Memorandum

Re: Criminal and Civil Jurisdiction & P.L. 280

By: Robert T. Anderson, Professor
University of Washington Law School
Director, Native American Law Center

Date: March 3, 2011

Introduction

This paper addresses the effect of proposed legislation (HB 1773 and HB 1448) upon the civil and criminal jurisdiction of the state, United States and Indian tribes within Indian country in Washington. The main points that have come up are addressed in the bullet points and expanded upon in the sections that follow. I have attached a general Q & A on Public Law 280 by Professor Carole Goldberg of the UCLA Law School.

- As a general matter, states lack civil and criminal jurisdiction over Indians and tribes within Indian country unless Congress authorizes a state to exercise jurisdiction. Conversely, states generally have jurisdiction over Indians outside Indian country, unless a treaty or other federal law preempts state law.

- Indian country is defined in federal law and includes reservations, dependent Indian communities and allotments. 18 U.S.C. § 1151. It is important to note that the Indian country definition includes fee land owned by non-Indians within reservations, and state rights of way running through Indian reservations

- A federal law passed in 1953, Public Law 280 (P.L. 280), authorized states to unilaterally assert jurisdiction over Indian country. Washington accepted some criminal and civil jurisdiction through laws passed 1957 and 1963. *See* RCW 37.12.100 - .130.

- In 1968 Congress repealed the part of PL 280 that allowed states to acquire jurisdiction without tribal consent. It also amended the remainder by providing that "[t]he 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 the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588). . . ." 25 U.S.C. § 1323.

- The Secretary of the Interior is authorized to accept a retrocession from a state only after consulting with the Attorney General. Exec. Order No. 11435, 33 Fed.

Reg. 17339 (1968). He or she is not required to accept the retrocession. As a practical matter, the Secretary considers the law enforcement capacity of the tribe and the United States with respect to any retrocession in order to avoid a decrease in on-the-ground law enforcement. Also, the views of the Justice Department would carry great weight since the local U.S. Attorney and FBI would have increased obligations after any retrocession.

- The bills pending in the state legislature would require the Governor to retrocede, or give back, upon tribal request part, or all, of the jurisdiction that the state acquired pursuant to P.L. 280. This could include off-reservation trust, or restricted lands, or be limited to reservation depending on the wishes of the affected tribe. The bills allow a tribe to seek retrocession of only on-reservation matters, or particular subject matter in the civil or criminal contexts.

- Tribes would continue to have criminal jurisdiction over their own members and members of other federally recognized tribes. They would not have criminal jurisdiction over non-Indians.

- The proposed legislation would not alter the balance of tribal and state civil regulatory authority in Indian country. That area would remain complex and confusing, but unaffected by the proposed legislation.

- The state would continue to have exclusive jurisdiction over crimes by non-Indians v. non-Indians. The United States is only authorized to accept the retrocession of jurisdiction provided to states under P.L. 280. State jurisdiction over non-Indian v. non-Indian crime was not granted by P.L. 280.

I. P.L. 280's Limited Grant of Civil Jurisdiction

States did not gain any authority to regulate civil activities in Indian country through P.L. 280. *Bryan v. Itasca County*, 426 U.S. 373 (1976) (no authority under P.L. 280 to tax personal property of tribal member). The Supreme Court stated that it "was not the Congress's intention to extend to the States the 'full panoply of civil regulatory powers,' but essentially to afford Indians a judicial forum to resolve disputes among themselves and with non-Indians." *Id*.

II. Washington's Limited Acceptance of Jurisdiction

In 1957, Washington offered to accept full jurisdiction over any reservation in the state upon request from the tribe. 1957 Wash. Laws ch. 240. Of the ten tribes that requested such jurisdiction, only four remain subject to full jurisdiction since the state retroceded jurisdiction on the other six reservations. The latter six are now subject to the same P.L. 280 scheme as other recognized tribes in 1963.[1]

[1] There are several reservations established after 1968 that are not subject to P.L. 280 at all.

In 1963 Washington asserted civil and criminal jurisdiction: (1) over all off-reservation Indian country; (2) over all reservations, but this assertion does not extend to Indians when on trust or restricted lands within reservations; and (3) over Indians on trust or restricted lands within reservations in the following eight subject matter areas.

(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.

The example of highways. Washington State asserted criminal jurisdiction over operation of motor vehicles on all roads under paragraph (8) above. However, Washington cannot regulate speeding by tribal members because it is not a criminal offense, but only a civil infraction sanctioned by a fine. *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991). The tribe would have authority to regulate speeding by members on reservation roads.

Because Washington asserted civil jurisdiction over operation of motor vehicles on public roads, state courts may entertain personal injury lawsuits among Indians arising within reservations on tribal roads, *McRea v. Denison*, 885 P.2d 856 (Wash. App. 1994). Such jurisdiction would disappear if jurisdiction were retroceded, but under *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) the state would presumably have authority to adjudicate cases involving only non-members on state highways.

III. Tribal Jurisdiction.

Tribes have full civil jurisdiction over their own members regarding activities arising within Indian country, and it is concurrent with state and federal jurisdiction.

Tribal civil jurisdiction over non-members exists when non-members are engaged in activities on tribal lands that involve the tribe or its members. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) (tribe may tax non-member purchases of cigarettes); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal may tax oil and gas production by non-Indian company on tribal land).

There is a presumption that tribes may not regulate the activities on non-Indians on fee land within reservations. *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In *Montana*, the Court set out two exceptions to this general presumption against tribal jurisdiction:

i) a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

ii) a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

The exceptions to the presumption have been very narrowly construed. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

Retrocession of jurisdiction would not affect the scope of tribal civil jurisdiction over non-Indians. State courts would lose civil adjudicative jurisdiction over matters involving tribal members within Indian country.

IV. Criminal Jurisdiction Over Indian Country in Non-P.L. 280 Jurisdictions[2]

A. Tribal Jurisdiction

Indian Tribes have criminal jurisdiction over their own members and other Indians who are members of federally recognized tribes. *See United States v. Lara*, 541 U.S. 193 (2004). Criminal penalties are limited to one year in jail and/or $5,000 per offense, or possibly to a total of nine years in jail and a $15,000 fine under procedures prescribed in the Tribal Law and Order Act of 2010. *See* 25 U.S.C. §§ 1302 (a)(7) & 1302 (b). In cases where the federal government has jurisdiction (see below), tribal criminal jurisdiction over Indians would be concurrent.

Tribes have no criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Tribal police do have "authority to stop and detain a non-Indian who allegedly violates state and tribal law while traveling on a public road within a reservation until that person can be turned over to state authorities for charging and prosecution." *State v. Schmuck*, 850 P.2d 1332 (Wash. 1993). This rule also extends to fresh pursuit off of reservations. *State v. Eriksen*, 241 P.3d 399 (Wash. 2010). Both state and federal law provide for cross-commissioning of tribal and state law enforcement officials to allow such officers to enforce applicable state and federal law under these arrangements. Tribes may do the same under their laws if they so choose.

B. State Jurisdiction

The State has no jurisdiction over tribal members, or other Indians who are members of federally recognized tribes for crimes committed within Indian country.

[2] A chart reflecting the criminal jurisdiction rules is attached.

The State has jurisdiction over crimes committed by non-Indians against other non-Indians within Indian country. *United States v. McBratney*, 104 U.S. 621 (1882); *Draper v. United States*, 164 U.S. 240 (1896).

C. Federal Jurisdiction

In Indian Country, the federal government has jurisdiction under the Major Crimes Act (MCA), 18 U.S.C. § 1153, over 16 enumerated crimes when committed by Indians against other Indians or non-Indians.[3]

The Indian Country Crimes Act (ICCA), 18 U.S.C. § 1152, extends to Indian Country those federal criminal laws that apply to areas of exclusive federal jurisdiction such as military bases and national parks.[4] The ICCA applies where a tribal member and a non-Indian are involved as victim and perpetrator. Thus, the defendant in such a case may be an Indian or a non-Indian. Crimes committed by Indians which are not covered by the Major Crimes Act, are included under this category of offenses. The ICCA has important exceptions. First, Indian v. Indian crimes are not covered.[5] Second, if an Indian has first been punished for a crime under tribal law, he or she may not be prosecuted under the ICCA for the same offense.

END

---

[3] "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, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title 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." 18 U.S.C. § 1153.

[4] The ICCA also includes state law crimes under the Assimilative Crimes Act (ACA). 18 U.S.C. § 13. The ACA fills gaps in the federal criminal code by incorporating state law offenses into the federal code. Thus, if a crime committed in Indian country is not covered by the MCA, or directly by the federal criminal code, a federal prosecutor may apply state criminal law through the Indian Country Crimes Act. *See Williams v. United States*, 327 U.S. 711 (1946) (assuming that the ACA was subsumed within the ICCA) and COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 734 (2005).

[5] Victimless crimes such as adultery also are not covered by the ICCA. *United States v. Quiver*, 241 U.S. 602, 605-606 (1916). *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 735-736 (2005) (citing and criticizing lower court cases that have not followed *Quiver*).

Questions and Answers about Public Law 280

by Carole Goldberg

Carole Goldberg is Jonathan D. Varat Distinguished Professor of Law at UCLA Law School and Director of UCLA's Joint Degree Program in Law and American Indian Studies. She is a leading authority on Public Law 280.

How did Public Law 280 change the rules of jurisdiction for reservations and others in Indian Country?

Before Public law 280 was enacted, the federal government and the tribal courts shared jurisdiction exclusive of the states, over almost all civil and criminal matters involving Indians on the reservations. With the enactment Public Law 280, affected states received criminal jurisdiction over reservation Indians. In addition, Public law 280 opened state courts to civil litigation that previously had been possible only in tribal or federal courts. In the six states actually named in Public Law 280, the federal government gave up most of its special criminal jurisdiction over crimes involving Indian perpetrators or victims.

Did Public Law, 280 change the trust status of Indian land or exclude Indian land or exclude Indians in affected states from receiving benefits under federal Indian programs?

Public Law 280 did not affect the trust status of Indian Lands. Neither did it exclude Indians in affected states from receiving benefits under federal Indian programs, such as the Indian Health Service or Indian education grants. However, the Bureau of Indian Affairs has sometimes used Public Law 280 as an excuse for reducing or eliminating funding for federal Indian programs in affected states. For example, when California came under Public law 280, the Bureau eliminated funding for certain education programs. This response by the Bureau cannot be justified by the language of Public Law 280, and the Bureau has begun restoring the benefits that were withdrawn after enactment of Public Law 280.

Which states are affected by Public Law 280?

The "mandatory" states, required by Public Law 280 to assume jurisdiction, are Alaska, California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs). and Wisconsin. The "optional" states, which elected to assume full or partial state jurisdiction, are Florida (I961), Idaho (1963, subject to tribal consent), Iowa (1967),

Montana (1963), Nevada (1955), North Dakota (1963, subject to tribal consent), South Dakota (1957-61), Utah (1971), and Washington (1957-63). Some of these states have subsequently retroceded some or all of their Public Law 280 jurisdiction.

Did tribes have to give their consent before Public Law 280 would take effect?

For the six states named in Public Law 280, state jurisdiction was put into effect without securing prior consent of the affected tribes. Some of the "optional" states voluntarily chose to assume jurisdiction only over tribes that consented. In 1968 Public Law 280 was amended to require consent for any future state jurisdiction under Public Law 280. However, tribes could not undo state jurisdiction established between 1953 and 1968.

What is retrocession? How can retrocession be initiated under Public Law 280?

Initially, Public Law 280 did not contain a provision permitting the states and the tribes to demand the return or "retrocession of state Public Law 280 jurisdiction to the federal government. However, in order to relieve the states' financial difficulties with Public Law 280, the 1968 Civil Rights Act enabled the states that had assumed Public Law 280 to offer the return of all or any measure of the jurisdiction to the federal government. The federal government would have the final say on whether to accept the retrocession. Not only were the Indians given no veto power over state-initiated retrocession, they had no way of imposing retrocession on an unwilling state that had acquired jurisdiction.

Are there any limits to state authority under Public Law 280?

States may not apply laws related to such matters as environmental control, land use, gambling, and licenses if those laws are part of a general state regulatory scheme. Public Law 280 gave states only law enforcement and civil judicial authority, not regulatory power. It also denied states power to legislate concerning certain matters, particularly property held in trust by the United States and federally guaranteed hunting, trapping, and fishing rights. The state cannot tax on the reservations. The United States Supreme Court has interpreted Public law 280 as a statute designed to open state courts to civil and criminal actions involving reservation Indians, not to subject reservations to the full range of state regulation. Finally, there are some matters so central to the very definition of the tribe, such as enrollment and certain domestic relations matters, that even state courts may be excluded from hearing such matters.

Are municipal and county laws applicable under Public Law 280?

Public law 280 may have rendered only statewide law applicable to reservation Indians, excluding municipal and county laws There are some judicial decisions that reject the application of local law to Indian reservations under P.L. 280. The rationale that courts have used to justify excluding local laws is that Public Law 280 was not intended to deny tribes their basic governmental functions.

Have any federal laws enacted after Public Law 280 reduced state authority on reservations?

Certain federal statutes enacted alter Pubic Law 280 have reduced the amount of jurisdiction available to states under the 1953 law, simultaneously increasing tribal sovereignty or federal power. In 1978, Congress enacted the Indian Child Welfare Act, which gives tribes exclusive jurisdiction over certain child custody proceedings involving Indian children. The act also regulates some other aspects of child custody. The Indian Gaming Regulatory Act of 1988 is another federal statute that supersedes or preempts P.L. 280. It makes enforcement of state gambling laws a federal rather than a state responsibility.

Can tribes have their own courts and systems of laws in Public Law 280 states?

Indian tribes have inherent sovereign authority. Most courts and attorneys general have found that under Public Law 280, the tribes have retained civil jurisdiction over activities within Indian Country as well as criminal jurisdiction over Indians. A few states, such as California, dissent from this view.