WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 6

TO: MEMBERS OF THE SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: David Moore, Staff Attorney

RE: Retroceding Jurisdiction Acquired Under Public Law 83-280

DATE: May 15, 2013

This Memo was prepared as background for the committee's discussion on establishing a state process for retroceding jurisdiction acquired under Public Law 83-280 (P.L. 280).

BACKGROUND

Historically, state jurisdiction over Indians in Indian country has been limited. The reasons for this stem from federal policy extending back to the founding of the United States to treat Indian tribes as sovereign nations.[1] This policy is expressed in the U.S. Constitution, which grants to Congress "the power...[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and to the President, the power to make treaties, including Indian treaties, with the advice and consent of the Senate.[2] Congress solidified this relationship in a series of Trade and Intercourse Acts between 1790 and 1834 in which it established a policy based on separating Indians and non-Indians and subjecting nearly all intercourse between the two to federal control.[3]

In the early 19th Century, the U.S. Supreme Court also underscored the limited nature of the states' jurisdictional control over Indians, most notably in two decisions arising out of Georgia's interference with the Cherokee Nation's title and control over land within its reservation. In the first of these cases, the Court affirmed that the tribe was a "distinct political society...capable of managing its own affairs and governing itself."[4] In the second, the Court held that "the laws of Georgia [could] have

[1] William C. Canby, Jr., *American Indian Law in a Nutshell*, 13 (West Publishing Co. 2009).
[2] U.S. Const. art. I, s. 8, and art. II s. 2.
[3] Canby, 14.
[4] *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (U.S. 1831).

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no force" within the boundaries of the territory occupied by the Cherokee Nation; rather, intercourse between the Cherokee Nation and the States was a matter of federal law.[5]

Over time, the notion that a state law "could have no force" in Indian country was tempered. This was partially due to the development of a body of law establishing certain jurisdictional principles; for example, the principle that state laws could apply to crimes committed by non-Indians against non-Indians in Indian country. However, the increasing applicability of state law in Indian country was also the result of the federal policies of assimilation and termination, which were aimed at eliminating tribes as distinct political societies.

Assimilation Era

The policy of assimilation was primarily carried about by the General Allotment Act of 1887, which authorized the President to allot portions of reservation land to individual Indians. Under the Act, the United States would hold the allotments in trust for 25 years; after that period, the land would be conveyed to the Indian in fee. For a variety of reasons, many of these allotments were sold, and at disadvantageous terms to the Indians, once they were converted to fee status. This resulted in: (1) a substantial diminution of Indian-held land; and (2) reservations being disaggregated into a "checkerboard" of jurisdictions, which substantially eroded the ability of tribes to exercise control over their land. The policy of allotment ended with the passage of the Indian Reorganization Act of 1934, which restored to tribal ownership certain lands that had not yet been sold, but the checkerboard nature of many reservations remained.

Termination Era

By the early 1950s, federal policy again returned to eliminating the political status of tribes, and in 1953, Congress formally adopted a policy of termination, expressed in House Concurrent Resolution 108, which expressly articulated:

> The policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship."[6]

In that same resolution, Congress terminated federal recognition of several tribes, including the Menominee Tribe.

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[5] *Worcester v. Georgia*, 31 U.S. 515, 561 (U.S. 1832).
[6] H. Con. Res. 108, 83rd Cong., 1s Sess. (1953).

Public Law 280

Concurrent with its adoption of the policy of termination,[7] Congress also passed P.L. 280. P.L. 280 transferred criminal jurisdiction and civil adjudicatory jurisdiction over Indians in Indian country[8] from the federal government to six states, with exceptions for certain reservations, and authorized other states to assume jurisdiction in Indian country as well. The original five mandatory P.L. 280 states are: California, Minnesota, Nebraska, Oregon and Wisconsin.[9] Alaska was added as a mandatory P.L. 280 state when it was admitted to the Union.

Very broadly, prior to the passage of P.L. 280, criminal jurisdiction over Indians in Indian country was shared by the federal government and the tribes. States, however, had jurisdiction over crimes between non-Indians and victimless crimes by non-Indians.[10] (This is currently the case on reservations not subject to P.L. 280.) P.L. 280 also granted states jurisdiction over certain civil matters. Specifically, the civil jurisdiction conferred by P.L. 280 is adjudicatory, meaning that it pertains to civil actions involving the resolution of disputes, not civil actions involving the regulation of activities.

A complete discussion of the issues surrounding P.L. 280's grant of jurisdiction to the states is beyond the scope of this Memo. Suffice it to say that various aspects of the law have engendered a fair amount of criticism since its passage. One commentator describes some of these criticisms as follows:

> State governments resented the fact that they were given the duty of law enforcement without the means to pay for it; Congress neither appropriated funds for that purpose nor rendered Indian Lands taxable by the states. The tribes, on the other hand, resented the fact that state jurisdiction was thrust upon them without their consent and they particularly objected to the provision that additional states could acquire jurisdiction without even consulting the concerned tribes.[11]

Self-Determination Era

In part due to these criticisms, and in part due to another shift in federal policy, which embraced tribal self-determination and autonomy, Congress passed the Indian Civil Rights Act of 1968 (ICRA). Among other provisions, ICRA amended P.L. 280 to: (1) prohibit states from assuming jurisdiction over a tribe absent the tribe's consent; and (2) authorize states that had acquired jurisdiction under P.L. 280 to retrocede this jurisdiction back to the federal government. Since 1968, approximately 30 tribes have achieved full or partial retrocession of state jurisdiction.[12]

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[7] House Concurrent Resolution 108 was approved the same day that P.L. 280 was passed by the House. [*Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 489, n. 32 (U.S. 1979).]

[8] Under federal law, "Indian country" includes: (a) all lands within the limits of a reservation; (b) all dependent Indian communities; and (c) all Indian allotments. [18 U.S.C. 1151.]

[9] When federal recognition of the Menominee Tribe and the Menominee Reservation was restored in 1973, the Menominee Reservation was not subjected to P.L. 280.

[10] Carole Goldberg & Duane Champagne, "Symposium: Indian Law at a Crossroads: Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last," 38 Conn. L. Rev. 697, 699.

[11] Canby, 258.

[12] Robert T. Anderson, "Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280," 87 *Wash. L. Rev.* 915, 946 (2012).

RETROCEDING JURISDICTION UNDER ICRA

The provision in the U.S. Code authorizing states to retrocede P.L. 280 jurisdiction does not specify any particular process a state must use to accomplish the retrocession. Rather, it simply provides as follows:

> 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 the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953....[13]

By Executive Order, the Secretary of the Interior is the President's designee to exercise the authority to accept a state's retrocession. Prior to accepting a retrocession of criminal jurisdiction, the Secretary of the Interior must consult with the Attorney General.

The contours of how a state will retrocede jurisdiction must be determined on a state-by-state basis. Further, because a retrocession may be of all or part of the jurisdiction acquired under P.L. 280, the post-retrocession jurisdictional arrangements will vary from circumstance to circumstance. It is possible, however, to identify certain elements of how retroceding P.L. 280 jurisdiction would affect a state. For example, following retrocession:

- A tribe would not have criminal jurisdiction over non-Indians.
- The state would continue to have exclusive jurisdiction over crimes committed by non-Indians against non-Indians.
- Jurisdiction for crimes committed by non-Indians against Indians would be exclusively federal.
- The balance of civil regulatory authority in Indian country would remain the same.

Washington

Recent legislation in the State of Washington provides an example of how one state has developed a process for retroceding P.L. 280 jurisdiction. Washington's retrocession legislation began with a bill, introduced during the 2011 Legislative Session, which required the Governor to issue a proclamation retroceding state criminal jurisdiction if requested by an Indian tribe. That bill did not pass, but it generated such interest from tribes, the U.S. Attorney's office, and state law enforcement entities, that the Governor, Speaker of the House, and President of the Senate subsequently appointed a Joint Executive-Legislative Workgroup to consider retrocession issues before the 2012 Legislative

[13] 25 U.S.C. s. 1323.

Session.[14] Membership of the Workgroup consisted of legislators, tribal chairpersons, executive agency staff, federal, state and local law enforcement, local government officials, and academics.[15]

The Workgroup met four times over five months to hear testimony from experts and stakeholders, discuss relevant issues, and develop a draft bill providing a process for retrocession.[16] The expert testimony the committee heard included presentations on the following issues:

- Mental health.
- Public assistance.
- Compulsory school attendance.
- Juvenile delinquency.
- Dependent children, adoption, and the Indian Child Welfare Act.
- The effect of civil retrocession on tribes, counties, cities, and the state.
- Jurisdiction over highways and roads.
- Pre-retrocession and pre-retrocession criminal jurisdiction.
- The federal approval process for proposed state retrocession.

The result of the Workgroup's efforts was House Bill 2233, which was introduced on January 5, 2012 and signed into law on March 19, 2012. Robert T. Anderson, Professor of Law at the University of Washington and member of the Workgroup, has explained that the goal of the Workgroup in drafting this bill was to "understand the complex legal and policy issues implicated in Indian country...[,] how tribal desires for retrocession could best be accomplished, and the effects of retrocession on both Indian and non-Indian parties."[17] To that end, the legislation "provides for non-tribal input to a process that tribes may initiate and present directly to the Governor."[18]

The process this legislation provides, according to Professor Anderson, is as follows:

1. The governing body of a tribe submits a resolution to the Governor requesting retrocession with information regarding the tribe's plan to exercise jurisdiction after retrocession.

2. Within 90 days of receiving the resolution, the Governor must convene a government-to-government meeting with the tribal governing body or its designated representatives. The

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[14] Anderson, 947.
[15] http://www.leg.wa.gov/JointCommittees/JELWGTR/Pages/Members.aspx.
[16] Anderson, 948. Additionally, the workgroup's committee materials are available at: http://www.leg.wa.gov/JointCommittees/JELWGTR/Pages/Meetings.aspx.
[17] Anderson, 950.
[18] *Id.*

Governor's office must also consult with elected officials of state political subdivisions located near the Indian tribe's territory.

3. The Governor has one year after receiving the tribal resolution to approve or deny the request in whole or in part, although extensions may be made for any term by agreement, or unilaterally by either party for six months. Any denial of a tribal request must be supported by reasons set out in writing by the Governor. If accepted, a proclamation to that effect must be issued and forwarded on to the Secretary of the Interior within 10 days.

4. Within 120 days of receiving the tribal resolution, but before approving it, designated standing committees of each house in the Legislature must be notified, and they may have hearings and make non-binding recommendations to the Governor.

5. The proclamation for retrocession will not be effective until accepted by a duly designated officer of the U.S. government.

6. If the proclamation addresses jurisdiction over public roads, the Governor must consider: (a) whether tribal interlocal agreements exist with other jurisdictions that address uniformity of motor vehicle operations in Indian country; (b) whether there is a tribal police department to ensure safety; (c) whether the tribe has traffic codes and courts; and (d) whether there are appropriate traffic control devices in place.

7. The legislation contains savings clauses that reserve any state jurisdiction over civil commitment of sexually violent predators under state law, and ensures that cases commenced in state courts or agencies prior to the effective date of a retrocession may continue. It also provides that the tribes covered by the existing partial retrocession scheme would remain eligible to use that mechanism.[19]

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[19] Anderson, 948-50.