The Duck Valley Reservation is within the Shoshone territory recognized in the Treaty of Ruby Valley in 1863.[25] The tribal territory currently stewarded by the Shoshone-Paiute Tribes was reserved through a series of Executive Orders.[26] The first occurred in 1877 under the authority of President Rutherford Hayes to recognize a reservation for the Western Shoshone.[27] In 1886, an Executive Order issued by President Grover Cleveland expanded the acreage as the Northern Paiute were moved onto the reservation.[28] A final Executive Order issued by President William Taft in 1910 added to the reservation acreage.[29] The Duck Valley Reservation spans across the present-day border between Idaho and Nevada. The contemporary landbase is composed of 289,819 acres.[30] All of the Duck Valley Reservation lands are held in trust for the Tribes with the exception of one five-acre parcel.

c. Kootenai Tribe of Idaho: Kootenai Indian Reservation and Kootenai Indian Country

The Kootenai Tribe of Idaho did not enter into a treaty with the United States, but the Treaty of Hellgate of 1855[31] was signed by other bands of the Kootenai (Ktunaxa) Nation and ceded the majority of the Ktunaxa Territory in the United States. The United States attempted to remove the Kootenai from the Kootenai River Valley near Bonners Ferry, Idaho to the Flathead Reservation in accordance with the Treaty.[32]

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[23] *See* Angelique EagleWoman, *Tribal Hunting and Fishing Lifeways & Tribal-State Relations in Idaho*, 46 Idaho L. Rev. 81, 84 (2009).

[24] *See* Executive Orders Relating to Indian Affairs – Idaho, Coeur d'Alene Reserve, available at: http://digital.library.okstate.edu/kappler/Vol1/html_files/IDA0835.html#id

[25] *See* Treaty with the Western Shoshoni, October 1, 1863, 18 Stat., 689, Ratified June 26, 1866, available at: http://digital.library.okstate.edu/Kappler/Vol2/treaties/sho0851.htm.

[26] *See* History, Official Site of the Shoshone-Paiute Tribes of the Duck Valley Reservation available at: http://www.shopaitribes.org/culture/.

[27] *See* Executive Orders Relating to Indian Affairs – Nevada, Duck Valley Reserve available at: http://digital.library.okstate.edu/kappler/Vol1/HTML_files/NEV0865.html.

[28] *Id.*

[29] *See* History, supra n. 25, available at: http://www.shopaitribes.org/culture/.

[30] *Id.*

[31] 12 Stat. 975, available at http://www.cskt.org/documents/gov/helgatetreaty.pdf.

[32] *Id*. The Idaho Supreme Court held in 1976 that the Hellgate Treaty was binding on the Kootenai Tribe of Idaho, but reserved to the Tribe the Article III Treaty hunting, fishing and gathering rights. State v. Coffee, 97 Idaho 905 (1976).

After numerous unsuccessful attempts, the United States allotted approximately 2,000 acres in parcels of land to Kootenai Tribal members in the Kootenai River Valley under Section 4 of the General Allotment Act.[33] Through fraudulent means, surveying errors, and inheritance by Kootenai that were Canadian citizens or could not prove they were born in the United States, some of the allotments and many undivided interests in other allotments were lost.[34] The Tribe and its citizens continue to possess undivided interests in the Kootenai Allotments.

A dependent Indian community near the Kootenai Allotments and near the site of the Roman Catholic Mission existed since the time of allotment.[35] A formal reservation, however, was not established until 1974. In that year, the Kootenai Tribe declared war on the United States to protest the poor conditions of the Kootenai community located near the Roman Catholic Mission outside Bonners Ferry. As a result, the United States deeded 12.5 acres of land in trust status on 18 October 1974 as the Kootenai Indian Reservation.[36]

The Kootenai Indian Reservation currently consists of the Kootenai Allotments held in trust for the Kootenai Tribe or its citizens, the 12.5 acre "Mission" property, and a number of parcels of land taken into trust by the United States for the benefit of the Kootenai Tribe.

3. The General Allotment Act of 1887 (Dawes Act)

By the late 1800s, powerful U.S. politicians were calling for an end to the Indian reservation system. Henry Dawes, who introduced the 1871 end to treaty-making legislation, was at the forefront of the movement to radically diminish tribal landholdings. As a Senator from Massachusetts, he sponsored the General Allotment Act[37] which is commonly referred to as the Dawes Act. The purpose of the General Allotment Act was to allow President of the United States to determine that a particular Indian reservation should be divided into allotments of 160 acre parcels or less. The allotments were to be distributed according to federally created tribal rolls for the purpose of converting tribal members into farmers as part of a "civilizing" process.[38]

Following allotment of the reservation, remaining lands were considered "surplus" with the United States setting a purchase price for those lands further diminishing the tribal landbase. Many of those federally purchased "surplus" lands have been re-designated as federal public lands. Allotments were subject to an original 25 year period of trust status where the United States through the Department of the Interior served as trustee for Indian owned lands. As part of the trustee status, the Indian owner was considered legally incompetent to manage real property permitting the designated Bureau of Indian Affairs Indian agents management authority over tribal lands. In 1906, the Burke Act passed to expedite the purchase of further Indian lands by providing that local Indian agents could determine tribal members "competent" for land sale

[33] *Kootenai Tribe of Band of Indians of Idaho v. United States*, Indian Claims Commission Docket 154 (Correspondence of Indian Agents to Commissioner of Indian Affairs, Plaintiffs Exhibits); *see also* Century of Survival: Kootenai Tribe of Idaho (2nd Ed. 2010), Chapter IV.
[34] *Id.*
[35] *See, Memorandum of the Regional Solicitor to Bureau of Indian Affairs regarding Kootenai Jurisdiction* (10 May 1977).
[36] Act of October 18, 1974, Pub. L. No. 93-458, 88 Stat. 1383.
[37] Ch. 119, 24 Stat. 388 (1887)(codified in part at 25 U.S.C. §§ 331-381)(Repealed).
[38] *See* Judith Royster, *The Legacy of Allotment*, 27 Ariz. St. L. J. 1, 13 (1995).

agreements.[39] This led to a second wave of dispossession for tribal members. By the end of the allotment process American Indians had an estimated loss of 86 million acres of land and that two-thirds of all lands allotted to individual Indians had also left Indian hands.[40]

In 1934 with the passage of the Indian Reorganization Act,[41] the U.S. Congress provided in the Act's first section that: "On or after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."[42] The next section of the law indefinitely extended the trust status of Indian owned lands.[43]

For the exact acreage allotted for Tribes in Idaho, the Indian Land Tenure Foundation has compiled the data and provided it on a public web site.[44] For citizens of the Kootenai Tribe, acreage lost according to the Indian Land Tenure Foundation amounted to 368 acres by 1934. This amount, however, does not include allotments stolen from Kootenai citizens or lost due to inheritance by Kootenai that were Canadian nationals and for whom the United States would not hold land in trust.[45] The Coeur d'Alene Tribe's reported amount of alienated acreage by 1934 was 40,499 acres as a result of the allotment policy.[46] The reported alienated acreage for the Nez Perce Tribe's members amounted to 96,292 acres. [47] Total by 1934 of lands lost through alienation for the Shoshone-Bannock Tribes was 35, 684 acres.[48] The Shoshone-Paiute Tribes of the Duck Valley Reservation escaped the allotment policy. The impact of the allotment policy with the subsequent settlement of non-Indians within reservation boundaries has been the subject of frequent analysis by the U.S. Supreme Court with judicial decisions adding complexity to issues of civil and criminal jurisdiction often linked to land ownership within tribal reservation boundaries.

B. Tribal Civil Jurisdiction Generally

Civil jurisdiction is most commonly linked to territorial boundaries, particularly in international jurisprudence. With the unique relationship existing between Tribal Nations and the development of federal Indian law, limitations have been placed on tribal civil jurisdiction through U.S. Supreme Court decisions.

The beginning point for tracing the development of federal Indian law principles is the Marshall Trilogy authored by Chief Justice John Marshall in early U.S. Supreme Court opinions. In the Trilogy's first case, *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, (1823), the Court set forth limitations on tribal property rights and on the ability of tribal governments to convey tribal property under U.S. law. The case involved a dispute over title to lands under two different

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[39] 25 U.S.C. § 349.
[40] *See* ANGELIQUE EAGLEWOMAN & STACY LEEDS, MASTERING AMERICAN INDIAN LAW 31 (Carolina Academic Press 2013).
[41] 25 U.S.C. §461 et seq.
[42] *Id.*
[43] 25 U.S.C. § 462.
[44] *See* Allotment Information for Alaska and the Northwest Area BIA regions, Indian Land Tenure Foundation web site available at: http://www.iltf.org/sites/all/themes/iltf/maps/alaska_and_northwest.pdf.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

chains of ownership: 1) 1773 and 1775 private purchases directly from a Tribal Nation and 2) a patent granted by the U.S. in 1818.[49] The Court opined that the United States acquired superior title from Great Britain over all tribal lands in mid-North America by virtue of the European "doctrine of discovery" principle.[50]

> In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined to countries 'then unknown to all Christian people;' and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.[51]

This principle relegated tribal ownership to an occupancy interest as a non-Christian people and conveyed superior title to Great Britain as the "discoverer" with this superior title flowing to the United States under the Court's logic.[52] The Court also stated that there were two ways for the U.S. to perfect title: 1) purchase from Tribal Nations or 2) conquest.[53]

To further the U.S. interest in gaining full title by purchasing Indian "occupancy title," the U.S. Congress passed the Trade and Intercourse Act of 1790[54] which has been periodically renewed and is still in force. This is often referred to as the "Non-Intercourse Act" and states that the U.S. is the only authorized purchaser of Indian occupancy title, thereby restricting the ability of Tribes to sell their lands and the ability of private parties and state governments from purchasing tribal lands.

The next two cases in the Trilogy determine the U.S. interpretation of tribal governmental authority and the federal preemption over state governments in the field of Indian affairs. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the tribal government brought an action in the U.S. Supreme Court to enjoin Georgia from seizing tribal land, nullifying tribal laws, and asserting state authority over the tribal territory. The majority opinion in the case reviewed the

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[49] Legal scholars have noted that no Tribal Nations were party to this action and have alleged that the actual title claims did not overlap viewing the case as an opportunity for the U.S. Supreme Court to provide guidance on land speculation without a live controversy before it. *See*, Eric Kades, *History and Interpretation of the Great Case of Johnson v. McIntosh*, 19 Law & Hist. Rev. 67, 69 (2001).

[50] 21 U.S. at 592.

[51] *Id*. at 576-77.

[52] 21 U.S. at 572-74.

[53] *Id*. at 587.

[54] 25 U.S.C. §177. Beginning with the 1790 enactment of the Trade and Intercourse Act (commonly referred to as the "Non-Intercourse Act due to the restrictions it imposed on trade), 25 U.S.C. §177, the U.S. Congress enacted the provision that: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty." *Id.*

subject matter jurisdiction[55] of the Court and determined that the Cherokee Nation was not a proper party before the Court.[56] Through reference to the U.S. Constitution's Commerce Clause, the Court concluded that tribal governments were not foreign nations or states to bring suit.[57] Rather, the Court determined that the tribal governments were a new form of political status referred to as "domestic dependent nations" and therefore not enumerated in the U.S. Constitution as capable of bringing suit in the U.S. Supreme Court.[58]

The third case involved a U.S. citizen and missionary, Samuel Worcester, who under the authority of the federal government and the Cherokee Nation entered Cherokee lands in contravention of a Georgia law requiring an oath of loyalty and permission from the state. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall set forth the historical interaction with tribal governments,[59] the adoption of British treaty-making practices by the United States with Indian Tribes,[60] and the primacy of the federal role over Indian affairs displacing state authority in the treaty-making power.

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[61]

The principle of federal preemption over state authority remains in effect in the United States. Unless there has been an express delegation of authority by the federal government, states lack authority in Indian affairs.

C. State Civil Jurisdiction and the "Infringement Test" Regarding Reservation Matters

The limitation on state civil jurisdiction within Indian Country has received refinements since the 1832 Worcester v. Georgia decision. In this section, the major federal case setting form the "infringement test" curtailing state authority will be discussed along with illustrative Idaho state court decisions.

In *Williams v. Lee*, 358 U.S. 217 (1959), the U.S. Supreme Court took up the issue of a non-Indian trading post owner on the Navajo Reservation seeking to enforce collection of a debt involving Navajo Nation members residing on the reservation by filing in a state court. The transaction and relevant parties were located on the Navajo Nation Reservation. The Court held that allowing the state court to adjudicate the dispute would be violative of tribal self-government and announced the following standard commonly known as the infringement test.

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[55] U.S. Const. Art. III §2.
[56] 30 U.S. at 16.
[57] *Id*. at 18.
[58] *Id.* at 17.
[59] 31 U.S. 544-546.
[60] *Id*. at 548-551.
[61] *Id*. at 561.

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[62]

The Court went on to opine that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[63] Therefore, the proper forum to bring the debt collection involving a reservation transaction would be the local tribal court.[64]

D. State Civil Jurisdiction Limited to Forums for Private Civil Litigants and Reservation Indians: 28 U.S.C. §1360 and I.C. § 67-5101

During the federal Indian law policy era of termination in the late 1940s and through the early 1970s, the U.S. Congress initiated a policy of terminating the federal recognition of tribal governments. As part of this termination era, federal legislation was passed delegating certain federal authority to state governments involving American Indians in Indian Country. One of the major pieces of legislation is commonly referred to as Public Law 280 which contained a criminal law component[65] and a civil law component. The criminal law component will be more fully discussed in Section IV. Criminal Jurisdiction.

The civil law component was codified in 28 U.S.C. §1360 and provides:

> (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

[62] 358 U.S. at 220.
[63] *Id*.
[64] *Id*. at 223.
[65] *See* 18 U.S.C. §1162.

(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.

This federal delegation to the state governments under this statute has received thorough treatment in two U.S. Supreme Court cases. Of particular importance to note at the outset is that there were initially six states referred to in the group as "mandatory states" for the provisions of Public Law 280 criminal and civil jurisdiction. Other states seeking this federal delegation are referred to as "optional states" which often sought a limited range of authority unlike the mandatory states.

1. U.S. Supreme Court Cases on the Federal Delegation for Private Civil Litigation

Two U.S. Supreme Court cases have interpreted the civil provisions of Public Law 280 and found that states were not allowed to assert state jurisdiction within reservations. The first case arose in Minnesota, one of the states listed as a mandatory state under Public Law 280. The second case arose in California, another mandatory state under Public Law 280. Both decisions found the states to be overreaching beyond the opening of state court forums to matters involving reservation Indians as allowed by 28 U.S.C. §1360.

In the *Bryan v. Itasca County*, 426 U.S. 373 (1976) decision, the U.S. Supreme Court considered whether Minnesota had acquired, under the federal delegation, authority to extend its civil laws onto an Indian reservation. Itasca County sought to impose a property tax on a reservation Indian's mobile home. Russell Bryan, member of the Minnesota Chippewa Tribe, filed suit in state court seeking a declaratory judgment that the county lacked authority to tax his home located on reservation land. The state district court held for the county. The Minnesota Supreme Court affirmed the ruling by the district court.

First, the U.S. Supreme Court articulated the general bar to state taxation on Indian reservations and referred to the *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) and the *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) decisions for this principle. Both cases prohibited state taxation imposed on reservation Indians. In *McClanahan*, the Court held that the state could not impose an income tax on a reservation Indian deriving all

of her income from on-reservation sources.[66] In *Moe*, the Court held that the state lacked authority to impose a personal property tax on motor vehicles owned by reservation Indians.[67]

Next in *Bryan*, the U.S. Supreme Court considered whether the state had acquired civil authority to reach a reservation Indian's property through the civil forum provisions of Public Law 280 codified at 28 U.S.C. §1360.[68] After reviewing the detailed legislative history on the criminal delegation provisions of Public Law 280, the Court concluded that "lawlessness on certain Indian reservations" motivated the delegation of criminal authority to mandatory states.[69] In examining the purpose of the civil section of Public Law 280, the Court set forth the following determination as to its proper application.

> Piecing together as best we can the sparse legislative history of s 4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action." With this as the primary focus of s 4(a), the wording that follows in s 4(a) "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" authorizes application by the state courts of their rules of decision to decide such disputes. Cf. 28 U.S.C. s 1652 . This construction finds support in the consistent and uncontradicted references in the legislative history to "permitting" "State courts to adjudicate[civil controversies" arising on Indian reservations, H.R.Rep.No.848, pp. 5, 6, U.S.Code Cong. & Admin.News 1953, p. 2411 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.] In short the consistent and exclusive use of the terms "civil causes of action," "aris(ing) on," "civil laws . . . of general application to private persons or private property," and "adjudicat(ion)," in both the Act and its legislative history virtually compels our conclusion that the primary intent of s 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court.[70]

Thus, the Court unanimously held that Minnesota had not been granted any authority to impose state laws within reservation boundaries or dealing with reservation Indians beyond allowing private civil suits against reservation Indians in state courts. This leads to the conclusion that state agency suits are not authorized under Public 280 for any purpose, including enforcement of state taxes on reservation Indians.

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[66] 411 U.S. at 179-181.
[67] 425 U.S. at 480-481.
[68] 426 U.S. at 377.
[69] *Id*. at 379.
[70] *Id*. at 383-85.

In a second case, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the U.S. Supreme Court again reviewed the extent of jurisdiction a mandatory state was delegated under Public Law 280 and whether it allowed for state application of criminal jurisdiction on tribal economic activity on tribal lands. In this case, two federally-recognized Tribes operated commercial bingo operations under tribal codes approved by the Secretary of the Interior on tribal lands. State and county officials sought to impose state law on the pot limits, game limits and other state law requirements on the tribal operations. The Tribes filed suit in federal district court seeking a declaratory judgment that the state lacked authority to impose its law on the tribal bingo operations.[71] The district court granted summary judgment for the tribal governments finding no basis for state authority. The Ninth Circuit affirmed.

California officials "insisted" that Congress enacted Public 280 as an express consent to state jurisdiction over Indians on tribal lands and should allow for the state bingo restrictions on the tribal operations.[72] The U.S. Supreme Court reviewed Public Law 280 for mandatory states as providing for application only of those state laws that were criminal in nature on tribal lands. "Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under §2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court."[73]

The Court drawing upon lower court decisions approved the dividing of state law into two categories for the purpose of determining delegated authority under Public 280. If the state law is criminal/prohibitory in nature, then the criminal delegation under Public 280 allows for state criminal prosecution.[74] If the state law is civil/regulatory in nature, then there is no delegation of authority under Public Law 280. In applying the prohibitory/regulatory test to the case at hand, the Court concluded: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular."[75] Based upon this conclusion, the Court rejected the state's argument that state laws could be applied on tribal lands pursuant to Public Law 280 to regulate tribal bingo operations.

Therefore, state laws that completely prohibit conduct fall within the scope of Public Law 280 criminal jurisdiction for mandatory states. Conduct that is regulated by state statutes is outside the scope of Public Law 280's delegation of federal criminal authority to states. In the civil context, Public Law 280's codification in 28 U.S.C. §1360 only provides for private civil litigation against on-reservation Indians in state court forums and does not provide for any state agency actions enforcing state civil laws on tribal lands.[76]

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[71] 480 U.S. at 206.
[72] *Id*.
[73] *Id.* at 208.
[74] *Id*. at 209.
[75] *Id*. at 211.
[76] Cf. Doe v. Mann, 415 F.3d 1038, 1059-60 (9th Cir. 2005). In that case, the Ninth Circuit opined that state agency child dependency proceedings fall into a new category of "civil adjudicatory jurisdiction" under Public Law 280 and therefore are analogous to private litigation in state court forums involving reservation Indians. This finding was used to support a determination that there was concurrent tribal and state jurisdiction over child dependency proceedings for California, a mandatory state under Public Law 280. 415 F.3d at 1067. *See* COHEN'S HANDBOOK

2. Idaho's Optional Delegation Statute I.C. 67-5101 and Caselaw

The Idaho law implementing delegated authority under Public 280 has limited the delegation to seven categories for both civil forum matters and for criminal law matters. The criminal law delegation will be discussed more thoroughly infra Section IV. C. In the civil context, Idaho was allowed to open its state court forums to any matters involving reservation Indians in private litigation under 28 U.S.C. §1360. The Idaho statute I.C. 67-5101 limited the state court forums to seven subject matter areas for civil causes of action. This partial assumption of listed categories for authority under both the civil and criminal sections of Public Law 280 was upheld in the U.S. Supreme Court decision, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 498-99 (1979) for the similar Washington statute, RCW 37.12.010.

Here is the text of the Idaho statute adopted in 1963 relating to acceptance of Public Law 280 delegated authority:

> The state of Idaho, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280)[1] hereby assumes and accepts jurisdiction for the civil and criminal enforcement of state laws and regulations concerning the following matters and purposes arising in Indian country located within this state, as Indian country is defined by title 18, United States Code 1151, and obligates and binds this state to the assumption thereof:
>
> A. Compulsory school attendance
> B. Juvenile delinquency and youth rehabilitation
> C. Dependent, neglected and abused children
> D. Insanities and mental illness
> E. Public assistance
> F. Domestic relations
> G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.
>
> (Footnote 1. 18 U.S.C.A. § 1162, 28 U.S.C.A. § 1360.
> Idaho Code Ann. § 67-5101 (West))

In I.C. §67-5102, state law provided that tribal governments may consent to expand these seven areas. The Nez Perce Tribe enacted Tribal Resolution 65-126 on April 13, 1965 and authorized expanded state jurisdiction for listed minor criminal offenses.[77] On March 9, 1999, the Nez Perce

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§6.04[3][b][ii]ftnote 107 (reviewing the holding in Doe v. Mann, 415, F.3d 1038 (9th Cir. 2005). "The Ninth Circuit's reading of ICWA is questionable." *Id*.

[77] Tribal Resolution 65-126 was applied in the following cases: State v. Major, 111 Idaho 410, 417-19 (1986)(concluding that the Tribal Resolution 65-126 "did not grant consent over a class of offenses which included grand theft by possession of stolen property"); State v. Marek, 112 Idaho 860, 869-70 (1987)(special concurrence of Justice Bistline) citing to Tribal Resolution 65-126); and County of Lewis v Allen, 163 F.3d 509, 514 (9th Cir. 1998)(holding that the tribal court lacked jurisdiction over a tort claim against a state deputy sheriff who carried out an investigation and arrest based upon the authority tribally consented to in Tribal Resolution 65-126).

Tribe rescinded the expanded jurisdiction.[78] Therefore, this section of I.C. §67-5102 is not actively in effect for any Idaho Tribe.[79]

With the passage of the Indian Civil Rights Act of 1968, the U.S. Congress provided that any further assumptions of Public Law 280 state jurisdiction required tribal consent.[80] No Tribal Nation has consented to Public Law 280 delegations to state governments.[81]

Additionally, the same disclaimer that appears in 28 U.S.C. §1360(b) was codified in I.C. §67-5103.

> Nothing in this act 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; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing, or regulation thereof.

This state law precludes Idaho state courts from exercising jurisdiction over any of the areas expressly listed in this section relating to Indian-owned personal property, any tribal land held in trust status and any of the provisions related to treaty rights, such as water rights and hunting rights.

Under the Idaho statute, implementation of state court forum access for private civil causes of action is only available for cases involving one of the seven separately listed types of claims. The statute combines both civil and criminal delegated authority and cites to the United States Code sections for each type of delegation allowed under Public Law 280. In Idaho, a civil cause of action filed in a state court forum involving a reservation Indian must arise from any one of the following seven subject areas: 1) compulsory school attendance: 2) juvenile delinquency and youth rehabilitation; 3) dependent, neglected and abused children; 4) insanities and mental illness; 5) public assistance; 6) domestic relations; or 7) operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.

There are few private litigation civil causes of action that involve the first five categories of this Idaho statute. The rare tort case may fit within one of these subject matter categories when state law provides an action brought by a private plaintiff against a reservation Indian. The

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[78] *See* Idaho Attorney General Guideline 5/5/99 regarding action by Nez Perce Tribe rescinding Tribal Resolution 65-126, available at: http://www.ag.idaho.gov/publications/op-guide-cert/1999/G050599.pdf

[79] In 1963, the Fort Hall Business Council per Resolution 1651 dated February 6, 1963 objected to Senate Bill 91 which became I.C. § 67-5101 as unilateral action by the state rather than providing for tribal consent prior to any assumption of state criminal jurisdiction.

[80] *See* 25 U.S.C. §1321(a)(1); *see also* 25 U.S.C. §1326 governs a special election for the purposes of tribal consent.

[81] *See* COHEN'S HANDBOOK §6.04[3][a].

sixth category, domestic relations, is very broad and would include marriage and divorce actions. The seventh category regarding motor vehicles would allow for personal injury actions involving a reservation Indian operating or managing a motor vehicle on particular roads.

a. Idaho Supreme Court Decision Lack of State Jurisdiction for Reinstatement of Tribal Political Office: *Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257 (1968)

In *Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 257 (1968), a Shoshone-Bannock tribal member, Edward Boyer, filed a mandamus suit in state court seeking to be reinstated into a tribal political office on the Fort Hall Business Council and to receive damages in the amount of the salary for his allegedly illegal removal from office.[82] The state district court ruled that it was without subject matter jurisdiction to decide the issues in the suit.[83] The Idaho Supreme Court reviewed the state statute I.C. §67-5101 and found no basis for state authority over the action. Further, no agreement to expand state jurisdiction had been entered into between the state and the Shoshone-Bannock Tribes pursuant to I.C. §67-5102.[84]

b. Idaho Supreme Court Decision under I.C. §67-5101(F) Domestic Relations: *Sheppard v. Sheppard*, 104 Idaho 1 (1982)

The category of domestic relations under I.C. 67-5101provided a state court forum for the divorce action in *Sheppard v. Sheppard*, 104 Idaho 1 (1982). In this case, George Sheppard, a non-Indian, filed for divorce from Roma Sheppard, Shoshone-Bannock tribal member, in Idaho state court and sought division of marital property, determination of custody of their children and an order of child support.[85] Several issues were in dispute in the case, including a challenge by Mr. Sheppard to the validity of the Tribal Court decree of adoption for the fourth child of the marriage[86] and a challenge by Mrs. Sheppard to state court jurisdiction over the property at issue in the divorce proceeding.[87]

Turning to the argument regarding the adoption of a fourth child, the Idaho Supreme Court upheld the validity of the Tribal Court adoption decree reasoning that the federal full faith and credit statute, 28 U.S.C. § 1738, was applicable to state courts regarding tribal court judgments.[88] In approving this principle for Idaho, the Idaho Supreme Court opined that "this holding will facilitate better relations between the courts of this state and the various tribal courts within Idaho."[89] In a footnote to this section, the Idaho Supreme Court expressed encouragement for the Shoshone-Bannock Tribal Courts to reciprocate full faith and credit for state court judgments.

[82] 92 Idaho at 258.
[83] *Id*. at 259.
[84] *Id*. at 261-262.
[85] 104 Idaho at 5.
[86] *Id.* at 7.
[87] *Id.* at 9.
[88] *Id*.
[89] *Id*. at 8.

> It has come to the attention of this Court that, in an action related to this case, the Shoshone-Bannock appellate court, in reversing the tribal trial court, held that it was not required to give full faith and credit to the decrees of Idaho state courts. In part this decision was based on the belief that state courts did not accord tribal courts full faith and credit. As we have shown, some state courts, including this one, do. Secondly, the tribal court failed to acknowledge 28 U.S.C. § 1738, which requires "every court within the United States" to give full faith and credit to decrees of state courts (emphasis added). Along with this opinion extends the hope of a good working relationship between state and tribal courts, and we hope, therefore, that the Shoshone-Bannock courts will reconsider the application of full faith and credit in their proceedings. Indeed the commentators unanimously agree that tribal courts must afford other states full faith and credit.[90]

Further, the Court stated that Mr. Sheppard had failed to provide the relevant tribal code section to determine whether there were procedural deficiencies in the adoption decree.[91] Mr. Sheppard's challenged to the Tribal Court's subject matter failed for lack of proof and child support for the fourth child was upheld.[92]

As to the state court jurisdiction challenge on division of property, the Idaho Supreme Court reasoning at times deviated from firmly grounded principles of Indian land ownership for lands held in trust status.[93] The Court determined that the state court forum was available under the I.C. 67-5101 section "(F) Domestic Relations" for the private divorce action and for the distribution of community property under state law.[94]

The majority did not find a limitation on the state's authority pursuant to I.C. §67-5103 regarding the tribal land in trust status. The Idaho Supreme Court stated: "From the foregoing we conclude that the exceptions to state jurisdiction in 25 U.S.C. §1322(b) and I.C. §67-5103 do not prevent the courts of this state from requiring that one party to a marriage recompense the other party for his or her share of the community contributions that have gone into property that is held in trust or subject to a restraint on alienation by the federal government."[95]

One of the central issues over the division of marital property was whether Mr. Sheppard could claim reimbursement for funds paid for the purchase of lands placed in sole ownership of Mrs. Sheppard and under the federal trust status only available to American Indians.[96] Another was the valuation of the permanent improvement of the family home located on the tribal trust land of her Indian father.[97] The majority of the Idaho Supreme Court held that Mrs. Sheppard's sole ownership of the tribal trust property was overridden by the state law principle that "the

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[90] *Id*. at 8 ftnote 2.
[91] *Id*. at 8.
[92] *Id*. at 8-9.
[93] *See* In re Marriage of Wellman, 852 P.2d 559, 564 (Mont. 1993)(holding that state courts lacked authority to determine disposition of Indian trust lands and distinguishing *Sheppard v. Sheppard*, 104 Idaho 1 (1982)).
[94] 104 Idaho at 14-15.
[95] *Id*. at 20.
[96] 25 U.S.C. § 348. This section provided that the President will hold in trust status Indian allotments for "the sole use and benefit of the Indian" and further that "if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." *Id.* It should be noted that the original twenty-five year trust period was indefinitely extended pursuant to the Indian Reorganization Act, 25 U.S.C. § 462.
[97] *Id.* at 5.

spouse with control over the community property acts as trustee for the community."[98] This led the Court to conclude that Mrs. Sheppard would be in breach of her fiduciary duty to her non-Indian spouse by shielding the solely owned Indian property and home built on that property behind federal law from Mr. Sheppard's reimbursement claim.[99] The Court also noted that the reimbursement claim did not change the ownership status of the tribal trust lands.[100] By failing to recognize the status of the permanent improvement on the trust land of an American Indian, the Court also valued the family home and required Mrs. Sheppard to provide a financial offset to Mr. Sheppard for the value of the permanent improvement on trust land.[101]

In dissent, Justice Bistline cited to the state implementation statute for Public 280, 25 U.S.C. § 1322 (b), that contained the prohibition upon state authority to "adjudicate"… "the ownership or right to possession of such [tribal trust] property or any interest therein." He pointed out that the U.S. Supreme Court has recognized permanent improvements to tribal trust land as part of the land in *U.S. v. Rickert*, 188 U.S. 432 (1903). Thus, Justice Bistline opined that the family home and the tribal trust property should not have come within the state court's authority for valuation in the community property distribution.[102]

c. Idaho Supreme Court Decision Lack of State Jurisdiction over Tribal Employment Claim: *Robles v. Shoshone-Bannock Tribes*, 125 Idaho 852 (1994)

In *Robles v. Shoshone-Bannock Tribes*, 125 Idaho 852 (1994), the suit arose when David Robles filed in state court asserting that his tribal employer owed him back wages. In dispute at the trial level was whether Robles was employed directly by the tribal government or by a tribally-owned corporation.[103] On appeal to the Idaho Supreme Court, the Court provided guidance that the state court lacked jurisdiction over the dispute as not within one of the subject areas of I.C. §67-5101.[104] The Court also stated that unless Robles could prove that the Shoshone-Bannock Tribes had agreed pursuant to I.C. §67-5102 to expand the categories of state authority the case would be dismissed on jurisdictional grounds.[105]

E. State Jurisdiction over Tribal Members off of Reservation Lands

With the 1924 Indian Citizenship Act,[106] Congress naturalized all American Indians as citizens of the United States. Therefore, tribally-enrolled persons have dual citizenship within

[98] 104 Idaho at 22.
[99] *Id.*
[100] *Id.* at 20.
[101] *Id.* at 6.
[102] *Id*. at 29.
[103] *Id*. at 854. Tribal governments enjoy tribal sovereign immunity from suit. Tribal corporations may be organized to include in their articles of incorporation "sue and be sued" clauses. Any such suit must still be brought into a court with proper jurisdiction. *See* COHEN'S HANDBOOK §4.04[3][a][ii]. "The tribal corporation may be subject to suit, but the correct forum for such suit may not be a state court." 104 Idaho at 854.
[104] *Id*. at 855.
[105] *Id*.
[106] Act June 2, 1924, 43 Stat. 253, ante, 420. *See* codification at 8 U.S.C. §1401(b). "The following shall be nationals and citizens of the United States at birth… (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;" *Id*.

his/her Tribal Nation and U.S. citizenship which includes state citizenship. It should be noted that American Indians off of reservation lands are subject to state laws as other state citizens.

The Idaho Supreme Court has applied this principle to a wholly owned Indian livestock association sued for the off reservation collision between cattle under the association's care and a pickup truck on an interstate highway. In *Odenwalt v. Zaring*, 102 Idaho 1 (1980), the Idaho Supreme Court upheld state jurisdiction over the damages action filed in state court by the pickup owner and driver John Odenwalt against the livestock owner, Don Zaring, and the Indian-owned Bannock Creek Stockmen's Association. Although the Association asserted that there was no state jurisdiction due to the substantial federal legislation over Indian grazing, the Court held that the collision occurred off of the reservation on a highway and subject to state court jurisdiction.[107]

F. Tribal Civil Jurisdiction over Non-Members in Indian Country

Tribal civil jurisdiction extending beyond tribal members has been a subject taken up by the U.S. Supreme Court to create limitations on tribal adjudicatory authority as discussed more fully in this section. This limitation on tribal authority over non-Indians began with a U.S. Supreme Court decision involving tribal criminal jurisdiction, *Oliphant v. Suquamish Indian Tribe*, 431 U.S. 191 (1978),[108] and has influenced limitations in the civil jurisdiction realm. Generally, an analysis of tribal jurisdiction starts with inherent tribal jurisdiction within the tribal territory and then with a review of caselaw or statutes that have imposed limitations on that territorial jurisdiction. This section will review the current caselaw impacting tribal adjudicatory authority over non-members within reservation boundaries.

1. Tribal Civil Adjudicatory Authority over Plaintiff Non-Tribal Members

Tribal codes generally allow any person to file a lawsuit in Tribal Court, including non-tribal members. When a plaintiff is a non-tribal member, he/she consents to the jurisdiction of the Tribal Court and may proceed with his/her lawsuit. Thus, as long as the Tribal Constitution and the tribal laws allow for any person to file suit in the Tribal Court, then the action may go forward. Non-tribal members residing on reservations may file civil suits in Tribal Court as a matter of convenience.

2. Defendant Non-Tribal Members

When a lawsuit is filed in Tribal Court against a non-tribal member, then specific U.S. Supreme Court limitations are operative. This line of limiting cases begins with the *Montana v. United States*, 450 U.S. 544 (1981), decision providing a restraint on tribal adjudicatory authority on fee lands within tribal territories. In *Montana*, the U.S. Supreme Court considered the ability of the Crow Tribe to pass a tribal resolution banning non-Indian hunting on fee lands owned by non-Indians within the Crow Reservation boundaries.[109]

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[107] 102 Idaho at 4-5.

[108] This case will be more thoroughly discussed in Section IV infra.

[109] 450 U.S. at 547.

To determine whether inherent tribal sovereignty provided authority for the ban, the Court cited to the criminal law decision in *United States v. Wheeler*[110] for the proposition that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." The Court explained that tribal governments had been implicitly divested of inherent sovereignty by virtue of "the dependent status of tribes" for any areas beyond regulation of internal tribal matters.[111] Only an express statement of Congress delegating authority would be sufficient to counteract the implicit divestiture of tribal authority according to the Court's opinion.[112]

From this rationale, the Court set forth a general barrier to tribal authority over non-Indians on fee lands within reservation boundaries as follows: "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[113] The Court went on to note two exceptions to this general barrier, commonly referred to as "the consensual relations" exception and the "direct effects" exception. Under the first *Montana* exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." In the Ninth Circuit case, FMC v. Shoshone-Bannock Tribes, 905 F.3d 1311 (9th Cir. 1990), the Court upheld the Tribes civil jurisdiction over the company located on fee land within the reservation on the basis of the consensual relations *Montana* prong due to the company's mining leases, contracts and other business activities with the Tribes.[114] Therefore, the Tribes had civil jurisdiction to enforce the Tribal Employment Rights Ordinance (TERO) to the employment practices of FMC.[115] Under the second *Montana* exception, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[116]

As non-member defendants sought to challenge the adjudicatory authority of Tribal Courts, the U.S. Supreme Court established the tribal exhaustion doctrine. In *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985), the Court held that prior to a nonmember challenging tribal jurisdiction in federal district court the nonmember must first exhaust all tribal remedies through every level of the tribal judicial system.[117] The Court determined that filing in federal court to challenge tribal authority fell under federal question jurisdiction based on "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] §1331."[118] Next, the Court held that the Tribal Court should in the first instance provide its determination of jurisdiction prior to federal court determination. The Court explained "[e]xhaustion of tribal remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also

[110] 435 U.S. 313, 326 (1978)(rejecting Double Jeopardy as a barrier for the federal prosecution of a tribal member who had been previously convicted of the same act by his Tribe based upon the separate sovereign status of each prosecuting government).
[111] 450 U.S. at 564
[112] *Id*.
[113] *Id*. at 565.
[114] 905 F.3d at 1315.
[115] *Id*.
[116] *Id*.
[117] 471 U.S. at 857.
[118] 471 U.S. at 852.

provide other courts with the benefit of their expertise in such matters in the event of further judicial review."[119] In a footnote, the Court provided exceptions to the tribal exhaustion doctrine when 1) the filing is "motivated by a desire to harass or is conducted in bad faith;" 2) "where the action is patently violative of express jurisdictional prohibitions;" or 3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[120]

The U.S. Supreme Court has since applied the tribal exhaustion doctrine to a federal case based on diversity of citizenship jurisdiction in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987). In a subsequent case, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the U.S. Supreme Court held the tribal exhaustion doctrine inapplicable based on its findings that two non-members were involved in a personal injury action on a state highway right-of-way[121] and application of the doctrine would only result in delay.[122]

The Ninth Circuit recently handed down the decision in *Evans v. Shoshone-Bannock Land Use & Policy Commission*, 736 F.3d 1298 (9th Cir. 2013), involving the challenge to Tribal Court jurisdiction by a nonmember. David Evans sought to construct a family home within the Shoshone-Bannock Reservation boundaries on fee land without obtaining a tribal building permit and his construction contractor and subcontractor failed to apply for tribal business licenses. Enforcing tribal laws, the Shoshone-Bannock Land Use & Policy Commission commenced an action in Tribal Court. Mr. Evans immediately filed for an injunction in federal district court. The district court ruled that Mr. Evans had to exhaust tribal remedies and dismissed the case.[123] On appeal, the Ninth Circuit reversed finding that the Tribes could not demonstrate authority over Mr. Evans under either of *Montana*'s exceptions and therefore, tribal jurisdiction was not plausible and there was no need to exhaust tribal remedies.[124]

G. Basics on the Indian Child Welfare Act, 25 U.S.C. §1901 et seq.

With the passage of the Indian Child Welfare Act in 1978,[125] the U.S. Congress exercised its authority in Indian affairs to regulate the transfer of cases from State Courts to Tribal Courts for cases involving the placement of off-reservation tribal children[126] outside of a parental home. The law was passed in response to the overwhelming number of tribal children placed in non-Indian homes by State Courts and state social workers. Under the findings section of the law, Congress stated that: "(4) an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction

[119] *Id*. at 857.
[120] *Id*. at 856 ftnote 21.
[121] 520 U.S. at 455-56.
[122] 520 U.S. at 459 ftnote 14.
[123] 736 F.3d at 1301.
[124] *Id*. at 1302-06.
[125] 25 U.S.C. §1901 et seq.
[126] There are many reasons for American Indian families with tribal children to reside off of a reservation, primary reasons include the ability to obtain access to educational institutions or for employment opportunities. In 1952, the Bureau of Indian Affairs was actively encouraging American Indian adults to move with their children to urban areas as part of the Urban Indian Relocation Program. Approximately 750,000 American Indians participated in the program. *See* EagleWoman & Leeds, MASTERING AMERICAN INDIAN LAW 17-18 (2013).

over Indian child proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[127]

The law applies when two primary requirements are met. First, an Indian child must be the subject of the proceeding and second, the proceeding must be for the placement of the child outside of a parental home. Indian child is defined as: "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[128] Second, the law defines the relevant child custody proceeding as one of the following: 1) foster care placement, 2) termination of parental rights, 3) preadoptive placement, and 4) adoptive placement.[129]

When a qualified Indian child is in one of the four relevant child custody proceedings, the next inquiry is to determine whether there is exclusive jurisdiction that ousts state jurisdiction over the proceeding. Under 25 U.S.C. § 1911(a) Exclusive Jurisdiction, the federal law provides exclusive tribal jurisdiction as noted below.

> 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.

In Idaho, there has been no explicit federal law vesting state jurisdiction over Indian children residing or domiciled within a reservation. In the event that the Tribe does not have exclusive jurisdiction, as when an Indian child resides off of a reservation, then the Tribe will exercise concurrent jurisdiction with the state.[130]

In this next section, the involuntary removal of tribal children will be the focus under the Indian Child Welfare Act. In section 25 U.S.C. § 1911(b), State Courts are directed to transfer any child custody proceeding involving an Indian child for foster care placement or for termination of parental rights as follows: "the [state] court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either

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[127] *Id.* at §1901(4), (5).

[128] 25 U.S.C. §1903(4).

[129] *Id*. at §1903(1).

[130] In a case arising under California child dependency law, Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), the Ninth Circuit issued a decision that Public Law 280 was meant to be read into 25 U.S.C. § 1911(a) as allowing California concurrent jurisdiction and denying all Tribes in the state exclusive jurisdiction unless they requested re-assumption of exclusive jurisdiction under 25 U.S.C. § 1918 of ICWA. This reading of Public Law 280 within ICWA has been criticized. *See* COHEN'S HANDBOOK § 6.04[3][b][ii]ftnote 107 (reviewing the holding in Doe v. Mann, 415, F.3d 1038 (9th Cir. 2005). "The Ninth Circuit's reading of ICWA is questionable." *Id*. *See also*, RCW 13.38.060(1) Washington state law passed in 2011 clarifying that exclusive tribal jurisdiction under 25 U.S.C. §1911(a) exists for children residing or domiciled on an Indian reservation "unless the tribe has consented to the state's concurrent jurisdiction." Id. Washington has an eight category Public Law 280 statute almost identical to the Idaho statute, I.C. §67-5101, with the notable exception that the Washington statute included an eighth category: adoption proceedings, RCW 37.12.010. By passage of the above mentioned statute in 2011, Washington has recognized the need for tribal consent to further state jurisdiction on Indian reservations, rather than attempting to insert Public Law 280 jurisdiction into the Indian Child Welfare Act's provisions.

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."[131] The child's Tribe and Indian custodian also have the right to intervene in any child custody proceeding in state court.[132]

Under 25 U.S.C. §1912(a), state courts are required to notify "by registered mail return receipt requested" the child's Indian parent or Indian custodian and the child's Tribe of any proceeding for a foster care placement or proceeding to terminate parental rights involving the Indian child. Finally, the Indian Child Welfare Act instructs State Courts in making the decision to place an Indian child in foster care or an adoptive home to follow placement preferences. 25 U.S.C. § 1915 provides in section (a) for the placement of an Indian child in an adoptive home the State Court shall follow this order: "(1) a member of the child's extended family, (2) other members of the child's Indian tribe, or (3) with other Indian families." For foster care placement, the preferences are: (i) a member of the child's extended family, (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs."[133]

The Indian Child Welfare Act also applies when an Indian child is being placed for a voluntary adoption or foster care by a parent. The provisions are included in section 25 U.S.C. §1913. The U.S. Supreme Court has decided two cases involving voluntary adoptions of Indian children and the application of the Indian Child Welfare Act. The first case is *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) involving the issue of the domicile of twin baby boys placed for adoption by their Indian parents. Although Choctaw unwed parents attempted to place the children within the jurisdiction of a state court in a planned adoption to non-Indians, the U.S. Supreme Court overturned the state court's adoption decree based on the Tribe's assertion of exclusive jurisdiction over the child custody proceedings pursuant to 25 U.S.C. §1911(a). The Tribe asserted that the twin babies were domiciled on the reservation as were the Indian parents and the U.S. Supreme Court agreed based upon the principle that a child is normally domiciled with his/her mother.[134]

In a second and more recent case, *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013), the U.S. Supreme Court issued a 5-4 decision on whether an unwed Indian father could assert the Indian Child Welfare Act's provisions when the child's non-Indian mother placed the child for voluntary adoption. The Court specifically held that the ICWA parental termination provisions in 25 U.S.C. §1912(f) did not apply to a non-custodial parent, such as the Indian father in the case; the required remedial efforts prior to involuntary termination of parental rights to rehabilitate the family did not apply when the Indian father had never had custody of the child, and that the ICWA placement preferences did not prevent the non-Indian adoptive couple from adopting the Indian child when no other adoptive petitions had been filed.[135] In the majority opinion, the Court focused on a narrow purpose for the ICWA by stating "when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole

[131] In the Idaho case of Matter of Baby Doe, 123 Idaho 464, 467 (1993), the state court did not transfer the pending child custody proceeding based on the objection of child's mother consistent with 25 U.S.C. § 1911(b).
[132] 25 U.S.C. § 1911(c).
[133] *Id*. at § 1915(b).
[134] 490 U.S. at 47-49.
[135] 133 S.Ct. at 2557.

custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated." This case in the voluntary adoption context does not by its facts have implications for state court proceedings involving the involuntary child custody proceeding initiated by state agency action.

For further reading on the Indian Child Welfare Act, these resources are recommended: "The Bureau of Indian Affairs, Guidelines for State Courts; Indian Custody Proceedings," 67584 Fed. Register Vol. 44 No. 228 (1979); B.J. Jones, THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN (ABA 2003); and "The Idaho Child Protection Manual, Chapter 11 The Indian Child Welfare Act" (Supreme Court of Idaho 2011).

H. Probate for Tribal Members[136]

This section will provide an overview of the primary federal law on probate for tribal members. The relevant Tribal Code should also be consulted when a probate case arises involving a tribal member.

The American Indian Probate Reform Act[137] (AIPRA) was passed by Congress on October 27, 2004, and it took effect on June 20, 2006. It was passed as an amendment to the Indian Land Consolidation Act[138] and was designed to reduce and reverse the fractionated ownership of Indian trust allotments that resulted from the operation of the General Allotment Act[139] and the probate provisions it contained. AIPRA is a complicated statute that contains several devices intended to address the fractionation issue.

Individual Indians who own or may own interests in trust allotments are encouraged to pass those interests in a will upon their death. Encouragement comes from three different sources: first, if interests are passed by will they may devised to anyone although not necessarily in trust status; second, if a person passes without a will, the provisions of the statute will define who inherits those interests; and third, if a person passes without a will those interests may be subject to purchase by others.

Intestate Succession

If an Indian person who owns an interest in a trust allotment dies intestate (that is without a will) AIPRA provides that only certain people may inherit the decedent's interests in trust. These "eligible heirs"[140] include any of a decedent's children, grandchildren, great grandchildren, full or half siblings by blood, or parents who are also one of the following: an Indian; a lineal descendent within two degrees of consanguinity of an Indian or an owner of a trust or restricted interest in a parcel of land prior to October 27, 2004.[141] For purposes of this section, "Indian" is defined differently than in any other provision of federal law as (A) a person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner of a trust or restricted interest as of October 27, 2004, or; (B) any person meeting the

[136] This section was contributed by Douglas Nash, Nez Perce Appellate Court Judge and Former Director of the Center for Indian Law and Policy, Seattle University School of Law.
[137] 25 U.S.C. §§ 2201 *et seq*.
[138] 96 Stat. 2515, 1-6 (1983)
[139] 24 Stat. 388, 390 (1887)
[140] 25 U.S.C. § 2201(9)
[141] *Id.*

definition of Indian under the Indian Reorganization Act (25 U.S.C. § 479) and regulations promulgated thereunder; and (C) with respect to lands in California, also any person who owns a trust or restricted interest in a parcel of such land in that state. If a family member is not eligible, AIPRA will look to the next eligible heir in line.

Interests in trust land passing intestate are divided into two categories for purposes of probate.[142] Those that are less than 5% of the total allotment will pass according to the "single heir rule" to the oldest surviving eligible[143] child, grandchild or great grandchild.[144] If none, the interest passes to the Tribe with jurisdiction and if none, then to co-owners equally. A surviving spouse will receive nothing unless the spouse is living on the interest at the time of decedent's death and if so, will receive a life estate without regard to waste in that parcel.[145] This is true regardless of whether the spouse is Indian or not.[146] If the interest is greater than 5% the spouse will receive a life estate without regard to waste[147] and the remainder will pass to the decedent's eligible children in equal shares – thus fractionating it contrary to the expressed purpose of the Act. If a child has died before the decedent, that child's eligible children will share that interest equally by right of representation.[148] If there are no children or grandchildren the interest will pass to the decedent's surviving eligible parents in equal shares.[149] If no parents, the interest passes to the decedent's surviving eligible siblings in equal shares.[150] If none, then to the Tribe with jurisdiction[151] and, if none, then to the co-owners in equal shares.[152]

Testamentary Disposition

While AIPRA defines how and to whom interests in trust land can be passed by a will (Testamentary) the interest can be passed to anyone – the question is whether it will pass in trust status or in fee.

An owner of an interest in a trust allotment may devise that interest in trust to one of the following eligible devisees:

1. Any lineal descendant of the testator;
2. Any person who owns a preexisting undivided trust interest in the same parcel of land;
3. The Indian tribe with jurisdiction;
4. Any Indian.[153]

The interest will remain in trust status even if the lineal descendants are non-Indian.[154] With a will, a testator can leave a life estate to anyone so long as the remainder goes to an eligible devisee and it will remain in trust[155] or the testator can leave the interest to a non-eligible

[142] 25 U.S.C. § 2206(a)
[143] 25 U.S.C. § 2201(9)
[144] 25 U.S.C. § 2206(a)(2)(D)(iii)
[145] *Id*. at § 2206(a)(2)(D)(ii)
[146] *Id*. at § 2206(a)(2)(A), § 2206(a)(2)(D)
[147] *Id*. at § 2206(a)(2)(A)(i)
[148] *Id*. at § 2206(a)(2)(B)(i)
[149] *Id*. at § 2206(a)(2)(B)(iii)
[150] *Id.* at § 2206(a)(2)(B)(iv)
[151] *Id*. at § 2206(a)(2)(B)(v)
[152] *Id*. at § 2206(a)(2)(C)(i)
[153] *Id*. at § 2206(b)(1)(A)
[154] *Id*. at § 2206(b)(2)(A)(i)
[155] *Id.*

person who will receive the interest in fee.[156] There are some restrictions on devises of interests in fee that are subject to the jurisdiction of a Tribe organized under the Indian Reorganization Act[157] and AIPRA provides the authority for Tribes to purchase any interests to be transferred in fee status at probate by paying fair market value.[158]

Tribal Probate Codes

Interestingly, AIPRA authorizes the enactment of tribal probate codes that will govern the descent and distribution of trust lands within that Tribe's jurisdiction notwithstanding any other provision of law[159] including rules of intestate succession.[160] The authorization of tribal probate codes does not give tribal courts jurisdiction to probate trust interests. That authority remains within the Office of Hearings and Appeals. Tribal codes adopted under this authority must be approved by the Secretary of the Interior before they become effective.[161] (For the Tribal Nations in Idaho, each Tribal Code should be consulted for specific tribal law provisions).

Land Consolidation Mechanisms

AIPRA contains many provisions of interest to tribal governments and officials to effectuate land consolidation and reduce fractionation of the lands over which they have jurisdiction. Indian landowners should be aware of these mechanisms and how they operate in shaping their estate plan and preparing their wills.

Land Consolidation Plans – AIPRA authorizes Tribes to adopt a tribal land consolidation plan that can provide for the sale or exchange of any tribal lands or interests in lands for the purpose of eliminating fractional interests or consolidating its tribal land holdings.[162] The Act specifies the requirements a consolidation must meet in order to secure required Secretarial approval.[163]

Purchase by Tribe – Tribes may purchase all of the interests in a tract with the consent of 50 percent or more of the undivided interest co-owners.[164] Any interest owned by the Tribe may be included in the computation of the percentage for ownership consent.[165] Any Indian owning an undivided interest and in actual use and possession of such a tract for at least 3 years preceding the Tribe's attempt to purchase may purchase the tract by matching the tribal offer.[166] If the individual acquiring the interest wishes to sell or transfer within five years, the Tribe will have the right to purchase the parcel at fair market value.[167] Secretarial approval is required for a

[156] *Id*.
[157] *Id*. at § 2206(b)(2)(B)
[158] 25 U.S.C. § 2205(c)
[159] *Id*. at § 2205(a)(1)
[160] *Id.* at § 2205(a)(2)(A)
[161] *Id*. at § 2205(b)(1)
[162] 25 U.S.C. § 2203(a)
[163] *Id*. at § 2203(a)(5)
[164] 25 U.S.C. § 2204(a)(1)(B)
[165] *Id*. at § 2204(a)(2)(B)
[166] *Id*. at § 2204(b)(1)
[167] *Id*. at § 2204(b)(2)

land sale under this process but it is not required when the Tribe has an approved land consolidation plan.[168]

Partition – Partition under AIPRA is not the traditional process of dividing a parcel into separate legal parcels for each individual owner. While that process is still available, partition under AIPRA is one that reconsolidates all interests in a parcel into one owner through purchase and not necessarily with the consent of all other co-owners. Parcels that have 50 or more but less than 100 co-owners where no one person owns an interest that is greater than 10% of the whole or parcels that have 100 or more co-owners are defined as "highly fractionated"[169] and are subject to the partition process. The process, requirements and limitations for partition are specified in AIPRA.[170]

Purchase Option at Probate – AIPRA grants the Secretary the authority to sell trust interests in a decedent's estate at probate, including the life estate that a surviving spouse would otherwise receive, but at no less than at fair market value.[171] Interests that are less than 5% passing by intestate succession may be sold without the consent of the heirs.[172] Those sales are precluded if: 1) the interest is passing by a valid will thus triggering the consent requirement;[173] 2) the heir to receive it lives on the parcel at the time of decedent's death;[174] or 3) the heirs voluntarily agree to enter into a consolidation agreement at probate.[175] Eligible purchasers are any other eligible heir taking an interest in the same parcel by intestate succession; co-owners or the Tribe with jurisdiction.[176]

Conclusion

AIPRA had the effect of drastically changing the law that applies to Indian wills, probate and land consolidation. It is complex and technical and is over 40 pages long. It contains many provisions that are not described here. Indian land owners should insist on having competent assistance in developing an estate plan and preparing a will that is consistent with their wishes for the distribution of their trust property.

I. Basics on State and Tribal Taxation within Reservations

Taxing authority have been recognized as an inherent governmental power to generate revenue to provide governmental services. Tribal governments in Idaho have passed tax codes for the generation of tax revenue for this purpose. Generally, tribal lands, assets, income and property located in Indian Country are exempt from state taxation. The primary U.S. Supreme Court decision involving state taxation of a tribal member was *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). In that case, the Court held that states did not have

[168] *Id*. at § 2204(b)(3)
[169] 25 U.S.C. § 2201(6)
[170] 25 U.S.C. § 2204(c)
[171] 25 U.S.C. § 2206(o)(2)
[172] *Id*. at § 2206(o)(5)(A)
[173] *Id*. at § 2206(o)(5)(A)(i)
[174] *Id*. at § 2206(o)(5)(B)(i)
[175] *Id*. at § 2206(e)
[176] *Id*. at § 2206(o)

authority to impose income tax on reservation Indians deriving their income from on-reservation sources.

A shift occurred in the late 1970s through the present, where the U.S. Supreme Court has held concurrent state and tribal taxing authority in Indian country for transactions involving non-Indians or where the legal incidence of the state tax does not fall on a tribal member or tribal entity.[177] In *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), the U.S. Supreme Court struck Montana's attempt to tax on-reservation cigarette sales to tribal members and on-reservation property taxes for tribal member vehicles,[178] but upheld state tax on cigarette purchases to non-members at tribal smoke shops.[179]

In Idaho, a few particular state tax provisions are worth noting. First, the state legislature passed a property tax exemption for tribal-government owned fee land in 2011, I.C. § 63-602A. Second, a recent regulation established that the *McClanahan* state income tax exemption applies to any Indian enrolled in a federally-recognized Tribe residing on any of the Idaho reservations.[180]

J. Indian Canons of Construction: Treaty Interpretation and Federal Statutes

When a treaty or statute involving American Indians is at issue, the U.S. Supreme Court has developed special interpretative tools called the Indian canons of construction. "The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor."[181] The Idaho Supreme Court has applied the Indian canons of construction in decisions involving tribal treaty hunting and fishing rights cases.[182]

K. Honoring Civil Orders/Judgments Between Tribal Courts and State Courts

The Idaho Supreme Court indicated approval for the recognition of Tribal Court judgments as entitled to full faith and credit by state courts in *Sheppard v. Sheppard*, 104 Idaho 1, 8 (1982). The Court reached this result based upon the text of the federal statute, 28 U.S.C. §1738, extending full faith and credit to judicial proceedings "within the United States and its Territories and Possessions." Thus, the Court reasoned that Tribal Courts fit within the phrase "Territories and Possessions" for the purpose of recognition in Idaho state courts.[183]

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[177] *See* Wagnon v. Prairie Band Potawatomi, 546 U.S. 95 (2003)(upholding state fuel tax on non-Indian distributor of fuel for tribal gas station on reservation because of finding that legal incidence on distributor not tribal entity).
[178] 425 U.S. at 480-481.
[179] *Id*. at 481-83.
[180] *See* Idaho Tax Commission web site at: http://tax.idaho.gov/i-1138.cfm.
[181] COHEN'S HANDBOOK § 2.02[1].
[182] *See* State v. McConville, 65 Idaho 46 (1943); State v. Arthur, 74 Idaho 251 (1953); and State v. Tinno, 94 Idaho 759 (1972).
[183] 104 Idaho at 8.

1. Coeur d'Alene Tribal Code Provisions

The Full Faith and Credit provisions of the Law and Order Code of the Coeur d'Alene Tribe are provided below (current through July 2014).

4-25.01 Full Faith and Credit

Full faith and credit shall be given in the Coeur d'Alene Tribal Court to the judicial proceedings of every federal court, state court and court of every federally recognized Indian tribe in which final judgments have been obtained, provided the person seeking enforcement of any such a judgment fully conforms to the procedures outlined below.

4-25.02 State and Tribal Courts Entitled to Full Faith and Credit

Notwithstanding the provisions in this title, the Coeur d'Alene Tribal Court may refuse to recognize the judgment of any state or tribal court which has refused or has clearly indicated that it would refuse to honor the valid final judgments of the Coeur d'Alene Tribal Court. The Tribal Council shall work in conjunction with the Tribal Court to develop agreements with the various states and other federally recognized tribes concerning mutual recognition of valid court judgments.

4-25.03 Jurisdiction and Procedure for Establishing Full Faith and Credit

Any judgment creditor shall be entitled to seek enforcement of a final state or foreign tribal court judgment in accordance with the following procedures:

(A) Written Petition by Judgment Creditor: The judgment creditor shall file a written petition with the Clerk of the Coeur d'Alene Tribal Court, accompanied by a verified copy of the state or foreign tribal court judgment sought to be enforced. The petition shall set forth the relevant facts, sufficient to fully advise the Court of the parties and nature of the underlying cause of action. The petition shall be served upon the judgment debtor in the same manner as authorized by the Law and Order Code of the Coeur d'Alene Tribe for service of civil process.

(B) Written Answer by Judgment Debtor: The judgment debtor may file with the Clerk a written answer or response to the petition at any time prior to the hearing on the petition.

(C) Hearing on Petition: After reasonable notice to the judgment debtor, the petition seeking full faith and credit shall be heard. The debtor shall be required at the hearing to show cause why the state or tribal court judgment should not be enforced.

4-25.04 Review of Jurisdictional Basis for State or Tribal Judgment

At the hearing upon the petition, the Tribal Court shall examine the underlying facts of the state or tribal judicial order sought to be enforced in order to determine: (a) that the state or tribal court had proper subject matter jurisdiction over the dispute to enable it to render a valid judgment; (b) that the state or tribal court had proper personal jurisdiction over the judgment

debtor to enable it to render a valid judgment; and (c) that the judgment debtor received fair notice and opportunity to be heard prior to entry of the state or tribal judgment. Full faith and credit shall be given to a state or foreign tribal court judgment only if the Coeur d'Alene Tribal Court determines that all the requirements of subsection (a), (b), and (c) were met.

4-25.05 Review of Consumer Transactions

In considering a petition for full faith and credit by a judgment creditor in connection with a consumer transaction, the Tribal Court shall review the underlying facts and circumstances of the consumer transaction in order to determine the existence of any unconscionable act or practice by the supplier. In determining whether an act or practice by the supplier is unconscionable, the Tribal Court shall consider the following circumstances which the supplier knew or had reason to know:

(A) That the supplier took advantage of the inability of the consumer reasonably to protect his or her interests because of physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors.

(B) That when the consumer transaction was entered into, the price may have exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers.

(C) That when the consumer transaction was entered into there was no reasonable probability of payment in full of the obligation by the consumer.

(D) That the supplier made a misleading statement of opinion on which the consumer was likely to rely to his/her detriment.

If the Tribal Court determines that an act or practice of a consumer transaction was unconscionable, the Court may refuse to enforce the state or other tribal court judgment or may enforce only such part of the judgment that was not affected by the unconscionable act or practice.

4-25.06 Entry of Judgment

Once the Coeur d'Alene Tribal Court has satisfied itself that the state or tribal judicial proceedings are entitled to full faith and credit, the Court shall enter a judgment in favor of the judgment creditor. The entry of said judgment entitles the judgment creditor to enforce its judgment against the judgment debtor.

4-25.07 Remedies Available to Judgment Creditor

After judgment is entered in the Coeur d'Alene Tribal Court, the judgment creditor may enforce its judgment in any manner currently available for judgment creditors in this Code.

2. Kootenai Tribal Code Provisions

The Kootenai Tribe of Idaho Law and Order Code provides for the recognition of foreign judgments in Chapter 7 Recognition and Enforcement of Foreign Judgments and Service of Foreign Process as follows (current as of July 2014).

7-1 RECOGNITION AND ENFORCEMENT

7-1.01 The Kootenai Tribal Court shall only recognize and enforce a foreign judgment if the proponent of the foreign judgment takes the following actions:

(1) Submits proof that the person against whom the foreign judgment has been rendered is subject to the jurisdiction of the Kootenai Tribal Court.

(2) Submits proof that the foreign judgment is based on valid subject matter jurisdiction.

(3) States good cause why an attempt at enforcement of the foreign judgment in the jurisdiction in which it was rendered was unsuccessful or would be futile.

(4) Submits proof that the foreign judgment is final and that it is not under appeal.

(5) Submits proof that the government that issued the foreign judgment provides comity or full faith and credit to the orders, decrees, and judgments of the Kootenai Tribe.

7-1.02 The Kootenai Tribal Court need not recognize the foreign judgment if:

(1) The person against whom the foreign judgment has been rendered is not subject to the jurisdiction of the Kootenai Tribal Court.

(2) The defendant in the foreign court did not receive notice of the proceedings and sufficient time to allow preparation of a defense.

(3) The foreign judgment would serve to violate any federal law or tribal law, custom or tradition.

(4) The foreign judgment was obtained by fraud.

7-1.03 The Kootenai Tribal Court need not recognize the attorney's fee award in a foreign default judgment. The burden of proof will fall upon the proponent of the award to demonstrate its reasonableness.

7-2 PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT

7-2.01 To be recognized and enforced, a foreign judgment must be filed by its proponent with the Kootenai Tribal Court within one year from the date of its issuance.

7-2.02 Proper filing with the Kootenai Tribal Court takes place when a proponent of the judgment delivers to the Court a certified copy of the foreign judgment, the date of its entry, record of any later entries affecting it, such as levies of execution and payments in partial satisfaction, and a motion requesting that the Court recognize and enforce the foreign judgment. A properly filed foreign judgment shall be docketed and recorded in the Court in the same manner as other cases.

7-2.03 Upon proper filing of a foreign judgment with the Court, the Court shall issue a summons directing the defendant to appear at a date not more than thirty (30) days from the date of service and respond to the motion requesting the Court to recognize and enforce the foreign judgment. Once the defendant has been served, failure to appear or respond as directed shall not prevent the Court from ruling on the motion.

7-2.04 For all foreign judgments not given full faith and credit by Federal mandate, the Court will review all evidence relevant to the foreign judgment and shall issue an order granting or denying the motion to recognize and enforce the foreign judgment. The order shall be the final judgment of the Kootenai Tribal Court and shall be enforceable as such.

7-3 SOVEREIGN IMMUNITY

7-3.01 Nothing in this chapter shall be deemed to waive the sovereign immunity of the Kootenai Tribe of Idaho to any extent.

7-4 SERVICE OF PROCESS INVOLVING FOREIGN CAUSES OF ACTION

7-4.01 If service is desired to be obtained upon an Indian within the exterior boundaries of the Kootenai Indian Reservation for the purposes of initiating a civil judicial proceeding in a foreign tribal, state or federal court, such service must be performed by a Kootenai Tribal Officer, or another party designated by the Tribal Court. Any person desiring such service shall submit a written request for such service to the Kootenai Tribal Police together with the document that is desired to be served and the location of the person to be served. A schedule of fees and mileage for such service required to be paid by the judgment creditor shall be as determined by the Police chief and approved by the Tribal Court. An Affidavit of Service shall also be provided upon obtaining the desired service.

3. Nez Perce Tribal Code Provisions

The Nez Perce Tribal Court generally recognizes all valid foreign judgments pursuant to Rule 56 Recognition and Enforcement of Foreign Judgments in Chapter 2-2 Rules of Civil Procedure in the Nez Perce Tribal Code. The plaintiff files the foreign judgment with the Tribal Court and the Court sets the matter for a hearing. After the hearing, if the foreign judgment is recognized, the Court treats the judgment as a Tribal Court judgment and proceeds accordingly.

The text of Rule 56 is set forth below.

Rule 56. Recognition and Enforcement of Foreign Judgments

(a) "Foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court.

(b) A copy of any foreign judgment authenticated in accordance with the laws of the jurisdiction in which it was issued may be filed in with the clerk of the Court. The clerk shall treat the foreign judgment in the same manner as a judgment of the Tribal Court. A judgment so has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the Tribal Court and may be enforced or satisfied in like manner, with the following exception:(1) The terms of a judgment providing for the custody of a

minor child may not be modified, vacated, reopened nor stayed unless the Court has assumed jurisdiction of the case.

(c) (1) At the time of the filing of the foreign judgment, the judgment creditor or his attorney shall make and file with the clerk of the court an affidavit setting forth the name and last known post-office address of the judgment debtor, and the judgment creditor.
(2) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's attorney, if any. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.
(3) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until five (5) days after the date the judgment is filed.

(d) (1) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the Court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or until the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished security for the satisfaction of the judgment required by the law of the jurisdiction in which it was rendered, if the Court determines such security is necessary.
(2) If the judgment debtor shows the Court any ground upon which enforcement of the judgment would be stayed in the issuing jurisdiction, the Court shall stay enforcement of the foreign judgment for an appropriate period, and may require security for satisfaction of the judgment during the stay.

(e) Any person filing a foreign judgment shall pay to the clerk of the Court a fee established by the Tribal Court.

(f) The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this rule remains unimpaired.

(g) This act may be cited as the 'Enforcement of Judgments Act.'

4. Shoshone-Bannock Tribal Code Provisions

The Shoshone-Bannock Tribal Law and Order Code has full faith and credit provisions in Chapter VI Full Faith and Credit for State and Other Tribal Court Judgments. Section 2 of Chapter VI provides the process for any judgment creditor seeking enforcement through the Shoshone-Bannock Tribal Courts. If all procedures are followed, then Section 6 provides remedies for the judgment creditor. Section 7 allows for an informal process as requested by the judgment creditor for the assignment of a Consumer Advocate to negotiate a remedy between the debtor and the judgment creditor. The Section further states: "The Business Council urges affected parties to use this informal approach whenever possible to avoid the expense and time involved in execution and garnishment proceedings."

For judgments entered by state courts and other tribal courts, Section 8 is set forth as follows.

SECTION 8 STATE AND TRIBAL COURTS ENTITLED TO FULL FAITH AND CREDIT

Notwithstanding any of the provisions of this Title, the Shoshone-Bannock Tribal Court shall refuse to recognize the judgment of any State or Tribal Court which has refused or has clearly indicated that it would refuse to honor the valid final judgments of the Shoshone-Bannock Tribal Court. The Business Council shall work in conjunction with the Tribal Court Administrator and the Chief Judge of the Tribal Court to develop agreements with the various States and other federally-recognized Tribes concerning mutual recognition of valid court judgments.

5. Shoshone-Paiute Tribal Code Provisions

For information on the process of submitting state court judgments to the Shoshone-Paiute Tribal Court, please contact the Tribal Court personnel directly.

IV. Criminal Jurisdiction within Indian Country

Criminal jurisdiction is most commonly linked to territorial boundaries, particularly in international jurisprudence. With the unique relationship existing between Tribal Nations and the development of federal Indian law, limitations have been placed on tribal criminal jurisdiction through U.S. Supreme Court decisions and federal statutes. Early in the interactions between Tribal Nations and the United States, treaty documents often contained provisions that each government would provide reparations to the other for any criminal activity of their citizens. It was generally understood that Tribal Nations had societal laws and clans in place to police and enforce when transgressions took place by their own citizens and community members.

As the tide of federal Indian policy shifted from the sovereign-to-sovereign era (1778-mid 1800s) to an era of removal/permanent reservations (1800s),[184] the Bureau of Indian Affairs (BIA) was moved from the U.S. War Department, where it was created in 1789, to the U.S. Department of the Interior in 1849. By the end of the 1800s, federal Indian policy had shifted from government-to-government relations with Tribal Nations to full "plenary" authority being asserted over aspect of American Indian life. This authority was announced and upheld in U.S. Supreme Court decisions as a power available to the U.S. Congress pursuant to the ward/guardian status of Tribal Nations.

In the late 1800s, BIA Indian agents ruled over American Indians on reservations controlling food rations, treaty payment distributions and enforcing U.S. Indian policies to assimilate and destroy any expressions of tribal culture. During this time period, the

[184] The U.S. federal Indian policy eras are generally understood as: sovereign-to-sovereign era (1778- mid 1800s), removal and reservation eras (1800s), allotment/assimilation era (late 1800s – early 1900s), Indian self-government era (1930s – 1940s), termination era (1940s – 1960s), and the Indian self-determination era (late 1960s – present). For more information on the U.S. federal Indian policy eras, *see* EagleWoman & Leeds, MASTERING AMERICAN INDIAN LAW 8-18 (2013); COHEN'S HANDBOOK §§ 1.01 – 1.07 (2012 ed.).

allotment/assimilation era was imposed on tribal peoples across the country and is generally regarded as the most traumatic U.S. federal Indian policy era. Often, military forts were located close to reservations to provide support to Indian agents on behalf of the United States. In the area of criminal jurisdiction, Indian agents and high level BIA officials lobbied Congress for authority to enforce U.S. criminal laws on reservations.

A foundational U.S. Supreme Court decision in the area of criminal was *Ex Parte Crow Dog*, 109 U.S. 556 (1883), where the Court held that a Lakota charged with murder of another Lakota in Dakota Territory was not subject to U.S. criminal laws. In the decision, the Court did not find any basis for the assertion of U.S. laws and held that Crow Dog's petition for habeas corpus relief was granted. With this decision, BIA officials sought public support for their campaign aimed at passing federal legislation allowing for U.S. prosecution of American Indians on reservations.

A. Concurrent Criminal Jurisdiction: U.S. Federal Government and Tribal Governments

In response to this pressure and public outcry, the U.S. Congress enacted the Major Crimes Act of 1885, 18 U.S.C. §1153, providing for federal prosecution of American Indians within Indian country committing any of the listed felony level crimes in the statute. The Major Crimes Act did not oust tribal jurisdiction, but during this time period tribal custom and laws were severely restricted by BIA Indian agents. The Major Crimes Act was quickly challenged when a charge for murder was brought under the federal law against two Indians on the Hoopa Valley Reservation in California for the death of another Indian.

In *U.S. v. Kagama*, 118 U.S. 375 (1886), the U.S. Supreme Court failed to find a constitutional basis to support the Major Crimes Act,[185] but rather resorted to a public policy rationale. The Court rejected the argument that the power to regulate commerce with Indian tribes would allow for a criminal statute over American Indians.

> The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.[186]

[185] 118 U.S. at 378. "The constitution of the United States is almost silent in regard to the relations of the government that was established by it to the numerous tribes of Indians within its borders." *Id*.
[186] *Id.* at 378-79.

Rather, the Court upheld the Major Crimes Act as an outgrowth of the relationship between Tribal Nations and the United States.

The hostility characterizing tribal-state relations is stated in the following excerpt and has often been cited to throughout U.S. jurisprudence and legal scholarship on federal Indian law.

> It seems to us that this is within the competency of congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States,-dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen. (emphasis in the original)[187]

With this rationale, the U.S. Supreme Court found the Major Crimes Act (MCA) as within the authority of Congress. The MCA has been amended several times to add and reword listed felonies for federal prosecution of American Indians in Indian Country.

In 1948, the term "Indian country" was federally defined in 18 U.S.C. §1151. The definition included three types of Indian country for the purposes of federal law: "(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."[188]

Further, federal criminal law has been expanded with the General Crimes Act, commonly referred to as the Indian Country Crimes Act (ICCA), 18 U.S.C. §1152. Under the ICCA, federal prosecution in Indian country extends to crimes by American Indians against a non-Indian based on any crime under the federal criminal code and extends to crimes committed by a non-Indian against an Indian. The ICCA has exemptions for federal prosecution: "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."[189]

In the U.S. Supreme Court, *Williams v. U.S.*, 327 U.S. 711 (1946), the Court broadly held that the Assimilative Crimes Act, 18 U.S.C. § 13, allowed for federal prosecutions on Indian reservations based upon state criminal law provisions for crimes committed by non-Indians against Indians and for crimes committed by Indians against any persons. In *Williams*, the Court did not apply the Assimilative Crimes Act because the federal criminal code was available for

[187] *Id*. at 383-84.
[188] 18 U.S.C. § 1151.
[189] 18 U.S.C. § 1152.

the prosecution of the rape of an 18 year-old American Indian female by a married white man on the Colorado River Indian Reservation.[190]

The integration of state criminal offenses into the federal prosecutorial authority within Indian country and the exceptions built into criminal jurisdiction by federal law has caused this area of law to be referred to as a complicated jurisdictional maze.[191] It is worth noting that a further exception to criminal jurisdiction in Indian country occurred with the U.S. Supreme Court decision, *U.S. v. McBratney*, 104 U.S. 621 (1881), where the Court held that a non-Indian committing a crime against a non-Indian in Indian country was exclusively within state criminal jurisdiction. Tribal governments have not relinquished any criminal jurisdiction and thus, have concurrent criminal jurisdiction with the federal government. Federal statutes and U.S. Supreme Court have imposed limitations on the exercise of tribal criminal authority within Indian country which will be further discussed below.

B. Tribal Government Criminal Jurisdiction

As noted in section II of this Bench Book, five of the Tribal Nations in Idaho have fully functioning Tribal Court systems and are exercising criminal authority. With the starting point of inherent criminal jurisdiction within the tribal territory over all persons, there has been a marked narrowing and restricting of this authority with the enactment of federal statutes and U.S. Supreme Court decisions. Tribal governments have concurrent criminal jurisdiction generally with the federal government or, where delegated to state governments, with state government within Indian country. A major exception that has been carved out of tribal criminal jurisdiction is authority over non-Indian perpetrators within Indian country announced in the U.S. Supreme Court decision, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).[192]

The federal statutory limitations on tribal criminal jurisdiction are largely found in the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301, 1302. In 1990, the U.S. Congress amended 25 U.S.C. § 1301(2) to include within the definition of "powers of self-government" the following: "and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." This amendment is commonly referred to as the "*Duro* fix" and is the rare example of the U.S. Congress overriding a U.S. Supreme Court decision[193] by express federal legislation to the contrary. Thus, tribal criminal jurisdiction extends to all Indians within the tribal territory.

In 25 U.S.C. §1302(a)(7)(B), (C), and (D), Congress has federally legislated limitations on tribal criminal sentencing in Tribal Courts. In general, a Tribal Court may not impose "for conviction of any one offense any penalty or punishment greater than imprisonment for a term of

[190] 327 U.S. at 717-718.

[191] A chart developed by Professor Angelique EagleWoman will be provided at the end of section IV Criminal Jurisdiction in Indian country to visually depict criminal jurisdiction authority by tribal governments, the federal government and state government.

[192] Tribal governments may impose civil fines on non-Indians pursuant to civil provisions in the tribal code, but may not criminally charge or incarcerate non-Indians.

[193] In Duro v. Reina, 495 U.S. 676 (1990), the U.S. Supreme Court held that tribal government criminal jurisdiction was limited to tribal members only and did not extend to members of other tribal governments. This was expressly negated by amendment to the Indian Civil Rights Act in 25 U.S.C. §1301(2) recognizing the inherent criminal authority of tribal governments over all Indians within the tribal territory.

1 year or a fine of $5,000, or both."[194] Additionally, tribal governments are limited from "imposing a total penalty or punishment greater than imprisonment for a term of 9 years."[195] While tribal governments retain concurrent criminal jurisdiction over all Indians within the tribal territory, the federal limits on tribal criminal sentencing severely hamper tribal prosecution of significant criminal activity.

Two U.S. Supreme Court cases have expressly upheld the ability of tribal criminal prosecution and federal criminal prosecution of American Indians for the same criminal conduct as not implicating the U.S. Constitution's Fifth Amendment double jeopardy bar. In *U.S. v. Wheeler*, 435 U.S. 313, 328 (1978), the U.S. Supreme Court held that an American Indian convicted in Navajo Tribal Court and in federal court for the same offense had been subject to separate sovereign authority and therefore, no double prosecution occurred within the meaning of the U.S. Constitution's Fifth Amendment's double jeopardy clause. In *U.S. v. Lara*, 541 U.S. 193 (2004), the U.S. Supreme Court held that the "Duro fix" was within the plenary authority of Congress allowing prosecution of a non-member Indian by the Spirit Lake Tribal Court.[196] Further, the Court rejected the claim that prosecution in that Tribal Court barred subsequent prosecution in federal court for the same offense under the U.S. Constitution's Fifth Amendment double jeopardy clause.[197] In sum, American Indian criminal defendants may be prosecuted twice for the same offense when a tribal government asserts criminal authority and when the federal government asserts criminal authority.

In recent years, national media attention has focused on lawlessness on American Indian reservations and the lack of federal prosecution involving felony level criminal activity by American Indians and non-Indians. Federal prosecutorial declinations have been regarded as central to the growing crime in Indian country.[198] Unable to fully prosecute or impose more than minimal sentences, tribal governments have not been able to address unsafe community conditions.

In 2010, Congress passed the Tribal Law & Order Act (TLOA) to partially address some of these concerns which amended the Indian Civil Rights Act to include expanded tribal criminal sentencing authority only for those tribal governments meeting the new federal standards. The expanded standards raise the limitations for tribal criminal sentencing to maximum penalties of "imprisonment for a term of 3 years or a fine of $15,000, or both."[199] In order to impose these sentences, the tribal government must comply with the additional requirements in 25 U.S.C. §1302(b), (c), and (d). Some of these additional requirements are: provide a tribal public defender at no cost for indigent defendants, allow for assistance of counsel at the level of the U.S. Constitution; provide a tribal judge licensed in the Unites States meeting a standard of sufficient legal training over criminal matters; provide publicly all relevant criminal procedure, criminal law and court evidentiary rules; and provide an audio or other recording of any criminal

[194] 25 U.S.C. §1302(a)(7)(B). The punishment in this section has been increased from imprisonment for six months or a fine of $500 or both by federal amendment in 1986 by Public Law 99-570.
[195] *Id*. at §1302(a)(7)(D).
[196] 541 U.S. at 307.
[197] *Id*. at 210.
[198] *See* GAO Study: U.S. Department of Justice Declinations of Indian Country Criminal Matters, GAO 11-167R, Dec. 13, 2010, available at: http://tloa.ncai.org/documentlibrary/2011/01/GAO%20Report_declinations.pdf "Declination rates tended to be higher for violent crimes, which were declined 52 percent of the time, than for nonviolent crimes, which were declined 40 percent of the time." *Id*. at 3.
[199] 25 U.S.C. §1302(a)(7)(C).

proceeding.[200] Tribal governments have been applying for grants to revise and update criminal law and procedure codes to meet this new standard. Many tribal governments have expressed that there is considerable additional expense without sufficient federal funding assistance to increase tribal criminal sentencing capabilities.[201]

In sum, Tribal Courts have concurrent prosecutorial authority with the federal government and with state government over alleged American Indian perpetrators within the tribal jurisdiction. Prosecution for the same offense by the Tribal Court and either a federal or state prosecution[202] does not violate the U.S. Constitution's Fifth Amendment double jeopardy clause as the U.S. Supreme Court has upheld such convictions as the actions of separate sovereigns. Due to the limitations on criminal sentencing in the Indian Civil Rights Act,[203] tribal governments are not able to fully curb criminal activity and must rely on federal and, where appropriate, state prosecution with higher sentencing levels for the most egregious criminal activity within the tribal territory.

C. State Criminal Jurisdiction in Indian Country and Federal-Delegation under Public Law 280 to Idaho

State governments have had one almost continuous area of exclusive criminal jurisdiction in Indian country based upon a U.S. Supreme Court decision in 1881. The U.S. Supreme Court in *U.S. v. McBratney*, 104 U.S. 621 (1881), held that when Colorado was admitted to the Union on an equal footing this meant the state's criminal jurisdiction extended over crimes committed by a non-Indian against a non-Indian on the Ute Reservation. A similar question arose before the Idaho Supreme Court in *State v. Snyder*, 119 Idaho 376 (1991), where the state's prosecution of a non-Indian driving under the influence of alcohol on the Nez Perce Indian Reservation on a road not maintained by the state was before the Court. Relying on the holding of *McBratney*, the Idaho Supreme Court held that the offense was not against an Indian and therefore, the state had exclusive criminal jurisdiction over the non-Indian as well as a duty "in maintaining traffic safety and protecting the traveling public, Indian and non-Indian alike."[204] For certain exclusively or concurrent federal offenses, federal criminal jurisdiction would apply to non-Indian violators as well within Indian Country where the offense occurred with a non-Indian perpetrator and a non-Indian victim.

1. Federal Delegation of Criminal Jurisdiction under Public Law 280

As noted in Section III D., Congress enacted Public Law 280, codified for criminal jurisdiction at 18 U.S.C. § 1162, during the termination era of federal Indian policy for the

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[200] *Id*. at §1302(c).

[201] *See* GAO Study: Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds, GAO 12-658R, May 30, 2012, available at: http://www.gao.gov/assets/600/591213.pdf "Among the tribes that responded to our survey (109), none reported that they were exercising TLOA's new sentencing authority, and, in open-ended responses, many tribes (86 of 90, or 96 percent) reported challenges to exercising this authority due to funding limitations." *Id.* at 3.

[202] *See* State v. Major, 111 Idaho 410, 412 (1986) (citing to Abbate v. United States, 359 U.S. 187, 193-94 (1959)).

[203] 25 U.S.C. § 1302(a)(7).

[204] 119 Idaho at 379.

primary purpose of delegating federal criminal authority in Indian country to state governments. The federal law did not include federal funding which made it unattractive to many states. In the enactment, six states were specifically identified for the federal delegation and are commonly referred to as the mandatory Public Law 280 states: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. When originally enacted tribal governments had no role in the federal delegation and had no opportunity to request the delegation be retroceded to eliminate state criminal jurisdiction and return to federal criminal jurisdiction.

In 1968 with the enactment of the Indian Civil Rights Act, Congress provided that any future federal delegations to state governments required tribal consent, 25 U.S.C. §1321(a). The criminal component of Public Law 280 codified at 18 U.S.C. §1162 has been amended to include a new subsection (d) pursuant to the 2010 Tribal Law & Order Act (TLOA). The new subsection (d) allows for a tribal government to request state criminal jurisdiction retrocession for a return to concurrent federal and tribal criminal jurisdiction. As currently enacted, the statute is as follows:

> (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 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 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.
>
> (d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--
> (1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and
> (2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

Between 1953 and 1968, other states were given the option to seek the federal delegation and pass conforming state legislation. With the 1968 tribal consent provision added, no tribal government has consented to state criminal jurisdiction.

In 1963, the Idaho state legislature enacted I.C. §67-5101 including seven categories of state authority for civil and criminal matters in Indian country. This section will focus on the criminal jurisdiction implications of the statute. Here is the text of the state statute:

> The state of Idaho, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280)[1] hereby assumes and accepts jurisdiction for the civil and criminal enforcement of state laws and regulations concerning the following matters and purposes arising in Indian country located within this state, as Indian country is defined by title 18, United States Code 1151, and obligates and binds this state to the assumption thereof:
>
> A. Compulsory school attendance
> B. Juvenile delinquency and youth rehabilitation
> C. Dependent, neglected and abused children
> D. Insanities and mental illness
> E. Public assistance
> F. Domestic relations
> G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.
>
> (Footnote 1. 18 U.S.C.A. § 1162, 28 U.S.C.A. § 1360.
> Idaho Code Ann. § 67-5101 (West))

With the enactment of this state law, the seven listed categories that correspond to criminal offenses under state law apply to American Indians committing such offenses in Indian country and allow for prosecution in Idaho state courts.

2. Criminal/Prohibitory or Civil/Regulatory Test for Public Law 280 Application

As noted in Section III. D.1., two major U.S. Supreme Court cases have clarified the federal delegation to state governments based on whether the conduct is criminal/prohibitory or civil/regulatory under state law. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the U.S. Supreme Court rejected the assertion of Minnesota, a mandatory Public Law 280 state, that the state had acquired taxing authority in Indian country over tribal members through Public Law 280. The Court did not find that state governments obtained civil regulatory authority through the passage of any part of Public Law 280.[205] Rather, the Court noted the primary concern behind passage of the law "was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."[206]

The second case, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), dealt with whether California, a mandatory Public Law 280 state, had the authority to apply state criminal law to the commercial bingo operations of two tribal governments. The U.S. Supreme Court reviewed Public Law 280 and approved a test for determining whether a state's laws fell within the criminal/prohibitory category for Public Law 280 or within the civil/regulatory category outside the scope of Public Law 280.[207]

A neighbor to Idaho, the state of Washington has a very similar optional Public Law 280 statute, codified at RCW 37-12-010.[208] Of particular relevance to the extent of delegated criminal jurisdiction is a Ninth Circuit decision involving the "operation of motor vehicles" category under Washington law and application of the criminal/prohibitory or civil/regulatory Public Law 280 test. In *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991) cert. denied, 503 U.S. 997 (1992), the Ninth Circuit reviewed the state's history in decriminalizing traffic offenses to determine whether the state had Public Law 280 criminal jurisdiction in Indian country over a tribal member cited for speeding. The Court found that state law had been revised for speeding and other traffic infractions as subject to civil fines and as separate from criminal offenses such as reckless driving or driving under the influence of

[205] 426 U.S. at 381-86.
[206] *Id*. at 379.
[207] 480 U.S. at 207-08.
[208] RCW 37.12.010 provides: "The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:
(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted."

alcohol.[209] Thus, the Ninth Circuit concluded that state law had removed traffic infractions from criminal/prohibitory and the state's traffic laws fell within the civil/regulatory category as state regulation of driving.[210] Furthermore, the Court found it significant that tribal sovereignty was being exercised through tribal traffic laws enforced by tribal law enforcement on reservations and working with state patrol officers.[211]

3. Idaho Case Law under the Public Law 280 delegation codified at I.C. §67-5101

The most numerous cases decided by the Idaho Supreme Court under 1.C. § 67-5101 involve state court prosecutions of American Indians on reservations for driving under the influence of alcohol and/or drugs charged under I.C. §18-8004 and related state law. A variety of challenges have been asserted by tribal members which may indicate a general misunderstanding of this area of the law and the concurrent state court jurisdiction delegated by I.C. §67-5101. For example, challenges to these types of convictions have included: an assertion that there is exclusive federal jurisdiction of Indians on reservation and felonies involving Indians thus the state is without jurisdiction;[212] an assertion that Congress was without authority to allow Public Law 280 jurisdiction for the state;[213] an argument that the state was without authority to require and charge American Indians under I.C. §18-8002's requirement to submit to a breath test in the course of an arrest for driving under the influence of alcohol and/or drugs;[214] an assertion that the state lacked authority to charge for leaving the scene of an accident under I.C. §18-8007;[215] an assertion that state law enforcement lacked authority to arrest tribal member once the tribal member left the state maintained public roadway;[216] a contention that a tribal member should have been extradited from tribal police custody to state police custody;[217] and a contention of ineffective assistance of counsel for failing to seek a change of venue to tribal court for a state prosecution of driving under the influence of alcohol and/or drugs.[218]

The Idaho Court of Appeals has also upheld the conviction of an American Indian for violation of the state felony child abuse statute as within the I.C. §67-5101 category (C) Dependent, neglect, and abused children.[219] In *State v. Marek*, 116 Idaho 580 (Ct. App. 1989),

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[209] 938 F.2d at 148.
[210] *Id*. at 149.
[211] *Id*.
[212] *See* State v. Michael, 111 Idaho 930, 931 (1986); State v. Warden, 127 Idaho 763, 764 (1995).
[213] *See* State v. Fanning, 114 Idaho 646, 647-48 (1988).
[214] *See* State v. McCormack, 117 Idaho 1009, 1010 (1990); *but see*, State v. McCormack, 117 Idaho 1009 (1990)(dissenting opinion on denial of petition for rehearing by Justice Bistline). "Accession to and assumption by Idaho of jurisdiction for criminal enforcement and punishment of motor vehicle offenses on Indian reservations does not and cannot reserve subsequent jurisdictional power for the state to impose a law such as I.C. 18-8002 which is civil/regulatory in nature, [carries a civil] penalty, and [is] express[ly civil by] legislative designation." *Id*. at 1020.
[215] *See* State v. Smith, 127 Idaho 771, 773-76 (Ct. App. 1995).
[216] See State v. Barros, 131 Idaho 379, 381 (1998).
[217] *See* State v. Beasley, 146 Idaho 594, 596 (2008).
[218] *See* Lawyer v. State, 2012 WL 9492954 (Ct. App. 2012).
[219] The Idaho Supreme Court issued a prior decision in State v. Marek, 112 Idaho 860 (1987)(dismissing the aggravated battery charge as subject to federal prosecution under the Major Crimes Act and remanded with instructions to enter the judgment of conviction for felony injury to a child under state jurisdiction as granted in I.C. §67-5101(C)).

the Court held that conviction under I.C. §18-1501(1) for felony injury to a child fit within the Public Law 280 jurisdiction listed in I.C. §67-5010(C) and met the criminal/prohibitory test as set forth in U.S. Supreme Court cases.[220]

In reviewing the extent of state jurisdiction for traffic offenses as within the Public Law 280 criminal jurisdiction delegated to the state, the Idaho Supreme Court has opined that a traffic infraction is within the criminal/prohibitory scope of I.C. §67-5101(G). In *State v. George*, 127 Idaho 693 (1995), the Court upheld a traffic citation and related conviction for delaying and obstructing an officer when an American Indian woman challenged the ability of a state patrolman to cite her for failing to stop at a stop sign and failure to provide proof of insurance within reservation boundaries.[221] The Court's reasoning relied upon a prior decision, *State v. Bennison*, 112 Idaho 32 (1986), where a jury trial was demanded for a traffic infractions and was denied because the traffic infraction was not punishable by imprisonment and did not amount to a criminal offense that implicated the right to jury trial under the Idaho Constitution.[222] Yet in *George*, the Court stated that the traffic infraction was reviewed as a criminal offense for the analysis employed in the opinion and therefore, fit within the criminal/prohibitory test. The Court also noted that the state legislature had characterized a traffic infraction as a "civil public offense"[223] In *George*, the Court further distinguished the Ninth Circuit decision in *Confederated Tribes of the Colville Reservation v. Washington*[224] as not including the Idaho Constitution's provision on the right to a jury trial,[225] although this right was not held available for Idaho traffic infractions.[226]

Finally, the state courts have also declined to exercise state criminal jurisdiction clearly outside of the scope of the listed categories in I.C. § 67-5101. In *State v. Allan*, 100 Idaho 918 (1980), the Idaho Supreme Court set aside a conviction of bribery of a county officer and dismissed the information based on lack of subject matter jurisdiction over the prosecution of an American Indian for conduct on a reservation. The Court rejected the contention offered by the state that the Indian at issue was "emancipated" or to be considered a non-Indian due to living on a reservation different than his home reservation for state criminal jurisdiction purposes.[227]

In *State v. Ambro*, 142 Idaho 77 (Ct. App. 2005), the Idaho Court of Appeals vacated a judgment convicting an American Indian for possession of a controlled substance on a reservation. The Court disapproved of the conviction based upon a state law enforcement officer stopping Ambro on a public road and then subsequently securing a search warrant for her home on a reservation locating a controlled substance there. Further, the state filed an amended information dropping the original charges and adding a charge under I.C. §37-3732(c) for possession of methamphetamine. In reviewing the charges, the Idaho Supreme Court stated: "[p]ossession of a controlled substance does not concern the operation or management of motor vehicles. Accordingly, the state did not have subject matter jurisdiction to prosecute Ambro for the methamphetamine, which she possessed on the reservation, regardless of whether it was

[220] 116 Idaho at 582-84.
[221] 127 Idaho at 694.
[222] 112 Idaho at 45-46.
[223] *See* former I.C. § 49-110(4) and current I.C. §49-110(5).
[224] 938 F.2d 146 (9th Cir. 1991) cert. denied, 503 U.S. 997 (1992)
[225] 112 Idaho at 698.
[226] See State v. Bennison, 112 Idaho 32, 45-46 (1986).
[227] 100 Idaho at 920-921.

found during a traffic stop on a state maintained highway."[228] The Court noted that tribal or federal prosecution would be available for such offenses.

The state courts have exclusive jurisdiction over criminal offenses committed by American Indians off of reservations within the state territory.[229] In *State v. Mathews*, 133 Idaho 300 (1999), the Idaho Supreme Court upheld the ability to seek execution of a search warrant on the reservation related to a criminal act occurring off of the reservation.[230] For generally applicable federal criminal laws, federal jurisdiction may be asserted concurrently with state jurisdiction for off-reservation offenses by American Indians.

For further reading, a recent resource is "American Indian Crime in Idaho: Victims, Offenders, and Arrestees," Planning, Grants and Research Statistical Center – Idaho State Police, February 2013.

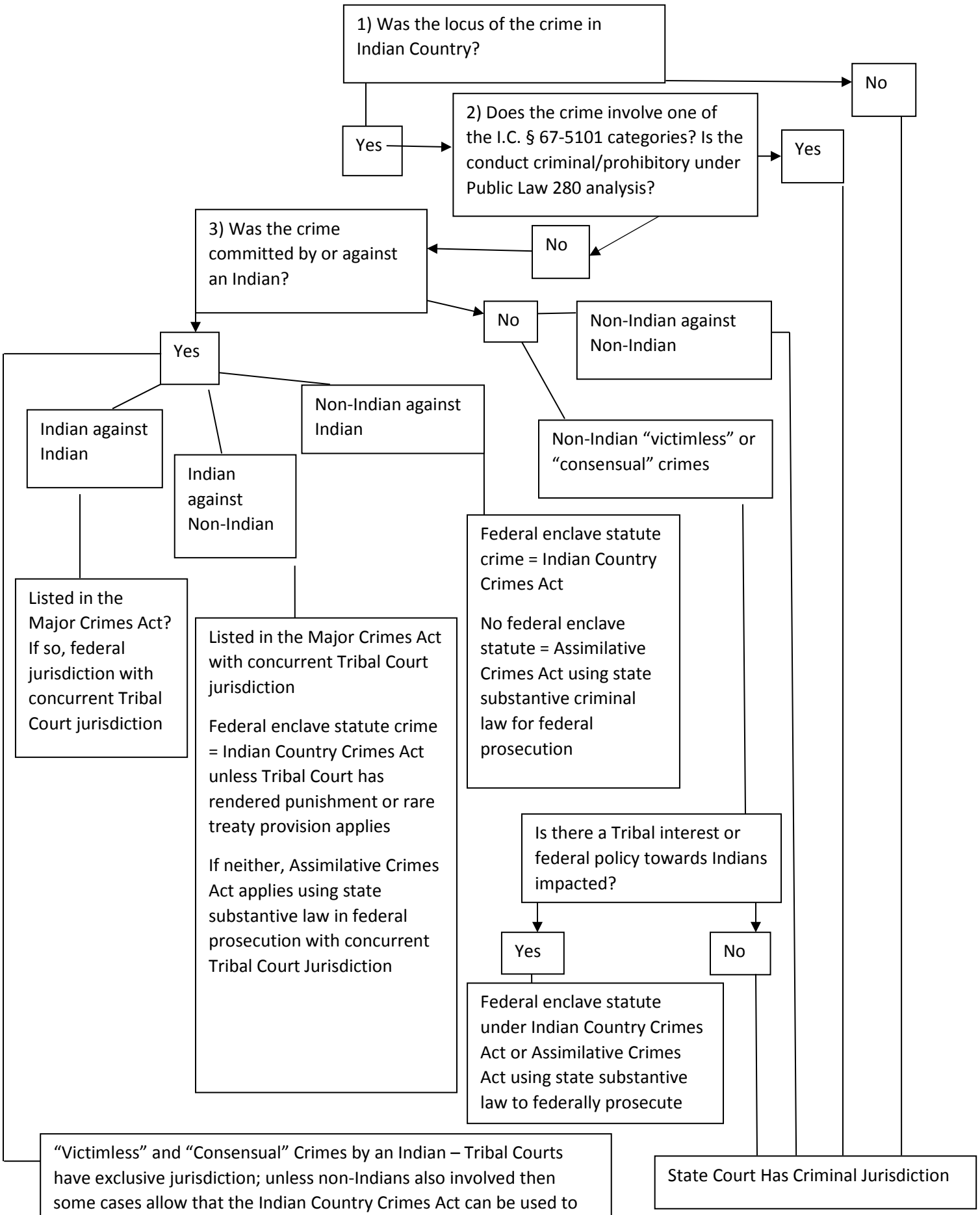
D. Chart on Criminal Jurisdiction in Idaho[231]

[228] 142 Idaho at 83.

[229] *But see* State v. Wolfe, 2013 WL 5526299 (Ct. App. 2013)(dismissing a motion for reconsideration on the issue of the state's lack of subject matter convicting an American Indian to a life sentence for an alleged murder on tribal lands involving presumptive federal jurisdiction due to the failure to follow proper procedure and ruling that the prior motion for reconsideration had been abandoned, thus the conviction was subject to res judicata).

[230] 133 Idaho at 313.

[231] Developed by Professor Angelique EagleWoman.


1) Was the locus of the crime in Indian Country?
No
Yes
2) Does the crime involve one of the I.C. § 67-5101 categories? Is the conduct criminal/prohibitory under Public Law 280 analysis?
Yes
No
3) Was the crime committed by or against an Indian?
No
Non-Indian against Non-Indian
Yes
Indian against Indian
Indian against Non-Indian
Non-Indian against Indian
Non-Indian "victimless" or "consensual" crimes
Listed in the Major Crimes Act? If so, federal jurisdiction with concurrent Tribal Court jurisdiction
Listed in the Major Crimes Act with concurrent Tribal Court jurisdiction
Federal enclave statute crime = Indian Country Crimes Act
No federal enclave statute = Assimilative Crimes Act using state substantive criminal law for federal prosecution
Is there a Tribal interest or federal policy towards Indians impacted?
Yes
No
Federal enclave statute under Indian Country Crimes Act or Assimilative Crimes Act using state substantive law to federally prosecute
"Victimless" and "Consensual" Crimes by an Indian – Tribal Courts have exclusive jurisdiction; unless non-Indians also involved then some cases allow that the Indian Country Crimes Act can be used to apply state law in federal court via the Assimilative Crimes Act
State Court Has Criminal Jurisdiction

E. Domestic Violence Issues

In recent years, the victimization of American Indian women in reservation communities has reached national and international attention. In 2007, Amnesty International issued a report titled, "Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the United States."[232] With the 2013 reauthorization of the Violence Against Women Act (VAWA), the U.S. Congress sought to partially address the lack of prosecution by federal and state authorities within Indian country when non-Indians perpetrated violent crimes against American Indians.

The 2013 VAWA enactment included amendments to the Indian Civil Rights Act to allow authorized tribal governments the ability to prosecute domestic violence crimes perpetrated by both American Indians and non-Indians. New 25 U.S.C. §1304 provides the process for a tribal government to become a participating Tribe by meeting the standards for prosecution set forth in the section. The effective date of the special domestic violence jurisdiction for tribal governments is two years after the date of enactment: March 7, 2015. Tribes seeking to participate sooner than that date may apply for pilot project status with the Department of Justice. In 2014, three Tribal Nations are in pilot project status: Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Umatilla Tribes of Oregon.[233]

Under 25 U.S.C. §1304, tribal prosecution is authorized over individuals who commits against an Indian an act of domestic violence, dating violence or violates a protection order within Indian country.[234] Tribal jurisdiction is not authorized for domestic violence crimes perpetrated by a non-Indian against a non-Indian[235] or where the perpetrator has no relationship to the Indian Country of the participating Tribe.[236] The statute also does not address sexual violence against an Indian perpetrated by a stranger, rather it requires an intimate relationship between the perpetrator and the Indian person for tribal prosecution.[237]

[232] The full report is available at: http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf.
[233] *See* Department of Justice, Thursday, Feb. 6 2014 Press Release: "Justice Department Announces Three Tribes to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013," available at: http://www.justice.gov/opa/pr/2014/February/14-ag-126.html.
[234] 25 U.S.C. §1304(c).
[235] *Id*. at §1304(b)(4)(A).
[236] *Id*. at § 1304(b)(4)(B).
[237] *Id*. at § 1304(a)(1)-(2).