# TRIBAL AND STATE JURISDICTION

# TO

# ESTABLISH AND ENFORCE CHILD SUPPORT

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## PREFACE

In 1991, the Federal Office of Child Support Enforcement (OCSE) published Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support. In addition to legal research, the publication identified barriers to, and possible solutions for, Tribal and State court reciprocity in child support. The publication included information from interviews conducted by the American Bar Association with attorneys, judges, and child support caseworkers who daily worked in State and Tribal courts. Organizations such as the National Child Support Enforcement Association, the Institute for Court Management, the Bureau of Indian Affairs, and the American Indian Law Center also provided input.

Since 1991, there has been increased interaction between States and Tribes in the area of child support. There are now nine Tribes receiving Federal funding to operate Title IV-D child support programs. OCSE has established a Tribal/State Cooperation Workgroup. The U.S. Supreme Court has also issued several decisions regarding Tribal and State jurisdiction. As a result of this activity, OCSE issued a task order to revise its 1991 publication.

Unlike the first publication, the focus of this revised publication is on legal research rather than identification of best practices. Researchers used on-line internet resources , identified in the Appendix, as well as traditional “law library” resources, in order to identify Tribal and State case law, law review articles, and other publications. The goal of this revised publication is to provide a comprehensive legal resource for child support lawyers and decision-makers, although Tribal and State caseworkers may also benefit from the jurisdictional discussions and explanation of Federal regulations regarding child support establishment and enforcement.

Historical information about Federal legislation affecting Tribes provides a context for the discussion of jurisdictional issues in child support cases. The publication is not intended to be a statement of Federal/Tribal policy. For comprehensive information about the relationship between Tribes, States, and the Federal government, readers should consult the Handbook of Federal Indian Law by Felix Cohen, which is updated on a regular basis. The most recent update is Nell Newton et al., eds., Cohen’s Handbook of Federal Indian Law (2005 ed.).

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# CHAPTER ONE
# INTRODUCTION

## OVERVIEW

According to data submitted to the Federal Office of Child Support Enforcement, State child support agencies reported 15.9 million child support cases in FY 2004.[1] These cases resulted in the establishment or acknowledgment of 1.6 million paternities, the establishment of 1.2 million new child support orders, and the collection and distribution of $21.9 billion in child support payments.[2] Such data do not include child support cases handled outside of the IV-D program. Nor do they include Tribal cases. The collections represented about 59% of the total current amount due and a collection in about 60% of arrears cases.[3] Such data do not include child support cases handled outside of the IV-D program. Nor do they include Tribal cases.

During the same period, nine Tribes operating Federally funded IV-D child support programs reported 26,425 child support cases.[4] These cases resulted in the establishment of 2,773 paternities, the establishment of 10,211 support orders, and the collection and distribution of $12.4 million in child support payments.[5] Such data do not include child support cases heard within the legal system of those nine Tribes that were not processed through the Tribal IV-D program. Nor do they include child support cases arising within the other 553 Federally recognized Tribal governments.

Although there are information gaps, it is clear from the above statistics that there are large numbers of children entitled to child support for whom enforcement remains a problem. To date, most of the focus has been on improving interState enforcement between States. However, many of the same issues that arose in years past in the interState arena – lack of reciprocity in enforcement, service of process problems, poor communication – are present today when there is interaction between a State and an American Indian Tribe. [6]

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[1] Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Child Support Enforcement (CSE) FY 2004, Preliminary Report to Congress.

[2] *Id*.

[3] *Ibid*.

[4] Office of Child Support Enforcement, *supra* note 1. The reporting Tribes were the Chickasaw, Lac du Flambeau, Lummi, Menominee, Navajo, Forest County Potawatomi, Puyallup, Sisseton-Wahpeton, and Port Gamble S'Klallam.

[5] *Id*.

[6] As noted by the Native American Training Institute, "[t]he dilemma over whether to use the term Indian, Native American, American Indian, or some other term, when referring to the collective group has been a long-running debate. The only agreement seems to be that there is no agreement on any one term. . . . [T]he issue often comes down to a matter of personal preference. . . . It is also important to note that some people may have definite preferences for the term used while others will not have a particular preference as long as any term is used respectively." North Dakota Department of Human Services, Journey to Understanding: An Introduction to North Dakota Tribes (2003) (written under contract by the Native American Training Institute) [hereinafter referred to as Journey to Understanding]. According to a 1995 U.S. Census Bureau survey of people within the group that the term was meant to represent, 49.76% of the respondents preferred the term "American Indian," 37.35% preferred the term "Native

In 1989, a project funded by the State Justice Institute surveyed various individuals in the 32 States with Federally recognized Indian Tribes. The second most frequently cited area of disputed jurisdiction cases was that of domestic relations cases--divorce, child custody, and support.[7] Specifically, in the area of child support enforcement, the following problems were cited: "a non-Indian spouse may challenge a Tribal court child support order accompanying a divorce; a reservation Indian may seek to reject a State court's jurisdiction with child support; a Tribe member may seek to reject a State court process served on the reservation."[8] Tribal court judges have raised similar concerns. In a 1999 survey of Tribal court judges in the lower 48 States, 80% of the respondents indicated that they had encountered problems having their Tribal court judgments enforced in State forums – even when the States are required to do so by Federal law.[9]

Over 40% of the difficulties with State court recognition of Tribal court orders related to subject matters covered by the Federal full faith and credit mandates of the Violence Against Women Act[10] and the Full Faith and Credit for Child Support Orders Act.[11] In hearings before the U.S. Commission on InterState Child Support, American Indians also cited the need for State courts to be more sensitive to Tribal custom and collection procedures, and the need for expedited modification or review procedures when a State support order is based on imputed wages, which may be unrealistic for obligors living on Indian reservations.[12]

In 1991, the Federal Office of Child Support Enforcement published the first edition of Tribal and State Court Reciprocity in the Establishment and Enforcement of Child Support. The publication documented efforts by States and Tribes to address these issues through intergovernmental efforts. Innovations included intergovernmental forums addressing jurisdiction issues, intergovernmental agreements regarding support enforcement, specially drafted court rules, and uniform registration statutes addressing mutual recognition of State and Tribal support orders. This second edition updates the 1991 publication, with an emphasis on changes in law. The most dramatic change since 1991 is the advent of Federally funded Tribal child support programs.

## DEFINITIONS

**Indian** According to the 2002 U.S. Census, there are about 4 million people who identified themselves as American Indian, Alaska Native, or a combination of Indian and other races. There are many legal definitions of "Indian." For example, under some

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American," 3.66 % preferred some other term, 3.51% preferred the term "Alaska native," and 5.72% expressed no preference. For purposes of this monograph, the term American Indian or Indian is used.

[7] Rubin, *Tribal Courts and State Courts: Disputed Civil Jurisdiction Concerns and Steps Toward Resolution*, State Ct. J. 9 (Spring 1990).

[8] *Id.* at 11.

[9] *See* Reeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311 (2000).

[10] 18 U.S.C. § 2265 (2002).

[11] 28 U.S.C. § 1738B (2002).

[12] U.S. Commission on InterState Child Support, Supporting Our Children: A Blueprint for Reform (U.S. Gov't Printing Office: Washington, DC 1992).

Federal laws, an Indian is anyone of Indian descent.[13] Other Federal laws define "Indian" as a member of a "Federally recognized" Indian Tribe.[14] Federal regulations governing the Tribal IV-D program (45 C.F.R. § 309.05) define “Indian” as “a person who is a member of an Indian Tribe.” They then define “Indian Tribe” as “any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe and includes in the list of Federally-recognized Indian Tribal governments as published in the Federal Register pursuant to 25 U.S.C. 479a-1.” Still other Federal laws use the word "Indian" without defining it.[15] Additionally, each Indian Tribe has its own enrollment requirements. Enrollment is usually based on either descent or blood quantum. Therefore, a person who is not considered a member of a Tribe because he or she lacks the requisite percentage of Tribal blood may nevertheless be considered an Indian under Federal law. Similarly, a non-Indian adopted into Tribal membership may not be considered an Indian under Federal law.[16]

**Indian Country** "Indian country" is defined in a Federal statute addressing criminal jurisdiction:

> "Indian country" . . . means (a) all land within the limits of an Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[17]

Presumably, this definition would also apply to civil jurisdiction (for which there is no comparable Federal statute). The definition is significant because it means that land owned by a non-Indian that is located within an Indian reservation is still considered Indian country. Also, trust and restricted Indian allotments that are located outside of a reservation are considered Indian country.

"Indian country" and "Indian reservation" are often used synonymously but they are not identical. As noted above, Indian country can include trust and restricted Indian allotments that are outside of the reservation. Proper identification of Indian country is crucial in any discussion of Tribal court jurisdiction. If there is a dispute, proof is an issue of law to be decided by a judge rather than a jury.[18]

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[13] *See, e.g.*, 25 U.S.C. § 479.
[14] *Id*.
[15] *See, e.g.*, 25 U.S.C. §§ 451, 452, 456.
[16] *See United States v. Rogers*, 45 U.S. 567 (1846); *State v. Atteberry*, 519 P.2d 53 (Ariz. 1974).
[17] 18 U.S.C. § 1151.
[18] *See, e.g.*, *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), *cert. denied* 477 U.S. 906 (1986); *United States v. Levesque*, 681 F.2d 75, 78 (1st Cir. 1982), *cert. denied* 459 U.S. 1089 (1982).

**Reservation** A reservation is land under the jurisdiction of Indian Tribes, bands, or communities, and the Federal government, as opposed to the States in which they are located. It covers territory over which a Tribe(s) has primary governmental authority. Its boundary is defined by Tribal treaty, agreement, executive or secretariat order, Federal statute, or judicial determination.[19]

**Tribe** A Tribe is a group of Indians that has had a certain autonomous political status since the time of its first contact with European settlers. They have a government-to-government relationship with the United States, which finds its basis in the Constitution. In discussing jurisdictional issues, the term "Tribe" refers to a group of American Indians protected by a trust relationship with the Federal government.[20]

This special relationship with the United States only applies to Tribes that are "recognized" by the Federal government. Such recognition has its origins in treaties, Acts of Congress, Executive Orders, rulings by Federal courts, or the modern Federal acknowledgment process at the Department of the Interior.[21] As of 2005, there are about 1.5 million Indians who are enrolled in 562 Federally recognized Tribes. These Tribes are located in 32 of the contiguous States and Alaska.

Each Tribe establishes its own criteria for enrollment. These criteria are set forth in Tribal constitutions, articles of incorporation, or ordinances. Usually, to enroll as a Tribal member, a person must meet Tribal requirements regarding descent or blood quantum. Tribal membership is not contingent on residency. Each Tribe maintains its own enrollment records. As a general rule, a person cannot have dual enrollment status.

**Trust Land** "Trust lands" are lands owned either by a Tribe or by an individual Indian, and the United States acts as trustee to the Tribe or the individual Indian. The land cannot be sold, transferred, leased or used by someone else unless approved by the Federal government. It is not subject to most State jurisdiction, including taxation and condemnation, but it is subject to rules and administration of the Federal government.

[19] According to the Native American Training Institute, a common misperception is that "reservations" are parcels of land given to Indian Tribes by the U.S. government. To the contrary, a reservation is land that Indian Tribes have always owned; it is land that was "reserved" by the Tribes and never given over to the United States. Journey to Understanding, *supra* note 6.

[20] F. Cohen, Handbook of Federal Indian Law (ed. 1982).

[21] Information from the website of the U.S. House Committee on Resources, Office of Native American and Insular Affairs Subcommittee, http://resourcescommittee.house.gov/subcommittees/naia.htm.

# CHAPTER ONE
# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

18 U.S.C. § 1151

18 U.S.C. § 2265

25 U.S.C. § 451

25 U.S.C. § 452

25 U.S.C. § 456

25 U.S.C. § 479

28 U.S.C. § 1738B

## Case Law

*United States v. Rogers*, 45 U.S. 567 (1846)

*United States v. Levesque*, 681 F.2d 75 (1st Cir. 1982), *cert. denied* 459 U.S. 1089 (1982)

*United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), *cert. denied* 477 U.S. 906 (1986)

*State v. Atteberry*, 519 P.2d 53 (Ariz. 1974)

## Periodicals/Publications

F. Cohen, Handbook of Federal Indian Law (ed. 1982).

North Dakota Department of Human Services, Journey to Understanding: An Introduction to North Dakota Tribes (2003) (written under contract by the Native American Training Institute).

Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Child Support Enforcement (CSE) FY 2004, Preliminary Report to Congress.

Reeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311 (2000).

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U.S. Commission on InterState Child Support, Supporting Our Children: A Blueprint for Reform (U.S. Gov't Printing Office: Washington, DC 1992).

# CHAPTER TWO
# HISTORY OF TRIBAL POWERS

## PRIOR TO EUROPEAN CONTACT

Most Indian Tribes had developed their own forms of self-government long before contact with European nations. Although the forms of government varied, the traditional decision-making body was the Tribal council. Council leaders were usually consensus-oriented, achieving "control over members by persuasion and inspiration, rather than by peremptory commands."[22] Historically, Indian Tribes had no written laws. Conduct was governed by custom. Sanctions for violation of the norm of conduct included mockery, ostracism, and religious sanctions. Tribal justice also often included restitution or compensation to the injured party.

Contact with European nations – and increasing interaction with American society – forever changed Tribal government. However, Tribal sovereignty was recognized even then; various foreign governments negotiated treaties with American Indian Tribes, obtaining land in exchange for small goods, money, or promises.

## POST FORMATION OF UNITED STATES

A Tribe's presence within the territorial boundaries of the United States subjects the Tribe to Federal legislative power. Tribes can no longer exercise external powers of a sovereign, such as entering into treaties with foreign countries.[23] However, that does not mean that all preexisting Tribal powers are abolished. The guiding principle is that Tribal powers are exclusive in matters of internal self-government, except to the extent that such powers have been limited by Federal treaties or statutes.

### The Eighteenth Century

In 1775, the Continental Congress created three departments of Indian affairs, which had responsibility for maintaining relations with Indian Tribes in order to assure their neutrality during the Revolutionary War.[24]

In 1789 – the first year of the first U.S. Congress – there were three statutes passed that affected Indians. The Act of August 7, 1789 created the Department of War. In addition to handling military affairs, the Department was required to handle "such other matters . . . as the President of the United States shall assign . . . relative to Indian affairs." The second statute required respect for Indian rights in the governance of the Northwest Territory. The third law also recognized the sovereign status of Indian Tribes by appropriating a sum not exceeding $20,000 to defray "the expense of negotiating and treating with the Indian Tribes."

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[22] Cohen, *supra* note 20, at 230.
[23] *See Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 574 (1823). *See also* Cohen, *supra* note 20.
[24] Journey to Understanding, *supra* note 6, at 27.

**The Nineteenth Century** The first major Federal act impacting on Tribal jurisdiction was the General Crimes Act of 1817.[25] It gave the Federal government jurisdiction over crimes committed by Indians against non-Indians within Indian country, so long as the Indian involved had not been punished under the law of the Tribe. The General Crimes Act also gave the Federal government exclusive jurisdiction over crimes committed by non-Indians against Indians. Significantly, Indian nations retained exclusive jurisdiction over crimes committed by Indians against other Indians.[26]

There were also three U.S. Supreme court decisions between 1823 and 1832 that addressed Tribal self-government: *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In *Cherokee Nation v. Georgia*, the Cherokee Nation filed in the Supreme Court a motion for injunction against the State of Georgia to restrain the State from executing and enforcing the laws of Georgia within the Cherokee nation. The Court first addressed whether it had jurisdiction under Article 3 of the Constitution, which gives the Court jurisdiction over disputes between a State or the citizens thereof and a foreign State. Although the Court concluded that the Supreme Court lacked jurisdiction because an Indian Tribe within the United States is not a foreign State in the sense of the Constitution, Chief Justice Marshall highlighted the unique sovereign status of Tribes. He introduced the phrase "domestic dependent nations" as a way to describe the status of American Indian Tribes, stating that the relationship between Tribes and the United States resembled that of "a ward to his guardian."

*Worcester v. Georgia* was particularly supportive of Tribal sovereignty. In 1829, Georgia had passed a law to add Cherokee territory to certain Georgia counties and to extend Georgia laws over the same. In 1830, Georgia passed another law making it unlawful for anyone, "under the pretext" of authority from the Cherokee Tribe, to meet or assemble as a council for the purpose of making laws for the Tribe, or to hold court or serve process for the Cherokee Tribe. It also made it unlawful for a white person to live within the Cherokee nation without a license from the Georgia governor, in which the person swore to uphold Georgia laws while within the Cherokee nation. Worcester, a Vermont resident who resided in the Cherokee nation in order to preach Christianity, was convicted of violating the law. The Supreme Court issued a writ of error, ordering Georgia to appear before the Court to show why its act was not unconstitutional. In *Worcester*, the Court acknowledged that war and conquest give certain rights to the conquering State. However, the relation between the Cherokee Nation and the United States was "that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character." Specifically, the Court held that the Cherokee Nation was a distinct community over which the Cherokee Nation had exclusive authority and in which State laws had no force.

[25] Codified at 18 U.S.C. § 1152. Further discussion of the General Crimes Act is found within Chapter Three.

[26] *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 9.02[c] (2005 ed.).

Despite the Supreme Court's recognition of Tribal sovereignty, the period from 1815 to 1845 was also the height of the Removal Era. President Andrew Jackson advised the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes to move west of the Mississippi River or be subject to the laws of the States of Georgia and Alabama. From 1845 to 1887, thousands of settlers seeking gold, land, and adventure took over this "promised" land west of the Mississippi. From 1817 to the late 1880s, approximately 42 different Tribes were forcibly relocated to "Indian country."

The Removal Era also gave rise to what are known as assimilationist policies – attempts to "civilize" Native Americans by indoctrinating them into "Western" religion, views on land ownership, and trade. The end of the nineteenth century marked a shift from the earlier recognition of Tribal self-government to legislative curtailment of the powers of Indian Tribes.

In 1883 the U.S. Supreme Court decided the case of *Ex parte Crow Dog*, 109 U.S. 556 (1883). Crow Dog had killed a fellow Sioux, Spotted Tail. Tribal law required that Crow Dog support the family of Spotted Tail; it did not provide for other punishment such as imprisonment. The family of Spotted Tail accepted the Tribal punishment. However, due to a public outcry in the States, the Federal government prosecuted Crow Dog in Federal court where he was convicted and sentenced to death. The Supreme Court reversed, concluding that the "pledge to secure to these people . . . an orderly government . . . necessarily implies . . . the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." The Court recognized the possibility of Congress' placing limits on Tribal self-government but only if Congress did so in clear language.

Two years later, Congress responded with passage of the Major Crimes Act. The Act only applies to Indian defendants. It makes it a Federal crime for an Indian to commit certain major crimes -- such as murder, rape, and arson -- against either an Indian or a non-Indian in Indian country. According to several commentators, it is unclear whether such Federal jurisdiction is exclusive or whether Tribal courts have concurrent jurisdiction over the crimes listed.[27]

[27] *See, e.g*., Stoner and Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders,* 34 N.M.L. Rev. 381 (2004); Department of Justice, Criminal Resource Manual, The Major Crimes Act – 18 U.S.C.§ 1153 (Oct. 1997). Although the Supreme Court has alluded to the possibility that federal jurisdiction under the Major Crimes Act may be exclusive of the Tribes (*see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n. 14 (1978)), at least one federal circuit has found Tribal jurisdiction to be concurrent (*see Wetsit v. Stafne*, 44 F.23d 823, 825-26 (9th Cir. 1995)). Reading the statute such that Tribal concurrent jurisdiction remains is also consistent with subsequent Congressional action. In reaction to the Supreme Court case of *Duro v. Reina*, Congress amended the Indian Civil Rights Act. The 1991 amendment defines "powers of self-government" to include the inherent power of Indian Tribes to exercise criminal jurisdiction over all Indians; there is no express exception for crimes enunciated in the Major Crimes Act. *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 9.04 (2005 ed.).

Two years later, in 1887, Congress passed the General Allotment Act. This Act provided for the division of Tribal lands into 160-acre parcels allotted to individual Indians and for the sale of "surplus" Tribal lands to non-Indians. The allotment system was designed to break up reservations and dilute the powers of Tribal governments. By 1934, Indians had lost two-thirds of their land: from 148 million acres in 1887 to 48 million acres in 1934.

It was during this "assimilation era" that the Bureau of Indian Affairs instituted Courts of Indian Offenses (referred to as BIA or CFR courts). These courts were run by the BIA Indian agent for each reservation pursuant to legal codes and procedures established by the BIA. Indian judges were hired and fired by the BIA. Even the police were chosen by the BIA. The courts had the power to resolve Tribal civil disputes and minor criminal offenses. However, the structure imposed by the BIA undermined the authority of Indian chiefs and traditional Tribal self-government.

**The Twentieth Century** President Roosevelt renounced this policy of autocratic rule over Indians in signing the Indian Reorganization Act of 1934.[28] The Act reflected conflicting philosophies toward Tribal self-government. On the one hand, the Act abolished the allotment policy. It also guaranteed the right of any Indian Tribe to "organize for its common welfare," including the adoption of an "appropriate constitution and bylaws." On the other hand, it gave the Secretary of the Interior the authority to provide technical advice and assistance as the Secretary determined was needed. It replaced the traditional consensus decision-making approach of Tribes with a requirement that the constitution and by-laws would become effective when ratified "by a majority vote of the adult members of the Tribe" in a special election. Finally, it required the Secretary to "review the final draft of the constitution and bylaws . . . to determine if any provision" was contrary to applicable laws. Historically, Indian Tribes had governed through custom rather than formal written laws.[29] The Indian Reorganization Act resulted in Tribes ratifying constitutions and laws that, in large part, copied BIA codes.[30]

Congressional attitude toward Indian Tribes, as reflected in legislation, has varied in the years since the Indian Reorganization Act. In the 1950's Congress passed several termination acts that resulted in the termination of 109 Tribes as Federally recognized, self-governing entities.[31] In 1953, Congress also enacted Public Law 280. Discussed in greater detail later, Public Law 280 authorized States to impose State civil and criminal jurisdiction over reservations, with or without Tribal consent.

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

[29] Cohen, *supra* note 20.

[30] Most Tribes have now replaced BIA codes with codes that address diverse issues.

[31] Nearly all of these tribes were later successful in regaining Tribal status, although many recovered only a small portion of their former lands. See Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. Davis L. Rev. 53, nn. 8-9 (1995); Walch, *Terminating the Indian Termination Policy*, 35 Stan. L. Rev. 1181 (1983).

The 1960's saw passage of the Indian Civil Rights Act.[32] As noted by the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), there were two "distinct and competing" purposes in the Act. One objective was to promote Indian self-government and protect Tribal sovereignty from undue interference. For example, the Act narrowed the reach of Public Law 280 by requiring Tribal consent in order for Public Law 280 jurisdiction to be extended over reservations in the future. A second objective was to strengthen the position of individual Tribal members vis-à-vis the Tribe. Thus, the Act legislatively applied nearly all of the Bill of Rights to Tribal courts and governments. Another aspect of the Act that affected Tribal self-government was its limitation on Tribal court criminal punishment to six months and $500. Congress later raised those limits to one year and $5000.[33]

Since 1970, there have been a number of Congressional acts affirming Tribal self-government. The Indian Financing Act of 1974 provides financial assistance to Tribal governments. The Indian Self-Determination and Education Assistance Act of 1975[34] authorizes Federal grants to Tribes specifically to improve Tribal governments. It also authorizes Indian Tribes to enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services to administer programs or services that otherwise would be administered by the Federal government. The Indian Child Welfare Act of 1978 (ILWA) recognizes the importance of Tribal control over custody and adoption proceedings. In 1991, Congress amended the Indian Civil Rights Act to define the "powers of self-government" to include "the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[35] In 1994 Congress enacted the Federal Full Faith and Credit for Child Support Orders Act.[36] The Act requires a State to recognize and enforce another State's child support order. "State" is defined as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18)." Therefore, States and Tribes are required to recognize and enforce valid Tribal child support orders, without regard to whether such orders were issued by a State or Tribal court or agency.

Finally, amendments to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorize Federal funding to an Indian Tribe or Tribal organization that demonstrates the capacity to operate a child support enforcement program that meets the objectives of Title IV-D, "including the establishment of paternity, establish, modification, and enforcement of support orders, and location of

[32] P.L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301 – 41).
[33] P.L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302(7)).
[34] P.L. No. 93-638. The Act was amended in 1988, 1990, and 1994.
[35] The amendment in 1991 was a Congressional "fix" to the Supreme court decision in *Duro v. Reina*, 495 U.S. 676 (1990). *Duro* held that Tribal courts do not have criminal jurisdiction over non-member Indians. The language overturns *Duro* by defining powers of Tribal self-government to include the "inherent power of Indian Tribes" to "exercise jurisdiction over all Indians."
[36] 28 U.S.C. § 1738(B).

absent parents."[37] The Act also provides that State IV-D agencies may enter into cooperative agreements with an Indian Tribe, Tribal organization, or Alaska Native Village, group, regional or village corporation so long as it "has an established Tribal court system or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such Tribal entity."[38]

United States Presidents have also been vocal in supporting Tribal sovereignty. President Johnson recognized "the right of the first Americans . . . to freedom of choice and self-determination." President Nixon strongly encouraged "self-determination" among the Indian people. President Reagan pledged "to pursue the policy of self-government" for Indian Tribes and reaffirmed "the government-to-government basis" for dealing with Indian Tribes. President George H.W. Bush recognized that the Federal government's "efforts to increase Tribal self-governance have brought a renewed sense of pride and empowerment to this country's native peoples." At a 1994 meeting with the heads of Tribal governments, President Clinton reaffirmed the United States' "unique legal relationship with Native American Tribal governments" and issued a directive to all executive departments and Federal agencies that, as they undertook activities affecting Native American Tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of Tribal sovereignty. The directive also required the executive branch to consult, to the greatest extent practicable and permitted by law, with Indian Tribal governments before taking actions that affect Federally recognized Indian tribes. Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, was issued in 2000.

More recently, President George W. Bush, Jr. reaffirmed the principles of Tribal sovereignty and self-determination for Tribal governments in the United States. On April 30, 2004, he signed Executive Order 13336, entitled American Indian and Alaska Native Education, which devotes greater assistance to American Indian and Alaska Native students in meeting the academic standards of the No Child Left Behind Act in a manner that is consistent with Tribal traditions, languages, and cultures. On September 23, 2004, he issued an Executive Memorandum that reinforces the unique government-to-government relationship with Indian Tribes and Alaska natives. Recognizing the existence and durability of the unique government-to-government relationship between the United States and Indian tribes and Alaska Native entities, President Bush stated that "it is critical that all departments and agencies adhere to these principles and work with Tribal governments in a manner that cultivates mutual respect and fosters greater understanding to reinforce these principles."

[37] See Section 5546 of the Balanced Budget Act of 1997, P.L. No. 105-33 (codified as amended at 42 U.S.C. § 655(f)).

[38] P.L. No. 104-193, 110 Stat. 2166 at 2256 (codified as amended at 42 U.S.C. § 654(33)). According to OCSE-AT-98-21 (July 28, 1998), it is not necessary that the Tribe comply with every federal IV-D regulation in order to qualify for a cooperative agreement with a State IV-D agency.

The United States Supreme Court also has held repeatedly that Indian Tribes retain "attributes of sovereignty over both their members and their territory."[39] However, in the last quarter of the century, its decisions increasingly pointed out the limits of Tribal jurisdiction over non-Indians or nonmember Indians: *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Duro v. Reina*, 495 U.S. 676 (1990); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Three of the cases involved Tribal jurisdiction in criminal cases. In *Oliphant*, the Court held that, by submitting to the overriding sovereignty of the United States, Indian Tribes necessarily gave up their power to try non-Indian citizens of the United States except as authorized by Congress. In *Wheeler,*[40] the Court upheld the power of a Tribe to punish Tribal members who violate Tribal criminal laws. It found that Tribal sovereignty over an Indian offender had not been divested as a result of the dependent status of Tribes. However, the Court noted that the powers of self-government involve only the relations among members of a Tribe, such as the power to punish Tribal offenders, and the inherent powers to determine Tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members: "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[41] In *Duro*, the Court directly addressed the issue of jurisdiction over nonmember Indians, i.e., Indians who are not enrolled members of the Tribe whose jurisdiction is invoked. It extended the ruling in *Oliphant* to deny Tribal courts criminal jurisdiction over nonmember Indians.[42]

Another Supreme Court case focused on Tribal regulatory authority. *Montana v. United States* involved a Tribal regulation of the Crow Tribe of Montana, which prohibited hunting and fishing within the reservation by any nonmember of the Tribe, including on lands within the reservation owned by nonIndians. The State of Montana, however, continued to assert its authority to regulate hunting and fishing by non-Indians

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[39] *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee,* 358 U.S. 217 (1959).

[40] *Wheeler* involved an Indian defendant who had been convicted and punished in a Navajo Tribal court for contributing to the delinquency of a minor and was subsequently prosecuted in federal court for statutory rape rising out of the same incident. The Court concluded that the subsequent federal prosecution of an offender already prosecuted and punished in Tribal courts did not violate double jeopardy because the Tribal and federal prosecutions were brought by separate sovereigns and therefore were not "for the same offense."

[41] 435 U.S. 313, 326.

[42] Congress subsequently passed a statute expressly granting Tribal courts such jurisdiction. *See* 105 Stat. 646 (codified at 25 U.S.C. § 1301(2)), amending the Indian Civil Rights Act. In *United States v. Lara*, 541 U.S. 193 (2004), the Court held that the amendment was a Constitutionally permissible reinstatement by Congress of a tribe's inherent power to prosecute nonmember Indians for misdemeanors. Therefore, because the Double Jeopardy Clause does not bar successive prosecutions brought by separate sovereigns, there was no bar to federal prosecution of a defendant nonmember Indian for assaulting a federal officer after he had been convicted under a Tribal criminal misdemeanor statute for violence to a policeman.

within the reservation. The United States filed an action in the Supreme Court seeking a declaratory judgment establishing that the Tribe and the United States had sole authority to regulate hunting and fishing within the reservation, and an injunction requiring Montana to obtain the Tribe's permission before issuing licenses for use within the reservation. The Supreme Court concluded that, while the Tribe may regulate hunting or fishing by nonmembers on land belonging to the Tribe or held in trust for the Tribe, it had no power to regulate non-Indian fishing and hunting on reservation land owned by nonmembers of the Tribe. The court cited *Oliphant* in stating that "exercise of Tribal power beyond what is necessary to protect Tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation." The Court found that regulation of hunting and fishing by nonmembers of a Tribe on land no longer owned by the Tribe did not bear a clear relationship to Tribal self-government or to internal relations.

There is language in *Montana* that became especially important in the later case of *Nevada v. Hicks*. Writing for the majority, Justice Stewart stated:

> Though *Oliphant* only determined inherent Tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the Tribe. To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members, through commercial dealing, contacts, leases, or other arrangement. . . . A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conducts threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. . . .No such circumstances, however, are involved in this case.[43]

The last case, *Strate v. A-1 Contractors*, involved Tribal adjudicatory authority in a civil action. There was a car accident, involving non-Indians, which occurred on a North Dakota public highway that ran through the Fort Berthold Indian Reservation. One of the drivers was a widow of a deceased Tribal member whose adult children were also Tribal members. She filed a personal injury action in Tribal Court, which ruled that it had jurisdiction over the claim. The respondent, who was the employer of the other driver, filed an action in Federal district court, seeking a declaratory judgment that, as a matter of Federal law, the Tribal Court lacked jurisdiction to adjudicate the personal injury action. The District Court dismissed the action, determining that the Tribal Court had civil jurisdiction. The Eighth Circuit reversed. Relying on *Montana*, it concluded that the Tribal court lacked subject matter jurisdiction over the dispute. The Supreme Court agreed, and affirmed the decision of the Eighth Circuit.

[43] 450 U.S. 544, 566-7.

Justice Ginsburg delivered the opinion for a unanimous Court. She began by stating, "Our case law establishes that, absent express authorization by Federal statute or treaty, Tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." After citing *Oliphant*, she declared that *Montana* "is the pathmarking case concerning Tribal civil authority over nonmembers." *Montana* described "a general rule that, absent a different congressional direction, Indian Tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the Tribe or its members; the second concerns activity that directly affects the Tribe's political integrity, economic security, health or welfare." The Court concluded that neither exception was present in the case. There was no consensual relationship. Nor was regulatory or adjudicatory authority over the State highway accident needed to preserve the right of reservation Indians to make their own laws. Therefore, the State forum was the proper place for the driver to pursue her case.

**The Twenty-First Century** Some commentators have noted that *Montana* marked a shift away from a strict territorial conception of Tribal power, as evident in the recent Supreme Court decision of *Nevada v. Hicks*, 533 U.S. 353 (2001).[44] Respondent Hicks was a member of the Fallon Paiute-Shoshone Tribes who lived on the reservation. He was suspected of killing protected game life. On two occasions, State game wardens obtained State court search warrants. They then obtained Tribal court warrants, and -- accompanied by a Tribal police officer -- searched the respondent's property. The respondent alleged that during the second search, two mounted sheep heads (of an unprotected species) were damaged. He brought suit in Tribal Court against the State officials in their individual capacities, alleging trespass, abuse of process, and violation of civil rights. The Tribal Court held that it had jurisdiction over the claims. The State officials then filed an action in Federal district court seeking a declaratory judgment that the Tribal Court lacked jurisdiction. The District Court ruled that the Tribal Court did have jurisdiction. The Ninth Circuit affirmed, concluding that although the game wardens were non-Indians, their conduct occurred in the respondent's home, which was located on Tribe-owned land within the reservation. The Supreme Court reversed.

Justice Scalia, writing for the majority, characterized the issue as that of determining whether the Tribal Court had jurisdiction to adjudicate the alleged tortious conduct of State wardens executing a search warrant for evidence of an off-reservation crime. Citing *Strate*, the Court noted that the Tribe's adjudicative jurisdiction over a nonmember cannot exceed its legislative jurisdiction. The Court, therefore, first examined whether the Tribe – either as an exercise of its inherent sovereignty, or under grant of Federal authority – could regulate State wardens executing a search warrant for evidence of an off-reservation crime. The Court acknowledged that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*. However, the majority concluded that the general rule of *Montana* applied to both Indian and non-Indian land: "The ownership status of land, in other words, is only one factor to

[44] *See* Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 (2003).

consider in determining whether regulation of the activities of nonmembers is 'necessary to protect Tribal self-government or to control internal relations.'" The Court noted that sometimes land ownership would be a dispositive factor. In fact, in prior Supreme Court decisions, the fact that the cause of action arose on land not owned by the tribe had been virtually conclusive of the lack of Tribal civil jurisdiction. However, "the existence of Tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."

The Court then characterized the issue in the present case as that of determining whether regulatory jurisdiction over State officers was necessary to protect Tribal self-government or to control internal relations. It concluded that it was not. The Court noted that the Indians' right to make their own laws did not exclude all State regulatory authority on the reservation: "Though Tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'The Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Pet 515, 561 (1832)" [citing *White Mountain Apache Tribe v. Backer*, 448 U.S. 136, 141 (1980)]. The Court concluded that Tribal authority to regulate State officers in executing process related to the violation, off reservation, of State laws was not essential to Tribal self-government or internal relations, and that the State's interest in execution of process was considerable.

In a concurring opinion, Justice Souter, joined by Justices Kennedy and Thomas, opined that the principal determination of jurisdiction over civil matters on a reservation should be the membership status of the nonconsenting party, not the status of the underlying real estate,[45] i.e., whether the action arose in Indian country: "The path marked best is the rule that, at least as a presumptive matter, Tribal courts lack civil jurisdiction over nonmembers."[46] Justice O'Connor wrote a separate concurring opinion, which Justice Scalia noted, "is in large part a dissent from the views expressed in this opinion." Her opinion, joined by Justices Stevens and Breyer, characterized the majority's "sweeping opinion" as one that, "without cause, undermines the authority of Tribes to make their own laws and be ruled by them" in a case that involved Tribal power to regulate the activities of nonmembers on land owned and controlled by the Tribe.

Another opinion, *United States v. Lara,*[47] interpreting the "*Duro*-fix" amendment to the Civil Rights Act of 1968, is a must-read on the issue of inherent Tribal sovereignty versus delegated Federal authority, as well as on the Constitutional authority given to Congress to legislate regarding Tribal sovereignty. In a 7-2 decision, there were three concurring opinions. As noted by Justice Thomas in his concurring opinion, "As this case should make clear, the time has come to reexamine the premises and logic of our

[45] *Id.*
[46] 533 U.S. 353, 376-7.
[47] *See supra* note 42.

Tribal sovereignty cases.[48] Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse Federal Indian law and our cases."[49]

[48] 541 U.S. 193, 214.
[49] 541 U.S. 193, 219.

# CHAPTER TWO
# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

Balanced Budget Act of 1997, P.L. No. 105-33 (1997)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

General Allotment Act, 24 Stat. 388, ch. 119, codified at 25 U.S.C. § 331

General Crimes Act, codified at 18 U.S.C. § 1152

Indian Child Welfare Act of 1978, P.L. No. 95-608 (1978)

Indian Civil Rights Act, P.L. No. 90-284, 82 Stat. 77 (1968), codified at 25 U.S.C. §§ 1301 – 41

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

Indian Self-Determination and Education Assistance Act of 1975, P.L. No. 93-638 (1975)

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Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

P.L. No. 99-570, § 4217, 100 Stat. 3207-146 (codified at 25 U.S.C. § 1302(7))

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P.L. No. 104-193, 110 Stat. 2166 at 2256 (codified as amended at 42 U.S.C. § 654(33))

18 U.S.C. § 1152

25 U.S.C. § 331

25 U.S.C. §§ 461-479

25 U.S.C. § 1301(2)

25 U.S.C. §§ 1301 – 41

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**Case Law**

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

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*Fisher v. District Court*, 424 U.S. 382 (1976)

*Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)

*Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 574 (1823)

*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)

*Montana v. United States*, 450 U.S. 544 (1981)

*National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985)

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*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)

*Strate v. A-1 Contractors*, 520 U.S. 438 (1997)

*United States v. Lara*, 541 U.S. 193 (2004)

*United States v. Wheeler*, 435 U.S. 313 (1978)

*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)

*Williams v. Lee,* 358 U.S. 217 (1959)

*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)

*Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995)

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# CHAPTER THREE
# AN OVERVIEW OF TRIBAL COURT JURISDICTION

## TRIBAL COURTS

According to the Bureau of Indian Affairs, there are now 562 Federally recognized Tribal governments within the United States.[50] Among the Federally recognized Indian Tribes and Alaska Native villages, there are approximately 275 Tribal courts and 23 CFR courts.[51]

Tribal courts have similar authority as State courts. They take sworn testimony and provide parties procedural rights.[52] However, there is greater diversity among Tribal courts than among State courts. Some Tribes operate both trial and appellate courts, and have detailed rules governing appellate review. For example, the Navajo Nation, which has the largest and most populous reservation in the United States, has a long-standing Tribal court system. It consists of seven district courts, including a children's court and a peacemaker court, within each district, as well as an appellate court, the Navajo Supreme Court.[53] In other Tribes, the Tribal council provides appellate review, while in others there is no appellate review at all. Among various Northwest and Plains Tribes, there are inter-Tribal courts of appeals.[54]

Tribal legal systems often include forums that focus on dispute resolution. "One example is the family forum for domestic relations disputes among the Pueblo communities where intra-familial matters are resolved through family gatherings or talking circles facilitated by family elders. . . . Another noted example is the Navajo Peacemaker Court, created in 1982 as a way of fostering and encouraging use of traditional Navajo justice methods. . . . It employs non-adversary methods of community participation in achieving conflict resolution through, for example, 'talking out,' apology, and restitution. The Navajos provide a peacemaker forum for each of the Nation's judicial districts to handle a wide variety of cases, including criminal actions, dissolution of marriage, child custody, and property disputes. . . . As one Tribal judge put it, '[t]he Peacemaker Court, which emphasizes the involvement of family and friends in dispute resolution, promotes Tribal traditions and community harmony for a Tribe that is reconstituting after a century of dislocation.'"[55]

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[50] *See* www.doi.gov/bureau-indian-affairs.html (2005).

[51] For the development of Tribal courts, *see* Hagan, Indian Police and Judges: Experiments in Acculturation and Control (1966); National American Indian Court Judges Association, Indian Courts and the Future (1978). In 1900, two-thirds of reservations had CFR courts. According to the Bureau of Indian Affairs, there are now 562 federally recognized Tribes in the contiguous United States and Alaska. Among these Tribes, there are approximately 275 Tribal courts and 23 CFR courts. www.Tribalresourcecenter.org.

[52] Although Tribes are not subject to the Bill of Rights within the U.S. Constitution, the Indian Civil Rights Act of 1968 made applicable many of the Constitutional rights to Tribes. The exceptions include the right to appointed counsel to indigent defendants in certain criminal cases.

[53] Atwood, *Tribal Jurisdiction and Cultural Meanings of the Family*, 79 Neb. L. Rev. 577, 592 (2000).

[54] *Id*.

[55] Atwood, *supra* note 53, at 596-597.

Eligibility requirements to be a Tribal judge vary among Tribes. Some Tribes require their judges to be members who are fluent in the Tribe's language while others allow non-Indians to serve as Tribal court judges. State-licensed attorneys are not automatically admitted to practice in Tribal courts. Many Tribes have a requirement that the attorney be admitted to practice in Tribal court, according to local Tribal ordinances.

## TRIBAL LAW

As a result of the Indian Reorganization Act, most Tribes now have written laws and constitutions. Although early laws often copied BIA codes, current Tribal codes address such diverse issues as divorce, custody and support, adoption, and health.

Tribal law includes treaties, the Tribal constitution, codes, decisional law, and custom (seldom codified).[56] The Federal government has recognized that many Tribal customs and traditions have the force and effect of law: "We have determined that such Tribal customs are equivalent to 'common law' as described by William Blackstone: '[t]he *lex nonscripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions' (Blackstone, 1 Commentaries on the Law of England 62)."[57]

Excellent collections of Tribal codes exist at the University of Washington, and the Native American Rights Fund in Boulder, Colorado. There are also several on-line resources for accessing selected Tribal codes. Such resources are listed in Appendix A.

**Applicable Law in Civil Cases** Many Tribal codes state that in all civil matters, the Tribal court shall apply the ordinances, customs, and usages of the Tribe not prohibited by the laws of the United States. In any matter not covered by Tribal ordinance, custom, or usage, such codes provide that the Tribal court may use relevant Federal or State laws as a guide. An example is found in the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indian Tribal Code:

TITLE 2 - RULES OF PROCEDURE
CHAPTER 2-2 CIVIL ACTIONS, LIMITATIONS AND LIABILITY

2-2-4 Laws Applicable in Civil Actions

(a) In all civil actions, the Tribal Court shall first apply the applicable laws, Ordinances, customs and usages of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (Tribes) and then shall apply any applicable laws of the United States and authorized regulations of the Department of the Interior. Where doubt arises as to customs and usages of the Tribes, the Tribal Court may request the advice of the appropriate committee which is recognized in the community as being familiar with

[56] Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 Am. Indian L. Rev. No. 2, n. 158 (Fall 1991).
[57] Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309).

> such customs and usages. Any matter not covered by Ordinances, customs and usages of the Tribes or by applicable Federal laws and regulations may be decided by the Court according to the laws of the State of Oregon.

Regulations governing Courts of Indian Offenses provide that in all civil cases the Tribal court shall apply any applicable laws of the United States, any authorized regulation of the Interior Department, and any ordinance or custom of the Tribe not prohibited by such Federal laws. Where there is doubt about custom or usage of the Tribe, the court may request the advice of counselors familiar with these customs and usages. Any matters not addressed by such laws, regulations, ordinances or custom must be decided by the Court of Indian Offenses according to the law of the State in which the disputed matter lies.[58]

## TRIBAL TERRITORIAL JURISDICTION

Indians that commit offenses outside reservation boundaries, or outside trust land that was within the original borders of a now diminished reservation, are usually subject to State laws.[59] Tribal courts usually only have jurisdiction over causes of action that arise in Indian country. Domestic law cases are an exception to that general rule because a Tribal court may have jurisdiction over a paternity action even if conception occurred off the reservation.

## TRIBAL SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is the authority of a tribunal to hear a particular case. For example, a probate court typically has subject matter jurisdiction to hear cases related to estate matters but not to divorce. Many Tribal courts are courts of general jurisdiction (e.g., jurisdiction over matters ranging over a number of subject areas).

In order to understand the extent of Tribal subject matter jurisdiction over civil and criminal matters, it is important to understand these three principles:

(1) an Indian Tribe possesses, in the first instance, all the inherent powers of any sovereign State;

(2) a Tribe's presence within the territorial boundaries of the United States subjects the Tribe to Federal legislative power and precludes the exercise of external powers of sovereignty of the Tribe, such as its power to enter into treaties with foreign nations, that are inconsistent with the territorial sovereignty of the United States. However, the Tribe’s presence within the territorial boundaries of the United States does not by itself affect the internal sovereignty of the Tribe;

[58] 25 C.F.R. § 11.500 (2004).
[59] *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

(3) inherent Tribal powers are subject to qualification by treaties and by express legislation of Congress. Absent such qualification, full powers of internal sovereignty are vested in the Indian Tribes and in their duly constituted bodies of government.[60]

## FEDERAL LIMITATION ON TRIBAL JURISDICTION

**Overview** Through several enactments, Congress has asserted the Federal government's jurisdiction over criminal matters in Indian country,[61] thereby lessening the control of Tribal courts. In addition, in some States and for some individual Tribes, Congress has limited Tribal control by authorizing State criminal jurisdiction in Indian country. Finally, the United States Supreme Court has prevented Indian nations from exercising criminal jurisdiction over non-Indians and non-member Indians by determining that such jurisdiction is no longer within the Tribes' inherent authority.[62]

Congress has not enacted any general statute authorizing Federal courts to supplant Tribal courts in hearing civil matters arising in Indian country. However, Indian country cases will sometimes be within concurrent Federal jurisdiction under the general Federal question statute[63] or through the statute authorizing Federal courts to hear suits between citizens of different States (referred to as "diversity jurisdiction").[64] Thus, for example, Federal courts sometimes hear civil actions challenging the jurisdiction of Tribal courts to hear certain disputes involving non-Tribal members that arise in Indian country. In such cases, however, the Supreme Court has determined that Federal courts should require litigants to first exhaust their remedies in Tribal court.[65] In addition, in some States and for some individual Tribes, Congress has limited Tribal control by authorizing State jurisdiction over civil causes of actions between Indians or to which Indians are parties, which arise in those areas of listed Indian country.[66] This jurisdiction is limited to private causes of action, and does not encompass State regulation.

**Federal Indian Country Criminal Laws** The first major Federal act affecting Tribal jurisdiction over criminal activity was the General Crimes Act,[67] enacted in 1817. It gave the Federal government jurisdiction over crimes, committed by Indians against non-Indians, within Indian country, so long as the Indian involved had not been punished under the law of the Tribe. Because of the exception for cases in which the Indian defendant has already been punished under Tribal law, there is the understanding that the Federal jurisdiction under the General Crimes Act is concurrent with Tribal jurisdiction. However, the Federal criminal jurisdiction over crimes

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[60] N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 4.01[1] (2005 ed.). The Handbook notes that there have been some recent judicial departures from these principles.
[61] Indian country is defined in 18 U.S.C. § 1151.
[62] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
[63] 28 U.S.C. § 1331.
[64] 28 U.S.C. § 1332.
[65] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).
[66] 28 U.S.C. § 1360.
[67] 18 U.S.C. § 1152.

committed by Indians against non-Indians is exclusive of the States. Importantly, under the General Crimes Act, Indian nations retain exclusive jurisdiction over crimes committed by one Indian against another. The General Crimes Act also gave the Federal government exclusive jurisdiction over crimes committed by non-Indians against Indians. Wherever the Federal government has jurisdiction under the General Crimes Act, offenses are defined by Federal criminal law, or are borrowed from State law through the Assimilative Crimes Act.[68]

The next significant Federal act was the Major Crimes Act of 1885.[69] Enacted in response to the Supreme Court's decision in *Ex parte Crow Dog,*[70] it originally granted Federal jurisdiction, exclusive of the States, over seven crimes committed by an Indian within Indian country. The number has steadily increased to include: "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive sexual contact], incest, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery and a felony under section 661 of Title 18 [within special maritime and territorial jurisdiction of the United States, the taking away with the intent to steal the personal property of another]."[71] It is unclear whether jurisdiction over these major crimes is exclusive with Federal courts or whether Tribal courts have concurrent jurisdiction.[72] As a practical matter, the severe limitations on Tribal criminal punishments introduced by the Indian Civil Rights Act of 1986[73] make Tribal prosecution of major crimes relatively rare.

**Other Federal Legislation** The Indian Civil Rights Act, mentioned above, initially limited Tribal court criminal punishment to six months and a $500 fine. These limits were later raised to one year and a $5000 fine.[74]

**Public Law 280** In 1953, at the height of the termination and assimilation era,[75] Congress passed Public Law 280, which significantly affected Tribal jurisdiction by introducing State criminal authority into Indian country.[76] Historically, State courts did not have jurisdiction over crimes occurring in Indian country that involved Indians and

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[68] *See* N. Newton *et al.*,eds., Cohen's Handbook of Federal Indian Law § 9.02[c] (2005 ed.).
[69] 18 U.S.C. § 1153.
[70] 109 U.S. 556 (1883).
[71] 18 U.S.C. § 1153.
[72] *Supra* note 27.
[73] 25 U.S.C. § 1302(7) (limiting punishment for any one offense to one year in jail and a $5000 fine).
[74] *Supra* note 33.
[75] The Termination Era ran from approximately 1945 to 1961. The Court in *Bryan v Itasca County*, 426 U.S. 373 (1976), emphasized that Public Law 280 was not a termination measure. Rather it reflected an assimilationist philosophy: "That Congress intended to facilitate assimilation when it authorized a transfer of jurisdiction from the Federal Government to the States does not necessarily mean, however, that it intended in P. L. No. 280 to terminate Tribal self-government." *Washington v. Yakima*, 439 U.S. 463, 488 n. 32 (1979).
[76] Public Law 280 is codified in various sections of 18 U.S.C., 25 U.S.C., and 28 U.S.C. For detailed discussions of the statute, *see, e.g.*, Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535 (1975); Foerster, *Comment: Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333 (1999). *See also* the dissent of Chief Justice Matthews in *John v. Baker*, 982 P.2d 738 (Alaska 1999).

non-Indians. Jurisdiction was limited to the Tribes or Federal government.[77] Public Law 280[78] initially provided for the mandatory transfer to five States[79] of jurisdiction over criminal offenses committed by or against Indians in the area of Indian country listed opposite the named States or territory.[80] It also gave those States jurisdiction over civil causes of actions between Indians or to which Indians were parties, which arose in those areas of listed Indian country.[81] In 1958 Congress added Alaska as a sixth mandatory State.[82] There was no requirement that the Tribes consent to such transfer of jurisdiction to the listed States. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Supreme Court declined to answer whether Public Law 280 conferred exclusive or concurrent jurisdiction on States. However, the consensus of lower Federal courts, many State courts, and the Solicitor's Office within the Department of the Interior is that Indian nations retain concurrent jurisdiction under Public Law 280.[83] A major consequence of Public Law 280 is that Indian nations lose exclusive jurisdiction over non-major offenses committed by one Indian against another Indian.

Other States not listed among the mandatory States had the option of assuming Public Law 280 jurisdiction. Congress granted permission for such States to assume civil or criminal jurisdiction "at such time and in such manner" as the people of the State by affirmative legislative action, should decide to assume.[84] If such a State had a constitution or statutes disclaiming jurisdiction in Indian country, Public Law 280 authorized the State to amend those laws, if necessary, in order to remove any legal impediment to the assumption of civil or criminal jurisdiction.[85]

An overall goal of Congress, in numerous pieces of legislation introduced during the session in which Public Law 280 was introduced, was "withdrawal of Federal responsibility for Indian affairs wherever practical, and . . . termination of the subjection of Indians to Federal laws applicable to Indians as such."[86] The legislative history of Public Law 280 suggests that Congress's main goal was to address the lack of law

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[77] *See* Gould, *supra* note 44.
[78] The text of Public Law 280 is set forth in Appendix B.
[79] California, Minnesota (except for Red Lake Reservation), Nebraska, Oregon (except for Warm Springs Reservation), and Wisconsin (except for Menominee Reservation).
[80] Codified at 18 U.S.C. § 1162. *See* Comment, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333 (1999).
[81] Codified at 28 U.S.C. § 1360.
[82] An exception within Alaska is the Metlakatla Reservation.
[83] *See* Jimenez & Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," 47 AU L. Rev. 1627 (1998).
[84] 25 U.S.C. §§ 1321-1322.
[85] 25 U.S.C. § 1324. According to a report accompanying the House version of Public Law 280 in 1953, there were eight States, which – in response to Enabling Acts -- had Constitutions disclaiming all right and title to lands owned by Indians and declaring that such lands remained under the absolute jurisdiction and control of the Congress of the United States. *See* H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953). These States were Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.
[86] S.Rep. No. 699, 83rd Cong., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409.

enforcement on Indian reservations.[87] The Report of the House Committee on Interior and Insular Affairs, which was subsequently incorporated into the Senate Report, stated: "As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, Tribes are not adequately organized to perform that function; consequently there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility."[88] The Tribes exempted from the State assumption of jurisdiction were Tribes that had legal systems and organizations perceived as functioning in a "satisfactory manner."[89]

According to the Supreme Court in *Washington v. Yakima*, the jurisdictional bill also reflected Congressional concern over "the financial burdens of continued Federal jurisdictional responsibilities on Indian lands." There is less background as to why civil jurisdiction was also transferred to States. However, as noted by the Court in *Washington v. Yakima*, the legislation was "without question reflective of the general assimilationist policy followed by Congress from the early 1950's through the late 1960's. [omitting citations] The failure of Congress to write a Tribal-consent provision in the transfer provision applicable to option States as well as its failure to consult with the Tribes during the final deliberations on Pub. L. 280 provide ample evidence of this." 439 US.463, 490.

By 1958, as a result of amendments to Public Law 280 and implementing State legislation, 16 States had acquired Public Law 280 jurisdiction.[90] However, said jurisdiction in most of these States was limited to (1) less than all of the Indian reservations in the State, (2) less than all of the geographic areas within an Indian reservation, or (3) less than all subject matters of the law.

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which limited the extension of Public Law 280 jurisdiction.[91] No State can now acquire Public Law 280 jurisdiction over Indian country unless the Tribe consents by a majority vote of the adult Indians voting at a special election.[92] The amendments also provide explicitly for partial assumption of jurisdiction. It is therefore possible for a State to have Public Law 280 jurisdiction but not with every Tribe located in the State or not over every subject area. The ICRA also authorized the United States to accept a "retrocession" or return of

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[87] *Id.* at 5.
[88] S.Rep. No. 699, 83rd Cong., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409, 2411-12.
[89] *Id*.
[90] Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. Disclaimer States have responded in diverse ways to the Public Law 280 offer of jurisdiction. Only North Dakota actually amended its constitution. *See Washington v Yakima*, 439 U.S. 463, 486 n. 29 (1979). Many of these States have repealed their statutes assuming jurisdiction (e.g., Arizona), returned their jurisdiction to the federal government (e.g., Nevada), or had their statutes assuming jurisdiction invalidated by the courts (e.g., North Dakota and South Dakota).
[91] P.L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-41). For a full discussion of Public Law 280, *see* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3] (2005 ed.).
[92] Codified at 25 U.S.C. §§ 1321 and 1322. *See Kennerly v. District Ct. of Montana*, 400 U.S. 423 (1971).

jurisdiction, full or partial, previously acquired by a State under Public Law 280,[93] but only at the request of the State. Tribes could not insist upon retrocession. Several States, such as Nebraska, Washington, Wisconsin, and Minnesota, have retroceded their Public Law 280 jurisdiction over various Tribes.

The chart[94] below summarizes the States that currently have some form of civil and/or criminal jurisdiction under Public Law 280:

[93] Codified at 25 U.S.C. § 1323(a). The Indian Civil Rights Act also repealed Section 7 of Public Law 280 with the proviso that the repeal did not affect any cession made prior to the repeal. 25 U.S.C. § 1323(b). Section 6 of Public Law 280 was re-enacted without change. 25 U.S.C. § 1324.

[94] The sources of information for the chart are N. Newton *et al*., eds., Cohen's Handbook of Federal Indian Law (2005 ed.) and Goldberg-Ambrose, Planting Tail Feathers: Tribal Survival and Public Law 280 (UCLA American Indian Studies Center 1997), pages 9 - 10.

| State | Extent of Jurisdiction |
|---|---|
| Alaska | All Indian country within the State[95] |
| California | All Indian country within the State |
| Florida | All Indian country within the State |
| Idaho | All Indian country within the State, limited to the following subject matters: compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; mental illness; domestic relations; and operation of motor vehicles on public roads |
| Iowa | Only over the Sac and Fox Indian community in Tama County, limited to civil and some criminal jurisdiction |
| Minnesota | All Indian country within the State, except the Red Lake and the Nett Lake reservations[96] |
| Montana | Only over felonies on the Salish and Kootenai reservation.[97] |
| Nebraska | All Indian country within the State, except the Omaha and Winnebago reservations. |
| Oregon | All Indian country within the State, except the Burns Paiute and Warm Springs reservations. With regard to the Umatilla Reservation, jurisdiction is limited to civil jurisdiction.[98] |

[95] In *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), the United States Supreme Court removed the Indian country status of most lands held by Alaskan Natives. Since Public Law 280 applies within "Indian country," that decision left Public Law 280 irrelevant to much of Alaska. However, there are still Native allotments and Native townsites that likely qualify as Indian country, leaving some room -- in addition to the Metlakatla Indian Reservation -- for the continued operation of Public Law 280. *See* Strommer & Osborne,"'Indian Country' and the Nature and Scope of Tribal Self-Government in Alaska," 22 Alaska L. Rev. 1 (2005).

[96] When Minnesota was listed as a mandatory Public Law 280 State, Red Lake Reservation was excepted from its jurisdiction. In 1975, Minnesota retroceded, its jurisdiction over the Nett Lake Reservation.

[97] *See* Public Law 280 discussion in *Balyeat Law, PC v. Pettit*, 291 Mont. 196, 967 P.2d 398 (1998).

[98] When Oregon was named as a mandatory Public Law 280 State, Warm Springs Reservation was excepted from its jurisdiction. In 1981, Oregon retroceded its criminal jurisdiction over the Umatilla Reservation.

| | |
|---|---|
| Washington | Only fee patent (deeded) land within Indian country. Jurisdiction on trust land is limited to the following subjects, unless the Tribe consents to full State jurisdiction:[99] compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoptions; dependent children; and operation of motor vehicles on public roads. |
| Wisconsin | All Indian country within the State, except the Menominee reservation[100] |

There have been several Supreme Court decisions interpreting Public Law 280.[101] In *Washington v. Yakima*, the Court held that Public Law 280 authorized a State to assert only partial jurisdiction within a selected area of an Indian reservation; in the case, the State of Washington had enacted legislation obligating the State to assume civil and criminal jurisdiction over Indians and Indian territory within the State, but – with the exception of eight subject matter areas, which included domestic relations – not to extend such jurisdiction over Indians on trust or restricted lands without the request of the affected Indian Tribe.[102] In *Bryan v. Itasca County*, the Court interpreted Public Law 280 to grant States jurisdiction over criminal matters and private civil litigation involving reservation Indians, but not to grant civil regulatory authority such as a State personal property tax within the reservation. Discussing the holding in *Bryan*, the Court in *California v. Cabazon Band* stated that "when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation, or civil in nature, and applicable only as it may be relevant to private civil litigation in State court." In *California v. Cabazon Band*, the Court set forth a test for distinguishing between criminal and civil laws: "[I]f the intent of a State law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the State law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian

[99] For a complete list of Tribes that consented to full Washington Public Law 280 jurisdiction (some of which have later retroceded), *see* National American Indian Court Judges Association, Justice and the American Indian, Vol. 1, The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations (1974).

[100] When Wisconsin was named as a mandatory Public Law 280 State, the Menominee Reservation was exempted from its jurisdiction. In 1976, when Congress terminated the Tribe, Wisconsin reacquired jurisdiction over that territory. When Congress restored the Menominee Tribe to federal status in 1976, Wisconsin retroceded the jurisdiction it had acquired by the termination.

[101] *See Washington v. Yakima*, 439 U.S. 463, 486 n. 30, citing *Williams v. Lee,* 358 U.S. 217 (1959); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); and *Bryan v. Itasco County*, 426 U.S. 373 (1976). *See also California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[102] Partial Public Law 280 jurisdiction was explicitly authorized by the Indian Civil Rights Act of 1968. *See supra* note 91.

Reservation. The shorthand test is whether the conduct at issue violates the State's public policy." Applying such a test to the facts of the case, the Court concluded that Public Law 280's grant of criminal jurisdiction did not include a regulatory statute such as California's statute governing the operation of bingo games.[103]

## TRIBAL, FEDERAL, OR STATE JURISDICTION IN CRIMINAL ACTIONS

As noted earlier, the General Crimes Act gives Federal courts jurisdiction over crimes committed by Indians against non-Indians or by non-Indians against Indians in Indian country. The Major Crimes Act is Federal legislation that gives Federal courts jurisdiction over certain serious crimes committed by Indians in Indian country, whether the victim is Indian or non-Indian.[104] It is unclear whether the Federal government's jurisdiction in such cases is exclusive or concurrent with the Tribe.[105]

Public Law 280 gives certain State courts jurisdiction over criminal offenses involving Indians in Indian country. In the mandatory Public Law 280 States, Federal jurisdiction under the General Crimes Act and Major Crimes Act is eliminated by statute.[106] In the optional Public Law 280 States, the impact on Federal jurisdiction is less certain, with courts differing on whether the Federal government retains criminal jurisdiction.[107]

Both in the non-Public Law 280 jurisdictions and those jurisdictions affected by Public Law 280, concurrent Tribal criminal jurisdiction likely exists. From the perspective of Tribal criminal jurisdiction, the main difference between these two arrangements is that in the non-Public Law 280 situation, Tribes have *exclusive* jurisdiction over non-major crimes committed by one Indian against another. In the Public Law 280 situation, Tribes share jurisdiction over such crimes with the States, at least in mandatory States and in optional States that have assumed full jurisdiction. If a State has assumed only partial jurisdiction under Public Law 280, then the Federal government and the Tribe will share jurisdiction over remaining matters.

The Supreme Court has also had occasion to review the criminal jurisdiction of Tribal courts in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990). Relying not on specific Federal legislation but on the dependent status of Indian Tribes in relation to the sovereignty of the United States, the Court in these cases held that Indian Tribes have no criminal jurisdiction over non-Indians or nonmember Indians for offenses

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[103] For a further discussion of the distinction between criminal and regulatory action, *see* Foerster, *supra* note 76.
[104] The constitutionality of the Major Crimes Act was upheld in *United States v. Kagama*, 118 U.S. 375 (1886). *See also United States v. Antelope*, 430 U.S. 641 (1977).
[105] Although the Supreme Court has alluded to the possibility that federal jurisdiction under the Major Crimes Act may be exclusive of the Tribes (*see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n. 14 (1978)), at least one federal circuit has found Tribal jurisdiction to be concurrent (*see Wetsit v. Stafne*, 44 F.3d 823, 825-826 (9th Cir. 1995)).
[106] 18 U.S.C. § 1162(c).
[107] *See* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3][d] (2005 ed.).

committed in Indian country. Tribes do have Tribal jurisdiction over Indians who have committed crimes on the reservation.

Indian Tribal leaders viewed *Duro v. Reina* (exempting nonmember Indians from criminal misdemeanor laws of local Tribal governments) as a major assault on the ability of Tribal governments to administer justice in Indian country.[108] In reaction to the decision, Congress amended the Indian Civil Rights Act to define "powers of self-government" to include "the *inherent* power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians"[109] [emphasis added]. The Supreme Court examined the so-called "*Duro* fix" in the case of *United States v. Lara*, 541 U.S. 193 (2004). Lara, a nonmember Indian, was convicted in Tribal court of a misdemeanor offense of violence to a policeman. He was later charged with the Federal crime of assaulting a Federal officer. Lara claimed that the Federal prosecution was barred by the Double Jeopardy Clause. The Supreme Court ruled that it was not. In reaching that conclusion, the Court concluded that the Congressional amendment to the Indian Civil Rights Act had eliminated restrictions that the political branches had placed, over time, on the exercise of a tribe's inherent legal authority over nonmember Indians: "That new statute, in permitting a tribe to bring certain Tribal prosecutions against nonmember Indians, does not purport to delegate the Federal Government's own *Federal* power. Rather, it enlarges the *tribes'* own 'powers of self-government.'"[110] Therefore, since the Tribe had been acting as a separate sovereign in its prosecution of Lara, the subsequent Federal prosecution was not barred by the Double Jeopardy Clause.

One can summarize jurisdiction over criminal offenses according to the following chart. Wherever Federal and State court jurisdiction is not exclusive, Tribal jurisdiction is concurrent.

[108] Forum Summary, Tribal Leaders Forum on *Duro v. Reina*, held January 11, 1991. Sponsored by the American Indian Resources Institute in conjunction with the National Indian Justice Center and the Native American Rights Fund.

[109] The amendment in 1991 was a Congressional "fix" to the Supreme court decision in *Duro v. Reina*, 495 U.S. 676 (1990). *Duro* held that Tribal courts do not have criminal jurisdiction over non-member Indians. The language overturns *Duro* by defining powers of Tribal self-government to include the "inherent power of Indian Tribes" to "exercise jurisdiction over all Indians." For an analysis of the "Duro fix," especially its language recognizing the "inherent power" of Tribes to recognize criminal jurisdiction over all Indians, *see* Gould, *supra* note 44.

[110] 541 U.S. at 198.

| | Location | Type of Offense | Status of Defendant | Status of Victim |
|---|---|---|---|---|
| **Exclusive Tribal Court** | Indian Country in State without PL 280 criminal jurisdiction | Felony not listed in Major Crimes Act or Misdemeanor | Indian (either member or nonmember) | Indian or non-Indian |
| **Exclusive State Court** | Indian Country in State without PL 280 criminal jurisdiction | Felony | Non-Indian | Non-Indian |
| **Exclusive State Court** | Outside Indian Country | Felony or Misdemeanor, except in which Federal law makes crime one of national applicability | Indian or non-Indian | Indian or non-Indian |
| **Exclusive State Court** | Indian Country in State with complete mandatory PL 280 criminal jurisdiction | Felony or Misdemeanor<br>(no Major Crime exception) | Non-Indian | Indian or non-Indian |
| **Federal Court** | Indian Country in State without complete PL 280 criminal jurisdiction | Major Crime*<br><br>Felonies and Misdemeanors in which Indian has not been punished under Tribal law**<br><br>Felonies and Misdemeanors*** | Indian<br><br>Indian<br><br>Non-Indian | Indian or non-Indian<br>Non-Indian<br><br>Indian |

*Unclear whether jurisdiction over Major Crimes is exclusive or concurrent with Tribal court jurisdiction; jurisdiction is exclusive of State courts.

**Jurisdiction is concurrent with Tribal courts, but exclusive of State courts.

***Jurisdiction is exclusive of Tribal and State courts.

Sometimes Federal crimes relating to Indian country are defined outside the framework of the General Crimes Act, the Major Crimes Act, and Public Law 280. The jurisdictional analysis for such offenses is entirely different, because the limitations and exceptions in the General Crimes Act and Major Crimes Act will not apply, and Public Law 280 does not eliminate Federal criminal jurisdiction under such special laws. Thus, for example, nonsupport is a Federal offense under some circumstances, and includes a failure to meet a support obligation established by a Tribal court. This crime is punishable under Federal law regardless of whether the support obligation was established in a Public Law 280 State or a non-Public Law 280 State.

Tribes may also have jurisdiction over the crime of nonsupport committed by Indians in Indian country, assuming their Tribal code sanctions such an offense.[111] In complete Public Law 280 jurisdictions, where the Tribal code establishes a criminal offense for nonsupport, the State will have concurrent criminal jurisdiction over a criminal nonsupport offense committed by an Indian in Indian country. When the offense is committed by a non-Indian in Indian country, only the State or the Federal government has subject matter jurisdiction to prosecute the defendant for criminal nonsupport.[112]

## TRIBAL OR STATE JURISDICTION IN CIVIL ACTIONS

The United States Supreme Court has broadly affirmed Tribal civil jurisdiction within Indian country.[113] In non-Public Law 280 jurisdictions, a Tribe has exclusive jurisdiction over civil causes of action against member Indians that arise in Indian country: "Tribes have the power to make their own substantive laws in internal matters, and to enforce that law in their own forums."[114] When the suit is brought by an Indian against a non-Indian, and the claim arises on Indian land in Indian country, jurisdiction over civil causes of action is typically concurrent or shared by Tribal and State courts.[115] A State normally has exclusive jurisdiction over civil causes of action that arise outside Indian country and involve off-reservation residents, Indian or non-Indian.[116] In non-Public Law 280 jurisdictions, the issue of Tribal versus State jurisdiction typically arises

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[111] For example, criminal nonsupport is a misdemeanor offense in Tribes operating under CFR codes. 25 C.F.R. § 11.425 governing Courts of Indians Offenses provides the following: "A person commits a misdemeanor if he or she persistently fails to provide support which he or she can provide and which he or she knows he or she is legally obligated to provide to the spouse, child, or other dependent."

[112] *See State v. Zaman*, 252 Ariz. Adv. Rep. 49 (Ariz. App. Div. 1, cr 960349, decided 09/23/1997). Indian Tribes have no jurisdiction to prosecute non-Indians for crimes committed on an Indian reservation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

[113] *See*, *e.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Williams v. Lee*, 358 U.S. 217 (1959); *but see Nevada v. Hicks*, 533 U.S. 353 (2001) (denying Tribal jurisdiction to hear claim against State official).

[114] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[115] *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148 (1984). For Tribal courts operating under authority from the Code of Federal Regulations, it is clear that civil jurisdiction encompasses nonmember Indians. 25 C.F.R. § 11.103(a).

[116] A notable exception is established by the Indian Child Welfare Act, 25 U.S.C. § 1911(b), which provides for the transfer of many off-reservation child welfare proceedings involving Indian children to Tribal court. Based on State case law, paternity cases involving an Indian party are also exceptions to the general rule.

in cases where the cause of action arose on non-Indian fee land or a State right-of-way in Indian country, and the defendant is a non-Indian. It also often arises in cases where the cause of action arose off the reservation, but one of the parties is an Indian living on the reservation. When jurisdiction is at issue, the practitioner must look to legislation and case law for guidance.

In Public Law 280 jurisdictions, the question of State jurisdiction over civil causes of action in Indian country is simplified. When the claim is against an Indian respondent, Tribal jurisdiction is often concurrent or shared with State jurisdiction. A mandatory Public Law 280 State has jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[117] An optional Public Law 280 State may also have civil jurisdiction,[118] but it may be partial (i.e., only certain specified subject areas or jurisdiction over a limited part of Indian country). Therefore, even if the case involves two member Indians, a State with full Public Law 280 civil jurisdiction will generally have authority to adjudicate the matter. The Supreme Court has declined to rule on whether Public Law 280 jurisdiction is exclusive or concurrent with Tribal jurisdiction.[119] However, other Federal and State courts have held that Tribes have concurrent jurisdiction.[120]

A challenge to jurisdiction arises when one of the parties believes that the forum selected by the petitioner lacks subject matter jurisdiction, and that the action should be heard by a different forum. When a petitioner files an action against an Indian respondent in State court rather than Tribal court, and the Indian respondent argues that the State court lacks jurisdiction, the Supreme Court decision that historically has been most relevant to the issue of State assertion of jurisdiction is *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, a non-Indian had brought suit in State court against a Navajo Indian for a debt arising out of a transaction that took place on the Navajo Reservation. The Arizona Supreme Court had upheld the exercise of State court jurisdiction. In reversing, the Supreme Court enunciated the following rule: "Essentially, absent governing Acts of Congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them." [121]

The test was rephrased as a preemption and infringement analysis in *White Mountain Apache Tribe v. Bracker*.[122] Under the preemption test, the question is whether the exercise of State authority is pre-empted by Federal law. Under the

[117] 28 U.S.C. § 1360(a).
[118] 28 U.S.C. § 1322(a).
[119] The Supreme Court in *Washington v. Yakima,* 439 U.S. 463, 488 n. 32, and 501 n.48 (1979), refused to address whether such jurisdiction was concurrent or exclusive.
[120] *See* Jimenez & Song, *supra* note 83.
[121] *Williams v. Lee*, 358 U.S. 217, 220 (1979).
[122] 448 U.S. 136 (1980).

infringement test, the question is whether the State action will "infringe on the right of reservation Indians to make their own laws and be ruled by them." Areas that the Supreme Court has identified as essential self-government matters include determination of Tribal membership, regulation of domestic relations among members, and rules of inheritance for members.[123] In conducting an infringement analysis, State court decisions tend to examine whether one or both parties are enrolled members of an Indian tribe, whether the cause of action arose on or off the reservation,[124] and what are the Tribal and State interests at stake.

When a petitioner files an action against a non-Indian or nonmember respondent in Tribal court rather than State court, and the non-Indian respondent argues that the Tribal court lacks jurisdiction, the Supreme Court decision that is most relevant on the issue of Tribal civil jurisdiction is *Montana v. United States*.[125] As noted earlier, *Montana* addressed a Tribal court's exercise of civil subject matter jurisdiction over a non-member of the Tribe on non-Indian fee land. While noting a Tribe's inherent sovereign power over its members, the Supreme Court also pointed out the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." If the action involves a nonmember or a non-Indian, the question is whether "the exercise of Tribal power is necessary to protect Tribal self-government or to control internal relations."[126] Any exercise of Tribal power beyond that is "inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation."[127] In the case at hand, the Court concluded that Tribal regulation of hunting and fishing by nonmembers of a Tribe on lands no longer owned by the Tribe bore no clear relationship to Tribal self-government or internal relations. The Court identified two circumstances, or exceptions, where Tribal civil jurisdiction could exist over non-Indians on non-Indian fee land: when there is a "consensual relationship" between the non-Indian or nonmember Indian and the

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[123] *See United States v. Wheeler,* 435 U.S. 313, 322, n. 18 (1978). *See also, e.g., Fisher v. District* Court, 424 U.S. 382 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990).

[124] A review of case law suggests that there is inconsistency in defining where the cause of action arose in paternity establishment and child support cases. Some courts look at conception as the defining event. Other courts focus on where the custodial parent applied for public assistance.

[125] 450 U.S. 544 (1981).

[126] *Montana v. United States*, 450 U.S. 544, at 565 (1981). *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Citing the two exceptions in *Montana*, the *Strate* Court concluded that the Tribal court lacked subject matter jurisdiction over a civil action against allegedly negligent non-Indians, involving a traffic accident on a public highway running through Indian reservation land. *See also Nevada v. Hicks*, 533 U.S. 353 (2001). In *Nevada,* the Supreme Court concluded that the Tribal court lacked jurisdiction in a civil law suit brought by a Tribal member against State game wardens who had executed State court and Tribal court search warrants to search his on-reservation home for an off-reservation crime. The Court stated that the fact that the nonmember's activity occurred on Tribal land was not dispositive. Citing *Montana*, the Court concluded that the "Tribal authority to regulate State officers in executing process related to the violation, off reservation, of State laws is not essential to Tribal self-government or internal relations." In contrast, the Court found that the State's interest in execution of process was considerable. For a discussion of the impact of *Montana*, *see* Gould, *supra* note 44.

[127] *Montana v. United States* , 450 U.S. 544 at 564 (1981). *See also Nevada v. Hicks*, 533 U.S. 353 (2001).

Tribe or a Tribal member, "through commercial dealings, contracts, leases, or other arrangements"; and when exercise of jurisdiction is necessary to protect "the political integrity, the economic security, or the health or welfare of the Tribe."[128]

The Court has interpreted these *Montana* exceptions narrowly, out of concern that the exceptions might swallow the rule.[129] In *Atkinson Trading Co., Inc. v. Shirley*, 523 U.S. 645 (2001), the Supreme Court stated that the consensual relationship exception requires a nexus between the nonmember's conduct and the Tribe's regulation. The fact that a nonmember has received or may receive Tribal services, such as police and fire protection, does not create the necessary connection. It also stated that the second exception is "only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government."[130]

When a State has concurrent jurisdiction with a Tribe, the State court may nevertheless decline to exercise such jurisdiction if it feels such an exercise would infringe on a Tribe's self-governance.[131] Rules respecting deference to Tribal courts are currently under development for concurrent Tribal and State jurisdiction, especially in Public Law 280 States.[132] In the event of concurrent jurisdiction, the case may be adjudicated by the first tribunal to validly exercise jurisdiction.[133]

## STATE JURISDICTION TO SERVE PROCESS IN INDIAN COUNTRY

If the State court has subject matter jurisdiction over a civil or criminal action involving an Indian who resides on a reservation, service of the pleadings or arrest warrant on the Indian must also be proper. Some States and Tribes have entered into cross-deputizing agreements to address service of process and service of arrest warrants. For example, pursuant to the Fort Peck Comprehensive Code of Justice, Title XII, § 208, a procedure exists to cross-deputize certain Montana law enforcement officers with authority to detain and arrest Indians on the Fort Peck Indian Reservation. The procedure requires that the Montana law enforcement agency submit the name of the officer to the Tribal Executive Board for a resolution approving that particular officer.

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[128] *Montana v. United States* , 450 U.S. 544 at 566 (1981). *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Citing the two exceptions in *Montana*, the *Strate* Court concluded that the Tribal Court lacked subject matter jurisdiction over a civil action against allegedly negligent non-Indians, involving a traffic accident on a public highway running through Indian reservation land.

[129] *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[130] 532 U.S. at 657, n. 12. As noted by federal courts, "the tribe's interest in the political, economic, health, or welfare effects of a particular action is not enough, by itself, to meet this exception. . . . Otherwise, the exception would swallow the rule." *See, e.g., County of Lewis v. Nez Perce Tribe*, 163 F.3d ___ (9th Cir. 1998).

[131] *See, e.g., Lemke v. Brooks*, 614 N.W.2d 242 (Minn. 2000).

[132] *See*, *e.g.*, *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 265 Wis.2d 64, 665 N.W.2d 899 (Wis. 2003); *see also* N. Newton *et al.*, eds., Cohen's Handbook of Federal Indian Law § 6.04[3][c] (2005 ed.).

[133] *See, e.g., South Dakota ex rel. Jealous of Him v. Mills,* 627 N.W.2d 790 (S.D. 2001); *Harris v. Young*, 473 N.W.2d 141, 145 (S.D. 1991).

If there are no such agreements, cases have split on whether State process may be served on the Indian respondent or defendant while he or she is on the reservation.[134] In a case involving action that arose off the reservation, the Supreme Court addressed the related issue of State service of a search warrant. In *Nevada v. Hicks*, 533 U.S. 353 (2001), respondent Hicks was a member of the Fallon Paiute-Shoshone Tribe of western Nevada, who lived on the Tribe's reservation. He was suspected of having killed, off the reservation, a California bighorn sheep, which was a gross misdemeanor under Nevada law. Twice, State game wardens obtained State-court and Tribal-court search warrants. Both times, in executing the warrants on the home of Hicks, the State sheriffs were accompanied by Tribal officers. After the second search, Hicks filed suit in the Tribal Court alleging, in part, that the wardens had trespassed and abused process. The Tribal Court held that it had jurisdiction, which was upheld by the Tribal Appeal Court. The petitioners then sought in Federal District Court a declaratory judgment that the Tribal Court lacked jurisdiction over the claims. The Federal court concluded that the fact that Hicks's home was on Tribe-owned reservation land was sufficient to support Tribal jurisdiction over the civil claims against nonmembers arising from their activities on that land.

The Supreme Court reversed. It concluded that the Tribal Court did not have jurisdiction to adjudicate the wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime because the Tribe did not have regulatory authority over the State officers.[135] The Court pointed out that the fact that Indians have the right to make their own laws and be governed by them "does not exclude all State regulatory authority on the reservation." A State may not be able to exercise the same degree of regulatory authority within a reservation as it may do off the reservation. However, using the *Montana* test,[136] the Court concluded that Tribal authority to regulate State officers in executing process related to the off-reservation violation of State laws was not essential to Tribal self-government or internal relations. Moreover, it concluded, the State's interest in executing process was considerable, and did not impair the Tribe's self-government.

Most of the reported State court decisions regarding State service of process within Indian country pre-date *Nevada v. Hicks*. Courts have used the *Williams* test to review State service of process on an Indian residing on a reservation. With regard to the preemption prong, courts have uniformly held that there is no Federal statute preempting State service of process. Conclusions regarding whether the State action infringes on Tribal sovereignty vary.

Montana courts have concluded that State service of process does not infringe on Tribal sovereignty: "Indian country is not a Federal enclave off limits to State process servers. Service of process extends to Indian defendants served within the reservation."[137] The Wisconsin Supreme Court has recognized that service of process

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[134] *See* W. Canby, American Indian Law in a Nutshell 192-194 (4th ed. 2004).
[135] In *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1977), the Court had stated: "As to nonmembers . . . a Tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. . . ."
[136] *Montana v. United States*, 450 U.S. 544 (1981).
[137] *Bad Horse v. Bad Horse,* 163 Mont. 445, 517 P.2d 893 (1974), *cert. denied* 419 U.S. 847 (1984).

is an attempt to apply State law on the reservation.[138] However, the court also found that applying State service of process statutes had little if any effect on Tribal sovereignty. The case involved a juvenile delinquency proceeding against an enrolled member of the Menominee Indian Tribe for acts that had occurred off the reservation. The New Mexico Supreme Court has also upheld State service of process on an Indian while on the reservation for off-reservation acts.[139] In contrast, the Arizona court in *Francisco v. State*, 556 P.2d 1 (Ariz. 1976) held that State service on an Indian while on the reservation was invalid. *Francisco* involved a mother and alleged father who were both Papago Indians; the mother and child had lived in Tucson, Arizona since the child's birth, and the father lived on the reservation. Action was brought in State court to establish paternity. The Pima County Deputy Sheriff served the alleged father while he was on reservation, and the alleged father subsequently challenged the State court's personal jurisdiction over him. The Arizona Supreme Court pointed out that Arizona lacked Public Law 280 jurisdiction. The court concluded, therefore, that the State could not extend its laws to Indian reservations such that a deputy sheriff could validly serve an Indian on the reservation.[140] In another case, Arizona attempted to accommodate concerns about interference with Tribal sovereignty by authorizing service of process within Indian country only when process is served by mail, as in the case of long-arm jurisdiction over out-of-State defendants.[141]

When State service is made on a non-Indian on the reservation, the court is less likely to find interference with Tribal sovereignty. In the later case of *State v. Zaman*,[142] the Arizona Court of Appeals emphasized the distinction between State service on an Indian within the boundaries of a reservation (not allowed under prior State case law) and State service on a non-Indian on the reservation. Citing prior U.S. Supreme Court decisions, it upheld the State service of process on a non-Indian on the reservation. It also commented that Public Law 280 was irrelevant because the law was a method whereby a State may assume jurisdiction over reservation Indians: "Arizona does not need Public Law 280 to extend its laws to non-Indians within the boundaries of a reservation."[143]

A comprehensive analysis of service of process in Indian country is found in Letter Opinion 94-L-245, written by the then Attorney General of North Dakota. The Attorney General was responding to an inquiry as to whether a county sheriff could enter the reservation to serve a notice of levy upon an Indian residing on the reservation. The Letter Opinion begins by stating that the response assumes that the State court had jurisdiction over the matter and the parties. Although it also predates *Nevada v. Hicks*, the Letter Opinion makes the following points, which are still valid:

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[138] *In Interest of M.L.S.,* 157 Wis. 2d 26, 458 N.W.2d 541 (1990).
[139] *See State Securities, Inc. v. Anderson,* 84 N.M. 629, 506 P.2d 786 (1973).
[140] *Accord Martin v. Denver Juvenile Court*, 493 P.2d 1093 (Colo. 1972). Note that both of these cases were decided before the Supreme Court's ruling in *Nevada v. Hicks*, 533 U.S. 353 (2001).
[141] *See Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989).
[142] 194 Ariz. 442, 984 P.2d 528 (1999). Note that there are several Arizona appellate opinions arising from the original trial case.
[143] 194 Ariz. at 443-4, 984 P.2d at 529-30.

1. On a reservation, State authority over a nonmember Indian or non-Indian is more extensive than that over Tribal members.[144]

2. Prior to *Nevada v. Hicks*, State courts had split in their decisions regarding the service of process by a sheriff upon an Indian in Indian country.[145]

3. If Tribal law does not allow Tribal authorities to aid a sheriff in the service of process, service by the State sheriff is more likely to be held valid; the court is less likely to find infringement of Tribal sovereignty if the Tribe chose not to exercise its right of self-government in this area.[146]

4. If State law requires personal service of process, notice should be served in cooperation with Tribal authorities.[147]

5. State law may provide for a less intrusive form of service of process, such as service by mail.

6. Another way to avoid the jurisdictional problem is to have service conducted by Tribal law enforcement officers, assuming State law does not restrict service to State officers.[148]

Service on a defendant will not remedy an invalid exercise of subject matter jurisdiction. For example, when a State trial court lacks subject matter or personal jurisdiction over an Indian defendant, service on the individual while he or she is on the reservation is insufficient to give the State court jurisdiction over the defendant**.**[149]

## TRIBAL PERSONAL JURISDICTION

**Bases for Personal Jurisdiction** Assuming subject matter jurisdiction, Tribal codes typically assert personal jurisdiction in a civil action over any person who is a

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[144] *See, e.g., State v. Zaman*, 194 Ariz. 442, 984 P.2d 528 (1999).
[145] *Compare, e.g., State Sec., Inc. v. Anderson*, 506 P.2d 786 (N.M. 1973); *Little Horn Bank*, 555 P.2d 211 (Mont. 1976); *LeClair v. Powers*, 632 P.2d 370 (Okla. 1981)(upholding State service of process on Indians while they are within the boundaries of the reservation) *with Francisco v. State*, 556 P.2d 1 (Ariz. 1976); *Tracy v. Superior Ct.,* 810 P.2d 1030 (Ariz. 1991) (disapproving of State service upon Indians in Indian country).
[146] *But see* Comment, *A World without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country,* 61 U. Chi. L. Rev. 707, 725 (1994), positing that application of State law impinges on Tribal sovereignty even when the Tribe has not explicitly addressed the issue.
[147] In *Nevada v. Hicks*, the State game warden had obtained a Tribal warrant, in addition to his State court warrant, and had asked Tribal authorities to accompany him when he served the process on Hicks in his home on the reservation.
[148] The Letter Opinion notes dicta in *Francisco v. State* in which the court noted that an otherwise invalid sheriff's service upon an Indian in Indian country "could have validly been effected through the Papago Indian authorities who are vested with power to serve process pursuant to Tribal law. 556 P.2d 1 at 2, n. 1 (1976).
[149] *See, e.g., Nenna v. Moreno,* 132 Ariz. 565, 647 P.2d 1163 (1982); *State ex. rel. Flammond v. Flammond,* 190 Mont. 350, 621 P.2d 471 (1980).

member of the Tribe.[150] There may be limits to the exercise of civil jurisdiction over a nonmember Indian or non-Indian. For example, the Civil and Criminal Law and Order Code of the Hualapai Tribe (Arizona) provides that the Tribal court:

> shall have jurisdiction of all suits wherein the defendant is a member of the Tribe and between members and non-members which are brought before the Court, provided that the Tribal court shall not have jurisdiction over non-Indian defendants in civil matters, unless said non-Indian shall have submitted himself to said jurisdiction. Submission of jurisdiction shall be by written stipulation or oral stipulation in open court or by filing an action in Tribal court against an Indian.

Ch. 2, § 2.1 (1975). The Three Affiliated Tribes of Fort Berthold Reservation (North Dakota) limit civil jurisdiction in domestic relations cases to actions involving enrolled members of the Tribe. Section 2(a)(3).

Regulations governing Courts of Indian Offenses authorize jurisdiction over "all suits wherein the defendant is a member of the Tribe or Tribes within their [CFR court's] jurisdiction, and of all other suits between members and nonmembers which are brought before the [CFR] courts by stipulation of both parties." 25 C.F.R. § 11.22.

Tribal codes usually also assert personal jurisdiction over persons who are present, domiciled, or resident on the Tribal reservation or other Tribal lands.[151] Some codes specifically address non-Indians in that context. For example, the Tribal Code of Keweenaw Bay Indian Community of L'Anse Indian Reservation (Michigan) States the following:

> Any person, whether Indian or non-Indian, and whether natural or created by law, who is found within the territorial jurisdiction of this Court as defined by Section 1.501 . . . shall be subject to the jurisdiction of this Court. Non-Indian persons, by their residence, employment, or by their participation in any other activity within the territorial jurisdiction of this Court impliedly consent and submit to the provisions of this Code and the jurisdiction of this Court.

Ch. 1.5, § 1.502.

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[150] *See, e.g.*, Law and Order Code of the Fort McDowell Yavapai Community, Arizona, Section 1-7.Civil Jurisdiction, B (1)(b) (2000); Coquille Tribal Code, Tribal Court Ordinance 610.200(c)(1). The Coquille Tribal Code also asserts personal jurisdiction over persons who are eligible for Tribal enrollment, or who have consented to the court's jurisdiction by marriage to a Tribal member.

[151] *See, e.g.*, Confederated Salish & Kootenai Tribes of the Flathead Reservation, Tribal Laws, 1-2-104(2)(a); Law and Order Code of the Fort McDowell Yavapai Community, Arizona, Section 1-7.Civil Jurisdiction, B (1)(a) (2000); Coquille Tribal Code, Chapter 610.200(c)(3).

The Law and Order Code of the Coeur d'Alena Tribe of Indians (Idaho) asserts that "[a]ny non-Indian who voluntarily comes onto or lives within the exterior boundaries of the Reservation hereby . . . consents to jurisdiction." 1-2.01.

The Hualapai Tribe (Arizona) ensures that nonresidents are aware of the significance of their presence on the reservation. Pursuant to the Tribal code, a sign must be erected at all entrances to the Reservation informing the general public that they have consented to Tribal jurisdiction upon entering the Reservation.[152]

If the respondent is a nonresident, many Tribal codes have long-arm statutes authorizing the assertion of personal jurisdiction under circumstances similar to State long-arm statutes.[153]

The definition of "residence" was raised in the case of *Father v. Mother*, No. 3 Mash. 204 (Mashantucket Pequot Tribal Court 1999). Denying the defendant's Motion for Relief, the Tribal court found that the court possessed exclusive subject matter jurisdiction over a paternity and custody action brought by the member father if the child was residing on the reservation at the time the original action was begun. The mother, a non-member Indian who lived in the State of Virginia, had argued that the child did not reside on the reservation; she characterized the child's 10-month stay there as a visit. In ruling that the child was a resident of the reservation, the court rejected "the historically gendered and sexist rules of the western common law" that presumed the child's residence was that of the mother's. Rather, it looked to Tribal law with its focus on the well-being of the Tribal member children:

> The Family Relations Law and Child Protection Law does not require a Tribal member child to have resided on Nation lands for any minimum amount of time before this Court may exercise its jurisdiction over him or her. In Tribal law, this is not an unusual omission. The lack of a requirement that residency be of a minimum duration reflects the special ties of native Americans to their ancestral homelands and reservations, and to the Tribal history, culture and extended family relations that are alive there. . . .. Thus for the Native American, the reservation is unlike any other place on the face of the earth.

**Service of Process** Finally, a valid exercise of Tribal court jurisdiction requires valid service of process. When the civil action is being heard by a Tribal court, service should comply with the relevant Tribal code. Most Tribal codes allow personal service; service by registered mail, return receipt requested; or, in certain circumstances, service by publication.[154]

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[152] Civil and Criminal Law and Order Code of Hualapai Tribe Ch. 1, § 1.1 (1975).
[153] *See, e.g*., Sisseton-Wahpeton Sioux Tribe, Chapter 45 Act of Non-Domiciliaries, Section 45-01-01 Personal Jurisdiction by Act of Non-Domiciliaries.
[154] *See, e.g*., Crow Law and Order Code, 1-153, 1-154.

The Tribal code may also specify who may serve process.[155] For example, the Nez Perce Tribal Code authorizes service by any person who is not a party and who is at least 18 years old. At the plaintiff's request, the court may require service of process by a Tribal police officer or other person specially appointed by the court.[156]

[155] *See, e.g.*, Law and Order Code of the Kalispel Tribe of Indians, Ch. 3, 3-401.
[156] Nez Perce Tribal Code, Chapter 2-2, Rule 4(c).

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# CHAPTER THREE
# TABLE OF STATUTES AND AUTHORITIES

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## CHAPTER FOUR
## JURISDICTION IN DOMESTIC LAW CASES

The myriad Congressional acts and Supreme Court cases -- often reflecting inconsistent policies, philosophies, and interpretations -- have resulted in complex jurisdictional issues.[157] This is true in the domestic relations area.

Congress has recognized that a Tribe has a strong interest in "preserving and protecting the Indian family as the wellspring of its future."[158] The Supreme Court has also stressed the importance of Tribal power to regulate internal domestic relations.[159] But inherent jurisdiction is not conclusive in family law disputes in which one of the parents is a non-Indian or nonmember Indian.

In 1989, a committee of the Conference of Chief Justices mailed a survey to various individuals in the 32 States with Federally recognized Indian country. Twenty-one States reported disputed jurisdiction cases.[160] The most frequently cited case problems arose under the Indian Child Welfare Act. However, domestic relations disputes – divorce, child custody and support – were next in frequency. Disputes arose over which court system had jurisdiction over the establishment of paternity and support, and over enforcement of existing orders. In a more recent survey of Tribal courts, 83% of responding Tribal judges cited trouble enforcing their decisions in State courts.[161]

Although cooperation among Tribes and States has greatly improved since then, including an increase in the use of intergovernmental and cooperative agreements, issues still arise. The next section of this monograph will focus on jurisdictional and operational issues arising in paternity and child support cases in which at least one of the parties is an American Indian.

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[157] *Yakima v. Washington*, 439 U.S. 463, 470 n.7 (1979).
[158] H.R. Rep. No. 95-1386 at 19.
[159] *See Montana v. United States*, 450 U.S. 544 (1981). *See also Fisher v. District* Court, 424 U.S. 382 (1976).
[160] Rubin, *supra* note 7.
[161] Stoner and Orona, *supra* note 27.

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# CHAPTER FIVE
# PATERNITY ESTABLISHMENT

Parentage is at the heart of the determination of a duty to pay support. When children are born outside of marriage, the first step in a support establishment action is usually determination of paternity. A State IV-D agency does not pursue paternity establishment in public assistance cases where *good cause* exists.[162] "Good cause" is an exception to the public assistance recipient's obligation to cooperate with the State IV-D office in its efforts to establish paternity. A finding of good cause means that State IV-D efforts to establish paternity, or to establish and enforce a child support obligation, cannot proceed without a risk of harm to the custodial parent (or caretaker relative) and child. Nor must a State IV-D agency establish paternity when the IV-D agency has determined that it would not be in the best interest of the child in a case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending.[163] Federal regulations provide that the Tribal IV–D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the Tribal IV–D agency, it would not be in the best interests of the child to establish paternity.[164]

## DETERMINATION OF PATERNITY

**Voluntary Acknowledgment** To be eligible to receive Federal IV-D funding, States and Tribes must operate a child support program that provides for the establishment of paternity. Federal regulations setting the paternity establishment requirements for a State IV-D program appear at 45 C.F.R. § 303.5. Federal regulations setting paternity establishment procedures that must be part of a Tribal IV-D program appear at 45 C.F.R. § 309.100.

One of the paternity establishment methods that State and Tribal IV-D programs must provide is a voluntary acknowledgment of paternity. There are no Federal regulations prescribing the voluntary acknowledgment process for Tribes. However, State child support programs must ensure that the civil process for acknowledging paternity is available at hospitals and birthing centers.[165] This process is often called "in-hospital acknowledgment." Unmarried parents are not required to sign a paternity acknowledgment but they must be given the opportunity to do so at each hospital and birthing center in the State. As part of this process, the putative father can consult with an attorney and may request genetic tests prior to signing the acknowledgment. Once the acknowledgment is signed, it is filed with the State registry of birth records. State law must provide that the signed paternity acknowledgment creates a rebuttable, or – at State option – a conclusive presumption of paternity and can be the basis for a support order without further paternity proceedings.[166] Either parent has 60 days, from the date an acknowledgment of paternity is signed, to revoke it for any reason. The Rescission Form must be in writing. After this 60-day period has expired, a parent must go to court

[162] 45 C.F.R. § 302.70.
[163] 45 C.F.R. § 302.70.
[164] 45 C.F.R. § 309.100.
[165] 45 C.F.R. § 303.5(g)(2).
[166] 45 C.F.R. §§ 302.70(a)(5)(iv), (vii).

to challenge it. If a parent does bring an action in court after the 60-day time frame, the bases for challenging the acknowledgment are limited to fraud, duress, or a material mistake of fact.

States must give full faith and credit to a determination of paternity made in another State through the paternity acknowledgment process.[167] There is no such requirement on Tribes, which are not subject to the Federal Full Faith and Credit clause of the Constitution in the absence of express legislation. Tribal courts may recognize such determinations pursuant to comity. See the discussion herein.

**Genetic Testing** States must have laws requiring a child and all other parties in a contested paternity case to submit to genetic tests upon the request of any such party.[168] They must also have procedures which provide that any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence; if no objection is made, a written report of the test results is admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. Finally, States must have laws that create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability of the alleged father being the father of the child.[169]

Tribal IV-D programs must have procedures requiring that, in a contested paternity case (unless otherwise barred by Tribal law), the child and all other parties must submit to genetic tests upon the request of any such party.[170] The phrase "otherwise barred by Tribal law" is intended to cover situations in which, either by action of one or both of the parties or the application of Tribal law, or both, paternity has already been conclusively determined and may not be reconsidered. In such cases, genetic testing to challenge the paternity determination would not be authorized.[171]

**Judicial or Administrative Proceeding** In the absence of an acknowledgment, a State IV-D plan must provide for the establishment of paternity by bringing a legal action (before a court or administrative forum) in accordance with State law.[172] A Tribal IV-D plan must provide for the establishment of paternity "by the process established under Tribal law, code, and/or custom." [173] Federal regulations expressly state that establishment of paternity pursuant to a Tribal IV-D program requirement has no effect

[167] 45 C.F.R. § 302.70(a)(11).
[168] 45 C.F.R. § 302.70(a)(5) and § 303.5(d) and (e).
[169] 45 C.F.R. §§ 302.70(a)(5)(v), (vi).
[170] 45 C.F.R. § 309.100(a)(3).
[171] 69 Fed. Reg. 16,638 at 16,658 (2004): "Examples of such a paternity determination would include a voluntary admission of paternity or circumstances under which the Tribe has other means of recognizing paternity under Tribal law. A Tribe, through its own custom, tradition or procedure, may recognize a man as the father or may preclude a man who holds himself out to be the father from challenging paternity. Similarly, a Tribe may have a conclusive presumption of paternity when a child is born to married parents or if a noncustodial parent has been validly served in a paternity proceeding and failed to contest paternity in such proceeding."
[172] 45 C.F.R. § 302.31.
[173] 45 C.F.R. § 309.100(a)(1).

on Tribal enrollment or membership.[174] However, in reality, paternity establishment can affect enrollment if a tribe's enrollment process requires a birth certificate and/or descent line. In such circumstances, if a man's name is on the birth certificate, the child can be enrolled into the tribe -- regardless of whether the name is on the certificate due to a paternity adjudication, a default paternity order, or a paternity acknowledgment, and regardless of whether the man is the child's biological father. Therefore, State and Tribal child support workers need to remember the importance of paternity establishment for potential Tribal children.

In a purely judicial setting before a State or Tribal court, a petition or complaint is filed requesting the establishment of parentage. Notice of the action is served, usually by certified mail or personal service, upon the alleged father. If the alleged father does not admit paternity, a trial is scheduled at which time both parties present evidence, including relevant testimony or facts meeting any presumptions recognized by the jurisdiction, and any genetic test results. Based on an evaluation of the evidence, the judicial officer decides the issue of paternity.

If the defendant has failed to respond after being served with the appropriate case paperwork (i.e., summons and pleading seeking paternity establishment), Federal regulations governing State IV-D programs require the IV-D agency to seek entry of a default order.[175] There is no such requirement on Tribal IV-D programs.

Judicial proceedings are available in both private cases and cases brought by a child support agency. In States using an administrative process to determine paternity, the administrative proceedings are only available in cases brought by a child support agency. In a typical administrative process, the alleged father is notified of the allegation of paternity and of a scheduled conference time. At the appointed time, he has the opportunity to acknowledge paternity. If he does not acknowledge paternity, an administrative hearing before an administrative hearing officer is scheduled. At the hearing, both parties present evidence, including relevant testimony of facts meeting any presumptions recognized in the jurisdiction, and any genetic test results. Based on an evaluation of the evidence, the administrative hearing officer decides the issue of paternity. Some Tribes, such as the Navajo Nation, have also established an administrative process for child support cases.

Tribes that do not receive Federal IV-D funding may also provide forums for the establishment of paternity. They do not need to meet Federal IV-D regulatory requirements.

Paternity establishment after the death of the alleged father is an issue that may arise among Indian children – not for support purposes, but because of the need to establish paternity to become enrolled with the Tribe. In some circumstances the Department of Interior may also determine the issue in a probate proceeding involving Indian trust land.

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[174] 45 C.F.R. § 309.100(d).
[175] 45 C.F.R. § 302.70(a)(5)(viii).

Pursuant to the Full Faith and Credit for Child Support Orders Act,[176] States and Tribes are required to recognize and enforce valid child support orders. If such orders are premised on a finding of paternity, the State or Tribe must honor such paternity findings.[177] States are also required by Federal law to give full faith and credit to "stand alone" paternity determinations made in another State, whether through an administrative process or a judicial process.[178] Tribes are not subject to this requirement.

**Custom** Reuniting Indian fathers and their children is important for a number of reasons. Knowing who and where the father is obviously affects the children and other family members who want to reclaim kinship ties. In Native American culture, fathers are expected to provide food and shelter for their families. They are also traditionally viewed as teachers, guides, role models, leaders, and nurturers. Determination of paternity may also be a step toward Tribal enrollment. "Tribal membership is directly related to Federal benefits. Membership also has implications for legal jurisdiction, inheritance or restricted or trust lands, and voting rights."[179]

In developing regulations that govern Tribal IV-D programs, the Federal government has recognized that Tribes may provide for the legal determination of paternity pursuant to custom and religious practice. Such regulations define "Tribal custom" to make it clear that the term means unwritten law that has the force and effect of law.[180]

## TRIBAL OR STATE SUBJECT MATTER JURISDICTION

The decision of whether a Tribal court or State court has exclusive or concurrent jurisdiction in a paternity case is influenced by a number of factors: whether the State is a Public Law 280 State with civil jurisdiction over domestic matters, whether the mother and alleged father are members of the same Tribe, whether one party is an Indian and the other is not, whether a party resides on a reservation or Tribal land, whether conception occurred on or off the reservation, whether the mother applied for public assistance from the State and the State IV-D agency is bringing the paternity action, whether there is a Tribal forum for a paternity action, and which court is making the initial decision regarding jurisdiction. It is impossible to draw many "bright lines" because the court rulings often conflict. For the purpose of the following discussion, we will initially focus on whether the parents in a particular case are American Indian. We will then note other factors that seemed decisive for the court. State child support agencies should keep in mind that if paternity has already been determined under Tribal

[176] 28 U.S.C. § 1738B.
[177] *See* 69 Fed. Reg. 16,658 (March 30, 2004).
[178] 45 C.F.R. § 302.70(a)(11).
[179] Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Strengthening the Circle: Child Support for Native American Children at 40 [hereinafter referred to as Strengthening the Circle].
[180] 45 C.F.R. § 309.05.

law, which usually includes custom, a State must give full faith and credit to that determination and should not attempt to initiate a State action for paternity establishment.

**Member Indian Mother and Member Indian Alleged Father/Reside on Reservation**

***Public Law 280 Jurisdiction*** In general, a State with complete Public Law 280 civil jurisdiction has jurisdiction over domestic relations actions, to which Indians are parties, and which arise in Indian country.[181] A case in point is *Becker County Welfare Department vs. Bellcourt*, 453 N.W.2d 543 (Minn.1990). In this case, the mother, alleged father, and child were enrolled Tribal members who lived on White Earth Reservation in Minnesota. As a result of the mother's receipt of public assistance, Becker County initiated a paternity action against Bellcourt in a State court. The court adjudicated paternity and ordered support. Bellcourt appealed on the issue of subject matter jurisdiction. Becker County pointed out that Public Law 280 conferred jurisdiction over civil causes of action in Minnesota to which Indians are parties. The father argued that the county's action was not based on a civil law of "general application to private persons," but rather was regulatory in nature and therefore outside of Public Law 280.

The Minnesota Court of Appeals disagreed. It concluded that, in seeking reimbursement of public assistance, the county was not acting in a regulatory capacity but was "only acting on behalf of a private party who has assigned her rights to establish paternity and recover child support."[182] Because the action was a civil action of "general application to private persons," the State trial court had properly exercised its Public Law 280 jurisdiction. Noting that "the legislative history of Pub. L. 280 indicates that the statute was intended to redress the lack of adequate Indian forums,"[183] the Court of Appeals noted that the constitution of the Minnesota Chippewa Tribe did not authorize creation of Tribal courts to deal with domestic relations matters: "Thus, even though the tribe has a strong interest in self-governance and in determining the parentage of Indian children, Congress cannot have intended that there be no forum to execute the AFDC reimbursement program it mandates."[184] Where conception occurred appeared to be an irrelevant factor in the court's analysis since it was not discussed.[185]

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[181] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[182] 453 N.W.2d 543, 544.
[183] *Id.*
[184] 453 N.W.2d 543, 544.
[185] *State v. W.M.B.*, 159 Wis. 2d 662, 465 N.W.2d 221 (1990) reached a similar conclusion, ruling that a State court may have concurrent jurisdiction to establish paternity. In *State v. W.M.B.*, the parties and child were all members of the same tribe, who lived on the reservation. The action was a contempt proceeding in which the father attacked the underlying paternity order as void. Using a federal preemption and infringement analysis, the court first concluded that federal regulations cited by the respondent as establishing federal preemption of State court jurisdiction did not do so. It then examined whether State jurisdiction to establish paternity would infringe on the right of tribes to establish and maintain their Tribal government. It concluded that it would not. The court found that when paternity and child support were first established by a State trial court in 1977, there was no Tribal code that focused on paternity and child support and no Tribal court existed at the time. In a later Tribal court proceeding

***No Public Law 280 Jurisdiction*** In the absence of Public Law 280 jurisdiction, if both parents are enrolled members of the same Tribe, who live in Indian country, State courts have held that the Tribal court has exclusive jurisdiction. The decision in *Jackson County Child Support Enforcement Agency v. Swayney*[186] is illustrative.

In *Jackson County,* the mother, alleged father, and child were all enrolled members of the Eastern Band of Cherokee Indians living on the reservation. The mother had applied for public assistance from the State of North Carolina, and had assigned her right to establish paternity and collect child support to the State. The State agency filed a paternity action in State court; the alleged father challenged State court jurisdiction. On appeal, the North Carolina Supreme Court held that the State court lacked subject matter jurisdiction over the paternity matter. Using the *Williams v. Lee* test, the court stated:

> The determination of the paternity of an Indian child is of special interest to Tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations. Thus, exclusive Tribal court jurisdiction over the determination of paternity, where the defendant is an Indian living on the reservation, is especially important to Tribal self-governance. The State's interest in having this matter litigated in its own courts Is less compelling . . . [and] the State may resort to the Court of Indian Offenses to secure a judgment or order determining the paternity of the child, thus meeting [the Federal AFDC] requirement.[187]

The Supreme Court of North Dakota also held that a Tribal court had exclusive jurisdiction to determine paternity when both parents and the children were enrolled members of the same tribe, conception occurred on the reservation, and the alleged father lived on the reservation. In *M.L.M. v. L.P.M*., 529 N.W.2d 184 (N.D. 1995), the court concluded that the mother's period of residency off the reservation and the alleged father's off-reservation employment were not significant enough to overcome the danger that "the exercise of such jurisdiction would undermine the authority of the Tribal courts over reservation affairs and thereby infringe on the right of the Indians to govern themselves."[188] In other cases, the North Dakota Supreme Court has held that the State's provision of public assistance[189] and a defendant's delay of eight years in raising

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involving custody, the court noted that the Tribal court had not questioned the State's jurisdiction in the paternity and support proceeding. NOTE: The court mentions a 1976 Governor proclamation retroceding jurisdiction over the Menominee Indian Reservation "pursuant to federal law," but does not identify Public Law 280 by name. Wisconsin currently has Public Law 280 civil jurisdiction over all Indian country within the State, with the exception of the Menominee Reservation. See *supra* note 101.

[186] 352 S.E.2d 413 (N.C. 1987).

[187] 352 S.E.2d at 418-9. *Accord Jackson County Smoker v. Smoker, Jr.*, 341 N.C. 182, 459 S.E.2d 789 (1995).

[188] 592 N.W.2d 184, 186, citing *McKenzie County Social Serv. Bd. v. V.G*., 392 N.W.2d 399, 402 (N.D. 1986).

[189] *See McKenzie County Social Servs. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986); *McKenzie County Social Serv. Bd. v. C.G.,* 633 N.W.2d 157 (N.D. 2001).

subject matter jurisdiction[190] are each insufficient to outweigh the Tribe's significant interest in Tribal determination of parentage of children of Tribal members when conduct occurred on the reservation.

South Dakota courts have also concluded that there is exclusive Tribal court jurisdiction in a paternity action in which both parents are enrolled Tribal members domiciled on the reservation.[191]

In *Davis v. Means,*[192] the Navajo Tribal court emphasized how interwoven a child's Indian heritage is with paternity establishment and why the Tribal court has jurisdiction to resolve paternity, including the authority to order genetic testing: "The Navajo maxim is this: 'It must be known precisely from where one has originated.' The maxim focuses on the identity of a person (here the child) and his or her place in the world, and is a crucial component of the tenet of family cohesion."[193] The court noted that establishing paternity with reasonable certainty was essential for the family to achieve stability and harmony.

In contrast to the above decisions is the Wisconsin case of *State v. W.M.B*.[194] The parties and child were all members of the Menominee Tribe, who lived on the Menominee reservation. The action was a contempt proceeding in which the father attacked the underlying State paternity order as void. He argued that the Tribal court had exclusive jurisdiction over any paternity action between Tribal members living on the reservation because in 1976 Wisconsin had retroceded its jurisdiction over the Menominee Indian Reservation, prior to initiation of the State action in 1977. In its analysis, the Court of Appeals noted that there were two barriers to a State's exercise of jurisdiction relating to Indian matters. First, was there Federal law preempting a State's authority to act? Second, did the State action infringe upon the rights of tribes to establish and maintain Tribal government? The court noted that "Wisconsin has recognized a trend toward reliance on Federal preemption and away from the idea of inherent Indian sovereignty as an independent bar to State jurisdiction."[195]

The court first concluded that the two Federal regulations cited by W.M.B as establishing Federal preemption – 25 CFR 11.22 and 11.30 – were enabling legislation of the Court of Indian Offenses and, as such, were not Federal statutes establishing Federal preemption of the exercise of subject matter jurisdiction by State courts over paternity and child support actions involving members of Indian Tribes. The court then examined whether State court jurisdiction unduly infringed on Tribal self-governance. The court was influenced by the fact that, despite Wisconsin's retrocession of

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[190] *Id.*

[191] *See, e.g., South Dakota ex rel. Jealous of Him v. Mills*, 627 N.W.2d 790 (2001); *Harris v. Young*, 473 N.W.2d 141, 144 (S.D. 1991) (citing *Fisher v. Dist. Court of Sixteenth Jud. Dist*., 424 U.S. 382 (1976); *Wells v. Wells*, 451 N.W.2d 402, 405 (S.D. 1990)).

[192] 21 Indian L. Rptr. 6125 (Navajo 1994).

[193] 21 Indian L. Reptr. 6125, 6127.

[194] *State v. W.M.B.*, 159 Wis. 2d 662, 465 N.W.2d 221 (1990). At the time of the State court action, Wisconsin had retroceded its Public Law 280 jurisdiction over the Menominee Tribe. See *supra* notes 101 and 185.

[195] 465 N.W.2d 221, 223.

jurisdiction, the Menominee Tribe had not "exercised its sovereign governmental authority in the resolution of paternity issues" in 1977. At the time of the State court paternity hearing, there was no Tribal court and the record was silent about the existence of any Tribal code dealing with paternity "that could demonstrate Tribal interest in an assertion of jurisdiction." In fact, the court noted, the Tribal court had subsequently determined custody issues in the case, without questioning the State's jurisdiction to adjudicate paternity. It held that the State court's judgment of paternity and support was not void for lack of subject matter jurisdiction.

It therefore appears that, at least for one State court, the availability of a Tribal forum or statute for paternity establishment is an important factor the court will consider in deciding whether State jurisdiction infringes upon Tribal self-government.

**Member Indian Mother and Member Indian Alleged Father/One Member Resides off Reservation**

***Public Law 280 Jurisdiction*** In general, a State with complete Public Law 280 jurisdiction over civil causes of action involving Indians has jurisdiction over domestic relations matters if the cause of action occurred in Indian country.[196] None of the researched paternity cases discussed Public Law 280 jurisdiction under facts in which one of the Tribal members resided outside of Indian country.

***No Public Law 280 Jurisdiction*** In the absence of Public Law 280 jurisdiction, when both parents are enrolled members of the same Tribe but one member lives off the reservation, State courts will conduct a *Williams* preemption-infringement analysis. If one of the parties files a paternity action in State court and jurisdiction is challenged, the State court will likely focus on where the cause of action arose. If conception occurred in Tribal territory, the State court will most likely find that the Tribal court has exclusive jurisdiction. A case in point is *McKenzie County Social Service Board v. C.G.*, 633 N.W.2d 157 (N.D. 2001). The case involved an Indian mother and alleged father from the same Tribe. Conception occurred on the reservation. The mother received public assistance from the State of North Dakota, which filed the paternity and support action in State court on her behalf. The alleged father lived off the reservation at the time the lawsuit was filed. When the alleged father failed to appear at the hearing, the State court entered a default order establishing paternity and support and ordering reimbursement of public assistance. Eight years later, the father moved to set aside the judgment for lack of subject matter jurisdiction. The court treated the motion as a Rule 60b motion for relief from a final judgment because the judgment was void.

The North Dakota appellate court used the infringement test to determine whether State court jurisdiction was proper: Would State court jurisdiction undermine the authority of Tribal courts over reservation affairs and infringe on the right of Indians to govern themselves? The court concluded that determination of the parentage of a child of Indian Tribal members was intimately connected with the right of reservation Indians to make their own laws and be ruled by them. The State provision of public

[196] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).

assistance, Title IV-D's requirements to recover support with the possibility of Federal financial sanctions for nonperformance, and the father's residency off the reservation were not enough to override that Tribal interest. The court concluded that the State district court had lacked jurisdiction to determine paternity in this case and the order was void. Based on the facts, the appellate court ruled that the Tribal court had exclusive jurisdiction.[197]

In contrast is the case of *Anderson v. Beaulieu*, 555 N.W.2d 537 (Minn. 1996). In *Anderson,* the mother, alleged father, and child were all members of the same Tribe. The mother and child lived off the reservation; the mother received public assistance from the county. At the time of the paternity and support action, which had been brought in State court, the alleged father worked off the reservation. His motion to dismiss for lack of subject matter jurisdiction was denied. After he obtained employment on the reservation, he brought a motion for reconsideration. The Minnesota appellate court asked whether the State action would undermine the tribe's right of self-government. Citing the case of *Jackson County CSEA v. Swayney*, but distinguishing the present facts, the court concluded that State court jurisdiction had not impinged on the tribe's self-governance.[198] Although the mother, father, and child were all members of the same Tribe, the mother and child lived off the reservation. Second, the action arose off the reservation because the mother had applied for AFDC through the county.[199] Finally, the court concluded that the "tribe's interest [in paternity establishment] is outweighed by the State interest in securing child support payments as required by the AFDC program." NOTE: When the paternity action began, the father was employed off the reservation. The court pointed out that by working off the reservation and voluntarily agreeing to genetic testing, he had voluntarily submitted himself to State jurisdiction. It is unclear to what extent those factors were the main basis for the court's holding versus the results of its infringement analysis.

*South Dakota ex rel. Jealous of Him v. Mills*, 627 N.W.2d 790 (S.D. 2001) also involved two member Indians, one of whom was an alleged father domiciled off the reservation. The court upheld the State trial court's jurisdiction in a paternity action between Tribal members: "When one party becomes domiciled off the reservation, State and Tribal courts enjoy concurrent jurisdiction, and the case may be adjudicated by whichever court first obtains valid personal jurisdiction." The court emphasized that it would have ruled differently if both members had been domiciled on the reservation.

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[197] *Accord In re M.L.M.*, 529 N.W.2d 184 (N.D. 1995) (where both parents were Tribal members and conception occurred on the reservation, the fact that the child was born off the reservation, that the mother lived off the reservation for a period of time, and that the alleged father lived off the reservation and was employed off reservation did not outweigh the right of Indians to govern themselves).

[198] Unlike the facts in *Swayney*, upon which the appellate court had concluded that the Tribe's interest would be infringed if the State court asserted jurisdiction over paternity, the court in *Anderson* concluded that the Tribe's interest would not be infringed if the State court asserted jurisdiction in this case. Here the mother and child lived off the reservation, the father worked off the reservation, and the father had submitted to State administered genetic testing.

[199] It is interesting that the court considered the cause of action to have arisen where the mother applied for public assistance as opposed to where conception occurred. Because the court determined that the cause of action arose outside of Indian country, Minnesota's Public Law 280 jurisdiction did not come into play. The court did not mention Public Law 280 in its analysis.

If the plaintiff files the paternity action in Tribal court and the defendant challenges subject matter jurisdiction, the Tribal court will most likely reject the challenge. When both parties are enrolled members of the same Tribe, the Tribal court will most likely conclude that it has jurisdiction, regardless of the residence of the parties, because of the importance of paternity establishment to Tribal interests. If conception occurred on the reservation, there is a strong argument for exclusive Tribal jurisdiction.

In summary, when both parties are members of the same Tribe but one of the Tribal members lives off the reservation, the facts of the specific case – where conception occurred, whether public assistance was provided by the State, whether there are consensual contacts between the defendant and the forum -- may be dispositive regarding jurisdiction.

**Member Indian Mother and Member Indian Alleged Father/Both Parents Reside off Reservation** No cases were found with this fact pattern. Although all parties lived off the reservation in *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), the parties were not both member Indians. See discussion below. In Attorney General's Opinion 2000-F-07, the North Dakota Attorney General discusses hypothetical fact patterns regarding paternity actions involving enrolled Tribal members. Noting that there is no bright-line test for determining jurisdiction, she concluded that under North Dakota law, which is respectful of Tribal interests, it would be appropriate for a county attorney to invoke State court jurisdiction when conception and the application for public assistance take place off the reservation, and all parties live off the reservation; in her opinion, State court jurisdiction in such a case would not unduly infringe upon Tribal sovereignty. A Tribal court may reach a different conclusion if it finds that such action does constitute an undue infringement.

**Member Indian Mother and Non-Member/Non-Indian Alleged Father**

***Public Law 280 Jurisdiction*** In general, a State with complete Public Law 280 jurisdiction over civil causes of action, has jurisdiction over domestic relations matters that occur in Indian country located within that State, involving Indians or to which Indians are parties.[200] None of the researched paternity cases discussed Public Law 280 jurisdiction under facts involving one party who was a nonmember Indian or non-Indian.

***No Public Law 280 Jurisdiction*** In the absence of Public Law 280 jurisdiction, when the alleged father is a non-Indian, and the action is filed in State court, State courts have usually engaged in a *Williams* preemption-infringement analysis. The analysis is the same, regardless of whether the party is a non-member Indian or a non-Indian.[201] A State decision that emphasizes that point is *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002). The case involved parents from different Tribes, who lived off the reservation. When the mother initiated a State action to establish paternity and support,

[200] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[201] *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353, 377 n. 2 (2001).

the father challenged State court jurisdiction. Upholding the trial court's exercise of jurisdiction, the North Dakota court stated that, as a nonmember of the mother's Tribe, the father had the same standing as a non-Indian, and thus could not assert the Tribe's right of self-government against the Tribe's own member. In other words, the "infringement test" could not be used offensively by a non-member Indian against a member Indian who had chosen to file her paternity action in State court.[202]

The court further held that when two Tribes were involved, each Tribe needed to conduct the *Williams* infringement test separately in the context of its own Tribe and Tribal member. Here, the court balanced the Tribe's "significant interest in determining the parentage of one of its members" against the facts of this case. The court concluded that State court jurisdiction did not infringe upon the Tribe's right to govern itself. In fact, given that the parents' relationship occurred off any reservation, the place of conception was unknown but most likely took place off the reservation, the parents signed a paternity acknowledgment off the reservation, the parents lived off the reservation, and the mother and child were receiving public assistance from the State, "the existence of any Tribal court jurisdiction, much less exclusive Tribal court jurisdiction, is questionable."[203]

The Arizona Supreme Court has also upheld State court jurisdiction in an action brought by the State against a non-Indian father to determine paternity.[204] The facts that conception occurred on the reservation and that all parties resided on the reservation were not dispositive.

Placing emphasis on the Tribal interest in paternity establishment are two Tribal court decisions: *Solomon v. Jantz*, 25 Indian L. Rptr. 6251 (Lummi Court 1998) and *Tafaya v. Ghashghaee*, 25 Indian L. Rptr. 6193 (Pueblo of Pojoaque Court 1998). In both cases, the Tribal courts concluded that the Tribal court had properly exercised jurisdiction against a non-Indian in a paternity/support action. The courts did not discuss the Supreme Court holdings in *Montana v. United States* or *Nevada v. Hicks*.[205]

No cases were found post *Nevada* in which a nonmember Indian or non-Indian challenged Tribal court jurisdiction in a paternity action, and the Indian plaintiff argued

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[202] *Accord State v. Zaman*, 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998) ("As long as the Indian party selects the State forum, there is nothing for the infringement test to protect against." 946 P.2d at 461. The putative father was a non-Indian who had argued that the Indian mother's State paternity action infringed upon the tribe's interest in self-government.)

[203] 649 N.W.2d at 576.

[204] *State v. Zaman,* 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998). In so holding, the Supreme Court reversed the Court of Appeals decision in *State v. Zaman*, 187 Ariz. 81, 927 P.2d 347 (1996) (*Zaman I*).

[205] *Montana v. United States*, 450 U.S. 544 (1981), *Nevada v. Hicks*, 533 U.S. 353 (2001). *Montana* had held that, absent federal legislation, Indian Tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation, subject to two exceptions: (1) the nonmember entered into a consensual relationship with the Tribe or its members, or (2) the nonmember's activity directly affects the Tribe's political integrity, economic security, health, or welfare. In *Nevada*, the Court applied the *Montana* test in a case involving conduct by a nonmember on Indian land within the reservation.

that where conception occurred on the reservation, the facts met one or both prongs of the *Montana* test.

Most Tribal participants in a 1991 ABA telephone survey responded that intertribal paternity situations usually are not troublesome. The opinion expressed, especially among Tribal judges, was that there exists a high level of cooperation between most Tribal court systems. Tribal judges stated that they were much more likely in intertribal matters to telephone one another, or otherwise agree upon a forum, than they were in Tribal/State matters. Most State and Tribal judges also remarked, however, that they desired more frequent interaction between States and Tribes as a way to quickly resolve many of the difficulties associated with determining the paternity of Indian children.

**Non-Indian/Non-Member Mother and Indian Alleged Father** When the non-Indian or non-member Indian mother files a paternity action against an Indian alleged father in State court, the Indian alleged father may raise a jurisdictional challenge. See above for a discussion regarding the role of Public Law 280 jurisdiction.

If conception occurred off the reservation or if the non-member Indian or non-Indian mother applied for public assistance from the State, and the State court views that action as the date the cause of action arose, Public Law 280 will not apply because the cause of action did not arise within Indian country.

Where Public Law 280 is not applicable, the State court will conduct a *Williams* preemption-infringement test. Using such a test in the case of *State ex rel. Vega v. Medina,*[206] the Iowa Supreme Court ruled that the State trial court had properly exercised subject matter jurisdiction over the State's action to establish paternity, current child support, and reimbursement of public assistance, when the State, child and mother were non-Indians; the child's conception arose off reservation; and the State has a strong interest in protecting its assistance program as well as ensuring the well-being of its citizens. The court also noted that the defendant's Tribe did not have a Tribal court to handle paternity and support cases.

If the non-Indian or non-member mother files a paternity action in the court of the Tribe in which the alleged father is enrolled, the non-Indian or non-member Indian is deemed to have consented to Tribal jurisdiction. The issue then becomes one of determining whether Tribal law authorizes jurisdiction in such a case.[207] If it does, and if the Tribal court has personal jurisdiction over the Indian alleged father, the Tribal court will most likely uphold Tribal court jurisdiction. In *Dallas v. Curley*, (No. AP-005-94 - Appellate Court of the Hopi Tribe), the Appellate Court held that the Hopi Tribal court

[206] 549 N.W.2d 507 (Iowa 1996).

[207] The question in this case was not whether the State court had jurisdiction, but whether jurisdiction was with the Hopi Tribal Court or the Hopi Village of Upper Moenkopi, which was the residence of the alleged father. However, the holding of the court is relevant because of its examination of how the law treated disputes involving nonmember Indians.

properly exercised jurisdiction over a paternity action brought by a nonmember Indian mother against a member of the Hopi Tribe.

**Non-Indian Mother and Non-Indian Alleged Father** If neither parent is an Indian, Public Law 280 jurisdiction is inapplicable. If the parties live off the reservation and conception occurred off the reservation, the State court has exclusive subject matter jurisdiction. If the parties live on the reservation and conception occurred on the reservation, it is still likely that a State court will find it has jurisdiction on the basis that there is no infringement of Tribal interest. If the parties live on the reservation, the non-Indian mother filed the paternity action in Tribal court, and the non-Indian father challenges subject matter jurisdiction, the Tribal court will likely focus on where the cause of action arose and whether exercise of jurisdiction is necessary to protect the political integrity, economic security, or health or welfare of the Tribe.[208]

[208] *See Montana v. United States*, 450 U.S. 544 (1981), which identifies two exceptions where Tribal civil jurisdiction can exist over non-Indians on non-Indian land.

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# CHAPTER FIVE
# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

Full Faith and Credit Clause of Constitution

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Public Law 280 (enacted in 18 U.S.C., 25 U.S.C. and 28 U.S.C.)

28 U.S.C. § 1738B

45 C.F.R. § 302.31

45 C.F.R. § 302.70

45 C.F.R. § 303.5

45 C.F.R. § 309.05

45 C.F.R. § 309.100

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

## State Attorney General Opinion

North Dakota Attorney General's Opinion 2000-F-07

## Case Law

*Fisher v. District Ct.*, 424 U.S. 382 (1976)

*Montana v. United States*, 450 U.S. 544 (1981)

*Nevada v. Hicks*, 533 U.S. 353 (2001)

*Strate v. A-1 Contractors,* 520 U.S. 438 (1997)

*Dallas v. Curley*, (No. AP-005-94 - Appellate Court of the Hopi Tribe)

*Davis v. Means,* 21 Indian L. Rptr. 6125 (Navajo 1994)

*Solomon v. Jantz*, 25 Indian L. Rptr. 6251 (Lummi Court 1998)

*Tafaya v. Ghashghaee*, 25 Indian L. Rptr. 6193 (Pueblo of Pojoaque Court 1998)

*Anderson v. Beaulieu*, 555 N.W.2d 537 (Minn. 1996)

*Becker County Welfare Department vs. Bellcourt*, 453 N.W.2d 543 (Minn.1990)

*Harris v. Young*, 473 N.W.2d 141 (S.D. 1991)

*Jackson County Child Support Enforcement Agency v. Swayney,* 352 S.E. 2d 413 (N.C. 1987)

*Jackson County Smoker v. Smoker, Jr.*, 341 N.C. 182, 459 S.E.2d 789 (1995)

*Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 60 Cal. Rptr. 2d 667 (1997)

*McKenzie County Social Serv. Bd. v. C.G.,* 633 N.W.2d 157 (N.D. 2001)

*McKenzie County Social Serv. Bd. v. V.G*., 392 N.W.2d 399 (N.D. 1986)

*M.L.M. v. L.P.M*., 529 N.W.2d 184 (N.D. 1995)

*Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002)

*South Dakota ex rel. Jealous of Him v. Mills*, 627 N.W.2d 790 (S.D. 2001)

*State ex rel. Vega v. Medina,* 549 N.W.2d 507 (Iowa 1996)

*State v. Zaman,* 190 Ariz. 208, 946 P.2d 459 (1997), *cert. denied*, 522 U.S. 1148 (1998)

*State v. Zaman*, 187 Ariz. 81, 927 P.2d 347 (1996) (*Zaman I)*

*State v. W.M.B.*, 159 Wis.2d 662, 465 N.W.2d 221 (1990)

*Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990)

## Periodicals/Publications

Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Strengthening the Circle: Child Support for Native American Children (1998).

# CHAPTER SIX
# SUPPORT ESTABLISHMENT

## DETERMINATION OF SUPPORT OBLIGATION

**Judicial or Administrative Proceeding** When paternity is not an issue, the next stage of case processing is the establishment of a support order. Federal regulations governing both State and Tribal IV-D programs require the use of local law and procedures in establishing the support order.[209] The action may be brought before a judicial or an administrative forum.

When a State IV-D agency brings an action to establish a support order, it must meet certain Federal timeframes.[210] The Federal regulations require the establishment of a support order or, at a minimum, the service of process needed to begin the order establishment process, within 90 calendar days of locating the alleged father or non-custodial parent. If service of process cannot be obtained within this timeframe, the State IV-D agency must document that it has made a diligent effort to serve process. According to these regulations, if a State's tribunal dismisses a petition to establish a support order without prejudice, the child support office must review the case and examine the tribunal's reasons for dismissing the establishment action. If, after reviewing the reasons, the child support office determines that it would be appropriate to pursue the order establishment action again in the future, the office must bring the establishment action at that time. Finally, in a case whose parties acknowledge paternity, the regulations require the State IV-D agency to obtain a support order based upon that acknowledgment. Tribal IV-D agencies are also required to provide for the establishment of a support order, but are not subject to Federal timeframes.

Within both State and Tribal IV-D agencies, the establishment process typically involves the following steps:

1. Contact parents
2. Interview parents
3. Apply guidelines
4. Obtain order by consent or adjudication
5. Create fiscal account(s).

Especially among Tribal cultures, there is often an emphasis on working with the parties to reach an agreement short of full litigation.

**Determination of Support Amount** Pursuant to the Family Support Act of 1988, States, as a condition of receiving Federal IV-D funding, must have support guidelines that constitute rebuttable presumptions of the correct amount of support to be awarded by courts or administrative agencies when setting or modifying child support

[209] 45 C.F.R. § 303.4(b).
[210] 45 C.F.R. § 303.4(d).

orders.[211] Federal regulations establishing requirements for Tribal IV-D programs also require support guidelines. Both State and Tribal IV-D plans must establish one set of guidelines that are based on a specific descriptive and numeric criteria and result in a computation of the support obligation.[212] The support amount calculated pursuant to the guidelines is presumed to be correct. The presumptive amount is subject to rebuttal but, if a tribunal deviates from the presumptive amount, it must provide written findings on the record as to why the presumptive amount would be unjust or inappropriate in the specific case.[213] Tribes and States receiving IV-D funding must also review and revise, if appropriate, their support guidelines at least once every four years.[214]

The Federal regulations governing State child support guidelines also require the following:

- The guidelines must consider all earnings and income of the noncustodial parent.

  In the case of *Marriage of Purnel v. Purnel*,[215] the California Court of Appeal, Fourth District, was asked to determine whether the trial court impermissibly considered the noncustodial parent's receipt of funds from Indian trust allotment lands. Following a divorce proceeding, in which the non-Indian husband was awarded custody of the children, the State trial court ordered the noncustodial parent, who was a member of the Auga Caliente Band of the Cahuilla Indians, to pay support of $1063 per month per child for three children. The wife did not challenge the amount of the support order itself. Rather on appeal she argued that the State of California had no jurisdiction "to tax Indian reservation lands or the income earned by Indians from activities carried on within the boundaries of the reservation."

  The California Court of Appeals upheld the State trial court's jurisdiction as well as the award of support. The court concluded that the support award did not constitute an assignment of Indian trust property or monies, which is prohibited by Federal law. The support order did not require that the support be paid from any particular income source. The wife had "very substantial assets quite apart from the lucrative leases of her trust allotment lands, assets which are in no way related to her being a Native American."[216] The court also noted that once the wife received payment of the rental income from the lease of her Indian Trust Allotment lands, it lost its "Indian" character and became fungible money, which could be used to pay support as any other money could.

- The guidelines must provide for the health care needs of the child, through health insurance or other means.

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[211] 42 U.S.C. § 667(b)(2).
[212] 45 C.F.R. § 302.56 (guideline requirements that a State must meet); 45 C.F.R. § 309.105 (guideline requirements that a Tribe or Tribal organization must meet)
[213] 45 C.F.R. § 302.56(g).
[214] 45 C.F.R. § 302.56(e) (requirement governing State IV-D programs); 45 C.F.R. § 309.105(4) (requirement governing Tribal IV-D program).
[215] 52 Cal. App. 4th 527, 60 Cal. Rptr. 2d 667 (1997).
[216] 52 Cal. App. 4th at 539, 60 Cal. Rptr. 2d at 675.

Federal regulations governing Tribal child support guidelines allow a Tribal IV-D plan to indicate whether non-cash payments will be permitted to satisfy support obligations.[217] Comments on the proposed final rule governing Tribal child support enforcement programs pointed out that many reservations and Indian communities are located in remote areas with little or no industry or business; thus, there are limited opportunities for cash employment. In drafting the final rule, OCSE was persuaded "to accommodate the long-standing recognition among Indian Tribes that all resources that contribute to the support of children should be recognized and valued by the IV-D programs.[218] Federal regulations define "non-cash support" as "support provided to a family in the nature of goods and/or services, rather than in cash, but which, nonetheless, has a certain and specific dollar value.[219] The non-cash support must directly contribute to the needs of a child, such as "making repairs to automobiles or a home, the clearing or upkeep of property, providing a means for travel, or providing needed resources for a child's participation in Tribal customs and practices."[220] If non-cash payments will be permitted to satisfy support obligations, Federal regulations[221] require the following:

- The Tribal support order allowing non-cash payments must State the specific dollar amount of the support obligation;
- The non-cash payments are not permitted to satisfy assigned support obligations.[222]

In the comments and responses to the proposed final rules, OCSE stresses that States should be able to process Tribal orders allowing non-cash payments through their automated systems because of the requirement that the orders also clearly include a specific dollar amount reflecting the support obligation.[223] For example, a Tribal support order could provide that an obligor owes $200 a month in current support, which may be satisfied with the provision of firewood suitable for home heating and cooling to the custodial parent and child. The order could provide that a cord of firewood has a specific dollar value of $100 based on the prevailing market. Therefore, the obligor would satisfy his support obligation by providing two cords of firewood every month. The valuation of non-cash resources is the responsibility of the Tribe.[224]

In a case decided by the Northern Plains Intertribal Court of Appeals, *Attikai v. Thompson, Sr.*,[225] the Court of Appeals emphasized the cultural differences between the "non-Native American population of the State of South Dakota and the Native American population of the Crow Creek Sioux Tribe." Because of those differences, the

[217] 45 C.F.R. § 309.105(a)(3).
[218] 69 Fed. Reg. 16,638 at 16,658 (March 30, 2004).
[219] 45 C.F.R. § 309.05.
[220] 69 Fed. Reg. 16,638 at 16,659 (March 30, 2004).
[221] 45 C.F.R. § 309.105(a)(3).
[222] However, the non-cash payments can be credited toward arrears, as well as current support obligations. 69 Fed. Reg. at 16,659.
[223] *See* 69 Fed. Reg. at 16,659.
[224] *Id.*
[225] 21 Indian L. Reptr. 6001 (No. CV-02-02-93 N. Pls. Intertr. Ct. App., Aug. 31, 1993).

Tribal court had discretion as to application of South Dakota State support guidelines and to adherence to South Dakota case law interpreting such guidelines. The mother had argued that the father had a duty to support his firstborn child, paramount to subsequent children born of the father. She based her position on a South Dakota case. The Court of Appeals held that the Tribal trial court did not need to adhere to such case law if it did not "fit within the acceptable cultural standards" of the Crow Creek Sioux Tribe. However, because there was no record about whether the Tribe "accepts as part of its cultural standard that the firstborn child has the paramount right of support over later born children, whether born within a marriage or outside of a marriage," the court remanded the issue back to the Tribal trial court for further hearings. If necessary, the court noted that it would be appropriate for the Tribal court judge to have testimony, possibly from Tribal elders, on this issue.

## TRIBAL OR STATE SUBJECT MATTER JURISDICTION

### Member Indian Custodian and Member Indian Noncustodian/Reside on Reservation

***Public Law 280 Jurisdiction*** In a complete Public Law 280 State, the State has jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[226] In *County of Inyo v. Jeff*,[227] the California court found that California had concurrent jurisdiction in a child support action pursuant to Public Law 280. The court conducted an infringement analysis under *Williams* and concluded that the State had subject matter jurisdiction, despite the fact that both parents were member Indians. The dispositive factor for the court was the Federal requirement that States vigorously pursue the collection of child support from noncustodial parents or risk the loss of Federal funding.

Reaching a contrary result was the Iowa Supreme Court in *State of Iowa, ex rel. Dept. of Human Serv. v. Whitebreast*.[228] In that case, both parties were members of the Sac and Fox Tribe of the Mississippi. The custodial parent had assigned her support rights to the State in order to receive public assistance from the State of Iowa. In order to secure reimbursement of public assistance and prospective support from the noncustodial parent, the State agency brought an action in State court. The district court had dismissed the State's petition. On appeal, the Iowa Supreme Court affirmed the dismissal. Concluding that the State action was regulatory in nature rather than one of general application to private persons, it held that Public Law 280 was inapplicable.[229]

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[226] 28 U.S.C. § 1360.
[227] 227 Cal. App. 3d 487, 277 Cal. Rptr. 841 (1991).
[228] 409 N.W.2d 460 (Iowa 1987).
[229] *But see McKenzie County Social Serv. Bd. v. V.G.*, 392 N.W.2d 399 (N.D. 1986) (the court, while acknowledging that county was a non-Indian, held that county's interest was only through an assignment

The court then applied the *Williams* preemption-infringement analysis, concluding that State jurisdiction was preempted:

> [T]he public nature of the Child Support Recovery Unit . . . seems to us inescapable. Though its obligations are statutorily described in terms of "services" to be furnished in the enforcement of child support awards, CSRU's function is clearly regulatory in nature. Its duties are defined and shaped by a host of administrative regulations. . . . Congress has not given Public Law 280 States, like Iowa, the jurisdiction to adjudicate controversies spawned by . . . regulation involving Tribal Indians. Thus we affirm the district court's dismissal of the State's petition.
>
> Inherent in our decision is the recognition that in areas of regulation and taxation our State laws must give way to the pre-emptive force of Federal and Tribal interests. . . .[230]

***No Public Law 280 Jurisdiction*** In States without Public Law 280 jurisdiction, where the cause of action arose in Indian country and both parents are member Indians who reside in Indian country, the outcome is straightforward – the Tribal court has exclusive jurisdiction over the action.[231] This conclusion is consistent with the Supreme Court's holdings that Indian tribes retain an inherent authority to regulate domestic relations among members. However, the outcome becomes less clear when the custodian receives public assistance from the State. Due to the assignment of support rights, some State courts find that the cause of action arose off the reservation. That may be sufficient to "tip the balance" to the State under some State courts' infringement analysis.

For example, the North Carolina court in *Jackson County Child Support Enforcement v. Swayney*[232] upheld State court jurisdiction over the child support component of an action between Tribal members. The conclusion is especially interesting given that the court denied State court subject matter jurisdiction over the paternity component of the action. Unlike paternity, for which the court found undue infringement on Tribal self-governance by the State, in the child support context the court found that the State was specifically required by the Federal government as part of the "AFDC[233] program to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support."[234] North Carolina later confirmed its opinion that the State and Tribe have concurrent jurisdiction when the action is one to

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of support rights from the Indian mother. The court considered the support action to be one between two Indians, and based its decision, in part, on an analysis of Public Law 280.) However, since the *McKenzie* decision was issued in 1986, North Dakota has enacted legislation confirming the separate interest of the people of the State of North Dakota in IV-D cases. See N.D. Century Code § 14-09-09.26.

[230] 409 N.W.2d at 463, 464.

[231] *See State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749, 752 (S.D. 2001).

[232] 352 S.E.2d 413 (N.C. 1987).

[233] Aid for Families with Dependent Children. AFDC was the public assistance program that was replaced in 1996 by Temporary Assistance for Needy Families (TANF).

[234] 352 S.E.2d at 420.

recover AFDC payments. In such a case, the court concluded, the tribe's interest in self-government is not significantly affected by concurrent jurisdiction.[235] The court also emphasized, however, that where the Tribal court has already assumed jurisdiction, it is unlawful infringement for the State court to later assume jurisdiction.[236]

In contrast, the Navajo Supreme Court has held that the provision of State public assistance is irrelevant and that Tribal jurisdiction is exclusive.[237] In *Billie v. Abbott*, both parties were enrolled Navajos living on the Utah side of the Navajo reservation. A Navajo divorce decree ordered Billie, who was unemployed, to pay "reasonable child support when he is employed and the monthly amount to be arranged by the parties." There was never a judicial determination of the support amount. Mrs. Billie subsequently applied to the State of Utah for AFDC benefits. In the absence of a court order specifying a support amount, the Utah child support agency used its administrative process to establish a support obligation in the amount of the AFDC grant. When the amount was not paid, Abbott, the director of Utah's child support agency, submitted the case for Federal income tax refund intercept. For several years Billie's tax refund was intercepted, collecting $218,278.66. In 1987, Billie brought an action in Navajo Tribal court seeking an injunction against further use of Utah's tax interceptions, the return of his intercepted Federal tax refunds, and payment of his cost and attorney's fees. On appeal, the Navajo Nation Supreme Court affirmed the Tribal court's decision as it related to subject matter and personal jurisdiction: "[T]he Navajo Nation's exclusive power to regulate domestic relations among Navajos living within its borders is beyond doubt."[238]

The Navajo Nation Supreme Court concluded that even if the obligee was receiving AFDC benefits from the State, the Tribal court had exclusive jurisdiction to establish the support obligation, to establish the arrearage amount, and to enforce the support order.

> Although Utah has an interest in serving eligible Navajo children, the manner in which it determines eligibility (use of non-Navajo law) implicates essential Navajo Tribal relations, and in the end Utah jeopardizes the rights of Navajos to have their support decided by Navajo courts. Only Navajo courts using Navajo law can decide Billie's child support obligation. Only Navajo courts can be used to collect past-due support owed by Navajos living on the Navajo reservation. . . . Utah's decision on Billie's support obligation would not only adversely affect Navajo authority over internal Tribal matters, but it may

[235] *Jackson County Child Support Enforcement Agency, ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995).
[236] The Tribal order awarded child custody to the wife and property to the wife with no support to be paid by the father. The North Carolina Supreme Court ruled that the Tribal court was available for the State to seek recovery of AFDC payments.
[237] *Billie v. Abbott*, 16 Indian L. Rptr. 6021 (Navajo Supreme Court Nov. 10, 1988)
[238] *Billie v. Abbott*, 16 Indian L. Rptr. 6021, 6023 (Navajo Supreme Court Nov. 10, 1988).

> encourage Navajos to go directly to Utah in hopes of receiving a larger award. State interference would indeed hinder the development of Navajo domestic relation law.[239]

**Member Indian Custodian and Member Indian Noncustodian/One Member Resides off Reservation**

***Public Law 280 Jurisdiction*** In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians, which occur in Indian country located within that State.[240] None of the researched support establishment cases discussed Public Law 280 jurisdiction under circumstances in which one of the Tribal members resided outside of Indian country.

***No Public Law 280 Jurisdiction*** In the absence of Public Law 280 jurisdiction, when both parents are enrolled members of the same Tribe but one member lives off the reservation, and the action is filed in State court, State courts will usually conduct a *Williams* preemption-infringement analysis to resolve any jurisdictional challenge. As stated in the paternity discussion, there is no definitive answer regarding subject matter jurisdiction in this fact pattern. South Dakota has case law holding that when one Tribal member resides outside the reservation, and the other parent and child reside on the reservation, the State and Tribal courts possess concurrent jurisdiction in a child support action.[241] The case may be adjudicated by the first tribunal to validly exercise jurisdiction.

The North Dakota Supreme Court recently reached a similar conclusion.[242] In its decision, the court distinguished between paternity actions between enrolled Tribal members (over which prior North Dakota decisions have found exclusive Tribal jurisdiction) and support establishment actions between enrolled Tribal members. The court cited with approval the North Carolina decision of *Jackson County Child Support Enforcement Agency v. Swayney*,[243] which also distinguished between paternity and support establishment actions. The North Dakota Supreme Court somewhat narrowed the reach of its decision by holding "Tribal courts and State courts have concurrent subject-matter jurisdiction to determine a support obligation against an enrolled Indian, where parentage is not at issue[244] and the defendant is not residing on the Indian reservation when the action is commenced."[245] Nevertheless, the Chief Justice filed a dissent, finding the majority's distinction between paternity cases and support establishment cases, and its corresponding conclusion that State court jurisdiction infringes on Tribal interests in the former but not the latter, troubling: "It seems to me to

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[239] *Id.*
[240] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[241] *See State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749, 752 (S.D. 2001).
[242] *See Rolette County Social Serv. Bd. v. B.E.*, 697 N.W.2d 333 (N.D. 2005).
[243] 352 S.E.2d 413 (N.C. 1987).
[244] In this case, the defendant and noncustodial parent was the mother who acknowledged her support obligation.
[245] *Rolette County,* 697 N.W.2d 333 (N.D. 2005)

be presumptuous for the State courts to determine for the Tribes what is infringement on their right to govern themselves."

**Member Indian Custodian and Member Indian Noncustodian/Both Parents Reside off Reservation** No cases were found with this fact pattern. When conception and the application for public assistance take place off the reservation, and all parties live off the reservation, at least one State Attorney General has concluded that State court jurisdiction would not unduly infringe upon Tribal sovereignty and therefore has authorized the child support agency to consider filing such cases in State court.[246]

**Member Indian Custodian and Non-Member/Non-Indian NonCustodian**

***Public Law 280 Jurisdiction*** In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians, which occur in Indian country located within that State.[247] If the plaintiff is the State IV-D agency bringing an action on behalf of an Indian custodial parent against a non-Indian, at least one court has concluded that the case is public in nature and is not one involving a private support action.[248] Under such an analysis, the case would then be considered one involving two non-Indians and Public Law 280 would be inapplicable. Other State courts focus on the assignment nature of the State's interest. Because the State derives its interest in the child support action from the Indian custodian by means of an assignment of support rights, such courts view the action as involving an Indian and therefore invoking Public Law 280 jurisdiction.[249]

***No Public Law 280 Jurisdiction*** In the absence of Public Law 280 jurisdiction, when one parent is a non-member Indian and the action is filed in State court, the State court will usually engage in a *Williams* preemption-infringement analysis. The court will conduct the same analysis, regardless of whether the noncustodian is a non-member Indian or a non-Indian. Recognizing the sovereign status of each Federally recognized Tribe, the Supreme Court has treated non-member Indians in the same way as non-Indians with regard to jurisdictional issues.[250]

If the Indian custodial parent files the support action in Tribal court and the non-member Indian or non-Indian challenges jurisdiction, the Supreme Court's holdings in *Montana v. United States,*[251] *Strate v. A-1 Contractors,*[252] and *Nevada v. Hicks*[253] become relevant. The Tribal court must decide whether jurisdiction over the non-member noncustodian is necessary to protect Tribal self-government or to control internal relations. At least with regard to non-Indians whose claims arose on non-Indian

[246] *See* North Dakota Attorney General's Opinion 2000-F-07
[247] *See Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 530, 60 Cal. Rptr. 2d 667, 669 (1997).
[248] *See State of Iowa, ex. rel. Dept. of Human Serv. v. Whitebreast,* 409 N.W.2d 460 (Iowa 1987).
[249] *See, e.g., McKenzie County, Social Serv Bd. v. V .G*, 392 N.W.2d 399 (N.D. 1986), *cert. denied,* 480 U.S. 930 (1987).
[250] *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438 (1997); *Nevada v. Hicks*, 533 U.S. 353, 377 n. 2 (2001).
[251] 450 U.S. 544 (1981).
[252] 520 U.S. 438 (1997
[253] 533 U.S. 353 (2001).

land, the *Montana* Court has held that Tribal jurisdiction is presumptively lacking. Absent express authorization by Federal statute or treaty, Tribal jurisdiction over the conduct of nonmembers exists only in the following limited circumstances: either (1) the nonmember entered into a consensual relationship with the Tribe or its members, or (2) the nonmember's activity directly affects the Tribe's political integrity, economic security, health, or welfare.[254] When one of the parties is an Indian and the other is a non-Indian or nonmember Indian, the establishment of support arguably would fall within those exceptions.

**Non-Indian/Non-Member Custodian and Indian NonCustodian** When the non-Indian or non-member Indian custodial parent files a support establishment action against an Indian noncustodial parent in State court, the Indian obligor may raise a jurisdictional challenge.

***Public Law 280 Jurisdiction*** In general, a State with complete Public Law 280 jurisdiction over civil causes of action has jurisdiction over domestic relations matters involving Indians which occur in Indian country located within that State. See above for a discussion regarding the role of Public Law 280 jurisdiction. One of the few reported child support decisions to extensively discuss Public Law 280 jurisdiction is *Marriage of Purnel v. Purnel*. [255] The case was a post-judgment proceeding, following an earlier State court divorce decree, in which the trial court ordered the wife, a member of the Agua Caliente Band of the Cahuilla Indians, to pay support to her non-Indian husband. One of the issues raised was whether the State of California properly exercised jurisdiction. In concluding that it had, the court discussed Public Law 280 at length. It emphasized that as one of the mandatory Public Law 280 States, California had jurisdiction over civil causes of actions to which Indians are parties, including domestic relations matters.

The court noted the lack of decisions regarding Public Law 280 jurisdiction, other than cases involving State court jurisdiction that had been challenged due to an attempt to enforce the State's police powers or to exercise the State's authority to tax property, notwithstanding the Federal prohibition to do so in subdivision (b) of Public Law 280. Citing an earlier California decision,[256] the court concluded that when a California agency has filed a civil action seeking support pursuant to an assignment of support rights, it is acting as a private party. "In our view it is inconceivable that Congress could have intended that State courts not have jurisdiction to enforce the foregoing mandates [of Title IV-D], especially in view of the fact that such mandates arise only after approval of an application made to a county welfare department for AFDC benefits of a Native American child."[257] Similarly, a Public Law 280 State has jurisdiction to apply to Native American State laws on divorce.[258] Finally, the court noted that the defendant had

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[254] See *Nevada v. Hicks*, 533 U.S. at 358: *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *Montana v. United States*, 450 U.S. 544 (1981).
[255] *Supra* note 215.
[256] *County of Inyo v. Jeff*, 227 Cal. App. 3d 487, 277 Cal. Rptr. 841 (1991).
[257] 52 Cal. App. 4th 527, 536, 60 Cal. Rptr. 2d 667, 673.
[258] *See also United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974).

voluntarily appeared and participated in the State divorce proceedings. In the court's opinion, "there is no question but that the trial court had the jurisdiction to make the child support order it did." [259]

***No Public Law 280 Jurisdiction*** *New Mexico ex rel. Dept. of Human Servcs. v. Jojola*[260] is a case from a State without Public Law 280 jurisdiction, in which the New Mexico Supreme Court upheld the exercise of State court jurisdiction. The court found that the plaintiff, the county agency that was providing public assistance to the mother, was a non-Indian, so it considered the case as one between an Indian and non-Indian. In conducting a *Williams* analysis, the court applied a three-prong test: Determining (1) whether the parties were Indian or non-Indian; (2) whether the cause of action arose within an Indian reservation; and (3) the nature of the interest to be protected. The court found that the parties were Indian and non-Indian, the cause arose outside of the reservation when the mother applied for public assistance, and there was no interference with any Tribal interest. The court was influenced by the Congressional mandate requiring States to seek reimbursement of public assistance.

When the non-Indian or non-member custodial parent files a support establishment action in the court of the Tribe in which the obligor is enrolled, the non-Indian or non-member Indian is deemed to have consented to Tribal jurisdiction. The issue then becomes whether Tribal law authorizes jurisdiction in such a case. If it does, and if the Tribal court has personal jurisdiction over the Indian noncustodial parent, the Tribal court will most likely uphold Tribal court jurisdiction.

**Non-Indian Custodian and Non-Indian NonCustodian** If neither parent is an Indian, Public Law 280 jurisdiction is inapplicable. If both parties reside off the reservation, the State court has exclusive jurisdiction. If at least one of the parties resides on the reservation but the cause of action arose off the reservation, a State court will most likely find it has jurisdiction because there is no infringement of Tribal interest. If the parties live on the reservation, the non-Indian custodial parent filed the support action in Tribal court, and the non-Indian noncustodian challenges the subject matter jurisdiction, the Tribal court will likely focus on where the cause of action arose and whether jurisdiction is necessary to protect the political integrity, economic security, or health or welfare of the Tribe.

[259] 52 Cal. App. 4th 527, 538, 60 Cal. Prtr. 2d 667, 674.
[260] 99 N.M. 500, 660 P.2d 590 (1983).

# CHAPTER SIX
# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

Family Support Act of 1988, P.L. No. 100-485 (1988)

Public Law 280 (enacted in 18 U.S.C., 25 U.S.C., and 28 U.S.C.)

42 U.S.C. § 667(b)(2)

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*Montana v. United States*, 450 U.S. 544 (1981)

*Nevada v. Hicks*, 533 U.S. 353 (2001)

*Strate v. A-1 Contractors,* 520 U.S. 438 (1997)

*Williams v. Lee,* 358 U.S. 217 (1959)

*United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974)

*Attikai v. Thompson, Sr.*, 21 Indian L. Reptr. 6001 (No. CV-02-02-93 N. Pls. Intertr. Ct. App., Aug. 31, 1993)

*Billie v. Abbott*, 16 Indian L. Rptr. 6021 (Navajo Supreme Court Nov. 10, 1988)

*County of Inyo v. Jeff*, 227 Cal. App. 3d 487, 277 Cal. Rptr. 841 (1991)

*Jackson County Child Support Enforcement Agency v. Swayney,* 352 S.E.2d 413 (N.C. 1987)

*Marriage of Purnel v. Purnel*, 52 Cal. App. 4th 527, 60 Cal. Rptr. 2d 667 (1997)

*McKenzie County Social Serv. Bd. v. V.G.,* 392 N.W.2d 399 (N.D. 1986)

*New Mexico ex rel. Dept. of Human Servcs. v. Jojola*, 99 N.M. 500, 660 P.2d 590 (1983)

*Rolette County Social Serv. Bd. v. B.E*., 697 N.W.2d 333 (N.D. 2005).

*State ex rel. LeCompte v. Keckler*, 628 N.W.2d 749 (S.D. 2001)

*State of Iowa, ex rel. Dept. of Human Serv. v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987)

**Periodicals/Publications**

None

# CHAPTER SEVEN
# MEDICAL SUPPORT ENFORCEMENT

## STATE TITLE IV-D REQUIREMENTS

**Definition** Medical support is the legal provision of medical, dental, prescription, and other health care expenses. It can include provisions to cover health insurance costs as well as cash payments for unreimbursed medical expenses. Child support establishment addresses the health needs of children in three ways. First, there are Federal laws and regulations that require the parents to provide health insurance coverage. Second, the guideline calculation can apportion the costs not reimbursed by health insurance to each of the parents. Finally, the guidelines can address extraordinary medical expenses.

**Support Guidelines** There are three categories of medical expenses: health insurance premiums; payment for the uninsured portion of regular medical expenses, such as co-payments, deductibles, and uncovered expenses; and extraordinary medical expenses.[261] Many guidelines are silent regarding the definition of a medical expense.

- **Health insurance premiums**

  Federal regulations require that child support guidelines provide for children's health care needs through "health insurance or other means."[262] Because the cost of insurance varies so greatly, it is not included within the basic guideline amount. Instead, most State guidelines treat the cost of health insurance in one of two ways. The most common method is to add the actual cost of health insurance to the basic support amount and then prorate the cost between the parents based on their proportion of income.[263] The other method is to order one parent to pay for health insurance and then deduct that cost from the paying parent's income.

- **Uninsured medical expenses**

  Uninsured medical expense encompasses a range of items that includes co-payments, medication costs, uncovered procedures and conditions, and cash payments in lieu of health insurance.

  – **Definition of medical expense -** Some States provide a definition of medical expenses. For example, they list treatment provided by medical doctors and dentists, treatment for chronic conditions and asthma,

[261] *See* Elrod, *Adding to the Basic Support Obligation*, in Guidelines: The Next Generation (M. Haynes, ed., U.S. Dept. of Health & Human Serv. 1994)[hereinafter Guidelines: The Next Generation].
[262] 45 C.F.R. § 302.56(c)(3).
[263] An analysis of health care provisions is contained in L. Morgan, Child Support Guidelines: Interpretation and Application (Aspen Law and Business, Supp. 2000) [hereinafter Child Support Guidelines].

counseling, psychiatric treatment for mental disorders, and physical therapy as medical expenses.[264]

– **Inclusion within guideline -** Support guidelines that expressly address medical expenses vary in how they distinguish ordinary medical expenses from extraordinary medical expenses. Some States expressly provide that the basic support amount assumes a certain amount of unreimbursed medical costs. For example, the Alabama Schedule of Basic Child Support Obligations assumes unreimbursed medical costs of $ 200 per family of four per year. These assumed costs include medical expenses not covered or reimbursed by health insurance, Medicaid, or Medicare.[265] Many States set a threshold amount for what constitutes an add-on medical expense; by implication, medical expenses that do not meet that threshold are subsumed within the basic support amount. For example, in New Jersey, unreimbursed health care expenditures (medical and dental) up to and including $250 per child per year are included in the schedules, which provide that "such expenses are considered ordinary and may include items such as nonprescription drugs, co-payments or health care services, equipment or products." The fact that a family does not incur that amount of health care expense is not a basis for deviating from the guidelines. Predictable and recurring unreimbursed health care expenses in excess of $250 per child per year are added to the basic support amount. [266] In Indiana, uninsured expenses in excess of 6 percent of the basic support obligation are considered extraordinary medical expenses resulting in an add-on to the basic amount. Presumably, expenses less than the threshold for extraordinary medical expenses are considered ordinary expenses that are subsumed within the basic support amount.

  Other States take the approach that the basic support amount can be adjusted by adding the cost of any noncovered medical, dental, and prescriptive medical expense.[267]

  If the ordinary medical expense is subsumed within the basic support amount or treated as an adjustment to the amount, the expense is typically shared by the parents in accordance with the guideline formula. In contrast, Hawaii statutorily specifies that ordinary uninsured medical and dental expenses are the responsibility of the custodial parent.[268]

[264] *See* guidelines of Alabama, Colorado, Delaware, Kentucky, and Maine.
[265] Ala. R. Jud. Admin. 32 (2001).
[266] *See* N.J.Ct. R., Appendix IX-A (2005).
[267] *See*, *e.g.,* Fla. Stat. Ann. § 61.30(8) (2005).
[268] Hawaii Family Court Child Support Guidelines, Instructions, p.7 (1998).

- **Extraordinary medical expenses**

  Extraordinary medical expenses are those expenses that extend beyond the ordinary expectation of medical need in a family, as contemplated by most State guidelines formulas.

  – **Definition -** Numerous States define "extraordinary medical expenses."[269] There seem to be several approaches, the most common of which is to define extraordinary medical expenses as unreimbursed medical expenses that exceed a certain amount per child per calendar year.[270] The next most common approach is to define extraordinary medical expenses as uninsured expenses in excess of $100 for a single illness or condition.[271] A third approach is to define extraordinary medical expenses as uninsured expenses that exceed a certain percentage of the basic obligation.[272]

    Sometimes States combine a threshold amount with an illustrative list of types of qualifying expenses. Examples include Colorado, Kentucky, and Maine.

    Other States do not use the phrase "extraordinary medical expenses." They do, however, recognize an adjustment for certain unreimbursed medical expenses. Like those States that do expressly address extraordinary medical expenses, they usually establish a threshold based on a certain dollar amount per child per calendar year.[273]

  – **Inclusion within guideline -** No State support guideline includes extraordinary medical expenses within the basic support amount. Such expenses are usually the basis for a deviation from the basic support amount or an add-on to the guideline amount.[274]

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[269] Those States are Colorado, District of Columbia, Indiana, Kentucky, Louisiana, Maryland, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Vermont, Virginia, Washington, and West Virginia.
[270] Kentucky - $100; Maine - $ 250 per child or group of children per calendar year (2001); New Mexico - $ 100; Ohio - $ 100; South Carolina - $250; Vermont - $ 200 (but statute does not State whether that threshold is per child).
[271] Examples of this approach are found in the guidelines of Colorado and Maryland.
[272] Indiana – 6 percent (2004); Washington – 5 percent (2000).
[273] *See, e.g*., Alabama (guideline assumes unreimbursed medical costs of $ 200 per family of four per year); Iowa (CP pays first $ 250 per year per child of routine medical and dental expenses up to $ 500 per year for all children. Additional amounts are apportioned between parents) (2004); Massachusetts (CP pays first $100 per child per year. For routine medical and dental expenses above that amount, court allocates between parties) (2002); New Jersey ($250 per child per calendar year) (2005); Pennsylvania ($250 per child per year); Virginia (any reasonable and necessary unreimbursed medical or dental expenses in excess of $250 per calendar year per child) (2005).
[274] *See* Child Support Guidelines, *supra* note 263, Table 3-2. *See also* Notar & Schmidt, *State Child Support Guideline Treatment of Children's Health Care Needs*, in Guidelines: The Next Generation, *supra* note 261.

**Health Insurance Coverage** Federal law and regulations require States to provide for children's health needs by obtaining health insurance or by other means.[275] Current regulations require State IV-D agencies to secure medical support information and to obtain and enforce medical support in the form of health care coverage from the noncustodial parent, when such coverage is available at a reasonable cost.[276] Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of the service delivery mechanism.[277]

To remove some of the impediments to obtaining medical coverage, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93),[278] which:

- prohibited discriminatory health care coverage practices;
- created "qualified medical child support orders" (QMCSOs)[279] to obtain coverage from group plans subject to ERISA;[280] and
- allowed employers to deduct the cost of health insurance premiums from an employee's income.

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[281] amended the Social Security Act to require States, as a condition of receiving Federal funds, to enact a provision for health care coverage in all orders established or enforced by the IV-D agency.[282] Before PRWORA, the requirement to seek health insurance coverage had been mandatory for public assistance cases, while nonpublic assistance IV-D applicants could opt not to have medical support established and enforced.

Because health care costs remained problematic, Congress again addressed medical support in 1998. Provisions in the Child Support Performance and Incentives

[275] 42 U.S.C. § 652(f); 45 C.F.R. § 302.56(c)(3).
[276] 45 C.F.R. §§ 303.30, 303.31.
[277] 45 C.F.R. §§ 302.80, 303.30, 303.31. The meaning of "reasonable cost" has evolved. 45 CFR 303.31 (a)(1) now reads, " Health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism."
[278] P.L. No. 103-66 (1993).
[279] A "QMCSO" is a medical support order that creates the existence of an "alternative recipient's" right to receive benefits under a group plan. An "alternative recipient" is the child of a participant or beneficiary of a plan.
[280] In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA) to help protect employer-provided pension and health benefits and to encourage employers to establish such plans. ERISA regulates most privately sponsored pension plans and health benefit plans. The law is important for child support purposes because it preempts State laws and regulations governing health insurance and employee benefit plans, including employer self-funded health insurance plans. ERISA also imposes requirements regarding information that must be provided to plan participants and beneficiaries, internal procedures for determining benefit claims, and standards of conduct of those responsible for plan management.
[281] P.L. No. 104-193 (1996).
[282] 42 U.S.C. § 666(a)(19)(A).

Act of 1998 (CSPIA)[283] were enacted to eliminate barriers to establishing and enforcing medical support coverage. CSPIA requires State IV-D agencies to enforce health care coverage by use of a National Medical Support Notice (NMSN). Implementing Federal regulations are at 45 C.F.R. § 303. A parallel regulation, developed by the Department of Labor, adopts the use of the NMSN under ERISA.[284] CSPIA also established the Medical Child Support Working Group, which was required to submit a report to the Secretaries of HHS and Labor recommending measures to improve health care coverage.[285] The resulting report contains 76 recommendations that would expand health care coverage for children in the IV-D system.[286]

**National Medical Support Notice**

The standardized NMSN complies with ERISA's informational requirements and restrictions[287] and with Title IV-D requirements. It also contains a severable employer withholding notice to advise the employer of:

- State law applicable to the requirement to withhold;
- the duration of withholding;
- limitations on withholding, such as the Consumer Credit Protection Act;
- prioritization under State law for withholding child support and medical support, if insufficient funds are available for both; and
- the name and phone number for the appropriate division of the State IV-D agency handling the withholding.[288]

The NMSN notifies the parent's employer of the provision for health care coverage for the child. In addition, if the NMSN is properly completed and satisfies ERISA's conditions, it constitutes a QMCSO as defined by ERISA.[289] The intent is to simplify the processing of cases for employers.

States must mandate the use of the NMSN in all cases in which the noncustodial parent is required to provide health care coverage and that parent's employer is known.[290] There is an exception to using the NMSN if the order stipulates that alternative health care coverage must be provided.

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[283] P.L. No. 105-200 (1998).
[284] 29 C.F.R. § 2590.
[285] Section 401 of P.L. No. 105-200 (1998).
[286] The Working Group's report, *21 Million Children's Health: Our Shared Responsibility,* can be found on the Federal Office of Child Support Enforcement (OCSE) web site at http://www.acf.dhhs.gov/programs/cse/rpt/medrpt/index.html.
[287] 29 U.S.C. § 1169(a).
[288] 45 C.F.R. § 303.32.
[289] 29 U.S.C. § 1169(a).
[290] Section 466(a)(19) of Title IV-D of the Social Security Act, as amended by section 401(c)(3) of CSPIA, codified at 42 U.S.C. § 666(a)(19)(B).

Federal regulations[291] require States to have the following procedures:

- The NMSN must be used to notify employers of a health care coverage order;
- The NMSN must be transmitted to an employer within 2 business days from entry of the individual in the State Directory of New Hires;
- The employer must transmit the NMSN to the health coverage provider within 20 business days of the date of the NMSN and must withhold contributions and send them to the plan;
- The NMSN can be contested based on mistake of fact;
- The employer must notify the IV-D agency upon termination of the parent's employment; and
- The IV-D agency must notify the employer when the order becomes ineffective and must work with the custodial parent to choose a plan when options for coverage exist.

## TRIBAL TITLE IV-D REQUIREMENTS

There is no current requirement that Tribal support orders include medical support. However, there is no prohibition for a Tribal support order to do so. Tribes are encouraged to make sure that children have access to medical care through the Indian Health Service (IHS) or otherwise.[292] The IHS is an agency of the United States Public Health Service, within the Department of Health and Human Services. It does not provide health insurance coverage. However, it is responsible for providing Federal health services to the approximately 1.5 million American Indians and Alaska Natives who belong to the more than 562 Federally recognized tribes in 35 States.

As of October 1998, the Federal system consisted of 37 hospitals, 59 health centers, 44 health stations, and four school health centers. American Indians and Alaska Natives, who are enrolled members of their Tribe and who reside within the service delivery area of an IHS facility, can access the services with no out-of-pocket charge. However, State child support workers need to be aware that Tribal members may not live near an available IHS facility. Also, lack of IHS funds may result in some Tribes requiring the Tribal member to use private insurance or Medicaid prior to IHS services.

Although there is no requirement for Tribes to include medical support in the establishment or modification of a support order, to the extent that the Tribe is enforcing a valid State support order pursuant to the Full Faith and Credit for Child Support Orders Act, it must also enforce any provision within the State support order concerning health care coverage.[293] If the State order requires the father to repay Medicaid costs

[291] 45 C.F.R. § 303.32(c).
[292] 69 Fed. Reg. 16,638 at 16,660.
[293] *Id.*

associated with birthing costs, issues regarding the Federal government's trust responsibility to provide health care to Native Americans and Alaska Natives may arise.[294]

[294] *See* C. Barbero, The Federal Trust Responsibility: Justification for Indian-Specific Health Policy (2005).

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# CHAPTER SEVEN
# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

Child Support Performance and Incentives Act of 1998, P.L. No. 105-200 (1998)

Consumer Credit Protection Act, P.L. No. 90-321 (1969), codified as amended at 15 U.S.C. §§ 1601 *et seq*.

Employee Retirement Income Security Act (ERISA), P.L. No.93-406 (1974)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Omnibus Budget Reconciliation Act of 1993, P.L. No. 103-66 (1993)

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

Title IV-D of the Social Security Act, P.L. No. 93-647 (1975), codified at 42 U.S.C. §§ 651 *et seq*.

15 U.S.C. §§ 1601 *et seq*.

28 U.S.C. § 1738B

29 U.S.C. § 1169(a)

42 U.S.C. § 652(f)

42 U.S.C. § 666(a)(19)

29 C.F.R. § 2590

45 C.F.R. § 302.56(c)(3)

45 C.F.R. § 302.80

45 C.F.R. § 303.30

45 C.F.R. § 303.31

45 C.F.R. § 303.32

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

Ala. R. Jud. Admin. 32 (2001)

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N.J.Ct. R., Appendix IX-A (2005)

**Case Law**

None

**Periodicals/Publications**

C. Barbero, The Federal Trust Responsibility: Justification for Indian-Specific Health Policy (2005).

Elrod, *Adding to the Basic Support Obligation*, in Guidelines: The Next Generation (M. Haynes, ed., U.S. Dept. of Health & Human Serv. 1994).

L. Morgan, Child Support Guidelines: Interpretation and Application (Aspen Law and Business, Supp. 2000).

National Medical Child Support Working Group, *21 Million Children's Health: Our Shared Responsibility* (2002). See http://www.acf.dhhs.gov/programs/cse/rpt/medrpt/index.html.

Notar & Schmidt, *State Child Support Guideline Treatment of Children's Health Care Needs*, in Guidelines: The Next Generation (M. Haynes, ed. U.S. Dept. of Health & Human Serv. 1994).

# CHAPTER EIGHT
# MODIFICATION OF SUPPORT

Support orders that were fair when initially issued pursuant to support guidelines do not usually remain so with the passage of time. The financial circumstances of the parents change; the necessity for childcare might be eliminated; the costs of food, clothing, medical care, and school increase or decrease.

## STATE TITLE IV-D REQUIREMENTS

Federal law requires a State, as a condition of receiving Federal IV-D funds, to have laws and procedures providing for a review of IV-D support orders at least once every three years at the request of either party or, in an assistance case, at the request of the State.[295] States can establish a reasonable quantitative standard based on either a fixed dollar amount or percentage, or both, as a basis for determining whether an inconsistency between the existing child support award amount and the guideline amount is adequate grounds for petitioning for adjustment of the order. States may also adopt procedures for three-year reviews that do not require a change in circumstances or a percentage of difference from the prior order.[296] States can use any of three different methods for the review:

- Child support guidelines;[297]
- Application of a cost-of-living adjustment in accordance with a formula developed by the State;[298] or
- Use of automated methods to identify orders eligible for review, conduct the review, identify orders eligible for adjustment, and apply the appropriate adjustment under any threshold that might be established by the State.[299]

If child support guidelines are not used, either parent must be allowed to contest the adjustment.[300] Implementing Federal regulations also provide that addressing a child's health care needs in an order, through health insurance or other means, must be an adequate basis under State law to petition for an adjustment of the order, regardless of whether an adjustment in the amount of child support is necessary.[301]

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[295] Section 351 of the Personal Responsibility and Work Opportunity Act of 1996, P.L. No. 104-193, codified at 42 U.S.C. § 666(a)(10).
[296] *Id.*
[297] 42 U.S.C. § 666(a)(10)(A)(i)(I).
[298] 42 U.S.C. § 666(a)(10)(A)(i)(II).
[299] 42 U.S.C. § 666(a)(10)(A)(i)(III).
[300] 42 U.S.C. § 666(a)(10)(A)(ii).
[301] 45 C.F.R. § 303.8.

## TRIBAL TITLE IV-D REQUIREMENTS

Pursuant to Federal regulation, the initial Tribal application for Title IV-D funding must include a statement identifying how the Tribe or Tribal organization will operate a IV-D program that meets the objectives of Title IV-D. Among the objectives that the Tribal IV-D plan must address is the modification of support orders.[302] Beyond that general requirement, there are no Federal regulations detailing modification procedures that a Tribe must provide.

A Tribal court will apply Tribal law in a modification action. Whether an administrative agency could modify a judicial support order was the issue in *Esther Bedoni v. Navajo Nation Office of Hearings and Appeals*.[303] The court concluded that under the Navajo Nation Child Support Enforcement Act, the Office of Hearings and Appeals could only modify its own administrative orders. The Tribal trial court maintained jurisdiction to modify trial court orders.

## INTERSTATE/INTERGOVERNMENTAL CASES

States, as a condition of receiving Federal IV-D funding, are required to enact the 1996 Uniform InterState Family Support Act (UIFSA).[304] Tribes are <u>not</u> required to enact UIFSA. On the other hand, both States and Tribes are subject to the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).[305] Like UIFSA, FFCCSOA sets limits on when a "State" is permitted to modify another State's support order. The Act defines "State" to include "Indian country (as defined in section 1151 of title 18)."[306] Therefore, both States and Tribes should be applying consistent rules regarding when another jurisdiction's support order can be modified. Those rules[307] are outlined below:

- If there is only one support order and an individual party or child resides in the issuing State, that State has continuing, exclusive jurisdiction to modify.
- If there is only one support order and no party or child lives in the issuing State, the party seeking modification must register the order for modification in a State – other than his or her own – that has personal jurisdiction over the nonmovant.
- If there is more than one support order entitled to recognition and more than one State can claim continuing, exclusive jurisdiction, the tribunal

[302] 45 C.F.R. §§ 309.15 and 309.90.
[303] No. SC-CV-13-02 (Supreme Court of the Navajo Nation Sept. 3, 2003).
[304] Section 5537 of P.L. No. 105-33 (1997), amending Section 321 of P.L. No. 104-193 (1996) (codified at 42 U.S.C. § 666(f)). UIFSA (1996) is located at 9 Pt. 1B U.L.A. 235 (1999). It can also be accessed through the website of the National Conference of Commissioners on Uniform State Laws: www.nccusl.org. UIFSA was amended in 2001 but there is currently no federal funding mandate that States enact the 2001 amendments.
[305] P.L. No. 103-383 (1994) (codified at 28 U.S.C. § 1738B). *See also* 69 Fed. Reg. 16,638 at 16,658.
[306] 28 U.S.C. § 1738B(b).
[307] Section 105 of UIFSA and 28 U.S.C. § 1738B(e), (f).

must determine the controlling order.[308] The State that issued the controlling support order is the State with continuing, exclusive jurisdiction to modify.

- If there is more than one support order entitled to recognition and no issuing State can claim continuing, exclusive jurisdiction, a tribunal with jurisdiction over both parties must issue a new support order, which becomes the controlling order in the case.

One Alaska Native commenter to the proposed final rule on Tribal child support enforcement programs stated that Tribal court jurisdiction does not mesh with FFCCSOA when there is no geographic region from which to determine whether the parent or child resides "in the State" for purposes of CEJ or a controlling order determination. The Federal response was that "FFCCSOA does not limit the exercise of jurisdiction to a geographical area. FFCCSOA only requires a court exercising jurisdiction to have the authority to do so."[309]

[308] The order issued by the child's home State, as defined by the Act, is the controlling order. If no issuing State is the child's home State, the most recent order is the controlling order. Section 207 of UIFSA.
[309] 69 Fed. Reg. 16,638 at 16,665.

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# CHAPTER EIGHT
# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

Balanced Budget Act of 1997, P.L. No. 105-33 (1997)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

28 U.S.C. § 1738B

42 U.S.C. § 666(a)(10)

42 U.S.C. § 666(f)

45 C.F.R. § 303.8

45 C.F.R. § 309.15

45 C.F.R. § 309.90

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

UIFSA (1996), 9 Pt. 1B U.L.A. 235 (1999)

UIFSA (2001), 9 Pt. 1B U.L.A. __ (Supp. 2001)

Section 105 of UIFSA (1996) and (2001)

Section 207 of UIFSA (1996) and (2001)

## Case Law

*Esther Bedoni v. Navajo Nation Office of Hearings and Appeals*, No. SC-CV-13-02 (Supreme Court of the Navajo Nation Sept. 3, 2003)

## Periodicals/Publications

None

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# CHAPTER NINE
# SUPPORT ENFORCEMENT

Once a court or agency has entered a support order with proper subject matter and personal jurisdiction, the order is enforceable. Both State and Tribal IV-D programs must provide enforcement services to their customers.

## ENFORCEMENT REMEDIES

State and Tribal laws provide a variety of enforcement remedies. Some actions are directed against particular assets, such as personal or real property, and require that the court or agency have jurisdiction over the property. Such jurisdiction is called *in rem* jurisdiction, which is Latin meaning jurisdiction over the *res*, or thing. Other enforcement remedies are directed against the person, such as civil contempt or criminal prosecution. Those remedies require *in personam* jurisdiction, which is jurisdiction over the person. Federal law does not address jurisdictional requirements. However, Federal law does require that States and Tribes have certain types of remedies available to enforce support orders, in order to receive Federal IV-D funding. States and Tribes may have and use enforcement remedies in addition to the ones discussed below.

**State Title IV-D Requirements** Certain enforcement remedies are available exclusively to State IV-D agencies. Other remedies are available to any child support tribunal,[310] as well as to private attorneys and collection agencies. Some always involve court action; others are administrative in nature, requiring little or no court action. Determining correct remedies is case-specific. Thus, the facts, coupled with Federal and State mandates, dictate how a IV-D caseworker should proceed to enforce the particular support order. The following list highlights enforcement remedies that a State must have in order to receive Federal IV-D funding.

- **Income Withholding**

The most effective child support enforcement tool is income withholding, a procedure by which automatic deductions are made from wages or other income. Once initiated, income withholding can keep support flowing to the family on a regular basis. Today, any child support order issued or modified in a State, regardless of whether the case is a IV-D case, must contain a provision for income withholding.[311] Additionally, immediate withholding is required in all IV-D cases that have an order issued or modified on or after November 1, 1990.[312] The exceptions to immediate withholding are very limited. The Family Support Act of 1988[313] carved out a "good cause" exception to immediate income withholding. That exception requires the tribunal to approve a written agreement executed between the custodial parent and the noncustodial parent for an alternative payment arrangement. The tribunal must make a finding that implementing immediate income withholding would not be in the best interest of the child and require

[310] The term "tribunal" refers to a court and/or administrative agency.
[311] 42 U.S.C. § 666(a)(8)(B)(ii); 45 C.F.R. § 303.100(g).
[312] 45 C.F.R. § 303.100(b).
[313] P.L. No. 100-485 (1988).

some proof, if the order is being modified, that previously ordered support was paid in a timely manner.[314]

PRWORA brought about several additional changes to income withholding. For instance, different types of income, not just wages, are now subject to withholding.[315] Additionally, State agencies must have administrative authority to initiate income withholding. PRWORA also required the States to adopt UIFSA[316] and its direct income withholding provision. Under UIFSA, income withholding can be initiated in one State, and sent directly to an employer in another State, without involving a tribunal or the IV-D agency in either State.[317] Direct income withholding is available in all interState cases, including those handled by private attorneys.

In IV-D cases in which income withholding is not immediate, including those cases whose order predates the statutory date of November 1, 1990, and cases in which the court has found good cause, an income withholding must be initiated when the support owed is at least equal to one month's support amount.[318] Additionally, the noncustodial parent can request that income withholding be initiated or the State IV-D agency can determine, after request by the custodial parent, that income withholding would be appropriate.[319] In cases involving income withholding that is initiated rather than immediate, the noncustodial parent is entitled to notice. Should the noncustodial parent wish to contest the withholding, the only issue that the tribunal should consider is a mistake of fact (i.e., an incorrect amount or the incorrect individual).[320]

The National Directory of New Hires (NDNH) interacts with the Federal Case Registry (FCR), which contains information about persons in child support cases being handled by State IV-D agencies. These two databases compare their data and, when a match occurs, the NDNH provides the appropriate State with information concerning the noncustodial parent. That information can be used by the State to initiate an income withholding notice to the noncustodial parent's employer. OCSE has issued a standardized *Order/Notice to Withhold Income for Child Support*, which must be used for all child support orders.[321]

- **Judgments**

The Omnibus Budget Reconciliation Act of 1986[322] provided that all support orders must be entitled to judgment status. Further amendments to the Social Security Act have made it a State requirement that unpaid support installments become a judgment by operation of law, entitled to full faith and credit by States, and not subject to retroactive modification.

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[314] 42 U.S.C. § 666(b)(3)(A); 45 C.F.R. § 303.100(b)(2).
[315] 42 U.S.C. § 666(b)(8).
[316] Unif. InterState Family Support Act (1996)[hereinafter UIFSA], 9 Pt. 1B U.L.A. 235 (1999).
[317] UIFSA §§ 501 – 506 (amended 2001), 9 Pt. 1A U.L.A. 336 – 346 (1999).
[318] 45 C.F.R. § 303.100(c)(1).
[319] 45 C.F.R. § 303.100(c).
[320] *Id*.
[321] 42 U.S.C. §§ 666(a)(8)(B) and 666(b)(6)(A)(ii).
[322] P. L. No. 99-509 (1986).

- **Liens and Levy**

Federal law requires States, as a condition of receiving Federal funds, to provide that a lien, in the amount of overdue support, arises by operation of law against a noncustodial parent's real and personal property.[323] Methods for creating, and executing on, the liens are subject to State law. Federal law also requires States to give full faith and credit to the lien of another State, as long as "the State agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the State[.]"[324] To increase recognition of sister State liens, Congress required States to impose liens using standardized forms beginning March 1, 1997.[325]

- **Federal Tax Refund Intercept**

States, as a condition of receiving Federal funds, are required to submit qualifying IV-D cases for Federal income tax refund offset. Note that current Federal law does not allow a State to release tax information to a Tribal IV-D agency.[326] Tribes and States may enter into agreement to refer Tribal cases to the State for submittal for Federal income tax refund offset. Any such access would currently also require a request for State IV-D services. However, there is nothing to preclude an individual from applying for and receiving services from both a State and Tribal IV-D agency.[327]

- **Financial Institution Data Match (FIDM)**

FIDM is a means of locating certain obligor assets, which later can be levied to fulfill the unpaid support amount. These assets include demand deposit accounts, checking accounts or negotiable withdrawal order accounts, savings accounts, time deposit accounts and money-market mutual fund accounts. As provided in PRWORA, a State IV-D agency, as a condition of receiving Federal IV-D funding, must establish agreements with financial institutions to perform data match exchanges, in which account information is matched against a list of delinquent obligors.[328] After identifying accounts owned by the obligor, the State IV-D agency, consistent with State law, can seek to attach these assets and seize them to satisfy delinquent support debts.

The Child Support Performance and Incentive Act of 1998[329] amended the FIDM process to authorize OCSE to act as a conduit between States and multiState financial institutions to facilitate a centralized, quarterly data match.

- **State Income Tax Refund Offset**

Any State that has an income tax must, in order to receive Federal IV-D funding, have enacted a statute authorizing the State revenue agency to withhold income tax

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[323] 42 U.S.C. § 666(a)(4)(A).
[324] 42 U.S.C. § 666(a)(4)(B).
[325] 42 U.S.C. § 652(a)(11)(B)and 42 U.S.C. § 654(9)(E). The Notice of Lien form and accompanying instructions are available on the OCSE web site at www.acf.dhhs.gov/programs/cse.
[326] *See* 69 Fed. Reg. 16,638 at 16,656.
[327] *See* 69 Fed. Reg. 16,638 at 16,654.
[328] 42 U.S.C. § 666(a)(17).
[329] P.L. No. 105-200 (1998).

refunds due individuals who owe a child support debt. The procedure is nearly identical to the Federal tax refund offset procedure. The State revenue agency performs a role similar to the IRS.[330]

- **License Revocation**

As a condition of receiving Federal IV-D funds, a State must have procedures regarding the withholding, suspension, or restriction of the licenses of noncustodial parents who owe past due support. Specifically, the mandate relates to drivers' licenses, professional and occupational licenses, as well as recreational and sporting licenses.[331] Licenses can be affected when the noncustodial parent meets established criteria or fails to comply with subpoenas or warrants related to child support proceedings. Appropriate notice is required. Use of these procedures is not mandated in every case, but must be available at the State's discretion.

- **Consumer Reporting Agencies**

PRWORA required the States, as a condition of receiving Federal funds, to institute measures to periodically report unpaid child support to credit bureaus.[332]

- **Posting Bonds**

The Child Support Enforcement Amendments of 1984 required States, as a condition of receiving Federal funds, to enact and use "procedures which require that a noncustodial parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such noncustodial parent of the proposed action, and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State)."[333]

**Tribal Title IV-D Requirements** Tribes that do not receive Federal funding for their child support programs must provide full faith and credit to valid child support orders, but are not subject to Federal requirements governing specific enforcement remedies. Like States, Tribes that receive Federal funding to operate Tribal IV-D programs are subject to Federal regulations that require the enforcement of support orders. However, unlike States, the only mandated enforcement remedy is income withholding.

- **Income Withholding**

The income withholding requirements for Tribes operating Federally funded IV-D programs are similar to those requirements governing State IV-D programs. Tribal laws must require amounts to be withheld for both current support and any arrears.[334] Tribal IV-D agencies are required to use the Federal standardized income withholding notice.[335] Like States, Tribes cannot exceed, but may set lower income withholding

[330] P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666(a)(3)(A).
[331] 42 U.S.C. § 666(a)(16).
[332] 42 U.S.C. § 666(a)(7)(A).
[333] P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666.
[334] 45 C.F.R. § 309.110(b).
[335] 45 C.F.R. § 309.110(l).

limits than the Consumer Credit Protection Act.[336] Employers who discriminate due to withholding must be subject to a fine. Where there are multiple withholding orders for the same obligor, the Tribal IV-D agency must allocate withheld amounts to ensure that each order receives some amount of current support.[337] Tribal law must provide for a fine if the employer discharges an employee due to withholding.[338]

There is an important exception, however. Tribes are not required to have immediate income withholding. In promulgating the final rule, OCSE noted that many of the comments it had received from Tribes to the proposed rule indicated that other methods of collecting support – such as bringing the noncustodial parent before Tribal elders -- were more effective than income withholding.[339] Therefore, Federal regulations governing Tribal IV-D programs require that income be subject to withholding once the noncustodial parent has failed to make support payments equal to one month's amount of support.[340]

The regulations also provide for an exception to income withholding when either parent demonstrates, and the tribunal enters a finding, that there is good cause not to require income withholding; or a signed written agreement is reached between the custodial and noncustodial parent that provides for an alternate agreement.[341] A Tribal IV-D agency must receive and process income withholding orders from State or other Tribes and ensure such orders are promptly served on employers.[342] However, because Tribes are not required to enact UIFSA, Tribal employers or Tribally-owned businesses are not required to honor direct income withholding orders. Tribes may choose to require employers to honor direct withholding requests, but the enactment of such a law is not mandated.[343]

Federal regulations leave it to Tribal law to determine what type of income can be withheld for child support enforcement.[344] "For purposes of this regulation, we [the Federal Office of Child Support Enforcement] have defined income at 309.05, to mean any periodic form of payment due to an individual, regardless of source, except that the exclusion of per capita, trust or Individual Indian Money (IIM) payments must be expressly decided by a Tribe. This allows Tribes the flexibility to exclude specific categories of payments from this definition, including per capita payments, trust income, and gaming profit distributions. We have not required Tribes to withhold the Tribal benefits (casino profits, oil and mineral rights) of obligors. . . . In respect for Tribal sovereignty, we have determined that it is not appropriate in this regulation to directly affect Tribal management of Tribes' own resources."[345]

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[336] 45 C.F.R. § 309.110(c).
[337] 45 C.F.R. § 309.110(m).
[338] 45 C.F.R. § 309.110(k).
[339] 69 Fed. Reg. 16,638 at 16,661.
[340] 45 C.F.R. § 309.110(i).
[341] 45 C.F.R. § 309.110(h).
[342] 45 C.F.R. § 309.110.
[343] *See* 69 Fed. Reg. 16,638 at 16,662.
[344] *See* 69 Fed. Reg. 16,638 at 16,661.
[345] *Id.*

## RECOGNITION OF JUDGMENTS

**Full Faith and Credit** The United States Constitution requires that States give full faith and credit to the "Public Acts, Records, and Judicial Proceedings of every other State."[346] Because of their dependent sovereign status, Tribes are not bound by the Full Faith and Credit Clause of the Constitution.[347] Nor has Congress required Federal and State courts to give full faith and credit to all Tribal court decisions.[348] However, it has required full faith and credit in three specific areas: domestic violence orders (18 U.S.C. § 2265), child custody orders (25 U.S.C. § 1911(d)), and child support (28 U.S.C. § 1738B). In 1994, Congress enacted the Full Faith and Credit for Child Support Orders Act (FFCCSOA),[349] which specifically applies to Indian country (as defined by 18 U.S.C. § 1151), as well as States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories and possessions.[350] The Act requires the appropriate parties of such jurisdictions to:

- enforce according to its terms a child support order[351] made consistently with FFCCSOA by a court or agency of another State; and
- not seek or make a modification of such an order except in accordance with FFCCSOA.

Therefore, Tribes and States must recognize and enforce each other's valid child support orders, i.e., orders entered with appropriate subject matter and personal jurisdiction.[352] There is no Federal directive regarding how such recognition must occur. Many Tribes use a registration process for enforcement purposes under FFCCSOA.

**Comity** Comity between sovereigns is a voluntary, rather than mandated, recognition of each other's judgments and decrees:

> "[c]omity", in the legal sense, is neither a matter of absolute obligation on the one hand, nor a mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative,

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[346] U.S. Constitution art. IV, § 1, cl. 1.
[347] The U.S. Constitution does not apply to Tribes. *Talton v. Mayers*, 163 U.S. 376 (1896).
[348] *See, e.g.,* Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 New Eng. L. Rev. 669 n. 18 (2003); Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D.L. Rev. 311 (2000); Stoner and Orona, *supra* note 27.
[349] P.L. No. 103-383 (1994) (codified at 28 U.S.C. § 1738B).
[350] *See* OCSE-AT-02-03 on the applicability of FFCCSOA to States and Tribes.
[351] A Tribal order that did not State a specific dollar amount of support and did not provide criteria by which to judge whether the parties were fulfilling their obligations was not a recognizable child support order to which the court must give full faith and credit or extend comity. *John v. Baker*, Alaska Supreme Court No. S-11176 (No. 596 decided Dec. 16, 2005). The Alaska Supreme Court stated that a Tribal child support order need not match the format of a support order issued by State courts in order to be recognized. However, if the order simply directed the parties "to help each other financially," it was not concrete enough to be enforceable. The court pointed out that the issuing Northway Village Tribal court, in a brief filed in a related custody proceeding, had also maintained that its custody order did not include child support.
[352] *See, e.g., Hanson v. Grandberry*, Puyallup Tribal Court (No. CV 98-004 June 8, 1999)(http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm). *See also Smith v. Hall*, 2005 N.D. 215 (filed Dec. 20, 2005).

> executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of the laws.[353]

Whereas FFCCSOA only addresses valid child support orders, a basis for States and Tribes to recognize each other's paternity adjudications is the doctrine of comity. Some States have specific statutes outlining when comity is appropriate. For example, South Dakota provides that before a State court may consider recognizing a Tribal court order or judgment, the party seeking recognition must establish by clear and convincing evidence that:

(a) The Tribal court had jurisdiction over both subject matter and the parties;

(b) The order or judgment was not fraudulently obtained;

(c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including, but not limited to, due notice and a hearing;

(d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and

(e) The order or judgment does not contravene the public policy of the State of South Dakota.[354]

In *Smith v. Scott*,[355] the Mashantucket Pequot Tribal Court used the doctrine of comity to recognize and enforce a Connecticut money judgment for damages in a sexual abuse case. In deciding whether a particular judgment is to be recognized and enforced through comity, the Tribal court set forth several requirements that must be met. First, comity will not apply unless there is reciprocal recognition of judgments, i.e., the other sovereign – here the State of Connecticut – must recognize judgments of the Mashantucket courts. Second, the foreign judgment must not contravene the public policy of the Tribe. Finally, the foreign judgment must have been issued by a court of competent jurisdiction in the foreign jurisdiction.

## ENFORCEMENT OF TRIBAL SUPPORT ORDER

The following discussion focuses on enforcement of a Tribal support order. It assumes that it is a valid support order, with appropriate subject matter and personal jurisdiction.

### Obligor (Indian or Non-Indian) Resides and Works on Reservation

When the obligor resides and works on the reservation, Tribal courts may enforce the support order through a variety of means. The following remedies are common under Tribal codes:

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[353] *Hilton v. Guyot*, 159 U.S. 113 (1894).
[354] S.D. Codified Laws Ann § 1-1-25. *See also* N.D. Rule of Court 7.2.
[355] 30 Indian L. Rptr. 105 (Mashantucket Pequot Tribal Court, No. MPTC-CV-2002-182 April 23, 2003).

- an ongoing assignment of part of the obligor's periodic earnings or trust income;
- an order to withhold and pay money due;
- contempt;[356] and
- lien and execution on property.

As noted earlier, Tribes operating Federally funded IV-D programs must provide for enforcement by income withholding. A non-Tribal employer operating on the reservation must honor a Tribal income withholding order. By entering into "consensual relations" with the Tribe "through commercial dealings," the non-Indian employer is subject to Tribal jurisdiction.[357]

Tribal courts also often invoke non-punitive enforcement remedies, such as dispute resolution or admonishment by Tribal elders.

### Obligor (Indian or non-Indian) Resides on Reservation but Works off Reservation

When the obligor resides on a reservation but works off the reservation, the Tribal IV-D agency can enforce the order by sending an income withholding order directly to the off-reservation employer. Although Tribes are not required to enact UIFSA as a condition of receiving Federal IV-D funds, States are. Therefore, each State has enacted UIFSA, which requires an employer to honor direct income withholding orders/notices sent by States or Tribes. The Tribal court may also enforce the support order by contempt since it continues to have personal jurisdiction over the obligor.[358] Assuming Tribal code authority, the support order can be enforced against any property the obligor may own on the reservation.

The Tribal IV-D agency can also ask the State court or administrative agency to recognize and enforce the Tribal support order pursuant to the FFCCSOA. The State court or agency will then use State law to enforce the Tribal support order. This may be particularly effective if the obligor owns property off the reservation.

The Tribal support order can also be registered in a State court pursuant to UIFSA. Because UIFSA defines "State" to include Indian Tribes, a support order issued by a Tribe is enforceable in the State as soon as it is registered for enforcement; there is a presumption that the registered order is valid. If the obligor wishes to challenge the validity of the registered order, he or she must do so within the 20-day time limit for raising a challenge. At least one State court has held that a motion to vacate a Tribal support order based on lack of personal jurisdiction is a defense to registration that must be raised within the 20-day time period or it is waived.[359]

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[356] *See Hogdon v. Nelson,* No. SC-CV-19-94 (Navajo Supreme Court 8/23/1995). Accessible through www.Tribalresourcecenter.org/opinions.
[357] *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1314 (9th Cir. 1990).
[358] *See, e.g*., 9 Navajo Tribe Code tit 9, § 1303.
[359] *Smith v. Hall*, 2005 N.D. 215 (filed Dec. 20, 2005).

## ENFORCEMENT OF STATE SUPPORT ORDER

The following discussion focuses on enforcement of a State support order. It assumes that it is a valid support order, with appropriate subject matter and personal jurisdiction.

### Obligor (Indian or non-Indian) Resides and Works off Reservation

Whether or not the obligor is an Indian, so long as he or she resides and works off the reservation, the State court may enforce its support order just as it would enforce a support order involving non-Indian parties.

### Indian Obligor Resides and Works on Reservation

The State court may attempt to enforce its order by a contempt proceeding against the obligor. However, service of process on the obligor must be valid. See the discussion on Service of Process, herein.

The State agency may also seek enforcement of the order by income withholding. UIFSA requires that an employer honor a direct income withholding request. However, as noted earlier, no Tribe has enacted UIFSA nor is there a requirement that Tribes receiving Federal IV-D funding do so. Therefore, an employer in Indian country is not required to honor a State-issued direct income withholding request unless Tribal law so provides. If the Indian obligor works on a reservation where the Tribe receives Federal IV-D funding, the State agency can forward the State income withholding order to the Tribal IV-D agency for processing. Pursuant to 45 C.F.R. § 309.110(n), the Tribal IV-D agency must receive and process income withholding orders from the State or other Tribes and ensure that such orders are promptly served on employers.

It is unlikely that a State agency can seek enforcement of an arrearage judgment by sending a State garnishment order directly to the obligor's employer, if that employer is located on a reservation. Courts have found such action an unlawful infringement on Tribal sovereignty.[360] Both *Joe v. Marcum* and *Begay v. Roberts* involved Indian defendants who had incurred commercial debts with non-Indians off the reservation. In each case, the non-Indian entity obtained money judgments, which it then attempted to enforce by writs of garnishments against the Indian's employer, which was located on the reservation. In *Joe v. Marcum*, the employer was a Delaware incorporated business, which operated a strip mine and maintained its offices exclusively on the reservation. The writ of garnishment was served on the reservation. The Federal court concluded that to permit the State court of New Mexico to run a garnishment against an employer, on the reservation, and attach wages earned by an Indian for on-reservation labor, "would thwart the Navajo policy not to allow garnishment. Such impinges upon Tribal sovereignty."[361]

[360] *See, e.g*., *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980); *Begay v. Roberts*, 807 P.2d 1111 (Ariz. App. 1990).
[361] *Joe v. Marcum,* 621 F.2d at 361-62.

In contrast, although the defendant in *Begay v. Roberts* worked on the reservation, his employer was a political subdivision of the State of Arizona, with offices Statewide. The writs were served on the employer at one of its offices off the reservation. Begay argued that although the State court may have had jurisdiction to enter the judgments against him, it did not have jurisdiction to garnish his wages because he was an Indian who lived and worked on the Navajo reservation. The garnishee maintained that, because the employer issued the wages off the reservation, the State court had jurisdiction to garnish them. In its decision, the Arizona Court of Appeals emphasized that it did not matter that, under other circumstances, the employer was subject to the jurisdiction of the Arizona courts: "Because Begay is a Navajo Indian living and working on the reservation, . . . this case cannot be decided without considering the Indian law implications. The fact that the transaction resulting in the underlying actions occurred off the reservation does not eliminate these implications, although it may be a factor to consider."[362] The court used the preemption and infringement analysis set forth in *Williams v Lee.*[363] It concluded that "the garnishment of a reservation Indian's wages earned on the reservation is preempted and infringes on Navajo Tribal sovereignty."

Several factors were key to the court's holding. First, it stated that the Navajo Treaty of 1868 had been interpreted consistently to preclude State court jurisdiction over Navajos living on the reservation. Second, although the garnishment in this case took place physically off the reservation, unlike the garnishment in *Joe v. Marcum*, it did not believe that such a distinction affected the result; just as in *Joe v. Marcum*, the effect of the garnishment would reduce Begay's income and thus threaten or have a direct effect on the "health and welfare of the tribe," citing *Montana v. United States*.[364] Third, the State action of issuing a writ of garnishment against an Indian's wages, which were earned on the reservation, infringed upon Navajo Tribal sovereignty because the Navajo Tribal Code did not provide for enforcement of judgments by garnishment. Rather, the Navajo Tribe had chosen to provide alternative remedies for the enforcement of judgments against reservation Indians.

The State IV-D agency may seek recognition and enforcement of the order pursuant to FFCCSOA. Tribes within Indian country are required to give full faith and credit to valid State child support orders. Once a State support order is recognized under FFCCSOA, the Tribal court can use enforcement methods that are available under Tribal law.

If the State has complete Public Law 280 jurisdiction over domestic matters, the State IV-D agency can probably also seek enforcement against any nontrust property[365] that is owned by the Indian obligor and located within the State, including personalty.[366]

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[362] *Begay v. Roberts*, 807 P.2d at 1111, 1115 (Ct. App. 1990).
[363] *Williams v. Lee,* 358 U.S. 217 (1959).
[364] *Montana v. United States,* 450 U.S. 544 (1981).
[365] 25 U.S.C. § 1322(b) excludes trust property from execution.
[366] *See Calista Corp. v. DeYoung*, 562 P.2d 338 (Alaska 1977) (allowed State with Public Law 280 jurisdiction to collect child support arrears by obtaining cash distributions from stock in corporations formed pursuant to the Native Claims Settlement Act).

## Indian Obligor Resides on Reservation but Works off Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the Indian obligor while he or she is working off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off the reservation.

When the obligor derives income off the reservation, the State IV-D agency can seek enforcement of the State support order by income withholding against the off-reservation income. A case in point is *First v. State*.[367] Applying a preemption/infringement test, the Montana Supreme Court found no Federal preemption to State enforcement against off-reservation income and no unlawful infringement on the right of reservation Indians to make their own laws and be ruled by them. It therefore upheld State administrative income withholding against off-reservation income (unemployment benefits), payable to an enrolled Tribal member living on the reservation, as a means to enforce a State child support order. The court held that State court jurisdiction did not violate Federal law, but actually promoted Federal law regarding the Title IV-D child support program. It also concluded that since the Tribal code only addressed support enforcement against on-reservation income and was silent on enforcement against off-reservation income, Montana's assertion of subject matter jurisdiction did not interfere with Tribal sovereignty. It noted that although the purpose of the income withholding was to enforce a child support obligation, it was a collection action and therefore "not an area dominated by Tribal tradition and custom."[368]

If the obligor is a Federal employee, the Federal government has the authority to withhold wages for child support, regardless of American Indian/American Native membership, residency, or employment on a reservation.[369]

If the obligor owns property on the reservation against which the support order may be enforced, the State IV-D agency may ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court would then use Tribal law to enforce the State support order.

## Indian Obligor Resides Off Reservation but Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the Indian obligor while he or she is off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off reservation.

The State agency may also seek enforcement of the order by income withholding. UIFSA requires that an employer honor a direct income withholding

[367] 247 Mont. 465, 808 P.2d 467 (1991).
[368] *Id*. at 473.
[369] *See* OCSE-IM-02-01 Income Withholding from Federal Employees Working on Indian Reservations.

request. However, no Tribe has enacted UIFSA nor is there a requirement that Tribes receiving Federal IV-D funding do so. Therefore, an employer in Indian country is not required to honor a State-issued direct income withholding request against wages earned by an Indian obligor, unless Tribal law so provides. Based on case law addressing writs of garnishment, it is likely that such direct State action would be considered an infringement on Tribal sovereignty, regardless of whether the employer was the Tribe, a Tribally-owned employer, or an employer that also does business within the State – especially if the Tribe had not authorized income withholding for support enforcement.[370] If the Indian obligor works on a reservation where the Tribe receives Federal IV-D funding, the State agency can forward the State income withholding order to the Tribal IV-D agency for processing. Pursuant to 45 C.F.R. § 309.110(n), the Tribal IV-D agency must receive and process income withholding orders from State or other Tribes and ensure that such orders are promptly served on employers.

Probably the best approach is for the State IV-D agency to seek recognition and enforcement of the order pursuant to FFCCSOA. Tribes within Indian country are required to give full faith and credit to valid State child support orders. Once a State support order is recognized under FFCCSOA, the Tribal court can use enforcement methods that are available under Tribal law.

**Non-Member or Non-Indian Obligor Resides and Works on Reservation**

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. Service of process must be valid. See the discussion on service of process herein. It can also enforce the order against any personal or real property that the obligor owns off reservation.

If the non-member or non-Indian obligor works for the Tribe or a Tribally owned business, direct enforcement by State income withholding or garnishment of wages will likely be unsuccessful due to Tribal sovereign immunity. If the non-member or non-Indian obligor works on the reservation for an employer that is not entitled to claim Tribal sovereign immunity, it is less clear whether such action infringes on Tribal sovereignty.

If the Tribe operates a Federally funded IV-D program, the State IV-D agency can ask the Tribal IV-D agency for assistance in processing the State income withholding order. The Tribal IV-D agency is required by Federal regulation to promptly serve the State withholding order on the employer.[371]

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. This may be particularly effective if the obligor owns property on the reservation and Tribal law allows enforcement of the State support order against such property.

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[370] *See Joe v. Marcum,* 621 F.2d 358 (10th Cir. 1980) and *Begay v. Roberts,* 7 P.2d 1111 (1990).
[371] 45 C.F.R. § 309.110(n).

### Non-Member or Non-Indian Obligor Resides off Reservation but Works on Reservation

The State agency may attempt to enforce the State child support order by a contempt proceeding against the obligor. To avoid jurisdictional issues, the agency should serve the obligor while he or she is off reservation. The State agency can also enforce the order against any personal or real property that the obligor owns off reservation.

If the non-member or non-Indian obligor works for the Tribe or a Tribally owned business, direct enforcement by State income withholding or garnishment of wages will likely be unsuccessful due to Tribal sovereign immunity. If the non-member or non-Indian obligor works on the reservation for an employer that is not entitled to claim Tribal sovereign immunity, it is less clear whether such action infringes on Tribal sovereignty.

If the Tribe operates a Federally funded IV-D program, the State IV-D agency can ask the Tribal IV-D agency for assistance in processing the State income withholding order. The Tribal IV-D agency is required by Federal regulation to promptly serve the State withholding order on the employer.[372]

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. In *Hanson v. Grandberry*,[373] the plaintiff, a non-Indian who resided off the reservation, sought enforcement in Tribal court of a State child support order against the defendant, also a non-Indian, who resided off the reservation but who was an employee of the Puyallup Tribe, working at the Tribal College located within the reservation. The defendant argued that simply because he was an employee of the Tribe did not mean that the Tribe automatically had jurisdiction over him. The plaintiff argued that by voluntarily working for a Tribal enterprise, the defendant had consented to Tribal jurisdiction. She sought full faith and credit of the order and garnishment of wages. The Puyallup Tribal Court held that the defendant had entered into a consensual relationship with the Tribe, thereby giving the Tribe jurisdiction over him. Furthermore, FFCCSOA authorized the Tribe to enforce the State child support order.

### Non-Member or Non-Indian Obligor Resides on Reservation but Works off Reservation

The State IV-D agency may attempt to enforce the State support order by contempt; the best approach for avoiding service of process issues is to serve the obligor while he or she is at work or otherwise off the reservation. When the obligor derives income off the reservation, the State IV-D agency can also seek enforcement of

[372] 45 C.F.R. § 309.110(n).
[373] Puyallup Tribal Court (No. CV 98-004 June 8, 1999)(http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm).

the State support order by income withholding against the off-reservation income. Federal and State income tax refund offset are also effective remedies.

The State can also ask the Tribal court to recognize and enforce the State support order pursuant to the FFCCSOA. The Tribal court will then use Tribal law to enforce the State support order. This may be particularly effective if the obligor owns property on the reservation and Tribal law allows enforcement of the support order against such property.

# CHAPTER NINE

# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

U.S. Constitution, Full Faith and Credit Clause, U.S. Constitution art. IV, § 1, cl. 1.

Alaska Native Claims Settlement Act, P.L. No. 92-203 (1971), codified at 43 U.S.C. §§1609 - 1624

Child Support Enforcement Amendments of 1984, P.L. No. 98-378 (1984), codified at 42 U.S.C. § 666

Child Support Performance and Incentive Act of 1998, P.L. No. 105-200 (1998)

Consumer Credit Protection Act, P.L. No. 90-321, 82 Stat. 146 (1969), codified at 15 U.S.C. §§ 1601 *et seq*.

Family Support Act of 1988, P.L. No. 100-485 (1988)

Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (1994), codified at 28 U.S.C. § 1738B

Omnibus Budget Reconciliation Act of 1986, P. L. No. 99-509 (1986)

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

15 U.S.C. §§ 1601 *et seq*.

18 U.S.C. § 1151

18 U.S.C. § 2265

25 U.S.C. § 1322(b)

25 U.S.C. § 1911(d)

42 U.S.C. § 652(a)(11)(B)

42 U.S.C. § 654(9)(E)

42 U.S.C. § 666

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42 U.S.C. § 666(a)(4)(B)

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42 U.S.C. § 666(a)(8)(B)

42 U.S.C. § 666(a)(16)

42 U.S.C. § 666(a)(17)

42 U.S.C. § 666(b)(3)(A)

42 U.S.C. § 666(b)(6)(A)(ii)

42 U.S.C. § 666(b)(8)

43 U.S.C. §§1609 - 1624

45 C.F.R. § 303.100

45 C.F.R. § 309.110

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 at 16,641 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

Uniform InterState Family Support Act (1996), 9 Pt. 1B U.L.A. 235 (1999)

Sections 501-506, UIFSA

9 Navajo Tribe Code tit 9, § 1303

S.D. Codified Laws Ann § 1-1-25

**Case Law**

*Hilton v. Guyot*, 159 U.S. 113 (1894)

*Talton v. Mayers*, 163 U.S. 376 (1896)

*FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1314 (9th Cir. 1990)

*Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980)

*Hanson v. Grandberry*, Puyallup Tribal Court (No. CV 98-004 June 8, 1999) (http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm)

*Hogdon v. Nelson,* No. SC-CV-19-94 (Navajo Supreme Court 8/23/1995)

*Smith v. Scott*, 30 Indian L. Rptr. 105 (Mashantucket Pequot Tribal Court, No. MPTC-CV-2002-182 April 23, 2003)

*Begay v. Roberts*, 807 P.2d 1111 (Ariz. App. 1990)

*Calista Corp. v. DeYoung*, 569 P.2d 338 (Alaska 1977)

*First v. State*, 247 Mont. 465, 808 P.2d 467 (1991)

*John v. Baker*, Alaska Supreme Court No. S-11176 (No. 596 decided Dec. 16, 2005)

*Smith v. Hall*, 2005 N.D. 215 (filed Dec. 20, 2005)

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Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D.L. Rev. 311 (2000).

Stoner and Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M.L. Rev. 381 (2004).

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# CHAPTER TEN
# EFFORTS AT FACILITATING INTERJURISDICTIONAL SUPPORT ENFORCEMENT

## TRIBAL AND STATE CHILD SUPPORT PROGRAMS

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[374] as amended by the Balanced Budget Act of 1997,[375] authorizes the direct funding of Tribal child support enforcement programs by the Federal government. The Department of Health and Human Services published a final rule on March 30, 2004,[376] providing the mechanism for Tribes to submit child support enforcement plans and, upon approval, to receive direct Federal funding of Tribally operated programs.

As of March 2007, the following Tribes have been approved to operate their own child support programs:

- Chickasaw Nation / OK
- Forest County Potawatomi Community / WI
- Lac du Flambeau Band of Lake Superior Chippewa Indians / WI
- Lummi Nation / WA
- Menominee Tribe / WI
- Navajo Nation / NM, AZ, UT
- Port Gamble S'Klallam Tribe / WA
- Puyallup Tribe of Indians / WA
- Sisseton-Wahpeton Oyate / SD
- Central Council Tlingit and Haida Indian Tribes / AK

There are also twenty-seven tribes with start-up programs: Osage Tribe of Oklahoma; Cherokee Nation of Oklahoma; Quinault Indian Nation (WA); Nooksack Indian Tribe (WA); Confederated Tribes of Umatilla (OR); Confederated Tribes of Colville (WA); Winnebago Tribe (NE); Three Affiliated Tribes (Mandan, Hidatsa and Arickara Nation) (ND); Red Lake Band of Chippewa Indians (MN); Oneida Tribe of Indians (WI); Keewenaw Bay Indian Community (MI); White Earth Nation (MN); Muscogee (Creek) Nation, (OK); Pueblo of Zuni (NM); Ponca Tribe of Oklahoma; Penobscot Nation (ME); Kickapoo Tribe of Kansas; Kaw Nation (OK); Mescalero Apache Tribe (NM); Comanche Nation (OK); Modoc Tribe (OK); Klamath Tribes (OR); Tulalip Tribes (WA); Aleutian/Pribilof Islands Association (AK); Northern Arapaho Tribes (WY); Chippewa Cree Tribe (MT); and Coeur D'Alene Tribe (ID) .

Some Tribal child support programs use the computer systems within their corresponding State. Others are not yet computerized and operate using manual

[374] P.L. No. 104-193.
[375] P.L. No. 105-33.
[376] 69 Fed. Reg. 16,638 (Mar. 30, 2005) (to be codified at 45 C.F.R. Part 309).

systems. A few Tribes have agreements with their individual States or counties for personal service on their reservation, although most do not.

Some Tribes operate their own Temporary Assistance for Needy Families (TANF) program. Members of Tribes that do not have their own program receive TANF benefits through the State's system.

Federal regulations governing State IV-D plans were also amended to require States to cooperate with Tribal IV-D programs.[377] 45 C.F.R. § 302.36(a)(2) now requires States to extend the full range of services available under the IV-D plan to all Tribal IV-D programs.

## COOPERATIVE AGREEMENTS

PRWORA also provides that State IV-D agencies may enter into cooperative agreements with an Indian Tribe, Tribal organization, or Alaska Native Village, group, regional or village corporation so long as it "has an established Tribal court system or Court of Indian Offenses with the authority to establish paternity, establish, modify or enforce support orders or to enter support orders in accordance with child support guidelines established or adopted by such Tribal entity."[378] It is not necessary that the Tribal entity have laws and procedures meeting Federal requirements for all IV-D functions. Implementing regulations are at 45 C.F.R. § 302.34.[379] Such arrangements shall contain provisions for providing courts and law enforcement officials with pertinent information needed in locating noncustodial parents, establishing paternity and securing support, to the extent that such information is relevant to the duties to be performed pursuant to the arrangement. A State may delegate one or multiple IV-D functions to the Tribal entity under a cooperative agreement.[380] Under cooperative agreements, Tribes will not have direct access to the Federal Parent Locator Service (FPLS), Federal debt recovery, or the Federal income tax refund offset. However, Tribal cases will be processed using all resources available through the State IV-D program, as outlined in 45 C.F.R. §§ 303.70, 303.71, and 303.72.[381]

45 C.F.R. § 303.107 establishes requirements for cooperative agreements. They must:

> (a) Contain a clear description of the specific duties, functions and responsibilities of each party;
>
> (b) Specify clear and definite standards of performance which [sic] meet Federal requirements;
>
> (c) Specify that the parties will comply with title IV-D of the Act, implementing Federal regulations and any other applicable Federal regulations and requirements;

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[377] 69 Fed. Reg. 16,638 (Mar. 30, 2005).
[378] Public Law No. 104-193, 110 Stat. at 2256 (codified as amended at 42 U.S.C. § 654(33)). According to OCSE-AT-98-21 (July 28, 1998), it is not necessary that the Tribe comply with every federal IV-D regulation in order to qualify for a cooperative agreement with a State IV-D agency.
[379] 54 Fed. Reg. 30,222 (July 19, 1989), as amended at 61 Fed. Reg. 67,240 (Dec. 20, 1996).
[380] OCSE-AT-98-21 (July 28, 1998).
[381] *Id.*

> (d) Specify the financial arrangements including budget estimates, covered expenditures, methods of determining costs, procedures for billing the IV-D agency, and any relevant Federal and State reimbursement requirements and limitations;
>
> (e) Specify the kind of records that must be maintained and the appropriate Federal, State and local reporting and safeguarding requirements; and
>
> (f) Specify the dates on which the arrangement begins and ends, any conditions for revision or renewal, and the circumstances under which the arrangement may be terminated.[382]

Federal financial participation (FFP) in the eligible costs of providing IV-D services under such a cooperative agreement is available to the State.[383]

An example of a formal cooperative agreement is one between the Eastern Band of Cherokee Indian Tribe and the State of North Carolina. The State has one child support enforcement office that serves several counties in the area, including the reservation. The office, located in Bryson City, 10 miles from Cherokee, provides two case workers to the Cherokee CFR Court, one for intake of new cases, and the other for enforcement of current active cases. The primary objective of both offices is to provide the best services available to enrolled children.[384]

## INTERGOVERNMENTAL AGREEMENTS

Nationwide, States and Indian Tribes have negotiated hundreds of intergovernmental agreements (IGAs) on such diverse subjects as hunting and fishing rights, taxation, cross-deputization, and the Indian Child Welfare Act.[385] States and Tribes are also exploring the use of IGAs to facilitate support enforcement. An example is the Colville Agreement of 1987 entered into by the Washington State Department of Social and Health Services and the Colville Confederate Tribes.[386]

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[382] 54 Fed. Reg. 30,223 (July 19, 1989).
[383] *See* OCSE-AT-98-21 on cooperative agreements.
[384] Strengthening the Circle, *supra* note 179 at 10.
[385] *See* American Indian Law Center, State/Tribal Agreements: A Comprehensive Study (1981).
[386] For an overview of options for overcoming jurisdictional barriers, *see* J. Mickens, Toward a Common Goal: Tribal and State Intergovernmental Agreements for Child Support Cases (State Justice Institute 1994).

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# CHAPTER TEN

# TABLE OF STATUTES AND AUTHORITIES

## Statutes and Regulations

Balanced Budget Act of 1997, P.L. No. 105-33 (1997)

Personal Responsibility and Work Opportunity Reconciliation Act, P.L. No. 104-193 (1996)

42 U.S.C. § 654(33))

45 C.F.R. § 302.36(a)(2)

45 C.F.R. § 303.70

45 C.F.R. § 303.71

45 C.F.R. § 303.72

45 C.F.R. § 303.107

54 Fed. Reg. 30,222 (July 19, 1989), as amended at 61 Fed. Reg. 67,240 (Dec. 20, 1996)

54 Fed. Reg. 30,223 (July 19, 1989)

Tribal Child Support Enforcement Programs: Final Rule, 69 Fed. Reg. 16,638 (Mar. 30, 2004) (to be codified at 45 C.F.R. Pt. 309)

## Case Law

None

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American Indian Law Center, State/Tribal Agreements: A Comprehensive Study (1981).

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Office of Child Support Enforcement, U.S. Dept. of Health & Human Serv., Strengthening the Circle: Child Support for Native American Children (1998).

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## CONCLUSION

The goal of this revised monograph has been to update information regarding the history, processes, jurisdictional issues, and innovations of State and Tribal interaction in the area of child support. Basic knowledge of both State and Tribal programs, and communication among stakeholders in each community, will lead to continued improvement in the delivery of services to Indian children. As one Tribal judge commented, "[o]nce we are willing to find out about each other, we can work together."

As the topic of Tribal and State interaction increasingly appears on the agenda of child support conferences, speakers and attendees have had opportunities for sharing best practices. Practice tips have included the following:

- To determine if someone is enrolled in a Tribe, ask the person for his or her Certificate of Degree of Indian Blood (CDIB) card, which shows enrollment.
- Remember that each Tribe is different, with its own laws.
- Find out what procedure(s) are required to register a State support order for enforcement with the Tribe.
- Coordinate service of process in Indian country with the Tribe. When personal service is required, Tribal authorities are often the most appropriate individuals for serving State process on a reservation.
- State and Tribal court clerks are excellent resources regarding pleadings, required forms, and filing deadlines and procedures.
- Attorneys should check regarding authority to practice law in a particular forum. Admission to practice in a State court does not automatically mean that the attorney is admitted to practice in a Tribal court in that State.
- Communicate.
- Build a foundation of trust.

Speakers have also made the following long-range recommendations:

- National and State child support conferences should include sessions that provide attendees an opportunity to become better informed about Tribal cultures and Tribal child support programs.
- Tribal child support conferences should include sessions that provide attendees an opportunity to learn about State's best practices so that Tribes can decide if such practices are helpful in developing their own child support programs.

- Joint conferences should be regularly planned for Tribal and State court judges who hear child support cases in order to address mutual problems, issues, and solutions regarding child support.

## Appendix A
## INTERNET RESOURCES

Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) responsibility is the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian Tribes, and Alaska Natives. There are 562 Federal recognized Tribal governments in the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency's responsibility. In addition, the Bureau of Indian Affairs provides education services to approximately 48,000 Indian students. For information about the BIA see http://www.doj.gov/bureau-indian-affairs.html (Note: As of June 2005, the BIA website and the BIA mail servers have been made temporarily unavailable due to litigation.)

Indian Health Service

The Indian Health Service (IHS), an agency within the Department of Health and Human Services, currently provides health services to approximately 1.5 million American Indians and Alaska Natives who belong to 562 Federally recognized Tribes in 35 States. For information about health services for Indian children see www.ihs.gov

National Tribal Child Support Association

For information about Tribal IV-D child support programs see www.supportTribalchildren.org

National Tribal Justice Resource Center

According to its website, the National Tribal Justice Resource Center is the largest and most comprehensive site dedicated to Tribal justice systems, personnel and Tribal law. The Resource Center is the central national clearinghouse of information for Native American and Alaska Native Tribal courts, providing both technical assistance and resources for the development and enhancement of Tribal justice system personnel. Programs and services developed by the Resource Center are offered to all Tribal justice system personnel -- whether working with formalized Tribal courts or with tradition-based Tribal dispute resolution forums. For information about Tribal courts see www.Tribalresourcecenter.org

Native American Legal Resource Center at Oklahoma City University (OCU) School of Law

OCU School of Law's Native American Legal Resource Center is dedicated to advancing scholarship in the field of American Indian law and improving the quality of legal representation for Native Americans. It advises Tribes and governments on matters of economic development and supports the activities of the OCU chapter of the Native American Law Student Association. The Center also helps make available Tribal law by publishing the *Oklahoma Tribal Court Reports* and *the Oklahoma Tribal Constitutions* Annotated. For information about American Indian law and initiatives in

area of domestic violence, see
http://www.okcu.edu/law/academiccenters/academiccenters_nativeamerican.html

Native American Rights Fund and the National Indian Law Library

Founded in 1970, the Native American Rights Fund (NARF) is the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian Tribes, organizations and individuals nationwide. It operates the National Indian Law Library (NILL), which is a public law library devoted to Federal Indian and Tribal law. For information about Tribal law see www.narf.org

Office of Child Support Enforcement

The Federal Office of Child Support Enforcement (OCSE) is within the Administration for Children and Families, Department of Health and Human Services. Its mission is to provide direction, guidance, and oversight to State and Tribal CSE program offices for activities authorized and directed by Title IV-D of the Social Security Act and other pertinent legislation. Central and regional offices collaborate to assess State needs, and to provide technical assistance, policy clarification, training and support for CSE programs. For information about Federal, State, and Tribal initiatives in child support enforcement see http://www.acf.hhs.gov/programs/cse/fct/Tribal.htm

Tribal Law and Policy Institute

The Tribal Law and Policy Institute is a Native American owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples. The Institute hosts a Tribal Court Clearinghouse. For Tribal codes see http://www.Tribal-institute.org

U.S. House Committee on Resources, Office of Native American and Insular Affairs Subcommittee

The jurisdiction of the House Committee on Resources includes: Native Americans generally, including the care and allotment of Native American lands and general and special measures relating to claims that are paid out of Native American funds; and Insular possessions of the United States generally (except those affecting the revenue and appropriations). For information about the Office of Native American and Insular Affairs Subcommittee see
http://resourcescommittee.house.gov/subcommittees/naia.htm
For frequently asked questions and answers regarding American Indians see
http://resourcescommittee.house.gov/subcommittees/naia/nativeamer/faqspf.htm

U.S. Senate Committee on Indian Affairs

Until 1946, when a legislative reorganization act abolished both the House and Senate Committees on Indian Affairs, the Senate Committee on Indian Affairs had been in existence since the early 19th century. After 1946, Indian affairs legislative and oversight jurisdiction was vested in subcommittees of the Interior and Insular Affairs Committees of the House of Representatives and the Senate. In 1977, the Senate re-established the Committee on Indian Affairs and voted it a permanent Committee in

1984. The Committee has jurisdiction to study the unique problems of American Indian, Native Hawaiian, and Alaska Native peoples and to propose legislation to alleviate these difficulties. These issues include, but are not limited to, Indian education, economic development, land management, trust responsibilities, health care, and claims against the United States. Additionally, all legislation proposed by members of the Senate that specifically pertains to American Indians, Native Hawaiians, or Alaska Natives is under the jurisdiction of the Committee. For information on Federal legislation related to American Indians, Native Hawaiians, or Alaska Natives see http://indian.senate/gov/

U.S. Department of Justice, Office of Tribal Justice

The Office of Tribal Justice (OTJ) was established to provide a single point of contact within the Justice Department for meeting the Federal responsibilities owed to Indian Tribes. Because Indian issues cut across so many entities within the Executive Branch, OTJ, in cooperation with the Bureau of Indian Affairs, serves to unify the Federal response. According to its website, one of the activities for which OTJ has coordination and liaison responsibilities is Tribal Justice Systems and Public Law 280 Policy. For information on current legal issues in Indian Country see www.usdoj.gov/otj

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## Appendix B
## PUBLIC LAW 280

The relevant text of P.L. 280 as enacted in 1953[387] is set out below with subsequent amendments. An amendment in 1954 brought the Menominee Tribe within the provisions of this section; the deleted exception is indicated by a double strike through. The 1958 amendments[388] are underlined; they extended both the criminal and civil provisions of Public Law 280 to all Indian country within Alaska. In 1970, Congress again amended Public Law 280 by excepting the Metlakatla Indian community from the exclusive jurisdiction of Alaska, and providing that sections 1152 and 1153 (the General Crimes Act and the Major Crimes Act) are not applicable within the areas of Indian country listed in the mandatory Public Law 280 States, as "areas over which the several States have exclusive jurisdiction"; these 1970 amendments[389] are crossed out and capitalized. 1984 amendments deleted references to "Territories" that had been added in 1958; the deleted language is crossed out and in italics.

"AN ACT
"To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"`1162. State jurisdiction over offenses committed by or against Indians in the Indian country.'

"**SEC. 2**. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"` 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"`(a) Each of the States ~~*or Territories*~~ listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian

[387] Act of August 15, 1953, Pub. L. 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).
[388] Act of August 8, 1958, Pub. L. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).
[389] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358 (codified as amended at 18 U.S.C.§ 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

country listed opposite the name of the State ~~*or Territory*~~ to the same extent that such State ~~*or Territory*~~ has jurisdiction over offenses committed elsewhere within the State ~~*or Territory*~~, and the criminal laws of such State ~~*or Territory*~~ shall have the same force and effect within such Indian country as they have elsewhere within the State ~~*or Territory*~~:

"`State ~~*or Territory*~~ of Indian country affected

| State or Territory of | Indian country affected |
|---|---|
| Alaska | All Indian country within the ~~Territory~~ STATE, EXCEPT THAT ON ANNETTE ISLANDS, THE METLAKATLA INDIAN COMMUNITY MAY EXERCISE JURISDICTION OVER OFFENSES COMMITTED BY INDIANS IN THE SAME MANNER IN WHICH SUCH JURISDICTION MAY BE EXERCISED BY INDIAN TRIBES IN INDIAN COUNTRY OVER WHICH STATE JURISDICTION HAS NOT BEEN EXTENDED. |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State, ~~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.

"`(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.'

"**SEC. 3**. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"`1360. State civil jurisdiction in actions to which Indians are parties.'

"**SEC. 4**. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"` 1360. State civil jurisdiction in actions to which Indians are parties

"`(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
"`State of Indian country affected.

| State of | Indian country affected |
|---|---|
| Alaska | All Indian country within the ~~Territory~~ STATE, EXCEPT THAT ON ANNETTE ISLANDS, THE METLAKATLA INDIAN COMMUNITY MAY EXERCISE JURISDICTION OVER OFFENSES COMMITTED BY INDIANS IN THE SAME MANNER IN WHICH SUCH JURISDICTION MAY BE EXERCISED BY INDIAN TRIBES IN INDIAN COUNTRY OVER WHICH STATE JURISDICTION HAS NOT BEEN EXTENDED. |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State, ~~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 confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"`(c) Any Tribal ordinance or custom heretofore or hereafter adopted by an Indian Tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.'

"**SEC. 5**. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

"**SEC. 6**. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"**SEC. 7**. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

(Added Aug. 15, 1953, ch. 505, Sec. 4, 67 Stat. 589; amended Aug. 24, 1954, ch. 910, Sec. 2, 68 Stat. 795; Pub. L. 85-615, Sec. 2, Aug. 8, 1958, 72 Stat. 545; Pub. L. 95-598, title II, Sec. 239, Nov. 6, 1978, 92 Stat. 2668; Pub. L. 98-353, title I, Sec. 110, July 10, 1984, 98 Stat. 342.)

AMENDMENTS

1984 - Subsec. (a). Pub. L. 98-353 struck out "or Territories" after "Each of the States", struck out "or Territory" after "State" in 5 places, and substituted "within the State" for "within the Territory" in item relating to Alaska.

1978 - Subsec. (a). Pub. L. 95-598 directed the amendment of subsec. (a) by substituting in the item relating to Alaska "within the State" for "within the Territory", which amendment did not

become effective pursuant to section 402(b) of Pub. L. 95-598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1958 - Subsec. (a). Pub. L. 85-615 gave Alaska jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in all Indian country within the Territory of Alaska.

1954 - Subsec. (a). Act Aug. 24, 1954, brought the Menominee Tribe within the provisions of this section.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective July 10, 1984, see section 122(a) of Pub. L. 98-353, set out as an Effective Date note under section 151 of this title.

ADMISSION OF ALASKA AS STATE

Admission of Alaska into the Union was accomplished Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

AMENDMENT OF STATE CONSTITUTIONS TO REMOVE LEGAL IMPEDIMENT; EFFECTIVE DATE

Section 6 of act Aug. 15, 1953, provided that: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act (adding this section and section 1162 of Title 18, Crimes and Criminal Procedure): Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

CONSENT OF UNITED STATES TO OTHER STATES TO ASSUME JURISDICTION

Act Aug. 15, 1953, ch. 505, Sec. 7, 67 Stat. 590, which gave consent of the United States to any other State not having jurisdiction with respect to criminal offenses or civil causes of

action, or with respect to both, as provided for in this section and section 1162 of Title 18, Crimes and Criminal Procedure, to assume jurisdiction at such time and in such manner as the people of the State shall, by legislative action, obligate and bind the State to assumption thereof, was repealed by section 403(b) of Pub. L. 90-284, title IV, Apr. 11, 1968, 82 Stat. 79, such repeal not to affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Retrocession of jurisdiction by State acquired by State pursuant to section 7 of Act Aug. 15, 1953, prior to its repeal, see section 1323 of Title 25, Indians.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 sections 566e, 711e, 713f, 714e, 715d, 1300b-15, 1300f, 1300i-1, 1323, 1747, 1772d, 1918.

## Appendix C
## FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS

### Section 1738B. Full faith and credit for child support orders

(a) General Rule. - The appropriate authorities of each State -

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

(b) Definitions. - In this section:

"child" means -

(A) a person under 18 years of age; and

(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

"child's State" means the State in which a child resides.

"child's home State" means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

"child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

"child support order" -

(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

(B) includes -

(i) a permanent or temporary order; and

(ii) an initial order or a modification of an order.

"contestant" means -

(A) a person (including a parent) who -

(i) claims a right to receive child support;

(ii) is a party to a proceeding that may result in the issuance of a child support order; or

(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

"court" means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

"modification" means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

(c) Requirements of Child Support Orders. - A child support order made by a court of a State is made consistently with this section if -

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g) -

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

(d) Continuing Jurisdiction. - A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

(e) Authority To Modify Orders. - A court of a State may modify a child support order issued by a court of another State if -

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

(f) Recognition of Child Support Orders. - If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this

section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

(g) Enforcement of Modified Orders. - A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

(h) Choice of Law. -

(1) In general. - In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

(2) Law of State of issuance of order. - In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) Period of limitation. - In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

(i) Registration for Modification. - If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.