

Washington Legislature Passes Landmark Legislation On Jurisdiction Over Indian Country

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State Representative John McCoy advanced and obtained legislative approval of progressive and unprecedented state legislation regarding jurisdiction over lands reserved by Indian tribes in treaties and agreements. Engrossed Substitute House Bill 2233 provides a path by which Indian tribes in Washington State may obtain removal (retrocession) of any or all state criminal and civil jurisdiction granted to states in a federal law adopted in 1953 -- commonly known as Public Law 280 (P.L. 280). The new legislation was approved in the Senate on March 5, 2012 by a vote of 42-6, and in the House by a vote of 59-38 on March 6, 2012.

As a general matter, states lack civil and criminal jurisdiction over Indians within Indian country. Conversely, states generally have jurisdiction over Indians outside Indian country, unless a treaty or other federal law preempts state law (as with off-reservation treaty fishing rights in Washington). Indian country is defined in federal law and includes reservations, dependent Indian communities and allotments. 18 U.S.C. § 1151. Importantly, the Indian country definition includes non-Indian fee land within Indian reservations, and state rights of way running through Indian reservations. Prior to P.L. 280, Washington State generally had no jurisdiction over criminal or civil matters that involved Indians in Indian country. Public Law 280 mandated that six states assume jurisdiction over most Indian country in those states (not including Washington). P.L. 280 also gave states such as Washington the option to assert jurisdiction over Indian country without the consent of the affected tribal government -- a situation that is viewed as unjust in Indian country. Washington accepted some criminal and civil jurisdiction through laws passed 1957 and 1963. *See* RCW 37.12.100 - .130. The 1957 statute provided for the assumption of state jurisdiction only upon tribal request, while in 1963 the State unilaterally imposed its jurisdiction over Indians on reservations in a very complex fashion.

In 1968 Congress repealed the section of P.L. 280 that allowed states to acquire jurisdiction without tribal consent. It also amended the statute by providing that "[t]he 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 [P.L. 280]." 25 U.S.C. § 1323. The Secretary of the Interior was authorized by the President to accept a retrocession from a state only after consulting with the Attorney General. Exec. Order No. 11435, 33 Fed. Reg. 17339 (1968). He or she is not required to accept the retrocession. As a practical matter, the Secretary considers the law enforcement capacity of the tribe and the United States with respect to any retrocession in order to avoid a decrease in on-the-ground law enforcement. Also, the views of the Justice Department

carry great weight since the local U.S. Attorney and FBI would have increased obligations to enforce federal criminal laws in Indian country after any retrocession.

The Yakama Nation led the tribal effort to obtain approval of state legislation that would create a tribally-initiated path toward removal of state jurisdiction. Representative John McCoy, Senator Margarita Prentice and Senator Craig Pridemore took the lead on legislation introduced in both the House and Senate.

Representative McCoy's bill and Senator Rockefeller's bill were first introduced in the 2011 session of the legislature, but failed to pass. In June of 2011, a task force to explore the issues was formed. A letter from House Speaker Frank Chopp and Senate President Lisa Brown explained that:

It became apparent that retrocession is an issue of broad importance to the tribes; federal, state and local governments; and the citizenry of Washington. It also became apparent that retrocession is not generally understood and that a coordinated and focused effort would be necessary to give the issue the attention it deserves and allow all affected parties an opportunity to discuss and understand potential implications.

Accordingly, we are joining with Governor Gregoire to establish a Joint Executive-Legislative Workgroup on Tribal Retrocession.

The twenty-member task force met four times between July and November for in-depth discussions of the issues and development of a draft bill. In January, identical bills were introduced in both houses of the legislature, House Bill 2233 and Senate Bill 6147

Washington's new legislation authorizes the Governor to forward a Proclamation for retrocession to the Secretary of the Interior if certain conditions are met. While current law permits only the partial retrocession of criminal jurisdiction and no retrocession of civil jurisdiction, the new legislation allows for retrocession of "all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe." The process is commenced by a tribal resolution and would be carried out in the following fashion, although some of the details are omitted from this summary.

1. The process is commenced when 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 the retrocession.
2. Within ninety (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 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 (6) 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 ten (10) days.

4. Within one hundred and twenty (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 the Secretary of the Interior as provided by federal procedures (usually a Federal Register notice).

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.

Note: This section, Section 1 (8) of HB 2233, was the last amendment to the bill. An earlier Senate version required the Governor (and in some cases other state agencies) to certify that actions and agreements on the foregoing matters (including interlocal agreements) were in place. The House refused to concur in the Senate version and the language was changed to provide that the Governor should simply consider the issues in making her decision on a retrocession proclamation.

7. The legislation contains savings clauses reserving any state jurisdiction over civil commitment of sexually violent predators under state law, and ensuring that cases commenced in state courts or agencies prior to the effective date of a retrocession may continue.

After being signed by the Governor the legislation would become effective 90 days after the last day of the Regular Session of the 2012 Legislature per Washington Constitution, Article I, Section II, Subsection (c).¹

The Bill is attached.

¹ A comprehensive analysis of the statute and issues surrounding P.L. 280 will appear in a future edition of the Washington Law Review. The author of this summary was a task force member.

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 2233

62nd Legislature
2012 Regular Session

Passed by the House March 6, 2012
Yeas 59 Nays 38

Speaker of the House of Representatives

Passed by the Senate March 5, 2012
Yeas 42 Nays 6

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 2233** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 2233

AS AMENDED BY THE SENATE

Passed Legislature - 2012 Regular Session

State of Washington

62nd Legislature

2012 Regular Session

By House State Government & Tribal Affairs (originally sponsored by Representatives McCoy, Hunt, Haigh, Pedersen, Appleton, Morris, Billig, Fitzgibbon, Eddy, Sells, Tharinger, Jenkins, Hasegawa, Pollet, Wylie, Upthegrove, and Roberts)

READ FIRST TIME 01/31/12.

1 AN ACT Relating to creating a procedure for the state's
2 retrocession of civil and criminal jurisdiction over Indian tribes and
3 Indian country; and adding new sections to chapter 37.12 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 37.12 RCW
6 to read as follows:

7 (1) The process by which the state may retrocede to the United
8 States all or part of the civil and/or criminal jurisdiction previously
9 acquired by the state over a federally recognized Indian tribe, and the
10 Indian country of such tribe, must be accomplished in accordance with
11 the requirements of this section.

12 (2) To initiate civil and/or criminal retrocession the duly
13 authorized governing body of a tribe must submit a retrocession
14 resolution to the governor accompanied by information about the tribe's
15 plan regarding the tribe's exercise of jurisdiction following the
16 proposed retrocession. The resolution must express the desire of the
17 tribe for the retrocession by the state of all or any measures or
18 provisions of the civil and/or criminal jurisdiction acquired by the
19 state under this chapter over the Indian country and the members of

1 such Indian tribe. Before a tribe submits a retrocession resolution to
2 the governor, the tribe and affected municipalities are encouraged to
3 collaborate in the adoption of interlocal agreements, or other
4 collaborative arrangements, with the goal of ensuring that the best
5 interests of the tribe and the surrounding communities are served by
6 the retrocession process.

7 (3) Upon receiving a resolution under this section, the governor
8 must within ninety days convene a government-to-government meeting with
9 either the governing body of the tribe or duly authorized tribal
10 representatives for the purpose of considering the tribe's retrocession
11 resolution. The governor's office must consult with elected officials
12 from the counties, cities, and towns proximately located to the area of
13 the proposed retrocession.

14 (4) Within one year of the receipt of an Indian tribe's
15 retrocession resolution the governor must issue a proclamation, if
16 approving the request either in whole or in part. This one-year
17 deadline may be extended by the mutual consent of the tribe and the
18 governor, as needed. In addition, either the tribe or the governor may
19 extend the deadline once for a period of up to six months. Within ten
20 days of issuance of a proclamation approving the retrocession
21 resolution, the governor must formally submit the proclamation to the
22 federal government in accordance with the procedural requirements for
23 federal approval of the proposed retrocession. In the event the
24 governor denies all or part of the resolution, the reasons for such
25 denial must be provided to the tribe in writing.

26 (5) Within one hundred twenty days of the governor's receipt of a
27 tribe's resolution requesting civil and/or criminal retrocession, but
28 prior to the governor's issuance of the proclamation approving or
29 denying the tribe's resolution, the appropriate standing committees of
30 the state house and senate may conduct public hearings on the tribe's
31 request for state retrocession. The majority leader of the senate must
32 designate the senate standing committee and the speaker of the house of
33 representatives must designate the house standing committee. Following
34 such public hearings, the designated legislative committees may submit
35 advisory recommendations and/or comments to the governor regarding the
36 proposed retrocession, but in no event are such legislative
37 recommendations binding on the governor or otherwise of legal effect.

1 (6) The proclamation for retrocession does not become effective
2 until it is approved by a duly designated officer of the United States
3 government and in accordance with the procedures established by the
4 United States for the approval of a proposed state retrocession.

5 (7) The provisions of RCW 37.12.010 are not applicable to a civil
6 and/or criminal retrocession that is accomplished in accordance with
7 the requirements of this section.

8 (8) For any proclamation issued by the governor under this section
9 that addresses the operation of motor vehicles upon the public streets,
10 alleys, roads, and highways, the governor must consider the following:

11 (a) Whether the affected tribe has in place interlocal agreements
12 with neighboring jurisdictions, including applicable state
13 transportation agencies, that address uniformity of motor vehicle
14 operations over Indian country;

15 (b) Whether there is a tribal traffic policing agency that will
16 ensure the safe operation of motor vehicles in Indian country;

17 (c) Whether the affected tribe has traffic codes and courts in
18 place; and

19 (d) Whether there are appropriate traffic control devices in place
20 sufficient to maintain the safety of the public roadways.

21 (9) The following definitions apply for the purposes of this
22 section:

23 (a) "Civil retrocession" means the state's act of returning to the
24 federal government the civil jurisdiction acquired over Indians and
25 Indian country under federal Public Law 280, Act of August 15, 1953, 67
26 Stat. 588 (codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Secs.
27 1321-1326, and 28 U.S.C. Sec. 1360);

28 (b) "Criminal retrocession" means the state's act of returning to
29 the federal government the criminal jurisdiction acquired over Indians
30 and Indian country under federal Public Law 280, Act of August 15,
31 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. Sec. 1162, 25
32 U.S.C. Secs. 1321-1326, and 28 U.S.C. Sec. 1360);

33 (c) "Indian tribe" means any federally recognized Indian tribe,
34 nation, community, band, or group;

35 (d) "Indian country" means:

36 (i) All land within the limits of any Indian reservation under the
37 jurisdiction of the United States government, notwithstanding the

1 issuance of any patent, and including rights-of-way running through the
2 reservation;

3 (ii) All dependent Indian communities with the borders of the
4 United States whether in the original or subsequently acquired
5 territory thereof, and whether within or without the limits of a state;
6 and

7 (iii) All Indian allotments, the Indian titles to which have not
8 been extinguished, including rights-of-way running through the same.

9 NEW SECTION. **Sec. 2.** A new section is added to chapter 37.12 RCW
10 to read as follows:

11 A civil or criminal retrocession accomplished pursuant to the
12 procedure set forth in section 1 of this act does not:

13 (1) Affect the state's civil jurisdiction over the civil commitment
14 of sexually violent predators pursuant to chapter 71.09 RCW and the
15 state must retain such jurisdiction notwithstanding the completion of
16 the retrocession process authorized under section 1 of this act; and

17 (2) Abate any action or proceeding which has been filed with any
18 court or agency of the state or local government preceding the
19 effective date of the completion of a retrocession authorized under
20 section 1 of this act.

21 NEW SECTION. **Sec. 3.** A new section is added to chapter 37.12 RCW
22 to read as follows:

23 (1) The provisions of section 1 of this act do not affect the
24 validity of any retrocession procedure commenced under RCW 37.12.100
25 through 37.12.140 prior to the effective date of this section.

26 (2) Any Indian tribe that has commenced but not completed the
27 retrocession procedure authorized in RCW 37.12.100 through 37.12.140
28 may request retrocession under section 1 of this act in lieu of
29 completing that procedure.

30 (3) Any Indian tribe that has completed the retrocession procedure
31 authorized in RCW 37.12.100 through 37.12.140 may use the process
32 authorized under section 1 of this act to request retrocession of any
33 civil or criminal jurisdiction retained by the state under RCW
34 37.12.120 or 37.12.010.

35 (4) The provisions of RCW 37.12.120 are not applicable to a civil

1 and/or criminal retrocession that is accomplished in accordance with
2 the requirements of section 1 of this act.

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