

EXCLUSIVE OF WHAT? THE HISTORICAL CONTEXT OF THE 1970 “METLAKATLA” AMENDMENT TO PL 280

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This Article examines the legal and historical contexts of the 1970 “Metlakatla” amendment to PL 280. This amendment is frequently relied upon by proponents of a divestiture interpretation of PL 280—an interpretation that PL 280 left the affected Indian Tribes within mandatory PL 280 states with no residual civil or criminal jurisdiction. The author argues that the conventional reliance upon that amendment to support a divestiture interpretation is based on flawed premises and that a more complete analysis of the language, background, and legislative history materials (both state and federal) pertaining to the amendment should lead to the conclusion that the amendment is in fact more consistent with a non-divestiture interpretation.

I. INTRODUCTION

Public Law 83-280 (PL 280)¹ was primarily intended to enable state criminal prosecutions for crimes committed within Indian country and, secondarily, to open state courthouse doors to civil ac-

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1. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2000)).

tions arising from within Indian country. PL 280 has been described as a “complicated statute which has been very controversial . . . often . . . misunderstood and misapplied . . . [with a] practical impact . . . way beyond that which was legally required, intended, and contemplated.”² At the root of the debate is whether, in conferring jurisdiction on state courts, PL 280 stripped tribes in Alaska of their jurisdiction.

This divestiture interpretation of PL 280 has been rejected in virtually all jurisdictions.³ Though it is still occasionally raised in various courts and has met a friendly reception in Alaska’s state courts,⁴ the divestiture interpretation’s continuing vitality in Alaska is not clear.

Supporters of the divestiture interpretation often cite Public Law 91-523,⁵ a 1970 amendment to PL 280’s criminal provision enacted in response to concerns raised by the Metlakatla Indian Community in Alaska (“Metlakatla Amendment”).⁶ This Article reviews the arguments used to link the Metlakatla Amendment to the divestiture interpretation by focusing on the legislative history of the amendment and its relation to prior amendments. Ultimately, this Article concludes that the Metlakatla Amendment neither ratified nor codified the divestiture interpretation into PL 280.

2. Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, <http://www.tribal-institute.org/articles/gardner1.htm> (last visited Mar. 30, 2006).

3. Office of Tribal Justice & U.S. Dep’t of Justice, *Concurrent Tribal Authority Under Public Law 83-280* (Nov. 9, 2000), http://www.tribal-institute.org/lists/concurrent_tribal.htm (“Indian tribes retain concurrent criminal jurisdiction over Indians in PL 280 states. That is the shared view of the Federal Government and the vast majority of courts that have directly considered the issue.”).

4. See *Native Vill. of Nenana v. State, Dep’t of Health & Social Serv.*, 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986), *overruled in part by In re C.R.H.*, 29 P.3d 849, 850 (Alaska 2001).

5. Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358 (codified as amended at 18 U.S.C. § 1162 (2000)).

6. “The nearly unanimous view among tribal courts, state courts, and lower federal courts, state attorneys general, the Solicitor’s Office for the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdictions of Indian nations untouched The only doubts about Congress’s intent derive from two 1970 amendments to Public Law 280.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 560–61 (2005 ed.) (citations omitted).

II. THE METLAKATLA AMENDMENT AND THE DIVESTITURE INTERPRETATION OF PL 280

A. Relevance of the Divestiture Interpretation in Alaska and Elsewhere

Is any discussion of PL 280 in Alaska necessary? Many might initially respond in the negative. In 1998, the United States Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*⁷ held that the Alaska Native Claims Settlement Act (ANCSA)⁸ had greatly reduced the acreage which could be considered Indian country in Alaska.⁹ As the Alaska Supreme Court noted the following year in *John v. Baker*,¹⁰ “P.L. 280, which grants states jurisdiction over disputes in Indian country, has limited application in Alaska because most Native land will not qualify for the definition of Indian country.”¹¹ The opinion went on to hold that PL 280 was, thus, irrelevant to a tribe’s claim to inherent membership-based jurisdiction outside Indian country.¹²

Yet the debate over PL 280 in Alaska continues between pro-tribal advocates, who favor tribal jurisdiction, and anti-tribal advocates, who press the divestiture interpretation. Many who oppose tribal court jurisdiction in Alaska state that PL 280 abrogated tribal jurisdiction both within and outside of Indian country. Most recently, this view was articulated by former Alaska Attorney General Gregg Renkes in October of 2004 when he issued an opinion¹³ taking the position that *Native Village of Nenana v. State, Department of Health & Social Services*,¹⁴ even though overruled in part,¹⁵ still stood for the proposition that PL 280 deprives Alaska Native Villages of any authority to initiate child protection proceedings in tribal court.¹⁶ The opinion states Alaska’s tribes can only exercise jurisdiction by (a) petitioning to resume jurisdiction under 25

7. 522 U.S. 520 (1998).

8. 43 U.S.C. §§ 1601–1629 (2000).

9. 522 U.S. at 532.

10. 982 P.2d 738 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000).

11. *Id.* at 747–48 (Alaska 1999).

12. *Id.* at 748.

13. Jurisdiction of State and Tribal Courts In Child Protection Matters, 2004 Op. Att’y Gen. No. 1 (Oct. 1, 2004), A.G. file no. 661-04-0467, available at <http://146.63.113.142/pdf/opinions/opinions/661040467.pdf> [hereinafter Renkes Op.].

14. 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986), *overruled in part by In re C.R.H.*, 29 P.3d 849, 850 (Alaska 2001).

15. *In re C.R.H.*, 29 P.3d at 850.

16. *See* Renkes Op., *supra* note 13, at 7–21.

U.S.C. § 1918,¹⁷ or (b) petitioning to transfer a case from state court under 25 U.S.C. § 1911(b).¹⁸ By applying the divestiture interpretation of PL 280 to Alaska Native Villages regardless of whether they occupy Indian country perpetuates the divestiture debate despite the dearth of Indian country in Alaska after ANCSA.¹⁹

Pro-sovereignty advocates, although in strong disagreement with the Renkes opinion, would agree that PL 280 still has relevance in Alaska because the *Venetie* ruling did not completely eliminate Indian country in Alaska.²⁰ As long as there is some Indian country in Alaska, the question of whether PL 280 was a divestiture statute will remain relevant. The Metlakatla Reservation, the sole Alaska reservation to have survived ANCSA, is clearly Indian country within even the narrowest interpretation of the statutory definition.²¹ Further, the approximately 900,000 acres of restricted Alaska Native allotments²² and the approximately 3,800 Alaska Native townsite lots²³ are strong candidates for Indian country status.²⁴ PL 280 therefore has some geographical scope in

17. *Id.* at 3, 19. Tribes can petition for either exclusive jurisdiction (as Chevak and Barrow have done) or for concurrent jurisdiction (as Metlakatla has done). *Id.* at 19.

18. *Id.* at 3, 12–14. The opinion mentions that tribes in non-PL 280 states have exclusive jurisdiction over Indian children under twenty-five years of age residing on reservations under 25 U.S.C. § 1911(a) without having to petition for re-assumption, but since Alaska is a PL 280 state, this provision will have little or no application. *Id.* at 10–12.

19. Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601–1629 (2000). The Act revoked reserves set aside for Native use, except for the Annette Island Reserve inhabited by the Metlakatla Indians. *Id.* at § 1618(a); *accord* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 n.2 (1998).

20. *Venetie*, 522 U.S. at 527 n.2.

21. *See id.*

22. Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 to 270-3, *repealed by* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, §18(a), 85 Stat. 688, 710 (1971). The Act allowed pending applications to go through. *Id.* Also, Natives who occupied land as their primary residence at the time of the passage of the Act could apply for up to 160 acres of vacant, unappropriated, unreserved land. *Id.* § 13(h)(5), 85 Stat. at 705 (codified at 43 U.S.C. § 1613(h)(5) (2000)).

23. Alaska Native Townsite Act, 43 U.S.C. §§ 733–736 (repealed 1976).

24. Some cases have discussed, without ruling, whether Alaska Native allotments are “Indian country.” *See* Jones v. State, 936 P.2d 1263, 1267 (Alaska Ct. App. 1997) (State can criminally prosecute for activities occurring on Alaska Native allotment under PL 280 regardless of whether allotment is Indian country); People of South Naknek v. Bristol Bay Borough, 466 F. Supp. 870, 877 (D. Alaska 1979) (municipality cannot tax realty and fixtures on Alaska Native allotments but can tax personalty, regardless of whether allotments are Indian country). *South Naknek* also addressed but did not decide if Native Townsites were Indian coun-

Alaska, although the exact delineation of that scope may need to await future court decisions.

PL 280 certainly has application within the other mandatory PL 280 states and within approximately ten states that have exercised the option PL 280 gave them to extend their jurisdiction into Indian country.²⁵ The dissent in *John v. Baker* opined that PL 280 eliminated tribal jurisdiction in areas over which state jurisdiction was extended.²⁶ If this view were ultimately to prevail, it would have a profound impact on tribal-state relations in those other states that have consistently recognized and upheld concurrent tribal jurisdiction. The dissent was not Alaska-specific: “Congress therefore chose to define the remaining Indian country in Alaska covered by P.L. 280 and all Indian country in the other five states, except for the excepted reservations, as ‘areas over which the several States have exclusive jurisdiction.’”²⁷

Thus, it is not surprising that the Metlakatla Amendment has been utilized outside Alaska to resist residual tribal jurisdiction. For example, the Cabazon Band of Mission Indians had to argue about the Metlakatla Amendment in federal district court in 1998.²⁸ The tribe countered in part that the Amendment “was adopted to resolve a problem unique to Alaska as to the status of Indian country in that state.”²⁹ The *Cabazon* court eventually rejected the divestiture interpretation, concluding that the Band retained its inherent criminal jurisdiction notwithstanding PL 280.³⁰ Still, the case

try. See *id.* at 877 (municipality cannot tax realty and fixtures on Alaska Native Townsite lots but can tax personalty, regardless of whether townsite lots are Indian country). For a general discussion of allotments and townsites in Alaska, see D. CASE & D. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 101–53 (2d ed., Univ. of Alaska Press, 2002).

25. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 362–63, n.125 (1982 ed.).

26. *John v. Baker*, 982 P.2d 738, 809 (Matthews, C.J., dissenting).

27. *Id.* at 810–11 (emphasis added).

28. *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1198 (C.D. Cal. 1998).

29. *Id.* at 1198 n.9.

30. *Id.* at 1200. Subsequently, the court granted summary judgment against the tribe on the separate issue of whether the state could regulate the use of tribal emergency vehicles with emergency lights while traveling on state highways to get between non-adjacent areas of the reservation; the court found that California’s regulations had not been shown to have significantly interfered with the tribal law enforcement activities. *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1201, 1208 (C.D. Cal. 1998). The Ninth Circuit issued an opinion affirming but then withdrew that opinion and ordered the district court to vacate its judgment and consider the impact of a 2001 BIA Deputation Agreement. *Cabazon Band of*

illustrates two points: first, that the Metlakatla Amendment has fueled legal arguments against tribes outside as well as within Alaska, and second, that all too often the response from non-Alaskan tribes has been that the amendment should be regarded as “unique to Alaska” and, that whatever its meaning, it should not apply to “Indian tribes in other designated states.”³¹ Any attempt to distinguish Alaska from other PL 280 states would be erroneous; PL 280 does not treat Alaska differently from other listed “mandatory” states.³²

For those reasons, notwithstanding the *Venetie* decision and the marked diminution of Indian country in Alaska, it is not a completely academic exercise to address the 1970 Metlakatla Amendment in historical context.

B. Case Reliance on the Metlakatla Amendment as Support for the Divestiture Interpretation

The Metlakatla Amendment had two components: 1) a change to 18 U.S.C. § 1162(a) to list Metlakatla as an “exception” to the areas of Indian country covered by the statute, and 2) the addition of the phrase “as areas over which the several states have exclusive jurisdiction” to subsection (c), which makes two federal criminal jurisdiction provisions inapplicable within areas of Indian country covered by PL 280.³³

The Metlakatla Amendment has been cited as supporting the divestiture interpretation in several instances.³⁴ These arguments have been based on one or more of three rationales.

Mission Indians v. Smith, 271 F.3d 910, 910–11 (9th Cir. 2001). The district court did reconsider but again ruled against the tribe. Cabazon Band of Mission Indians v. Smith, No. CV 97-4687CAS(JGX), 2002 U.S. Dist. LEXIS 27472, *35 (C.D. Cal. Oct. 17, 2002). The Ninth Circuit then overruled the district court, holding that the state was “precluded by the preemptive force of federal Indian law from prohibiting the [t]ribe’s use and display of emergency light bars on its police vehicle when those vehicles were traveling on public roads in performance of the tribal officers’ law enforcement functions.” Cabazon Band of Mission Indians v. Smith, 388 F.3d 691, 701 (9th Cir. 2004).

31. See *Cabazon Band*, 34 F. Supp. 2d at 1198 n.9.

32. See 18 U.S.C. § 1162 (2000); 28 U.S.C. § 1360 (2000). Both sections simply list Alaska alongside the five other mandatory states.

33. Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358 (codified as amended at 18 U.S.C. § 1162 (2000)).

34. Native Vill. of Nenana v. State, Dep’t of Health & Social Serv., 722 P.2d 219, 221–22 (Alaska 1986), cert. denied, 479 U.S. 1008 (1986), overruled in part by *In re C.R.H.*, 29 P.3d 849, 850 (Alaska 2001). The court rested its reasoning in part on the difficulty reconciling the conclusion that 28 U.S.C. § 1360 left Alaska Native Villages with concurrent jurisdiction and the subsequent intent of Congress embodied in explicit legislation to enable the Metlakatla Indian Community to

The first rationale is that the 1970 amendment was necessary to give Metlakatla concurrent criminal jurisdiction because PL 280 had removed that jurisdiction. The *Nenana* court stated: “It is difficult to reconcile that [PL 280 intended that Native councils continue to exercise their jurisdiction concurrently with the state] with the subsequent intent of Congress embodied in legislation enacted in 1970 to enable the Metlakatla Indian Community to exercise concurrent criminal jurisdiction.”³⁵ Justice Matthews, in dissent in *John v. Baker*, similarly argued that “[t]his amendment is important because it recognizes that the Metlakatla community lacked concurrent jurisdiction prior to the amendment. This, in turn, represents a recognition of pre-amendment exclusive jurisdiction in the state.”³⁶ Finally, a California district court articulated this point as follows:

Defendants also argue that the language employed by Congress when it amended P.L. 280 and extended it to Indian country in Alaska supports its plain meaning argument, in that Congress found it necessary to specifically confer concurrent jurisdiction over criminal matters to the Metlakatla Indian community, because absent such measure, the State of Alaska would have had exclusive criminal jurisdiction. Defendants argue that this provision in the amendment to P.L. 280 would have been unnecessary if the tribe had preexisting concurrent criminal jurisdiction.³⁷

The second rationale is that, because the Interior Department subscribed to the divestiture interpretation of PL 280 as of 1970, that interpretation was implicitly adopted by Congress.

Indeed, the Department of the Interior reported to Congress with respect to the 1970 amendment that P.L. 280, when made applicable to Alaska, “acted to *remove*, with limited exceptions, the *civil and criminal* jurisdiction for law and order purposes previously held by the Indian and native groups and the Federal Government.” The first section of the 1970 amendment thus reflected Congress’s belief that P.L. 280, as applied to Alaska, granted exclusive jurisdiction to the state.³⁸

exercise concurrent criminal jurisdiction. *See also* *John v. Baker*, 982 P.2d 738, 808–12 (Alaska 1999) (Matthews, C.J., dissenting). Justice Matthews relied extensively on the difficulty reconciling the explicit Metlakatla exception within the 1970 amendment.

35. *Nenana*, 722 P.2d at 222 (quoting Governor’s Task Force on Federal-State-Tribal Relations [In Alaska], 141–42 (1986) (footnotes omitted)).

36. *Baker*, 982 P.2d at 810 (Matthews, C.J., dissenting).

37. *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1198 n.9 (C.D. Cal. 1998).

38. *Baker*, 982 P.2d at 810 (Matthews, C.J., dissenting) (emphasis in original) (citations omitted).

The third rationale is that explicit inclusion of the term “exclusive” in subsection (c) constitutes a definitive Congressional pronouncement that state jurisdiction under PL 280 was intended to be exclusive of any tribal jurisdiction. The dissent in *John v. Baker* elaborated:

Section 2 of the 1970 amendment was necessary because under section 1 Metlakatla remained Indian country covered by P.L. 280. But Congress wanted the Indian community to have concurrent jurisdiction with the state in that area. Congress therefore chose to define the remaining Indian country in Alaska covered by P.L. 280 and all Indian country in the other five states, except for the excepted reservations, as “areas over which the several States have exclusive jurisdiction.” This language is more than merely an expression of Congress’s belief that P.L. 280 granted exclusive jurisdiction to the states; it ratifies that belief. It cannot be dismissed as merely the opinion of a later Congress concerning the meaning of a law passed by an earlier Congress. The later Congress changed the original act’s language to both reflect and enact its belief.³⁹

The California district court added that the:

defendants assert that subsection (c) of section 1162, which provides that “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, establishes that the states shall have the sole authority to promulgate and enforce criminal law in those states.” Defendants argue that if Congress contemplated that the designated states would have concurrent criminal law jurisdiction with any other sovereign, including Indian tribes, it would not have used the term “exclusive” in subsection (c).⁴⁰

A closer examination of the historical context and legislative history of that amendment, however, indicates that all three rationales are inaccurate or incomplete. First, the need for corrective legislation in 1970 was not based on the divestiture interpretation of PL 280 (in that a suitable remedy for Metlakatla for that particular aspect of the problem had already been enacted by Congress in 1968) but on the need to overturn a 1958 court pronouncement declaring that the Reserve was not Indian country.⁴¹ Second, although the June 2, 1970 letter from the Department of the Interior, written in connection with the House Bill, does reflect adherence to the “divestiture” interpretation,⁴² subsequent correspondence

39. *Id.* at 810–11 (Matthews, J., dissenting) (citations omitted).

40. *Cabazon Band*, 34 F. Supp. 2d at 1198.

41. *United States v. Booth*, 161 F. Supp. 269, 275 (D. Alaska 1958).

42. Letter from Fred J. Russell, Under Secretary of the Interior, to Hon. James O. Eastland, Chair of the Comm. of the Judiciary, U.S. Senate (June 2,

from the Interior on November 10, 1970, written in connection with the Senate Bill which ultimately became law, reflects the opposite.⁴³ Finally, the term “exclusive” in subsection (c) was intended by Congress to mean *exclusive of federal jurisdiction under 18 U.S.C. §§ 1152 and 1153* and, if interpreted to mean exclusive of tribal jurisdiction, leads to a logical conundrum centered in Metlakatla itself.

III. INDIAN COUNTRY, RESIDUAL JURISDICTION, AND THE DIVESTITURE INTERPRETATION

A. Indian Country and the Federal Policy Underlying Conferral of Jurisdiction to State Courts in PL 280

Generally, absent congressional authorization, a state cannot enforce its criminal laws against the criminal activity of Indians in Indian country located within the state’s territory.⁴⁴ Until 1953, the congressional response to perceived lawlessness within Indian country had been enactment of statutes creating federal jurisdiction to prosecute crimes in federal court. Two such provisions, the General Crimes Act⁴⁵ and the Major Crimes Act,⁴⁶ are still codified

1970), included with H.R. Rep. No. 91-1545, *reprinted in* 1970 U.S.C.C.A.N. 4783, 4787–88.

43. Letter from Harrison Loesch, Ass’t Secretary of the Interior, to Hon. Emanuel Celler, Chair, House Judiciary Comm. (Nov. 10, 1970), 116 CONG. REC. 37355 (1970) [hereinafter Loesch Letter].

44. *See generally* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 359 (1962).

45. Pub. L. No. 80-772, 62 Stat. 683, 757 (codified as amended at 18 U.S.C. § 1152 (2000)). The General Crimes Act has also been referred to as the “Indian Country Crimes Act” or the “Inter-Racial Crimes Act” or the “Federal Enclave Act.” The Act descended from the earliest treaties and provisions of the Indian Trade and Intercourse Acts from 1790 forward. The present provision was originally enacted in 1834, Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733 (codified at 18 U.S.C. § 1152 (2000)). In its current incarnation, it provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

46. Pub. L. No. 80-772, 62 Stat. 683, 758 (codified as amended at 18 U.S.C. § 1153 (2000)). The Major Crimes Act was enacted in response to the decision in *Ex*

in the United States Code; in fact, they are the “§§ 1152 and 1153” of Title 18 referenced in the crucial subsection (c) of the criminal portion of PL 280,⁴⁷ and as such they do play a role in the interpretation of the 1970 amendment.

By contrast, in 1953, Congress, again faced with a problem of lawlessness on certain reservations, took a different approach. Rather than expanding federal criminal jurisdiction further, Congress, in an early version of an unfunded mandate, called upon the states to extend the reach of their criminal laws into the Indian country within their borders. Congress made this criminal law jurisdictional extension mandatory for five states; other states were given the option of extending their jurisdiction.⁴⁸ This was PL 280 in a nutshell. It eliminated the barriers to state court jurisdiction—both criminal and civil—which the boundaries of Indian country otherwise presented.⁴⁹

Parte Kan-gi-shun-ca (Crow Dog), 109 U.S. 556, 571–72 (1883), which held that neither the federal nor the territorial courts could try an Indian for on-reservation murder of another Indian. See *Keeble v. United States*, 412 U.S. 205, 209 (1973). The Act created federal jurisdiction to try certain listed major crimes against Indian defendants accused of criminal conduct against Indians. In its current incarnation, the statute, 18 U.S.C. § 1153 (2000), reads:

- (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
- (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

47. See 18 U.S.C. § 1162 (2000).

48. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, 28 U.S.C. § 1360 (2000)). The five mandatory states were California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added as a mandatory state by a 1958 amendment. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162 (2000)).

49. PL 280 did not extend state “regulatory” jurisdiction into Indian country. See *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976).

Section 2 of the Act set out the “criminal half”⁵⁰ and section 4 set out the “civil half.”⁵¹ Section 7, uncodified, was the “optional” provision, giving the consent of the United States to any other state to assume jurisdiction over the Indian country within that state’s borders.⁵² This Article focuses on the criminal provision, as that was the subject of the Metlakatla Amendment.

As enacted, the new criminal provision read:

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

State of Indian country affected

California.All Indian country within the State.

Minnesota.All Indian country within the State, except the Red Lake Reservation.

Nebraska.All Indian country within the State.

Oregon.All Indian country within the State, except the Warm Springs Reservation.

Wisconsin.All Indian country within the State, except the Menominee Reservation.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

50. Pub. L. No. 83-280, § 2 (codified at 18 U.S.C. § 1162 (2000)).

51. *Id.* at § 4 (codified at 28 U.S.C. § 1360 (2000)).

52. *Id.* at § 7. Section 1 put the new chapter heading into the chapter analysis for the criminal provision; section 2 contained the text of the new section. Sections 3 and 4 did the same for the civil section. Section 5 repealed a prior narrower 1949 enactment which had given California jurisdiction over the Agua Caliente Indian Reservation. Section 6 gave the consent of the United States to any state to amend where necessary their constitution to remove any legal impediment to assumption of jurisdiction.

(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.⁵³

One comment with respect to subsections (a) and (c) is pertinent here. Subsection (c) refers to the “areas of Indian country listed in subsection (a),” but this reference is not without ambiguity, since the tabular structure of subsection (a) in fact contained two lists of Indian country: one in which criminal jurisdiction was not being given to the states (the Menominee, Red Lake, and Warm Springs Reservations), and the other in which criminal jurisdiction was being given to the states (all remaining Indian country in Minnesota, Oregon, and Wisconsin, and all Indian country in California and Nebraska). The ambiguity did not present a particularly difficult conundrum, since the intent of subsection (c) was clear: Congress did not want the theretofore applicable federal criminal jurisdictional statutes—the General Crimes Act and the Major Crimes Act—to apply any longer in those areas of Indian country where the states would now be able to prosecute wrongdoers. These federal criminal jurisdictional statutes would logically continue to apply within the Menominee, Red Lake, and Warm Springs Reservations, within which the corresponding states had no criminal jurisdiction under PL 280.⁵⁴

B. Background to the 1958 Addition of Alaska as a PL 280 Jurisdiction

The Territory of Alaska was not included in the original 1953 listing of mandatory PL 280 states. It was not added until 1958 because the issue of the extent to which Alaska contained “Indian country,” which had flared up shortly after the acquisition of Alaska by the United States, simmered down and did not arise

53. 18 U.S.C. § 1162 (2000).

54. The Menominee Reservation was stricken from the list in 1954, effectively moving that Reservation from the “uncovered” list to the “covered” list. Act of Aug. 24, 1954, Pub. L. No. 83-661, 68 Stat. 795 (codified as amended at 28 U.S.C. § 1360 (2000)). This was a follow-up to the Act of June 17, 1954, Pub. L. No. 83-399, 68 Stat. 250, which authorized the Secretary of the Interior to terminate federal supervision over the Menominee Tribe’s property and members. The termination was not completed by the Secretary until 1961, so Wisconsin had PL 280 jurisdiction from 1954 to 1961. Following passage of the Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770 (codified at 25 U.S.C. §§ 903–903f (2000)), Wisconsin and the federal government disputed whether Wisconsin still had PL 280 jurisdiction; the issue was resolved when Wisconsin, utilizing the 1968 amendments to PL 280, discussed *infra*, retroceded its PL 280 jurisdiction. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 362 n.122 (1982 ed.).

again until 1957. The earliest cases did not consider whether there might be enclaves of Indian country within Alaska but instead treated all of Alaska as one unitary area, deciding whether Alaska as a whole was Indian country or not. The eventual answer was that Alaska was Indian country for some, but not all, purposes.

The definition of Indian country that was on the books when Alaska was acquired in 1867 was the one enshrined in the last Trade and Intercourse Act, from 1837:

That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.⁵⁵

Despite the text clearly encompassing Alaska,⁵⁶ in 1872 the Federal District Court for the District of Oregon held that Alaska was not “Indian country.”⁵⁷ Congress responded four months later by making Alaska Indian country for the purposes of sections 20 and 21 of the Trade and Intercourse Act.⁵⁸ The court in 1875 held that this enactment made Alaska Indian country for purposes of section 23 of the Act as well,⁵⁹ but it subsequently held that Alaska was not Indian country for purposes of other provisions of the Act.⁶⁰ Thus, when the 1834 definition disappeared from the United States Code as part of the 1874 Revision of Statutes,⁶¹ the answer to the ques-

55. Trade and Intercourse Act of 1834, 4 Stat. 729.

56. Interpreting this definition, and perhaps reflecting some exasperation at the inexplicable ruling of the Supreme Court of Oregon in *United States v. Tom*, 1 Or. 26, 27–28 (Or. 1853) (holding that Oregon was not included in this definition), Attorney General Caleb Cushing wrote: “Why, I repeat, does not this description apply to Oregon with mathematical precision of certainty? Is not Oregon a ‘part of the United States, west of the Mississippi?’” *Indians in Oregon*, 7 Op. Att’y Gen. 293, 296 (1855).

57. *United States v. Seveloff*, 27 F. Cas. 1021, 1024 (D. Or. 1872). As to why the *Seveloff* ruling chose to eschew Attorney General Cushing’s analysis and follow the 1853 *Tom* ruling, see generally D. Niedermeyer, *The True Interests of a White Population: The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 N.Y.U. J. INT’L L. & POL. 195 (1988).

58. Act of Mar. 8, 1873, 17 Stat. 530.

59. *In re Carr*, 1 Alaska Fed. 75, 77 (D. Or. 1875).

60. *Waters v. Campbell*, 29 F. Cas. 411, 411–12 (C.C.D. Or. 1876) (No. 17,264).

61. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 31 (1982 ed.).

tion of whether Alaska was Indian country was “yes” for some purposes but “no” for others.⁶²

After 1874, Alaska’s status as Indian country *vel non* became less unitary as various reservations were established, starting with the Metlakatla Reservation itself, created by statute in 1891.⁶³ Numerous reservations of varying sizes were created as reindeer reserves (starting in 1901), executive order reserves (starting in 1905), public purpose reserves (starting in 1920), and Indian Reorganization Act reserves (starting in 1936).⁶⁴

Following the 1874 disappearance of the prior definition of Indian country, a new statutory definition was not forthcoming from Congress until 1948, by which time the concept of Indian country had changed through judicial interpretation from a general notion of lands beyond a frontier to a more enclave-oriented description of lands within specific boundaries in the states and territories.⁶⁵ In 1948, Congress encapsulated these court rulings into a new tripartite codification:

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities

62. Despite the elimination of the statutory definition from the revision, other provisions in the Code referring to Indian country necessitated that some definition be utilized. The United States Supreme Court held that resorting to the former 1834 definition was still appropriate and further held that this definition was to be applied to “all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834.” *Ex parte Kan-Gi-Shun-Ca (Crow Dog)*, 109 U.S. 556, 561 (1883). Despite the reference to “acquired since the passage,” the Alaska courts continued to hold that Alaska was only Indian country for the specific purposes enumerated by Congress. *See, e.g., Kie v. United States*, 27 F. 351, 353 (C.C.D. Or. 1886). As of 1885, these purposes included “section 1955 of the act of July [27], 1868, and sections 20 and 21 of the intercourse act of 1834, and section 14 of the act of May [17], 1884.” *United States v. Nelson*, 29 F. 202, 203 (D. Alaska 1886), *aff’d*, 30 F. 112 (C.C.D. Or. 1887). *Nelson* held that section 14 of the 1884 Act had superseded sections 20 and 21 of the 1834 Act within Alaska, and this apparently defused the issue of for which purposes Alaska was or was not “Indian country.” *Id.*

63. Act of Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101 (1891) (formerly codified at 48 U.S.C. § 358).

64. *See* DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 65–95 (2d ed. 2002).

65. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 29–33 (1982 ed.).

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.⁶⁶

The first case to apply this statutory definition in Alaska was decided in 1957 and concluded that the Territory of Alaska could not prosecute a Native Alaskan for actions committed within the Tyonek Reservation because the reservation met the definition of Indian country and because Congress had not included Alaska within the 1953 enactment of PL 280.⁶⁷ In 1958, Congress responded to this ruling by extending PL 280 to Alaska, adding the “Territory of Alaska” to the list of the original five mandatory PL 280 states.⁶⁸

C. Early History of the Divestiture Interpretation

The current well-established consensus is that PL 280 did not curtail tribal jurisdiction. However, for the first several years following enactment of the statute, the issue was apparently not litigated at all, or was litigated only minimally, and reported cases contain little or no discussion of the subject.

Shortly after PL 280’s enactment, a brief letter within the Interior Department indicated that PL 280 had eliminated tribal jurisdiction.⁶⁹ That conclusion was uncritically repeated in a 1954 Solici-

66. Act of June 25, 1948, ch. 645, 62 Stat. 757 (1948) (codified as amended at 18 U.S.C. § 1151 (2000)).

67. *In re McCord*, 151 F. Supp. 132, 134–35 (D. Alaska 1957).

68. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545. Although Alaska attained statehood shortly afterwards, PL 280 still gave its authority to the “Territory” of Alaska in 18 U.S.C. § 1162 until 1970, and in 28 U.S.C. § 1360 until 1984. *See* Pub. L. No. 98-353, Title I, § 110, 98 Stat. 342 (1984).

69. “Although there has been no interpretation of the act of Aug. 15, 1953 (Public Law 280-83d Cong.), by the Federal courts, it is our view that the act, by providing that the State shall have jurisdiction over crimes and offenses committed by or against Indians in the Indian country *to the same* extent that the State has jurisdiction over crimes and offenses committed elsewhere within the State, except as limited in Section 2(b), made such jurisdiction of the State exclusive. The extent of the State’s jurisdiction is full and complete and permits of no such jurisdiction by any other body save the Federal Government and subordinate agencies of the state itself. The act also explicitly states that the criminal laws shall have the same force and effect within Indian country as they have elsewhere within the State. The effect of this provision clearly is to extend both the substantive and procedural laws of the State to crimes committed by Indians. Thus, State law defines not only the criminal offenses against the State and the penalties therefore, but it also defines the courts in which and the manner in which persons accused of committing such offenses [sic] are to be tried.” Solic. Mem. Op., 6

tor's Opinion⁷⁰ and in a Memorandum in 1961.⁷¹ All three were overruled by a subsequent Solicitor's Opinion issued in 1978.⁷² The opinion observed of the prior "divestiture" interpretation, "the position seems never to have been the subject of any considered legal analysis and now appears to be in conflict with principles enunciated in recent decisions of the Supreme Court."⁷³ This 1978 Opinion did not represent an abrupt change; prior to 1978, the Interior Department had issued statements recognizing residual tribal jurisdiction as early as 1976⁷⁴ and had taken actions that implicitly rec-

INDIAN L. REP. H-1, H-1 (Nov. 14, 1978) (quoting Letter from Assistant Secretary of the Interior Lewis to Area Director, Bureau of Indian Affairs, Minneapolis, Minn. (June 4, 1954)).

70. "It has been concluded that the effect of section 1162 is, among other matters, to repeal whatever power the tribes within that State may otherwise have possessed to impose their own criminal laws respecting any matter which section 1162 makes subject to the criminal jurisdiction of the State." Solic. Mem. Op. M-36241 (Sept. 22, 1954), II Op. of the Solic. of the Dep't of the Interior Relating to Indian Affairs 1917-1974 1649, 1650 (1979), available at http://thorpe.ou.edu/sol_opinions/p1626-1650.html#m-36241 [hereinafter 1954 Opinion]. This September 1954 opinion focuses more on a separate Act passed simultaneously with PL 280: "An Act to eliminate certain discriminatory legislation against Indians in the United States." Pub. L. No. 83-277, 67 Stat. 586 (codified at 18 U.S.C. § 1161 (2000)). That Act made the federal Indian liquor laws inapplicable to any act outside Indian country or to any transaction within Indian country conducted in conformity both with the laws of the State and the tribe. The Opinion notes that tribes, including tribes within California (a mandatory PL 280 state) have the residual authority to enact alcohol ordinances. It explains that "the scope of such a tribal ordinance is to be as much within the discretion of the tribe as the scope of the State liquor laws is to be within the discretion of the State" but notes that the reasoning of the June 4, 1954, letter means that "while, as noted above, an Indian tribe in California may by ordinance impose conditions consistent with the laws of that State upon the sale of liquor within its reservation, the penalty for violation of such conditions is to be imposed by the United States pursuant to sections 1154, 1156, and 3618 of Title 18, U.S.C., rather than by any provision of tribal law." 1954 Opinion, *supra*, at 1649-50.

71. Solic. Mem. Op. (Feb. 13, 1961), II Op. of the Solic. of the Dep't of the Interior Relating to Indian Affairs 1917-1974 1896 (1979), available at http://thorpe.ou.edu/sol_opinions/p1876-1900.htm.

72. Solic. Mem. Op. M-36907, 6 INDIAN L. REP. H-1 (Nov. 14, 1978).

73. *Id.* at H-2.

74. "[T]his office ha[d] already expressed the view that Pub. L. 280 did not divest Indian tribes of their part of the previously-existing concurrent Federal-tribal jurisdiction but transferred only Federal jurisdiction to the States." *Id.* at H-1 (referring to Solic. Mem. Op. (July 13, 1976)).

ognized residual tribal jurisdiction as far back as 1973.⁷⁵ In fact, portions of the Interior Department correspondence with respect to the Metlakatla Amendment indicate that the Interior had started to move away from its prior divestiture position as early as 1970.

Since 1978, the other “so-called mandatory Public Law 280 states that have addressed the issue consider state and tribal jurisdiction to be concurrent under Public Law 280.”⁷⁶ Examples abound, with authorities either explicitly holding that PL 280 left states and tribes with concurrent jurisdiction,⁷⁷ or deciding cases with that implicit assumption.⁷⁸ Cases interpreting 28 U.S.C. § 1360 from two mandatory PL 280 states (California and Minnesota) have reached the Supreme Court. The resulting rulings have indicated that the tribes do have residual authority under PL 280.⁷⁹

75. The Department had certified as far back as 1973 that several tribes in PL 280 states were performing law and order functions for purposes of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. *See id.* (referring to 38 Fed. Reg. 13,758–59).

76. *State v. Schmuck*, 850 P.2d 1332, 1344 (Wash. 1993).

77. *Lemke v. Brooks*, 614 N.W.2d 242, 245 (Minn. Ct. App. 2000); *Teague v. Bad River Band*, 612 N.W.2d 709, 716–17 (Wis. 2000); *see Walker v. Rushing*, 898 F.2d 672, 673–74 (8th Cir. 1990); 70 Op. Wis. Att’y Gen. 237, 1981 WL 157271 (1981); Op. Letter from Robert M. Spire, Att’y Gen., and Charles E. Lowe, Assistant Att’y Gen., to Sen. James E. Goll, Neb. Leg., Op. No. 48 (Mar. 28, 1985), *reprinted in* 1985 WL 168524 at *2; *see also Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991) (“[N]either the Indian Child Welfare Act nor Public Law 280 prevents [Alaska Native Villages] from exercising concurrent jurisdiction.”).

78. *See generally Donahue v. Justice Court*, 93 Cal. Rptr. 310 (Cal. Ct. App. 1971); *Zachary v. Wilk*, 219 Cal. Rptr. 122 (Cal. Ct. App. 1985); *Oregon v. Surface*, 802 P.2d 100 (Or. Ct. App. 1990).

79. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Supreme Court held that the purpose of 28 U.S.C. § 1360 was to grant states jurisdiction over private civil litigation involving Indians in state court but not to extend state regulatory authority into Indian country, and thus the statute did not grant states the power to tax personal property within Indian country. Similarly, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court held that PL 280 did not authorize enforcement of state laws regulating bingo and card games, since these were regulatory rather than criminal laws. In both cases, it was clear that the tribes had authority. The *Cabazon* opinion explicitly mentions that the bingo games were conducted pursuant to tribal ordinances. 480 U.S. at 204–05, 207 n.2. In *Bryan*, although there is no explicit mention that the tribe itself was imposing a tax, the Court indicated that the tribe could do so, noting a concern that “general regulatory control [in the states] might relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying

The only discordant note among these otherwise harmonious rulings came from the Alaska Supreme Court in the *Nenana* line of cases,⁸⁰ now overruled in part.

However, these developments in the case law all post-date the 1970 Metlakatla Amendment. The conventional wisdom is that, as of June 1970, the Interior Department was still adhering to its former view that PL 280 had eliminated tribal jurisdiction (although, as mentioned above, the legislative history of the 1970 Metlakatla Amendment contains indications that the Department of the Interior was beginning to move away from its prior interpretation as more fully developed *infra*).⁸¹

The question thus becomes whether the 1970 amendment, passed against the backdrop of the now-repudiated Interior Department interpretation, had the effect of concretizing that divestiture interpretation into the statute itself. The answer should be “no” for reasons elaborated *infra*.

D. History of the Divestiture Interpretation in Pre-ICWA Alaska

The Alaska Supreme Court has interpreted or cited PL 280 in several cases, but the net result has been that the divestiture interpretation, although not clearly repudiated, has also not been unequivocally adopted. Its earliest pronouncements in the 1970s lean towards a non-divestiture reading of the statute. The mid-1980s ushered in several rulings suggesting a divestiture interpretation, and the overruling of those cases in 2001, while still avoiding a definitive interpretation of PL 280, leaves the question open in Alaska. The fact that the divestiture interpretation is still possible, despite having been rejected in virtually all other jurisdictions facing the issue, indicates that the divestiture interpretation has had a considerably warmer welcome in Alaska than elsewhere.

The first four PL 280 cases decided by the Alaska Supreme Court⁸² all came in 1977, and two of them seemed to herald a non-

them, particularly if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation.” 426 U.S. at 388 n.14.

80. See discussion *infra* Part III.E.

81. The Department of the Interior had previously taken the position, expressed as late as 1970, that PL 280 vested exclusive criminal jurisdiction in the States. See, e.g., Letter of the Dep’t of Interior on the Metlakatla Amendment, in H. R. REP. NO. 91-1545 (1970), reprinted in 1970 U.S.C.C.A.N. 4783, 4784.

82. The Alaska Supreme Court resolved *Metlakatla Indian Cmty. v. Egan*, 362 P.2d 901 (Alaska 1961) (upholding the state law fish trap ban over the authority of the Secretary of the Interior to allow fish traps for Native communities), without reference to PL 280, although the United States Supreme Court cited PL 280 both in upholding the ruling as to Kake and Angoon, see *Organized Vill. of Kake v.*

divestiture interpretation. The first was *Ollestead v. Native Village of Tyonek*,⁸³ in which individual tribal members sought a declaratory judgment giving them rights over the area encompassing the town of Tyonek and shares in the proceeds from certain oil and gas leases.⁸⁴ The Ninth Circuit, in *Fondahn v. Native Village of Tyonek*,⁸⁵ had previously ruled that there was no federal court remedy for the dispute.⁸⁶ The superior court in *Ollestead* had relied on *Fondahn* in ruling that state courts also had no jurisdiction, and that authority to decide such disputes lay solely with the tribe itself.⁸⁷ The Alaska Supreme Court affirmed the superior court, though laying out a different jurisdictional assessment.⁸⁸ Noting that state court jurisdiction would arise, if it existed, under PL 280, the court indicated that 28 U.S.C. § 1360(a) (the civil half of PL 280) probably would allow Alaska state courts to adjudicate tribal membership disputes in situations where (as in *Tyonek*) there was no tribal court.⁸⁹ However, it refrained from making a definitive ruling on section 1360(a) because it found the particular dispute in this case to fall within the prohibition on state jurisdiction under section

Egan, 369 U.S. 60, 74 (1962), and in reversing the ruling as to *Metlakatla*, see 369 U.S. 45, 56 (1962).

83. 560 P.2d 31 (Alaska 1977).

84. *Id.* at 33.

85. 450 F.2d 520 (9th Cir. 1971).

86. *Id.* at 522.

87. See *Ollestead*, 560 P.2d at 32.

88. The Alaska Supreme Court noted that the Ninth Circuit itself had questioned the continued validity of its *Fondahn* ruling: “It is true that [*Fondahn*] was decided in 1971, more than three years after the enactment of the Indian Bill of Rights on April 11, 1968. But it is also true that the statute was not brought to our attention, and we did not even purport to decide what its effect upon jurisdiction might be. Instead, we followed pre 1968 law, adopting and applying the reasoning of the Tenth Circuit in *Martinez v. Southern Ute Tribe* The Tenth Circuit has indicated that *Martinez* may no longer be good law.” *Id.* at 34 (citations omitted).

Ultimately, federal court jurisdiction over tribal membership disputes was found to be lacking, in that only habeas corpus relief would be available in federal courts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

89. “The exclusivity of federal jurisdiction over Indian matters in Alaska was eliminated by a 1958 amendment to 28 U.S.C. § 1360(a) which gave Alaska jurisdiction over ‘civil causes of action between Indians or to which Indians are parties’ which arise in areas of Indian country within the then Territory. This provision suggests that state courts are vested with authority to decide corporate membership disputes among Indians including those involving claims under the Indian Bill of Rights.” *Ollestead*, 560 P.2d at 34 (footnotes omitted).

1360(b).⁹⁰ In a footnote to its analysis of section 1360(a), the court noted:

The Supreme Court in *Bryan, supra*, indicated that “nothing in (the) legislative history (of 28 U.S.C. § 1360) 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. . . .” In this case, appellants admit that the Native villages of Alaska, including Tyonek, do not have a system of laws or tribal courts. Therefore, state assumption of jurisdiction to hear membership disputes would not interfere with any internal tribal or village affairs.⁹¹

The implication seemed to be that Tyonek could establish a tribal court, and that if it did so, then state court adjudication of membership disputes would interfere with tribal affairs and section 1360(a) would likely not support state assumption of jurisdiction. The entire discussion was dicta because the court concluded that, regardless of whether section 1360(a) allowed state jurisdiction over tribal membership questions, section 1360(b) precluded state jurisdiction in Tyonek’s case.⁹² Nonetheless, the fact that the court apparently contemplated village jurisdiction in the context of the PL 280 analysis was significant.

The second and third rulings later in 1977 made it clear that issues regarding stock under the Alaska Native Claims Settlement Act (“ANCSA”)⁹³ would not be outside the scope of state jurisdiction. The supreme court first held that state courts did have jurisdiction to put ANCSA corporate stock into the hands of a state court trustee so that dividends could be used to pay child support obligations.⁹⁴ The court then held that state courts could decide the intestate succession of ANCSA stock.⁹⁵ Neither opinion expressed

90. “Since, however, we have concluded that § 1360(b) would preclude the assertion of jurisdiction pursuant to § 1360(a) even if it were applicable, we decline to resolve the question of the extent of the jurisdictional grant found in § 1360(a).” *Id.*

91. *Id.* at 34 n.4 (citations omitted).

92. *Id.* at 34.

93. Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1629(h). (2000)).

94. *Calista Corp. v. DeYoung*, 562 P.2d 338, 343–44 (Alaska 1977).

95. *Calista Corp. v. Mann*, 564 P.2d 53, 57–58 (Alaska 1977). The two rulings are not entirely consistent in their reasoning. *DeYoung* indicated that ANCSA stock was not § 1360(b) property. 562 P.2d at 341. *Mann* indicated that ANCSA stock was 1360(b) property, since it was subject to a restriction against alienation imposed by the United States, but that this only limited the court’s section 1360(a) jurisdiction and did not affect an independent grant of state court jurisdiction under ANCSA itself. 564 P.2d at 58.

any view on residual tribal jurisdiction or the divestiture interpretation; however, the intestate succession ruling did recognize traditional cultural adoptions under the customs and traditions of Alaska Native villages and allowed state courts to give recognition to such arrangements under the doctrine of “equitable adoption,” thus indicating the continued vitality of Native laws.

Still later in 1977, the court decided *Atkinson v. Haldane*,⁹⁶ ruling that the Metlakatla Indian Community had sovereign immunity from tort liability in state court.⁹⁷ Among the several anti-immunity arguments rejected by the court was an argument that section 1360, by extending state court jurisdiction within Indian country, had abrogated tribal sovereign immunity.⁹⁸ Fitting PL 280 into historical context, noting that several commentators had argued against PL 280 being regarded as full “termination” legislation, and again looking to *Bryan* for guidance, the court decided that Congress had not explicitly abrogated sovereign immunity by enacting PL 280, and that the courts were not free to read that consequence into the law.⁹⁹

Thus, as of the end of 1977, it seemed clear that PL 280 had not abrogated tribal sovereign immunity, nor had it eliminated Native customs and traditions or the duty of state courts to give legal cognizance to them. Similarly, the prospect that Alaska Native Villages might set up their own courts to resolve questions (such as tribal membership issues) was apparently seen by the Alaska Supreme Court as consistent with PL 280, indicating that tribal jurisdiction had not been completely removed.

E. Residual Tribal Jurisdiction under PL 280 in post-ICWA Alaska

Passage of the Indian Child Welfare Act¹⁰⁰ in 1978 ushered in a change in Alaska case law away from issues of protection of tribal finances as in *Ollestead* and *Atkinson* and towards protection of tribal children.

The non-divestiture view initially seemed to retain its ascendancy in the child protection context in 1986 when the Alaska Supreme Court in *In re J.M.*¹⁰¹ remanded a case involving an Alaska

96. 569 P.2d 151 (Alaska 1977).

97. *Id.* at 175.

98. *Id.* at 163–67.

99. *Id.*

100. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963 (2000)).

101. 718 P.2d 150 (Alaska 1986).

Native Child for further proceedings in the Kaltag Tribal Court.¹⁰² The child protection case had been initiated in tribal court when the child's mother failed to pick up her two-month-old child, J.M., following the child's two-week hospital stay in Fairbanks.¹⁰³ The Kaltag Village Council learned of the situation and issued a written order assuming custody of J.M.¹⁰⁴ At the Council's direction, J.M. was released from the hospital and placed in a foster home in Galena.¹⁰⁵ A few weeks later, the Kaltag Village Chief contacted a state social worker to request state foster care payments for the child.¹⁰⁶ The social worker responded that foster care payments would only be provided if the child were in state foster care, and the chief told the social worker to do what was necessary to establish the child's right to the payments.¹⁰⁷ The Chief later sent a letter specifying that the child should "remain in the custody of the State."¹⁰⁸ The social worker initiated a state court child protection case, in which Kaltag intervened.¹⁰⁹ When the state court case moved in the direction of termination of parental rights, Kaltag objected and claimed exclusive jurisdiction under 25 U.S.C. § 1911(a).¹¹⁰ The state trial court ruled against Kaltag's motion to dismiss, finding that Kaltag had relinquished custody of J.M. to the State of Alaska and was estopped from claiming otherwise.¹¹¹ The state court then terminated the mother's rights, and the tribe, as well as the mother, appealed.¹¹² The Department of Health and Social Services, resisting the re-transfer back to tribal court, did not dispute that J.M. was a ward of a tribal court or that Kaltag had ex-

102. *Id.* at 156.

103. *Id.* at 151.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 151–52.

110. 25 U.S.C. § 1911(a) reads:

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.

25 U.S.C. § 1911(a) (2000). Kaltag relied on the second sentence of this provision for its exclusive jurisdiction argument, as the child had been made a ward of the tribal court prior to state court action. *J.M.*, 718 P.2d at 152.

111. *J.M.*, 718 P.2d at 152.

112. *Id.*

clusive jurisdiction under section 1911(a), but argued that Kaltag had waived its jurisdiction by releasing custody of J.M. to the State.¹¹³ The court noted, “Although we are not asked to decide whether Kaltag is an ‘Indian tribe’ or whether the Village Council is a ‘tribal court’ within the meaning of the ICWA, we will describe the legal bases on which Kaltag relies to justify these conclusions,” and proceeded to do so.¹¹⁴ Ultimately ruling that the Chief’s actions had not been a sufficiently explicit waiver to divest the tribe of jurisdiction, the court remanded the case for further proceedings in the Kaltag Tribal Court.¹¹⁵

A few weeks later, however, the Alaska Supreme Court issued an opinion which came the closest that court has come to adopting the divestiture interpretation. *Native Village of Nenana v. State Department of Health and Social Services*¹¹⁶ involved a child protection case that started in state court rather than tribal court, and the state court denied the motion of the Village to have the case transferred to the tribe under ICWA section 1911(b).¹¹⁷ The Alaska Supreme Court upheld this, reading ICWA section 1918(a)¹¹⁸ as requiring the Village to obtain approval by the Secretary of the Interior for a petition for re-assumption of jurisdiction before it could require transfer of the case under section 1911(b).¹¹⁹ The court noted:

113. *Id.* at 153.

114. *Id.*

115. *Id.* at 154–55.

116. 722 P.2d 219 (Alaska 1986).

117. *Id.* at 220. 25 U.S.C. § 1911(b) reads:

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

25 U.S.C. § 1911(b)(2000).

118. 25 U.S.C. § 1918(a) reads:

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

25 U.S.C. § 1918(a) (2000).

119. *Native Vill. of Nenana*, 722 P.2d at 221.

Our reading of 25 U.S.C. § 1918(a), indicates that Congress intended that Public Law 280 give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction over such matters, and the Secretary of the Interior approves tribe's [sic] petition.

Although some commentators have concluded that Public Law 280 does not create exclusive state jurisdiction . . . we see no explanation for the mention of Public Law 280 in section 1918(a) unless it required reassumption.¹²⁰

Nenana was a definitive interpretation of 25 U.S.C. §§ 1911 and 1918 but not necessarily a definitive interpretation of PL 280. The opinion goes on to say:

Regardless of whether Public Law 280 vests exclusive or concurrent jurisdiction in the applicable states, *prior* to the Child Welfare Act, Indian tribes may not have had jurisdiction over custody proceedings in a section 1911(b) situation, i.e., where the child was domiciled off the reservation The referral jurisdiction provision may actually grant Indian tribes greater authority than they had prior to the Act.¹²¹

Thus, the court had two alternate routes to the same conclusion: one interpreted ICWA and PL 280, the other interpreted ICWA without PL 280. The court concluded that a section 1911(b) transfer required a section 1918 petition and could be reached “[r]egardless of whether Public Law 280 vests exclusive or concurrent jurisdiction in the applicable states.”¹²² As a result, it is not accurate to state that *Nenana* “held” that PL 280 had vested exclusive jurisdiction in the state courts.¹²³

120. *Id.* (internal citation omitted).

121. *Id.* (internal citation omitted).

122. *Id.*

123. The court may have thought at the time that ICWA mandatory transfer jurisdiction might be greater than general inherent tribal jurisdiction because general inherent jurisdiction could not encompass off-reservation children whereas ICWA mandatory transfer jurisdiction could, but this view was not rejected until thirteen years later in *John v. Baker*. See *John v. Baker*, 982 P.2d 738, 754 (Alaska 1999) (tribes have inherent jurisdiction over domestic relations of tribal members, including child custody, regardless of whether they occupy Indian country). Alternatively, the court may have thought that the authority to mandate a transfer of an already-existing state court case was a greater authority than tribal courts would have under a general state/tribal concurrent jurisdiction pattern under which the first case filed in time would generally be allowed to be completed without interference from the other jurisdiction. This latter view was noted by the Ninth Circuit in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991) (“Likewise, referral jurisdiction is broader in scope than con-

The court twice in subsequent years declined to overrule *Nenana*, first in 1987 in *In re K.E.*,¹²⁴ in which the court adhered to *Nenana* with minimal discussion,¹²⁵ and again in 1992 in *In re F.P.*,¹²⁶ in which there was substantial discussion of the intervening 1991 Ninth Circuit decision in the *Venetie* adoption case.¹²⁷ The Ninth Circuit had ruled that, were the Native Villages of Fort Yukon and Venetie found to be the modern-day successors to historical villages, then they would have authority to grant tribal adoptions, effectively rejecting the divestiture view of PL 280.¹²⁸ But the Alaska Supreme Court in *F.P.* was not persuaded that the *Venetie* adoption holding required it to overrule *Nenana*. In *F.P.*,¹²⁹ the court noted that the Ninth Circuit's opinion that Venetie and Fort Yukon might be sovereign if they were the modern-day successors to historical tribes was inconsistent with a 1988 Alaska Supreme Court ruling in *Native Village of Stevens v. Alaska Management & Planning*.¹³⁰ In *Stevens*, the court had undertaken a survey of federal tribal relations in Alaska and concluded that, with the sole exception of Metlakatla, there were *no* federally recognized tribes in Alaska.¹³¹

F.P. represented the nadir of judicial rulings on state/tribal authority; the court indicated that PL 280 had removed tribal authority and that there had never been any tribes in Alaska from which such authority could be removed.¹³² This makes it even less appo-

current jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction.”).

124. 744 P.2d 1173 (Alaska 1987).

125. *Id.* at 1174.

126. 843 P.2d 1214 (Alaska 1992).

127. *Id.* at 1215–16.

128. *See Native Vill. of Venetie I.R.A. Council*, 944 F.2d at 558–59. The supposed conflict between the *Venetie* and *Nenana* rulings was not as great as it appeared. If one read *Nenana* as having relied primarily on its construction of sections 1918 and 1911(b) and read *Venetie* as having ruled that PL 280 did not abrogate concurrent tribal jurisdiction, while acknowledging the possibility that a petition to re-assume under section 1918 might be required for either section 1911(a) exclusive jurisdiction or section 1911(b) mandatory transfer jurisdiction, the two rulings were in fact harmonious.

The Ninth Circuit did not discuss whether § 1911(b) transfers would require a section 1918 petition; no transfer issues were presented since the adoptions had been initiated and completed before the Tribal Councils, with no state court case brought. *See id.* at 550–51.

129. 843 P.2d at 1215.

130. 757 P.2d 32 (Alaska 1988).

131. *Id.* at 34–36.

132. *See F.P.*, 843 P.2d at 1215.

site authority for the divestiture interpretation of PL 280 than *Nenana* and *K.E.* before it. If there were no federally recognized tribes in Alaska, then there was no basis for inherent tribal jurisdiction regardless of whether the divestiture interpretation of PL 280 was correct or not.

The Alaska Supreme Court next took up the PL 280 issue in *John v. Baker*.¹³³ By that point, intervening pronouncements by all three branches of the federal government had changed the landscape.

First, the Department of the Interior conducted its own survey of the history of federal-tribal relations in Alaska and reached a conclusion opposite to that of the Alaska Supreme Court in *Stevens*.¹³⁴ The “Sansonetti opinion,” issued in the last days of George H. W. Bush’s administration, concluded that there were federally recognized tribes in Alaska (although specification of which Alaska communities qualified was left for another day).¹³⁵ However, their authority over territory and over non-members was limited because ANCSA lands would not meet the definition of “Indian country.”¹³⁶ The specification of tribes was supplied later that year in October, when the Department of the Interior issued its definitive list of federally recognized tribes in Alaska, with a preamble making it clear that the listed villages were tribes with the same status as tribes in the lower 48 states.¹³⁷

133. 982 P.2d 738 (Alaska 1999).

134. *Id.* at 749.

135. Solic. Mem. Op. M-36975 (Jan. 11, 1993) at 131 (on file with author) [hereinafter *Sansonetti Opinion*].

136. *Id.*

137. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,365–66 (Oct. 21, 1993) [hereinafter *1993 List*]:

The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department’s intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to principles of Federal Indian law, to exercise the same inherent and

Second, Congress followed up in 1994 with legislative changes that explicitly ratified the Secretary's authority to issue the list and added one Alaska tribe that the Secretary had omitted.¹³⁸

Third, in 1998, the United States Supreme Court issued an opinion which vindicated Solicitor Sansonetti's view that ANCSA lands were not "Indian country," thus taking 45 million acres, the vast majority of Native lands in Alaska, out from under that statutory definition.¹³⁹

John v. Baker provided the Alaska Supreme Court with its first opportunity to revisit PL 280 in light of these developments.¹⁴⁰ The effect of the Department of the Interior's list and the congressional ratification thereof was found by the Alaska Supreme Court to be definitive on the tribal recognition issue.¹⁴¹ As to PL 280, the court noted that, in the absence of any showing that the case arose within, or that the Native Village of Northway occupied, Indian country, there was no need to interpret PL 280.¹⁴² Outside Indian country, Alaska Native Villages could exercise their inherent jurisdiction over the internal domestic relations of tribal members or those eligible for tribal membership, and that constituted a sufficient basis for the jurisdiction of the Native Village of Northway in that case.¹⁴³ There was also no need to consider whether to overrule *Nenana's* interpretation of ICWA, since *John v. Baker* involved an interparental custody dispute rather than a child protection case and was thus outside the definition of "child custody proceeding" in ICWA.¹⁴⁴ The federal government, in an amicus brief, unsuccessfully urged the Alaska Supreme Court to reject the divestiture interpretation of PL 280:

The United States argues that our prior interpretation of P.L. 280 remains relevant even if Northway Village does not occupy Indian country because it would be contrary to established law to conclude that a tribal court had greater powers outside, rather

delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

138. Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. §§ 479a, 479a-1 (2000) and 25 U.S.C. §§ 1212-15 (2000)).

139. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 524, 527 (1998).

140. Actually, the tribal recognition issue had been raised in *Hernandez v. Lambert*, 951 P.2d 436 (Alaska 1998), but the court chose not to address it, finding independent state grounds on which to rule. *Id.* at 439 n.4, 441 n.10.

141. *John v. Baker*, 982 P.2d 738, 749 (Alaska 1999).

142. *Id.* at 748.

143. *See id.* at 759-61.

144. *Id.* at 746-47.

than inside, of Indian country. It is true that, generally, Indian nations possess greater powers in Indian country than they do outside it. . . . And at least one federal reservation does still exist in Alaska. Thus, the United States correctly notes in its brief that the recognition of Northway's jurisdiction creates a disjunction in Indian law jurisprudence. But this inconsistency does not create a justification to address issues that are not squarely before us.¹⁴⁵

Thus, in the wake of *John v. Baker*, the non-recognition analysis of *Native Village of Stevens v. Alaska Management and Planning*¹⁴⁶ was effectively superseded. *Nenana*,¹⁴⁷ however, was still good law, such that section 1911(b) transfers would still require Secretarial petitions in state court.¹⁴⁸ As to the divestiture interpretation of PL 280, the ambiguous pronouncements in *Nenana* about whether its conclusions on section 1911(b) transfers were premised upon or "regardless of" PL 280 still had whatever validity they previously had.¹⁴⁹ The geographical scope of PL 280 was, however, greatly reduced, by the recognition in *John v. Baker* that PL 280 had no application outside the now-narrowed bounds of Indian country in Alaska under the Supreme Court's 1998 *Venetie* tax case ruling.¹⁵⁰

The validity of *Nenana*, although not before the court in *John v. Baker*, was squarely before the court two years later in *C.R.H.*,¹⁵¹ in which the court overruled *Nenana* and held that section 1918 re-assumption petitions were not necessary before a state court could transfer a child protection case to tribal court under ICWA section 1911(b).¹⁵² A definitive ruling on the divestiture interpretation of PL 280, however, was still not forthcoming:

145. *Id.* at 748 n.46 (citation omitted).

146. *See In re F.P.*, 843 P.2d 1214, 1215 (Alaska 1992).

147. 722 P.2d 219 (Alaska 1986).

148. *See John*, 982 P.2d at 748.

149. *Id.* The court did characterize the rulings in *Nenana* ("[W]e interpreted § 1918(a)'s re-assumption requirement to mean that PL 280 had vested exclusive jurisdiction over child custody matters in state courts, and that the state exercised exclusive jurisdiction until a particular tribe successfully petitioned the Secretary of the Interior") and *F.P.* ("[W]e reiterated our view that P.L. 280 had granted the states exclusive jurisdiction over child custody matters, quoting from the portion of *Nenana* that interpreted ICWA's § 1918(a). . . . In sum, our decisions to limit tribal adjudicatory power in *Nenana* and *F.P.* turned on our interpretation and application of ICWA and PL 280"), *id.* at 745–46, thus tying *Nenana* more strongly to PL 280 than *Nenana* itself had.

150. *Id.* at 748.

151. *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

152. *Id.* at 852.

Nikolai urges us to reconsider *Nenana*'s interpretation of P.L. 280, and to hold that the Alaska Native tribes affected by P.L. 280 retain jurisdiction concurrent with that of the state. We need not reach this issue, however, because the jurisdiction claimed by Nikolai exists regardless of P.L. 280: Subsection 1911(b) tribal transfer jurisdiction over ICWA custody cases was expressly approved by Congress in enacting ICWA. The language and structure of section 1911 reflect congressional intent that all tribes, regardless of their P.L. 280 status, be able to accept transfer jurisdiction of ICWA cases from state courts. We therefore hold that Nikolai may assume jurisdiction over this case under ICWA's subsection 1911(b) transfer provision. To the extent that *Nenana*, *F.P.*, and *K.E.* are inconsistent with this decision, those cases are overruled.¹⁵³

With the divestiture interpretation soundly rejected by decisions from the other mandatory PL 280 jurisdictions and with *Nenana*, the only opinion containing language favoring the divestiture interpretation having been overruled in part, it would seem that there was no remaining precedent supporting the divestiture interpretation in Alaska. *Nenana* had originally reached its conclusion "regardless" of whether PL 280 stripped tribes of concurrent jurisdiction. To the extent that *John v. Baker* and *C.R.H.* both may have characterized the holding of *Nenana* as having been an interpretation of PL 280¹⁵⁴ rather than an interpretation of ICWA section 1918 "regardless" of PL 280, it is far from clear that either opinion could, or was meant to, give *Nenana* a broader scope than the language of *Nenana* would support. With both standing for the proposition that PL 280 was irrelevant without a showing of Indian country, any interpretation that *Nenana* could have given to PL 280 is even less cogent, in light of the fact that *Nenana* makes no mention of the case having arisen within "Indian country."

The October 2004 opinion from the Alaska Attorney General purports to find much more remaining vitality in the overruled *Ne-*

153. *Id.* As in *John v. Baker*, the *C.R.H.* opinion characterized *Nenana* as having interpreted PL 280:

This court interpreted P.L. 280 in *Native Village of Nenana*, holding that through that law Congress effectively divested tribal jurisdiction and granted the state 'exclusive jurisdiction over matters involving the custody of Indian children.' State jurisdiction remained exclusive, we held, unless a tribe governed by P.L. 280 successfully petitioned to reassume custody under ICWA section 1918.

Id. at 851–52. However, the court also noted that *Nenana* had based its analysis primarily on the language of ICWA section 1918. *Id.* at 852 n.13.

154. *See supra* notes 123 and 128 and accompanying text.

nana line of cases than has any other court or commentator.¹⁵⁵ It gives a broad reading to *Nenana*, beyond the section 1911(b) transfer question actually at issue in that case, and it gives a broad divestiture application to PL 280, apparently both inside and outside Indian country, despite the contrary pronouncements in *John v. Baker* and *C.R.H.*¹⁵⁶ It also concludes that no Alaska Native Village has any jurisdiction over ICWA child custody proceedings aside from Metlakatla (because it has a reservation) and the two villages (Barrow and Chevak) which have had their petitions to re-assume exclusive jurisdiction granted by the Interior Department.¹⁵⁷ It is not clear the extent to which this view will hold any weight with the courts, but it is clearly the current position of Alaska's Executive Branch.

IV. HISTORY OF THE METLAKATLA AMENDMENT

A. PL 280 and the Metlakatla Reservation

The Metlakatla Reservation was established statutorily in 1891,¹⁵⁸ somewhat incongruously, only four years after Congress had enacted the landmark anti-reservation pro-assimilation Dawes General Allotment Act in 1887.¹⁵⁹ Eighty years later, the Metlakatians again bucked the trend of history, becoming the only Alaskan tribe whose reservation was not revoked by the Alaska Native Claims Settlement Act.¹⁶⁰ As a result, Metlakatla is the one land area within Alaska whose status as Indian country is unquestioned today.

In between those two bookends, however, Metlakatla's status as Indian country came into question.

A few months after the 1957 *McCord* decision that the Tyonek reservation was "Indian country,"¹⁶¹ Martin Reggie Booth of Metlakatla was charged with driving under the influence and assault

155. See Jurisdiction of State and Tribal Courts in Child Protection Matters, A.G. file no 661-04-0467, 2004 Op. Att'y Gen. No. 1, <http://146.63.113.142/pdf/opinions/opinions/661040467.pdf>.

156. See *id.* at 7–8, 11–12.

157. *Id.* at 19–20; 58 Fed. Reg. 11,766 (Feb. 26, 1993) (as corrected at 58 Fed. Reg. 16,448 (Mar. 26, 1993)) (Metlakatla re-assuming concurrent jurisdiction); 64 Fed. Reg. 36,391 (July 6, 1999) (Barrow and Chevak re-assuming exclusive jurisdiction).

158. Act of Mar. 3, 1891, 25 Stat. 1101.

159. Act of Feb. 8, 1887, 24 Stat. 388.

160. 43 U.S.C. § 1618(a) (2000).

161. See *supra* note 67 and accompanying text.

and battery.¹⁶² His attorney filed a motion challenging the court's jurisdiction in reliance on the *McCord* decision, arguing that Metlakatla was Indian country as well.¹⁶³ Before that motion could be decided, a plea bargain was apparently arranged;¹⁶⁴ the assault charge was dismissed, and Booth pled guilty to the DUI charge in April 1958.¹⁶⁵ Four days after the guilty plea was entered, the court issued what seems to have been a clearly advisory opinion because "the [g]overnment, as well as the [c]ourt, felt it was necessary to go fully into the question of the [c]ourt's jurisdiction in this case, as well as in violations of territorial law committed in the community of Metlakatla, Alaska."¹⁶⁶ The Assistant United States Attorney filed a "most exhaustive brief" and "because of the excellence of this brief, the [c]ourt adopt[ed] the same, with a few additions and appropriate rewording," concluding that Metlakatla was not Indian country¹⁶⁷ and thus *McCord* would not preclude criminal prosecutions in Metlakatla.¹⁶⁸ Four months later, Congress added the Territory of Alaska to PL 280, such that *McCord* would not preclude criminal prosecutions anywhere in Alaska.¹⁶⁹

Since 1958, this anomalous *Booth* ruling that Metlakatla did not occupy Indian country has been effectively superseded. As noted above, by enacting the Alaska Native Claims Settlement Act ("ANCSA"),¹⁷⁰ in 1971. Congress specifically excepted Metlakatla from ANCSA, such that its reservation was not revoked and its citizens not authorized to participate in the land and cash elements of the Act.¹⁷¹ In 1976, the Alaska Supreme Court recognized that Metlakatla enjoyed sovereign immunity based in part on its reservation status.¹⁷² And in 1998, the United States Supreme Court

162. *United States v. Booth*, 161 F.Supp. 269, 270 (D. Alaska 1958).

163. *See id.*; *see also In re McCord*, 151 F.Supp.132 (D. Alaska 1957).

164. *Booth*, 161 F. Supp. at 270.

165. *Id.*

166. *See id.*

167. *Id.*

168. *See id.* at 275.

169. *Compare* *United States v. Booth*, 161 F. Supp. 269 (D. Alaska 1958) (dated Apr. 25, 1958) *with* Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (dated Aug. 8, 1958).

170. Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601-1629(h) (2000)).

171. 43 U.S.C. § 1618(a) (2000).

172. *See Atkinson v. Haldane*, 569 P.2d 151, 156 (Alaska 1976). In subsequent decisions where the Alaska Supreme Court called into question the sovereign immunity of all other Alaska Native Villages, it was careful to carve out an exception for Metlakatla. *See Native Vill. of Stevens v. Alaska Mgmt. and Planning*, 757 P.2d 32, 34-35 (Alaska 1988). The reasoning in *Native Village of Stevens* on the

seemed to cement Metlakatla's status as Indian country in its *Venetie* opinion.¹⁷³

Nevertheless, as of 1970 when Congress was considering the Metlakatla Amendment to PL 280, the *Booth* case had not yet been superseded. A 1961 decision from the United States Supreme Court in *Metlakatla Indian Community v. Egan*¹⁷⁴ had cited *Booth* uncritically in the course of ruling that, because of Metlakatla's reservation, the permission of the Secretary of the Interior for the Metlakatlans to use fish traps would override the State law prohibition against such traps.¹⁷⁵ Although this ruling in some respects bolstered Metlakatla's status as a reservation, it did not deal directly with Metlakatla's status as "Indian country," and the fact that the opinion apparently relied in part on *Booth* implied that it saw nothing inconsistent in allowing *Booth* to remain good law. The *Booth* ruling, issued about four months before PL 280 was extended to Alaska in August 1958, was to have significant implications for the 1970 amendment.

Metlakatla had been in the habit of enforcing its tribal criminal laws for years prior to 1958, and apparently it continued doing so for years after 1958.¹⁷⁶ It does not appear that after 1958 either the state or the federal government interfered at all with Metlakatla's enforcement of its tribal criminal laws, at least initially.¹⁷⁷ Metlakatla was completely unaware that anyone thought it had lost its tribal criminal jurisdiction until some point in the mid-1960s,¹⁷⁸

non-immunity of Alaska Native Villages has been effectively superseded by the opinion in *Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 438–39 (Alaska 2004) ("Each of AVCP's member tribes is therefore protected by tribal sovereign immunity.").

173. *See* *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.2 (1998).

174. 369 U.S. 45 (1962).

175. *Id.* at 51–52, 57–58. By contrast, in the companion case of *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the state prohibition overrode the Secretarial authorization in the villages of Kake and Angoon, which did not have reservations. *Kake*, 369 U.S. at 62.

176. H.R. REP. NO. 91-1545 (1970), reprinted in 1970 U.S.C.C.A.N. 4783, 4784. The Metlakatlans created a model community. . . . They set up rules for the election of a mayor and council. They arranged for their own community to furnish governmental services, including education. . . . They also enforced law and order as far as misdemeanor offenses were concerned. Major offenses were the responsibility of the Federal Government.

177. *See id.*

178. *Id.* at 4785.

when the community set about trying to have the loss of jurisdiction addressed.

This led Metlakatla to support an effort that had started in the early 1960s to enact a major amendment to PL 280. The following section tracks that effort and its ultimate outcome.

B. Metlakatla and the Indian Civil Rights Act

The effort to amend PL 280 was spearheaded by the Senate's Standing Subcommittee on Constitutional Rights, chaired by the redoubtable Senator Sam Ervin Jr. of North Carolina.

Starting in 1961 and concluding in March, 1963, the subcommittee held exploratory hearings in nine states, with eighty-five tribal representatives testifying.¹⁷⁹ Since the Federal Constitution had no application to tribal governments, the subcommittee's main concern had been that individuals had no constitutional protections against excesses by such governments.¹⁸⁰ As the hearings progressed, however, the committee reached the conclusion that the lack of constitutional protections was only part of the problem, and that PL 280 had resulted in a breakdown in the administration of justice to such a degree that Indians were being denied due process and equal protection of the law.¹⁸¹

Nine legislative proposals encompassing the subcommittee's suggestions were introduced by Senator Ervin in the closing days of the 88th Congress in July 1964,¹⁸² and the same nine were introduced again in the early days of the 89th Congress in February 1965.¹⁸³ One of the bills—numbered S. 966 in the 89th Congress—proposed to revoke section 7 (the “optional” section) of the original PL 280¹⁸⁴ with a proviso that any already-existing cession of jurisdiction from the United States to a particular state would not be

Strangely enough, neither the territorial nor the Federal Government notified Metlakatla after enactment of the new statute to inform the community that its court and police had lost their authority to function. In the midsixties [sic], when this fact became known, the community discontinued its practice of employing a magistrate and police.

179. 110 CONG. REC. 17326 (1966) (statement of Sen. Ervin); S. REP. NO. 89-1553, at 6 (1966).

180. S. REP. NO. 89-1553, at 6–7.

181. *Id.* at 8–9.

182. *See* 110 CONG. REC. 17326 (July 29, 1964) (statement of Sen. Ervin); S. 3043, 88th Cong. (1964) (addressing PL 280).

183. *See* 111 CONG. REC. 1799 (Feb. 2, 1965) (statement of Sen. Ervin); *see also* S. 966, 89th Cong. (1965) (addressing PL 280).

184. Section 7 dealt with assertion of jurisdiction by “optional” PL 280 states. Act of Aug. 15, 1953, Pub. L. No. 83-280 §7, 67 Stat. 588 (not codified).

affected.¹⁸⁵ Future extensions of PL 280 jurisdiction by a state would still be possible, but only with the consent of the affected tribe. The bill also included a provision under which a state could retrocede any jurisdiction it had obtained under either the civil section or the criminal section of PL 280, or under the “optional” section 7.¹⁸⁶

Hearings were held during the 89th Congress in June 1965, which indicated that S. 966 was the most popular of the set of bills:

Senate Bill 966 drew from Indians or their representatives more support than was given to any of the other bills before the subcommittee. With few exceptions, the experiences of Indian tribes under State jurisdiction, as provided for in Public Law 280, was said to be almost wholly unsatisfactory.

Other groups or individuals stated similar views. Not all witnesses were critical of State jurisdiction, to be sure, but it is significant to note that in those instances which satisfaction with State jurisdiction was indicated, the assumption of that jurisdiction followed State consultation with or consent of the tribes concerned.

Not everyone who favored S. 966 was wholly in accord with the present version of the bill. The most frequently proposed change was one providing for piecemeal or partial extension of State jurisdiction to the reservation area.¹⁸⁷

Although S. 966 did not pass during the 89th Congress, a similar package (slimmed down somewhat by the elimination of two of the prior bills and consolidation of two others, leaving five bills and one joint resolution) was introduced in the 90th Congress in May 1967.¹⁸⁸ This bill, S. 1845, contained the PL 280 amendment that had been in S. 966 the previous session.

The fate of S. 1845 and its companion Indian Civil Rights bills became entwined with that of another bill, H.R. 2516, a controversial general civil rights bill which the House passed and conveyed to the Senate in August 1967. Senator Ervin was determined to have the Indian Civil Rights provisions of S. 1845 and its companions inserted into H.R. 2516. Under his chairmanship, the Senate Subcommittee on Constitutional Rights, on October 12, 1967, approved an amended H.R. 2516 (which differed substantially from

185. *Id.*

186. *Id.*

187. S. Rep. No. 89-1553, at 13 (1966). The Report also notes that another question arose as to how consent of the Indian people would be obtained, and that the bill would have to be amended in order to provide the necessary machinery for determining this consent or lack thereof.

188. S. 1843-1847, 90th Cong. (1967). S.J. Res. 87, 90th Cong (1967). S. 1845 essentially contained the same provisions as S. 966 in the 89th Congress.

the version passed by the House), and inserted the Indian Civil Rights provisions, including the PL 280 changes. However, the full Senate Judiciary Committee rejected the subcommittee's amendment on October 25, 1967, reverting to language similar to that which the House had originally passed.¹⁸⁹

While the controversy over H.R. 2516 made its way toward the Senate floor, the Senate Judiciary Committee took up the narrower S. 1845 and its companions, condensed them into a single bill (S. 1843) and issued a favorable report on December 6, 1967.¹⁹⁰ Senate Bill 1843 passed on December 7, and included the amendment to PL 280.¹⁹¹

In the meantime, H.R. 2516, without Senator Ervin's language, proved to be a tremendously controversial and time-consuming bill on the floor of the Senate in early 1968. As the bill labored its way through extended debate and repeated attempts at cloture votes, Senator Ervin eventually succeeded on the Senate floor where he had failed before the Judiciary Committee.¹⁹² Thus, the Indian Civil Rights provisions of S. 1843, including the changes to PL 280, were incorporated into H.R. 2516.¹⁹³ With that amendment included, H.R. 2516 passed the Senate¹⁹⁴ and went back to the House, which agreed to the Senate's changes.¹⁹⁵ On April 11, 1968, H.R. 2516 became Public Law 90-284, Title IV of which contained the amendments to PL 280, albeit with most of its legislative history attached to a separate, un-enacted bill.¹⁹⁶

Metlakatla followed these developments with interest; the Congressional Record contains a letter from John W. Smith, Acting Mayor of the Metlakatla Indian Community, stating, "We are on record to fully support Senator Sam J. Ervin's Indian rights bill as an amendment to H.R. 2516 when the civil rights measure comes before the Senate. We especially want to amend law 280 to clear up jurisdiction on our tribal land."¹⁹⁷

189. S. Rep. No. 90-721 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1837, 1838, 1848, 1854, 1863.

190. *See generally* S. Rep. No. 90-841 (1967).

191. 113 CONG. REC. 35473 (Dec. 7, 1967).

192. *See* 114 CONG. REC. 5838 (Mar. 8, 1968).

193. *See id.*

194. 114 CONG. REC. 5992 (Mar. 11, 1968).

195. 114 CONG. REC. 9553, 9621 (Apr. 10, 1968).

196. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968).

197. 113 CONG. REC. 35,475 (Dec. 7, 1967). The letter is undated but was probably written in November 1967, like the other letters with which it appears. It is included with materials in the Congressional Record accompanying passage of S. 1843 by the Senate in December 1967.

Metlakatla's optimism that H.R. 2516 (which later became Public Law 90-284) would clear up its jurisdiction problems was logical. The 1968 amendments "reflected the shift in national policy toward Indians, from an assimilationist approach, to a policy promoting tribal self-governance and self-reliance."¹⁹⁸ Although they did not answer the question of whether PL 280 in 1953 had divested tribes of their jurisdiction, the 1968 amendments made that question less important, at least in situations where the affected tribe and the State were in agreement as to the division of jurisdictional responsibility between them, as was the case between Metlakatla and Alaska.¹⁹⁹ After the 1968 amendments, a tribe and state which were in agreement as to the division of jurisdictional responsibility between them within the tribe's Indian country could implement that agreement without need for further federal legislation. If the State had too much jurisdiction, it could retrocede; if the State had too little, it could extend its jurisdiction, with the consent of the Tribe.²⁰⁰

So what prohibited Metlakatla and the State of Alaska after 1968 from implementing their agreement without going back to Congress? The answer requires a closer reading of state legislative materials.

C. Metlakatla and the State Retrocession Bill

Metlakatla and the State of Alaska did in fact try to utilize the 1968 amendment to PL 280 to re-vest jurisdiction in the Tribe, and in 1969, came very close to doing so.

Senator Robert Ziegler of Ketchikan, on March 14, 1969, introduced Senate Bill 266, "[a]n Act relating to criminal jurisdiction

198. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1171 (8th Cir. 1990).

199. If PL 280 did strip the tribes of jurisdiction, then retrocession to the United States would return jurisdiction to the tribe. *See, e.g.*, *Umatilla Indian Reservation; Oregon's Acceptance of Retrocession of Jurisdiction*, 46 Fed. Reg. 2195 (Jan. 8, 1981) ("Through retrocession to the United States, criminal jurisdiction will return to the Confederated Tribes of the Umatilla India Reservation."). If PL 280 left tribal jurisdiction intact, then of course the tribe would have never lost it in the first place.

200. Simultaneously, other portions of the Indian Civil Rights Act limited tribal court sentencing authority to six months, and fines to \$500. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 202, 82 Stat. 77 (1968). The limitation was later enlarged to one year and \$5,000. Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302 (2000)). Thus, tribal court authority was effectively limited to misdemeanor-level crimes.

on the Annette Island.”²⁰¹ As introduced, the bill added a new section 12.05.012 to the Alaska Statutes, which read:

Jurisdiction of Annette Islands:

Subject to acceptance by the United States, as provided in Section 403 of the Act of Congress of April 11, 1968, 82 Stat. 79, 25 U.S.C. Sec. 1323, there is hereby retroceded to the United States to be exercised concurrently with the jurisdiction of the State of Alaska, measures of criminal jurisdiction on the Annette Islands as was exercised by it immediately prior to the date of the enactment of the Act of Congress of August 8, 1958, (Pub. L. 85-615) 72 Stat. 545.²⁰²

Following referral to the Judiciary Committee, a committee substitute was offered on March 25, which added an effective date.²⁰³ This clause made the bill effective the day after its passage and approval by the Governor, or the day it would become law without approval. As amended by the Senate Judiciary Committee and reported back on March 25,²⁰⁴ the bill passed the Senate on March 26 and the House on April 4, both unanimously.²⁰⁵

It was, however, vetoed by then-Governor Miller. The veto message indicated that the Governor did not necessarily disagree

201. See S. 266, 6th Leg., 1st Sess. (Alaska 1969).

202. See *id.*

203. 1969 Alaska S. J. 457. The committee substitute changed the wording of the new ALASKA STAT. § 12.05.020, but the changes were citational or grammatical, not substantive:

Subject to acceptance by the United States, as provided in Section 403 of the Act of Congress of April 11, 1968; P.L. 90-284; 82 Stat. 79 (which added 25 U.S.C., Sec. 1323), there is retroceded to the United States, to be exercised concurrently with the jurisdiction of the State of Alaska, such measures of criminal jurisdiction on the Annette Islands as were exercised by it immediately prior to the date of the enactment of the Act of Congress of August 8, 1958 (Pub. L. 85-615) 72 Stat. 545 (which amended 18 U.S.C., Sec 1162 and 28 U.S.C., sec. 1360).

Alaska Comm. Substitute (Judiciary) for S. B. 266, 6th Leg., 1st Session (1969).

204. *Id.* The committee substitute added a section 2 (“This Act takes effect on the day after its passage and approval or on the day it becomes law without approval”) and slightly reworded the new section 12.05.020 to read:

Jurisdiction of Annette Islands. Subject to acceptance by the United States, as provided in Section 403 of the Act of Congress of April 11, 1968; PL 90-284; 82 Stat. 79 (which added 25 U.S.C., Sec. 1323), there is retroceded to the United States, to be exercised concurrently with the jurisdiction of the State of Alaska, such measures of criminal jurisdiction on the Annette Islands as were exercised by it immediately before the enactment of the Act of Congress of August 8, 1958; P.L. 85-615; 72 Stat. 545 (which amended 18 U.S.C., Sec 1162 and 28 U.S.C., sec. 1360).

Comm. Substitute for S. B. No. 266 (6th Leg., 1st Sess.).

205. The bill passed 15-0 in the Senate and 39-0 in the House. 1969 Alaska S. J. 479 (March 26, 1969); 1969 Alaska H. J. 627 (April 4, 1969).

with the bill's goal, but thought that the bill would not achieve that goal:

A careful study of the Federal law, under which retrocession was to occur, revealed that the Bill does not accomplish its objective because (1) only areas defined as Indian country qualify for retrocession of criminal jurisdiction to the Federal Government under 25 U.S.C. 1323; and (2) according to the Case of United States versus Booth, 17 Alaska 561, 161 F. Supp. 269 (Alaska 1958), the Annette Islands are not Indian country, within the meaning of the pertinent Federal provisions. Thus, regardless of the merits of the Bill's objectives, present law appears to preclude the Federal Government from accepting criminal jurisdiction over the Annette Islands.²⁰⁶

Although it seems anomalous today to consider Metlakatla as not being Indian country, the law as of 1970 and the continued validity *vel non* of the *Booth* opinion, were not clear. And, one cannot otherwise fault the logic of the veto message: if Metlakatla was indeed not "Indian country," then retrocession of jurisdiction would be a legal impossibility, since Alaska's jurisdiction over Metlakatla would not be a function of PL 280 at all. Nor was this a problem that a state legislative enactment could rectify; only the federal government could specify whether a given area was "Indian country."

Thus, Metlakatla had to go back to Congress. The important point, however, is that the reason it had to go back to Congress was not because of the divestiture interpretation of PL 280 itself, as that particular aspect of the problem had already been solved. Assuming that PL 280 had stripped the tribe of all jurisdiction, the cooperation and acquiescence of the State of Alaska would suffice to restore such jurisdiction. Rather, Metlakatla had to go back to Congress because, if *Booth* was still good law and Metlakatla did not occupy Indian country, the State could not retrocede anything

206. 1969 Alaska S. J. 833 (April 24, 1969). The Governor also expressed legal hesitance that the State of Alaska could retain concurrent criminal jurisdiction over "Indian country." This concern was unfounded; it has since developed that partial retrocession is permissible. *See, e.g.*, Umatilla Indian Reservation; Oregon's Acceptance of Retrocession of Jurisdiction, 46 Fed. Reg. 2195 (Jan. 8, 1981) (retroceding criminal jurisdiction only). Further, even had it been the case that Alaska had had to retrocede jurisdiction completely, it could have, with the consent of the people of Metlakatla, re-assumed partial jurisdiction over limited subject matter areas under the newly enacted 28 U.S.C. § 1321.

The Governor also expressed confusion over whether the federal government could apply federal criminal statutes, while in the past the federal government had applied territorial criminal statutes. This too seems to have been a secondary issue.

under the 1968 amendments, since PL 280, both in its original 1958 version and its post-1968 version, would be irrelevant. Moreover, only Congress could specify that the Annette Islands Reserve was Indian country; this, and not the divestiture interpretation, was why Metlakatla had to go back to Congress.

We now turn to the specifics of the 1970 Metlakatla Amendment itself. The following two sections analyze the amendment to subsection (a) and to subsection (c) of 18 U.S.C. § 1162.

V. THE METLAKATLA AMENDMENT

A. The 1970 Amendment and Subsection (a)

Listing Metlakatla as Indian country for purposes of PL 280 was not as simple as it might have first seemed. The legislative history indicates that Congress at least initially thought that the simplest solution would be to list Metlakatla as a reservation under 18 U.S.C. § 1162(a): “S. 902 . . . would give Metlakatla status similar to that enjoyed by the Warm Springs Indians of Oregon and the Red Lake Indians of Minnesota.”²⁰⁷

But Metlakatla was not seeking status similar to those of Warm Springs and Red Lake; within those two reservations, state jurisdiction did not run at all.²⁰⁸ Metlakatla was not objecting to the existence of Alaska’s jurisdiction, it was only objecting to the loss of its own jurisdiction. As Metlakatla was now limited to imposing prison sentences of six months or less by the Indian Civil Rights Act,²⁰⁹ it is likely that both Metlakatla and the State of Alaska would have objected to a provision that had the effect of stripping the State of its jurisdiction entirely. Listing Metlakatla in the same way that Warm Springs and Red Lake were listed would accomplish the goal of denominating Metlakatla as Indian country for the

207. H.R. REP. NO. 91-1545, (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4785. These are the two tribes listed as exceptions to the application of PL 280 in 18 U.S.C. § 1162(a). The Menominee Tribe in Wisconsin had originally been a third exception, but was removed from that list in 1954.

208. *John v. Baker*, 982 P.2d 738, 810 (Alaska, 1999) (Matthews, J., dissenting): On excepted reservations, such as Red Lake, the writ of state law under PL 280 did not run. With respect to Metlakatla, Congress intended that state law would continue to apply but that the Metlakatla Indian community would have concurrent jurisdiction over those offenses committed by Indians which would be within the jurisdiction of tribes located in areas where PL 280 does not apply.

209. 25 U.S.C. § 1302(7), *amended by* Pub. L. No. 909-284, § 202, 82 Stat. 77. This was amended in 1986 to allow for terms of up to one year. Pub. L. No. 99-570, § 4217, 100 Stat. 3207-146.

purposes of PL 280. However, this would have the unhappy consequences of shutting out the State from exercising criminal jurisdiction, and forcing the federal government to start exercising such jurisdiction over major offenses, a result not desired by Metlakatla, Alaska, or the United States.

Metlakatla wanted to be listed as an area of Indian country over which PL 280 was extended. However, the tabular structure of section 1162(a) did not lend itself readily to that, as the only specifically named reservations were the exceptions, which PL 280 did not reach. Thus, if Metlakatla was going to be named in the same way as Red Lake and Warm Springs, some extra language would be necessary in order to distinguish Metlakatla from those two reservations. To this end, the bill, as originally introduced, provided:

Alaska All Indian country within the State, except that on the Annette Islands, the Metlakatla Indian community may exercise concurrently such jurisdiction as was vested in it immediately prior to the date of enactment of the Act of August 8, 1958 (72 Stat. 545).²¹⁰

This language apparently led to concerns within the Departments of Justice and the Interior that Metlakatla's jurisdiction prior to 1958 might have exceeded the limits imposed as of 1968 by the Indian Civil Rights Act. The Justice Department suggested that the last clause be amended to read "as was vested in it prior to the enactment of Public Law 85-615, subject to the provisions of title II of Public Law 90-284."²¹¹ The Interior Department suggested the following language:

Alaska All Indian country within the State, except that on the Annette Islands, the Metlakatla Indian community may exercise jurisdiction over the 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 and subject to the provisions of title II of the act of April 11, 1968.²¹²

The elimination of the word "concurrent" in the Interior's proposed language from the original bill apparently raised concerns that this might make Metlakatla's jurisdiction exclusive, but a

210. 116 CONG. REC. 32,585 (Sept. 18, 1970).

211. Letter from Richard Kleindienst, Deputy Att'y Gen., to Hon. James O. Eastland, Chair of the Comm. of the Judiciary, U.S. Senate, included with H.R. REP. NO. 91-1545, (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4783, 4787-88.

212. Letter from Fred J. Russell, Under Sec. of the Interior, to Hon. James O. Eastland, Chairman of the Comm. of the Judiciary, U.S. Senate, included with H.R. Rep. No. 91-1545, (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4768-87.

letter from the Interior Department assured the Senate that its new language would have the effect of allowing Metlakatla to exercise concurrent jurisdiction:

The authority over minor crimes conferred on the Metlakatla community by this bill will be concurrent with that authority exercised by the State of Alaska over Indian people living in the Metlakatla community. The bill does not confer on the Metlakatla community exclusive jurisdiction over minor crimes committed by its people on the reservation.²¹³

As enacted by the Senate, the bill included the Interior's language but excluded the final clause referring to ICRA, as the Senate felt that compliance with ICRA should be understood and need not be explicit:

Alaska All Indian country within the State, except that on the Annette Islands, the Metlakatla Indian community may exercise jurisdiction over the 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.²¹⁴

This is the language that ultimately became law.²¹⁵

It is necessary to acknowledge that the legislative history contains statements which suggest that Metlakatla had lost its jurisdiction as a result of the extension of PL 280 to Alaska in 1958.²¹⁶ As such, even a superficial read of the legislative history would lead

213. *Id.* at 4787–88.

214. Loesch Letter, *supra* note 43:

On September 18, 1970, the Senate passed S. 902 with the Department's amendment, except that the last clause of that amendment, "and subject to the provisions of Title II of the Act of April 11, 1968," was deleted by the Senate Judiciary Committee as being redundant. It was the opinion of the Committee and the Senate that the phrase ". . . 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," and the wording of the Act of April 11, 1968 itself, would subject the Metlakatla Indian Community to the provisions of that Act.

We are inclined to agree with that interpretation and would have no objection to House passage of the Senate modification of the Department's recommended amendment.

215. Almost unnoticed was the change from "[a]ll Indian country with the Territory" to "[a]ll Indian country within the State," an acknowledgment, twelve years after the fact, that Alaska was no longer a territory. The corresponding change in the statute's civil counterpart, 28 U.S.C. § 1360, was not made until 1984.

216. The legislative history also contains statements inconsistent with this divestiture interpretation, as discussed *infra* Part V.B. in the analysis of the amendment to subsection (c).

one to the conclusion that Congress in 1970 was being told, as Metlakatla had been told, that PL 280 was the legal vehicle by which Metlakatla had lost its jurisdiction. But the question is whether the Metlakatla Amendment memorialized that belief into statutory law, and the answer is that nothing in the amendment to subsection (a) did so. The point is not that Congress believed that PL 280 left tribes with concurrent jurisdiction, but rather that Congress did not need to believe that PL 280 had stripped tribes of their jurisdiction in order to see the necessity of amending subsection (a) to list Metlakatla. The divestiture question had become secondary as of 1970 because, in light of the 1968 amendments, any problem stemming from a divestiture interpretation of PL 280 was remediable by an agreement between Metlakatla and Alaska. What was not remediable was the supposed absence of Indian country in Metlakatla, and the legislative history makes it clear that Congress recognized the need to delineate Metlakatla as Indian country:

[W]e feel this language is needed in view of the position taken by the State of Alaska in April of this year when Governor Miller vetoed a bill passed by the legislature which would have retroceded certain criminal jurisdiction held by the State over Annette Islands to the Federal Government because the Annette Islands are not Indian country within the meaning of the pertinent Federal provisions.²¹⁷

The extra language surrounding Metlakatla's place on the list was necessary to distinguish it from Red Lake and Warm Springs. The Interior Department suggested the following phraseology be included: "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,"²¹⁸ not to specify that Metlakatla had had no jurisdiction prior to the amendment or to imply that concurrent state/tribal jurisdiction was the status quo in areas of Indian country over which PL 280 did not reach, but rather to replace the reference to Metlakatla's pre-1958 jurisdiction (which might have exceeded the limits of the Indian Civil Rights Act) with an analogy to present-day tribal jurisdiction unaffected by PL 280 (which would have to comply with the Indian Civil Rights Act).

217. Letter from Fred J. Russell, Under Sec. of the Interior, to Hon. James O. Eastland, Chair of the Comm. of the Judiciary, U.S. Senate (June 2, 1970), included with H.R. Rep. No. 91-1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4787.

218. *Id.*

B. The 1970 Amendment and Subsection (c)

The same amendment added ten words to the end of subsection (c) of 18 U.S.C. § 1162. Before the amendment, the subsection read:

The provision 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.²¹⁹

Following the amendment, subsection (c) read:

The provision 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.²²⁰

The dissent in *John v. Baker* made the assumption that “exclusive” must refer to “exclusive of tribal jurisdiction,” and thus concluded that the addition of these words constituted explicit congressional endorsement that PL 280 stripped tribes of their jurisdiction. Thus, the natural question is whether this clause means “exclusive of tribal jurisdiction” or “exclusive of federal sections 1152 and 1153 jurisdiction.”²²¹

It must be remembered that sections 1152 and 1153 are the General Crimes Act and the Major Crimes Act, laws which create jurisdiction for federal prosecutions in federal courts. This alone indicates that Congress was addressing the demarcation between state jurisdiction and federal jurisdiction, not that between state jurisdiction and tribal jurisdiction. In other words, in areas where PL 280 gave criminal jurisdiction to the states under subsection (a), 18 U.S.C. §§ 1152 and 1153 should not apply to give concurrent criminal jurisdiction to the United States. Conversely, in those areas exempted from the application of PL 280 (i.e., Red Lake and Warm Springs), sections 1152 and 1153 should apply so that major crimes, outside the scope of state PL 280 jurisdiction and outside tribal prosecutorial authority post-ICRA, can be federally prosecuted.

219. Loesch Letter, *supra* note 43.

220. *Id.*

221. Or, perhaps, “exclusive of both”; but the problems of interpreting it to mean that prove to be the same as those analyzed *infra* accompanying an interpretation of “exclusive of tribal jurisdiction.”

The more precise phrase “exclusive of federal sections 1152 and 1153 jurisdiction” is used rather than the simpler “exclusive of federal jurisdiction,” because federal criminal laws of general applicability (i.e., defining crimes regardless of where committed) remain in effect within Indian country regardless of 18 U.S.C. § 1162. See *United States v. Anderson*, 391 F.3d 1083 (9th Cir. 2004); *United States v. Pemberton*, 121 F.3d 1157, 1164 (8th Cir. 1997).

But the legislative history gives us a bit more insight than that. As noted above, the reference in the original pre-1970 subsection (c) to “the areas of Indian country listed in subsection (a) of this section” was an ambiguous reference, in that there are two categories of Indian country listed in subsection (a)—those covered by PL 280 and those exempted. The awkwardness of fitting Metlakatla into that list highlighted the list’s bifurcated nature. The motivation for the addition of the ten words—“as areas over which the several states have exclusive jurisdiction”—was to clarify that, of the two lists of Indian country in subsection (a), the list to which sections 1152 and 1153 would not apply was the list to which PL 280 itself did apply: i.e., those areas where the states had jurisdiction under PL 280, to be exclusive under sections 1152 and 1153.

The ten words being added to subsection (c) seemed to take the Interior Department by surprise; they had apparently not been in the House Bill on which Interior had submitted its written comments in June 1970, and it was apparent that Interior would have preferred that they not be in the Senate Bill either.

We also note that S. 902 as passed by the Senate contains a Section 2 which was not included in H.R. 6782 and which reads:

“Sec. 2. Subsection (c) of section 1162 of title 18, United States Code, is amended to read as follows: ‘(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.*’”

The italicized language is new. It is not discussed in the reports on the bill submitted by this Department and by the Department of Justice, nor in the reports of the House and Senate Committees on the Judiciary, nor in any of the testimony, floor action, or elsewhere in the background of the Senate S. 902. This Department’s report had, at least inferentially, recommended that Section 2 be deleted from the bill.²²²

The Interior Department’s concern led Senators Stevens, Gravel and Ervin to write a reassuring letter to Rep. Celler, to whose House Committee the Senate Bill was being referred following its passage by the Senate:

It has come to our attention that the Department of the Interior has raised a small question over the meaning of certain words in S. 902, which is designed to permit the Metlakatla Indians of the Annette Islands to have responsibility for maintaining law and order in their own community. This question concerns the meaning of the words “as areas over which the several states have exclusive jurisdiction,” in section 2 of the bill.

222. Loesch Letter, *supra* note 43.

This phrase adds new language to 18 United States Code 1162(c), which excludes the application of federal criminal provisions, sections 1152 and 1153, from those areas over which the states have jurisdiction. The additional language is descriptive only, and is not meant to change the meaning of 1162(c). It was added because subsection (c) refers to the “Indian country listed in subsection (a)” and that list includes Indian country not under state jurisdiction, as well as areas that are. Obviously sections 1152 and 1153 are meant to apply to the former category. The additional language is not intended to have any bearing on actual or potential arrangements between states and the tribes with respect to the allocation of law enforcement responsibility between them.

While the additional language is perhaps unnecessary, it was added for purposes of clarity. We believe it would be more confusing if the words were deleted at this late date in the legislative process. We hope that this letter of explanation will obviate any problems which might further delay the passage of the bill.²²³

This letter had apparently mollified the Interior Department:

As a result of discussions between representatives of this Department and the staffs of your committee and the corresponding Senate Committee, a letter was addressed to you on October 14, 1970, by Senators Ervin, Stevens and Gravel, the principal sponsors and managers of S. 902. The letter explains that the new language of 18 U.S.C. § 1162(c) which would be added by Section 2 of S. 902 was descriptive only, and was not intended to change the meaning of § 1162(c) “nor to have any bearing on actual or potential arrangements between states and the tribes which [sic] respect to the allocation of law enforcement authorities between them.”

With this understanding, which we interpret to mean that the *amendatory language will have no effect on whatever inherent jurisdiction particular Indian tribes have may retained in states which were given or have assumed jurisdiction pursuant to the Act of August 8, 1958, 72 Stat. 545, as amended and supplemented by Title II of the Act of April 11, 1968, 82 Stat. 77, we would not object to House passage of S. 902.*²²⁴

There are two dimensions to the significance of these parts of the legislative history. First, it is significant to note that the ten

223. Letter from Sens. Ted Stevens, Mike Gravel, and Sam J. Ervin Jr. to Hon. Emanuel Celler, Chair of House Judiciary Comm. (Oct. 14, 1970), 115 CONG. REC. 37,354 & 37,355 (Nov. 16, 1970).

224. Loesch Letter, *supra* note 43 (emphasis added). The letters to Representative Celler from Assistant Secretary Loesch and from Senators Erwin, Gravel and Stevens were included in the Congressional Record, and Representative Donohue, in his remarks, re-affirmed the substance of the letter. 115 CONG. REC. 37,354 (Nov. 16, 1970).

words were added not to have any implication for tribal authority, but to clarify that sections 1152 and 1153 were to apply where PL 280 did not, and were not to apply where PL 280 did (more specifically, in those areas of Indian country within “mandatory” PL 280 states and not excepted from PL 280’s operation). In other words, the ten words dealt with the demarcation between state jurisdiction and federal jurisdiction, not between state jurisdiction and tribal jurisdiction.

Second, it is even more significant that the legislative history makes reference to “actual or potential arrangements between states and the tribes with respect to the allocation of law enforcement authorities between them,” and “whatever inherent jurisdiction particular Indian tribes may have retained in states which were given or have assumed jurisdiction pursuant to [PL 280].”²²⁵ Both certainly imply residual tribal law enforcement authority. The former could perhaps be explained as a function of the possibility of state-tribal agreements under the 1968 amendment; but the latter directly posits that the Department of the Interior was contemplating that inherent jurisdiction could have survived the enactment of PL 280.

Such statements are clearly inconsistent with the notion that the Department of the Interior was monolithically adhering to its 1954 position that there was no tribal jurisdiction within Indian country covered by PL 280. As such, it cannot be said that Congress was ratifying that prior position when it enacted the 1970 amendment.

It appears that as of 1970, Interior was on the cusp of a dramatic shift in its view of the divestiture interpretation of PL 280. The eventual 1978 Solicitor’s Opinion, which officially overruled its prior divestiture pronouncements from 1954 and 1961, noted that in 1976 “this office ha[d] already expressed the view that Pub. L. 280 did not divest Indian tribes of their part of the previously-existing concurrent Federal-tribal jurisdiction but transferred only Federal jurisdiction to the States.”²²⁶ The Opinion further noted that even prior to the 1976 memorandum, the Interior Department’s actions had not always been consistent with the 1954 memorandum, including certification as far back as 1973 that several tribes in PL 280 states were performing law and order functions.²²⁷ Thus, the November 10, 1970 letter appears to have been an early

225. *Id.*

226. Solic. Mem. Op. M-36907, 6 INDIAN L. REP. H-1, H-1 (Nov. 14, 1978) (citing Solic. Mem. Op. (July 13, 1976).

227. *Id.* (referencing the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197).

harbinger of Interior's 1973 certifications, its 1976 letter, and its ultimate 1978 recognition that PL 280 did not deprive tribes of inherent jurisdiction.

There is one further point to the analysis of subsection (c), which starts by posing the question, did Congress intend that 18 U.S.C. §§ 1152 and 1153 apply within Metlakatla?

The answer to that question is no. There is nothing in the text or the legislative history of the 1970 amendment that would indicate that Congress wanted the General Crimes Act or the Major Crimes Act to apply to Metlakatla. In fact, in the legislative history one finds several inferences that Congress did not contemplate that the amendment would allow enforcement of federal criminal laws or require federal resources to be expended.²²⁸

With that answer in mind, is it possible to interpret the term "exclusive" in subsection (c) to mean "exclusive of tribal jurisdiction"? If so, that would mean that sections 1152 and 1153 do not apply in areas where the state has jurisdiction "exclusive of tribal jurisdiction." Thus, since the state's jurisdiction in Metlakatla is clearly concurrent with, and not exclusive of, Metlakatla's jurisdiction, sections 1152 and 1153 necessarily *do* apply within Metlakatla, and jurisdiction over major crimes is shared between the state and federal governments—directly contrary to what Congress intended. If, however, "exclusive" in subsection (c) is interpreted to mean "exclusive of federal [sections] 1152 and 1153 jurisdiction," then the state's PL 280 jurisdiction within Metlakatla does meet that criterion, and sections 1152 and 1153 *do not* apply within Metlakatla, consistent with congressional intent.²²⁹ Under that latter consistent interpretation, the ten words in subsection (c) serve only to confirm that PL 280 criminal jurisdiction in Alaska and other mandatory PL 280 states is mutually exclusive with sections 1152 and 1153 criminal jurisdiction in the federal government, a logical result. It

228. H. Rep. No. 91-1545, Sep. 30, 1970, accompanying S. 902, *reprinted in* 1970 U.S.C.C.A.N. 4783, 4784 ("Authority over major criminal offenses in the Indian community would remain exclusively with the State of Alaska"); 116 CONG. REC. 37,355 (Nov. 16, 1970) (remarks of Rep. Pollock) ("I should add in closing that, according to the Interior Department report, the enactment of S. 902 will not generate any immediate need for Federal monetary assistance since prior to 1958, Metlakatla was able to finance its law and order program exclusively from local funds.").

229. And, if the term "exclusive" in subsection (c) means exclusive of federal *and* of tribal jurisdiction, then again, Metlakatla's clearly concurrent jurisdiction within the reservation means that Metlakatla doesn't fit that criterion, so sections 1152 and 1153 apply, and Alaska's jurisdiction in Metlakatla is exclusive of neither tribal nor federal jurisdiction.

may be argued that this is almost tautological; sections 1152 and 1153 are federal jurisdictional statutes, so the clause in subsection (c) merely specifies that these federal jurisdictional statutes do not apply in areas where state jurisdiction is exclusive of federal jurisdiction, a statement that is perhaps unnecessary. But this is entirely consistent with the observation in the legislative history that “while the clause is perhaps unnecessary, it is added for purposes of clarity.”²³⁰

Moreover, the conundrum created by interpreting “exclusive” in subsection (c) to mean “exclusive of tribal jurisdiction” only worsens when one considers that all other Indian country affected by PL 280 is effectively in the same position as Metlakatla (i.e., jurisdiction is shared by the tribe and the corresponding state government). Thus, if “exclusive” in subsection (c) does mean exclusive of tribal jurisdiction, then sections 1152 and 1153 apply in all such areas, and in fact everywhere that PL 280 applies. With such a reading, the original “unfunded mandate” purpose of PL 280, replacing federal prosecution with state prosecution, fails entirely.

Of course, it might be argued by some that, in all other areas of Indian country outside Metlakatla, the state, tribal and federal courts have been in error in concluding that state and tribal jurisdiction is concurrent. Indeed, if they were to reach the opposite conclusion, the word “exclusive” in subsection (c) could mean “exclusive of tribal jurisdiction” without creating a logical inconsistency. But that would still leave the conundrum within Metlakatla itself; the legislative intent to create concurrent jurisdiction between Metlakatla and the State of Alaska is so clear that it is impossible to assert that Alaska’s jurisdiction within Metlakatla is “exclusive of tribal jurisdiction.”²³¹ Thus, one is ineluctably led to the paradoxical result that sections 1152 and 1153 have to apply within Metlakatla, contrary to Congress’ clear intent,²³² if “exclusive” in subsection (c) means “exclusive of tribal jurisdiction.”

230. Letter from Sens. Ervin, Gravel and Stevens to Hon. Emanuel Celler, Chair, House Judiciary Comm. (Oct. 14, 1970), 116 CONG. REC. 37,354–55 (Nov. 16, 1970).

231. “With respect to Metlakatla, Congress intended that state law would continue to apply but that the Metlakatla Indian community would have concurrent jurisdiction” *John v. Baker*, 982 P.2d 738, 810 (Alaska 1999) (Matthews, J., dissenting).

232. “Authority over major criminal offenses in the Indian community would remain exclusively with the State of Alaska. It was emphasized at the hearing that while the State authorities would be required to handle major offenses under the proposed amendment just as it does now, this legislation would meet a very real need” 116 CONG. REC. 37,354 (Nov. 16, 1970) (remarks of Rep. Pollock).

VI. CONCLUSION

Although it is correct that the Interior Department in June 1970 expressed the view to Congress that PL 280 had stripped Metlakatla of its jurisdiction, it is incorrect to conclude that this interpretation was codified into statutory law by the 1970 Metlakatla Amendment. First, the 1970 amendment was not necessitated by the question of whether PL 280 had divested Metlakatla of all jurisdiction, as Congress had already (through its 1968 amendments) given Alaska and Metlakatla the tools necessary to adjust the jurisdictional division between them regardless of the original divestiture issue. Rather, it was necessitated by the fact that only the federal government could designate Metlakatla as Indian country to overcome the *Booth* decision. Second, the Interior Department did not consistently adhere to its June 1970 position that PL 280 divested tribes of all jurisdiction and, in its correspondence relating to the change in subsection (c), took the view as early as November 1970 (prior to passage of the amendment) that PL 280 might leave room for residual concurrent tribal jurisdiction (which view was repeated by members of Congress at the time the amendment bill was passed). Third, the addition of the term “exclusive” to subsection (c) was intended to mean “exclusive of federal sections 1152 and 1153 jurisdiction,” not “exclusive of tribal jurisdiction.” In fact, the opposite interpretation leads to a result clearly contrary to congressional intent.

Thus, the 1970 amendment did not transform Interior’s previous and now-disavowed divestiture interpretation into codified law; the wording chosen by Congress is entirely consistent with the non-divestiture interpretation subsequently adopted by all of the PL 280 states that have considered the issue. The amendment left the Interior Department with the same capacity it had had prior to that amendment to reconsider and ultimately repudiate its previous interpretation, which it eventually did.

If and when the time does come for the Alaska Supreme Court to address the issue left unresolved by *C.R.H.* (i.e., whether the concurrent jurisdiction which the court has recognized exists between state and tribal courts over tribal members *outside* Indian country has been abrogated *within* Indian country by PL 280), the 1970 Metlakatla Amendment should not present an analytical obstacle to reaching the correct resolution.