

Tribal Court Jurisdiction – A Brief Overview
For the Willamette Valley American Inn of Court
April 15, 2010

Presentation by
Edmund Clay Goodman
Hobbs, Straus, Dean, & Walker, LLP
806 S.W. Broadway, Suite 900
Portland, OR 97205
(503) 242-1745
egoodman@hobbsstraus.com

I. Introduction

- A. The rules and understandings governing tribal court jurisdiction are complex, and involve consideration of a variety of factors.
- B. Tribal Courts exercise jurisdiction within a tribe’s “Indian country,” with some exceptions (Indian Child Welfare, off-reservation hunting and fishing exercised pursuant to treaty rights). Indian country includes reservation lands, “informal reservations,” lands held in trust by the United States for the tribe, lands held in trust by the U.S. for individual Indians, lands specially set aside as Indian country by Congress, and lands that comprise “dependent Indian communities.” *See* 18 U.S.C. § 1151 (defining “Indian country” for criminal jurisdictional purposes).
- C. Yet Indian country is a jurisdictional maze. The court with jurisdiction over a particular act will vary depending on whether the victim and/or offender is Indian or non-Indian, whether the issue is a civil or criminal matter, if criminal, the nature of the crime, whether the land at issue is held in fee or trust, and whether the State where the Indian country is located is covered by Public Law 280.

II. Criminal Jurisdiction

- A. In 1883, United States Supreme Court recognized that Indian tribes possessed exclusive jurisdiction over crimes committed by one tribal member against another on that tribe’s reservation. *Ex parte Crow Dog*, 109 U.S. 556 (1883).
- B. *Crow Dog* involved murder of one tribal member by another. Under the traditional tribal practices, the case was resolved in a tribal forum by an agreement between the families involved in which the killer’s family would pay \$600, eight horses, and a blanket to the victim’s family as restitution.
- C. Because the resolution did not involve the death penalty or even jail time, non-Indians, politicians, and the Bureau of Indian Affairs pressured Congress to adopt the Major Crimes Act, 18 U.S.C. § 1153, which granted the United States

- criminal jurisdiction over a list of seven “major crimes” committed in Indian country, so that penalties that the non-Indian community was more familiar with could be meted out.
- D. Indian tribes have criminal jurisdiction over criminal acts committed by Tribal members, as well as by Indians who are members of other federally-recognized tribes. 25 U.S.C. § 1301(2). *See United States v. Lara*, 541 U.S. 193 (2004).
 - E. Indian tribes’ authority to punish such criminal behavior is limited by the Indian Civil Rights Act to a maximum \$5000 fine and/or one year imprisonment. 25 U.S.C. § 1302 (7).
 - F. The United States now has jurisdiction over 14 “major crimes” in Indian country where the offender is Indian in non-P.L. 280 States (including assault, sexual assault, rape, murder, and kidnapping). 18 U.S.C. § 1153. However, tribes can prosecute the same offenders for lesser offenses arising out of the same acts without double jeopardy. *United States v. Wheeler*, 435 U.S. 313, 325-26 (1978).
 - G. Indian tribes lack criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
 - H. The Supreme Court, however, has continually recognized that tribal police may arrest and detain offenders for purposes of turning them over to the appropriate jurisdiction for prosecution, even if the tribe itself lacks criminal jurisdiction. *Duro v. Reina*, 495 U.S. 676, 697 (1990) (declaring that tribal law enforcement possessed authority “to restrain those who disturb public order on the reservation, and if necessary, to eject them”; if the tribe itself does not possess jurisdiction to try and punish an offender, “tribal officers may exercise their power to detain the offender and transport him to the proper authorities [for prosecution]”)
 - I. States have criminal jurisdiction where both the victim and the offender are non-Indian.
 - J. In certain states (not covered by Public Law 280), the United States has jurisdiction where the offender is non-Indian but the victim is Indian.
 - K. Thus, to summarize:
 - 1. Tribal courts have jurisdiction over criminal actions in Indian country where the defendant is an Indian (with the exception of “major crimes”).
 - 2. Federal courts have jurisdiction over major crimes in Indian country where the defendant is an Indian, and have jurisdiction over crimes where the defendant is non-Indian but the victim is Indian.

3. State courts have jurisdiction over crimes in Indian country where both the victim and the defendant are non-Indian.
4. Public Law 280, which will be discussed later, changes this framework, by granting the jurisdiction that the federal government has to the states, as well as granting jurisdiction over any crimes allegedly committed by Indian defendants.

III. Civil Jurisdiction

- A. Tribal courts can exercise civil jurisdiction over Indians within Indian country, whether or not the Indians involved are tribal members, under the same principles that govern criminal jurisdiction over non-Indians.
- B. Indian tribes have some degree of civil jurisdiction over non-Indians in Indian country, although there are variables that impact that jurisdiction in certain instances: the status of the land (whether it is privately-owned fee land or land held in trust by the United States), the nature of the activity at issue, and the relationship of the non-Indian to the tribe and its members.
 1. *Williams v. Lee*, 358 U.S. 217 (1959) (tribal courts have exclusive jurisdiction over civil cases on Indian lands where non-Indian sues an Indian, noting that resolution of conflicts between the jurisdiction of State and Tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them");
 2. *Montana v. United States*, 450 U.S. 544 (1981) (Indian tribes do not have jurisdiction over on-reservation activities of non-Indians on "fee" lands owned by non-Indians, unless [1] non-Indian has entered into "consensual relationships with the tribe or its members" or [2] activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").
 3. *Nevada v. Hicks*, 533 U.S. 353 (2001) (Tribal Court does not have jurisdiction in a civil rights lawsuit brought by a Tribal member against two state law enforcement officers who conducted a search on plaintiff's trust property on-reservation, with an analysis suggesting that *Montana's* general rule preempting tribal civil jurisdiction over nonmembers applies throughout Indian Country, with land status used as a factor in determining whether one of the *Montana* exceptions has been met).

IV. Public Law 280

- A. In 1953, Congress adopted what is now known as Public Law 280. Act of Aug. 15, 1953, Public Law 53-280, ch. 505, 67 Stat. 588.
- B. Public Law 280 was a grant of criminal and, to a more limited extent, civil jurisdiction to certain states over Indian country within their borders. Oregon was one of the six “mandatory” states in which Public Law 280 jurisdiction was imposed. Other states had the option to assume such jurisdiction voluntarily under the statute. However, in 1968, Congress revised the “voluntary” provisions of Public Law 280 to require tribal consent to a state’s assumption of Public Law 280 jurisdiction. The 1968 revision did not change the status of the “mandatory” states such as Oregon.
- C. The Confederated Tribes of the Warm Springs Reservation were exempted from Public Law 280. The Confederated Tribes of the Umatilla Indian Reservation in recent years executed a “retrocession” of Public Law 280 criminal jurisdiction with the State of Oregon, meaning that the Umatilla Tribe now exercises criminal jurisdiction within its reservation boundaries.
- D. The grant of criminal jurisdiction to the states under Public Law 280 is broad, and essentially provides that the states shall exercise criminal jurisdiction over offenses committed in Indian country to the same extent that the state exercises criminal jurisdiction elsewhere within its borders. 18 U.S.C. § 1162.
- E. Public Law 280, however, was a grant of jurisdiction to the states. It did not dispossess tribes of their pre-existing criminal jurisdiction over Indians committing crimes within their Indian country. Tribes and states therefore exercise concurrent criminal jurisdiction in Public Law 280 states, although as a practical matter – due to limited resources – many tribes do not exercise this concurrent criminal jurisdiction.
- F. The grant of limited civil jurisdiction to states under Public Law 280, 28 U.S.C. § 1360, has been subject to a number of legal challenges. The Supreme Court held that Public Law 280 was not a grant of tax authority to the states, *Bryan v. Itasca County*, 426 U.S. 373 (1976), nor was it a grant of general civil-regulatory jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).
- G. Public Law 280’s grant of civil jurisdiction is therefore limited to a grant of jurisdiction to state courts to hear and decide upon civil disputes between Indians or to which an Indian is a party arising in Indian country. The state court hearing such a dispute shall give full force and effect to any tribal ordinance or custom applicable to the dispute, so long as such ordinance or custom is not inconsistent with the law of the state. 28 U.S.C. § 1360(c).

III. VAWA “Full Faith and Credit” Provisions

- A. The Violence Against Women Act (VAWA), originally enacted in 1994, with several amendments since then, established grant programs to prevent violence against women and established a national domestic violence hotline.
- B. VAWA also addresses abusers who travel from one jurisdiction or another, which was often a means of avoiding enforcement of a protection order issued in one jurisdiction. Traditionally, protection orders were good only within the jurisdiction that issued the order. Most jurisdictions did not provide full faith and credit to other jurisdictions' protection orders
- C. Congress incorporated a “full faith and credit” provision in VAWA that authorizes the recognition and enforcement in State court of a protection order issued by an Indian tribe, as well as vice-versa. States and tribes must enforce all valid protection orders issued by any other State or any other tribe.

18 U.S.C. § 2265. Full faith and credit given to protection orders

(a) Full faith and credit. Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.

(b) Protection order. A protection order issued by a State, tribal, or territorial court is consistent with this subsection if--

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or counter petition. A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if--

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(d) Notification and registration.

(1) Notification. A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.

(2) No prior registration or filing as prerequisite for enforcement. Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.

(3) Limits on internet publication of registration information. A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration or filing of a protection order, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(e) Tribal court jurisdiction. For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.

18 USCS § 2266. Definitions

* * *

(5) Protection order. The term "protection order" includes--

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a

civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.