

*This article appeared in substantially similar form in Resolving Disputes Locally: Alternatives for Rural Alaska issued by the Alaska Judicial Council in August 1992.*

# Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?

SUSANNE DI PIETRO\*

*This article discusses the legal issues implicated by claims of tribal court jurisdiction, without advocating a particular resolution of those issues. The article provides an historical and legal overview of the sovereignty status of Alaska Native tribes. The remainder of the article explores the legal effects of Public Law 83-280 on tribal court jurisdiction in Alaska and discusses general principles of tribal court jurisdiction and how they might apply in Alaska.*

## I. INTRODUCTION

It is not widely known outside of rural Alaska that as of 1993 at least one hundred Alaska Native villages were operating tribal councils or tribal courts that resolve local disputes as their primary or major functions.<sup>1</sup> Moreover, tribal court and council dispute

---

Copyright © 1993 by Alaska Law Review

\* Staff Attorney, Alaska Judicial Council, Anchorage, Alaska; J.D., Northwestern University School of Law, 1987; B.A., Vanderbilt University, 1983; member, Alaska Bar Association.

This article was developed under a grant from the State Justice Institute. Points of view expressed herein are those of the author and do not necessarily represent the official position or policies of the Institute.

1. See generally TERESA W. CARNS ET AL., RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY (1993) [hereinafter RESOLVING DISPUTES LOCALLY II].

resolution activity in Alaska reportedly has increased substantially over the past six years.<sup>2</sup>

The increase in, and the range of, tribal dispute resolution activity in Alaskan villages raise interesting and important legal issues about tribal court jurisdiction and authority. Although a federal line of authority recognizes the existence and jurisdiction of at least some tribal courts in Alaska,<sup>3</sup> the State of Alaska does not.<sup>4</sup> The purpose of this article is to explain the legal issues implicated by claims of tribal court jurisdiction without advocating a particular resolution of those issues.

Because many Alaska Native tribes base their authority and jurisdiction to operate tribal courts on their status as sovereign entities,<sup>5</sup> a threshold issue for this discussion of tribal court jurisdiction is whether Alaska Native tribes have sovereign status. The sovereignty debate is presented here first to set the context for the analysis of tribal court jurisdiction. The remainder of the article explores the legal effects of Public Law 83-280 on tribal court jurisdiction in Alaska and discusses general principles of tribal court jurisdiction and how they might apply in Alaska.

## II. TRIBAL COURTS IN ALASKA

### A. History of Tribal Courts and Village Councils

Village councils, composed of chiefs, elders or elected representatives of the local community, were first organized around the turn of the twentieth century.<sup>6</sup> The councils typically had authority in a wide range of village affairs, "and could be character-

---

2. *Id.* at 3. The Judicial Council expects this rapid rate of change to continue. *Id.* The increase may be related in part to the fact that around 1986 the Administration for Native Americans within the federal Department of Health and Human Services targeted Alaska Native tribes for special consideration in making grants for tribal self-determination, including the formation of tribal courts. 51 Fed. Reg. 36,517 (1986).

3. *See infra* notes 84-87 and accompanying text.

4. *See infra* notes 88-91 and accompanying text.

5. RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 29.

6. *Id.* at 10. The development of councils apparently was encouraged by missionaries, teachers and other government officials. *Id.* Before contact with the non-Native community, Alaska Native groups governed themselves and resolved their disputes through a variety of social/political and family structures. *Id.* at 7. For a summary of anthropological observations about these structures, see *id.* at 7 tbl. 1.

ized as combining the executive, legislative and judicial functions into one organization."<sup>7</sup> After the newly formed State of Alaska instituted a unified court system in 1959,<sup>8</sup> the councils continued to play a role in village life;<sup>9</sup> by the 1970's, however, the roles of many councils were changing substantially,<sup>10</sup> and other councils were falling into disuse.<sup>11</sup>

At least within the past six or seven years that the Alaska Judicial Council has been studying the issue, a number of villages have revived the tribal council structure for dispute resolution, and in some instances have begun to formalize the dispute resolution activities of these councils into tribal courts.<sup>12</sup> Supported by the regional tribal organizations (commonly referred to as Native non-profit corporations) and the federal Administration for Native Americans, and working cooperatively in many places with state government employees, the tribal councils and tribal courts typically work on Indian Child Welfare Act cases, handle traditional adoptions, enforce local ordinances (mainly alcohol control and minor criminal matters) and generally maintain community harmony.<sup>13</sup>

In 1992, the Alaska Judicial Council evaluated two well-established tribal courts, the Minto and Sitka Tribal Courts.<sup>14</sup> The

---

7. *Id.* at 11.

8. *See* ALASKA CONST. art. IV, § 1.

9. RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 12-13.

10. *Id.* at 21-22.

11. *Id.* The councils' roles may have been undermined in villages where the Alaska court system maintained a presence. *See id.* at 60. However, the court system does not maintain a strong presence in rural Alaska. "Judicial officers, including full or part-time magistrates live in only about fifty locations, or fewer than one-quarter of the State's communities." *Id.* at 28. Residents in the other communities tend to have very infrequent contact with the courts. *Id.*

12. *Id.* at 3. The most common arrangement involves villages that use Indian Reorganization Act ("IRA") councils or traditional councils to adjudicate disputes as the need arises. Some villages operate tribal courts, however, that are separate entities from the tribal councils. *Id.* at 29-30.

13. *Id.* at 31.

14. *See* TERESA W. CARNS ET AL., RESOLVING DISPUTES LOCALLY: ALTERNATIVES FOR RURAL ALASKA 19 (1992) (on file with the Alaska Judicial Council) [hereinafter RESOLVING DISPUTES LOCALLY I]. Minto is an Athabascan village of approximately 218 in Interior Alaska. *Id.* at 21. The Sitka Tribal Court is operated by the Sitka Tribe of Alaska. *Id.* at 93. The Council's study, funded by the State Justice Institute, also evaluated PACT, a multi-cultural conciliation project operating in Barrow.

Council found the courts to be low-cost, volunteer-staffed organizations that respond effectively to local needs for handling child and family cases, and enforcing local ordinances.<sup>15</sup> In 1993, the Council expanded on its earlier work by surveying all tribal dispute resolution activity in Alaska. The resulting report shows that residents of more than one hundred Alaska villages and communities take at least some of their disputes to local tribal councils or tribal courts for resolution.<sup>16</sup> On the basis of its observations, the Council concluded that because village residents participate voluntarily in tribal court and council proceedings, most of these organizations have operated without formal legal challenge to their authority and jurisdiction.<sup>17</sup>

#### B. Tribal Status and Tribal Court Authority

Many Alaska Native villages base their claim of authority for tribal courts and councils to make legally binding decisions on an assertion of sovereign tribal status.<sup>18</sup> As a general principle of Indian law, Indian tribes are qualified to exercise powers of self-government by virtue of their original tribal sovereignty.<sup>19</sup> Thus, the question of whether Alaska Natives are sovereign tribes is important to a discussion of tribal court jurisdiction. Tribal advocates and the State have debated extensively whether Alaska Native villages are tribes for purposes of determining tribal sovereign status and the rights and responsibilities which flow from that status. Because the issue is a factual one<sup>20</sup> that arises only on

---

15. *Id.* at ES-7 to ES-11. The tribal courts serve non-Natives as well as Natives, either because the non-Natives are related through marriage to Natives or because (in Minto) they live in the community. *Id.* at ES-10.

16. See RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 90-92 tbl. 2.

17. *Id.* at 30; RESOLVING DISPUTES LOCALLY I, *supra* note 14, at ES-8. Note that non-Native residents also submit voluntarily to tribal jurisdiction. See *id.* at ES-8; RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 74 n.142.

18. RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 29.

19. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 (Rennard Strickland et al. eds., 1982 ed.).

20. *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988).

a case-by-case basis,<sup>21</sup> the federal and state courts have failed to comprehensively resolve the issue for Alaska Natives.<sup>22</sup>

Under general principles of federal Indian law, tribal status can be recognized in any of three ways: (1) directly by Congress, through statute or treaty; (2) by the executive branch, through mechanisms such as the federal acknowledgment process; or (3) judicially.<sup>23</sup> The legal issues concerning the sovereign powers of Alaska Natives are complicated by the unique history of federal-tribal and State-tribal dealings in Alaska.<sup>24</sup> In the lower forty-eight states, the federal government's interaction with tribes usually involved the formation of treaties that recognized the tribes' historical sovereign status.<sup>25</sup> Because the federal government did not make treaties directly with Alaska Natives,<sup>26</sup> however, the

---

21. See, e.g., *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 41 (Alaska 1988) ("We conclude that Stevens Village is not entitled to utilize the defense of tribal sovereign immunity."); *Atkinson v. Haldane*, 569 P.2d 151, 156 (Alaska 1977) ("The reservation status of the Metlakatla Indian Community sets them apart from other Alaska Natives[,] and . . . the status of the Metlakatla Indian Community has always more closely resembled the status of the tribe in other states.").

22. See *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (superseding 953 F.2d 1179 (9th Cir. 1992)) ("[W]e have not addressed the question whether any Alaskan native village constitutes an Indian tribe for the purpose of sovereign immunity. . . . [W]e must remand so that an adequate record can be prepared so that we may review this 'complex factual question.'" (citation omitted)); *Nenana Fuel Co. v. Native Village of Venetie*, 834 P.2d 1229, 1234 (Alaska 1992) (Moore, J., concurring) ("To date, no court has expressly considered whether a Native group which once resided on a federally recognized reservation in Alaska constitutes a sovereign Indian tribe after the passage of the [Alaska Native Claims Settlement Act].").

23. See generally *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Holliday*, 70 U.S. (8 Wall.) 407 (1865); *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979).

24. *Governmental Jurisdiction of Alaska Native Villages over Land and Nonmembers*, Opinions of the Solicitor, U.S. Dep't of the Interior, No. M-36,975 3 (Jan. 11, 1993) [hereinafter Op. Solicitor].

25. COHEN, *supra* note 19, at 62-74.

26. Alaska was owned by Russia for most of the treaty-making period of the United States, which officially ended in 1871. *Id.* at 107. Russia sold its interest in what is now Alaska to the United States in the 1867 Treaty of Cession. See Treaty of Cession, March 30, 1867, U.S.-Russia, 15 Stat. 539 [hereinafter 1867 Treaty].

While Alaska Natives were not signatories to the Treaty of 1867, they are expressly mentioned in the agreement. Article III of the Treaty provides that the

parties in the debate over tribal status for Alaska Native villages have relied on other historical factors to argue the issue.

Tribal advocates contend that federal Indian law principles, including the test for sovereign tribal status, apply equally to all tribes in the United States, including Alaska Natives.<sup>27</sup> They argue that beginning with the language in the Treaty of Cession and continuing with ANCSA and over forty other post-ANCSA statutes, Congress and the executive branch of the federal government have recognized Alaska Natives' tribal status by treating Alaska Natives similarly to other Indians, despite any historical differences.<sup>28</sup> Thus, according to their argument, "because Alaska Native villages historically were ethnological tribes, and because their consequent legal tribal status has never been terminated by the federal government or voluntarily abandoned by the villages, the villages necessarily continue to have the legal status of 'tribes.'"<sup>29</sup>

In *Native Village of Venetie I.R.A. Council v. Alaska*,<sup>30</sup> the Ninth Circuit Court of Appeals indicated its willingness to consider this reasoning. After considering the legal-historical basis justifying recognition of sovereign tribal status, the Ninth Circuit concluded: "[T]o the extent that Alaska's natives formed bodies politic to

---

"inhabitants" of the ceded territory (except uncivilized Native tribes) could choose to "be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States," and that the "uncivilized tribes" of the Territory will be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." *Id.* at 542.

27. Eric Smith & Mary Kancewick, *The Tribal Status of Alaska Natives*, 61 U. COLO. L. REV. 455, 499-500 (1990). In this context, they argue that the Treaty of Cession, signed by the United States government, provides that the laws of the United States will apply to the "civilized tribes" in Alaska in the same manner as they apply to Indians in other states. *Id.* at 500.

28. Memorandum from Native American Rights Fund to Lynn Forcia, Chief of Bureau of Indian Affairs' Branch of Acknowledgement and Research 25-39 (1992) (in support of request to rescind, correct and republish Bureau of Indian Affairs' 1988 list of federally recognized tribes) (on file with author); Letter from Lloyd B. Miller, an Anchorage attorney with Sonosky, Chambers, Sachse, Miller, Munson and Clocksin, whose practice emphasizes Native law, to Kenton Pettit, *Alaska Law Review* Editor-in-Chief, and Susanne Di Pietro, Alaska Judicial Council Staff Attorney 3 (Nov. 3, 1993) (on file with *Alaska Law Review*).

29. Smith & Kancewick, *supra* note 27, at 456 (footnote omitted). Smith and Kancewick argue that the pattern of the federal relationship with Alaska Native villages constitutes federal recognition of their tribal status as a matter of law.

30. 944 F.2d 548 (9th Cir. 1991).

govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities.”<sup>31</sup> The court refused to rule on the sovereignty issue, however, due to the inadequate factual record developed in lower court proceedings.<sup>32</sup>

The *Venetie* court also acknowledged that a sovereignty claim will fail if Congress has affirmatively divested sovereignty status.<sup>33</sup> Opponents of Alaska Native village sovereignty, including the State of Alaska and private litigants,<sup>34</sup> raise this point to contest tribal sovereignty. According to these groups, the United States government’s failure to sign treaties or create reservations for Alaska Natives shows that Congress and the executive branch never intended to recognize Alaska Natives as sovereign tribes.<sup>35</sup> They further argue that even if Native villages were at one time entitled to sovereign status, they relinquished that status by accepting the Alaska Native Claims Settlement Act of 1971 (“ANCSA”).<sup>36</sup>

---

31. *Id.* at 558 (footnote omitted).

32. *Id.* at 559. *See also* *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (“We cannot reach [the sovereignty issue] because . . . the district court failed to enter express findings of facts or develop a record to support its conclusion that the Native Village of Tyonek is an Indian tribe protected by sovereign immunity.”). Significantly, the district court in *Native Village of Tyonek* had previously ruled that the Tyonek Village “is a tribe protected by the doctrine of sovereign immunity.” *Id.* at 633. Although this ruling did not ultimately become the law of the case, it evinces judicial willingness to recognize the sovereign status of an Alaska Native village.

33. *Venetie I.R.A. Council*, 944 F.2d at 558.

34. *See, e.g., id.* at 548 (State of Alaska opposing sovereignty claim); *Nenana Fuel Co. v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992) (Nenana Fuel Co. opposing sovereignty claim).

35. *See* *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 35-36 (Alaska 1988) (“There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law.” (quoting *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 917-18 (Alaska 1961), *rev’d in part*, 369 U.S. 45 (1962))).

36. 42 U.S.C. §§ 1601-1629e (1988). *See e.g., Nenana Fuel Co.*, 834 P.2d at 1238 (Moore, J., concurring); *Native Village of Stevens*, 757 P.2d at 41 (“ANCSA abolishes all reservations in Alaska . . . [T]here is nothing in the legislative history of ANCSA which remotely suggests that IRA villages are to be recognized as having a government role.”). “ANCSA was intended to resolve the land rights of Alaska’s eighty-thousand Native inhabitants.” COHEN, *supra* note 19, at 740. By its language, ANCSA extinguished any and all Native claims against the United

In a child custody suit, *In re F.P.*,<sup>37</sup> the Alaska Supreme Court reaffirmed its position alongside the opponents of tribal sovereignty, stating that “the history of the relationship between the federal government and Alaska Natives . . . indicates that Congress intended that most Alaska Native groups not be treated as sovereigns.”<sup>38</sup> By refusing to follow federal precedent established by the Ninth Circuit in *Venetie*,<sup>39</sup> the Alaska Supreme Court established a conflict on the sovereignty issue between the state and federal courts.

In addition to the Alaska judicial branch’s opposition to tribal sovereignty, the state executive branch’s official policy on Native sovereignty is that “Alaska is one country, one people.”<sup>40</sup> Under this policy, “[t]he State of Alaska opposes expansion of tribal governmental powers and the creation of ‘Indian Country’ in Alaska.”<sup>41</sup> The executive branch’s current position differs from the previous administration’s position under Governor Cowper. The Cowper Administration (1988-1991) established a tribal status policy acknowledging that many, but not all, Native Alaskan groups could qualify, even if they had not gone through the formal process. The policy further acknowledged that tribes that do not occupy reservations nevertheless possess some powers, but the extent of those powers is not fully defined in the law.<sup>42</sup>

Because the state and federal courts dispute the sovereignty issue and because the governor’s view changed with a new administration, the sovereignty debate remains lively and relevant to the scope of tribal adjudicatory authority in Alaska.

---

States, the State of Alaska and other persons that were based upon aboriginal right, title, use or occupancy of land in Alaska in exchange for 40 million acres of land, approximately \$462.5 million in congressional appropriations and \$500 million in oil royalties. COHEN, *supra* note 19, at 740-41.

37. 843 P.2d 1214 (Alaska 1992).

38. *Id.* at 1215 (quoting *Native Village of Stevens*, 757 P.2d at 34).

39. *See id.* (“The decision in *Native Village of Venetie* fails to persuade us that our prior cases should be overruled.”).

40. Admin. Order No. 125 (1991) (signed by Gov. W.J. Hickel).

41. *Id.* The only group excepted from the current policy is the Metlakatla Indian Tribe of the Annette Islands Reserve. For a discussion of the Metlakatla Tribe and why its status is different from that of other Alaska Native villages, see RESOLVING DISPUTES LOCALLY I, *supra* note 14, at 35 n.125.

42. *See* Admin. Order No. 123 (1990) (signed by Gov. Steve Cowper). Subsequently, Governor Hickel revoked Administrative Order No. 123.



### III. NATURE AND EXTENT OF TRIBAL ADJUDICATORY AUTHORITY

Assuming for purposes of this discussion that the legal issues eventually will be settled in favor of a finding of tribal status, what authority would be recognized for their tribal courts? By virtue of their historic status as self-governing political entities, tribes retain full powers of internal sovereignty,<sup>43</sup> except as expressly qualified by the legislative power of the United States.<sup>44</sup> An expression of this retained sovereignty is the principle that tribes have jurisdiction over their members and territory.<sup>45</sup> This authority is subject to limitation by Congress, however, in the form of federal treaties, agreements or statutes.<sup>46</sup>

One aspect of internal sovereignty that tribes retain, absent congressional action or tribal waiver, is the power to maintain "order and peace among their own members."<sup>47</sup> Tribes retain the authority to adjudicate civil matters involving Indians within tribal territory.<sup>48</sup> In criminal matters, the United States Supreme Court held that tribes generally kept their jurisdiction to try an Indian for

---

43. A distinction is made between internal sovereignty, the right of tribes to govern their internal affairs, and external sovereignty, for example, the power to enter into treaties with foreign nations. Tribes lost most of their external powers of sovereignty by virtue of their incorporation into the United States. COHEN, *supra* note 19, at 244.

44. *Id.* at 241-42; *see also* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

45. As this principle suggests, "there is a significant territorial component to tribal power." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). The territorial boundaries of tribal power generally are defined by the concept of "Indian country." The concept of Indian country and the question of whether it exists in Alaska are crucial to defining tribal court jurisdiction. *See* Op. Solicitor, *supra* note 24, at 132 (concluding, among other things, that ANCSA largely controls the determination of whether any territory exists over which Alaska Natives can exercise governmental authority).

46. COHEN, *supra* note 19, at 764.

47. *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883).

48. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989). The extent of tribes' authority over civil actions involving non-tribal members within tribal territory is less clear; resolution of conflicts between the jurisdiction of state and tribal courts seems to depend on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Fisher*, 424 U.S. at 386.

a crime committed against another Indian within Indian country;<sup>49</sup> however, in 1885, in an exercise of its broad powers to regulate Indian affairs,<sup>50</sup> Congress assumed that jurisdiction by statute.<sup>51</sup> Congress has passed other laws eroding tribal sovereignty in Indian country.<sup>52</sup>

Congress also has exercised its authority to delegate certain jurisdictional authority to the states.<sup>53</sup> Public Law 83-280 ("PL 280") is an example of a statute by which the federal government delegated a measure of its jurisdictional authority to five selected states.<sup>54</sup> It extends to the state courts jurisdiction to adjudicate civil and criminal matters involving Indians in Indian country.<sup>55</sup> Alaska Territory, originally not included in PL 280, was added to it in 1958.<sup>56</sup>

---

49. *Crow Dog*, 109 U.S. at 571-72.

50. COHEN, *supra* note 19, at 212. Congress also has a trust responsibility to Indians, a responsibility that can act as a limitation on congressional power over Indians. *Id.* at 220-21.

51. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1153, 3242 (1988)).

52. Congress also defined federal court criminal jurisdiction over illegal possession, sale or manufacture of liquor in Indian country. *See* 18 U.S.C. §§ 1154, 1156, 1161, 3055, 3113, 3488, 3669-70. As a matter of judicial construction, however, "the courts have insisted upon a clear and specific expression of congressional intent to extinguish traditional prerogatives of sovereignty" before holding that a particular statute limits tribal powers. COHEN, *supra* note 19, at 242 & n.10.

53. COHEN, *supra* note 19, at 259, 361. *See* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). State jurisdiction generally is preempted both "by federal protection of tribal self-government and by federal statutes on other subjects relating to Indians." COHEN, *supra* note 19, at 349.

54. *See* COHEN, *supra* note 19, at 362. The original five states were California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation) and Wisconsin (except the Menominee Reservation). *See* 18 U.S.C. § 1162(a) (1988); 28 U.S.C. § 1360(a).

55. *See* 28 U.S.C. § 1360(a); 18 U.S.C. § 1162(a). Section 7 of PL 280 originally also set up a mechanism for any state to assume jurisdiction in Indian country if it so desired. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, §7, 67 Stat. 588, 590 (1953). However, this optional assumption provision was repealed in 1968 by the Civil Rights Act and replaced by a provision requiring tribes' consent to any future assumption. *See* Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73, 78 (1968) (codified at 25 U.S.C. § 1321(a) (1983)).

56. *See* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a) (1984)). In the rest of this article, "PL 280" refers both to the original law and to the 1958 amendments.

Congress enacted PL 280 in 1953, during the time that the Eisenhower administration had adopted the policy of terminating the special federal-tribal relationship, with the ultimate goal of assimilating Indians into American society.<sup>57</sup> Although the legislative history is in some respects ambiguous, Congress's main intent was to remedy a perceived lack of adequate law enforcement on many reservations.<sup>58</sup> The perceived lawlessness "was attributed to the limited applicability of federal criminal laws and the inadequacy of tribal law enforcement institutions."<sup>59</sup> The grant of civil jurisdiction apparently was something of an afterthought.<sup>60</sup>

In 1958, Public Law 85-615<sup>61</sup> amended PL 280 and extended Alaska's state court civil jurisdiction to private civil causes of action involving Indians in Indian country.<sup>62</sup> It also gave to Alaska's state courts a measure of criminal jurisdiction in Indian country.<sup>63</sup> Other sections of the statute expressly preserved the legislative authority of tribes when not inconsistent with applicable state civil law,<sup>64</sup> and specifically disclaimed any grant of power to the states

57. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 175 (1983).

58. COHEN, *supra* note 19, at 176.

59. *Id.*

60. *Id.* at 364; *see also* Bryan v. Itasca County, 426 U.S. 373, 381 (1976).

61. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a) (1984)).

62. The civil jurisdictional grant of PL 280 provides that:

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 . . . 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:  
Alaska . . . All Indian country within the State.

28 U.S.C. § 1360(a) (1988).

63. For the language of the criminal jurisdictional grant, *see infra* note 112.

64. Section 1369(c) provides:

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.

28 U.S.C. § 1360(c) (1988). One commentator has said that interpretation of this provision is likely to depend on the meanings given "inconsistent" and "applicable." DAVID S. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 454 (1984).

to encumber or tax Indians and Indian properties held in federal trust or restricted against alienation.<sup>65</sup>

The legislative history of Public Law 85-615 suggests that Alaska was added to the list of PL 280 states in response to a 1957 opinion from the United States District Court in Anchorage holding that the Territory of Alaska lacked jurisdiction to enforce its criminal laws against Natives living on the Moquawkie Indian Reservation (Tyonek) because the reserve was "Indian country."<sup>66</sup> By adding Alaska to the list, Congress appears to have intended that the Territory continue to provide law enforcement in the villages.<sup>67</sup>

#### IV. TRIBAL COURT JURISDICTION UNDER PUBLIC LAW 280

Interpretation of tribal court jurisdiction is complicated by the question of whether Congress intended PL 280 to divest tribes of their retained civil and criminal jurisdiction. Where this issue has been litigated, tribal advocates have argued that PL 280 did not preempt tribal court jurisdiction and that tribal courts may continue to exercise their jurisdiction concurrently with the State.<sup>68</sup> The State has argued, however, that the jurisdiction conferred on it by PL 280 is exclusive.<sup>69</sup>

The following discussion of PL 280 is divided into separate sections on criminal and civil jurisdiction. The general discussion of civil jurisdiction contains sections dealing with two specific types of cases: matters arising under the Indian Child Welfare Act and

---

65. 28 U.S.C. § 1360(b) (1988).

66. Petition of McCord, 151 F. Supp. 132 (D. Alaska 1957). According to one source, when PL 280 originally was enacted, the federal and territorial governments had assumed that there was no Indian country in Alaska, and that Alaska Natives in Native villages were subject to the criminal and civil laws of the territorial government. REPORT OF THE GOVERNOR'S TASK FORCE ON FEDERAL-STATE-TRIBAL RELATIONS SUBMITTED TO GOVERNOR BILL SHEFFIELD 139-40 (1986) [hereinafter REPORT OF THE GOVERNOR'S TASK FORCE]; see also *People of S. Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 877 (D. Alaska 1979). Others reject this conclusion, however, arguing that before the *McCord* decision, state and federal authorities probably had never considered the issue. Letter from Mary Kancewick to the Alaska Judicial Council (1991) (on file with Alaska Judicial Council).

67. See S. REP. NO. 1872, 85th Cong. 2d Sess. 3347 (1958), reprinted in 1958 U.S.C.C.A.N. 3347.

68. See *infra* notes 86-87 and accompanying text.

69. See, e.g., *Native Village of Nenana v. Department of Health & Social Servs.*, 722 P.2d 219, 221 (Alaska 1986), cert. denied, 479 U.S. 1008 (1986).

civil regulatory matters. The criminal jurisdiction analysis includes sections on the Indian Major Crimes Act and cases arising under the Indian Civil Rights Act.

#### A. Jurisdiction over Civil Matters

PL 280 grants states jurisdiction over private civil litigation involving Indians who reside on reservations to the same extent that the State has jurisdiction over other civil causes of action.<sup>70</sup> Contrary to the State's position that the grant of jurisdiction is exclusive, commentators have concluded that PL 280 did not specifically extinguish any tribal court jurisdiction and, consequently, that Alaska Native villages may continue to exercise their jurisdiction concurrently with the state.<sup>71</sup> According to this view, Congress intended to delegate through PL 280 only that jurisdiction exercised by the federal government—that is, concurrent jurisdiction over private civil litigation—and never intended to infringe upon the tribes' inherent sovereign power to adjudicate civil disputes among their members in their territory. The Ninth Circuit Court of Appeals has noted that "to the extent that they have addressed the issue" other mandatory PL 280 states have concluded that tribal courts have concurrent civil jurisdiction.<sup>72</sup>

1. *Jurisdiction over Child Custody Matters.* The viewpoint that PL 280 was a broad grant of exclusive civil jurisdiction has been asserted by Alaska in litigation involving the Indian Child Welfare Act ("ICWA").<sup>73</sup> Among other things, the Act regulates tribal court jurisdiction of certain custody proceedings involving Indian children.<sup>74</sup> In ICWA, Congress declared that part of the

---

70. See 28 U.S.C. § 1360(a) (1988).

71. CASE, *supra* note 64, at 451-54; COHEN, *supra* note 19, at 367 ("It is . . . probable that the jurisdiction of the tribes remains concurrent with the states in Indian country subject to Public Law 280 to the same extent that it was concurrent with the federal government prior to the Act.").

72. Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 561 (9th Cir. 1991) (citing Opinion No. 48, Opinion Letter from Robert M. Spire, Nebraska Attorney General (Charles Lowe, Ass't Att'y General), to State Senator James E. Goll (March 28, 1985), and 70 Op. Att'y Gen. Wis. 237, 243 (1981)).

73. 25 U.S.C. §§ 1901-1963 (1988).

74. Child custody proceedings represent about 16% of the Minto Tribal Court's caseload and virtually all of the Sitka court's caseload. RESOLVING DISPUTES LOCALLY I, *supra* note 14, at 75, 101. The Sitka Tribal Court's child custody proceedings, usually referred from the tribal social service agency, consist

national policy of the United States is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by [establishing] minimum Federal standards for the removal of Indian children from their families."<sup>75</sup>

Among its provisions, ICWA requires that tribes be given notice of involuntary proceedings in state court,<sup>76</sup> and it codifies tribes' right to intervene in certain state court child custody proceedings.<sup>77</sup> ICWA also provides that full faith and credit be accorded to the laws and court orders of Indian tribes in these matters, and establishes a preference that Indian children be placed with extended family or in other Indian homes if they must be removed from their homes.<sup>78</sup> ICWA expressly defines "Indian" to include any person who is "an Alaska Native and a member of a Regional Corporation" as defined in the Alaska Native Claims Settlement Act.<sup>79</sup>

The debate over ICWA jurisdiction in Alaska centers around the interpretation of PL 280 and Section 1918(a) of ICWA, commonly referred to as the "reassumption of jurisdiction" provision.<sup>80</sup> Section 1918(a) provides in relevant part:

---

mainly of guardianships. *Id.* at 103-05. The Minto Tribal Court's child custody proceedings consist of traditional adoptions and, occasionally, mediated custody arrangements. *Id.* at 86.

Generally, child custody proceedings under ICWA do not include voluntary placements, such as voluntary, private adoptions, or state foster care placements where the parent can regain custody at any time. *See* 25 U.S.C. §§ 1903(1)(i)-(iv) (1988); *see also* D.E.D. v. State, 704 P.2d 774, 781 (Alaska 1985) (voluntary care agreement did not fall under ICWA definition of "child custody proceeding"). Child custody proceedings under ICWA also do not include juvenile delinquent cases or divorces. 25 U.S.C. § 1903(1).

75. 25 U.S.C. § 1902 (1988).

76. *See id.* § 1912(a). Notice, by registered mail or personal service, must be given to the parent or Indian custodian and the tribe. *Id.* § 1912(a); ALASKA CHILD IN NEED OF AID RULES 7(e)(1); Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67,588-89 (1979).

77. *See id.* § 1911(c). Some Alaska Native villages direct all ICWA notices to the tribal court for review. RESOLVING DISPUTES LOCALLY I, *supra* note 14, at 104; RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 74, 80. Some take an active role in ICWA cases through their village councils. *Id.* at 40-41, 45, 52 n.114, 66, 69, 71, 77, 81-82, 87. Other villages authorize regional Native organizations to intervene in ICWA cases on their behalf. *Id.* at 43.

78. COHEN, *supra* note 19, at 196; *see generally* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

79. 25 U.S.C. § 1903(3) (1988).

80. *Id.* § 1918(a).

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of [PL 280] . . . or pursuant to any other Federal law, may reassume jurisdiction over Indian child custody proceedings. Before any Indian tribe may reassume jurisdiction . . . , such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.<sup>81</sup>

The State contends that PL 280 divested tribes of all child custody jurisdiction, arguing that the notion of reassumption necessarily implies a previous divestiture.<sup>82</sup> The tribes contend that PL 280 divested tribes only of their traditional *exclusive* jurisdiction over child custody matters, leaving them to share concurrent jurisdiction with the State.<sup>83</sup>

Two Alaska Supreme Court opinions support the view that Indian child custody jurisdiction lies exclusively with the State; a federal decision, however, holds that tribal court jurisdiction is concurrent with Alaska state court jurisdiction. In the federal case, *Native Village of Venetie I.R.A. Council v. Alaska*,<sup>84</sup> two Alaska Native villages sought to enjoin the State of Alaska from refusing to recognize tribal court adoptions.<sup>85</sup> The Ninth Circuit Court of Appeals held in favor of the villages, rejecting the State's argument that congressional intent in enacting PL 280 was to give the states exclusive child-custody jurisdiction and to divest the villages of any inherent authority or sovereignty to make child-custody determinations.<sup>86</sup> The court concluded that PL 280 does not prevent any Alaskan Native village from exercising concurrent jurisdiction with

---

81. *Id.*

82. *Native Village of Venetie I.R.A. Council v. Alaska*, 687 F. Supp. 1380, 1394-95 (D. Alaska 1988). Under the State's interpretation, no Alaska tribes are currently eligible for jurisdiction because no tribal organizations in Alaska have petitioned for or received the Secretary of the Interior's approval under Section 1918(a). The State apparently does not contest the tribal notification and intervention provisions of ICWA; for example, the State notifies the Sitka court and the Minto Tribal Council of involuntary child custody proceedings. *RESOLVING DISPUTES LOCALLY I*, *supra* note 14, at 82, 103-04.

83. *Native Village of Venetie*, 687 F. Supp. at 1382-83.

84. 944 F.2d 548 (9th Cir. 1991).

85. *Id.* at 551. Both parties agreed that the matter in controversy arose under ICWA. *Id.*

86. *Id.* at 562. The court's analysis also implicitly rejected the State's position that petitioning for and receiving approval from the Secretary of the Interior is the *only* way for tribes to exercise ICWA jurisdiction.

the State under ICWA if it can prove its status as a federally recognized tribe.<sup>87</sup>

The Ninth Circuit holding conflicts with the Alaska Supreme Court's earlier ruling in *Native Village of Nenana v. Department of Health & Social Services* and with its later holding in *In re F.P.*<sup>88</sup> In *Nenana*, the court concluded that Nenana, which had neither petitioned for nor received the Secretary of the Interior's permission to assume jurisdiction over child custody proceedings, lacked jurisdiction to decide the case of an Indian child who had been found to be in need of aid.<sup>89</sup> The court did not discuss the sovereignty issue; it based its decision on the conclusion that Congress intended PL 280 to divest tribes of all child custody jurisdiction.<sup>90</sup> The court accepted the State's argument that Congress would not have included a provision for reassuming jurisdiction unless it intended to divest the tribes of jurisdiction in the first place.<sup>91</sup> Also evident in *Nenana*, however, is a concern that tribes not be permitted to exercise jurisdiction in child custody matters "until such time as there is satisfactory proof that a particular tribe has the ability to adjudicate properly such cases."<sup>92</sup>

2. *Civil Regulatory Authority over Tribal Members in Tribal Territory.* A special area of concern raised by PL 280's jurisdictional grant is what authority the states have to enforce their own regulatory laws against Indians living in Indian country. A related question concerns the tribes' authority to enforce their own ordinances against resident members and non-members. Both questions are discussed below.

---

87. *Id.* The appellate court remanded the case to the trial court to make these factual determinations regarding tribal status. *Id.*

88. *Native Village of Nenana v. Department of Health & Social Servs.*, 722 P.2d 219 (Alaska 1986); *In re F.P.*, 843 F.2d 1214 (Alaska 1992). For a discussion of *In re F.P.*, see *supra* text accompanying notes 37-39.

89. *Id.* at 220.

90. *Id.* at 221.

91. *Id.* Note that the Ninth Circuit explicitly rejected this reasoning in *Venetie*, concluding that the Section 1918(a) reassumption provision applies to the tribes' right to reassume *exclusive or referral* jurisdiction over child custody matters. *Venetie*, 944 F.2d at 561. Also, the state court did not apply canons of construction of Indian law (for example, that ambiguities must be resolved in favor of the tribe and tribal rights cannot be extinguished by implication) to its interpretation of this provision, while the federal court did. See *id.* at 561-62.

92. *Nenana*, 722 P.2d at 222. The court, however, did not define "ability."



a. *State's Authority to Enforce its Civil Regulatory Laws against Alaska Natives.* PL 280's grant of civil jurisdiction to the states does not include the power to enforce state civil regulatory laws against Indians living in Indian country. In *Bryan v. Itasca County*,<sup>93</sup> the United States Supreme Court held that the State of Minnesota could not impose a tax on a reservation Indian.<sup>94</sup> The Court concluded that if Congress had intended in enacting PL 280 to confer upon the states general civil regulatory powers over reservation Indians, it would have said so expressly.<sup>95</sup> One implication of *Bryan* is that if PL 280 does not confer upon the states jurisdiction to enforce civil regulatory laws against Indians in Indian country, then the tribes retain that exclusive jurisdiction.

To determine the scope of this jurisdictional limitation on the states, it is necessary to identify what laws are civil/regulatory in nature. The United States Supreme Court addressed this issue in *California v. Cabazon Band of Mission Indians*,<sup>96</sup> concluding that California ordinances regulating tribal bingo operations were civil regulatory in nature and thus that PL 280 did not authorize the State to enforce them on the reservation.<sup>97</sup> In *Cabazon*, the Court formulated a shorthand test for distinguishing between civil regulatory and criminal prohibitory laws: whether the conduct at issue violates the State's public policy.<sup>98</sup> Lower courts have consistently applied the *Cabazon* standard to decide whether a particular law is civil regulatory or criminal in nature.<sup>99</sup>

---

93. 426 U.S. 373 (1976).

94. *Id.* at 378-79; *see also* 18 U.S.C. § 1162(b) (1988).

95. *Bryan*, 426 U.S. at 390.

96. 480 U.S. 202 (1987).

97. *Id.* at 208.

98. *Id.* at 202.

99. *See, e.g.,* Quechan Indian Tribe v. McMullen, 984 F.2d 304, 308 (9th Cir. 1993) (California's fireworks laws not civil/regulatory); Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991) (Washington's traffic law establishing speed limits is civil/regulatory.), *cert. denied*, 112 S. Ct. 1704 (1992); Sycuan Band of Mission Indians v. Roache, 788 F. Supp. 1498, 1503 (S.D. Cal. 1992) (California's slot machine laws are civil/regulatory.).

In *Confederated Tribes of the Colville Reservation*, the Ninth Circuit Court of Appeals held that the traffic regulations on the Colville Reservation in Washington were civil/regulatory laws; thus, state law enforcement officers lacked jurisdiction to enforce them. 938 F.2d at 149. Although the State of Washington had assumed civil and criminal jurisdiction for acts committed by Indians on Indian lands in eight specific subject areas (including the operation of motor vehicles on public

b. *Tribes' Authority to Enforce Local Ordinances against Resident Members and Non-members.* Many Alaska Native tribes claim the authority to enforce local ordinances, particularly alcohol control and minor offenses, against their members (and other Indians) in their territory.<sup>100</sup> In *Chilkat Indian Village v. Johnson*,<sup>101</sup> the Ninth Circuit indicated that a tribal court is an appropriate forum for such disputes. The court evinced this possibility by refusing to hear the Chilkat Indian Village's claims that some of its members had violated a village ordinance prohibiting alienation of artifacts without the permission of the village council.<sup>102</sup> The Ninth Circuit reasoned that it had no jurisdiction over the claims against the tribal members because the tribe's attempt to enforce one of its own ordinances against its own members did not present a federal question.<sup>103</sup> The court characterized the Chilkat Indian Tribe's attempts to enforce its ordinance against tribal members as "the staple of the tribal courts."<sup>104</sup>

---

roads), *id* at 147 n.1, a Washington statute stated that "a traffic infraction may not be classified as a criminal offense." *Id.* at 148.

100. See RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 35, 39, 40, 44, 52, 53, 59-61, 87. For example, most of the Minto court's cases involve violations of local ordinances. RESOLVING DISPUTES LOCALLY I, *supra* note 14, at 77. Minto characterizes these cases as civil/regulatory matters. See Native Village of Minto, Alaska, Code of Village Regulations § 90.30 (1985) ("All hearings shall be conducted as civil matters.").

101. 870 F.2d 1469 (9th Cir. 1989).

102. *Id.* at 1476.

103. *Id.* The court raised, but did not decide, the question of whether some of the claims might be subject to requirements that tribal court remedies be exhausted before federal courts would hear the dispute. *Id.* at 1475 n.11. On remand, however, the district court held that all parties were required to exhaust all tribal court remedies, see *Chilkat Indian Village v. Johnson*, No. J84-024 (D. Alaska Oct. 9, 1990), and referred the case to the Chilkat Village Tribal Court for trial on the merits. *Id.* The trial ended in February 1993. Marilee Enge, *Treasure of the Tlingit: Whose Laws?*, ANCHORAGE DAILY NEWS, Apr. 8, 1993, at A1, A6. The tribal court judge ruled on November 3, 1993 that the artifacts must be returned to the Ganaxteidi clan in Klukwan. Marilee Enge, *Tribal Judge Orders Tlingit Totems Home*, ANCHORAGE DAILY NEWS, Nov. 5, 1993 at A1, A10.

The district court also held that the Chilkat Indian Village is a federally recognized tribe and is a "dependent Indian Community" classifiable as "Indian country." *Chilkat Indian Village v. Johnson*, No. J84-024 (D. Alaska Oct. 9, 1990).

104. *Chilkat Indian Village v. Johnson*, No. J84-024 (D. Alaska Oct. 9, 1990). One of the defendants was a non-Indian, non-resident art dealer. *Id.* at 1471, 1473. As to the Village's attempt to enforce its ordinance against the non-member art dealer, the court found that a federal question had been presented because the

As mentioned above, a related area of concern for tribes is whether tribal courts have authority to enforce tribal criminal ordinances against non-member Indians in tribal territory. Although the United States Supreme Court recently decided that issue in the negative, Congress legislatively reversed that opinion in 1991, thereby restoring tribal jurisdiction over non-member Indians.<sup>105</sup>

*c. Limitations on State's exercise of jurisdiction.* A final aspect of PL 280's grant of civil jurisdiction is the requirement that Native "ordinances and customs" be given "full force and effect" in Alaska state courts whenever they are "not inconsistent" with any applicable civil law of the State.<sup>106</sup> Although the meaning of this provision has not been litigated, it apparently requires an Alaska court hearing a civil cause of action arising under PL 280 to apply tribal law, including customary law, if no inconsistent state law exists.<sup>107</sup>

## B. Jurisdiction Over Criminal Matters

Congress historically has attempted to limit the scope of tribal criminal jurisdiction. In the late 1800's and early 1900's, Congress was concerned with "providing effective protection for the Indians" from the criminal acts of non-Indians. In 1790, Congress assumed federal jurisdiction over offenses by non-Indians against Indians to the same extent as if the offense had been committed against a non-Indian.<sup>108</sup> In 1885, as Congress became more concerned with "providing effective protection for the Indians,"<sup>109</sup> it expanded

---

tribe's claim of the sovereign power to enact a valid ordinance, such as one applicable to non-Indians regulating tribal artifacts on its fee lands, is based on a disputed federal claim. *Id.* at 1473.

The result in *Chilkat* is consistent with an earlier Ninth Circuit case in which the court held that no federal question was raised by Indian plaintiffs who sought to contest the results of a tribal election on the ground that tribal election laws of undisputed validity had been violated. *See* *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981).

105. *See* *Duro v. Reina*, 495 U.S. 676 (1990), *rev'd by* 25 U.S.C. § 1301 (1991).

106. 28 U.S.C. § 1360(c) (1988).

107. *See* COHEN, *supra* note 19, at 366.

108. *Id.* (citing 1 Stat. 137 (citing Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790), and Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (1817) (current version at 18 U.S.C. § 1152 (1988))).

109. *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978).

federal criminal jurisdiction over serious offenses committed by or against Indians in Indian country.<sup>110</sup> More recently, the United States Supreme Court has decided that tribes have no criminal jurisdiction over non-Indians in Indian country.<sup>111</sup> PL 280 worked yet another change in the tribal-federal-state balance of criminal jurisdiction by extending to the mandatory PL 280 states a measure of criminal jurisdiction over crimes throughout Indian country within the states' borders.<sup>112</sup> The remainder of this section

110. The Indian Major Crimes Act is codified at 18 U.S.C. §§ 1153, 3242 (1988). The Act was passed in reaction to the Supreme Court's decision in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), which held that tribes generally retained their jurisdiction to try an Indian for a crime committed against another Indian within Indian country. COHEN, *supra* note 19, at 300.

111. *Oliphant*, 435 U.S. at 195. Cohen suggests that most traditional non-penal sanctions may still be imposed on members of tribal society and that exclusion from tribal territory may be the only action that can be imposed on non-Indians. See COHEN, *supra* note 19, at 336.

112. The criminal jurisdictional grant of PL 280 provides that:

Each of the States listed . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . 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 . . . .

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

18 U.S.C. § 1162(a) (1988). For the language of the civil jurisdictional grant, see *supra* note 62.

In Alaska, members of the Metlakatla Indian Community (Annette Islands Reserve) experienced one of the administrative burdens created by this grant. The Metlakatla residents belatedly learned that they no longer retained previously exercised criminal jurisdiction over minor offenses. CASE, *supra* note 64, at 456. Because no state troopers or magistrates worked in Metlakatla, inadequate law enforcement on the reservation resulted under PL 280. 115 CONG. REC. 3225-26 (daily ed. Feb. 7, 1969) (remarks of Sen. Gravel). Consequently, in 1970, Congress passed an exception to PL 280's criminal jurisdictional grant that conferred concurrent criminal jurisdiction on the Metlakatla Community. Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358 (codified as amended at 18 U.S.C. § 1162(a) (1988)). The problems faced by the Metlakatla residents remain today, however, as it is generally acknowledged that budget constraints hamper Alaska's efforts to provide satisfactory law enforcement in the vast and remote rural areas of the state. OTWIN MARENIN & GARY COPUS, *POLICING RURAL ALASKA: THE VILLAGE PUBLIC SAFETY OFFICER ("VPSO") PROGRAM 1* (1989); *RESOLVING*

discusses several of these congressional enactments affecting tribal criminal jurisdiction.

1. *Public Law 280*. As with PL 280's grant of civil jurisdiction, there is disagreement as to whether Congress intended the tribes and the State to share concurrent criminal jurisdiction. Those who believe criminal jurisdiction to be concurrent argue that in enacting PL 280, Congress intended only to substitute state for federal jurisdiction in the existing system.<sup>113</sup> According to this view, prior to PL 280, the federal government and Indian tribes shared criminal jurisdiction (unless jurisdiction had been otherwise transferred), and with PL 280, the federal government transferred its share of this concurrent jurisdiction to the states.

Others argue that a 1970 amendment to PL 280 suggests that Congress interpreted the original transfer of jurisdiction to the states to be wholly exclusive.<sup>114</sup> The amendment adds language expressly enabling the Metlakatla Indian Community to exercise concurrent criminal jurisdiction over the Annette Islands Reserve in Alaska,<sup>115</sup> and it refers to mandatory PL 280 states as "areas over which the several States have exclusive jurisdiction."<sup>116</sup> Other evidence that Alaska's PL 280 criminal jurisdiction is exclusive consists of remarks made by members of Congress both when Alaska was added as a PL 280 state and when the Metlakatla

---

DISPUTES LOCALLY I, *supra* note 14, at A-6 (Susanne Di Pietro, Memorandum regarding Summary of Bush Justice Conference Recommendations 11 (May 2, 1990)).

113. See COHEN, *supra* note 19, at 348.

114. REPORT OF THE GOVERNOR'S TASK FORCE, *supra* note 66, at 142.

115. See *supra* note 112.

116. COHEN, *supra* note 19, at 345. However, Cohen concludes that the legislative history surrounding the 1970 amendment is ambiguous, and that the phrase "exclusive jurisdiction" is most naturally read to mean only exclusive of federal jurisdiction with no intent to affect tribal jurisdiction. *Id.* Cohen explains that the Metlakatla language was included to respond to confusion created at least in part by the decision in *United States v. Booth*, 161 F. Supp. 269 (1958), which held that the Metlakatla Reservation was not Indian country. COHEN, *supra* note 19, at 345 nn.138, 139. Other legislative history suggests that the Metlakatla amendment was sought as a prophylactic measure only, in case it was later decided that Public Law 280 silently extinguished tribal criminal law enforcement jurisdiction. Letter from Lloyd B. Miller, *supra* note 28, at 6. Others respond that the assumptions or beliefs of the amending Congress in 1970 should not be dispositive of the beliefs or intent of the enacting Congress. See, e.g., *Consumer Product Safety Comm'n v. GTE*, 447 U.S. 102, 119 (1980).

bill was introduced,<sup>117</sup> remarks that support the interpretation that PL 280 divested the tribes of their retained criminal jurisdiction.<sup>118</sup>

The courts also have failed to provide a definitive statement of PL 280's criminal jurisdictional grant. In *Walker v. Rushing*,<sup>119</sup> the Eighth Circuit Court of Appeals recently held that PL 280 "did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of [PL] 280 or its legislative history precludes concurrent tribal authority."<sup>120</sup> The Eighth Circuit concluded that the Omaha Tribe could prosecute a member of the Omaha Tribe in the tribal court for violation of the tribal code.<sup>121</sup>

The Alaska state courts have not addressed the issue of whether tribal and state courts concurrently share criminal jurisdiction. In *Harrison v. State*,<sup>122</sup> however, the Alaska Court of Appeals rejected a defense based on an assertion that a tribal court had *exclusive* jurisdiction over the offense. The defendant, an Athabascan Indian, moved to dismiss a reckless driving charge on the ground that the State lacked jurisdiction to prosecute because the Chickaloon Village Traditional Court had exclusive jurisdiction.<sup>123</sup> Interpreting PL 280, the court held that "Indian tribal courts do not have exclusive jurisdiction over criminal offenses committed by Alaska Natives in Alaska even if these offenses occur in 'Indian Country.'"<sup>124</sup> The court expressly declined to consider

---

117. REPORT OF THE GOVERNOR'S TASK FORCE, *supra* note 66, at 142 (citing S. REP. NO. 902, 91st Cong., 1st Sess. (1969)).

118. The legislative history consists of remarks by Representative Kenneth B. Keating, the Judiciary Committee member who managed the bill on the floor of the House of Representatives; remarks by the bill's sponsor, Alaska Senator Mike Gravel; parts of the report of the subcommittee to which the bill was referred in the Senate; parts of the report of the members of the Committee on the Judiciary who reported the bill to the Senate floor; comments from the Department of the Interior; and remarks from Representative Howard Pollock, Alaska's only member of the House of Representatives. *Id.*

119. 898 F.2d 672 (8th Cir. 1990).

120. *Id.* at 675.

121. *Id.* The defendant was driving on a public road on the Omaha Indian Reservation when she struck and killed two persons, also members of the tribe. *Id.* at 672.

122. 784 P.2d 681 (Alaska Ct. App. 1989).

123. *Id.* at 682.

124. *Id.* at 683.

whether Alaska's jurisdiction might be concurrent with that of the tribal court, stating that the issue was not adequately briefed.<sup>125</sup>

2. *The Indian Major Crimes Act.* In 1885 Congress restricted tribal criminal jurisdiction by enacting the Indian Major Crimes Act ("IMCA"),<sup>126</sup> which extended federal jurisdiction to certain types of serious criminal conduct by Indians against other Indians within Indian country.<sup>127</sup> Although it has acknowledged the issue, the United States Supreme Court has not decided whether IMCA divested tribes of jurisdiction over major crimes.<sup>128</sup>

Subsequent congressional enactments have modified IMCA's jurisdictional grant. First, PL 280 altered the scope of the grant by repealing IMCA insofar as it applied to those areas covered by PL 280.<sup>129</sup> The leading treatise on Native law, *Felix S. Cohen's Handbook of Federal Indian Law*, has concluded that the "intent of the criminal law section [of PL 280] was to substitute state for federal jurisdiction under the Indian Country Crimes Act and IMCA."<sup>130</sup> Thus, the federal government gave to PL 280 states the power to prosecute the crimes covered by IMCA.

The Indian Civil Rights Act<sup>131</sup> ("ICRA") also altered the jurisdictional effect of IMCA. The United States Supreme Court has held that the issue of whether the federal government has "exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of [ICRA] which limits the punishment that can be imposed by Indian tribal courts."<sup>132</sup> ICRA's other jurisdictional ramifications are discussed below.

125. *Id.* at 683 n.2.

126. 18 U.S.C. § 1153(a) (1988).

127. COHEN, *supra* note 19, at 300. Crimes currently covered by IMCA include murder, manslaughter, kidnapping, rape, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary and robbery. *See* 18 U.S.C. § 1153(a) (1988).

128. *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n.14 (1978).

129. *See* 18 U.S.C. § 1162(c) (1988) ("The provisions of [18 U.S.C. §§ 1152 and 1153] shall not be applicable within areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.").

130. COHEN, *supra* note 19, at 344.

131. 25 U.S.C. §§ 1301-1341 (1988). ICRA is contained within the 1968 Civil Rights Act. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

132. *Oliphant*, 435 U.S. at 203 n.14.

3. *The Indian Civil Rights Act.* ICRA, passed by Congress in 1968,<sup>133</sup> has provisions affecting both the substantive rights of tribal members and tribal court procedures. Generally, ICRA infringes on tribal powers of self-government "by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."<sup>134</sup> ICRA's purpose was to prevent perceived injustices perpetrated by tribal governments while at the same time minimizing congressional interference with tribal autonomy and self-governance.<sup>135</sup>

Many of ICRA's provisions concern tribal criminal justice systems. For example, ICRA guarantees certain rights: (1) the right to be free from unreasonable searches and seizures; (2) not to be put in jeopardy twice for the same offense; (3) not to incriminate oneself; (4) to a speedy and public trial; (5) to confrontation and cross-examination at trial; (6) to counsel at the defendant's own expense; (7) to trial by jury in criminal cases; (8) to due process and equal protection of the laws; and (9) not to be subjected to cruel and unusual punishment or excessive bail.<sup>136</sup>

For villages wishing to start tribal courts in Alaska, providing for ICRA's constitutional guarantees could require re-examining some traditional practices. For example, the Minto tribal court traditionally has operated with a strong regard for the confidentiality of the proceedings. However, a policy of closed hearings and confidentiality may not always be compatible with ICRA's guarantee of a public trial at the defendant's request.<sup>137</sup>

ICRA conferred broad jurisdiction on tribal courts to resolve disputes arising under its provisions. With the exception of habeas corpus petitions, tribal members claiming that their rights under

---

133. Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77 (codified at 25 U.S.C. §§ 1301-1303 (1988)).

134. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). See also COHEN, *supra* note 19, at 336. ICRA also limits the punishment that can be imposed by Indian tribal courts to a term of one year imprisonment or a fine of \$5000. 25 U.S.C. § 1302(7) (1988). The 1968 Act limited sanctions to six months imprisonment and no greater than a \$500 fine. See 25 U.S.C. § 1302(7) (1969), amended by Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 sec. 4217, 100 Stat. 3207-146.

135. *Santa Clara Pueblo v. Martinez*, 436 U.S. 62-66 (1978)

136. See 25 U.S.C. §§ 1302-1303 (1988).

137. RESOLVING DISPUTES LOCALLY I, *supra* note 14, at 73-74.



ICRA have been violated must press those claims in tribal court.<sup>138</sup> The United States Supreme Court held in 1978 that ICRA does not authorize a private cause of action in federal court for declaratory and injunctive relief against a tribal government.<sup>139</sup> The Court reasoned that suits against tribes under ICRA are barred from suit by tribal sovereign immunity, and that ICRA does not contain the unequivocal waiver of immunity that would be necessary to allow such a suit.<sup>140</sup>

## V. CONCLUSION

The legal authority of tribal courts in Alaska to hear and decide disputes among members of their communities currently is not formally recognized by the State of Alaska or its court system, largely because the State does not accede to Alaska Native tribes' claims of sovereignty or the existence of Indian country in Alaska. Yet tribal courts function in Alaska on a regular basis,<sup>141</sup> and the State (both through its judges and magistrates, and through executive branch agencies including the Department of Public Safety and the Division of Family and Youth Services) routinely interacts at an informal level with these tribal courts and tribal councils.<sup>142</sup>

The Alaska Judicial Council found that state agencies and groups can benefit from interaction with tribal courts.<sup>143</sup> For example, a village's tribal court can assist a state social worker by arranging a child's temporary or permanent placement,<sup>144</sup> a

---

138. *Santa Clara Pueblo*, 436 U.S. at 65 ("Tribal forums are available to vindicate rights created by ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply."). Federal courts have jurisdiction over writs of habeas corpus. 25 U.S.C. § 1303 (1988).

139. *Santa Clara Pueblo*, 436 U.S. at 52.

140. *Id.* at 59.

141. RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 113.

142. *Id.* at 95-96.

143. RESOLVING DISPUTES LOCALLY I, *supra* note 14, at 171; RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 113.

144. A successful example of this type of cooperation occurs in the Dillingham area, where the Dillingham based state social worker works with tribal councils or courts in Dillingham, Ekwok, Manokotak, New Stuyahok and Togiak in child-in-need-of-aid cases. RESOLVING DISPUTES LOCALLY II, *supra* note 1, at 103 n.192. The tribal organizations monitor families' progress and report back to the social worker, giving the social worker advice and information about the families involved. *Id.*

Village Public Safety Officer ("VPSO")<sup>145</sup> can refer violations of village ordinances to the tribal court instead of calling Troopers to the village and transporting the defendant to the nearest state court location.<sup>146</sup> Villages also benefit from such interaction because they can achieve a measure of local control over the affairs of the villagers.<sup>147</sup>

Until the federal-state split of authority on the sovereignty issue and Indian country is resolved, the scope of PL 280's jurisdictional grant will be interpreted differently by the Alaska State courts and the federal courts. An interim legal approach that supports the State's informal interaction with tribal courts and councils is to categorize all of the various local means of adjudicating or conciliating disputes as alternative dispute resolution processes. The benefit of this approach is that it permits interaction without reference to the controversial issues of sovereignty and Indian country. The disadvantage to this approach, at least from the perspective of tribal advocates, is that state agencies are free to interact with the tribal courts without recognizing tribal sovereign status. Nonetheless, it seems clear that the benefits to both the

---

145. The VPSO is responsible for fire fighting, boat safety, first aid and law enforcement in the village. The VPSO program was established originally in 1982 in the Department of Public Safety. *RESOLVING DISPUTES LOCALLY II*, *supra* note 1, at 99. In 1993, it was statutorily established as an official responsibility of the Department of Public Safety, enabling the department to adopt regulations establishing criteria for entry and participation in the program, and to implement training standards. *Midwives and VPSOs subject of new measures signed into law by Governor Walter Hickel*, *TUNDRA TIMES* 7 (Week of June 16, 1993). The Department of Public Safety contracts with village governments to hire and supervise the VPSOs. *RESOLVING DISPUTES LOCALLY II*, *supra* note 1, at 99. In 1992, eighty-five villages had VPSOs, and an additional thirty-nine had unfilled VPSO slots. Telephone Interview of Alaska Department of Public Safety representative by Teresa W. Carns, Senior Staff Associate, Alaska Judicial Council (November 1992). VPSOs receive six weeks of training at the Department of Public Safety's Training Academy in Sitka. *RESOLVING DISPUTES LOCALLY II*, *supra* note 1, at 100.

146. An example of this practice occurs in Minto, where the VPSO works closely with the Minto Tribal Court. *RESOLVING DISPUTES LOCALLY I*, *supra* note 14, at 77. The Fairbanks District Attorney attributes Minto's low rates of reported crime and prosecutions to successful operation of a tribal court. *Id.* at 85.

147. *RESOLVING DISPUTES LOCALLY II*, *supra* note 1, at 103.

State and the villages from mutual informal cooperation outweigh the disadvantages.<sup>148</sup>

---

148. After evaluating the work of the Sitka and Minto Tribal Courts, the Alaska Judicial Council recommended that the State and Tribes foster a mutually cooperative attitude toward the legitimate work of Tribal courts. *RESOLVING DISPUTES LOCALLY I*, *supra* note 14, at 173. In its follow up report, the Council reiterated its recommendation for cooperation and its neutrality on the issues of Native sovereignty and tribal court jurisdiction. *RESOLVING DISPUTES LOCALLY II*, *supra* note 1, at 114.

