

Emergency Preparedness and Shared Jurisdiction under Public Law 280

Professor Carole Goldberg
UCLA School of Law
Native Nations Law and Policy Center

*Second Annual
Regional Emergency Preparedness Conference:
“Promoting tribal, federal, state, and local alliances”*

June 21, 2005

Outline of Presentation

- Sources of Shared/Concurrent Jurisdiction in Public Law 280 States
 - Inherent tribal authority
 - State jurisdiction under Public Law 280 and otherwise
 - What Public Law 280 Did Do
 - What Public Law 280 Did Not Do
 - Gaps and Uncertainties
 - State criminal jurisdiction outside Public Law 280
 - Remaining federal criminal jurisdiction over specific subjects
- Managing Concurrent Tribal-State Jurisdiction under Public Law 280
 - Issues and conflicts
 - Solutions and possibilities

Sources of Shared/Concurrent Jurisdiction

- Inherent Tribal Authority (ITA)
 - Predates United States and derives from tribal members
 - Supreme Court has decided that ITA no longer extends to non-Indians in criminal matters
 - Supreme Court has also denied ITA over non-Indians in civil matters on non-Indian fee lands absent consent or great tribal imperatives
 - Congress has reaffirmed that ITA extends to nonmember Indians
 - Under Indian Civil Rights Act, criminal penalties limited to one year in jail and \$5,000 fine per offense

Sources of Shared/Concurrent Jurisdiction

- **State Jurisdiction under Public Law 280 -- Which States and Tribes are Affected?**
 - **23% of reservation-based tribal population and 51% of tribes in lower 48 states; potentially all of Alaska tribes**
 - **6 “mandatory states” -- Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin; others “optional”**
 - **Some tribes excluded initially, some “retroceded” or returned to non-280 status**
 - **In Wisconsin, Menominee was excluded, 10 PL 280**
 - **In Minnesota, Red Lake was excluded and Nett Lake retroceded, 11 PL 280**

Sources of Shared/Concurrent Jurisdiction

- **State Jurisdiction under Public Law 280**
 - **General Purposes**
 - Relieve federal expenses
 - Promote forced assimilation
 - Address “lawlessness” in Indian country
 - **What Public Law 280 DID Do**
 - Eliminated most federal Indian country criminal jurisdiction
 - Authorized state criminal jurisdiction -- broadened outside control because of greater scope of state authority
 - Opened state civil courts to suits against Indians
 - After 1968, authorized retrocession upon state’s request

Sources of Shared/Concurrent Jurisdiction

- State Jurisdiction under Public Law 280
 - What Public Law 280 did NOT do
 - Terminate tribes
 - Federal recognition maintained
 - Trust status of land maintained
 - Federal obligations to provide services maintained
 - Authorize jurisdiction over tribes
 - Make state regulations applicable to Indians

Sources of Shared/Concurrent Jurisdiction

- State Jurisdiction under Public Law 280
 - What Public Law 280 did NOT do (continued)
 - Give the state taxing authority over Indians
 - Make county and city laws applicable to Indians
 - Abrogate tribes' federally protected hunting and fishing rights
 - Authorize state jurisdiction over trust lands
 - Eliminate the tribes' civil and criminal jurisdiction

Gaps and Uncertainties

- Can the state pass CRIMINAL laws that are applicable to Indian Country under Public Law 280?
 - YES
- Can the state pass CIVIL / REGULATORY laws that are applicable to Indian Country?
 - NO

Gaps and Uncertainties: When is a state law criminal and when is it civil/regulatory?

- It is Criminal/Prohibitory when –
 - Intent of state law is generally to prohibit certain conduct
 - Shorthand Test: the conduct at issue violates the State's public policy
- It is Civil/Regulatory when –
 - State law generally permits the conduct at issue, subject to regulation
- The distinction is unclear, and courts consider a variety of factors (e.g., nature of penalty, number of exceptions, revenue purpose)

Criminal/Prohibitory vs. Civil/Regulatory: Sample Problems

- State Traffic Laws
 - Speeding
 - Driving without proof of insurance
 - Driving with a suspended license
 - DUI

Gaps and Uncertainties

- Practical consequences of Public Law 280
 - Lack of federal services and funding for tribes in areas of law enforcement and tribal courts to support concurrent jurisdiction
 - Fewer or more recent tribal police departments and courts
 - According to BJS, 5 tribal police departments in Minnesota PL 280 tribes, 7 in Wisconsin as of late 1990s
 - According to BIA, 9 tribal courts in Minnesota PL 280 tribes, 10 in Wisconsin as of 2001
 - Jurisdictional vacuums and “lawlessness”
 - More recent funding through DOJ, not Interior

State Jurisdiction Outside Public Law 280

- States may claim jurisdiction and authority independent of Public Law 280
- Examples
 - Criminal jurisdiction over crimes between non-Indians
 - Victimless crimes by non-Indians
 - Civil jurisdiction over non-Indians on non-Indian-owned fee lands, at least under some circumstances

Remaining Federal Jurisdiction over Specific Subjects

- Public Law 280 didn't repeal all federal criminal jurisdiction
- Examples of remaining federal jurisdiction
 - Trespass associated with hunting and fishing
 - Liquor violations
 - Gaming offenses

Managing Concurrent Tribal/State Jurisdiction under Public Law 280

- Tribal and state authority will sometimes be shared or concurrent under Public Law 280, at least where Indian nations establish justice systems
- Examples
 - Criminal jurisdiction over Indians
 - Civil disputes against tribal members arising in Indian country (e.g., dissolution of marriage)
 - Some civil matters involving nonmembers (e.g., domestic violence protection orders)

Managing Concurrent Jurisdiction under Public Law 280: Law Enforcement

- **Examples of Law Enforcement Issues**
 - Sharing of information (e.g., CLETS)
 - Tribal police vehicles with light bars
 - Weapons carried by tribal police
 - Uncertainty about whether arrestee is tribal member

Managing Concurrent Jurisdiction: Law Enforcement Solutions and Possibilities

- **Cooperative Agreements as one Response**
 - Avoid duplication
 - Pool resources and information
 - Minimize uncertainty about legal authority and failure to respond
 - Enhance cultural sensitivity of law enforcement
 - Issues of costs and liability
 - Underlying criminal justice system unaffected, however
 - Dependent on continuing good relations among governments
- **Other responses**
 - State peace officer status
 - Federal commissions

Managing Concurrent Jurisdiction under Public Law 280: Prosecutions

- Double jeopardy issues
 - General exception to double jeopardy clause for separate sovereigns under federal law
 - E.g., Minn. Stat. Ann. § 609.045 Foreign conviction or acquittal
 - If an act or omission in this state constitutes a crime under both the laws of this state and the laws of another jurisdiction, a conviction or acquittal of the crime in the other jurisdiction shall not bar prosecution for the crime in this state unless the elements of both law and fact are identical.

Managing Concurrent Jurisdiction under Public Law 280: Prosecutions

- Cooperative agreements may coordinate prosecution
- Diversion programs from state to tribal court
 - Share resources
 - May be culturally more appropriate

Other Solutions to Problems of Concurrent Jurisdiction under Public Law 280

- **Retrocession**
 - What does it mean?
 - May be partial or full
 - Usually based on state legislation
 - Requires some negotiation with federal government
 - Has taken place in several “mandatory” Public Law 280 states as well as “optional”
 - Potential to reclaim control over criminal justice system as well as law enforcement

Implications of Public Law 280 for Emergency Preparedness

- Although Homeland Security Act of 2002 lumps Indian nations together with local governments for funding purposes, it doesn't expand state authority
- State regulatory laws can't be imposed on tribes even in Public Law 280 states
- Cooperation is more critical than ever