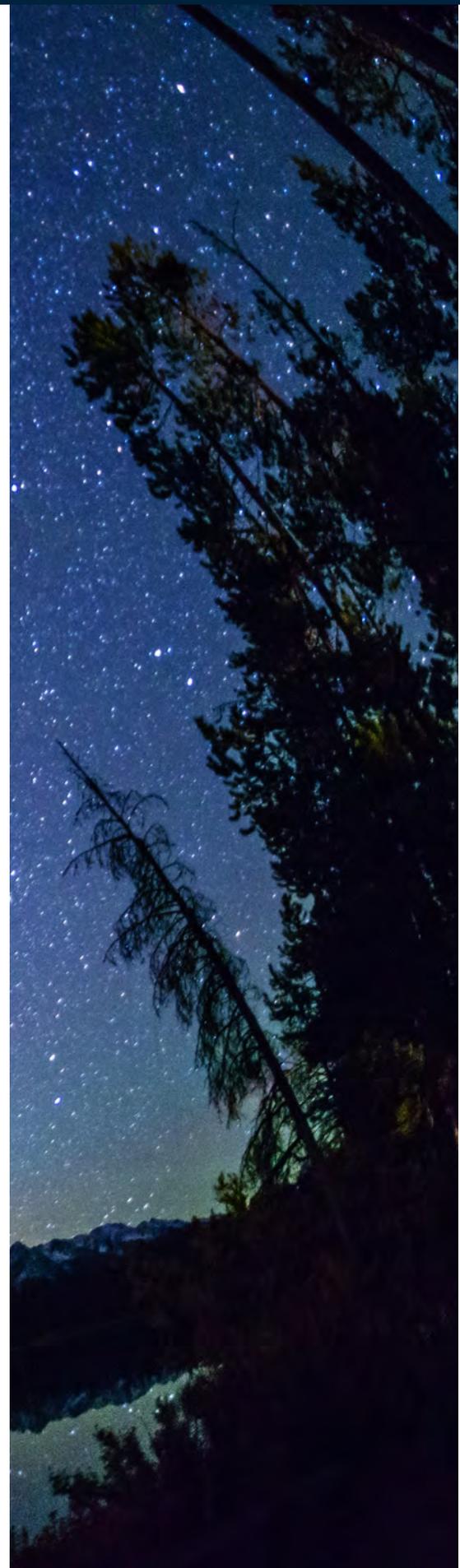


Evaluation report
March 2017

State Jurisdiction in Indian Country

Office of Performance Evaluations
Idaho Legislature





Office of Performance Evaluations

Created in 1994, the legislative Office of Performance Evaluations (OPE) operates under the authority of Idaho Code §§ 67-457-464. Its mission is to promote confidence and accountability in state government through independent assessment of state programs and policies. The OPE work is guided by professional standards of evaluation and auditing.

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Senator Cliff Bayer (R) and Representative Mat Erpelding (D) cochair the committee.

From the director

March 2017

Members
Joint Legislative Oversight Committee
Idaho Legislature

Laws governing jurisdiction in Indian country are incredibly complex. We found that nearly every stakeholder had a different understanding of some aspects of jurisdiction. Shared jurisdiction has resulted in gaps in law enforcement and difficulty in serving the people of Idaho, both on and off the reservation.

Under Public Law 280, the State of Idaho has options to fully or partially retrocede its jurisdiction of Indian country to the federal government. In this report, we do not take a position on whether Idaho should retrocede. We do, however, offer several recommendations for the Legislature to consider should it decide to pursue retrocession.

Regardless of retrocession, we offer recommendations for the Legislature to consider that will promote intergovernmental cooperation among tribal, local, and state governments in providing quality services in Indian country.

We appreciate the cooperation and welcome that tribes and local governments extended to us in conducting this evaluation. Also, we thank the staff of the Idaho Attorney General for helping us understand the many complex laws and related nuances.



Sincerely,



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**Formal
responses to the
evaluation are in
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Executive summary



Historical background

State and local government powers are limited in Indian country by federal law and tribal sovereignty. The US Constitution gives Congress exclusive power over Indian affairs, and states have jurisdiction on reservations only with Congressional consent.

Public Law 280, passed by Congress in 1953, mandates that six states assume criminal and civil jurisdiction in Indian country. It also gives all other states the option of assuming partial or full jurisdiction.

Idaho adopted Public Law 280 in 1963. Rather than assume full criminal and civil jurisdiction, the Legislature assumed partial jurisdiction. Idaho Code § 67-5101 lists seven matters of state jurisdiction which affects all five tribes in Idaho.

Congress amended Public Law 280 in 1968 to require tribal consent to future state jurisdiction. The amendments also allow states to return jurisdiction to the federal government, a process known as retrocession. The Idaho Legislature has considered retrocession with three bills, the last in 1999.

Idaho has jurisdiction over seven matters

1. **Compulsory school attendance**
2. **Juvenile delinquency and youth rehabilitation**
3. **Dependent, neglected, and abused children**
4. **Insanities and mental illness**
5. **Public assistance**
6. **Domestic relations**
7. **Operation and management of motor vehicles upon highways and roads maintained by the county or state or their political subdivisions**

Laws governing jurisdiction in Indian country are complex.



We found that nearly every stakeholder had a different understanding of some aspects of jurisdiction in Indian country.

All four neighboring states with Public Law 280 jurisdiction have retroceded some or all of their jurisdiction. Washington most recently retroceded jurisdiction over the Yakama Reservation in 2016. Montana is considering retrocession of jurisdiction over the Flathead Reservation.

Legislative interest and study purpose

Four legislative members of the Idaho Council on Indian Affairs requested a study to understand what the state’s obligations are under Public Law 280 and whether the state fulfills these obligations. They asked us to find out whether the state received any federal money to implement Public Law 280 and what processes other states have used to retrocede jurisdiction. We were not asked to evaluate whether Idaho should consider retrocession. This report does not support or oppose retrocession.

What we learned

Laws governing jurisdiction in Indian country are incredibly complex. The laws defining the limits of tribal, state, and federal jurisdiction are dynamic and a patchwork of state and federal court cases. Public Law 280 adds complexity to jurisdiction, and Idaho’s unique adoption of seven matters further complicates the situation. We found that nearly every stakeholder had a different understanding of some aspects of jurisdiction in Indian country.

Tribal members receive services from the tribe and the federal government in addition to state and local governments. Each government may have different policies and program guidelines. Idaho’s role in Indian country cannot be evaluated independent of the tribe and the federal government. Similarly, Idaho’s obligations under Public Law 280 cannot be cleanly separated from its obligations to all state citizens.

Many of Idaho’s duties in Indian country are not from Public Law 280. Idaho has obligations to Indians in Indian country the same as it has to all Idaho citizens. State and local governments cannot deny services based on someone’s Indian status, residence on tax-exempt land, or eligibility for federal services available to Indians. The only time Idaho’s duties are different in Indian country is when Idaho’s authority is denied by federal law or tribal sovereignty.

Implementing Public Law 280 is primarily the responsibility of county governments. County governments are most affected by the additional law enforcement obligations in Indian country. The judiciary and several executive agencies also have related responsibilities.

The operation of jurisdiction in Indian country raises concerns about public safety and equal treatment. Stakeholders shared concerns with us about public safety. These concerns include gaps in law enforcement, a lack of jurisdiction to enforce laws, or coordinating responsibility. They expressed concerns that Indian country may be a haven for non-Indian criminals.

Some stakeholders also raised concerns that shared jurisdiction creates the possibility for inadequate or unequal sentences or for a lack of access to state resources for Indians through tribal courts.

Public Law 280 does not provide federal funding to state or local governments. Although the state may receive matching funds for certain program expenditures, the federal government does not fund the implementation of Public Law 280. County governments must fulfill their additional responsibilities without additional funding.

Public Law 280 may reduce federal funding to tribes. Some studies have found that federal funding is much lower for tribal criminal justice in mandatory Public Law 280 states. Although Idaho is not a mandatory state, tribes here may be similarly affected.

What happens next

Concerns about Public Law 280 are entangled in a complex web of jurisdiction and relationships. Regardless of the confusion added by Public Law 280, Idaho citizens will best be served by tribal, local, and state governments that work well together. Providing quality services in Indian country is not a static problem to solve but a dynamic problem that requires persistent effort.

Providing quality services in Indian country is not a static problem to solve but a dynamic problem that requires persistent effort.



Recommendations for legislative action with or without retrocession

The Idaho Legislature cannot unilaterally solve problems in Indian country. We have made four recommendations for the Legislature's consideration that promote intergovernmental cooperation with or without retrocession.

1. Pass legislation that recognizes limited state authority for tribal police, such as in the case of fresh pursuit from Indian country.
2. Pass legislation to facilitate the recognition of tribal court orders of involuntary commitment.
3. Address funding gaps created by Public Law 280 for tribal or county governments.
4. Invest additional resources in existing intergovernmental forums, including the Idaho Council on Indian Affairs, and establish a liaison or office within the Office of the Governor dedicated to Indian affairs.

Recommendations for the Legislature to consider if it wishes to pursue retrocession

We provide four recommendations for the Legislature's consideration if it wishes to pursue retrocession. These recommendations are based on our fieldwork and the experiences of other states.

1. Ensure a smooth transition by clearly setting timelines and describing the jurisdiction to be retained and to be retroceded.
2. Customize retrocession based on the practical consideration of the capacity of tribal, state, or federal governments.
3. Formally involve tribal and county government officials to best learn about the practical implications of retrocession.
4. Recognize the right of each tribe to self-determination by formally empowering each tribe to initiate a consideration of retrocession.

Introduction



Legislative interest and historical background

States are typically limited in their power to enforce laws in Indian country; instead, tribes and the federal government have jurisdiction. Through Public Law 280, however, state jurisdiction can be expanded.¹

Idaho expanded its jurisdiction for seven matters listed in Idaho Code § 67-5101, and its jurisdiction affects five federally recognized Indian tribes. The Legislature has the option to request the return of jurisdiction to the federal government, a process called retrocession.

Retrocession has been considered by the Legislature in the past. Three bills were introduced between 1979 and 1999 that sought to return all or some state jurisdiction to the federal government. These retrocession efforts were primarily driven by the Shoshone-Bannock Tribes. Considerable uncertainty about changes in the precise role of the state made assessing these bills a difficult task for stakeholders.

1. 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. § 1321–1326.



Indian and Indian country are statutory terms that are not inclusive of all Native American peoples.

Four legislators, who had served as members of the Idaho Council on Indian Affairs, requested a study of Public Law 280, and the Joint Legislative Oversight Committee assigned us the request in March 2016. The request specifically asked our office to identify duties of state agencies under statute, determine whether tribal members receive the same level of state services as other citizens, identify federal funds related to the law, and describe the process that other states used to retrocede jurisdiction. The study request is available in appendix A.

The study request did not ask us to make any conclusions about the desirability of retrocession. We are unaware of any legislative efforts to retrocede, and the study request did not ask us to comment on particular retrocession options.

Evaluation approach

To best learn about the state’s role in Indian country, we invited the governing bodies of each tribe to participate in the evaluation. Tribal government is outside the authority of the Joint Legislative Oversight Committee, so the input and access tribes gave us were at their good will.

We travelled to four reservations at the invitation of the tribes and spoke with tribal officials and legal staff about each of the seven matters listed in statute. Because many local governments are responsible for implementing Public Law 280, we also spoke with county officials who work with the tribes. After our preliminary interviews, we developed our scope, which is in appendix B.

Report terms

Indian is the federal term used in statutes and court opinions for people affiliated with federally recognized tribes.

Indian country is a federal term that describes land set aside by the federal government for tribal occupancy.

Reservations constitute the largest portion of Indian country. Five federally recognized tribes have reservations in Idaho.

The study request asked us to compare the state's level of service in Indian country with the level offered outside Indian country. Instead of comparing levels of services, we describe how Public Law 280 affects services. We do this for two reasons:

1. Services are provided in Indian country under a different set of constraints. The tribal governments and the federal government provide similar services to the state, which makes the state's role different in Indian country. State services cannot be directly compared in and out of Indian country.
2. Reservations in Idaho vary by the amount of tribal and nontribal land and the populations of Indians and non-Indians. Three reservations span multiple counties, and one reservation straddles two states. This diversity presents a unique challenge for each local government.

Rather than develop our own criteria to evaluate services in these diverse circumstances, we chose to present the challenges brought to us by stakeholders about state jurisdiction in Indian country. Our methodology is available in appendix C.

Federal Indian Law, the legal framework in Indian country, is exceptionally complex. We summarize the law in general terms, which does not necessarily reflect the law's full complexity. Any legal analysis should not be relied upon as authoritative nor reflecting the position of the State of Idaho or the Office of the Attorney General. Those seeking authoritative legal interpretations or options for the application of Public Law 280 and Idaho Code § 67-5101 should seek counsel from attorneys or others with specialized expertise in Federal Indian Law.

2

Indian tribes in Idaho

Five federally recognized tribes have reservations in Idaho:²

- Coeur d'Alene Tribe
- Kootenai Tribe of Idaho
- Nez Perce Tribe
- Shoshone-Bannock Tribes
- Shoshone-Paiute Tribes

Each tribe has a unique culture with diverse customs and traditions. Likewise, each tribe shares a unique history with other tribes and the United States. No two tribes are alike and they should not be characterized as a single people.

As the original inhabitants of North America, some tribes in Idaho traveled with the seasons across what are now the western states. Other tribes established permanent villages along riverbanks and trade routes. The aboriginal territory of many of the tribes spanned millions of acres across the western states and into Canada.

2. The Northwestern Band of the Shoshone Nation has one office in Pocatello, Idaho, and one in Brigham City, Utah. Members of the nation live in Idaho; however, the nation's federally recognized land is in Utah.

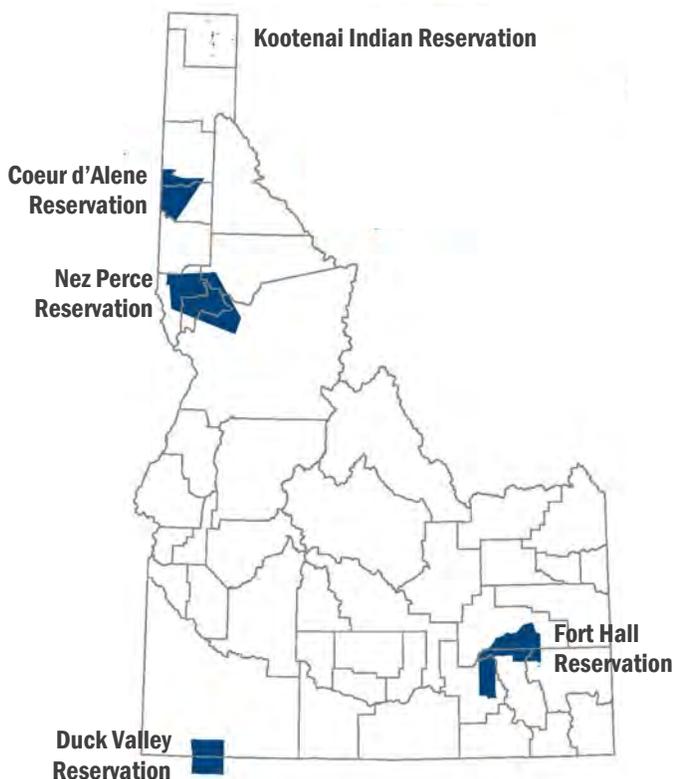


Julyamsh Powwow
in Post Falls, 2009

Each tribe has its own laws and administers services on its reservation.

The five federally recognized tribes each have constitutions, bylaws, and tribal law and order codes. Each tribe has an elected council that administers services, such as courts, law enforcement, health and human services, transportation, and public assistance. Tribal councils also oversee tribally owned enterprises. Exhibit 1 shows the locations of the five reservations.

Exhibit 1
Reservations span 13 county borders.



Source: Census Bureau, US Department of Commerce, 2014.

Each tribe has an elected council that may administer courts, law enforcement, health and human services, transportation, and public assistance.

Counties do not uniformly implement state jurisdiction.

Coeur d'Alene

The Coeur d'Alene Tribe's aboriginal territory included five million acres in eastern Washington, northern Idaho, and western Montana. The tribe had villages along the Coeur d'Alene, St. Joe, Clark Fork, and Spokane rivers as well as permanent sites near Hayden Lake, Lake Pend Oreille, and Lake Coeur d'Alene.

Schitsu'umsh is the native name for the tribe and means the ones who are found here. Around the turn of the nineteenth century, a French trapper named the tribe *Coeur d'Alene* or heart of the awl because of the tribe's superior trading skills.

The Coeur d'Alene Reservation was established by executive orders in 1867 and 1873. The 345,000 acres of reservation are situated in Benewah and Kootenai counties. The tribe has more than 2,400 enrolled members and approximately 1,500 live on the reservation.

The tribe's constitution was ratified in 1947. The tribe is governed by seven council members elected by the tribe. The chair is selected by the council members. The tribe operates many businesses including the Coeur d'Alene Casino Resort Hotel and the Benewah Medical and Wellness Center, which serves both Indian and non-Indian clients.

The Coeur d'Alene have a tribal court and police department. The Social Services Department offers public assistance to members. The child support program is administered by the tribal court. The medical and wellness center provides behavioral health services.



Kootenai Tribe of Idaho

The Kootenai Tribe of Idaho is one of seven bands under the Kootenai Nation that were split by the United States—Canada border. The tribe’s aboriginal territory spanned sections of Idaho, Montana, and Washington as well as British Columbia and Alberta, Canada. The tribe has never signed a treaty and has a long history of resisting federal efforts to remove members from the land they inhabit in northern Idaho. In 1887 some members of the tribe received land allotments along the Kootenai River.

Although some members received allotments, the tribe did not have a reservation until 1974 when the tribe declared a peaceful war with the United States. The federal government responded by establishing a 12.5-acre reservation for the tribe in Boundary County.³ Today there are approximately 150 enrolled members.

The tribe is governed by a nine-member council elected by constituents from three political districts. The chair is selected by the council. The tribe operates the Twin Rivers Canyon Resort and the Kootenai River Inn Casino and Spa. The Fish and Wildlife Department is the tribe’s largest department and its staff work with state and federal agencies on conservation efforts.

The Administration Department administers housing and transportation, and provides facilitation services for the Kootenai Valley Resource Initiative. The Tribal Court is administered independently as a separate branch of government. The tribe also has a tribal police office and a small health clinic.

3. See appendix D for a discussion of whether Idaho’s Public Law 280 jurisdiction applies to the Kootenai Indian Reservation.

Nez Perce

The Nez Perce Tribe followed seasonal food supplies across their aboriginal territory to predetermined areas in northeastern Oregon, northcentral Idaho, and southeastern Washington. The tribe calls themselves *Nimi'ipuu* or the real people. A French translator with the Lewis and Clark expedition gave the Nimi'ipuu the name *Nez Perce*, or pierced nose, even though the cultural practice was not common among the tribe.

The Nez Perce Reservation was negotiated by treaty in 1855. After gold was discovered on the reservation, a second treaty in 1863 decreased the reservation from 5.5 million acres to 770,000. The reservation lies across Clearwater, Idaho, Latah, Lewis, and Nez Perce counties.

The federal government entered into an agreement with the Nez Perce Tribe in 1893 that allowed the federal government to allocate acres of reservation land to individual members of the tribe. This agreement also allowed the federal government to sell what they deemed to be surplus acreage of the reservation to non-Indians, which created a quilted pattern of tribal and nontribal land in the reservation boundaries.

Because of the quilted pattern of land ownership, about 18,437 people live on the reservation but only 1,700 are members of the tribe. Total tribal membership is approximately 3,500.

The Nez Perce Constitution was ratified in 1948. The tribe is governed by the Nez Perce Tribal Executive Committee. The committee's nine members are elected by the Tribal General Council. The chair is elected by the committee. The tribe operates two casinos—the Its'e Ye-Ye Casino and the Clearwater River Casino and Lodge. The tribe also operates two express stores in the Lewiston and Winchester areas.

The tribe's Fisheries Resource Management Department is one of the largest tribal fisheries program in the United States and focuses on recovering and restoring species on and off the reservation. Tribal fisheries offices are located in McCall, Idaho, and Joseph, Oregon.

The Law and Justice Department administers the tribal court, prosecutor's office, law enforcement, and child support. The Social Services Department oversees many assistance programs to tribal members. The tribe also operates the Nimi'ipuu Health Clinic located in Lapwai, with a satellite office in Kamiah.

Shoshone-Bannock Tribes

The Shoshone-Bannock Tribes are two separate but culturally related tribes that started traveling together in the 1600s. Their combined aboriginal land covered Oregon, Nevada, Utah, Idaho, Wyoming, Montana, and Canada. The tribes traveled during the warmer months collecting food for winter.

The Fort Hall Reservation was established by executive order in 1867. The following year, the Fort Bridger Treaty secured the reservation as the tribes' permanent homeland. The reservation spans 544,000 acres among Bannock, Bingham, Caribou, and Power counties. Although the tribes lost land to the federal government after the treaty negotiation, the tribe and individual Indians own more than 90 percent of the reservation land. Of the more than 5,800 tribal members, approximately 4,100 live on the reservation.

The tribes' constitution and bylaws were adopted in 1936 and the Fort Hall Business Council governs the tribes. There are seven council members who serve full time and select the chair. The tribes operate the Shoshone-Bannock Hotel and Events Center and the Sage Hill Travel Center and Casino. In addition, the tribes have managed a herd of bison since 1966. The herd is 300–400 head in size.

In 2010 the tribes completed construction of a justice center that houses the tribal court, police department, and detention facilities for adult and juvenile offenders. The Transportation Department oversees road maintenance on the reservation. The Tribal Health and Human Services Department offers many public assistance programs to members and other qualified recipients. The social services program operates child protection, foster care, and Indian Child Welfare programs. The Four Directions Treatment Center provides residential and outpatient substance use disorder services.

Shoshone-Paiute Tribes

The Shoshone-Paiute Tribes are descendants of the Western Shoshone and Northern Paiute tribes. The tribes' aboriginal territory spanned Idaho, Nevada, and Oregon. The Duck Valley Reservation was established by executive order in 1877 for the Western Shoshone Tribe. The reservation boundaries were expanded by a second executive order in 1886 to accommodate the addition of the Northern Paiute Tribe. In 1910 the reservation was again expanded by executive order and totals approximately 290,000 acres in Owyhee County, Idaho, and Elko County, Nevada. There are more than 2,000 tribal members; 1,700 live on the reservation.

The tribes' constitution and bylaws were ratified in 1936. The Shoshone-Paiute Tribal Business Council governs the tribes. The council consists of six members, elected every two years, and a chairman, elected every three years. The tribes are the largest employer on the Duck Valley Reservation. The tribes promote fishing and hunting opportunities and operate a ranch.

They provide services including health care, education assistance, social services, housing, and in 2011 opened an airport. The tribal court employs a chief judge and participates in the Intertribal Court of Appeals in Reno, Nevada.



General jurisdiction in Indian country



Indian tribes inhabited North America centuries before the United States was established. Early explorers viewed tribes as independent, self-governing societies and engaged in commerce with tribes as they would with other foreign governments. The United States followed suit and treated each tribe as a separate sovereign nation. The use of treaties is the earliest example of the US government working with tribes in a formal government-to-government relationship.

The US Constitution gives Congress exclusive power over Indian affairs. Congress can establish formal relations with a tribe, modify the powers of tribal governments, and categorize land as Indian country. As such, the US Supreme Court has long held that tribes lost much of their land and certain aspects of sovereignty, such as the right to engage in foreign relations or to issue currency. Federal law supremacy and tribal sovereignty combine to limit the powers of state and local governments in Indian country.

The US Supreme Court has also characterized tribes as *domestic dependent nations* whose relationship with the United States “resembles that of a ward to his guardian.”⁴ The federal government is similar to the trustee and each tribe is the beneficiary. In a separate ruling, the court wrote that the United States has charged itself with “moral obligations of the highest responsibility and trust” to protect treaty obligations.⁵

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

5. *Seminole Nation v. United States*, 316 U.S. 286 (1942).

Rather than receive direct federal services, many tribes choose to receive federal funding to administer services themselves.

The federal government has a unique responsibility to provide Indians with benefits, resources, and protections.

The federal government's obligations to tribes as domestic dependent nations is commonly referred to as the federal trust responsibility. This responsibility has been implemented in part through federal benefits, services, and protections.

The federal government fulfills its trust responsibility to Indians by directly delivering services; funding tribal, local, or state governments to provide services; and ensuring access to services provided by local or state governments. For instance, the federal government provides health care through the Indian Health Service by paying 100 percent of state Medicaid spending on Indians at an Indian Health Service or tribal facility, funding tribe-operated clinics, or ensuring access to local or state health programs.

The Bureau of Indian Affairs in the US Department of the Interior manages resources held in trust and historically provided many services in Indian country, including certain court and law enforcement responsibilities. Today, rather than receive direct services, many tribes choose to receive federal funding to administer services themselves, which allows them to customize programs and services to individual tribal strengths and needs.

Indians residing in Indian country are state and US citizens with the right to access state and local government services.

Indians are citizens of the United States and of their state and local governments of residence. They have the same rights and benefits as other citizens. State and local governments cannot deny services to Indians based on their Indian status, their access to federal resources because of their Indian status, or their residence in Indian country. However, state and local government authority within Indian country, as a general matter, is constrained by principles of federal law supremacy and tribal self-governance. This reduced authority may interfere with local or state government services in Indian country.

Access to state courts, law enforcement, and involuntary commitment orders to receive mental health care have been ruled to interfere with tribal self-government. Federal courts have held in certain cases that state and local governments cannot deny services if reasonable avenues exist to overcome legal barriers. For example, South Dakota could not deny child support services to tribal members when a tribal court was willing to come to an agreement with the state. The extent of state and local obligations to provide equal services is dependent on the specific facts of the case.



Idaho Day, 2013. Photo credit: Idaho State Historical Society.

State authority in Indian country is constrained by federal law supremacy and tribal self-governance.

Reduced state authority may interfere with the delivery of state services.

Indian status is a political designation rather than a racial or ethnic term.

The assignment of jurisdiction in Indian country depends on three primary considerations.

Any individual who enters Indian country becomes subject to a complicated arrangement of jurisdiction shared among tribal, state, and federal governments. The federal statutes and court decisions describing this arrangement are part of what is known as Federal Indian Law. The assignment of jurisdiction depends on three primary considerations:

- Tribal membership or Indian status of the parties
- Location (tribal or nontribal land)
- Type of legal proceeding

Each consideration can contribute to confusion about who has jurisdiction, which delays justice and compromises public safety.

Tribal membership and Indian status

Tribes have the right to set criteria for tribal membership and the criteria vary from tribe to tribe. Indian status is a political designation that does not require tribal membership; rather, Indian status exists if an individual (1) is a descendent of a person clearly recognized as an Indian or (2) is recognized by a federally recognized tribe or the federal government as an Indian. A federally recognized tribe is one that shares a government-to-government relationship with the federal government through a treaty, an executive order, or an act of Congress.

Federal Indian Law assigns criminal jurisdiction based on the Indian status of an offender and victim. The jurisdiction to tax, regulate, or settle civil disputes is generally based on tribal membership.

The jurisdiction to arrest is in part determined by the Indian status of an individual, which creates difficulties for law enforcement. An officer who stops a speeding driver may or may not have the power to arrest the driver. The officer cannot know in advance if they will have this power. A state officer may observe a crime committed by or against an Indian and have no power to arrest, while a tribal officer may observe a crime committed by a non-Indian and have no power to arrest. All

officers have the right to detain an offender they cannot arrest until proper authorities arrive, however.

Indian country and tribal land

Indian country refers to land set aside by a treaty, an executive order, or an act of Congress for Indian occupancy. Indian country may include both tribal and nontribal land.⁶ We refer to land held in trust by the federal government for individual Indians or a tribe as tribal land. Indian country also contains land owned by state and local governments or by individuals who are not members of the resident tribe. We refer to this land as nontribal land.

6. 18 USC § 1151 designates three types of land as Indian country. Defined in various statutes, reservations and dependent Indian communities includes land owned by the federal government but held in trust for a tribe. Allotments are tracts of land allotted to individual Indians that remain in trust for Indians.

Challenges caused by land status

Knowing the exact location of a crime or the ownership of a specific parcel of land is necessary to determine who has jurisdiction. In a 2014 speech, the director of the Federal Bureau of Investigations illustrated how the unknown location of a crime delayed justice:

Last year, FBI agents responded to a homicide on a reservation. The victim was last seen alive with two suspects at a gas station on state land, but his body was ultimately found in the trunk of his car on the reservation. Investigators were unable to determine where the murder had actually taken place—if it occurred on the reservation, the federal government would have jurisdiction; if it occurred before the reservation, on the state land near the gas station, the state would have jurisdiction. Six months after the killing, the case remained unindicted, primarily because of the jurisdictional issue. Issues like that can mean that justice is delayed—and justice delayed is justice denied.*

* James B. Comey, “The FBI’s Commitment to Indian Country,” December 11, 2014.

An officer without jurisdiction to arrest an offender may detain that offender until the proper authorities arrive.

Federal Indian Law assigns criminal jurisdiction based on a land's Indian country status. However, the jurisdiction to tax, regulate, or settle civil disputes may depend on whether land is tribal or nontribal land.

Type of legal proceeding

Federal Indian Law defines the limits of jurisdiction differently for criminal laws as opposed to regulatory laws or civil disputes between private parties:

Criminal laws are enforced for behavior that is expressly prohibited. Murder and assault are clear examples of criminal laws.

Regulatory laws are enforced for behavior that is generally permitted but is taxed or regulated. The violation of regulatory laws may have criminal punishments but ordinarily will be deemed regulatory and outside the scope of permissible Public Law 280 jurisdiction. If the conduct regulated is generally prohibited, the law likely will be treated as a criminal law for Public Law 280 purposes.

Civil disputes are legal proceedings where a court applies the law to resolve a private dispute. These disputes include divorces or personal injury claims. They also may include suits to which governments are parties, such as involuntary commitments or civil rights claims.

Challenges caused by determining the difference between enforceable and nonenforceable legal proceedings are discussed in the next chapter.

Federal jurisdiction over crimes

The Major Crimes Act (18 USC § 1153) permits federal jurisdiction for specific crimes committed by Indians in Indian country. The federal government has jurisdiction even if the offender has been punished by the tribe for the same crime. The General Crimes Act (18 USC § 1152) creates federal jurisdiction over crimes (1) committed by non-Indians against Indians and (2) committed by Indians without an Indian victim that have not been punished by the tribe.

States typically have limited jurisdiction in Indian country.

In general, state and local laws cannot be enforced against tribal members for activities within their reservation. Tribes possess broad sovereign immunity and states cannot insert themselves into tribal affairs, levy taxes, or enforce state laws in Indian country without explicit consent from Congress.

Criminal jurisdiction

States have jurisdiction over crimes committed by non-Indian offenders in Indian country, but only if the crimes do not involve an Indian victim. If the crime involves either an Indian offender or victim, then the federal government and the tribe have jurisdiction depending on the nature of the alleged crime.

Civil disputes

In state court, anyone can sue a nonmember or a non-Indian for a dispute arising in Indian country. State courts typically cannot hear civil disputes arising on a reservation and brought against a member of the resident tribe regardless of who brings the suit. The US Supreme Court has found that allowing state courts to resolve disputes among or against tribal members interferes with tribal sovereignty.⁷

Regulatory and taxing authority

A state may only tax or regulate the tribe, its members, or tribal land with authorization from Congress. State income taxes apply to nonmembers, and local property taxes and zoning laws usually apply to nontribal land. In addition, in certain circumstances a state can collect taxes from businesses owned by the tribe or tribal members in Indian country for sales to nonmembers, but not for sales to members.

7. Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

States are typically prohibited from settling civil disputes against tribal members that arise in Indian country.

States have limited authority to impose taxes or enforce regulatory laws on tribal lands.

The rules of jurisdiction are different for Indians on their own reservation than on a reservation of another tribe.

Tribes do not typically have criminal jurisdiction over non-Indians.

Tribes have an inherent right to govern their members and lands.

Tribal governments have extensive self-governance powers over their own members. Tribes have criminal jurisdiction over all Indians, both members and nonmembers. Tribes can levy taxes, hear civil disputes, and enforce regulations against their members and nonmembers on their reservations under two circumstances: (1) the party entered into a consensual relationship with the tribe or tribal members and (2) the nonmember's conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health and welfare. Substantial legal controversy exists over the scope of these two circumstances; however, this controversy is beyond the scope of this report.

Inconsistent federal positions on state jurisdiction

Before 1989 the US Department of Justice held that federal jurisdiction over non-Indians who committed crimes against Indians was not exclusive of state jurisdiction, which meant a state could prosecute non-Indians for crimes committed against Indians on a reservation. Now the department maintains that federal jurisdiction in these instances is exclusive, which means states cannot prosecute non-Indians for crimes against Indians.*

*** US Department of Justice, US Attorneys' Manual § 9-20.100, "Criminal Resource Manual," 685, Exclusive Federal Jurisdiction Over Offenses by Non-Indians Against Indians.**

Public Law 280 jurisdiction in Idaho

4

In 1953 the federal government changed jurisdiction in Indian country by enacting Public Law 280 amid what is known as the Termination Era.⁸ Under this law, specified states were mandated to assume full jurisdiction in Indian country, and all other states had the option of assuming jurisdiction, either full or partial according to their terms. Full jurisdiction allows states to impose all criminal laws in Indian country. Partial jurisdiction allows states to pick which criminal or civil laws they will assume.

Idaho assumed partial jurisdiction in 1963 over seven matters of criminal or civil law. This partial jurisdiction was assumed without tribal consent and in opposition from the Shoshone-Bannock Tribes. In our interviews, representatives from four tribes voiced displeasure over the lack of consent. In 1968 Congress amended Public Law 280 to require tribal consent.

8. From 1953 to 1968 the federal government systematically ended its recognition of several tribes.



Shoshone-Bannock Fort Hall Drummers, Idaho Day, 2015.
Photo credit: Idaho State Historical Society.

Idaho assumed jurisdiction over seven matters listed in statute.

Idaho Code § 67-5101 lists the state’s criminal and civil jurisdiction over the following seven matters:

1. Compulsory school attendance
2. Juvenile delinquency and youth rehabilitation
3. Dependent, neglected, and abused children
4. Insanities and mental illness
5. Public assistance
6. Domestic relations
7. Operations and management of motor vehicles upon highways and roads maintained by the county or state or their political subdivisions

We were unable to determine why the Legislature selected these seven matters. Legislative records about Idaho’s assumption of jurisdiction do not exist. The precise scope of the broad matters listed in Idaho Code § 67-5101 must be determined by the courts in the context of a specific set of circumstances.⁹

Idaho shares jurisdiction over these matters with five tribes and, in some instances, the federal government. Idaho’s jurisdiction under the law is primarily implemented by county governments. The judicial branch and some executive agencies also have responsibilities.

We reviewed statute and case law and interviewed subject-matter experts on the seven matters. In the next sections, we describe the matters and identify which state agencies are responsible for jurisdiction in Indian country.

9. If the state fails to properly exercise authority gained through Public Law 280 jurisdiction, it presumably could be held liable to the extent it would be liable for the same conduct outside of Indian country. We are unaware of any cases addressing this issue, however.

Primarily, county governments implement Idaho’s jurisdiction.

Compulsory school attendance

Compulsory school attendance is defined in Idaho Code § 33-202 and requires that youth between the ages of 7 and 16 attend school or be home schooled. Under Idaho Code § 33-207, parents, guardians, and students may be charged with a misdemeanor for failure to comply with attendance laws.

We spoke to administrators of schools serving Indian students living on reservations and learned that districts enforce school attendance differently across the state. Some districts emphasize strategies that do not rely on the legal system, such as incentives for attending school. The choice to pursue charges against students or parents is at the discretion of school administrators and county prosecutors. Generally, older students are more likely to be held accountable for attendance than younger students.

Juvenile delinquency and youth rehabilitation

The Juvenile Corrections Act is in Title 20, Chapter 5 of Idaho Code. It defines how state laws apply to individuals who committed an offense when they were under the age of 18. Juveniles can commit offenses that would be criminal if committed by an adult and status offenses that would not be criminal. Idaho Code § 20-516(c) defines status offenses as truancy, curfew or alcohol violations, and running away from or being beyond the control of parents, guardian, or legal custodian.

According to the Department of Juvenile Corrections, 95 percent of all juvenile cases processed by Idaho are administered at the county level, and counties are responsible for detention, probation, and aftercare services. The department operates secure facilities for juveniles committed to the state by district courts, provides technical assistance to counties, and may receive and distribute federal funds to counties. The Department of Health and Welfare may also participate in mental health assessments and treatment under the Juvenile Corrections Act.

Domestic relations

Title 32 of Idaho Code governs domestic relations, such as marriage, divorce, child custody, child support, and domestic violence courts. State courts preside over civil matters and require limited involvement from the county, although law enforcement may remove a child from an unsafe home or enforce a court protection order.

The Department of Health and Welfare administers Idaho's child support program. The department conducts paternity tests, records and distributes payments, and helps establish or modify state court orders for child support or legal relationships between a parent and child. The department is also responsible for taking enforcement actions against noncompliant parents, such as wage withholdings or license suspensions.

Dependent, neglected, and abused children

References to dependent, neglected, and abused children are found in Title 16 of Idaho Code. This title includes the Child Protective Act, which outlines circumstances that children may be removed from the custody of their parents. The title defines child abuse and governs the termination of the parent-child relationship, including in cases of child abuse.

County governments are responsible for enforcing criminal child neglect and abuse laws. Law enforcement officers may remove a child. State courts hear involuntary child custody proceedings. Petitions invoking the Child Protective Act must be signed by either a prosecutor or deputy attorney general before being filed with a court. Children removed from their parents may be placed with the Department of Health and Welfare or another authorized agency. The department oversees state child protection and foster care programs.¹⁰ The department must ensure compliance with the federal Indian Child Welfare Act.¹¹

10. The federal government compensates the Department of Health and Welfare for eligible expenditures for child support and foster care. If obligations under Public Law 280 increase the department's eligible expenditures, the department would receive increased federal funding.

11. USC § 1901–1963.

Indian Child Welfare Act

The federal Indian Child Welfare Act requires state courts to notify a child's tribe of a child custody proceeding, allows the tribe to intervene in the proceeding, and permits the tribal court to assume jurisdiction over the proceeding. An Indian child's tribe has exclusive jurisdiction over that child living on the tribe's reservation unless the tribe has an agreement granting state jurisdiction.

Public assistance

Idaho Code Title 56 governs public assistance. Public assistance programs are available to all eligible citizens, including Indians living in Indian country unless enrolled in equivalent tribal programs.¹²

The authority to enforce child support by the Department of Health and Welfare also falls under Title 56 and was previously discussed under domestic relations.

Insanities and mental illness

Under Idaho Code § 66-329, state courts can order that individuals whose mental illness presents a danger to themselves or others be involuntarily committed to the custody of the Department of Health and Welfare to receive treatment. The department may also receive involuntary patients in other circumstances listed in Idaho Code § 66-324.

The department administers the two state psychiatric hospitals, State Hospital North and State Hospital South. The state also funds seven community-based mental health centers that serve residents in all 44 Idaho counties. Individuals involuntarily committed by a state court may receive services at State Hospital North or South or a community center. Involuntary juvenile commitments are also housed at State Hospital South.

Operation and management of motor vehicles upon highways and roads maintained by the county or state or their political subdivisions

Title 49 of Idaho Code governs motor vehicles. Chapter 14 defines motor vehicle crimes and Chapter 15 defines most traffic infractions. In addition, criminal laws under Title 18 involve the operation of a motor vehicle, such as vehicular manslaughter or driving under the influence of alcohol, drugs, or any other intoxicating substances.

Interstates 15 and 86, US Highways 12, 91, and 95, and many state highways and local roads travel through Indian country. An inventory of roads maintained by highway districts, counties, or

12. Most public assistance programs are supported by federal funds. Aid to the aged, blind, and disabled is not federally funded.

the state in Indian country is listed in exhibit 3. Idaho State Police and county sheriffs patrol these roads and are responsible for enforcing state criminal traffic laws. The Idaho Transportation Department, county governments, and local highway districts maintain the roads. The department also enforces administrative license suspensions against individuals convicted of drunk driving.

Exhibit 3

The Idaho Transportation Department records that 2,605 miles of roads maintained by highway districts, counties, or the state run through reservations in Idaho.

	Coeur d'Alene (miles of road)	Kootenai (miles of road)	Nez Perce (miles of road)	Shoshone-Bannock (miles of road)	Shoshone-Paiute (miles of road)
Local roads	549	4	1,337	290 ^a	27
State highways	53		100		11
US highways	42	1	127	27	
Interstates	9			28	

Source: Idaho Transportation Department, 2016.

a. The Shoshone-Bannock Tribes provided documentation that the Bureau of Indian Affairs cancelled agreements with local governments to maintain roads in the Fort Hall Reservation in 2014. The tribe does not believe the reservation should contain local roads maintained by the state or its subdivisions.



Nearly every stakeholder we spoke with has a different understanding of Idaho's jurisdiction under Public Law 280.

In general, Public Law 280 in Idaho is complex and confusing.

Public Law 280 complicates an already dynamic arrangement of jurisdiction in Indian country. Interpretations of Public Law 280 differ among federal and state courts. Nearly every stakeholder we spoke with has a different understanding of Idaho's jurisdiction under Public Law 280. We attribute this confusion to two factors:

Vague matters listed in Idaho Code § 67-5101

Difficulty distinguishing between enforceable and unenforceable legal proceedings

Comment by a Benewah County prosecutor

"Indian law is inconsistent not only over time, but by subject, state and reservation. Researching it is a leap into a torrent of change, contradiction and seeming conflict with the most basic principles of constitutional law."*

*** Douglas P. Payne, Criminal Jurisdiction in Indian Country; Complicated by Design, but Not Lawless. 54 Advocate 48 (2011).**

Vague matters

The seven matters in Idaho Code § 67-5101 are vague and do not reference specific laws. The courts must resolve any ambiguities about which laws are enforceable under Idaho statute (this has been done to a limited extent). We found ambiguity about state jurisdiction over domestic violence and dependent, neglected, and abused children laws.

Two examples highlight this ambiguity:

Idaho courts have not addressed whether Idaho has jurisdiction to enforce criminal domestic violence laws in Indian country under the umbrella of domestic relations. Idaho Code § 32-14 governs domestic violence courts but acts of domestic violence are not defined under Title 32. Idaho Code § 18-918 lists assault

Domestic violence in Indian country

Congress passed the 2013 Violence Against Women Reauthorization Act that recognized the high number of domestic violence crimes on reservations and authorized qualifying tribes' jurisdiction, under limited circumstances, over non-Indians who commit acts of domestic violence.

and battery as crimes that may be considered domestic violence.

Under Public Law 280, the Idaho Supreme Court ruled in 1987 that the state could prosecute felony injury to a child committed by an Indian.¹³ However, the court left unanswered whether (1) jurisdiction extended to all crimes that could be characterized as abuse or neglect and (2) jurisdiction only applied to a child's legal custodian.

We surveyed sheriffs and prosecuting attorneys working in Indian country. Of sheriffs who responded, none arrest Indian parents for child abuse on a reservation. Prosecuting attorneys who responded vary in whether they would prosecute Indian parents for child abuse.

Idaho courts have provided guidance about jurisdiction over the operation of motor vehicles. Jurisdiction extends to criminal laws that require the operation of a vehicle. The courts have also found that Idaho's jurisdiction extends to civil laws necessary for the enforcement of traffic crimes. Therefore, under Public Law 280 the state can prosecute an Indian for leaving the scene of an injury accident but not for a nontraffic offense that arises during a traffic stop.¹⁴

13. *State v. Marek*, 736 P.2d 1314 (Idaho 1987).

14. *State v. Smith*, 906 P.2d 141 (Idaho Ct. App. 1995) and *State v. McCormack*, 793 P.2d 682 (Idaho 1990).

Idaho courts have not defined the scope of state jurisdiction for most of the seven matters.

Conflicting state court decisions mean jurisdiction under Public Law 280 varies by state.

Idaho courts have not ruled whether some laws are criminal or regulatory.

Enforceable state legal proceedings

Since Idaho assumed jurisdiction, two important US Supreme Court decisions have narrowed state jurisdiction under Public Law 280 and clarified that Idaho can only enforce criminal laws and settle civil disputes.¹⁵ The court decisions do not allow states to enforce regulatory laws.

However, a law may be considered regulatory in one state and criminal in another, so jurisdiction may differ among states. For example, proceedings over child welfare, the determination of paternity, or recouping public assistance money have been characterized as both the enforcement of a regulatory law and a civil dispute. Both the federal 9th Circuit Court of Appeals and the Idaho Supreme Court have affirmed that the state has jurisdiction over child welfare.¹⁶

Traffic infractions have been characterized as both criminal and regulatory. The Idaho Supreme Court has ruled that traffic infractions such as speeding are criminal rather than regulatory and may be enforced by the state in Indian country.¹⁷ However, one subject-matter expert described the ruling as “ripe for reconsideration.”

Neither Idaho nor federal courts have directly addressed whether compulsory school attendance and juvenile status offenses laws may be enforced. The sheriffs and prosecuting attorneys who responded to our survey varied in whether they arrest or prosecute Indian juveniles for not complying with attendance laws or committing status offenses.

15. *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

16. *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005) and *Doe v. Doe*, 349 P.3d 1205 (Idaho 2015).

17. *State v. George*, 905 P.2d 626 (Idaho 1995).

Challenges of shared jurisdiction



The complicated arrangement of jurisdiction in Indian country allows for a myriad of creative and cooperative solutions. Tribes and local governments may establish joint courts, deputize each other's law enforcement officers, or enter into agreements to share resources. Federal efforts continue to attempt to make Indian country safer. Despite these efforts, gaps in law enforcement persist in Indian country both nationwide and in Idaho that jeopardize public safety.

Congress found in 2010 that the criminal jurisdiction scheme in Indian country is unduly complex with the following consequences:

- Negatively impacts the ability to provide public safety to Indian communities

- Increasingly exploited by criminals

- Requires a high degree of commitment and cooperation among tribal, state, and federal law enforcement officials¹⁸

18. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4), 124 Stat. 2262.

Stakeholders cited instances where federal efforts were slow or ineffective.

Tribes shared concerns with the Idaho US Attorney about domestic violence against Indian women, drug traffickers, criminals hiding on reservation lands, and inadequate or delayed communication.

Shared jurisdiction in Indian country contributes to gaps in law enforcement.

Many stakeholders we spoke to shared stories that highlighted gaps in law enforcement. They cited examples of people who should be arrested going free, cases with ample evidence going unprosecuted, and threats to public safety going unaddressed. Stakeholders most often attributed these gaps to three causes:

- Lack of federal action
- Lack of jurisdiction
- Coordination challenges

Indian country in other states is also subject to gaps in law enforcement regardless of Public Law 280. Although Idaho's unique adoption of Public Law 280 contributes to these gaps, Public Law 280 is not solely responsible.

Lack of federal action

County and state stakeholders shared concerns that the federal criminal justice system has limited capacity to address lesser crimes. These stakeholders cited instances where federal efforts were slow or ineffective, particularly for burglary, domestic violence, and less serious drug offenses. Two county stakeholders commented that the federal government may decline to prosecute a case even though it has jurisdiction. Tribal stakeholders did not provide similar concerns to us.

In 2013 the US Department of Justice found that federal prosecution of violent crime in Indian country fell 3 percent from 2000 to 2010. Nationally, concerns about the number of crimes the federal government declined to prosecute have driven efforts to improve law enforcement. The 2010 Tribal Law and Order Act and the 2013 Violence Against Women Reauthorization Act seeks to improve federal law enforcement efforts and expand tribal authority.

The US Attorney's Office for the District of Idaho published its *Indian Country Community Safety Strategy* in 2012 to help implement the Tribal Law and Order Act. The intent was to prevent tribal lands from becoming refuges for non-Indian criminals and to address specific needs of each tribe. The five tribes shared concerns with the US Attorney about domestic violence against Indian women, drug traffickers, criminals hiding on reservation lands, and inadequate or delayed communication

from the US Attorney's Office about criminal investigations and prosecutions. The US Attorney's Office has not published a follow-up report about its efforts to address the issues raised in the safety strategy.

Lack of jurisdiction

Because Federal Indian Law limits the jurisdiction of each government based on Indian status, Indian country, and legal proceeding, law enforcement officers do not have jurisdiction in many instances. For example, a tribal officer cannot arrest an intoxicated non-Indian driver and a county sheriff cannot arrest an Indian passenger in possession of drugs during a traffic stop. Tribal and county stakeholders shared concerns that this gap in law enforcement has created a safe haven for criminals.

We heard from federal and county law enforcement that Idaho's partial Public Law 280 jurisdiction improved some gaps in state law enforcement. Even though a county sheriff cannot arrest the passenger in possession of drugs, he can arrest an intoxicated Indian driver.

Although not mentioned by Idaho stakeholders, the right of tribal law enforcement to pursue and detain violators of state law in Indian country is often unclear and a concern in other states. For example, in Washington a tribal officer pursued a reckless driver outside the boundaries of the reservation and detained the driver until a county sheriff arrived to make the arrest. Washington courts later found that the tribal officer lacked even the authority to detain the driver. This example highlights the incentive non-Indian offenders may have to flee Indian country to evade justice.

Coordination challenges

When two governments share similar responsibilities to citizens, both governments can save money by shifting responsibilities to the other government. Both tribal and county stakeholders expressed frustration about situations where the other party failed to act when they were expected to. We heard examples of Indian children, primarily nonmember Indian children, put at risk or left without services because each government refused to act claiming the other had jurisdiction.

One study highlights a lack of accountability where responsibilities overlap. The absence of clear priority means governments may be able to shift responsibility.

We heard from federal and county law enforcement that Idaho's partial Public Law 280 jurisdiction improved some gaps in state law enforcement.

Only one tribe and one county in Idaho has a formal cross-deputization agreement that allows tribal officers to enforce state laws and vice versa.

Cross-deputization can help address gaps in law enforcement.

Nationwide, state and local law enforcement agencies often enter into deputization, cross-deputization, or mutual aid agreements with tribal police. These agreements promote the seamless flow of law enforcement among varying parties with the goal of public safety. The terms of these agreements vary but commonly address sovereign immunity, jurisdiction, geographic coverage, liability, arrests, citations, search warrants, interrogations, incarceration, prosecution, communication, sharing of information, personnel and equipment, emergency and nonemergency calls, and dispute resolution.

Two tribes have formal cross-deputization agreements, each with one county. One of those tribes also has an informal agreement with another county that allows one deputy sheriff to enforce tribal law.

The Office of Justice Services in the Bureau of Indian Affairs issues special law enforcement commissions to tribal, local, and state law enforcement. The special commissions allow these officers to enforce federal criminal laws in Indian country and can help alleviate gaps in law enforcement. Police officers with three tribes have received the special commissions.



Joel Minor, Chief of Police, Kootenai Tribal Police; Dave Kramer, Boundary County Sheriff; Heiko Arshat, Patrolman, Kootenai Tribal Police, January 2017.
Photo credit: Andrea Kramer.

Providing limited state authority for tribal police may reduce gaps in law enforcement.

State law only recognizes the authority of a tribal police officer if the officer is deputized by a county sheriff or city chief of police. A bill was considered by the Idaho Legislature in 2011 that would have given qualifying tribal police officers the authority to enforce state law in Indian country. The bill did not pass. Some sheriffs we spoke with are reluctant to deputize tribal or federal law enforcement. Cross-deputization agreements require support from all governments with jurisdiction in Indian country and cannot be unilaterally imposed by a state legislature.

Recommendation

The Legislature may wish to consider legislation to provide limited state authority to tribal police to enforce criminal state laws. Nevada and Oregon have laws that provide limited authority to qualifying personnel or in circumstances such as pursuit across reservation boundaries. This legislation would not replace current or future cross-deputization agreements but would help alleviate threats to public safety in the absence of those agreements.



Both tribal and county stakeholders expressed concerns about different outcomes under shared jurisdiction.

Separate legal systems create the potential for Indians to receive different outcomes.

Because Idaho shares jurisdiction with the tribes, the potential exists for an Indian to receive a different sentence for the same crime or have access to different resources compared with other Indians and non-Indians. Both tribal and county stakeholders expressed concerns about the potential for Indians to receive different outcomes under the current shared jurisdiction arrangement. Stakeholders identified two potential causes:

- A lack of recognition for tribal court judgments
- Limited tribal court sentences

Lack of recognition for tribal court judgments

The US Constitution outlines a policy called the full faith and credit doctrine, which allows parties to seek enforcement of final judgments from separate court systems.¹⁹ For example, if an Oregon court issues a protection order, the order could be enforced in Idaho. An Oregon judgment enforcing a contract is entitled to recognition by an Idaho court. Idaho's recognition of these orders allows those affected by the orders to access state resources.

Although the US Constitution requires states to give full faith and credit only to other states, Idaho and federal law require Idaho courts to recognize certain tribal court judgments.²⁰ We did not hear instances of Idaho courts refusing to honor tribal court judgments when legally obligated.

Tribal stakeholders noted concerns about the potential for different outcomes because the state does not recognize tribal court criminal sentences and orders for involuntary commitment. The full faith and credit doctrine does not typically apply to criminal sentences or orders for involuntary commitment.

19. Article IV, Section 1 of the US Constitution.

20. "Tribal court decrees, while not precisely equivalent to decrees of the courts of sister states, are nevertheless entitled to full faith and credit." *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982).

Therefore, a tribal court judgment cannot grant access to state rehabilitation resources. In these instances, individuals may receive different rehabilitation services or sentences.

Tribal stakeholders worry that a lack of access to state resources prevents adequate treatment, particularly for Indian juveniles or the mentally ill. Idaho's jurisdiction over juveniles and the mentally ill under Public Law 280 gives Indians access to these services through state courts. Some tribal stakeholders believe that the state should make those resources available through tribal courts because of Public Law 280.

County officials are more concerned that an inability to share or recognize tribal court convictions leads to different court outcomes. For example, one county official expressed uncertainty about whether tribal court convictions can be legally recognized in state courts. Another official believes the tribes are reluctant to share an offender's criminal history. The Idaho Legislature can ensure that Idaho courts use tribal court judgments to enhance sentencing, but a tribe must agree to share judgments with the state.

Limited tribal court sentences

Tribal courts are typically restricted by federal law to impose no more than a one-year sentence for any crime. For serious crimes, the Tribal Law and Order Act gives tribes the option of enhanced sentencing if the tribal court agrees to meet certain criteria. None of the tribes in Idaho have exercised this option.

Some county stakeholders are concerned that tribal court sentences are insufficient compared with state court sentences. For example, an individual tried in tribal court for vehicular manslaughter might receive a one-year sentence. The same individual could potentially receive a 15-year sentence in state court.

Some county stakeholders are concerned that tribal court sentences are insufficient compared with state court sentences.



The Legislature can require the recognition of certain tribal court orders.

Although the Legislature cannot address differences between tribal and state court sentencing options, it can require the recognition of tribal court orders. Involuntary treatment for mental illness is largely a state responsibility. The federal government has little infrastructure for involuntary mental health treatment.

Recommendation

The Legislature may wish to consider facilitating the recognition of tribal court orders for involuntary commitment.

The Arizona Legislature passed a bill mandating that Arizona courts recognize qualifying tribal court orders for involuntary commitment as they would an Arizona court order. By recognizing tribal court orders, the state agrees to provide involuntary mental health care on an equal basis to state citizens regardless of their residence in Indian country. The court order must include findings respecting due process for the affected patient, mental health diagnosis, and the least restrictive treatment alternative.



Idaho's jurisdiction is an unfunded mandate to county governments that may reduce federal funding to tribes.

Public Law 280 has been described as an unfunded mandate to states. While Idaho was not mandated to assume jurisdiction, county governments may feel that Public Law 280 is an unfunded mandate from the state. Some county officials commented on the lack of funding available for Public Law 280.

On the other hand, some tribal officials are concerned that Idaho's Public Law 280 status deprives them of opportunities to work with the federal government or opportunities for federal funding.

The combination of reduced federal responsibility and the possibility of reduced federal funding means that governments with land in Indian country have to stretch their resources further. We identified three possible sources of diminished funding:

- Funding for local governments
- Tribal funding for contracted services
- Federal grant awards

Funding for local governments

Enacting Public Law 280 was, in part, a way to reduce federal spending and shift federal responsibility to the six mandatory states. State and local governments receive no federal funding for these responsibilities. Similarly, in states that voluntarily assumed jurisdiction, state and local governments do not receive federal funding.

According to some reports, the lack of federal funding to local governments resulted in a vacuum of law enforcement. Local governments, tasked with replacing federal law enforcement, were not always willing or able to do so with their existing budgets. A state representative in Montana recounted in 1961 a particularly vivid example, describing the Omaha Reservation:

A lawless area was created . . . Murdered men have lain in the street within the Omaha Reservation for over 24 hours before police have investigated the crime.

Public Law 280 does not provide local or state governments with federal funding.

In 1998 tribes in mandated Public Law 280 states received less than 20% per capita for criminal justice than did tribes in non-Public Law 280 states.

Funding Public Law 280 in Montana

The problem of funding local governments for responsibilities under Public Law 280 has recently arisen for one of Idaho's neighbors. Montana shares jurisdiction with the tribe and the federal government on the Flathead Reservation for felonies committed by Indians.

In January 2017 officials in Lake County, Montana, drafted a resolution to withdraw county law enforcement services on the reservation because it does not receive funding from either the tribe or the state. The county is frustrated that it must divert resources from other services at the detriment of all county residents to meet obligations under Public Law 280. Montana lawmakers are concerned a withdrawal of county services will complicate jurisdiction, and they are working on a bill that would provide state funding to counties affected by Public Law 280.

Tribal funding for contracted services

Under the 1975 Indian Self-Determination and Education Assistance Act, tribes may opt to receive federal funds to administer their own programs rather than programs administered by the federal government. Under the act, any funds a tribe receives shall be no less than the funds the Bureau of Indian Affairs or the Indian Health Service would spend on direct services.

Public Law 280 replaced federal services with state services, and some studies have found that this replacement has decreased federal funds given to tribes.²¹ For example, a 2007 study found that in fiscal year 1998, tribes in mandatory Public Law 280 states received less than 20 percent per capita of what tribes in non-Public Law 280 states received from the Bureau of Indian Affairs for law enforcement and criminal justice funding. In 2015 the bureau estimated that tribes in mandatory Public Law 280 states received \$16.9 million less federal funding for tribal courts than if those tribes had been funded at the level of tribes unaffected by Public Law 280. The potential for reduced funds for tribal services is illustrated in exhibit 4.

21. The studies we found were specific to tribes in mandatory Public Law 280 states. Federal officials we interviewed suggested that generalizing about funding in optional states is difficult.

Exhibit 4

Under Public Law 280, tribes’ federal funding may be reduced.

In states without Public Law 280, tribes may choose to receive federal funding to replace federal services.



In states with Public Law 280, federal services are reduced, which may also reduce available federal funding.



Federal grant awards

In addition to contract services, tribes affected by Public Law 280 may also be at a disadvantage for federal grant awards. In our discussions with federal officials at the US departments of Interior, Health and Human Services, and Justice, we did not find any explicit consideration of a tribe’s Public Law 280 status for grant awards or eligibility. However, the director of the Office of Tribal Justice noted that criteria may change. Other federal officials noted that Public Law 280 may indirectly affect grant awards for law enforcement in two ways.

First, some grants may base awards on variables such as case load or the number of law enforcement officers. If state jurisdiction reduces a tribe’s case load, tribal awards may be reduced. Second, any reduction in funding for contracted services leaves tribes with less resources to prepare proposals for competitive grants.

The Legislature can address funding gaps created by Public Law 280.

Tribes may be eligible for certain grants through state agencies. The Department of Juvenile Corrections makes substance use disorder and millennium funds available to tribes the same as counties. The department also funds a Tribal Juvenile Justice Council that provides input to the Idaho Juvenile Justice Commission alongside the seven district councils.

Recommendation

The Legislature may wish to consider directly addressing funding gaps created by Public Law 280. One example to consider is Wisconsin, a mandatory state that made funding available to affected counties soon after Public Law 280 went into effect. During the 1980s, this funding was expanded to include support for cooperative law enforcement relations between tribes and counties.

In 1999 Wisconsin dedicated revenue from the state's gaming compacts with individual tribes to grants for county law enforcement, tribal law enforcement, and cooperative law enforcement efforts. One report found that the joint county-tribal programs funded by the state strengthened law enforcement and cooperation between tribes and counties.



Upper Mesa Falls. Photo credit: VisitIdaho.com

Retrocession

6

In 1968 Public Law 280 was amended to allow states to request the retrocession of jurisdiction to the federal government.²² States, not tribes, initiate the process.

The state describes the scope of jurisdiction it wishes to retrocede in a request to the US Secretary of the Interior.

If the request includes the retrocession of criminal jurisdiction, the secretary must consult with the US Attorney General.

The secretary and attorney general, in practice, consider the law enforcement capacity of the tribe and the federal government to avoid a decrease in on-the-ground law enforcement.

The secretary may deny or accept all or part of the state's request.

Retrocession goes into effect when a notice is published in the Federal Register listing the scope of jurisdiction retroceded and the date of retrocession.

Although the formal process for requesting retrocession is well established, requests have varied in their scope and a template does not exist. Other states have most commonly retroceded jurisdiction as separate bills for each tribe.

22. 25 USC § 1323.

**In 1979
legislation was
introduced to
repeal Idaho
Code Chapter
51, Title 67.**

Previous bills to retrocede have not passed the Idaho Legislature.

We found at least three bills to retrocede Idaho’s jurisdiction under Public Law 280. In 1979 legislation was introduced that would have repealed Idaho Code Chapter 51, Title 67 in its entirety for all tribes in Idaho. Legislators never voted on the bill.

The Shoshone-Bannock Tribes supported retrocession bills in 1994 and 1999. The 1994 bill would have created a new section of code requiring the governor to retrocede jurisdiction, by proclamation, over the operation and management of motor vehicles on the Fort Hall Reservation. The bill would have required a resolution from the Shoshone-Bannock Tribes requesting retrocession. The 1999 bill would have created a new section of code retroceding all state jurisdiction except over motor vehicles for the Shoshone-Bannock Tribes. The bill passed the Senate but was held for reconsideration and not voted on by the House of Representatives.

Documentation on the 1979 and 1994 bills was limited and did not lend to an understanding of why the Legislature took no action. The 1999 bill had mixed support—it was opposed by the Idaho Prosecuting Attorneys Association but supported by Bannock County officials. Legislative records indicate that stakeholders in 1999 shared the same confusion and uncertainty about state jurisdiction under Public Law 280 as stakeholders today.

Retrocession is a complex issue with implications for public safety and intergovernmental relationships.

As we have emphasized throughout this report, jurisdiction in Indian country is complex and dynamic. Assurances of public safety depend on the interface of multiple governments. Chapter 4 highlights real challenges stakeholders working in Indian country navigate daily. Some of those challenges might grow in scale rather than be alleviated with retrocession.

Likewise, Indian country includes complicated interactions among tribal, local, state, and federal governments. The quality of services in Indian country depends, in part, on the quality of relationships among governments. A successful retrocession hinges on those relationships. We discuss those relationships and ways the Legislature can help facilitate positive relationships in chapter 7.

This report does not endorse or oppose retrocession. Our discussion of retrocession is based on our research of other states and the concerns brought to us by stakeholders.



Lake Pend Oreille. Photo credit: VisitIdaho.com

Some challenges might grow in scale rather than be alleviated with retrocession.

A successful retrocession hinges on intergovernmental relationships.

Minnesota, Montana, Nebraska, Oregon, Washington, and Wisconsin have requested retrocession by passing legislation for certain tribes or parts of jurisdiction. The Nevada and Washington legislatures developed a formal process that authorizes other stakeholders to request retrocession. Washington's formal process incorporates local officials and a consideration of the practical implications of retrocession. Appendix E details the retrocession status of each Public Law 280 state. Appendix F has more details about the retrocession processes in Nevada and Washington.

We identified four factors for the Legislature to consider if it decides to pursue retrocession:

- Transition
- Partial jurisdiction
- Institutional knowledge
- Tribal self-determination

States can take efforts to ensure a smooth transition of jurisdiction

Tribes may differ in their readiness to accept state retrocession. Changes in jurisdiction and the different or new responsibilities of tribes, states, and the federal government may require an adjustment period. The length of any adjustment period will depend on the scope of jurisdiction being returned as well as the official implementation date set by the US Secretary of the Interior. States and tribes can take steps to ensure a smooth transition leading up to retrocession.

A clear description in the request for retrocession that identifies which jurisdiction would be returned and which would be retained may be beneficial to all parties. The recent retrocession process in Washington experienced a few complications because the initial description of jurisdiction being returned was unclear. When Nevada retroceded, it specified in statute that crimes committed or legal proceedings underway before retrocession would remain under state jurisdiction.

Tribes may need time to expand or enhance law enforcement and criminal justice capacities in preparation for retrocession, which includes securing funding outside of the federal government. The US Department of Justice requested one year to prepare for the recent retrocession in Washington, which may indicate that federal law enforcement agencies also need time to prepare for changes.

All stakeholders may benefit from a clear description in the request for retrocession that identifies which jurisdiction would be returned and which would be retained.

Counties and tribes share a working knowledge of how services are delivered on the ground and should be consulted.

Retrocession does not have to be one size fits all

The Legislature does not need to retrocede jurisdiction for all seven matters for all five tribes at a single time. Nor does it need to limit retrocession to a one-size-fits-all model. Other states have requested to retrocede specific parts of their jurisdiction:

- The Indian country of one or more tribes

- Certain subject matters

- Crimes of specific severity

- Legal proceedings involving only Indian plaintiffs, defendants, and victims

Retroceding specific parts of jurisdiction allows the state to return jurisdiction based on the distinct considerations of that jurisdiction. The role of the state and the capacity of the tribe and federal government vary on each reservation and for each matter.

County and tribal governments share the most knowledge about jurisdiction

County governments have primary responsibility for implementing jurisdiction under Public Law 280. Counties and tribes share a working knowledge of how services are delivered on the ground. They also share institutional knowledge about jurisdiction, relationships, and challenges experienced over decades.

Formally involving county and tribal governments in any deliberations of retrocession can provide policymakers with the best practical information. In Washington, tribes are required to provide the governor with a plan to replace state jurisdiction; the governor is required to convene meetings with local government officials before accepting or denying retrocession.

Other states recognize the right to tribal self-determination

The 1968 amendments to Public Law 280 recognized the right of tribes to self-determination and sovereignty by (1) creating a process for states to request the return of jurisdiction to the federal government and (2) requiring a special tribal election before states can assume new or additional jurisdiction. Some

states have echoed this respect for tribal sovereignty by initiating retrocession at the request of tribes or by retaining jurisdiction only with tribal consent.

Nevada provided for tribal elections to decide whether to keep state jurisdiction, mirroring the special tribal elections in the 1968 amendments. The Washington Legislature empowered tribes to request retrocession and required the governor to initiate the consideration of retrocession based on the tribe's request.

Recommendation

Should the Legislature decide to pursue retrocession, we recommend it consider transition, partial jurisdiction, institutional knowledge, and tribal self-determination into its decision-making process.



Other states offer retrocession strategies that empower and engage tribes in the process.



The practical changes of retrocession depend on tribal, local, state, and federal policy choices.

As we have described in previous chapters, Indian country is diverse and services depend on the policy choices of and relationships among tribal, local, state, and federal governments. The practical changes of retrocession similarly depend on the choices and relationships of these governments. The process Washington developed can provide some guidance but represents a single snapshot of one reservation.

In Idaho, each tribe may operate programs or have agreements with the state that relate to the seven matters in statute. Tribes also provide many of the same services the state obligated itself to under Public Law 280. In these instances, the Legislature may anticipate fewer practical changes to jurisdiction or the delivery of services in Indian country.

Conversely, several county officials are skeptical of the federal government's ability to fulfill an increased role in Indian country. Some officials are concerned about the loss of state jurisdiction over non-Indian offenders who commit crimes against Indian victims. The federal government would have exclusive jurisdiction over these crimes and some county officials question whether the federal government would assert jurisdiction. Other officials are concerned that when the federal government does not assert jurisdiction, tribal court sentences are inadequate compared with state sentences for similar crimes.

Other options for limited state jurisdiction on reservations

Under 25 CFR § 273.52, tribes may allow state employees to enter Indian country to inspect the conditions of public schools and to enforce state compulsory attendance laws on Indian youth and their parents or guardians. Similarly, 25 USC § 1919(a) allows tribes to give states shared jurisdiction over child custody proceedings for Indian children or to transfer jurisdiction to the state on a case-by-case basis.

If the Legislature considers retrocession, it may also wish to consider addressing our recommendations in the previous chapter on the rights of tribal law enforcement and the recognition of tribal orders. The challenges these recommendations address would likely grow with retrocession.



Sacajawea monument in Salmon, Idaho.



Retrocession would not change many of the services that the state and counties provide to Indians as Idaho citizens.

Retrocession would limit the enforcement of state criminal laws and access to state courts for civil disputes in Indian country.

With retrocession, jurisdiction in Indian country would revert to the general jurisdictional arrangement we described in chapter 2. Because Idaho’s optional Public Law 280 jurisdiction did not diminish federal or tribal jurisdiction, retrocession would not expand federal or tribal jurisdiction. Retrocession would remove state jurisdiction in Indian country over the seven matters in Idaho Code § 67-5101 for (1) crimes with Indian offenders or victims and (2) most civil disputes brought against members of the resident tribe. The tribe or federal government would have to act where the state loses authority.

The state would retain considerable obligations in Indian country. Access to most state and local services, such as education and public assistance programs, would not change. A general overview of what retrocession would and would not change is in exhibit 6.



Hells Canyon. Photo credit: Visit Idaho.com.

Exhibit 6

Retrocession would change Idaho jurisdiction in Indian country for three of the six circumstances of criminal and civil jurisdiction.

Circumstances	Current jurisdiction	Jurisdiction with retrocession
Criminal laws Non-Indian offender No Indian victim	Idaho	Idaho
Criminal laws Non-Indian offender Indian victim	Tribe (very limited) Idaho Federal	Tribe (very limited) Federal
Criminal laws Indian offender	Tribe Idaho Federal (limited)	Tribe Federal (limited)
Civil dispute Member defendant	Tribe Idaho	Tribe
Civil dispute Nonmember defendant	Tribe (limited) Idaho	Tribe (limited) Idaho
Civil taxation and regulatory laws Member Nonmember	Tribe (limited) Idaho (limited)	Tribe (limited) Idaho (limited)

Criminal jurisdiction depends on Indian status.

Civil jurisdiction depends on membership with the reservation's tribe.

Note: The exhibit describes general changes in jurisdiction, not an assessment of the delivery of services.

Exhibit 7 details the impact of retrocession of jurisdiction for each of the seven matters. The jurisdictional changes illustrated in these tables do not reflect the full extent of the practical changes that might occur with retrocession.

Exhibit 7

Idaho’s jurisdiction over the seven matters would change with retrocession.

Retrocession would not change tribal or federal jurisdiction.

Compulsory school attendance

	Current jurisdiction	Jurisdiction with retrocession
Criminal attendance laws Non-Indian parents and students	Idaho	Idaho
Criminal attendance laws Indian parents and students	Tribe Idaho	Tribe Idaho (with tribal consent)

Juvenile delinquency and youth rehabilitation

	Current jurisdiction	Jurisdiction with retrocession
Criminal laws Non-Indian juvenile No Indian victim	Idaho	Idaho
Criminal laws Non-Indian juvenile Indian victim	Idaho Federal	Federal
Criminal laws Indian juvenile	Tribe Idaho Federal (limited)	Tribe Federal (limited)

Note: The exhibit describes general changes in jurisdiction and is not an assessment of the delivery of services.

Dependent, neglected, and abused children

	Current jurisdiction	Jurisdiction with retrocession
Child custody proceedings Within an Indian child's reservation	Tribe Idaho	Tribe Idaho (with agreement)
Child custody proceedings Outside an Indian child's reservation	Tribe Idaho (must comply with Indian Child Welfare Act)	Tribe Idaho (must comply with Indian Child Welfare Act)
Criminal child neglect or abuse laws Non-Indian offender Non-Indian victim	Idaho	Idaho
Criminal child neglect or abuse laws Non-Indian offender Indian victim	Idaho Federal	Federal
Criminal child neglect or abuse laws Indian offender	Tribe Idaho Federal (limited)	Tribe Federal (limited)

Tribes may agree to state jurisdiction over child custody proceedings through the Indian Child Welfare Act.

Exhibit continued on next page.

Idaho’s child support program would have to make reasonable efforts to serve tribal members, even without jurisdiction.

Mental illness and insanities

	Current jurisdiction	Jurisdiction with retrocession
Involuntarily commitment Nonmembers	Idaho	Idaho
Involuntarily commitment Members transported outside Indian country	Idaho	Idaho
Involuntarily commitment Members inside Indian country	Tribe Idaho	Tribe

Public assistance (only child support within the public assistance statute may be affected by retrocession)

	Current jurisdiction	Jurisdiction with retrocession
Orders to establish paternity or provide child support Nonmembers	Tribe (limited) Idaho	Tribe (limited) Idaho
Orders to establish paternity or provide child support Members	Tribe Idaho	Tribe Idaho ^a

a. Idaho’s jurisdiction would be diminished, but jurisdiction for each case must be evaluated on a fact-specific basis.

Note: The exhibit describes general changes in jurisdiction, not an assessment of the delivery of services.

Domestic relations

	Current jurisdiction	Jurisdiction with retrocession
Nondivorce civil disputes Nonmember defendant	Tribe (limited) Idaho	Tribe (limited) Idaho
Nondivorce civil disputes Member defendant	Tribe Idaho	Tribe
Divorce Nonmember plaintiff Nonmember defendant	Idaho	Idaho
Divorce Nonmember plaintiff Member defendant	Tribe Idaho	Tribe Idaho (probable)
Divorce Member plaintiff Nonmember defendant	Tribe Idaho	Tribe
Divorce Member plaintiff Member defendant	Tribe Idaho	Tribe

If Idaho has jurisdiction over crimes of domestic violence involving Indians, retrocession would eliminate that jurisdiction.

State courts cannot affect the ownership of trust property in divorce actions.

Exhibit continued on next page.

Idaho Code § 67-5101 does not give Idaho jurisdiction on roads not maintained by the state or its subdivisions.

Operation and management of motor vehicles upon highways and roads maintained by the county or state or their political subdivisions

	Current jurisdiction	Jurisdiction with retrocession
Criminal laws Non-Indian offender Non-Indian victim	Idaho	Idaho
Criminal laws Non-Indian offender Indian victim	Idaho Federal	Federal
Criminal laws Indian offender	Tribe Idaho Federal (limited)	Tribe Federal (limited)
Civil dispute Member defendant	Tribe Idaho	Tribe
Civil dispute Nonmember defendant	Tribe (limited) Idaho	Tribe (limited) Idaho

Note: The exhibit describes general changes in jurisdiction, not an assessment of the delivery of services.

Intergovernmental relationships



Relationships in Indian country are rooted in hundreds of years of often painful history, including Public Law 280. Relationships are also rooted in contemporary history, which in Idaho includes models of cooperation and conflicts. Good relationships improve the ability to overcome challenges in Indian country and improve the provision of services regardless of Public Law 280.



Shoshone-Bannock Fort Hall Drummers with Representative Linden Bateman, Idaho Day, 2015. Photo credit: Idaho State Historical Society.

Tribes and counties both describe poor relationships, often citing a specific failed agreement or conflict.

Shared jurisdiction contributes to complicated interactions and relationships.

Tribal and county governments working in Indian country share a common interest to preserve public safety and serve Idaho citizens fairly. They also share jurisdiction over the seven matters listed in statute, which complicates their interactions and relationships.

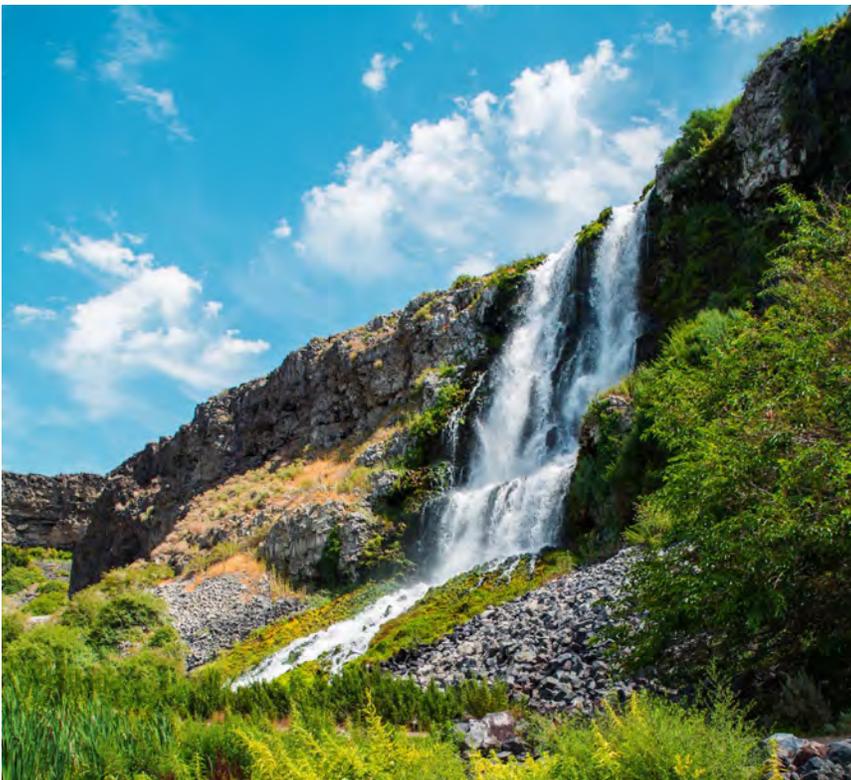
Each tribe we spoke with resented the historical context of Public Law 280 and Idaho's assumption of jurisdiction without tribal consent. Some tribes and counties describe poor relationships, often citing a specific failed agreement or conflict. These conflicts sometimes took the form of two versions of the same story with opposing parties attributing blame to the other party and both unwilling to attempt collaboration again.

Even with conflict, stakeholders agreed that having good relationships and communication was important. We found collaborative efforts among each tribe and some local governments on every reservation.

The quality of services in Indian country depends on collaboration among governments.

The problems caused by confusion about the law, gaps in law enforcement, different outcomes in different courts, and inadequate funding can be solved in part by good collaboration. In addition to examples of cross-deputization that we discussed in chapter 5, we heard examples of good collaboration between law enforcement agencies, such as shared county radio frequencies, dispatch services, and jail services. We also heard reports of shared crime data or incident reports.

We also heard numerous examples of problems caused by mutual distrust or misunderstandings between tribes, the state, and the counties. The inability or unwillingness to share resources, share crime data and incident reports, enforce court orders, cross-deputize law enforcement officers, develop a shared understanding of the law, or even communicate about the custody of a juvenile impedes public safety and puts all Idaho citizens at risk.



Thousand Springs. Photo credit: Visit Idaho.com.

Idaho has state and tribal forums that promote good relationships.

Idaho has two state-tribal forums to address issues of mutual concern: (1) the Council on Indian Affairs and (2) the Tribal State Court Forum.

The Council on Indian Affairs was established in 1999 under Idaho Code § 67-4004. Membership consists of four legislators (two from the Senate and two from the House), one representative from the Governor’s Office, and one representative from each of the five tribes. The council is charged with advising the Governor, the Legislature, and state agencies about state and tribal affairs. By law, the council is required to meet at least twice a year to discuss state policies affecting the tribes. However, the council has only met twice over the past three years.

The Tribal State Court Forum was established in 1993 by order of the Idaho Supreme Court. Membership includes state and tribal judges, a representative from the US District Court, and one consultant. Stakeholders we spoke to said the forum has been relatively inactive, though other stakeholders are optimistic about recent efforts. The *Tribal State Court Bench Book* was updated in 2014 and serves as a resource for understanding jurisdiction shared by the court systems.

The Legislature can facilitate intergovernmental relationships with new or existing forums.

Evolving laws and diverse circumstances mean that building a cohesive justice system in Indian country is not a static problem to solve but a dynamic problem that requires persistent effort. More than focusing on a specific issue, the Legislature may wish to promote forums to facilitate this effort.

Recommendation

The Legislature may wish to consider opportunities to enhance existing intergovernmental forums.

Leading practices indicate that forums like the Idaho Council of Indian Affairs or the Tribal-State Court Forum are most effective with dedicated administrative resources. Promising strategies in Indian country reflect strong and persistent leadership, stem from sustained educational efforts, and focus on common goals instead of conflicts.²³

The Legislature may also wish to consider creating a liaison or office within the Office of the Governor dedicated to Indian Affairs. The Governor's Office of Indian Affairs in Washington was referred to as a model for cooperation. The office was established in 1969 and is intended to affirm the importance to Washington of government-to-government relationships with federally recognized tribes.

Regardless of the future of state jurisdiction in Indian country, Idaho citizens will best be served by tribal, state, and local governments that can work well together. The Legislature may find that investing in strategies to jointly address issues with tribal and local stakeholders would provide long-term value.

23. Tribal Law and Policy Institute, "Promising Strategies: Tribal—State Court Relations," March 2013.





Study request



Sen. Jim Guthrie



Sen. Cherie Buckner-Webb



Rep. Mark Gibbs



Rep. Donna Pence



Idaho State Senate

SENATOR JIM GUTHRIE

March 2, 2016

TO: The Joint Legislative Oversight Committee

FROM: Legislative member of the Idaho Council on Indian Affairs

In 1953, the Federal Government passed Public Law 83-280 (PL 280). The law gave states the option to assume civil and criminal responsibility over seven areas of tribal jurisdiction which had traditionally been performed by the Federal Government. Those seven areas include compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglect and abused children; insanities and mental illness; public assistance; domestic relations; operation and management of motor vehicles upon highways and roads maintained by the county or state or political subdivisions thereof. PL280 did not provide federal funding support for states that assumed control over these areas¹. PL 280 impacts tribal members living on reservations and does not impact non-tribal members.

In 1963, the State of Idaho adopted PL 280 into code under 67-5101. By doing so, Idaho assumed financial and enforcement responsibility for all the areas outlined in PL 280. The level of enforcement and funding provided by the state under 67-5101 is uncertain but in many cases the Tribes in Idaho are now running their own programs in these areas.² Idaho's status as a PL 280 state may limit the resources Idaho's tribes can receive from their federal partners.

Some states that adopted PL 280 have since retroceded the jurisdiction back to the tribes and the federal government. In many cases have taken over servicing these areas themselves or have entered in to memorandums of understanding with state enforcement agencies.

In order to best evaluate the impact of possible changes to 67-5101, the legislative members of the Idaho Council on Indian Affairs requests the Joint Legislative Oversight Committee to evaluate the following questions regarding Idaho Code 67-5101.

1. What state agencies are statutorily obliged to fulfill the duties outlined in 67-5101?
2. Do these agencies fulfill the duties? Do agencies give tribal members the same level of service as other Idaho citizens?

¹ Final Report: Law Enforcement and Criminal Justice Under Public Law 280, National Criminal Justice Reference Service (NCJRS), May 2008. pg 7 <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>

² Ibid, pg 12

2. Do these agencies fulfill the duties? Do agencies give tribal members the same level of service as other Idaho citizens?
3. Do state agencies receive federal funds to provide services under PL 280? Would retrocession of PL 280 impact any of these programs for non-tribal members?
4. What is the process by which other states have retroceded PL 280?

As the legislative members of the Idaho Council on Indian Affairs, we believe further study of this law will help Idaho and the 4 tribes within Idaho impacted by PL280 determine the best course of action. We would appreciate the support of the Joint Legislative Oversight Committee in requesting the Office of Performance Evaluation review and report of the questions outlined above.

Thank you for your consideration of this request.

Sincerely,



Senator Jim Guthrie



Senator Cherie Buckner-Webb



Representative Marc Gibbs



Representative Donna Pence

Study scope



We will provide an understanding of what jurisdiction the state assumed, describe the process of retrocession, and identify how jurisdiction and obligations would be affected by retrocession.

We will answer the following questions:

1. In the adoption of Idaho Code § 67-5101, which duties and services did Idaho obligate itself to provide for Indians on specifically defined land? How does the state fulfill these obligations?
2. What federal funding, if any, does Idaho receive to implement Idaho Code § 67-5101, and how does it use those funds?
3. How would the state's jurisdiction and obligations change if Idaho retroceded all or part of its authority under Idaho Code § 67-5101?
4. How have other states retroceded Public Law 280 jurisdiction?



Shoshone Falls. Photo credit: Visit Idaho.com.

C

Methodology

We developed the scope of this report based on a study requested by legislative members of the Idaho Council on Indian Affairs and preliminary discussions with tribal, county, and state officials.

Our findings and recommendations are based on our literature review and interviews with subject-matter experts, as well as a qualitative analysis of our interviews and surveys.

We quickly realized that the level of service provided by the state in Indian country could not be directly compared with the level of service outside Indian country. The delivery of services is shared with each tribal government and the federal government.

To identify the state's obligations in Indian country under Idaho Code § 67-5101 and to understand the effect of state jurisdiction, we had to distinguish between the state's obligations under that law and obligations only tangentially related. For instance, although statute includes jurisdiction over public assistance, it is not the reason Idaho is obligated to provide public assistance.

We restricted our evaluation to those obligations and funding sources directly affected by jurisdiction through Idaho Code § 67-5101. Stakeholders brought up many concerns about funding or services involving tribal, local, state, or federal governments that do not directly relate to these obligations and are beyond the scope of this report.

Legal analysis

We conducted an extensive review of federal statutes, presidential executive orders, US Supreme Court decisions, Idaho statutes, Idaho court decisions, and other federal or state court decisions to understand the legal framework in Indian country. This framework is known as Federal Indian Law. We also interviewed subject-matter experts to reinforce our understanding of that law.

We worked closely with the Office of the Attorney General to ensure we accurately presented legal information in the report. We also interviewed attorneys from four executive agencies about the seven matters listed in statute.

Any legal summaries in this report are provided to clarify our findings and one caveat is essential: Federal Indian Law is exceptionally complex. To the extent we summarize that body of law, we do so at a level of generality that does not necessarily reflect its full complexity. Our legal analysis should not be relied upon as authoritative or as reflecting the position of the State of Idaho or the Office of the Attorney General. Those seeking authoritative legal interpretations or options concerning the application of Public Law 280 and Idaho Code § 67-5101 should seek counsel from attorneys or others with specialized expertise in Federal Indian Law.

Literature review

We conducted a literature review focusing on Public Law 280, retrocession, intergovernmental relationships, and the implications of retrocession.

We found no evaluations similar to this one in other states. However, we did find useful literature from the following sources:

- Academic journals
- Law review journals
- Federal agencies and working groups
- Nonprofit organizations

This literature helped to inform our understanding of Public Law 280 in Idaho, but we were careful to draw comparisons between Public Law 280 in Idaho and in other states. Idaho's mix of tribal, state, and federal responsibility is unique; direct comparisons to mandatory Public Law 280 states or to non-Public Law 280 states risk oversimplifying the complex reality.

Interviews

We conducted interviews with the following stakeholders working with the five tribes in Idaho:

Federal Indian Law is exceptionally complex. Our general explanation of the law does not reflect its full complexity.

Legislators
Idaho Supreme Court judge
Magistrate judge
County prosecuting attorneys
County sheriffs
County commissioner
County Public Works director
Highway district attorney
School administrators or their staff
Idaho Tribal Juvenile Justice Council
Idaho US District Attorney and her staff

We conducted interviews with state stakeholders in the following agencies who were familiar with the tribes but who have limited or indirect roles in implementing state jurisdiction:

Legislative Services Office
Governor's Office
Idaho Transportation Department
Idaho Department of Health and Welfare
Idaho Department of Juvenile Corrections
Idaho Department of Education
Idaho State Police

We interviewed or corresponded with staff from the following federal agencies:

Administration for Native Americans, Office of the
Administration for Children and Families, US
Department of Health and Human Services
Bureau of Land Management
Center for Substance and Abuse Treatment, Substance Abuse
and Mental Health Services Administration
Community Oriented Policing Services, US Department of
Justice
Idaho Division, Federal Highway Administration
Indian Health Service
Indian Highway Safety Program, Office of Justice Services,
Bureau of Indian Affairs
Office of Justice Services, Bureau of Indian Affairs
Office of Juvenile Justice and Delinquency Prevention, Office
of Justice Programs, US Department of Justice
Office of Research and Evaluation, US Department of Justice
Office of Tribal Justice, US Department of Justice
Office of Violence Against Women, US Department of Justice
Tribal Transportation Program, Office of Federal Lands
Highway, Federal Highway Administration

We interviewed two professors of Federal Indian Law and staff from the Tribal Law and Policy Institute.

We also spoke with three people familiar with the recent retrocession in Washington—one state attorney and law enforcement personnel at the US Department of Justice and the Office of Justice Services of the Bureau of Indian Affairs.

Surveys

After interviewing sheriffs and prosecuting attorneys working in Indian country, we drafted a survey for each stakeholder group. The survey questions were designed to compare the implementation of Idaho's Public Law 280 jurisdiction across counties and to gather information about intergovernmental relationships. Although 13 counties include land from the five reservations, we excluded Latah and Caribou counties because their boundaries do not overlap with a significant populated portion of any reservation.

Sheriffs

Eleven sheriffs received emails with the survey questions in September 2016. Of those, seven submitted survey responses (64 percent response rate). Two sheriffs submitted comments about working in Indian country but did not complete the survey and were not included in the survey analysis. Two sheriffs did not respond. Of the four sheriffs who did not submit survey responses, we interviewed three before development of the survey. Combining survey responses and interviews, we received feedback from 91 percent of sheriffs.

Prosecuting attorneys

Ten prosecuting attorneys received emails with the survey questions in September 2016. We excluded Bannock County because the prosecutor answered similar questions over the phone as part of our survey development. Of the 10 prosecutors who received the survey, 6 completed the survey via email and one completed the survey over the phone (70 percent response rate). One prosecutor responded that he agreed with the response submitted by another prosecutor, but we did not analyze a duplicative response. Two prosecutors did not respond at all. However, of the two prosecutors who did not respond, one was interviewed before development of the survey. Combining survey

responses and interviews, we received feedback from 91 percent of prosecuting attorneys.

Analysis

Survey analysis was completed in December 2016. Most questions elicited a yes or no response. Those responses were counted by frequency and grouped by reservation. The open-ended questions and any additional material volunteered by survey respondents were included as part of the qualitative analysis of our interviews.

Reservation site visits and interviews

Four of the five tribes invited us to meet with their tribal councils or staff attorneys:

- Coeur d'Alene Tribe
- Kootenai Tribe of Idaho
- Nez Perce Tribe
- Shoshone-Bannock Tribes

We traveled to each reservation in May 2016. We returned to the Fort Hall Reservation in August and October for interviews with the tribal council chair, attorney, and staff working in the following areas:

- Child support
- Courts
- Education
- Juvenile corrections
- Law enforcement
- Mental health
- Transportation
- Victim assistance

We were also able to meet in person with a Kootenai tribal court judge, a Nez Perce tribal prosecuting attorney, and a Nez Perce administrative specialist. Other correspondence with the tribes was facilitated through tribal attorneys via email or phone.

State jurisdiction after 1968



During our meeting with the Kootenai Tribal Council, the council raised the question of whether Idaho's jurisdiction applies to their reservation. A 1977 memorandum issued by an assistant regional solicitor for the US Department of the Interior argued that Idaho could only have jurisdiction with a special tribal election. The argument was based on the following timeline.

When Idaho adopted Public Law 280 in 1963, the Indian country of the Kootenai Tribe of Idaho was a dependent Indian community and scattered Indian allotments.

In 1968 Congress amended Public Law 280 to require a special tribal election before states assume criminal or civil jurisdiction in Indian country. This requirement does not apply to existing jurisdiction.

The Kootenai Tribal Council passed a resolution in 1969 requesting that Idaho exercise criminal and civil jurisdiction over the Kootenai in Indian country. In 1974 the Kootenai Tribe of Idaho finally received a 12.5-acre reservation. In 1976 the council voted to rescind the resolution consenting to state jurisdiction.

Given these facts, the solicitor concluded that jurisdiction under Idaho Code § 67-5101 applied to land that was Indian country before the 1968 amendments but not to the 1974 reservation. Further, because the 1968 amendments require a special tribal election, the Kootenai Tribal Council's 1969 request was not sufficient to extend state jurisdiction.²⁴

The question has not been litigated in Idaho courts and the state has made no formal statement.²⁵

24. Idaho Code § 67-5102 provides for additional state jurisdiction at the request of a tribal council.

25. Washington courts have litigated similar issues: *State v. Cooper*, 928 P.2d 406 (Wash. 1996) and *State v. Squally*, 937 P.2d 1069 (Wash. 1997). However, Washington's and Idaho's Public Law 280 laws are not directly comparable.



Public Law 280 states

Twelve states have Public Law 280 statutes that affect tribes—six mandatory and six optional. In addition, Arizona, North Dakota, South Dakota, and Utah passed laws to assume Public Law 280 jurisdiction that have had no effect. Utah’s law requires tribal consent and no tribes have consented to jurisdiction. The laws of the other three states were invalid.

Four of the six mandatory states and three of the six optional states have retroceded some measure of jurisdiction assumed under Public Law 280.

Mandatory states

Alaska

Alaska is home to 238 native villages and tribes and one Indian community. Public Law 280 affected all Indian country within the state. Alaska has not retroceded any jurisdiction.

California

All 107 tribes in California are subject to state jurisdiction under Public Law 280. No jurisdiction has been retroceded.

Minnesota

There are 11 tribes in Minnesota. Of those, 9 are subject to full state jurisdiction under Public Law 280. The Red Lake Band of the Chippewa Indians were excluded from jurisdiction and the state retroceded full jurisdiction for the Bois Fort Band of the Minnesota Chippewa Tribe in 1975.

Nebraska Nebraska is home to five tribes. Two tribes are affected by Public Law 280. One tribe does not have any Indian country and was never subject to the law. The state has retroceded full jurisdiction for the Winnebago Tribe of Nebraska (1986) and the Santee Sioux Nation (2006). Nebraska retroceded partial jurisdiction for the Omaha Tribe of Nebraska in 1970 and retains state jurisdiction over the operation of motor vehicles on public roads or highways in the reservation. The remaining tribe is subject to full state jurisdiction.

Oregon There are 10 tribes in Oregon. Of those, 7 are subject to state jurisdiction under Public Law 280. The Confederated Tribes of the Warm Springs Reservation of Oregon were excluded from jurisdiction. The state has retroceded full jurisdiction for the Burns Paiute Tribe (1979) and the Confederated Tribes of the Umatilla Indian Reservation (1981).

Wisconsin Wisconsin is home to 11 tribes. The state retroceded full jurisdiction for the Menominee Indian Tribe of Wisconsin in 1976. The other 10 tribes remain subject to state jurisdiction.

Optional states

Florida Florida assumed full criminal and civil jurisdiction in 1961 and without tribal consent. The state has not retroceded any jurisdiction. Two tribes are affected by Public Law 280—the Miccosukee Tribe of Indians and the Seminole Tribe of Florida.

Idaho Idaho assumed partial criminal and civil jurisdiction over seven matters in 1963 without tribal consent. The state has not retroceded jurisdiction and five tribes are affected by Public Law 280.

Iowa

Iowa is home to the Sac and Fox Tribe of the Mississippi in Iowa. The state assumed civil jurisdiction in 1967 without tribal consent. Iowa has not retroceded its civil jurisdiction. The state also has criminal jurisdiction over the tribe as granted by the federal government in 1948 through Public Law 846.

Montana

Of the seven tribes in Montana, only one is affected by Public Law 280. The state assumed criminal jurisdiction over the Confederated Salish and Kootenai Tribes of the Flathead Reservation in 1963 with tribal consent. In 1995 Montana retroceded jurisdiction over misdemeanors but retained jurisdiction over felony offenses.

Nevada

Nevada is home to 19 tribes. The state assumed full criminal and civil jurisdiction in 1955 over all tribes and without their consent. In 1973 Nevada amended its statute to require tribal consent for continued state jurisdiction. The amendment also provided retrocession for those tribes that did not consent under the 1973 law. The state has since retroceded full jurisdiction for all tribes affected by Public Law 280 (1975 and 1988).

Washington

There are 29 tribes in Washington. All 29 tribes are affected by Public Law 280. Washington has assumed jurisdiction under two separate state statutes. The state first assumed full criminal and civil jurisdiction in 1957 with the consent of 10 tribes. In 1963 Washington adopted partial criminal jurisdiction over eight matters on nontribal land and over non-Indians. Since 1969 Washington has retroceded partial jurisdiction for eight tribes (1969, 1972, 1987, 1989, 2000, and 2016).

Nevada and Washington



Rather than directly requesting retrocession of the federal government, the Nevada and Washington legislatures developed a formal process outlined in statute that authorizes other stakeholders to request retrocession.

Nevada gave all tribes the option to consent to continued state jurisdiction.

In 1955 Nevada adopted full jurisdiction over all state criminal laws and civil matters under Public Law 280. The legislature amended statute in 1973 to retrocede state jurisdiction unless a tribe consented to continued jurisdiction. The amendment specifically outlined the following:

- Clarified the scope of state jurisdiction under Public Law 280 so that tribes are not prevented from making and enforcing their own laws.

- Initiated a referendum election on reservations affected by Public Law 280 for enrolled tribal members to vote on whether to retain jurisdiction.

- Provided for retrocession if the referendum failed and clarified that offenses or proceedings predating retrocession would not be affected.

- Allowed the assumption or resumption of state jurisdiction under the 1968 federal amendments to Public Law 280.

The Washington legislature passed a bill providing a framework for tribes to request that the state initiate retrocession.

Washington asks tribes to submit a resolution to the governor requesting retrocession.

Washington adopted Public Law 280 in two parts. In 1957 it assumed jurisdiction over all state criminal laws and civil matters with consent from tribes. In 1963 Washington assumed partial jurisdiction over members of the resident tribe on tribal land and full jurisdiction on nontribal land without consent.

In 2012 the Legislature passed a bill providing a framework for tribes to request that the state initiate retrocession. The process for retrocession includes the following steps:

The tribal government must submit a resolution to the governor requesting retrocession along with a plan to exercise the replaced jurisdiction. The tribe is encouraged to cooperate with local governments in the development of the plan.

The governor must convene government-to-government meetings with the tribal government and must consult elected officials from local governments.

Within a year of receiving the request, the governor must choose to approve retrocession as requested, to deny retrocession, or to approve retrocession only in part. The governor must issue a proclamation and deliver it to the US Secretary of the Interior requesting the agreed upon retrocession. If any part of the tribe's request is denied, the governor must explain the denial in writing.

Between the tribe's request for retrocession and the governor's decision, the Legislature must hold public hearings in the appropriate standing committee. The committee may provide advisory comments to the governor.

Responses to the evaluation



“Your work brings valuable insights to the question of how best to overcome these statutory obstacles and provide more comprehensive and efficient public policies.”
—Butch Otter, Governor



“While solutions to these issues will be complex and require a great deal of cooperation and hard work by all parties involved, if we can work to remove some of the problem areas that cause such strain amongst jurisdictions and make everyone safer, it will be worth it in the end.”
—Chief J. Allan, Coeur d’Alene Tribe



“The emphasis on intergovernmental relationships in the report is welcomed by the Tribe and is a major component in addressing some of the problems identified in the report.”
—May Jane Miles, Nez Perce Tribal Executive Committee



“Of the 12 states that adopted P.L. 280, to date, 7 have retroceded those duties back to federal government. Idaho should also retrocede that law as to the Fort Hall Reservation.”
—Blaine J. Edmo, Fort Hall Business Council



“[We believe] that any retrocession would adversely affect all of Idaho’s citizens, tribal and non-tribal alike, and we oppose any effort to repeal I.C. § 67-5101.”
—Zachary Pall, Idaho Prosecuting Attorneys Association



C.L. "BUTCH" OTTER
GOVERNOR

February 27, 2017

Director Rakesh Mohan
Office of Performance Evaluations
945 W. Jefferson St.
Boise, ID 83702

Dear Rakesh,

Thank you for providing me with a copy of the Office of Performance Evaluations (OPE) report: *State Jurisdiction in Indian Country*. I appreciate the opportunity to respond.

As stated in your report, the language of Idaho Code 67-5101 – enacted in 1963 in furtherance of Public Law 280 – is extremely complex. The specificity of compacts between individual tribes and the federal government and the sovereignty of each tribe make it difficult to develop responsible State laws reflecting each tribe's needs while providing for State jurisdiction over certain criminal and civil cases.

Your work brings valuable insights to the question of how best to overcome these statutory obstacles and provide more comprehensive and efficient public policies. This report advances our understanding of the challenges posed by multi-jurisdictional governance and highlights the importance of developing strong working relationships across jurisdictional boundaries.

I particularly appreciate your collaboration with the Coeur d'Alene Tribal Council, the Kootenai Tribal Council, the Nez Perce Tribal Executive Committee, the Fort Hall Business Council, the Idaho Association of Counties, the Idaho Sheriffs Association, the Idaho Prosecuting Attorneys Association and the Attorney General in developing this report. The OPE report is stronger and more authoritative as a result of that outreach.

As Always – Idaho, "Esto Perpetua"

A handwritten signature in black ink that reads "C.L. Butch Otter".

C.L. "Butch" Otter
Governor of Idaho

CLO/pk



COEUR D'ALENE TRIBE

CHIEF J. ALLAN CHAIRMAN
P.O. BOX 408
PLUMMER, IDAHO 83851
(208) 686-5803 • Fax (208) 686-8813
email: chairman@cdatribe-nsn.gov

February 28, 2017

Office of Performance Evaluations
Idaho Legislature
954 W Jefferson Street, Suite 202
Boise, ID 83702

To Whom It May Concern:

On behalf of the Coeur d'Alene Tribe, we would like to thank you for investing the time and energy into the 2017 Evaluation Report on State Jurisdiction in Indian Country.

As the draft report states, "Laws governing jurisdiction in Indian Country are incredibly complex." Indeed, if issues of criminal and civil jurisdiction are ignored, we will continue to see problems. While solutions to these issues will be complex and require a great deal of cooperation and hard work by all parties involved, if we can work to remove some of the problem areas that cause such strain amongst jurisdictions and make everyone safer, it will be worth it in the end.

Fortunately, the Coeur d'Alene Tribe and the State of Idaho have a long history of collaborating to solve complicated issues that affect all Idahoans. Time after time, we've come to the table to find a solution that benefits all parties involved. We cannot emphasize enough the importance of continuing our government-to-government relationship as we work to address this issue. By working together, I believe we will find better ways to keep all Idahoans safer.

We're pleased the Joint Legislative Oversight Committee is studying the issue of Public Law 280 and its impacts. We look forward to working side by side with the members of the oversight committee, as well as others in the legislature and the state government to work on this important issue. If you have any questions or concerns about this issue or any issue involving Indian Country, please don't hesitate to contact my office - our door is always open.

Sincerely,

A handwritten signature in blue ink that reads "Chief J. Allan".

Chief Allan, Chairman
Coeur d'Alene Tribe



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

March 1, 2017

Mr. Rakesh Mohan, Director
Office of Performance Evaluations
Idaho Legislature
954 W Jefferson Street, Suite 202
Boise, ID 83702

Re: Office of Performance Evaluations Study on "State Jurisdiction in Indian Country"

Dear Mr. Mohan:

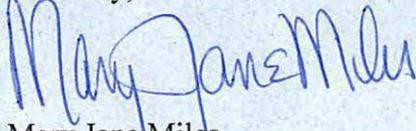
The Nez Perce Tribe ("Tribe") would like to thank the Office of Performance Evaluations for its work over the last year on the report "State Jurisdiction in Indian Country" and for including the Tribe in the evaluation process. The report is invaluable for its documentation of the history and impacts of Idaho's unilateral assumption of jurisdiction on certain matters in Indian Country under Public Law 280 in 1963. As the report illustrates, the mechanics of the law itself and the effects of this assumption of jurisdiction are extremely "complex and confusing" and solutions to the issues created are difficult to parse out. The majority of people in the state do not realize or understand the effects the law has on the state. As a result, the Tribe believes the report should be used as the starting point or basis for the initiation of dialogue and engagement between the state of Idaho and the Tribe on issues of jurisdiction and the provision of services to the citizens of the state.

The report discusses a wide range of recommendations to address issues or problems that exist under the current legal regime. Those recommendations include full or partial retrocession of the law by the state; cross deputization or the granting of limited authority to tribal law enforcement; providing full faith and credit for tribal court orders; and addressing county and tribal program funding shortfalls created under the law. Needless to say, none of these recommendations could or should be addressed in a vacuum or without government-to-government discussions between the parties. In fact, the emphasis on intergovernmental relationships in the report is welcomed by the Tribe and is a major component in addressing some of the problems identified in the report.

Mr. Rakesh Mohan
March 1, 2017
Page 2

The solutions to these problems will require input from all of the tribes and both the executive and legislative branch of the state government. Although the Tribe is still in the process of doing an in-depth evaluation of the full report, the Tribe is willing to engage in discussions with the state on mutually agreeable paths forward on these issues. The Tribe's ultimate goal is that all citizens within the exterior boundaries of the Nez Perce Reservation be provided with the full range of services and protections they deserve and are entitled to have.

Sincerely,



Mary Jane Miles
Chairman

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 478-3700
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FORT HALL BUSINESS COUNCIL
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Shoshone-Bannock Tribes

Comments to Idaho Office of Performance Evaluation on Jurisdiction in Indian Country Report

In 1953 the U.S. Congress passed Public Law 280 allowing states to assume certain responsibilities the federal government was providing Indian Tribes. In 1963, without the consent of the Tribes, Idaho assumed seven of those former federal obligations. Idaho did not, and has not, received any federal funding for assuming those duties. It was an unfunded assumption of former federal obligations to Tribes.

The Fort Hall Reservation is 544,000 acres. 98% is owned by the Tribes. The Coeur d' Alene and Nez Perce reservations are mostly owned by non-Indians. This is a very important distinction.

As the *State Jurisdiction in Indian Country* document reports, neither the State nor counties provide any services specifically tied to P.L. 280 within the Fort Hall Reservation. Idaho only provides Tribal residents of the reservation services because they are citizens of the state. Even after retrocession Tribal members would still be state citizens entitled to state services.

Because P.L. 280 currently applies to the Fort Hall Reservation the Shoshone-Bannock Tribes (Tribes) did not qualify for 30 million dollars in federal funding to build its Justice Center. The federal government indicated Idaho taxpayers were responsible for building the facility because Idaho assumed that obligation when it adopted P.L. 280. With no state funding, the Tribes were forced to take out a loan to build the Center.

Six of the assumed areas: 1. Juvenile Delinquency; 2. School Attendance (only for Idaho schools not Tribal schools); 3. Neglected Children; 4. Domestic Relations; 5. Public Assistance; and 6. Mental Illness, if provided within Indian reservations under P.L. 280 would be at an additional expense to Idaho taxpayers.

The remaining area is concurrent (with the Tribes) jurisdiction over the operation of motor vehicles on county or state maintained roads, could be considered a source of revenue (fines) to several Idaho counties. However, in 2014 all former memorandums of understanding between the counties and the Bureau of Indian Affairs (Bureau) to maintain roads within the Fort Hall Reservation were cancelled by the Bureau. Therefore, the only roads currently within the Fort Hall Reservation subject to P.L. 280 are Interstate 15, 86, and Highway 91.

Because Idaho has not and is not providing our tribal members with those services the federal government formerly provided, Idaho may be exposed to civil liability.

In summary, retrocession of P.L. 280 as to the Fort Hall Reservation only, allows the Tribes access to federal funds they are not currently able to receive and, would eliminate any potential liability or exposure for Idaho failing to adequately provide those services to members within the reservation. Law enforcement issues that exist today with P.L. 280 can still be addressed after retrocession via memorandums of agreement (MOA) with the Tribes, the State of Idaho, and its counties.

We look forward to a positive outcome and a continuation of this process including involvement from all stakeholders. Of the 12 states that adopted P.L. 280, to date, 7 have retroceded those duties back to federal government. Idaho should also retrocede that law as to the Fort Hall Reservation.



Blaine J. Edmo, Chairman

Fort Hall Business Council

OPE comment to the response

As noted in this report, the Idaho Prosecuting Attorneys Association opposed the 1999 retrocession bill and, according to its formal response, continues to oppose retrocession.

This report neither supports nor opposes retrocession. We recommend that if the Legislature wishes to pursue retrocession, it should include local government stakeholders, such as the prosecuting attorneys and tribal government stakeholders, in its deliberations to ensure access to the best institutional knowledge.

ZACHARY A. PALL
Prosecuting Attorney



OFFICE OF THE LEWIS COUNTY PROSECUTOR

GAY MILLER
Legal Assistant/Victim-Witness Coordinator

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February 27, 2017

To: Joint Legislative Oversight Committee
From: Zachary Pall, Prosecuting Attorney, Lewis County and Vice-President IPAA

Regarding: March 2017 Evaluation Report on State Jurisdiction in Indian Country

Members of the Committee:

I am writing on behalf of the Board of Directors of the Idaho Prosecuting Attorneys' Association (IPAA) to express our concerns regarding the Evaluation Report on State Jurisdiction in Indian Country (hereinafter Report). In reviewing the Report, these concerns arise in two main areas: First, the Report is largely based on anecdotal data and, second, it does not specifically address the importance of I.C. § 67-5101 in state agencies' ability to preserve the public safety of the tribal and non-tribal individuals we serve. The Idaho Prosecuting Attorneys' Association believes that any retrocession would adversely affect all of Idaho's citizens, tribal and non-tribal alike, and we oppose any effort to repeal I.C. § 67-5101.

A. The Report does not adequately address the concerns and pitfalls associated with changes in Idaho's jurisdictional assumption.

While the IPAA appreciates the time and effort that it took to generate such a lengthy report, the Report fails to address the core concerns regarding retrocession.

(1) In particular, the Report fails to answer what, in our view, is the most critical question posed within the study scope submitted to the Committee, Item 2: Do these agencies fulfill the duties [conferred by I.C. § 67-5101]? Do agencies give tribal members the same level of service as other Idaho citizens?

1.1 The answer to these questions, from the perspective of Idaho's prosecutors, and especially those serving areas considered Indian Country under federal law, is unequivocally yes; within the scope of I.C. § 67-5101, Idaho's prosecutors and law enforcement have readily undertaken the difficult and sometimes dangerous task of serving and protecting everyone within our jurisdictions, tribal and non-tribal alike.

1.2 The failure of the Report to directly answer this question can be seen throughout it. In particular, there is a distinct paucity of data related to the criminal (or civil) enforcement of the areas described by I.C. § 67-5101. Nowhere in the Report is there any description of the number of cases handled under I.C. § 67-5101 (which, admittedly, would be difficult to generate since prosecutors' offices generally do not keep that data). Even if that data were available, it would be difficult to properly analyze – if 10% of the population of a county is tribal and 6% of the caseload could be fairly described as falling under I.C. § 67-5101, is that over-representative given the limited scope of state jurisdiction, under-representative based on population, or within some sort of appropriate range? Without an answer to the core question of whether tribal and non-tribal members are well-served by the presence of I.C. § 67-5101, the legislature should not venture to make changes.

(2) The question of public safety is never coherently addressed within the Report. Several prosecutors wrote to OPE in response to the survey, and stated particular concerns about the effects that retrocession would have on the people of Idaho. Those concerns are only tangentially referred to and the specifics of those concerns and the reasons for them are not brought up. Instead, they are couched in terms that “one county official expressed uncertainty” rather than making any inquiry into the factual basis for those concerns. While it recognizes that a vehicular manslaughter conviction would only result in a maximum one-year sentence in tribal court in contrast to a maximum of fifteen years in state court, many of the other safety and due process concerns raised in communications were either ignored or glossed over.

(3) In addition, the recommendations presented in the Report simply do not follow from the information provided. For example:

3.1. The recommendation that the legislature authorize fresh pursuit is based on case law from another state without a single example where this has been an issue in Idaho.

3.2. The issue of cross-deputization is raised without recognizing the particular commitment of law enforcement to counties under Idaho law and the many and varied challenges to cross-deputization.

3.3. When the Report recommends that “[t]he Legislature may wish to facilitate the recognition of tribal court orders for involuntary commitment,” it does so despite recognizing that “[i]nvoluntary treatment for mental illness is largely a state responsibility” and without any analysis of any additional costs and other burdens to the State. The Report does not present a single instance where an individual has been denied mental health treatment because he or she was an enrolled tribal member.

B. Idaho’s Prosecuting Attorneys Oppose Retrocession as Endangering Public Safety Inside and Outside Indian Country.

Within the four factors identified for the legislature to consider if it were to pursue retrocession (p. 53), public safety does not appear anywhere in that list. Yet that is the area where the legislature should be most concerned. Retrocession would directly and adversely affect public safety for Idaho’s citizens.

(1) Retrocession would leave prosecution of major felonies to the federal government, despite the fact that the U.S. Attorney’s Office is unlikely to prosecute all of the cases submitted. For felony offenses where the State of Idaho has jurisdiction, such as Felony DUI, Vehicular Manslaughter, Felony Eluding an Officer, etc., repealing I.C. 67-5101 would mean that neither the State nor the Tribe would have jurisdiction over these crimes. Retrocession assumes that the U.S. Attorney’s Office will handle these crimes, an assumption that is not borne out by current practice.

(2) Retrocession would create additional dangers for law enforcement. The Report states that local law enforcement has the right to detain a tribal member until tribal law enforcement can respond. This is not clear and the status quo already leads to instances where tribal members refuse to comply with the directives of local law enforcement because they believe erroneously that the State does not have jurisdiction. Retrocession will lead to increased danger for law enforcement in what is already a difficult and dangerous set of situations.

(3) Retrocession does not address the status of tribal members who are committed to a facility in Indian Country.

The Report fails to even mention that retrocession would affect tribal members who have already been involuntarily committed to the custody of the Department of Health and Welfare within Indian Country. A tribal member who is committed to Lakeside Shelter Home in Winchester (within the 1863 boundaries of the Nez Perce Reservation) would no longer be within the jurisdiction of the State for purposes of that commitment or a re-commitment.

(4) The existence of I.C. § 67-5101 does not prevent collaboration. The current status quo does not prevent collaborative relationships and solutions between tribal and state jurisdictions. The Report specifically notes that collaborative relationships do exist and that the various parties agree that such relationships can be beneficial. Those relationships are established with recognition of the various roles, safeguards, and duties of each of the parties. Retrocession has the potential to jeopardize relationships already established and endanger these positive initiatives.

(5) Retrocession ignores Idaho's interests. The State of Idaho has very real interests in maintaining consistent policies in regards to its roads, its mental health facilities, its schools and its law enforcement agencies. Idaho and Idaho's counties have very real interests in maintaining standards and accountability for the matters for which it is responsible. A push towards retrocession cedes that responsibility and its interests in maintaining consistency and accountability.

Law enforcement and public safety are better-served by the existence of I.C. § 67-5101. Removing the tools available on the local level will be a detriment to both tribal and non-tribal individuals. We urge the legislature to take the recommendations presented here with great caution. Do not sacrifice the peace and safety of all of the people of Idaho in the name of retrocession.

Yours sincerely,



Zachary Pall
Prosecuting Attorney, Lewis County



Reports are available from the OPE website at www.legislature.idaho.gov/ope/
Office of Performance Evaluations | PO Box 83720 | Boise, ID 83720-0055 | Phone: (208) 332-1470