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HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: HB 1771

RELATING TO: Indian Reservation Jurisdiction

SPONSOR(S): Representative Arza

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) COUNCIL FOR SMARTER GOVERNMENT YEAS 9 NAYS 3
(2)
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(5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

A state may only exercise jurisdiction over Indian territory if expressly authorized to do so by Congress. Federal law allows states to assume jurisdiction over Indian territory by statute. Acting on this Congressional authorization, Florida currently has full criminal and civil jurisdiction over Indian lands within its borders.

With one narrow exception, this bill withdraws Florida's jurisdiction over Indian territory. Under this bill, Florida retains jurisdiction over the water rights compact between it, the Seminole Tribe of Florida, and the South Florida Water Management District.

This bill may reduce revenue from court fees but may also correspondingly reduce prosecution expenditures; the overall fiscal impact to the state is unknown. This bill does not appear to have a fiscal impact on local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes [x]	No []	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes [x]	No []	N/A []
4.	Personal Responsibility	Yes []	No [x]	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain: This bill withdraws the state's current jurisdiction over Indian reservations.

B. PRESENT SITUATION:

General Background

Article I, s. 8 of the Constitution of the United States grants Congress the authority to "regulate Commerce … with the Indian Tribes." Based in part on this provision, and in part on the near-exclusive authority of the federal government to engage in foreign policy, courts historically regarded Indian tribal lands, being the territories of sovereign nations, as beyond the jurisdiction of state law to regulate.[1] Congress has exclusive and plenary authority over Indian affairs and, as such, states may only exercise jurisdiction over Indian lands if Congress expressly authorizes them to do so.[2]

Congress authorized the states to do so in 1953, when it enacted Public Law 83-280 (commonly referred to as "Public Law 280" or simply "PL 280").[3] This statute required five states (the so-called "mandatory jurisdictions") to assume full civil and criminal jurisdiction over Indian reservations within their borders.[4] PL 280 also allowed any other state ("optional jurisdictions") to assume total or partial jurisdiction over Indian reservations "by legislative action."

In 1968, Congress significantly amended PL 280. First, the amendments require that a tribe consent before a state may assume jurisdiction over tribal lands; however, this requirement was not made retroactive. Nine optional jurisdictions, including Florida,[5] assumed jurisdiction pursuant to PL 280 prior to the 1968 tribal consent requirement.[6] Only one, Utah, has done so since.[7]

Additionally, the 1968 amendments allow the federal government to accept a "retrocession" by a state of any or all jurisdiction that that state previously assumed.[8] Pursuant to this provision,

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[1] *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
[2] *See Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979); *United States v. Wheeler*, 534 U.S. 303 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *United States v. Daye*, 696 F.2d 1305 (11th Cir. 1983).
[3] 67 Stat. 588, currently codified as extensively amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.
[4] The original five mandatory jurisdictions were California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska was added as a sixth upon its admission to the Union in 1959. *See* Pub. L. 85-508, 72 Stat. 339.
[5] *See* ss. 1 and 2, ch. 61-252, L.O.F.
[6] The others are Arizona, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota and Washington.
[7] Utah assumed jurisdiction pursuant to PL 280 in 1971.
[8] *See* 25 U.S.C. § 1323(a).

President Johnson issued an Executive Order authorizing the Interior Secretary, after consultation with the Attorney General, to accept any such retrocessions by notice published in the Federal Register, specifying the extent and effective of the retrocession.[9]

Title 18 U.S.C. § 1151 defines "Indian country" as

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

An Indian tribe may regulate the activities of its members within its territory, including by the imposition of criminal penalties, but a tribe lacks criminal jurisdiction over non-members on its territory.[10] Furthermore, as the Supreme Court of the United States explained recently in *Nevada v. Hicks*,[11] federal law does not prevent a state from exerting investigative powers in Indian country with respect to crimes committed outside Indian country, such as by state law enforcement personnel entering Indian country and executing a state search warrant there.

The federal "Indian Major Crimes Act,"[12] provides that

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, [rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of a female not his wife who has not attained the age of sixteen years, assault with intent to commit rape], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury … assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, [or embezzlement or theft within the "special maritime and territorial jurisdiction of the United States"] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition, the federal General Crimes Act provides for federal jurisdiction over other crimes between Indians and non-Indians in Indian country, again applying state law where federal law provides no specific definition of the crime involved.[13]

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[9] *See* Executive Order No. 11435, 33 F.R. 17339 (Nov. 21, 1968).
[10] *See Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).
[11] 533 U.S. 353 (2001).
[12] Title 18 U.S.C. § 1153.
[13] *See* 18 U.S.C. § 1152. *See also* 18 U.S.C. § 13 ("Assimilative Crimes Act") (generally applying state criminal law with respect to crimes committed in federal enclaves).

Tribal authorities have much broader authority in civil rather than criminal matters. For instance, most ordinary tort, contract and property claims, of the sort usually governed by state rather than federal law, must be exhausted in tribal court before they may be pursued in federal district court.[14] However, it does not appear that this exhaustion requirement must be met before a state court in a state that has assumed jurisdiction under PL 280 may hear such claims.

Indian Country in Florida

Two federally recognized Indian tribes have lands within the borders of Florida, the Seminole Tribe of Florida, Inc. ("Seminoles") and the Miccosukee Tribe of Indians of Florida ("Miccosukees"). The Seminoles have lands scattered throughout central and south Florida, with concentrations centered around Dania, Big Cypress and Brighton. The Miccosukees have a single contiguous area of roughly 285,000 acres in Miami-Dade and Broward Counties.

The vast majority of these lands are not federal reservation, but either state reservation, lands perpetually leased from the state, lands held in trust by the federal government for tribal benefit (so-called "tribal trust lands"), or lands held through an exclusive use permit from the United States Department of the Interior. In 1998, Congress designated a strip of Miccosukee land on the northern border of Everglades National Park as the Miccosukee Reserved Area, and provided that state jurisdiction assumed under PL 280 does not apply there.[15] As a state normally does not have jurisdiction over National Parks, it is unclear if this effected a substantive change.

The Seminoles do not have a tribal court system. The Miccosukees have a tribal court consisting of two judges, one "traditional" and one "contemporary." The Miccosukees adopted a Tribal Civil and Criminal Code in 1978. Crimes by one Miccosukee against another within Indian country are prosecuted by Assistant Council Attorneys on behalf of the Tribal Council (other than those crimes designated by the Indian Major Crimes Act for exclusively federal prosecution).

Federal legislation enacted in 2001 provides significant funding and other assistance to tribes in operating and possibly upgrading their judicial systems.[16]

See Section-by-Section Analysis for Present Situation with respect to individual sections of this bill.

C. EFFECT OF PROPOSED CHANGES:

See Section-by-Section Analysis.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. repealing s. 285.16, F.S., relating to state jurisdiction over Indian reservations.

Present Situation. Section 285.16, F.S., assumes full criminal and civil jurisdiction for the state over Indian reservations, specifies that state law applies on reservations in the same manner as elsewhere, and provides that enforcement of state law on reservations is the same as elsewhere.

Effect of Proposed Changes. This bill repeals s. 285.16, F.S., and thus eliminates state jurisdiction over or within Indian reservations. The legal situation would presumably revert to as

[14] *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). *But see El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) (holding that tribal court exhaustion was not required where putative "common-law" claims were actually claims under a federal statute providing for mandatory removal from state court).
[15] *See* Pub. L. 105-313, 112 Stat. 2964 ("Miccosukee Reserved Area Act").
[16] *See* Pub. L. 106-559, 114 Stat. 2778 ("Indian Tribal Justice and Legal Assistance Act"), now codified at 25 U.S.C. §§ 3651-81.

it was prior to Florida's assumption of jurisdiction under PL 280 in 1961, with jurisdiction over Indian country divided between the federal government and the tribes at Congressional discretion.

Section 2. amending s. 285.061(3), F.S., relating to transfers of lands to the United States to be held in trust for the Seminole and Miccosukee Indian Tribes.

Present Situation. Section 285.061, F.S., authorizes the Board of Trustees of the Internal Improvements Trust Fund ("the Board") to, at its discretion, transfer specified lands in Broward County, described in metes and bounds, to the United States to be held in trust for the benefit of the Seminole and Miccosukee Tribes (so-called "tribal trust lands"). The Board did so in 1983. Section 285.061(3), F.S., reserves state jurisdiction over these lands.

Effect of Proposed Changes. This bill amends s. 285.061(3), F.S., to conform with this bill's repeal of s. 285.16, F.S., thereby eliminating state jurisdiction over the tribal trust lands specified in this section.

This bill eliminates a reference to s. 285.16, F.S., but not to s. 285.165. Therefore, under this bill, the state continues to reserve jurisdiction with respect to the water rights compact entered into with the Seminole Tribe pursuant to that section. (See below)

Section 3. amending s. 285.165(1), F.S., relating to the water rights compact with the Seminole Tribe.

Present Situation. Section 285.165(1), F.S., ratifies a water rights compact among the state, the Seminole Tribe of Florida, and the South Florida Water Management District.

Effect of Proposed Changes. This bill eliminates the reference to s. 285.16, F.S., to conform to this bill's repeal of that section.

Section 4. amending s. 285.18(2)(c), F.S., relating to governing bodies of special improvement districts within Indian reservations.

Present Situation. Section 285.17, F.S., creates special improvement districts within the reservations of the Seminole and Miccosukee Tribes. Section 285.18, F.S., appoints these tribes' respective tribal councils as the governing bodies of these districts, and specifies their powers with respect to these districts. These powers include the authority to employ law enforcement personnel; such personnel are specifically authorized to investigate violations of state criminal law.

Effect of Proposed Changes. This bill amends s. 285.18(2)(c), F.S., to conform to this bill's repeal of s. 285.16, F.S., by eliminating the reference to special improvement district law enforcement personnel investigating violations of state criminal law.

Section 5. providing an effective date of upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill may reduce fees collected by the state courts with respect to civil or criminal proceedings regarding events on Indian reservations. The fiscal impact is unknown.

2. Expenditures:

This bill may reduce prosecution expenditures with respect to crimes committed on Indian lands. The fiscal impact is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

As a matter of federal law, Florida may not be able to unilaterally withdraw its current jurisdiction over Indian country within its borders. Under Executive Order 11435, the Secretary of the Interior

must consent on behalf of the federal government to any state seeking to retrocede jurisdiction assumed pursuant to PL 280. In practice, such consent has always been forthcoming, but it is particularly unclear what legal effect this requirement might have in the time between this bill's effective date and publication of the Interior Secretary's consent in the Federal Register.

This bill may make it difficult for the state to investigate and prosecute Indians and non-Indians alike, who have committed a crime off "Indian country" but fled there. Because this bill eliminates the provision in s. 285.16, F.S., that state law shall be enforced in the same manner on a reservation as off, the state may be required to seek extradition of such suspects in tribal courts unless a basis also exists for a federal arrest warrant. Moreover and for the same reason, this bill may require any party, including the state but also private parties, to obtain a federal subpoena or search warrant if that party wishes to pursue evidence that is in Indian country.

Likewise, it unclear to what extent the state would retain authority under this bill to prosecute a non-Indian for a crime committed against another non-Indian on Indian land. In such circumstances, case law suggests that the state might retain jurisdiction even under this bill.[17] However, although the state may retain jurisdiction, it may no longer have any effective enforcement or investigation mechanisms independent of voluntary tribal or federal assistance.

Regardless of this bill, crimes committed in Indian country remain subject to federal prosecution, both exclusively and concurrently with tribal authorities, to an extent specified by Congress. Many such prosecutions are indirectly subject to some state legislative input, since under the Indian Major Crimes Act, state criminal law defines federally-prosecuted crimes that have no specific federal definition. Moreover, regardless of this bill, PL 280 remains subject to Congressional modification or repeal.

Fundamentally, the principle of self-government for tribes is well established in federal law. Withdrawal of state jurisdiction might make practical sense if the tribes were equipped to exercise jurisdiction themselves. However, because the Seminoles have no tribal court system, and the Miccosukees have only two tribal judges and appear to have no full-time prosecutors, it is possible that under this bill most jurisdictional responsibility would simply escheat to the federal authorities. If Congress specifically appropriates funds to assume this responsibility, and the tribes acquire the infrastructure to assume it, both of which seem to have begun to some extent, then withdrawal would not constitute an abrogation of law enforcement responsibility. Florida's residents and guests have always relied upon state responsibility covering these lands. The Seminoles even highlight state jurisdiction on their web site.[18] Difficulties that might arise from any degree of lawlessness that the state could not address could be bad for tourism and for the general welfare.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 1, 2002, the Council for Smarter Government adopted one amendment to this bill. This strike-all amendment limits the state's retrocession of jurisdiction to Miccosukee lands and specifies that such retrocession is only with respect to crimes or causes of action involving a Miccosukee and taking place within Miccosukee territory. In addition, this amendment makes retrocession contingent and effective upon consent by the Secretary of the Interior.

The Council then reported this bill favorably, as amended.

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[17] *See, e.g., California v. Cabazon Band of Mission Indians*, 408 U.S. 202 (1987).
[18] *See, e.g.*, http://www.seminoletribe.com/government/government.shtml.

VII. SIGNATURES:

COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:	Council Director:
David L. Jaroslav, J.D.	Don Rubottom

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:	Council Director:
David L. Jaroslav, J.D.	Don Rubottom