

# “RETROCESSION OF PUBLIC LAW 280 JURISDICTION”

Dorothy Alther, Executive Director  
California Indian Legal Services  
October 15, 2015

# Public Law 280

- \* Passed in 1953;
- \* P.L. 280's criminal provision (18 U.S.C. § 1162) took federal criminal jurisdiction under the **Indian Country Crimes Act (aka General Crimes Act)** and the **Major Crimes Act** out of Indian Country in 5 states;
  - \* California, Minnesota, Nebraska, Oregon, and Wisconsin (commonly referred to as the “mandatory states”)
- \* Federal jurisdiction was replaced with state criminal jurisdiction and is exercised concurrently with the Tribes.

# RETROCESSION—THE PROCESS

- \* Tribal consent was not required before a mandatory State accepted criminal jurisdiction under P.L. 280;
- \* In 1968 Congress passed Indian Civil Rights Act (ICRA) which now requires tribal consent before the federal government may transfer its jurisdiction to a state;
- \* Also, the ICRA provides the method for states to return (retrocede) P.L. 280 jurisdiction back to the federal government. The state can retrocede all or any part of the criminal or civil jurisdiction acquired pursuant to PL 280 (25 U.S.C. § 1323)

# State Political Process

- \* There is no provision for tribal consent to a state seeking retrocession or for **a tribe to initiate and pursue retrocession;**
- \* If a tribe wants to influence the process it must do so by political means;
- \* The Secretary has discretion on whether to accept or reject a state's retrocession request.

# HOW IT IS WORKING

- \* Last count is there are over 150 Tribes subject to PL 280 in the lower 48, only 31 have successfully retroceded since 1968, and only 7 of those are from one of the 5 “mandatory ”states.

# JURISDICTION WITHOUT P.L. 280

- \* State steps out of Indian Country and criminal jurisdiction becomes federal and/or tribal;  
**except**
- \* For crimes committed by non-Indians against non-Indians.

# JURISDICTION WITHOUT P.L. 280

- \* **Indian Country Crimes Act** (aka General Crimes Act), 18 U.S.C. 1152, extends all general criminal laws of the United States to “Indian Country”
- \* Its primary purpose is to prosecute non-Indians committing major crimes against an Indian (exclusive federal)
- \* Non-major crimes committed by Indian defendant against non-Indian (concurrent federal and tribal unless tribe prosecutes first)

# JURISDICTION WITHOUT P.L. 280

- \* **Major Crimes Act**, 18 U.S.A. 1153, 14 major crimes applicable in “Indian Country” where the defendant is an Indian and regardless of who the victim is. Concurrent federal and tribal jurisdiction;
- \* *Ex Parte Crow Dog*-Indian murdered another Indian, no jurisdiction under General Crimes Act—needed new federal criminal statute.



# JURISDICTION WITHOUT P.L. 280

## Why More Complicated

- \* Who has jurisdiction starts with asking:
  - Is the perpetrator Indian or non-Indian?
  - Is the victim Indian or non-Indian?
  - Did the crime occur in “Indian Country”
    - reservation
    - allotment
    - dependent Indian community?

# Some of the Realities on How it Would Work

- \* NON-INDIAN CRIME:

- \* Felony Crimes---committed by non-Indian falls exclusively to the federal government;
- \* Misdemeanor---federal and **may be no prosecution**

- \* INDIAN CRIME:

- \* Felony Crimes---**maybe** federal prosecution (concurrent federal and tribal unless tribe prosecutes first)
- \* Misdemeanor---exclusively tribal jurisdiction

# How It Would Work

- \* Failure of the fed's to prosecute **non-Indians**, even if major, under the Indian Country Crimes Act is a problem seen in non-PL 280 states
- \* TLOA devotes considerable provisions on the “declination” process;
- \* The tribe is left with prosecuting the majority of crime occurring in its reservation;
- \* Tremendous resources would be needed.

# Examples of Crimes Left to the Tribe

- \* DUI
- \* Drug related crimes (possession, distributing, manufacturing, etc.)
- \* Domestic Violence (VAWA –criminal jurisdiction of non-Indians)
- \* Assault (can be major or misdemeanor)
- \* Trespass
- \* Breaking and Entering

# What Tribes Will Need

- \* Court system to address volume of cases;
- \* Court administrative capacity—jury trials, filing system,
- \* Prosecutors
- \* Public Defenders (keep it under one year)
- \* Probation Officer and department
- \* Criminal Codes

# What Tribes Will Need

- \* LAW ENFORCEMENT DEPARTMENTS—
  - \* Trained officers
  - \* Officer equipment (vehicles, radios, firearms, etc.)
  - \* Department with radio communication system, dispatch, evidence room, holding cell, booking system.,

# What Tribes Will Need

- \* Ability to incarcerate both short and long term!
  - \* Pre-trial detention
  - \* Misdemeanor sentences of 6 -12 month sentences
  - \* Long term prison sentences.
- \* Bureau of Prisons---pilot project of holding 100 beds for Native American inmates sentenced by tribal courts under enhanced sentencing provisions of the amended ICRA.

# Political Reality - Push Back

- \* State and local law enforcement
  - \* Safe haven for criminals
  - \* Tribes are not capable of effective justice systems
- \* Bureau of Indian Affairs
  - \* Do not fund law enforcement and courts in PL 280 states—there is no funding
- \* Department of Justice
  - \* U.S. Attorneys do not want to take on the work