

## INDIAN JURISDICTIONAL ISSUES

### HISTORICAL BACKGROUND

The United States Constitution, which allocates powers of government between the state and federal governments, vests exclusive authority to address the affairs of Indians in Indian country in the federal government. Indian tribes, as sovereigns that preexist the federal Union, retain inherent sovereign powers over their members and territory, including the power to exercise criminal jurisdiction over Indians. As a result, states lack authority over Indians in Indian country absent congressional authorization. Historically, this meant that the federal government and Indian tribes jointly exercised criminal jurisdiction over Indians in Indian country. Under the federalist structure, exclusive authority over Indian affairs is vested in the federal government. See *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976). As a result, states lack authority to prosecute Indians for crimes committed within Indian country without congressional authorization. *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962).

In 1834 Congress first addressed crime in Indian country by enacting the General Crimes Act (also known as the "Inter-racial Crimes Act"), 18 U.S.C. § 1152, which extended federal criminal jurisdiction to crimes between Indians and non-Indians. The General Crimes Act preserved important components of tribal self-government by providing that crimes between Indians remained within the exclusive jurisdiction of tribal governments and by excepting Indian offenders whom the tribal government had tried and punished, ensuring that tribes retained concurrent jurisdiction over crimes by Indians. While states generally retain authority over non-Indians in Indian country, including crimes by non-Indians against non-Indians, the prevailing view is that the General Crimes Act preempts state criminal jurisdiction over non-Indians who commit crimes against Indians. *State v. Larsen*, 455 N.W.2d 600 (S.D. 1990); *State v. Flint*, 756 P.2d 324 (Ariz. App. 1988). In 1885 Congress enacted the Major Crimes Act, codified as 18 U.S.C. § 1153, which created federal jurisdiction over certain enumerated serious felonies by Indians; however, tribes retained their inherent authority to punish Indians for crimes listed in the Major Crimes Act although the punishment they could impose was limited to one year of imprisonment.

### FEDERALLY GRANTED JURISDICTION AND PUBLIC LAW 280

In the early 1950s, Congress perceived a lack of law enforcement and judicial services in many areas of Indian country. As a result, Congress enacted

legislation commonly known as "Public Law 280," which is codified as 18 U.S.C. § 1162. Public Law 280 required six states to assume criminal and civil jurisdiction over all or part of Indian country within those states and provided that the General Crimes Act and the Major Crimes Act did not apply within those areas of Indian country. The six "mandatory" states were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Public Law 280 also authorized other states to voluntarily opt to assume criminal and civil jurisdiction over Indian country. This second group of eight states was empowered to assume such jurisdiction by amending their state constitutions and state statutes. The second group was made up of Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Under Public Law 280, the federal government retained concurrent jurisdiction to prosecute under the Major Crimes Act and General Crimes Act in the so-called "option states."

In 1968, however, Congress enacted various provisions to limit the further extension of Public Law 280. The 1968 provisions, codified as 25 U.S.C. §§ 1323 and 1324, require tribal consent, by majority vote of the adult members, before any of the option states could assume jurisdiction over any areas of Indian country.

### NORTH DAKOTA AND PUBLIC LAW 280

North Dakota initially opted to assert jurisdiction over actions between members of the tribes and nonmembers occurring on tribal land. This was based upon an interpretation of a constitutional provision by the North Dakota Supreme Court in *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957). In *Vermillion* the court held the state had jurisdiction in a personal injury action arising between two Indians on the Standing Rock Indian Reservation. The court's holding was based upon a determination that Indians were residents of North Dakota and, as such, the courts of this state were open to them for prosecution of civil claims pursuant to Article I, Section 9, of the Constitution of North Dakota.

In 1963, however, the Legislative Assembly enacted North Dakota Century Code Chapter 27-19 (attached as an appendix), which provided that the consent of the tribe is required prior to the assertion of state jurisdiction. Chapter 27-19 provided a means by which jurisdiction of the State of North Dakota could be extended over civil causes of action arising on Indian reservations upon acceptance of the Indian tribes or individuals of this jurisdiction. Upon such acceptance the state's civil jurisdiction concerning Indians would be the same

as the state's jurisdiction over all civil causes of action, and the civil laws of North Dakota of general application to private property would have the same force and effect within the Indian reservation or Indian country and on the members of the affected tribe or tribes. Chapter 27-19 placed certain limitations upon jurisdiction, provided that to the extent not inconsistent with applicable civil law tribal ordinances and customs are to be preserved, and provided procedures for withdrawal from state jurisdiction by Indian tribes.

The 1963 enactment of this statutory requirement of consent to jurisdiction, coupled with the 1968 changes to Public Law 280, persuaded the North Dakota Supreme Court in *Gourneau v. Smith*, 207 N.W.2d 256 (N.D. 1973), that North Dakota could no longer assert jurisdiction over claims arising on tribal lands without complying with Public Law 280. *Gourneau* reaffirmed previous North Dakota rulings that *Vermillion* was no longer applicable. The court in *Gourneau* did not reject the analysis articulated in the *Vermillion* decision, but noted that although Indians are residents of the state, "[f]ederal law prohibits State courts from assuming jurisdiction of civil actions involving Indians . . ." and which arise on Indian land unless the tribe has previously consented to the exercise of state civil jurisdiction. The North Dakota Supreme Court also held, in *Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975), that federal law rendered North Dakota Century Code Section 27-19-05, which provides for the individual acceptance of state jurisdiction, invalid as a method for obtaining state jurisdiction over Indian country. The court in *Nelson* held that "state jurisdiction over Indian Country may be obtained only by state and tribal compliance with Public Law 90-284, §§ 402 and 406."

The issue of state jurisdiction in North Dakota was addressed by the United States Supreme Court in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 893 (1986). In the initial case, the Three Affiliated Tribes brought suit in a North Dakota court against a non-Indian engineering firm for negligence in designing and installing a water supply system on the reservation. Wold Engineering moved to dismiss the complaint for lack of jurisdiction after filing a counterclaim and argued that the tribes had not consented to state court jurisdiction over the reservation. The North Dakota Supreme Court initially held that the state courts lacked jurisdiction over the claim. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 321 N.W.2d 510, 511-12 (N.D. 1982). The United States Supreme Court, believing that the state court's determination of its jurisdiction under state law may have been influenced by its erroneous interpretation of Public Law 280, reversed and remanded the case. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138 (1984). The Court noted that although North Dakota's enabling act

required it to disclaim jurisdiction over Indian country located within the state, and its original constitution so provided, the federal restrictions on the state's jurisdiction over Indian country were eliminated in 1953 by Public Law 280. Upon reconsideration, the North Dakota Supreme Court held that the action could be brought in state court if the tribe complied with the provisions of North Dakota Century Code Section 27-19-05, but also held that Section 27-19-05 eliminated any residual jurisdiction. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 364 N.W.2d 98 (N.D. 1985), rev'd 476 U.S. 877 (1986). Again the case was brought before the United States Supreme Court. *Three Affiliated Tribes*, 476 U.S. at 877. This time the United States Supreme Court unequivocally held that North Dakota could not disclaim jurisdiction over such suits and reversed and remanded the case back to the North Dakota Supreme Court for further proceeding consistent with its opinion. The North Dakota Supreme Court then recognized the second opinion of the United States Supreme Court in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 392 N.W.2d 87 (N.D. 1986).

## CIVIL REGULATORY AND TAXATION AUTHORITY UNDER PUBLIC LAW 280

The United States Supreme Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976), addressed the issue of whether Public Law 280 authorized states to exercise civil regulatory and taxation authority over Indians within the covered areas of Indian country. The Court found that it did not. The Court reasoned that Public Law 280 reflected Congress's concern with the lack of law enforcement and judicial resources for Indian country and meant to allow states to provide those two services only. *Bryan*, 426 U.S. at 383-87. Moreover, the Court explained,

[N]othing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and the conversion of the affected tribes into little more than private, voluntary organizations.

The United States Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), also limited a state's regulatory authority over Indians within Indian country. In this case, the Supreme Court explained that Public Law 280 did not authorize California to enforce its gaming laws in Indian country. The Court distinguished between civil regulatory laws and criminal prohibitory laws, allowing states to enforce only the latter in Indian country. According to the Court, the distinction between civil regulatory and criminal prohibitory laws

hinges on whether a state completely forbids conduct or simply regulates how it is undertaken. Because of that distinction, states may not enforce regulatory laws against Indians in Indian country, even though state law might impose a criminal sanction for their violation.

### **CONCLUSION**

The 1953 enactment of Public Law 280 gave six "mandatory" states civil and criminal jurisdiction over all or part of Indian country within those states. Public Law 280 also authorized another group of states, which included North Dakota, to voluntarily opt to assume criminal and civil jurisdiction over Indian country. This second group of eight states was empowered to assume such jurisdiction by amending their state constitutions and state statutes. In 1963 the Legislative Assembly enacted North Dakota Century Code Chapter 27-19. This chapter requires a tribal acceptance of jurisdiction before the state can assume jurisdiction in certain matters. Under this law, determining the parentage of children, termination of parental rights,

commitments by district courts, guardianship, guardianships, marriage contracts, obligations of support of spouse, children, or other dependents are examples of the types of cases which the state court could decide. In addition to this statutory provision regarding the consent of the tribes before the state can assume jurisdiction, in 1968 Congress enacted similar provisions to limit the further extension of Public Law 280. The 1968 provisions require tribal consent, by majority vote of the adult members, before any of the option states could assume jurisdiction over any areas of Indian country. Since the enactment of this amendment, no tribe has voted to consent to state court jurisdiction. In addition, Public Law 280 was amended to provide that states that had previously opted to exercise jurisdiction over Indian country could retrocede or disclaim such jurisdiction, subject to acceptance by the federal government.

ATTACH:1