Public Law 280 and Tribal Law and Order Act

January 31, 2014
California Indian Legal Services
Dorothy Alther, Executive Director
“Jurisdiction” refers to the power or authority to govern within a given territory

- It describes the **authority** of a court to deal with a dispute

- Jurisdiction is measured in terms of the power that one government or agency has in relationship to the power exercised by another

- It included the **power** of a nation or court to **make** and enforce the **laws** that govern the people within its territory
Definitions

- What does “concurrent” jurisdiction mean?
  - Simply – shared jurisdiction. Either (or sometime both) government can prosecute and convict a defendant.
  - Indian Defendant and Indian Victim: means either the federal or tribal government can prosecute. BUT the federal government will defer to the tribe if it choses to prosecute.
Definitions

- “Indian Country” is defined as an Indian reservation, an individual Indian allotment and a “dependent Indian community” (formerly the Timbisha Village)
Criminal Jurisdiction In Non-PL 280

- Non-Indian Defendant and non-Indian Victim: State has criminal jurisdiction on an Indian reservation:

- Non-Indian Defendant: Federal jurisdiction over major crimes where the defendant is non-Indian and victim is Indian—WHY? Tribes cannot prosecute or punish non-Indians. 435 U.S. 191 (1978)
Indian Defendant and Indian Victim: There is “concurrent” federal and tribal jurisdiction over major crimes on the reservation where both parties are Indian.

BUT the Indian Civil Rights Act places sentencing limitations on tribal courts, making tribal prosecution difficult.
In sum—

- Crimes involving Indians are prosecuted either in federal court or tribal court.

- There is NO state criminal jurisdiction unless the parties are both non-Indian.
Then Comes 1953

- Public Law 280 was passed in 1953—WHY?
  - Was the “Termination Era” and promote assimilation
  - Federal government was still recovering financially from WW II, and was looking at ways to spend less
  - Address “lawness” in Indian Country
Without tribal consent or consultation 5 states (California, Minnesota, Nebraska and Oregon, Wisconsin) signed up.

Their willingness to take on the responsibility was their desire to assert authority over a sovereign within their boundaries and the mistaken belief that funding and revenue would follow (Alaska was added later)
Three Areas of Jurisdiction

1. Criminal—the law violated imposes a fine, incarceration, restitution

2. Civil---the law is designed to compensate for losses, stop behavior or require behavior (injunctive, specific performance)

3. Regulatory---health and safety, zoning, building, taxation, labor, animal control
So What Did P.L 280 Do?

- P.L. 280 gave the 5 mandatory states “concurrent (shared)” jurisdiction with tribes over criminal (codified at 18 U.S.C. 1162(a) and civil matters (codified at 28 U.S.C. 1360(a) in “Indian Country.”

- **Regulatory** jurisdiction remains exclusively tribal.
Express Exceptions To The Grant of State Concurrent Jurisdiction

State has no jurisdiction to:

--probate trust lands;
--tax trust lands;
--regulate use or encumber trust lands;
--determine ownership or right of possession (landlord/tenant);
--county and city laws are not applicable to Indian Country (animal control); or
--abrogate tribes’ federally protected hunting and fishing rights
Lack of BIA funding for law enforcement and tribal courts, thus fewer tribal courts and tribal law enforcement being developed;

Still jurisdictional vacuums and “lawlessness”
Example, a tribal member with allotment-permits open dump on his allotment. No state regulatory jurisdiction can be enforced, EPA has limited and enforcement capacity and the Tribe doesn’t have tribal laws, a court, or tribal law enforcement to stop it.
Tribal Law and Order Act (TLOA)

- Passed on June 23, 2010
  A. Federal Accountability and Coordination
  B. State Accountability and Coordination
  C. Empowering Tribal Law Enforcement Agencies and Tribal Government
  D. Tribal Justice Systems
  E. Indian Country Crime Data Collection and Information Sharing
  F. Domestic Violence and Sexual Assault Prosecution and Prevention
TLOA Overview

- The Act addresses tribal justice and law enforcement in Indian Country;
- Clarifies the responsibility of federal, state, tribal and local governments with respect to crimes committed in tribal communities;
- Increases coordination and communications among federal, state, tribal and local law enforcement;
Subtitle B-State Accountability

Amendment to P.L. 280
Subtitle B-State Accountability

- Adds a new section to 18 U.S.C. § 1162 (PL 280)
  - “... at the request of an Indian Tribe, and after consultation and consent by the Attorney General –

- (1) sections 1152 and 1153 (federal criminal statutes) shall apply in the areas of the Indian Country of the Indian tribe; and

- (2) jurisdiction over those areas shall be concurrent among the Federal Government and State Government and, where applicable, tribal government.”
Subtitle B-State Accountability

- The following Tribes have requested re-assumption:
  - Elk Valley (CA)
  - Hoopa Valley (CA)
  - Table Mountain (CA)

- White Earth (MN) has successfully had the DOJ re-assume federal criminal jurisdiction
Subtitle C - Empowering Tribal Law Enforcement and Government

Enhanced Sentencing Authority
Subtitle C-Empowering Tribal Law Enforcement and Government

- Amends to the Indian Civil Rights Act §1302.
- 1.(a) In General---No Indian tribe;
  - (A) require excessive bail, impose excessive fines etc.
  - (B) except as provided for (C) impose sentence greater than 1 yrs. and $5,000 fine;
  - (C) except as provided for under (b) impose a sentence greater than 3 yrs or a fine of $15,000;
  - (D) impose a total penalty greater than 9 yrs.
Subtitle C - Empowering Tribal Law Enforcement and Government

- A Tribe may only exercise this enhanced sentencing if:

- The defendant has a previous conviction of same or comparable offense by any jurisdiction in U.S.; or

- Is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 yr. of imprisonment if prosecuted by the U.S. or any of the States; and
Subtitle C-Empowering Tribal Law Enforcement and Government

- The defendant is provided the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution; and

- At the expense of the tribal government, provide an indigent defendant assistance of a defense attorney licensed to practice law by any jurisdiction in the U.S. that applies appropriate licensing standards and effectively ensures the competence and professional responsibilities of its licensed attorneys.
Subtitle C-Empowering Tribal Law Enforcement and Government

- The tribal court judge presiding over the applicable criminal case---
  - (i) has sufficient legal training; and
  - (ii) is licensed to practice law in any jurisdiction in the United States (state, federal or tribal); and

- Prior to charging the defendant make publicly available the criminal laws, rules of evidence, criminal rules ...of the tribal government; and

- A record is maintained of the criminal proceeding (audio or other recording.)
Subtitle C-Empowering Tribal Law Enforcement and Government

- The defendant may be ordered to serve time in:
  - (A) tribal correctional center
  - (B) appropriate federal facility, at the expense of the U.S. pursuant to the Bureau of Prisons “Tribal Prisoner Pilot Project”;
  - (C) state or local government facility approved per agreement; or
  - (D) in an alternative rehab center of the Tribe.
Subtitle C-Empowering Tribal Law Enforcement and Government

- prior to charging the defendant the tribe must make publicly available the criminal laws, rules of evidence, criminal rules …of the tribal government;

- maintain a record of the criminal proceeding (audio or other recording)
Subtitle C-Empowering Tribal Law Enforcement and Government

- If a tribe does not exercise enhanced sentencing jurisdiction these new requirements do not come into play;

- So if a tribe does not sentence an Indian to more than one year they do not need to provide the added protections under the TLOA.
Conclusion

- Under PL 280 there is Major or General Crimes criminal jurisdiction;
- Criminal jurisdiction is “concurrent” (shared) between the state and the tribe;
- TLOA amends PL 280 to allow a tribe to seek re-assumption of federal criminal jurisdiction;
Conclusion

- If re-assumed is approved criminal jurisdiction will be “concurrent” between the:
  - The federal government;
  - The state government; and
  - Where applicable, the tribal government.
Conclusion

- Federal regulations on how to request re-assumption are summarized and provided;

- White Earth Nation has successfully sought re-assumption and will discuss the;
  - Why it did so;
  - The process; and
  - The advantages.