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Did the North Dakota Supreme Court Properly Decide State v. Hook

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DID THE NORTH DAKOTA SUPREME COURT PROPERLY DECIDE *STATE V. HOOK*?

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The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.

— Chief Justice John Marshall.[1]

I. INTRODUCTION

In October 1991, the North Dakota Supreme Court held in *State v. Hook* that state police and courts may exercise limited criminal jurisdiction over Indians on the Devils Lake Sioux Indian reservation lands.[2] The *Hook* decision overruled established precedent and ran contrary to the will of the people voiced through the North Dakota state legislature. A close analysis of *Hook* in light of current federal policies enunciated by the Supreme Court, promulgated by Congress, and embodied in North Dakota's legislative history as well as its case law leads this author to conclude: because the legislature of North Dakota has specifically declined to exercise criminal jurisdiction over Indians on Indian lands, state police and state courts lack authority to do so. Moreover, the state, when attempting to exercise jurisdiction over Indians on Indian lands, infringes on important tribal interests of self-government. Finally, overriding federal policies toward tribal self-determination preempt the state from seeking to exercise criminal jurisdiction over Indians on Indian lands.

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1. Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).

2. 476 N.W.2d 565, 571 (N.D. 1991). The *Hook* court expressly limited its holding to "non-major" misdemeanor crimes. *Id.* at 571. The *Hook* court provided citations of federal district court cases which construe Congressional enactments of state jurisdiction as having a limited nature. *Id.* at n.6 (alluding to Iowa Tribe of Indians v. State of Kansas, 787 F.2d 1434 (10th Cir. 1986); Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977)).

II. THE FACTUAL SETTING OF *STATE V. HOOK*

Terrance Hook sped along U.S. Highway 20 on April 7, 1989, some three miles south of Devils Lake.[3] North Dakota State Highway Patrol officer Gerald Buchli saw the speeding vehicle and gave chase.[4] As the two vehicles entered the Devils Lake Sioux Indian Reservation, Buchli turned on the cruiser's overhead warning lights.[5] Police of the Bureau of Indian Affairs had erected a roadblock, forcing Hook and Buchli to stop.[6] Buchli promptly arrested Hook and took him directly to the Law Enforcement Center in Devils Lake, ignoring both Bureau of Indian Affairs police and codified extradition procedures of the Devils Lake Sioux Tribe.[7]

During booking, police discovered that Hook, an enrolled member of the Devils Lake Sioux Tribe, had a blood alcohol level of .13 and that he had been driving with a suspended North

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3. State v. Hook, 476 N.W.2d 565, 565 (N.D. 1991).

4. *Id.* Buchli spotted Hook's vehicle on U.S. Highway 20 some three miles south of Devils Lake in Ramsey County. *Id.* North Dakota defines "fresh pursuit" as that which the common law does not cover, thereby enabling a member of a duly organized state, county, or municipal law enforcement unit of North Dakota or of another state of the United States to pursue a person who has committed or who is reasonably suspected of having committed a felony, misdemeanor, or traffic violation. N.D. CENT. CODE § 29-06-07 (1991). For a definition of what the common law covers by "fresh pursuit," see Gattus v. State, 105 A.2d 661, 666 (Md. 1954) (permitting an officer to pursue only felons or suspected felons with or without an arrest warrant into another jurisdiction to execute a lawful arrest).

5. *Hook*, 476 N.W.2d at 565.

6. *Id.* Buchli literally took Hook out of the hands of sworn and certified peace officers who possessed federally-vested authority to arrest Hook on or off the reservation. For a brief discussion on the extent of authority vested in Bureau of Indian Affairs Police, see Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 573 (1976) (requiring that a Bureau of Indian Affairs officer report and investigate all violations of any state, federal, or tribal law or regulation personally or vicariously observed which Indians and non-Indians commit and which occur on or off the reservation). Regarding a comprehensive list of Bureau of Indian Affairs officer's duties, see 25 C.F.R. §§ 11.301-.306 (1991).

7. *Hook*, 476 N.W.2d at 565. The record gives no clue as to why Buchli refused to turn over Hook to tribal peace officers and comply with the tribal reservation extradition procedures. *Id.* However, in October 1987, the Devils Lake Tribal Council by resolution A05-87-145 suspended all-cross-deputization and gave written notice to the North Dakota State Highway Patrol that it no longer had authority to make arrests on the Devils Lake Sioux Indian Reservation. Brief of Appellant A-32, State v. Hook, 476 N.W.2d 565 (N.D. 1991) (No. 900280-900282) (available at University of North Dakota Thormodsgard Law Library). For a listing of the Devils Lake Sioux Indian Reservation extradition procedures, see 1 DEVILS LAKE SIOUX TRIBE LAW & ORDER CODE, Title III, § 3-9-101 (1988) (permitting extradition of any person residing within the reservation for whom a court of any state in the United States has issued an arrest warrant and who lies beyond the jurisdiction of the tribal court). North Dakota's fresh pursuit statute does not expressly authorize state peace officers to exercise jurisdiction on Indian reservation land. N.D. CENT. CODE § 29-06-05 (1991) (acknowledging fresh pursuit of police from any duly organized state, county, or municipal law enforcement unit only). Seizing Hook and immediately heading for jurisdictional turf in Ramsey County suggests Buchli's awareness of his lack of jurisdiction on the reservation. *See Hook*, 476 N.W.2d at 565.

Dakota driver's license.[8] Police charged Hook with driving under the influence, driving on a suspended license, and attempting to elude a peace officer.[9]

Hook moved to suppress all evidence obtained incident to the arrest for lack of jurisdiction.[10] The state had neither complied with the tribe's extradition procedures nor obtained tribal consent in the state's fresh pursuit of Hook.[11] However, the trial court refused to follow North Dakota's forty years of precedent in *State v. Lohnes,*[12] which had precluded state law enforcement from exercising jurisdiction over criminal matters involving Indians on reservations.[13] Relying instead on cases pertaining to fishing rights and felonies occurring off the reservation, the trial court ruled that state police had jurisdiction to enter the Devils Lake Sioux Reservation and arrest Hook for a misdemeanor violation occurring on the reservation.[14] Finally, the trial court found that Congress, in passing the Act of May 31, 1946, had vested the state with jurisdiction over Indians committing misdemeanor offenses on Devils

8. *Id.* Buchli did not administer a sobriety test while on reservation premises, instead transporting Hook directly to the Law Enforcement Center in Devils Lake. *Id.*

9. *Id.* The charge of fleeing or attempting to elude a police officer could result in a conviction of a class A misdemeanor in North Dakota. *See* N.D. CENT. CODE § 39-10-71 (1987).

10. *Hook*, 476 N.W.2d at 565.

11. *Id.*

12. 69 N.W.2d 508 (N.D. 1955).

13. *Hook*, 476 N.W.2d at 565-66. For references indicating lack of statutory jurisdiction over criminal offenses on Indian reservations, see *infra* notes 147-57 and accompanying text; 18 U.S.C. § 1151 (1988) (defining Indian country as all land within the limits of any Indian reservation under the jurisdiction of the United States government, including any patent-issued lands and rights-of-way running through reservations, all dependent Indian communities within United States borders, and all Indian allotments of unextinguished titles); Greywater v. Joshua, 846 F.2d 486, 490 (8th. Cir. 1988) (stating that Indian tribes have power to enforce their criminal laws against tribal members); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th. Cir. 1975) (recognizing an Indian tribe's authority to exercise complete criminal jurisdiction over its members and within the limits of the reservation subordinate only to the expressed limitations of federal law); Davis v. O'Keffe, 283 N.W.2d 73, 75 n.1, 76 (N.D. 1979) (noting how the North Dakota Legislature has not provided a method for the state's assuming criminal jurisdiction over Indian reservations while acknowledging that a tribe generally possesses authority to control entry into its reservation and to deliver to state authorities tribal members suspected of committing a state offense). Yet the North Dakota Supreme Court upheld the validity of police to make a warrantless felony arrest on an Indian Reservation for an off-reservation crime despite absence of any agreement with the tribe for removing suspects from the reservation. Fournier v. Roed, 161 N.W.2d 458, 465-67 (N.D. 1968).

14. *Hook*, 476 N.W.2d at 565-66. The *Hook* majority indicated that the trial court had relied on the principles of Organized Village of Kake v. Egan, 369 U.S. 60, 75-76 (1962) (regulating non-reservation Indians' use of fish-traps by the state as not interfering with the tribal self-government or impairing a right granted or reserved under federal law); and Fournier v. Roed, 161 N.W.2d 458, 467 (N.D. 1968) (upholding state jurisdiction to enter (no fresh pursuit here) and seize an Indian on a reservation for a crime allegedly committed off the reservation since doing so ostensively did not interfere with the reservation's self-government despite violating tribal extradition procedures).

Lake Sioux Indian Reservation.[15] Hook entered a conditional plea to the charges and immediately appealed.[16]

III. THE PREMISES UNDERLYING *STATE V. LOHNES*

A. THE FACTS

The North Dakota Supreme Court in *Hook* agreed with the trial court and overruled *Lohnes*.[17] Briefly reviewing *Lohnes* provides an appropriate context before unpacking *Hook* to try and find its rationale. On July 1, 1954, Leonard Lohnes hit his wife Mary Lohnes several times while both resided on the Devils Lake Sioux Indian Reservation.[18] The state's attorney's office filed an information with the state court in Benson County, charging Lohnes with assault and battery, a misdemeanor.[19] Lohnes pled

15. *Hook*, 476 N.W.2d at 566 n.1 (citing in significant part, The Act of May 31, 1946, 60 Stat. 229). The act in its entirety provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation in North Dakota to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of Indian reservations: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on said reservation, nor shall anything herein contained deprive any Indian of any protection afforded by Federal law, contract, or treaty against the taxation or alienation of any restricted property.

Act of May 31, 1946, Pub. L. No. 394, ch. 279, 60 Stat. 229.

The North Dakota State Attorney General, in an amicus curiae brief calling for the North Dakota Supreme Court to deny the state criminal jurisdiction over Indians on Indian lands until North Dakota amended its constitutional disclaimer section, quoted the United States Attorney General's interpretation of the 1946 Act. Brief of the Attorney General of the State of North Dakota as Amicus Curiae 14, State v. Lohnes, 69 N.W.2d 508 (N.D. 1955) (No. Cr. 264) (available at University of North Dakota Thormodsgard Law Library). The United States Attorney General opined that the 1946 act could confer on the state concurrent jurisdiction over the Devils Lake Sioux Indian Reservation. *Id.* at 10. However, the *Hook* court only held that the state *could* exercise criminal jurisdiction over the "nonmajor" (misdemeanor) offenses committed on the reservation. *Hook*, 476 N.W.2d at 571.

Generally, federal courts exercise jurisdiction over sixteen categories of felony offenses which involve Indians on Indian reservation lands. *See* 18 U.S.C. § 1152 (1988) (providing for the federal government's exercising sole and exclusive jurisdiction for punishment of Indians on Indian country); 18 U.S.C. § 1153 (1988) (subjecting any Indian to the exclusive jurisdiction of the United States who commits enumerated felonies). Tribes exercise jurisdiction over Indian defendants on Indian reservation lands for all offenses not covered in the federal statute. *See id.*; *supra* note 13 and accompanying text (construing section 1152 as granting tribes exclusive criminal jurisdiction over members in *Ortiz-Barraza* and *Greywater*). However, the Indian Civil Rights Act of 1968 and the Anti-Drug Abuse Act of 1986 limit the ability of the tribe to impose a maximum of a one year jail sentence, a fine of $5,000 fine or both for each crime charged. *See* 25 U.S.C. § 1302 (1988) (defining the extent of tribal punishment); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (extending tribal punishment to a maximum of one year in jail, $5,000 fine, or both).

16. *Hook*, 476 N.W.2d at 566.

17. *Id.* at 570-71.

18. State v. Lohnes, 69 N.W.2d 508, 516-17 (N.D. 1955). Leonard and Mary Lohnes maintained membership in the Devils Lake Sioux Reservation. *Id.* at 517.

19. *Id.* at 509.

guilty to the charges but appealed the judgment to the North Dakota Supreme Court for want of state court jurisdiction.[20] The court in *Lohnes* determined that, as enrolled members of the reservation, Leonard and Mary Lohnes had attained the status of wards[21] and thus came under the exclusive jurisdiction of the federal government.

B. HISTORICAL ANALYSIS INDICATES A LACK OF STATE JURISDICTION

To establish absolute federal jurisdiction and control over enrolled members of the Devils Lake Sioux Indian Reservation, the *Lohnes* court traced the history of agreements—primarily treaties and statutes—between Indian tribes in North Dakota and the federal government.[22] Essentially, the Organic Law, which Congress passed on March 2, 1861, established the Territory of Dakota and provided for territorial government.[23] Congress particularly stated that nothing in the Organic Law would impair the rights and property of the Indians in the newly formed territory.[24] On April 15, 1867, the federal government entered into a treaty with the Sisseton and Wahpeton bands of the Sioux, permitting the Indians to adopt rules and regulations for their effective self-government and setting aside a specific portion of the Dakota Territory for exclusive Indian use.[25]

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20. *Id.* at 510. Because of the significant jurisdictional question, counsel for both defendant Lohnes and the state applied for certification to the North Dakota Supreme Court. *Id.*

21. *Id.* at 516.

22. *Id.* at 509-16. The *Lohnes* court stated that contextually setting out the historical framework would shed light on the meaning of the phrase "absolute jurisdiction and control over Indian lands." *Id.* at 512. To appreciate the value of historical analysis in understanding the exclusion of state jurisdiction, the sovereignty of the tribe, and the special trust relationship between Indian tribes and the federal government, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 48-49 (1982 ed.).

23. *Lohnes*, 69 N.W.2d at 510 (referencing Act of March 2, 1861, ch. 86, 12 Stat. 239).

24. *Id.* The *Lohnes* court quoted the disclaimer language of the Organic Act:

> Provided, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians * * * or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed * * * .

State v. Lohnes, 69 N.W.2d 508, 510 (N.D. 1955) (quoting Act of March 2, 1861, ch. 86, 12 Stat. 239). In other words, non-Indian inhabitants had to respect individual and property rights of Indians in the Dakota Territory and to refrain from usurping federal authority over the Indians. *See id.*

25. *Lohnes*, 69 N.W.2d at 510-11.

Congress ratified the treaty by legislative enactment. *Id.* at 511 (citing Treaty with Sisseton and Wahpeton Bands of Dakota or Sioux Indians, amended and accepted, April 22, 1867, 15 Stat. 505). The reservation lands represented the federal government's way of

In 1889, Congress passed the Enabling Act, leading to a division of the Dakota Territory and statehood for, among others, North Dakota.[26] One condition of the Enabling Act required that, to become a state, North Dakota would have to relinquish forever all rights and title to any lands owned or held by any Indian or Indian tribe.[27] North Dakota responded by including in its state constitution a disclaimer which paralleled the conditional requirement in the federal Enabling Act.[28] The state, while acknowledg-

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rewarding the Sisseton and Wahpeton for not joining the Sioux Indian outbreak in 1862. *Id.* at 510. Moreover, these bands had requested federal assistance in order to convert to an agricultural life style since their hunting lands were fast disappearing to the non-Indian settlers. *Id.* Finally, a federal government agent had to approve all such band rules and regulations. *Id.* at 511.

The federal government amended the treaty in 1872, by which the Sioux bands ceded to the federal government all rights, titles, and interest in the territory described in the 1867 treaty save for more limited reservation lands. *Lohnes*, 69 N.W.2d at 510 (referencing Act of June 7, 1872, ch. 325, 17 Stat. 281). In consideration of relinquishing the land, the Sioux bands would receive $80,000 for use in converting to an agricultural-based civilization. *Id.* (citing Act of Feb. 14, 1873, ch. 138, 17 Stat. 456). Congress, in amending the treaty, still retained exclusive jurisdiction over the rights and lands of the Indians on the newly established Devils Lake Sioux Indian Reservation. *Id.* Throughout the treaty-enacting period of the 1860s and 1870s, Congress negotiated with the Dakota Territory-based Indian bands by either enacting legislation or ratifying treaties. *See id.*

26. *Lohnes*, 69 N.W.2d at 511. In addition to North Dakota, the act led to statehood creation for South Dakota, Montana, and Washington. *Id.* (citing to Act of Feb. 22, 1889, ch. 180, § 1 and 4, 25 Stat. 676-77).

27. *Id.* at 511. The act also clearly provided that all Indian lands within the states shall remain under the absolute jurisdiction and control of Congress. *Id.* The federal government had to protect the Indians from fraud at the hands of their newly settled and ambitious non-Indian neighbors. *Id.* at 512. That the Enabling Act did not repeat verbatim the reservation of rights of Indians within the newly created states nevertheless implies continued protection of such rights by the federal government. *See* COHEN, *supra* note 22, at 222-24 (construing ambiguous treaty expressions in favor of the Indians, i.e., as the Indians would have understood them (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973) (construing liberally statutes, agreements, and executive orders dealing with Indian affairs so as to favor establishing Indian rights)). For an extended discussion as to the necessity of including in state constitutions specific disclaimers over Indian land, see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 570 (1975) (requiring that states include disclaimers in state constitutions as indicative of the federal government's continued "obligation to stand between two hostile groups" and prevent future exploitation of the Indians) (citing DEP'T OF INDIAN AFFAIRS, STATE OF MONTANA, TRIBAL GOVERNMENTS AND LAW AND ORDER 30 (1968)).

28. *Lohnes*, 69 N.W.2d at 511. The disclaimer language in North Dakota's state constitution reads nearly identical to that of the Enabling Act. *Id.* (citing to Act of Feb. 22, 1889, ch. 180, 25 Stat. 676; N.D. CONST. art. XVI, § 203 (1889)). Section 203 of the North Dakota Constitution reads as follows:

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States*; * * * that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States or reserved for its use.

N.D. CONST. art. XVI, § 203 (1889) (superseded by N.D. CONST. art. XIII, § 1(2) (emphasis added). Essentially, section 203 disclaims state jurisdiction over proprietary interest in title

ing absolute federal jurisdiction, thus ceded all rights and titles to Indian and Indian tribe-owned land in North Dakota.[29]

The *Lohnes* court buttressed its initial finding of exclusive federal jurisdiction and control over Indian lands by an appeal to practicality.[30] As a brand-new state, North Dakota really could not afford to extend its jurisdiction over Indian land and people, especially since the state had ceded to the federal government any power to tax Indian property or land.[31] Having lost the hunting grounds to non-Indian settlers, the Indians had become dependent on federal subsidies and required considerable assistance in transitioning from a hunting and gathering to an agricultural economy.[32] The federal government would have to financially underwrite and continue to maintain jurisdiction over the Indians and Indian land in North Dakota.[33]

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to Indian lands, political power of governance over Indian lands, and the power to tax personal property or land of the Indians. *Id.* For a comprehensive discussion of these three provisions of state disclaimer clauses, see *infra* notes 85-97 and accompanying text.

29. *Lohnes*, 69 N.W.2d at 511.

The Supreme Court has consistently interpreted the language of state disclaimer clauses as ceding to the federal government jurisdiction over the Indians occupying Indian reservation and village lands, i.e., "Indian country." *See* Dick v. United States, 208 U.S. 340, 342, 344-45, 354 (1907) (construing the Idaho constitutional disclaimer clause, which placed Indian lands under the absolute jurisdiction and control of the federal government, to have ceded to the United States exclusive jurisdiction over both the Indians and their lands); *In re* Heff, 197 U.S. 488, 509 (1905) (emancipating the Indian from federal control also requires the consent of the Indian and the state); Bates v. Clark, 95 U.S. 204, 208 (1877) (interpreting treaty clauses so as to make Indian country free from state or territorial jurisdiction despite falling within the boundaries of a state or territory provided that the title to such Indian country has not been extinguished).

The *Lohnes* court clarified a possible ambiguity in the Enabling Act and North Dakota's constitutional disclaimer, an ambiguity which seemed to treat both the unappropriated public lands and Indian-held or -owned lands as falling under exclusive federal jurisdiction. *Lohnes*, 69 N.W.2d at 512. The state exercised its jurisdiction over unappropriated public lands. *Id.* Yet the language in the Enabling Act and North Dakota's constitution limited exclusive federal jurisdiction and control to Indian lands. *Id.* By contrast, the more general language in both documents confined title in public unappropriated and Indian lands to the federal government for disposition. *Id.* In other words, the federal government only had exclusive jurisdiction over Indian lands while holding title over both Indian lands and public unappropriated lands. *Id.* (alluding to State ex rel. Tompton v. Denoyer, 72 N.W. 1014, 1017 (N.D. 1897) (construing the Enabling Act's condition—"and that said Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States"—as applying to Indian lands only and not to the matter of title).

30. *Lohnes*, 69 N.W.2d at 513.

31. *Id.* By virtue of the Enabling Act and its constitutional disclaimer, North Dakota could not tax the reservations for revenue. *Id.* The Supreme Court has consistently ruled that no state may impose taxes over Indian reservation lands. *See* McClanahan v. State Tax Comiss'n of Arizona, 411 U.S. 164, 178-81 (1973) (denying the state of Arizona tax jurisdiction over the Navajo nation due to the long-standing tradition of Indian sovereignty and independence and even despite not interfering with tribal self-government); STATE LEGISLATIVE RESEARCH COUNCIL, SOUTH DAKOTA, JURISDICTION OVER INDIAN COUNTRY IN SOUTH DAKOTA 11 (rev. version 1964) (estimating that assuming criminal jurisdiction pursuant to Public Law 280 would at least double the enforcement costs for every affected county in the state).

32. *Lohnes*, 69 N.W.2d at 511.

33. *Id.* As early as 1784, the federal government included treaty language which

C. FINDING LIMITED STATE JURISDICTION OVER INDIAN LANDS

The *Lohnes* court explained how the Supreme Court in *Draper v. United States* had permitted states to exercise jurisdiction only over non-Indians committing crimes on Indian reservation lands.[34] State residents would enjoy all privileges and immunities of the laws of North Dakota even when on Indian lands.[35] However, Congress and federal agents would retain jurisdiction over Indians on Indian lands.[36]

With the Act of May 31, 1946, Congress sought to extend to the state of North Dakota jurisdiction over crimes occurring on the Devils Lake Sioux Indian Reservation involving enrolled members of the Sioux tribe.[37] The *Lohnes* court construed the 1946 Act as reducing the exclusivity of federal jurisdiction to concurrent jurisdiction.[38] More significantly, the *Lohnes* court noted how the 1946 Act had transferred some of the exclusive jurisdiction over Indians, jurisdiction previously reserved in the federal government by the Enabling Act and granted by the state constitution, to North Dakota.[39] But before exercising the jurisdiction spoken of in the 1946 Act, North Dakota would have to amend its state constitution as it had done to comply with the Congressional condition set forth in the Enabling Act.[40] Congress in the Enabling Act would not grant statehood to sections of the Dakota territory unless such territorial sections, in this case, North Dakota, gave up all claims, titles, and interests in Indian lands within the state.[41]

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characterized the Indians as dependent wards in need of protection. COHEN, *supra* note 22, at 60 (drawing from Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15).

34. *Lohnes*, 69 N.W.2d at 515 (referencing Draper v. United States, 164 U.S. 240, 242-43 (1896)).

35. *Lohnes*, 69 N.W.2d at 516 (borrowing from State ex rel. Tompton v. Denoyer, 72 N.W. 1014, 1019 (N.D. 1897) (permitting the state the right to extend to its citizens lawfully on Indian lands all privileges and immunities of the laws of the state so as to not conflict with the reserved jurisdiction of the federal government over Indian lands)).

36. *Id.*

37. *Id.* at 516. However, Congress added one significant caveat--nothing in the 1946 act would deprive federal courts of jurisdiction over crimes listed under federal law which Indians would commit. *Id. See supra* note 15 for the text of the act's limiting qualification. Congress intended to reserve for the United States felony and other specifically enumerated offenses covered under federal statute committed by one Indian on the person of another Indian in Indian country. *See also* 18 U.S.C. § 1153 (a)(b) (1988) (listing the felony offenses that come under the exclusive jurisdiction of the United States).

38. *Lohnes*, 69 N.W.2d at 516.

39. *Id.* at 517.

40. *Id.* (citing the Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676 (requiring that state constitutional conventions enact disclaimers which would remain "irrevocable without the consent of the United States and the people of said States")).

41. *Id. See supra* note 28 and accompanying text (listing the substantive sections of the disclaimer clause).

North Dakota complied by including in its state constitution section 203 of article 16 wherein the state recognized jurisdiction over all Indian lands as residing exclusively in the federal government.[42]

D. IDENTIFYING A COMPACT THAT REQUIRES THE CONSENT OF BOTH PARTIES TO CREATE AND MODIFY MUTUAL OBLIGATIONS

The *Lohnes* court noted how North Dakota had treated the compliant act in section 203 of article 16 as a compact in its state constitution, a compact between the federal and the state government.[43] To have effect, compacts require consent of the compacting parties (the people of the United States and the people of North Dakota).[44] The people of the United States consented to its retaining exclusive jurisdiction over Indian lands in North Dakota through Congress's passing the Enabling Act.[45] The people of North Dakota, in turn, consented by incorporating into its state constitution a complete acquiescence to exclusive federal jurisdiction over all Indian lands in North Dakota.[46]

Through the Act of May 31, 1946, the people of the United States had consented to North Dakota's assuming limited criminal jurisdiction over the Devils Lake Sioux Indian Reservation.[47] Similarly, the people of North Dakota would have to consent to exercising a degree of jurisdiction over offenses committed on the Devils Lake Sioux Indian Reservation in 1946.[48] Before permitting North Dakota to exercise jurisdiction, the people of North Dakota would have to express their consent again by amending

42. *Lohnes*, 69 N.W.2d at 517 (quoting N.D. CONST. art. XVI, § 203 (1889) (acknowledging "'that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States' ")).

43. *Lohnes*, 69 N.W.2d at 517. Section 203, containing the disclaimer condition necessary for statehood, begins with the following heading: COMPACT WITH THE UNITED STATES. N.D. CONST. art. XVI, § 203 (1889) (superseded by N.D. CONST. art. XIII, § 1(2)). Furthermore, the preface to section 203 declares that the section's contents "shall be irrevocable without the consent of the United States and the people of this state." *Id. See* BLACK'S LAW DICTIONARY 281 (6th ed. 1990) (defining a compact as a contract between parties which creates enforceable rights and obligations and as an agreement based on the mutual consent of the parties).

44. *Lohnes*, 69 N.W.2d at 517. The *Lohnes* court merely reiterated how compacts operate. *See id.*

45. *Id.*

46. *Id.* In other words, Congress had required that North Dakota officially concede any jurisdictional claim over Indian lands as a necessary pre-condition of statehood. *Id.* The people of North Dakota acknowledged exclusive federal jurisdiction through a constitutional amendment in 1889. *Id.*

47. *Id.* The *Lohnes* court viewed the 1946 act as "consent by the United States" to change the original provision governing jurisdiction over the Indians. *Id.*

48. *Id.*

the state constitution.[49]

The *Lohnes* court could find no instance where the people of North Dakota had consented to exercising jurisdiction over the Devils Lake Sioux Indian Reservation as permitted in the 1946 act.[50] In the absence of a constitutional amendment, the original compact of 1889, the one based on consent between the people of the United States and of North Dakota, remained in effect.[51] The federal government continued to exercise exclusive and absolute jurisdiction over all offenses committed by Indians on the Devils Lake Sioux Indian Reservation.[52] The state thus lacked jurisdiction to try enrolled tribal member Leonard Lohnes for the misdemeanor charge of assault and battery, an act which occurred on an Indian reservation, in the County Court of Increased Jurisdiction of Benson County.[53]

IV. THE PREMISES UNDERYLING *STATE V. HOOK*

A. GOVERNING PRINCIPLES

After correctly identifying the overriding issue—whether North Dakota has criminal jurisdiction over misdemeanor offenses committed by an Indian on the Devils Lake Sioux Indian Reservation—the *Hook* court enumerated two governing 'principles': federal law comprises the primary source of criminal jurisdiction in Indian country;[54] and Congress may completely divest the unique and limited sovereignty that Indian tribes retain.[55] From these

49. *Id.*
50. *Id.*
51. *Lohnes*, 69 N.W.2d at 517.
52. *Id.* The *Lohnes* court termed the federal government's continued jurisdiction as over the Devils Lake reservation as "absolute." *Id.*
53. *Id. See Bench and Bar,* 30 N.D. L. REV. 462 (1954). The Indian Affairs Committee of the North Dakota State Bar Association had undertaken its own survey of the four reservations in North Dakota. *Id.* The committee determined that state courts definitively lacked jurisdiction over crimes committed on three of the Indian reservations involving Indians and probably lacked it on the fourth, i.e., Devils Lake Sioux Indian Reservation. *Id.* at 463. The committee noted the lack of an affirmative act of state consent and further that the provision in the state constitution disclaiming jurisdiction created considerable doubt on state courts having criminal jurisdiction over Indians on Indian lands. *Id.* The determination stemmed from a comprehensive survey of Supreme Court and state court decisions as well as an historical review of the development of reservations in North Dakota. *Id.* at 463-70. The committee had further reviewed Public Law 280 and recommended that the state legislature amend section 203 on disclaiming jurisdiction preparatory to the state's assuming jurisdiction over Indians on Indian lands. *Id.* at 463, 469.
54. *Hook*, 476 N.W.2d at 567 (referencing COHEN, *supra* note 22, at 282).
55. *Id.* (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)). However, the *Wheeler* dicta, which the *Hook* court conspicuously omitted, indicates that Congress *never* has divested the tribes of authority to punish for criminal offenses committed by Indians on Indian reservations. United States v. Wheeler, 435 U.S. 313, 325 (1978). Moreover, the *Wheeler* court identified the tribe's criminal jurisdiction to punish its own members on its own land as inherent sovereign authority that pre-dates the 'discovery' of the Indians by the

two 'principles,' the *Hook* court concluded that states only have criminal jurisdiction over Indians on an Indian reservation when Congress so allows.[56]

B. THE *LOHNES* DISSENT

Having defined its guiding 'principles,' the *Hook* court set out to discredit the underlying premises on which *Lohnes* had rested for nearly four decades.[57] The *Hook* court briefly alluded to the *Lohnes* holding: Because the respective people of the United States and North Dakota, having compacted to disclaim state jurisdiction over Indian lands as a pre-condition for statehood, both must consent to any change in that compact.[58] Next, the *Hook* court quoted verbatim a significant portion of the dissent in *Lohnes* which asserted that the disclaimer language did not have a territorial nature over Indians and therefore could not divest North Dakota of its police powers.[59] However, the dissent in *Lohnes* failed to advance a single case in support of the claim that the disclaimer section in North Dakota's constitution referred only to land and not the Indian people residing on those lands.[60] Furthermore, if the disclaimer clause had referred only to land and in no way impaired North Dakota from exercising its state police powers over Indians on Indian reservation lands as the *Lohnes* dis-

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Europeans. *Id.* at 322. The dependency status which the federal government enforced onto the Indian tribes did not result in any loss of the tribe's criminal jurisdictional sovereignty over its Indian members. *Id.* at 323-24.

56. *Hook*, 476 N.W.2d at 567. The *Hook* court's conclusion logically follows from its out-of-context 'principles.' However, the soundness of the two principles on which the conclusion rests remains suspect for want of qualifying context. *See supra* note 55 and accompanying text.

57. *Hook*, 476 N.W.2d at 567.

58. *Id.* at 567-68.

59. *Hook*, 476 N.W.2d at 568 (citing State v. Lohnes, 69 N.W.2d 508, 521 (N.D. 1955)).

After quoting section 203 of the state constitution (*supra* note 28 and accompanying text) where the state agreed to cede absolute jurisdiction and control of Indian lands to Congress, the *Lohnes* dissent argued that such disclaimer language dealt primarily with lands and not people, with the soil and not those residing thereon. State v. Lohnes, 69 N.W.2d 508, 518 (N.D. 1955) (Morris, J., dissenting) (citing N.D. CONST. art. XVI § 203 (1889)).

Cohen, however, explains that beginning with Wisconsin in 1836 and especially continuing through the period from 1889 to 1959, Congress included clauses expressly preserving Indian rights and federal jurisdiction over tribes in most organic acts establishing new territories. COHEN, *supra* note 22, at 268. The organic act establishing the Dakota Territory specifically provided that the act would not impair the individual or property rights of the Indian provided that such rights remain intact by treaty between the federal government and the Indians. Act of March 2, 1861, ch. 86, 12 Stat. 239. Moreover, the tribe had to consent to any changes in land or jurisdiction. *Id.* Congress required that territories seeking to become states include a constitutional disclaimer of jurisdiction clause as to Indian lands plus an acknowledgment of the federal government's overriding authority of the Indian lands. COHEN, *supra* note 22, at 268 n.72.

60. *See* State v. Lohnes, 69 N.W.2d 508, 518 (N.D. 1955) (Morris, J., dissenting).

sent had maintained, Congress had no reason to enact the May 31, 1946 Act.

The *Lohnes* dissent then quoted a large section of the dicta in *Draper v. United States* in which the Supreme Court refused to construe Montana's constitutional disclaimer clause as yielding to the federal government jurisdiction over criminal offenses committed on Indian lands by *non-Indians*.[61] From *Draper*, the *Lohnes* dissent concluded that the disclaimer clause only pertains to land and not people.[62] The *Hook* court, making no attempt to reconcile the inconsistencies in the *Lohnes* dissent, drew the inference that, when Congress withdraws its exclusive jurisdiction such as in the 1946 Act, the state may fill the void without having to modify the state's constitutional compact, specifically its jurisdictional disclaimer section.[63]

C. SELECTIVELY REFERENCING COHEN

As if to provide support for the *Lohnes* dissent, the *Hook* court relied on some premises advanced by Indian scholar Felix S. Cohen concerning the *Lohnes* holding.[64] Cohen, citing the *Lohnes* majority, noted that North Dakota in fact had relinquished jurisdiction over Indian lands through a two-party compact based in part on a state constitutional amendment and another on a congressional act.[65] However, relying on the Cohen premises, the *Hook* court argued that only one party, i.e., the people of the United States vís á vís a congressional act, could unilaterally alter the compact.[66] Therefore, the *Hook* court undertook to under-

61. *Lohnes*, 69 N.W.2d at 518-19 (citing Draper v. United States, 164 U.S. 240, 243-44 (1896)).

The *Lohnes* dissent ignored the significant reference in *Draper* that its holding in no way affected *McBratney*. *See* Draper v. United States, 164 U.S. 240, 242-43 (1896). In *McBratney*, the Court determined that Colorado's disclaimer clause did not preclude the state of Colorado from exercising jurisdiction over crimes committed by non-Indians on Indian reservations while also finding no question at issue as to Congress' continued regulation of *crimes committed by Indians on reservation lands*. United States v. McBratney, 104 U.S. 621, 624 (1881). *See also* United States v. Kagama, 118 U.S. 375, 382 (1886) (limiting state jurisdiction since Congress had defined a crime committed by an Indian on Indian land within the state as falling under the exclusive jurisdiction of the federal government and punishable in federal courts).

62. *Lohnes*, 69 N.W.2d at 520.

63. State v. Hook, 476 N.W.2d 565, 568 (N.D. 1991).

64. *Id.* (quoting COHEN, *supra* note 22, at 374 n.229). A board of authors and editors rather than Cohen, who died in 1953, prepared the 1982 edition of Cohen's handbook. COHEN, *supra* note 22, at *iii*. Cohen's original work, first published in 1942 and never updated by Cohen thereafter, contains no reference to *Lohnes*. *See* F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1986 ed.). However, noted scholars in Indian law comprise the board of authors and editors of Cohen's 1982 edition. COHEN, *supra* note 22, at *iii*.

65. *Hook*, 476 N.W.2d at 568 (quoting COHEN, *supra* note 22, at 374 n.229).

66. *Id. But see* United States v. Rickert, 188 U.S. 432 (1903). The Supreme Court denied South Dakota jurisdiction to tax personal property of Indians residing on reservation

stand what Congress had intended upon passing the Act of May 31, 1946.[67]

But the *Hook* court curiously omitted the remaining premises as well as the conclusion to Cohen's argument. Cohen speculated that, because of the Supremacy Clause, Congress "probably" has the power to withdraw its exclusive criminal jurisdiction over Indians committing crimes on Indian lands without state consent.[68] Furthermore, while the correct inquiry begins with whether Congress intended to break the compact and require state jurisdiction without state consent, Cohen *could find no indication of such intent.*[69] Cohen cautioned interested parties not to presume such an intent.[70] Therefore, Cohen concluded that the *Lohnes* decision seems correct.[71]

Cohen's endorsement of *Lohnes* in the absence of contrary congressional intent normally would shift the inquiry to what the state legislature of North Dakota has intended regarding state criminal jurisdiction over the Devils Lake reservation.[72] However, the *Hook* court does not raise the issue of state legislative intent anywhere in its opinion.

D. CONGRESSIONAL INTENT

Ignoring the question of state legislative intent, the *Hook* court instead proceeded to divine congressional intent that Cohen could not identify.[73] As indication of Congress's intent to confer

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lands because of the disclaimer provision in South Dakota's constitution. *Id.* at 441. The Court declared that the disclaimer provision remained irrevocable without the consent of the United States *and the people of the state of South Dakota as expressed by their legislative assembly. Id.* at 440-41. The action of the United States in virtue of the Enabling Act and the state of South Dakota through its constitutional disclaimer constitutes a 'compact.' *Id.* at 441. The disclaimer provision, which denies South Dakota the authority to tax Indian reservation property, continued as the law for its legislature and its people. *Id.* The state of South Dakota would have to abrogate the disclaimer clause before the Court could consider the state's jurisdiction to tax Indian reservation property. *Id.* As such, the Court maintained that no county in South Dakota had the authority to tax Indian personal property on Indian reservations. *Id.*

67. *Hook*, 476 N.W.2d at 568.

68. *Id.* (referencing COHEN, *supra* note 22, at 374 n.229).

69. COHEN, *supra* note 22, at 374 n.229.

70. *Id.*

71. *Id.*

72. For a discussion of the North Dakota Legislature's intent to not confer criminal jurisdiction over Indian reservations, see *infra* note 105 and accompanying text.

73. *See Hook*, 476 N.W.2d at 568. The *Hook* court, in a parenthetical footnote reference, reproduced a 1945 letter purported to be from the Secretary of Interior to the President of the Senate. *Id.* at 569 n.5. The *Hook* court may have relied on defendant Hook's appellate brief which contains a reprint of the interior secretary's letter to the house speaker. Brief of Appellant A-33, A-34, State v. Hook, 476 N.W.2d 565 (N.D. 1991) (No.900280-900282) (available at University of North Dakota Thormodsgard Law Library) (citing S. REP. No. 997, 79th Cong., 2d Sess. 1-2 (1946)). In the letter, the interior secretary acknowledged having received a resolution from the Devils Lake Sioux Tribe, urging state

jurisdiction to a state sans amending its constitutional disclaimer clause, the *Hook* court relied on the trial court's selection of cases, notably *Organized Village of Kake v. Egan* and *Fournier v. Roed*.[74]

In *Kake*, a Thlinget Indian fishing village sought to preempt state regulation of its fishing rights based on a disclaimer of jurisdiction in the Alaska Statehood Act over Indian property.[75] Before Alaska became a state in 1959, the Thlinget obtained federal permits to use fish traps.[76] Following statehood, Alaska

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criminal jurisdiction over its lands. *Hook*, 476 N.W.2d at 569 n.5. However, the *Hook* court did not include a copy of the resolution nor give any researchable reference. *Id.*

The resolution, which accompanied the letter claimed that, because state courts had exercised criminal jurisdiction over Devils Lake Sioux Indian Reservation for years and because no tribal court existed on the reservation, the tribe by a vote of 88 to 1 desired to continue under state court jurisdiction and sought federal legislation to make official such jurisdiction. Brief of Appellant A-34, State v. Hook, 476 N.W.2d 565 (N.D. 1991) (No.900280-900282) (available at University of North Dakota Thormodsgard Law Library) (citing S. REP. No. 997, 79th Cong., 2d Sess. 3 (1946)).

Yet current leadership of the Devils Lake Sioux Tribe has failed to locate a signed copy of the purported resolution. Telephone interview with the Honorable Andrew Morin, Judge, Devils Lake Tribal Court (Apr. 13, 1992). Interestingly, Judge Morin had located two tribal resolutions bearing the signature of Charles Blackbird, the only name that appears on the 1944 resolution. *Id. See* S. REP. No. 997, 79th Cong., 2d Sess. 3 (1946) (reproducing an unsigned copy of a tribal resolution, bearing only the name of Blackbird); Resolution, Devils Lake Sioux Tribe Executive Committee (Oct. 6, 1949) (bearing both the name and the signature of Blackbird) (copy on file in UND Law Review Office); Resolution, Devils Lake Sioux Advisory Committee (Dec. 1, 1949) (bearing both the name and the signature of Blackbird) (copy on file in UND Law Review Office). Moreover, research of tribal records indicates that 680 enrolled members over 18 years old resided on the Devils Lake Sioux Indian Reservation in 1946. *See* Survey for Eligible Voters, Devils Lake Sioux Tribal Enrollment Clerk, (Apr. 14, 1992) (copy on file in UND Law Review Office). According to the tribal base roll, total enrollment for the Devils Lake Sioux Tribe came to 1130 in 1943. *Id.*

Finally, the Devils Lake Sioux Tribe can find no documentation showing that the state courts prior to 1944 ever exercised criminal jurisdiction over Indians while on Devils Lake Sioux Indian Reservation. Telephone interview with the Honorable Andrew Morin, Judge, Devils Lake Tribal Court (Apr. 13, 1992). Tribal rules in effect in 1944 required a majority vote of enrolled members for any action representing the entire tribe. *Id. See* DEVILS LAKE SIOUX CONST. AND BY-LAWS art. IX, § 1 (1981) (requiring majority approval from eligible members for all proposed resolutions following an affirmative council vote). The Wheeler-Howard Act implies that a majority of tribal members vote on matters affecting the tribe. *See* Act of June 18, 1934, ch. 576, §§ 16, 17, 48 Stat. 987-88 (codified at 25 U.S.C. § 476 (1988)). Assuming that a signed copy of the resolution exists, only 13% of the tribe requested state jurisdiction, contravening the spirit if not the letter of federal legislation and tribal code, each requiring majority votes on tribal matters. Telephone interview with the Honorable Andrew Morin, Judge, Devils Lake Tribal Court (Apr. 13, 1992). The Bureau of Indian Affairs appointed judges for the Devils Lake Sioux Tribe in the 1940s. *Id.* The 'CFR Court' and not state courts exercised criminal jurisdiction over enrolled members of the Devils Lake Sioux Tribe. *Id.* Otherwise, defendant Lohnes would not have challenged the state's jurisdiction.

74. State v. Hook, 476 N.W.2d 565, 570 (N.D. 1991) (citing Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968)).

75. Organized Village of Kake v. Egan, 369 U.S. 60, 62 (1962). The Thlinget Indians of the Kake Village, not part of any reservation, base their entire livelihood on salmon fishing. *Id.* at 61.

76. *Id.* The federal government had purchased canneries on the islands of Angoon in 1948 and Kupreanof in 1950 on behalf of the Thlinget. *Id.* The Army Corps of Engineers issued permits to the Thlinget for fish-traps in navigable waters off of the two islands. *Id.* In

enacted an anti-fish-trap statute which it sought to enforce on the Kake Village.[77] The Supreme Court determined that the state's regulating off-reservation fishing did not impair treaty-protected reservation self-government.[78] More specifically, the Court construed one provision of the disclaimer clause in section four of the federal Alaska Statehood Act as not preventing Alaska from using its political power to limit Indian fishing.[79]

The *Hook* court, not discussing the facts in *Kake*, correctly observed that the disclaimer language in the Alaska enabling act ran similar to enabling acts in other states, including North Dakota.[80] In attempting to determine what Congress had meant by the disclaimer language in the Alaska Statehood Act, the *Hook* court selectively reprinted verbatim several paragraphs from *Kake* which focused on the first of three component provisions making up the disclaimer clause in section four, i.e., the provision dealing with giving up proprietary interest in Indian land.[81] The

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1960, the Secretary of the Interior granted permanent permits to the Thlinget to use fish-traps at numerous sites near both islands. *Id.*

77. *Id.* Alaska state police in 1959 arrested the president of the Kake Village Council and the foreman of the crew, the latter of which was setting one of the fish-traps. *Id.* at 62. Kake Village unsuccessfully sought an injunction, after which the Supreme Court agreed to hear the case. *Id.* at 61.

78. *Id.* at 75-76.

79. *Id.* at 67, 75-76 (referencing Alaska Statehood Act, § 4, 72 Stat. 339 (1958)). For a discussion of the Enabling Act states having disclaimer provisions, see *infra* note 135 and accompanying text.

80. State v. Hook, 476 N.W.2d 565, 570 (N.D. 1991). Alaska's disclaimer section reads as follows:

> Sec. 4 [Compact with United States; disclaimer of right and title to lands or other property; taxation]. As a compact with the United States said State and its people do agree and declare that they forever disclaim all rights and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property *(including fishing rights)*, the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; . . . *shall be and remain under the absolute jurisdiction and control of the United States* until disposed of under its authority except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That . . . no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

Alaska Statehood Act, § 4, 72 Stat. 339 (1958) (emphasis added). For a recitation of North Dakota's disclaimer section 203, see *supra* note 28.

81. State v. Hook, 476 N.W.2d 565, 570 (N.D. 1991) (quoting from Organized Village of Kake v. Egan, 369 U.S. 60, 69-70 (1962) (citing *Alaska Statehood: Hearings before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. 283-87 (1954) (discussing how the disclaimer clause will not impair the state from exercising its police power unless the clause also contains an express or implied reservation of exclusive federal jurisdiction)).

Hook court interpreted the Supreme Court in *Kake* as concluding that the disclaimer language of section four in the Alaska statute disclaimed a proprietary interest in the land itself but not governmental interest.[82]

However, the *Hook* court construed the entire disclaimer clause in section four of Alaska's Statehood Act as dealing with a proprietary interest in land.[83] Yet the Supreme Court in *Kake* specifically pointed out that only one provision of the disclaimer clause disclaimed the state's proprietary interest in Indian lands.[84] Moreover, the Court in *Kake* stated specifically that the one provision of the disclaimer clause dealing with proprietary interest had no bearing on the fishing rights dispute.[85] The disclaimer clause in section four provides, first, that the state of Alaska must disclaim right and title to Indian property; second, that the United States retains absolute jurisdiction and control over the Indian property; and third, that the state must not tax the Indian property.[86] The first provision regarding the state's disclaiming title to the Indian land pertains to "proprietary rather than governmental interest" and in no way applies to the fishing rights dispute.[87] The third clause, which precludes the state from taxing Indian lands, likewise does not bear on whether the state can regulate Indian fishing rights.[88]

The Supreme Court in *Kake* found that the second provision, in which the federal government retains "absolute jurisdiction and control," simply did not extend to deny the state of Alaska its political power to regulate off-reservation fishing.[89] The Court did not construe the disclaimer clause to grant Alaska unbridled political power over the reservations so as to exercise criminal jurisdiction—a point touched upon in *Kake*,[90] discussed in great detail

82. *Id.* The *Hook* court added that other jurisdictions with disclaimer language similar to North Dakota's had relied on the proprietary-governmental distinction in *Kake*. *Id.* The *Hook* court then listed a string of citations but did not provide or discuss the holdings in any of them. *Id.*

83. *Hook*, 476 N.W.2d at 570. The *Hook* court fails to even acknowledge the three provision make-up of the disclaimer section to the Alaska Statehood Act. *Id.*

84. Organized Village of Kake v. Egan, 369 U.S. 60, 68-69 (1962).

85. *Id.* at 68. In as unequivocal terms as possible the Court stated that "[t]he first and third provisions [of Alaska's disclaimer section] have nothing to do with this case . . . ." *Id.*

86. *Id.* See *supra* note 80.

87. *Kake*, 369 U.S. at 69.

88. *Id.* For a discussion on how the Supreme Court required the consent of the people of the United States as well as those of South Dakota, see *supra* note 66 (citing United States v. Rickert, 188 U.S. 432 (1903)).

89. *Kake*, 369 U.S. at 68. *But see supra* note 80 and accompanying text (ceding Indian fishing rights to the exclusive jurisdiction and control of the federal government).

90. *Kake*, 369 U.S. at 69. *See infra*, note 91 and accompanying text for a comprehensive discussion of congressional hearings on Alaska's disclaimer provision.

during senate hearings on the statehood question,[91] yet omitted entirely by the *Hook* court.[92] In fact, the United States Senate emphasized during hearings on Alaska statehood that the federal government would continue to retain absolute jurisdiction over Indian reservation lands and the tribes residing on such lands.[93] However, the *Hook* court simply concluded that the State of

91. *Alaska Statehood: Hearings before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. 283 (1954).

Mr. Ralph A. Barney, representative of the justice department, had proposed a disclaimer clause lifted from the Oklahoma enabling act. *Id.* The disclaimer, adapted for Alaska, would in part provide that the people of the proposed state would forever disclaim all right and title to all unappropriated lands as well as lands owned by or held for Indians, Eskimos, or Aleuts, or any community of such natives whose lands shall be subject to the jurisdiction and control of the United States. *Id.* Mr. Barney explained that the adaptation to include "Eskimo or Aleut" would enable the federal government "to control and supervise the Eskimos and Aleuts the same as Indians." *Id.* at 284. Moreover, Mr. Barney added the phrase "or any community of such natives" to take care of those cases involving community rather than individual property rights. *Id.*

New Mexico's Senator Anderson asked whether a person (race not specified) getting into trouble on an Indian reservation would come under state or federal jurisdiction. *Id.* at 285. Mr. Barney replied that a federal police officer would exercise jurisdiction because of the retention of federal jurisdiction (on New Mexico reservations). *Id.* Mr. Barney then cited the holding in *McBratney* to emphasize the consequences of not reserving federal jurisdiction in the act. *Id.* (citing United States v. McBratney, 104 U.S. 621, 624 (1881)) (granting state jurisdiction over non-Indians on Indian reservations for the failure of Congress to explicitly reserve for itself jurisdiction over criminal offenses committed on Indian reservations).

Oregon's Senator Cordon asked whether including the reservation of federal jurisdiction language would take state political jurisdiction away from the Indian and other Alaskan native lands. *Id.* at 285-86. Mr. Barney replied that the federal government would retain its police power over the disclaimed lands while in no way impinging on the state's exercise of its police power. *Id.* at 286. Moreover, not reserving exclusive federal jurisdiction results in a waiver of such jurisdiction to the state. *Id.* Mr. Barney then explained that the Statehood Act would give Alaska political jurisdiction, including all contained in the term "police power" unless the federal government reserves or implies exclusive jurisdiction. *Id.* The senate committee then agreed to limit the reservation of federal jurisdiction to the disclaimed lands until title is extinguished by the federal government. *Id.* at 287.

Wyoming's Senator Barrett pointed out that the federal government has exclusive jurisdiction over reservations in Wyoming. *Id.* Senator Cordon noted that the reservation provision should apply to the title of government-held lands. *Id.* Mr. Barney proposed an additional disclaimer in which nothing contained in Alaska's constitution would limit or impair the rights of persons or property pertaining to the Indians, Eskimos, or Aleuts or to limit the authority of the federal government to make any law respecting such Indians, Eskimos, or Aleuts. *Id.* However, the senate committee reacted negatively to the proposal, fearing that the preservation of rights might tie up the development of Alaska for the next decade. *Id.* at 288-89.

The three-tiered provision comprising section four of the Alaska Statehood Act therefore included separate disclaimer provisions for proprietary interest in the title of Indian lands, for reserving federal control over Indian lands, and for disclaiming the state's taxing such Indian lands. For a discussion of what entails jurisdiction over Indian lands, see COHEN, *supra* note 22, at 281 (defining jurisdiction as a function of both territory and subject matter, i.e., respectively, the location of the events and the race of the parties).

92. State v. Hook, 476 N.W.2d 565, 570 (N.D. 1991). The *Hook* court merely lifted a portion of the discussion regarding the senate committee's intention of not excluding the state's political jurisdiction in providing for a disclaimer section to the Alaska Statehood Act. *Id.* (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 68 (1962) (citing *Alaska Statehood: Hearings before the Senate Committee on Interior and Insular Affairs*, 83d Cong. 2d Sess. 283 (1954)).

93. *See supra* note 91 and accompanying text.

Alaska had only relinquished proprietary interests in lands, failing to recognize that Alaska's police power did not entail criminal jurisdiction over Indian reservation lands.[94]

In addition to the inapplicability of *Kake* as to Alaska's disclaimer clause not reaching to deny state regulation of off-reservation fishing rights, *Kake* bears little if any factual relevance to *Hook*. In fact, the Supreme Court in *McClanahan v. Arizona State Tax Comm'n*[95]recalled that nothing in *Kake* would justify a state's exercising jurisdiction to tax personal income of an Indian derived exclusively on an Indian reservation because of the state's disclaimer clause.[96] More particularly, the Court in *McClanahan* specifically noted that the *Kake* holding pertaining to fishing rights of non-reservation Indians failed to provide guidelines for exercising state authority in areas set aside by treaty (or statute) for the exclusive control and use of Indians on reservation lands.[97]

From its curious application of *Kake* on what Congress had intended, the *Hook* court turned to its holding in *Fournier v. Roed* for additional support.[98] In *Fournier*, a Ramsey County deputy sheriff entered the Fort Totten Indian Reservation and arrested Fournier, an enrolled member of the Devils Lake Sioux Indian Reservation.[99] The deputy had no warrant and only filed a complaint for auto theft after incarcerating Fournier in the Ramsey County jail.[100] At the conclusion of a preliminary hearing, Fournier sought dismissal for the sheriff's lack of criminal jurisdiction on the Indian reservation.[101] Fournier argued that section 203 of North Dakota's constitution, in which the state disclaimed absolute jurisdiction and control to the federal government, precluded the Ramsey County sheriff from exercising jurisdiction

94. *Hook*, 476 N.W.2d at 570. The Thlinget Indians did not reside on a reservation but rather in state-chartered villages, thus falling under direct state jurisdiction on matters other than fishing rights. Organized Village of Kake v. Egan, 369 U.S. 60, 62 (1962).

95. 411 U.S. 164 (1973).

96. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 176 n.15 (1973) (referring to Organized Village of Kake v. Egan, 369 U.S. 60, 68 (1962)).

97. *Id.* For an explanation on why the *Kake* holding does not apply to such a state as North Dakota, see GOLDBERG, *supra* note 27, at 571 (refusing in *Kake* to construe Alaska's disclaimer so as to deny fishing rights to a non-reservation Indian village has little relevance on other states in the Continental United States whose disclaimers have sought to protect the Indians from encroachment of settlers and homesteaders).

98. State v. Hook, 476 N.W.2d 565, 570 (N.D. 1991) (referencing Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968)).

99. Fournier v. Roed, 161 N.W.2d 458, 459 (N.D. 1968). The Fort Totten Indian Reservation falls within the exterior boundaries of Benson County but abuts with Ramsey County. *Id.*

100. *Id.*

101. *Id.*

over the Fort Totten Indian Reservation.[102] Both the trial and the district court denied Fournier's motion, leading to an appeal to the North Dakota Supreme Court.[103]

The *Fournier* court acknowledged that the state legislature had specifically declined to exercise criminal jurisdiction over Indian reservation lands despite the people of North Dakota's voting to amend section 203 to grant such jurisdiction by legislative action.[104] Moreover, the *Fournier* court recognized the two overriding reasons behind the legislature's declining to assume criminal jurisdiction over Indians on Indian reservation lands: First, the majority of Indians objected to the state's jurisdiction; and second, substantial state costs would result from the increased criminal jurisdiction.[105] While frankly conceding that the state had no

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102. *Id.* at 462-63. For a recapitulation of the Enabling Act, see *supra* note 27 and accompanying text; of section 203, see *supra* note 28 and accompanying text.

103. *Fournier*, 161 N.W.2d at 459.

104. *Id.* at 463-64. The *Fournier* court noted how Congress in 1953 had enacted Public Law 280. *Id.* at 463. Section seven of Public Law 280, despite Enabling Act disclaimers, extends federal consent to any state to assume civil and criminal jurisdiction over Indians on Indian reservation land provided that the people of the state also consent. *Id.* (citing Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588, 590). In 1958, the people of North Dakota approved an amendment to section 203 of the state constitution which provides in pertinent part that:

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, *provided, however, that the Legislative Assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by act of Congress;* * * *.

Fournier v. Roed, 161 N.W.2d 458, 463 (N.D. 1968) (citing 1959 N.D. Laws 430) (emphasis added by court).

105. *Id.* at 464 (citing S. Con. Res. RR, 37th N.D. Leg. Sess.).

The *Fournier* court mentioned that the legislature had authorized a feasibility study for state assumption of jurisdiction over Indian reservation lands. *Id.* (alluding to S. Con. Res. RR, 37th N.D. Leg. Sess. (1961) (lacking the financial resources precludes assumption of criminal and civil jurisdiction over Indians on Indian reservation land without federal assistance and necessitates a financial impact analysis by the legislative research committee)). In recommending against assuming criminal jurisdiction over Indian lands, the legislative research committee conducted a series of hearings on reservations and in reservation counties. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, 38th Leg. Sess. 37 (1963). The committee determined that Indians in North Dakota opposed state jurisdiction of Indians on Indian reservation land. *Id.* Moreover, the committee noted that assumption of criminal jurisdiction over Indian reservation lands would give rise to a "very expensive proposition." *Id.* The counties and cities could not provide the additional personnel without state assistance. *Id.* at 37-38. The state unlikely could afford to subsidize the cities and counties. *Id.* at 38. The committee therefore recommended that "criminal jurisdiction be left in the hands of the [f]ederal [g]overnment and the tribes." *Id.*

The *Fournier* court further noted that the North Dakota legislature in 1963 enacted Senate Bill 30, thereby putting the state in accord with Public Law 280. *Fournier*, 161 N.W.2d at 464 (citing 1963 N.D. Laws, S.B. 30, ch. 242 (providing only for civil jurisdiction

jurisdiction over Indians on reservation land for crimes committed off the reservation, the *Fournier* court nevertheless asserted such jurisdiction in the name of "law and order."[106]

In an attempt to consolidate this raw exercise of power, the *Fournier* court relied on the infringement test that the Supreme Court set out in *Williams v. Lee.*[107] In *Williams*, the state's exercising civil jurisdiction turned on whether doing so infringed on the right of reservation Indians to make their own laws and be ruled by them.[108] Without explaining why, the *Fournier* court merely concluded that a state law enforcement officer's entering a reservation and seizing an Indian did not interfere with the reservation's self government or otherwise impair any right granted to defendant Fournier under federal law or treaty.[109]

But the *Fournier* court's conclusion of granting state criminal jurisdiction over an Indian on Indian reservation land earmarks where the inquiry begins for defendants Fournier and Hook.[110] Considering defendant Fournier, the North Dakota Supreme

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over Indians on Indian lands subject to Indians first giving consent and specifically failing to provide for assumption of criminal jurisdiction)). Senate Bill 30 provided the means for individual or tribal acceptance of state jurisdiction over civil matters on Indian reservations. *Id.* The legislature, following the recommendations of its research committee, permitted individual Indians to first consent before the state could exercise civil jurisdiction. *Id.* at 463-64. However, the bill conspicuously failed to permit the state to exercise criminal jurisdiction over Indians on Indian lands. *Id.* The *Fournier* court noted that in no subsequent session has the legislature acted to assume criminal jurisdiction over Indian lands. *Id.* at 464. *See* N.D. CENT. CODE § 27-19-01 (1991) (providing for civil assumption of jurisdiction upon acceptance by the Indians but specifically noting of its *not* providing a method by which the state can assume criminal jurisdiction over an Indian reservation). The *Fournier* court then commented that in 1968 Congress enacted the Indian Civil Rights Act which subsequently requires consent of the Indians for the exercise of criminal jurisdiction. *Fournier*, 161 N.W. 2d at 464 (citing Act of Apr. 11, 1968, Pub. L. No. 90-284, Title IV, §§ 401-06, 82 Stat. 73). *See* G. Kenneth Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617, 641 (1968) (explaining how title four of the Indian Civil Rights Act, which requires Indian consent by a majority vote of the tribe before state assumption of jurisdiction, corrected the major oversight of Public Law 280).

See supra note 31 and accompanying text (predicting a doubling of law enforcement costs in affected South Dakota counties under Public Law 280).

106. *Fournier*, 161 N.W.2d at 465. The *Fournier* court further required that someone demonstrate how the Constitution, treaties, or federal enactments prevent the state of North Dakota from exercising jurisdiction over Indians on Indian lands. *Id.* Interestingly, the *Fournier* court made no attempt to resurrect the Act of May 31, 1946, as possible justification for exercising criminal jurisdiction over Indian lands.

107. *Id.* at 467 (referring to Williams v. Lee, 358 U.S. 217, 220 (1959)).

108. Williams v. Lee, 358 U.S. 217 (1959). Non-Indian Williams, operating a trading post on the Navajo reservation, sought a civil judgment in state court against Indian Lee for non-payment of bills due. *Id.* at 217-18. Lee moved to dismiss since jurisdiction resided in tribal rather than state courts. *Id.* at 218. However, Arizona state trial and supreme courts permitted non-Indians to civilly sue Indians in state court in the absence of specific federal legislation to the contrary. *Id.* But the Supreme Court viewed itself as retaining exclusive tribal or Congress-designated jurisdiction for crimes involving Indians. *Id.* at 220 n.5. Thus, unless Congress has acted, the Court determines whether the state infringes on the tribe's power to make its own laws and govern itself accordingly. *Id.* at 220.

109. *Fournier*, 161 N.W.2d at 467.

110. *See infra* notes 111-21 and accompanying text for jurisdictional questions

Court has since acknowledged that its common law gives deference to statutory enactments of the legislature.[111] The legislature, for want of Indian consent and because of significant cost considerations, by statute has declined to exercise criminal jurisdiction over Indians on Indian reservation land.[112]

In addition to overriding legislative enactments, the *Fournier* court had not considered its own precedent in *State ex rel. Tompton v. Denoyer*.[113] The *Denoyer* court denied the state the right to enter federal land tracts for making an arrest on a crime committed elsewhere.[114] *Denoyer* therefore means that the state may only enter onto such lands when the federal government has specifically reserved such a right for the state,[115] as Congress did with Public Law 280. Yet the *Fournier* court conceded that the state specifically declined to reserve such a right in complying with Public Law 280.[116]

In the absence of the North Dakota legislature's assuming criminal jurisdiction over a reservation, a state peace officer could have sought extradition of Fournier.[117] In fact, defendant Fournier claimed that his seizure violated an extradition provision

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surrounding defendant Fournier; *infra* notes 131-44 and accompanying text for jurisdictional questions surrounding defendant Hook.

111. *See* N.D. CENT. CODE § 1-01-06 (1987) (denying the existence in North Dakota of the common law where the code declares the law). The North Dakota Supreme Court, in *Davis v. O'Keefe*, noted that the legislature has made no provision for the state to assume criminal jurisdiction over Indians on Indian land. Davis v. O'Keefe, 283 N.W.2d 73, 75 n.1 (N.D. 1979). Moreover, the *O'Keefe* court acknowledged that the legislature had provided a means for state assumption of civil jurisdiction over Indians on Indian reservation lands but not for criminal jurisdiction. *Id.* A note in the North Dakota Century Code acknowledges the code's lack of provision for criminal jurisdiction over Indians on Indian reservation lands. N.D. CENT. CODE § 27-19-01 (1991). The *Fournier* court conceded that the legislature in the 1963 session enacted Senate Bill 30, legislation in which the state failed to provide for criminal jurisdiction and has since refused to take any affirmative steps for assuming criminal jurisdiction over Indians on Indian lands. *Fournier*, 161 N.W.2d at 464.

112. *Id.*

113. 72 N.W. 1014 (N.D. 1897).

114. *Id.* at 1016. The *Denoyer* court noted how those occupying federal lands do not qualify as residents of any state whose lands surround the federal tract. *Id.* Moreover, the state has no jurisdiction over such federal property. *Id.*

115. *Id.* More particularly, the *Denoyer* court stated that, unless Congress specifically reserves a right of access or jurisdiction, state officials cannot enter federal property in order to execute an arrest warrant or any other civil process. *Id.* For a brief discussion on how North Dakota declined to exercise a specific reservation of criminal jurisdiction over federally protected Indian lands as provided for in Public Law 280, see *supra* note 105 and accompanying text.

116. *Fournier*, 161 N.W.2d at 464.

117. *But see* Bruce E. Bohlman, *Recent Cases*, 45 N.D. L. REV., 430, 438-39 (1969) (disputing the state's right to extradite fugitives from Indian reservations in view of the tribe's lack of legal status to extradite from state territories (citing Ex Parte Morgan, 20 F. 298, 306 (W.D. Ark. 1883); quoting Extradition of Indian Fugitives to Reservations Where Offense Was Committed, 57 Interior Dec. 344, 345 (1941)).

in the Devils Lake Sioux Tribal Code.[118] However, a concurring opinion in *Fournier* construed the tribal extradition provision as inapplicable.[119] Yet a 1941 Interior Department ruling precludes states from extraditing Indian defendants from reservation lands without specific authorization.[120] The Interior Department ruling, penned by then Acting Solicitor General Felix S. Cohen, runs consistent with what the *Denoyer* court held nearly fifty years earlier: The state may only exercise jurisdiction over Indians on Indian lands with a specific reservation of authority generally in the form of a legislatively-enacted statute.[121]

E. STATE JURISDICTION OVER INDIANS ON INDIAN LANDS IN LIGHT OF CURRENT FEDERAL POLICIES

The confusion arising from the holdings in *Fournier* and *Hook* suggest a need to briefly trace recent changes in federal policy toward Indians and Indian lands.[122] Between 1943 and 1961, the

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118. *Fournier*, 161 N.W.2d at 476 (Knudson, J., concurring specially).

119. *Id.* Concurring Justice Knudson quoted the extradition section of the Devils Lake Tribal Code, indicating that it applied to offenses committed on reservations only. *Id.* Knudson states that, since the code says nothing about extraditing fugitives for crimes committed off the reservation, further consideration is precluded. *Id.* Knudson did not attempt to understand the intent of those who drafted the extradition section of the tribal code, a surprising oversight in view of the paramount issue then pending regarding possible interference in tribal self-government. Moreover, neither Knudson nor the majority in *Fournier* followed the rules of statutory construction that the Supreme Court has required in interpreting treaties and statutes affecting Indians. *See supra* note 27 and accompanying text (construing liberally so as to favor increased Indian rights).

120. BOHLMAN, *supra* note 117, at 439 (quoting Extradition of Indian Fugitives to Reservations Where Offense Was Committed, 57 Interior Dec. 344, 345 (1941)). The opinion, rendered by Cohen, indicates that a tribe may extradite Indians from state lands to the extent that states may extradite Indians from Indian lands. Extradition of Indian Fugitives to Reservations Where Offense Was Committed, 57 Interior Dec. 344, 345 (1941). In any case, unless state officers have authorization to extradite from Indian reservations, tribes may not extradite Indian fugitives on state lands. *Id.* The reverse would logically follow: the state may not extradite from Indian reservations if reservation authorities cannot extradite suspected Indians from state lands.

121. *Id.* *See* State ex rel. Tompton v. Denoyer, 72 N.W. 1014, 1016 (N.D. 1897) (permitting state officials to enter tracts of federal or Indian land in order to make an arrest only when the privileges and immunities of state law so specially reserve); *See supra* notes 107-109 and accompanying text; BOHLMAN, *supra* note 117, at 434-35 (citing 39 Stat. 243 (1916); 16 U.S.C. § 95 (1974) (permitting Washington state civil or criminal process over federal park lands despite exclusive federal jurisdiction because of Washington's having enacted state statutes)).

122. *See* GOLDBERG, *supra* note 27, at 535. Court decisions have unequivocally reaffirmed Congress's plenary power over Indian wards. *Id.* However, confusion arises over the allocation of congressional power between the states and Indian tribes when Congress has not acted. *Id.* The federal government has embraced alternating models, shifting from making Indians an integral part of states to retaining the unique status of Indians through tribal autonomy. *Id.* at 536. Public Law 280 seemed to reflect the ambivalence between these two policies. *Id.* at 546. Expressing 'grave doubts' for not requiring Indian consent before signing Public Law 280 in 1953, President Eisenhower recommended an immediate amendment to include some mechanism for tribal self-determination on the issue of state jurisdiction. *Id.* at n.54 (citing W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 186 (1966)). The amendment, which President Eisenhower had

federal government pursued a policy of termination of tribal dependency with the view toward state assimilation of Indians.[123] During the "termination" era, Congress passed such laws as the Act of May 31, 1946, and in particular Public Law 280,[124] both of which provided the legal but not the financial means for states to assume jurisdiction over Indians on Indian reservation lands. In its haste to sever ties with the Indians, Congress did not seek the consent of the affected tribes.[125]

The federal government began to abandon the termination policy in 1958, focusing instead on Indian self-determination.[126]

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urged, took Congress 15 years to produce, resulting in the Indian Civil Rights Act of 1968, particularly section 406. Section 406 requires a majority vote of the tribe before states not in compliance with Public Law 280 could assume jurisdiction over Indians on Indian lands. Act of Apr. 11, 1968, Public Law 90-284, § 406, 82 Stat. 80 (codified as 25 U.S.C. 1321 (1988)).

123. COHEN, *supra* note 22, at 152. Cohen defined 'termination' in a narrow sense as severing the special relationship between tribes and the federal government which Congress did not officially adopt until 1953. *Id.* One commentator referred to the post-war period of termination as one of "optimism, faith in [both] free enterprise [and] local government." *Id.* at 156 (citing Hasse, Termination and Assimilation: Federal Indian Policy 1943 to 1961, 92 (1974) (unpublished doctoral dissertation, Washington State University)). In 1952, the House of Representatives passed a resolution which required that its interior committee formulate legislative proposals designed to terminate all federal control over Indians as soon as possible. *Id.* at 170 (citing H.R. Res. 698, 82d Cong., 2d Sess., 98 CONG. REC. 8788 (1952)).

124. COHEN, *supra* note 22, at 175-76. The Act of May 31, 1946, applied only to Devils Lake Sioux Indian Reservation. *Id.* at 176. However, Congress had passed similar measures on behalf of Kansas in 1940 and Iowa in 1948. *Id.* (referencing, respectively, Act of June 8, 1940, ch. 276, 54 Stat. 249; Act of June 30, 1948, ch. 759, 62 Stat. 1161). Public Law 280 provided for mandatory transfer of criminal and civil jurisdiction to California, Minnesota (excepting Red Lake Reservation), Nebraska, Oregon (excepting Warm Springs Reservation), and Wisconsin (excepting Menominee Reservation). *Id.* (citing Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 4, 67 Stat. 588-89 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-26 (1988), 28 U.S.C. § 1360 (1988))). Additionally, Public Law 280 enabled all other states the option of assuming jurisdiction over Indians on Indian lands at some point in the future. *Id.* Those states having constitutional or enabling act disclaimer clauses had to amend such disclaimers as a precondition for assuming jurisdiction. *Id.* (citing Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, § 6, 67 Stat. 590 (codified as amended at 18 U.S.C. § 1162 (1989), 25 U.S.C. §§ 1321-26 (1988), 28 U.S.C. § 1360 (1988)). States not constrained constitutionally or statutorily with disclaimer sections could assume jurisdiction based on legislative enactment. *Id.* (citing Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, § 7, 67 Stat. 590 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-26 (1988), 28 U.S.C. § 1360 (1988))).

125. COHEN, *supra* note 22, at 177. Indians, in voicing their criticism to Public Law 280 for its failure to require Indian consent before state assumption of jurisdiction over Indians on Indian lands, urged President Eisenhower to veto the bill. *Id.* (referencing SEC. INT. ANN. REP. 243 (1954)).

126. *Id.* at 180.

Because of widespread criticism particularly from Congress, President Eisenhower sounded a full scale retreat from the termination charge sounded barely five years previously. *Id.* at 182. The interior secretary officially announced the end of coercive termination during a radio broadcast in 1958, permitting the termination of a tribe only upon consent of its members. *Id.*

Cohen explained that the notion of Indian tribes as basic governmental units of Indian policy undergirds the on-going self-determination era. *Id.* at 180. Congressional reorganization efforts of the 1930s resuscitated tribal governments. *Id.* By Congressional action in the 1970s, tribal government has grown and expanded. *Id.*

Congressional leaders, expressing concern over the loss of Indian land during termination, repudiated House Concurrent Resolution 108, an earlier unanimous resolution calling for complete tribal assimilation into state government.[127]

At the outset of this era of congressional recognition came the Indian Civil Rights Act of 1968, particularly Title IV which requires tribal consent through self-determination as a pre-condition for state assumption of jurisdiction, but little else.[128] States not having done so previously could assume criminal jurisdiction over a particular tribe based on the consent of the majority of tribal members.[129] But in North Dakota, the legislature has especially declined to exercise such authority.[130]

In passing Public Law 280 during the termination era, Congress granted five states criminal jurisdiction over Indians on Indian reservations without requiring constitutional or statutory modification of state disclaimer sections.[131] Might not Congress have similarly vested North Dakota with criminal jurisdiction over

127. COHEN, *supra* note 22, at 171. Congress passed House Concurrent Resolution in 1953 shortly before Public Law 280. *Id.* at 181. An interior committee of the Senate discovered that between 1948 and 1950 approximately 2.6 million acres of Indian land passed to non-Indians; between 1953 and 1957, another 1.8 million acres passed. *Id.* at 181-82 n.9. In 1953, Congress unanimously passed House Concurrent Resolution 108. *Id.* at 171-72 (citing H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953)). In 1957, both houses of Congress proposed a resolution, repudiating House Concurrent Resolution 108 and requiring future state adoption of Public Law 280 only with Indian consent. *Id.* at 181 (citing *Federal Indian Policy: Hearings on S. Con. Res. 3, S. 331, and S. 809 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 267 (Mar. 27, May 13 & 16, Jun. 17, Jul. 1 & 22, 1957)). However, Congress did not act on its proposal of repudiating its 1953 termination resolution until 1973. *Id.* at 181 n.7, 186-87 n.67. At President Nixon's prodding, Congress in 1970 formally repudiated House Concurrent Resolution 108 which had called for complete Indian assimilation by the states. *Id.* at 185-86 (referencing President Richard M. Nixon's Special Message to Congress on Indian Affairs, PUB. PAPERS 564, 567 (1970)).

One historian characterized the 1943-61 termination period as the government's "most concerted drive against Indian property and Indian survival since the [mass] removals" to the West after 1830 and the attempt at disenfranchising tribes and reservations after 1887. *Id.* at 153 (referring to A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 349 (Norman: University of Oklahoma Press, 1970)). *See* Brief of Appellant A-19, State v. Hook, 476 N.W.2d 505 (N.D. 1991) (No. 900280-900282) (available at University of North Dakota Thormodsgard Law Library) (describing Devils Lake Sioux Indian Reservation, which began under the 1867 treaty with roughly 245,141 acres, as having dwindled to 59,721 acres in 1990).

128. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1988).

129. *See supra* note 121 and accompanying text (discussing Indian Civil Rights Act of 1968).

130. *See supra* note 105 and accompanying text (indicating the reasons for the North Dakota Legislature's declining to exercise criminal jurisdiction over Indians on Indian lands in enacting Public Law 280 legislation).

131. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588 (codified in 28 U.S.C. § 1360(a) (1988)) (permitting California, Minnesota (excepting the Red Lake Reservation), Nebraska, Oregon (excepting Warm Springs Reservation), and Wisconsin (excepting Menominee Reservation) to assume criminal jurisdiction over all Indians on Indian lands within each state, respectively).

Indians on Indian lands in the Act of May 31, 1946, without the state's having to amend its constitutional disclaimer section?[132] Unlike the five states granted jurisdiction by unilateral congressional legislation in Public Law 280, North Dakota and ten other states entered the union between 1889 and 1959 with disclaimer baggage in tow.[133] These eleven candidates for statehood had to disclaim jurisdiction over Indians and Indian lands as a pre-condition for admission.[134] Having complied by inserting disclaimer clauses into their constitutions or statutory enabling acts, ten of these eleven states had to remove the same disclaimers before exercising jurisdiction which Congress offered in Public Law 280.[135] However, the Supreme Court decided in *Washington v. Yakima Indian Nation* that, if state law required a constitutional amendment of its disclaimer section in order to comply with Public Law 280, then the affected states must so amend.[136] But a state not needing to amend its constitution must still take positive state legislative action before implementing federal Public Law 280 legislation.[137] Thus, the Supreme Court in 1978 interpreted the language of section six in Public Law 280 as not mandating a constitutional amendment to change the disclaimer section before assuming jurisdiction and that state legislative action could suffice.[138]

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132. *See supra* note 15 and accompanying text (reciting the 1946 Act).

133. COHEN, *supra* note 22, at 368. The eleven states with disclaimer sections include North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, Alaska, and New Mexico. *Id.* at 368 n.175. However, Wyoming and Idaho entered the union based on enabling acts in federal law even though such federal legislation had the same effect in limiting these two states as well as the other nine regarding the limit of jurisdiction over Indians on Indian land. *Id.*

134. *Id.*

135. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, § 6, 67 Stat. 590 (codified as amended at 25 U.S.C. § 1324 (1988)). *See* S. REP. NO. 699, 83d Cong., 1st Sess. 7 (1953) (describing as 'legal impediments' state disclaimer sections which will require consent of the people for eight states which entered the union under the Enabling Act in order to amend state constitutions before assuming jurisdiction under Public Law 280). Of the eleven states with disclaimer sections in their constitutions or statutes, Alaska mandatorily assumed jurisdiction under Public Law 280 while still a territory but under different legislation and at a later date. COHEN, *supra* note 22, at 369 n.182 (citing Act of Aug. 8, 1958, Pub. L. No. 85-615). The Territory of Alaska had not entered into a compact with the federal government before assuming jurisdiction over Indians on Indian lands in 1958. *Id.* at 369 n.182. The disclaiming compact in which Alaska agreed to cede political jurisdiction of Indians and Indian lands back to the federal government took effect after the equivalent of Public Law 280 became operational in Alaska. *Id.*

136. 439 U.S. 463, 493 (1979). The Court deferred to state courts for determining whether the state should amend its constitution or merely enact legislation. *Id.* Washington state courts had construed section six of Public Law 280 as permitting a legislative act to amend the disclaimer language contained in the state constitution. *Id.* at 467.

137. *Yakima*, 439 U.S. at 493.

138. *Id.* at 485.

The Court found too much tentativeness in the section's language to conclude that

The North Dakota State Bar Association, the North Dakota State Attorney General, and the North Dakota Supreme Court in 1955 found that the compact language in the state constitution necessitated amending.[139] These related state entities viewed amending the constitutional disclaimer section as essential so that the people could consent to their exercising criminal jurisdiction over Indians on Indian land under the 1946 Act as well as under Public Law 280.[140] North Dakota amended its state constitution by popular vote to comply with Public Law 280 though the legislature subsequently declined to accept criminal jurisdiction over Indians on Indian lands.[141] As in *Yakima*, Congress's passing the Act of May 31, 1946, did not mandate the state's amending its con-

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Congress had required Enabling Act states such as Washington and North Dakota to amend their constitutions. *See id.* Furthermore, the Court construed the phrase in section six in which the people of a given state had Congress's permission to amend state constitutions "where necessary" as having do to so only if state law so requires. *Id.* at 483-84. But one must wonder if the plainer meaning of the phrase "where necessary" did not reflect Congress's understanding that eight of the Enabling Act states had disclaimer clauses in their constitutions while two others relied on statute. *See* COHEN, *supra* note 22, at 368 n.175; *supra* note 133 and accompanying text (distinguishing the nine states with constitutional disclaimers from the two with statutory disclaimers). If so, then the Court has misconstrued the plain meaning of section six or has rendered a decision in *Yakima* from an outcome-determinative perspective. The Court in *Yakima* viewed the phrase "consent of the people" in section six as not necessarily referring to a general referendum where the people by popular vote amend the state constitution but to legislative enactments as well. *Yakima*, 439 U.S. at 487-88. The Court considered the legislative history of Public Law 280 as not embracing mandatory constitutional amendments of disclaimer sections for Enabling Act states. *Id.* at 491. For example, while conceding that members of a congressional interior committee viewed section six as legally requiring Enabling Act states to amend their constitutions before assuming jurisdiction under Public Law 280, the Court nonetheless found no evidence that the committee intended to make section six a requirement for state constitutional amendments. *Id.* at 492-93.

Conversely, Assistant Interior Department Secretary Orme Lewis concluded that, because of the legal impediment of constitutional disclaimers expressly ceding jurisdiction over Indian lands to the federal government, the people of each state apparently would be required to amend the state constitution before legally assuming jurisdiction under section six of Public Law 280. S. REP. No. 699, 83d Cong., 1st Sess. 6-7 (1953). Of course, one could take issue with the 'apparently' expression of Lewis as too tentative to suggest that Congress made amendments to constitutional disclaimer sections mandatory in section six of Public Law 280. For the precise language of section six, see Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, § 6, 67 Stat. 590 (codified as amended at 25 U.S.C. § 1324 (1988)).

139. *See* BENCH AND BAR, *supra* note 53, at 463, 469 (recommending amending the state constitution before assuming criminal jurisdiction over Indians on Indian lands in order to comply with Public Law 280); BRIEF OF THE ATTORNEY GENERAL, *supra* note 15, at 16-18 (urging the North Dakota Supreme Court to require that North Dakota amend its state constitution before exercising jurisdiction over Indians on Indian lands as provided for by Act of May 31, 1946, and Public Law 280); *supra* notes 17-53 and accompanying text (discussing the *Lohnes* holding and attending rationale).

140. *See* BENCH AND BAR, *supra* note 53, at 469 (referring to the North Dakota State Bar's recommendations, the North Dakota State Attorney General's recommendations, and the holding in *Lohnes*, the latter of which required amending the state constitution before the state could assume criminal jurisdiction over Indians on Indian reservation lands).

141. N.D. CONST. art LXVIII (also known as section 203), *amended by* S. Con. Res Q, ch. 403, 1957 N.D. Sess. Laws 792, *approved*, June 24, 1958, ch. 430, 1959 N.D. Sess. Laws 843. *See supra* note 105 and accompanying text (declining to exercise criminal jurisdiction legislatively after amending its state constitutional disclaimer section); COHEN, *supra* note 22, at 369 n.181 (identifying North Dakota as the only state of the eleven Enabling Act

stitutional disclaimer section.[142] Moreover, no evidence exists to indicate that Congress intended to break its compact with the state of North Dakota and require state criminal jurisdiction over the Devils Lake Sioux Indian Reservation under the Act of May 31, 1946, without the state's first giving consent.[143] Accordingly, state police and state courts should not exercise jurisdiction over Indians on the Devils Lake Sioux Indian Reservation in North Dakota absent state legislative action.

In addition to recent federal legislative and executive policy changes, the judicial branch has also modified its approach to jurisdictional questions by looking particularly toward their effect on tribal self-determination. Assuming a grant of certiorari by the Supreme Court to review *Hook*, one could argue for application of the infringement test of *Williams* to the facts in *Hook*.[144] Moreover, in arguing before the Supreme Court, one might seek the Court's reaffirmation of the *Worcester* policy cited in *Williams*: Namely, that state laws have no effect on Indian lands, and state citizens may not enter onto Indian lands absent permission from the tribe or Congress.[145] As the Court had noted in *Williams*, the modification of the *Worcester* policy enabled the state to punish non-Indians committing crimes on Indian lands.[146] But crimes

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states to amend its state constitution in response to Public Law 280 requirements and the *Lohnes* decision).

142. *See supra* notes 136-38 and accompanying text (finding in *Yakima* that Public Law 280 does not mandate that Enabling Act states constitutionally amend disclaimer sections); *supra* note 15 and accompanying text (containing the precise language of the 1946 act).

143. *See* COHEN, *supra* note 22, at 374 n.229 (failing to find any intent that Congress intended to break the compact and require state jurisdiction without state consent, the *Lohnes* result seems correct).

144. Williams v. Lee, 358 U.S. 217, 219 (1959).

For a recitation of the facts and holding in *Williams*, see *supra* note 109 and accompanying text.

Reviewing the *Hook* decision would not mark the first time that the United States Supreme Court has questioned the North Dakota Supreme Court decision affecting Indian rights. For two instances involving the same case where the United States Supreme Court had to reverse the North Dakota Supreme Court for its attempting to exercise jurisdiction over Indians on Indian land at the expense of their equal protection, see Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984); Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986). In the second case, the Supreme Court preempted North Dakota's interest of exacting Indian consent for the state's exercising jurisdiction over Indians as a pre-condition to their having standing in state courts. *Wold*, 467 U.S. at 888. The Court relied on the pre-emption doctrine to find an overriding federal interest of equal access to courts for all citizens. *Id.* at 887. The Court also took the occasion to specifically overrule *Vermillion* in which the North Dakota Supreme Court had asserted civil jurisdiction over Indians on Indian lands despite the legislature's conditioning state jurisdiction on the Indians giving their consent. *Wold*, 467 U.S. at 880 (referencing Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957)).

145. *Williams*, 358 U.S. at 219 (referencing Worcester v. Georgia, 31 U.S. 515, 561 (1832)).

146. *Id.* at 220. *See supra* note 15 and accompanying text (discussing among others,

involving Indians on Indian lands would fall exclusively to federal jurisdiction unless Congress says otherwise.[147] In the absence of such a congressional enactment, the Court could determine whether any state action infringes on the tribe's power to make its own laws in order to govern its members.[148]

The Court in *United States v. Wheeler* held that the powers of tribes to govern relations among members do not dissipate as a result of the tribe's dependent status.[149] Furthermore, the power to prescribe internal criminal laws involves only the relations among tribal members.[150] Cohen has noted that the determinative factor for permitting the exercise of tribal power turns on whether "the matter falls within the ambit of internal self-government."[151] In other words, the question becomes: Does a state police officer who forcibly removes an enrolled member of the Devils Lake Tribe from the Devils Lake Sioux Indian Reservation for an offense committed on the reservation and in the presence of fully certified tribal police strike at the core of tribal self-government?

The answer to this infringement issue lies in examining the recent development of tribal self-government on the Devils Lake reservation. The Devils Lake Sioux Tribe has responded to the major federal policy goal of enhanced tribal self-government. Bureau of Indian Affairs police maintain the peace on the Devils Lake Indian Sioux Reservation. Devils Lake Sioux Tribe has developed and actively relies on a comprehensive civil and criminal code, one that underwent a major revision in 1988.[152] Title six of the tribal code addresses such violations as driving under the influence of alcohol and driving on a suspended license.[153] Moreover,

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the one instance of the Devils Lake Sioux Indian Reservation, where state courts may exercise criminal jurisdiction over a non-Indian on Indian reservation lands).

147. *Williams*, 358 U.S. at 220. *See supra* note 15 and accompanying text (discussing federal statutes which provide for federal jurisdiction over Indians on Indian lands).

148. *Williams*, 358 U.S. at 220. As an example of the Public Law 280 congressional enactment which North Dakota has specifically declined to exercise, see *supra* note 105 and accompanying text.

149. 435 U.S. 313, 326 (1978). *See* United States v. Mazurie, 419 U.S. 544, 557 (1975) (extending the powers of a tribe to cover both their members and their territory).

150. *Wheeler*, 435 U.S. at 326-27.

151. *See* COHEN, *supra* note 22, at 246.

152. *See, e.g.*, 1 DEVILS LAKE SIOUX TRIBE LAW & ORDER CODE, Titles I-IV, §§ 1-1-101 through 16-1-106 (1988) (ranging from general provisions in title one, criminal actions in title three, civil actions in title four, motor vehicles in title six, *et seq.*).

153. *Id.* § 6-6-122 (sentencing any Indian apprehended for and found guilty of driving on a court-suspended license to up to sixth months in jail and a $300 fine or both); *id.* § 6-6-126 (presuming an Indian to be under the influence of intoxicating liquor whose percent by weight of alcohol in the blood reads 0.10 or above and imposing a maximum sentence of 90 days in jail, a $500 fine, and suspension of the driving privilege for up to one year for a third offense within two years). Of course, officer Buchli had only placed Hook under arrest at

the Devils Lake Tribal Court can impose sentences up to a year in jail and a $5,000 fine for each count, sufficient remedies for the offenses charged against Hook.[154] The Devils Lake Sioux Tribe Law & Order Code also contains an extradition provision which the tribal court has used on occasion.[155] Finally, the Devils Lake Sioux Indian Reservation houses a secured detention facility staffed full-time by five jailers.[156] Thus, the Devils Lake Sioux Tribe effectively governs itself by exercising criminal jurisdiction over its enrolled members for offenses committed on the reservation.[157] The state therefore has no need to assume criminal jurisdiction over Indians on Indian lands.

V. IMPLICATIONS ARISING FROM *HOOK*

In view of federal acts of Congress and holdings of the Court recognizing tribal self-government in criminal matters affecting tribal members, state highway officer Buchli infringed on tribal self-government when he entered the reservation, took Hook off the reservation in the presence of sworn tribal officers of the law, ignored tribal extradition procedures, and presented Hook to a North Dakota state court. Furthermore, state courts interfered with tribal self-government by continuing to exercise criminal jurisdiction over Hook in total disregard of the Devils Lake tribal code, tribal court, and tribal incarceration facility.[158] Lastly, the current federal policy of increasing tribal self-government requires preempting North Dakota state police and courts from

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the Bureau of Indian Affairs-staffed road-block for the misdemeanor charge of fleeing from a peace officer. State v. Hook, 476 N.W.2d 565, 565 (N.D. 1991). However, under the Assimilated Crimes Act, the federal courts could have accepted jurisdiction once the Bureau of Indian Affairs police had taken Hook into custody. *See supra* note 15 and accompanying text (discussing 18 U.S.C. § 1152 (1988)).

154. *See supra* note 15 and accompanying text (amending the Indian Civil Rights Act of 1968 to increase punishment to up to one year in jail and a $5,000 fine if not both).

155. 1 DEVILS LAKE SIOUX TRIBE LAW & ORDER CODE, Title III, § 3-9-101 (1988) (permitting an enrolled member of the Devils Lake Sioux Tribe to undergo extradition for a charge beyond the jurisdiction of the tribal court).

156. *See* Randall Howell, *Fort Totten Jail Slated to Reopen Soon*, OUATE HO, May 1, 1991, at 27 (forecasting the jail's reopening within 30 days with five jailers following its renovation under Bureau of Indian Affairs supervision).

157. *See* Williams v. Lee, 358 U.S. 217, 222 (1959). The Court noted how Congress and the Bureau of Indian Affairs had assisted in strengthening the Navajo tribal self-government and its courts, resulting in significant improvement in its legal system through training and resource development. *Id.* The record at Devils Lake Sioux Indian Reservation reflects similar federal assistance in increasing tribal self-government, particularly its exercise of criminal jurisdiction. *See* Gordon K. Knight, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1399 (1985) (viewing the establishment of tribal courts as central to the revitalization characteristic of moving toward tribal self-determination).

158. *See* COHEN, *supra* note 22, at 350. Cohen grants a strong state interest in exercising at least civil jurisdiction over tribes lacking laws or any form of tribal self-government, clearly not the case on Devils Lake Sioux Indian Reservation. *Id.*

interfering where its state legislature has steadfastly declined to authorize jurisdiction.[159]

Illustrating judicial recognition of tribal self-government, the tenth circuit appellate court in *Ross v. Neff* recently denied state jurisdiction to seize an Indian on Indian land under circumstances similar to *Hook*.[160] A deputy county sheriff, entering reservation property in response to a traffic control service request, arrested Ross on drunk and disorderly charges.[161] The appellate court in *Ross* defined Indian country as subject to exclusive federal or tribal criminal jurisdiction unless Congress has provided otherwise.[162] The *Ross* court further noted how Congress had provided a statutory means in Public Law 280 for a state to assume criminal jurisdiction over Indian country.[163] However, like Arizona in *Williams*, Oklahoma in *Ross* had not taken the legislative steps necessary to assume jurisdiction over Indian country.[164] Even so, Oklahoma argued that its asserting criminal jurisdiction over Indians on Indian lands would not infringe on tribal interests.[165]

The tenth circuit court viewed the *Williams* infringement test as applicable principally in civil cases and the federal law as specifically provided for either federal or tribal criminal jurisdiction over the drunkenness charge against Ross.[166] Moreover, the court in *Ross* said that the Supreme Court has expressly limited state criminal jurisdiction on Indian lands to non-Indians.[167] In discharging the drunkenness charge against Ross for want of police jurisdiction, the tenth circuit stated that avenues to exercise jurisdiction over Indians on Indian lands must come from the legislature rather than courts or some fiat by county government.[168]

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159. *See supra* note 105 and accompanying text for a explanation on the legislature's refusal to authorize state criminal jurisdiction. Over a question of civil jurisdiction, the Court did not hesitate to find that permitting Arizona to exercise jurisdiction would cut asunder tribal court authority over reservation affairs, thus infringing on the right of the Navajo Nation to govern itself. Williams v. Lee, 358 U.S. 217, 222-23 (1959). Arizona had not accepted jurisdiction under Public Law 280 in view of the likely significant attending financial burdens. *Id.*

160. Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990).

161. *Id.* at 1352.

162. *Id.* (referencing 18 U.S.C. § 1152 (1988)).

163. *Id.* (citing to 25 U.S.C. § 1321 (1988) (permitting states to assume criminal jurisdiction over Indian lands with tribal consent, thus amending Public Law 280)).

164. *Id.* The tenth circuit court specifically stated that the sheriff had no jurisdiction to enter the reservation and arrest Ross. *Id. See supra* note 159 and accompanying text (indicating Arizona's failure to enact jurisdictional legislation pursuant to Public Law 280).

165. *Ross*, 905 F.2d at 1352.

166. *Id.* at 1352-53 (citing to 18 U.S.C. § 13 (1988) (permitting federal police to 'borrow' from state law to exercise jurisdiction over Indians on Indian lands)).

167. *Id.* at 1353 (alluding to Solem v. Barrett, 465 U.S. 463, 465 n.2 (1984)).

168. *Id.* The mere presence of a void in enforcement does not empower local law enforcement to enter onto tribal land. *Id. See also* State v. Spotted Horse, 462 N.W.2d

VI. CONCLUSION

The North Dakota Supreme Court in *Hook* sought through common law to impose its political will on the state of North Dakota by mandating the exercise of misdemeanor criminal jurisdiction over Indians on Devils Lake Sioux Indian Reservation land. Yet the North Dakota legislature, in enacting Public Law 280 legislation, declined to exercise criminal jurisdiction because the Indians do not wish it and further because of the major financial burden that would result. But Indians on the Devils Lake Sioux Indian Reservation have not petitioned for nor consented to state criminal jurisdiction, the tribal court having given formal written notice to the North Dakota State Highway Patrol that it lacked jurisdiction on the reservation. More importantly, tribal courts have always operated in the past and continue to do so in the present as part of the Devils Lake Sioux Tribe's drive toward self-determination. A forum of law should respect the will of the people of the state of North Dakota through their representative government as well as the will of the Indian people of the Devils Lake Sioux Tribe.

Congress, previously having sought to terminate tribal rights in the 1940s and early 1950s, has recognized the need for tribal self-government since the late 1950s. Congress has twice repudiated its intent in 1953 to abandon wholesale the tribes to the jurisdiction of state government. The development of tribal courts and tribal law embodies the epitome of tribal self-determination, the aspiration of which even the Supreme Court has recently recognized.[169]

When Congress has passed a statute during the assimilationist and termination eras, even a statute suggesting a general intent to curtail tribal powers, the Court will not strain to implement a policy which Congress has since rejected.[170] Congress has since rejected its attempt to forcibly assimilate such Indians as those of the Devils Lake Sioux Tribe into the machinery of such state governments as North Dakota's. The conclusion seems inescapable.

463, 467 (S.D. 1990) (denying the state criminal jurisdiction to pursue an Indian onto Indian country in view of the state's failing to comport with the purpose of Public Law 280 by only assuming limited jurisdiction over roads on reservation property but nothing else); Benally v. Marcum, 553 P.2d 1270, 1272-73 (N.M. 1976) (viewing a violation of due process and suppressing illegal fruits resulting from state police's relying on fresh pursuit to seize an Indian on Indian land rather than follow the tribe's extradition procedures).

169. Iowa Mut. Ins. Co. v. La Plante, 480 U.S. 9, 15-17 (1987) (promoting self-government encompasses the development of the entire tribal court system).

170. Bryan v. Itasca County, 426 U.S. 373, 388 n.14 (1976).