SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 424

SPONSOR: Senator Smith

SUBJECT: Indian Reservations

DATE: February 12, 2003 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Roberts	JU	Favorable
2.			CP	
3.				
4.				
5.				
6.				

I. Summary:

The bill amends s. 285.16, F.S., to create an exception to the state's assumption of jurisdiction over criminal offenses committed on Indian reservations and civil causes of action arising within Indian reservations. The bill provides the state's aforementioned assumption of jurisdiction does not apply to Indian reservations of the Miccosukee Tribe of Indians of Florida.

The bill becomes effective upon becoming law.

This bill substantially amends section 285.16, F.S.

II. 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]

[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).

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, 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 effect of the retrocession.[9]

Criminal Jurisdiction

The federal "Indian Major Crimes Act,"[10] 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.

[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).
[9] *See* Executive Order No. 11435, 33 F.R. 17339 (Nov. 21, 1968).
[10] Title 18 U.S.C. § 1153.

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.[11] However, the General Crimes Act expressly provides that it does not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe. Accordingly, crimes committed by an Indian against another Indian of the same tribe, while on that tribe's lands, are generally within the jurisdiction of that tribe and not the state or federal government.

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 the imposition of criminal penalties, but a tribe lacks criminal jurisdiction over non-members on its territory.[12] Furthermore, as the Supreme Court of the United States explained recently in *Nevada v. Hicks*,[13] 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.

Civil Jurisdiction

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 filing a claim in state court in a state that has assumed jurisdiction under PL 280.

Although Florida law applies, in a general sense, there are limitations as explained by the United States Supreme Court in *Bryan v. Itasca County, Minnesota,* 426 U.S. 373 (1976). The *Bryan*

[11] *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).
[12] *See Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).
[13] 533 U.S. 353 (2001).
[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).

court construed section 4 of PL 280 as granting civil jurisdiction only over private civil litigation in state courts, not to include general civil regulatory powers.

An example of this limitation of powers can be found in the case of *Seminole Tribe v. Butterworth,* 491 F.Supp. 1015 (S.D. Fla. 1980), aff'd, 658 F.2d 310 (5th Cir. 1981), cert.den., 455 U.S. 1020 (1982), where the Seminole Tribe of Florida sued to enjoin the enforcement of a state law restricting bingo operations to charitable organizations. The statute was declared to be "civil/regulatory" in nature rather than "criminal/prohibitory," and therefore unenforceable against the Seminole Indian Tribe. *See also, Houghtaling v. Seminole Tribe of Florida,* 611 So.2d 1253 (Fla. 1993)[although the state has jurisdiction over civil lawsuits between Indians and other persons, it does not have jurisdiction in suits brought by other persons against the Tribe, unless there has been an express waiver of tribal sovereign immunity.]

The Miccosukee Reserved Area and other Miccosukee Reserved Lands

The Miccosukee Tribe of Indians of Florida has resided within the Everglades National Park pursuant to a Special Use Permit issued by the National Park Service. In 1998, Congress enacted the Miccosukee Reserved Area Act which provided that the Tribe could live on the Park land permanently. *Public Law No. 105-31, 112 Stat. 2964 (1998).* The Miccosukee Reserved Area Act provides that the Miccosukee Reserved Area is to be considered Indian country and be treated as a federally recognized Indian reservation. Section 5 of the Act states that Public Law 280 shall not apply to the Miccosukee Reserved Area. **Accordingly, on these lands s. 285.16, F.S., currently does not apply so that the state does not have civil or criminal jurisdiction over the Miccosukee Reserved Area.**

However, the Miccosukee Tribe of Indians of Florida also has tribal reservation land in locations outside the Miccosukee Reserved Area. The reserved lands consist of a 47 acre commercial parcel in western Miami-Dade County at the NW corner of the intersection of Krome Avenue and U.S. 41, a 0.92 acre commercial parcel in western Miami-Dade County at the SW corner of the intersection of Krome Avenue and U.S. 41, and a 46.36 acre commercial/residential parcel located adjacent to the Miccosukee Reserved Area. **Accordingly, on these lands s. 285.16, F.S., is applicable so that the state does have civil and criminal jurisdiction over these areas.**

III. Effect of Proposed Changes:

The bill amends s. 285.16, F.S., to create an exception to the state's assumption of jurisdiction over criminal offenses committed on Indian reservations and civil causes of action arising within Indian reservations. The bill provides the state's aforementioned assumption of jurisdiction does not apply to Indian reservations of the Miccosukee Tribe of Indians of Florida.

Once the state relinquishes jurisdiction, absent a change in federal law or the agreement of the Tribe, the jurisdiction cannot be reestablished.

The bill will have an impact upon criminal jurisdiction, civil jurisdiction, and state regulatory jurisdiction. *Generally*, the following principles apply:

Criminal Jurisdiction

- Crimes committed by Miccosukee Indians against Miccosukee Indians on Miccosukee Indian reservation land will fall within the exclusive jurisdiction of the tribal court.
- Crimes committed by Miccosukee Indians on non-tribal land against Miccosukee Indians, other Indians, or non-Indians will fall within the jurisdiction of the federal government or state government.
- Crimes committed by non-Indians, or non-Miccosukee Indians, on Miccosukee tribal land will fall within the jurisdiction of the federal government.

Civil Jurisdiction

- The Miccosukee tribal court will have civil jurisdiction over civil disputes arising between Miccosukee Indians.
- The Miccosukee tribal court will have civil jurisdiction over civil disputes arising from activity on Miccosukee reservation land between a non-Miccosukee Indian, or a non-Indian, and the Miccosukee Tribe or a Miccosukee Indian when the nonmember enters into a consensual relationship with the tribe (e.g. commercial relationship with the tribe; slip and fall at a casino.) *See, Williams v. Lee,* 358 U.S. 217 (1959)[state court had no jurisdiction over civil claim by a nonmember against a member for a transaction that occurred on the reservation.]
- The Miccosukee tribal court will have civil jurisdiction over civil disputes arising from activity on Miccosukee reservation land between a non-Miccosukee Indian, or a non-Indian, and the Miccosukee Tribe when the nonmember's conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.
- Federal court or state court will have jurisdiction over civil disputes between the Miccosukee Tribe and nonmembers only where Congress has unequivocally authorized the suit or the Miccosukee Tribe has clearly waived its immunity from suit.
- Federal court or state court will have jurisdiction over all other civil matters involving disputes between Miccosukee Indians and nonmembers of the tribe.

State Regulation

- The Miccosukee Tribe can, on a limited basis, regulate by taxation, licensing, or other means, activities of nonmembers who enter consensual relationships with the tribe or its members. *See, Brendale v. Confederate Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989)[tribe could not exercise zoning authority over lands within the reservation that were owned by nonmembers of the tribe, except where those lands owned by nonmembers were in areas of the reservation that were no longer open to the public.]
- The Miccosukee Tribe can regulate, on a limited basis, conduct of nonmembers when that conduct threatens or directly affects the political integrity, economic security, or the health or welfare of the tribe. *See, Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982)[tribe's authority to tax nonmembers who chose to do business on the reservation falls within the tribe's sovereign powers as a necessary instrument of self-government and territorial management.]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Based upon judicial precedent, any person who is not a Miccosukee Indian and who is a crime victim on reservation lands would look to the federal courts for prosecution of the case. Those crimes or acts over which the federal courts do not have jurisdiction would likely be governed by tribal law.

As far as civil matters are concerned, disputes involving the Miccosukee Tribe, or a member, and a nonmember will fall under the jurisdiction of the Miccosukee Tribal court, the federal court, or a state court depending on the unique facts of each particular case. The most significant impact may be in the domestic relations area when proceedings involve Miccosukee Indians and nonmembers of the Miccosukee Tribe. The U.S. Supreme Court has ruled that a state court did not have jurisdiction over an adoption proceeding. *See, Fisher v. District Court,* 424 U.S. 382 (1976). Notably, however, *Fisher* only involved tribal members and not the assertion of a tribe's authority over nonmembers. Accordingly, it is unclear whether a state court may ever have jurisdiction over divorces, adoptions, custody disputes and domestic violence injunctions.

C. Government Sector Impact:

It is unclear what, if any, government sector impact this bill would have.

VI. Technical Deficiencies:

None.

VII. Related Issues:

As a matter of federal law, Florida may not be able to unilaterally withdraw its current jurisdiction over Indian country within its borders. Title 25 U.S. Code section 1323 states in part: "The United States is authorized to accept retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, pursuant to the provisions of (Public Law 280)." 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.

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.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.