

Federal Indian Law

Criminal Jurisdiction and Retrocession

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Basic Principles

- Indian tribes are governments with inherent powers
- U.S. Constitution itself does not limit tribal powers – only federal and state powers
- Constitution gives Congress full control over Indian affairs – including authority to limit tribal powers
- Treaty rights are property rights
- State law is generally preempted within Indian country
- Federal government has a trust responsibility to tribes

Who are the tribes and where do they exercise their powers?

- Federal Register list of recognized Indian tribes, 75 Fed. Reg. 60810 (October 1, 2010) (acknowledgment regs at 25 CFR part 83) (566 Tribes as of Jan. 2011).
- Tribal powers exercised within “Indian country.” 18 U.S.C. 1151 (def. includes Indian reservations; allotments; and dependent Indian communities).

U.S. Constitution

- Vested all authority over Indian affairs in Congress and the Executive
- The Congress Shall have Power To . . .
Regulate Commerce with foreign nations,
among the several States, and with the
Indian Tribes. Art. I, § 8, cl.3
- Treaty Power; Supremacy Clause

The Federal-Tribal-State Relationship

Trade and Intercourse Act of 1790

Indian Country Crimes Act (interracial crimes made
Federal offenses) (1816)

Johnson v. McIntosh (1823)

Cherokee Nation v. Georgia (1831)

Worcester v. Georgia (1832)

Criminal Jurisdiction

Three General Rules

No tribal criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Tribe*

States have jurisdiction on over non-Indian v. non-Indian crime, *U.S. v. McBratney*

Tribes have criminal jurisdiction over members and non-member Indians (unaffected by P.L. 280)

Non-PL 280 Criminal Rules

Jamestown S' Klallam; Nooksack

Upper Skagit; Stillaguamish

Sauk-Suiattle; Samish*

Cowlitz*; Snoqualmie

Cook's Landing (in lieu site held to be reservation)

*No Reservations Established At This Time

Criminal Jurisdiction (non-PL 280)

- Federal Major Crimes Act (Indian defendants; enumerated offenses)
- Federal Indian Country Crimes Act (Indian and non-Indian involved as defendant and/or victim; federal criminal code for federal enclaves applies; exceptions for Indian v. Indian crimes)
- Non-Indian v. Non-Indian (State)

Criminal Jurisdiction in Indian Country

	Defendant	
Victim	Indian	Non-Indian
Indian	Tribe: Yes	Tribe: No
	US: Yes, MCA	US: Yes, ICCA
	State: No (unless PL 280)	State: No (unless PL 280)
Non-Indian	Tribe: Yes	Tribe: No
	US: Yes, ICCA, MCA	US: No
	State: No, (unless PL 280)	State: Yes, <i>McBratney</i>

P.L. 280

Congress mandated state civil and criminal jurisdiction in five states in 1953

Other states given option to assume jurisdiction without tribal consent

U.S. retains concurrent criminal jurisdiction in non-mandatory states. See Proposed DoJ Rule, 76 Fed. Reg. 28675, 29676 (May 23, 2011)

1968 Amendments

- States may assert jurisdiction only with tribal consent
- Prior assumptions to remain in effect (including Washington)
- States allowed to retrocede jurisdiction to the United States, but no role for tribes

WA Statute (1963)

- The state of Washington assumes criminal and civil jurisdiction over Indians and Indian territory:
- But this does not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation, except in 8 subject matter areas:

No Civil Regulatory Jurisdiction

- *Bryan v. Itasca County* (PL 280 does not provide states with taxing authority; it simply opens state courthouse door to resolve private civil disputes)
- *California v. Cabazon Band* (merely attaching criminal penalties to civil regulations does not make them enforceable as within PL 280s grant of criminal jurisdiction)

Example

- Because Washington asserted jurisdiction over operation of motor vehicles on public roads, state courts may entertain personal injury lawsuits arising within reservations on tribal roads. *McRea v. Denison*.
- Washington may not enforce civil regulatory rules such as speeding regulations against Indians because they are an exercise of regulatory power. *Confederated Tribes of Colville Reservation v. State*.

State Criminal Jurisdiction in Indian Country Washington PL 280 (partial)

	Defendant	
	Indian	Non-Indian
	State has jurisdiction over Indians on <u>all Indian country outside of reservation boundaries</u>	State has jurisdiction over non-Indian defendants on all land within Indian country
	<p>State has <u>no</u> jurisdiction over Indians <u>on tribal trust or allotted lands within reservation boundaries, except</u> for:</p> <ol style="list-style-type: none"> 1. Compulsory school attendance; 2. Public assistance; 3. Domestic relations; 4. Mental illness; 5. Juvenile delinquency; 6. Adoption proceedings; 7. Dependent children; and 8. Operation of motor vehicles upon the public streets, alleys, roads and highways 	

Full P.L. 280 Reservations (Based on 1957 Statute)

- Tribe Subject to Full State Civil Adjudicatory and Criminal over all of Indian Country.
 - ✓ Muckleshoot Tribe
 - ✓ Squaxin Island Tribe
 - ✓ Nisqually Tribe
 - ✓ Skokomish Tribe

Partial P.L. 280 Reservations

Puyallup Tribe; Quileute Tribe Quinault Nation;
Shoalwater Bay Tribe; Spokane Tribe

Suquamish Tribe; Swinomish Tribe; Tulalip Tribes;
Chehalis Tribe

Colville Tribe; Yakama Nation; Hoh Tribe; Kalispel
Tribe

Lower Elwha Klallam Tribe; Lummi Nation; Makah
Nation

Port Gamble S' Klallam Tribe

Retrocession

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to [P.L. 280].

25 U.S.C. § 1323.

Presidential Proclamation Delegating Authority to Secretary of the Interior

United States may accept retrocession of jurisdiction upon publication of acceptance in federal register.

“Provided, That acceptance [by the Secretary of the Interior] of such retrocession [by a state] of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General.”

33 Fed. Reg. 17339 (1968) (LYNDON B. JOHNSON)

WA Retrocession

- It is the intent of the legislature to authorize a procedure for the retrocession, to the Quileute Tribe, Chehalis Tribe, Swinomish Tribe, Skokomish Tribe, Muckleshoot Tribe, Tulalip Tribes, and the Colville Confederated Tribes of Washington and the United States, of criminal jurisdiction over Indians for acts occurring on tribal lands or allotted lands

Current Criminal Retrocession Statute

- [Upon request of enumerated tribes] the governor may, within ninety days, issue a proclamation retroceding to the United States the criminal jurisdiction previously acquired by the state over such reservation. However, the state of Washington shall retain jurisdiction as provided in RCW [37.12.010](#).
- RCW 37.12.120

Resources

- Cohen's Handbook of Federal Indian Law (2005 ed. & 2009 Supp.)
- Anderson, et al., American Indian Law: Cases and Commentary (2d Ed. 2010)
- Canby, American Indian Law in a Nutshell (5th ed. 2009)