



U.S. Department of Justice

Environment and Natural Resources Division

**MEMORANDUM FOR UNITED STATES ATTORNEYS
IN “OPTIONAL” PUBLIC LAW 280 STATES**

From: John C. Cruden, Assistant Attorney General
Sam Hirsch, Principal Deputy Assistant Attorney General

To: Michael W. Cotter, U.S. Attorney, District of Montana
Chair, Native American Issues Subcommittee, Attorney General’s Advisory Committee
Michael C. Ormsby, U.S. Attorney, Eastern District of Washington
Annette L. Hayes, U.S. Attorney, Western District of Washington
Wendy J. Olson, U.S. Attorney, District of Idaho
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cc: Sally Q. Yates, Deputy Attorney General
Ian H. Gershengorn, Acting Solicitor General
David Bitkower, Acting Assistant Attorney General, Criminal Division
Monty Wilkinson, Director, Executive Office for United States Attorneys
Tracy Toulou, Director, Office of Tribal Justice

Re: Concurrent Federal Criminal Jurisdiction Under 18 U.S.C. §§ 1152 and 1153 in
“Optional” Public Law 280 States

Date: January 18, 2017

For decades, conflicting judicial decisions and Department of Justice statements have led to uncertainty about whether the United States has concurrent jurisdiction under 18 U.S.C. §§ 1152 and 1153 over Indian-country crimes that fall within an “optional P.L. 280” State’s jurisdiction under Section 7 of Public Law No. 83-280, 67 Stat. 588, 590 (1953). The Acting Solicitor General, after reviewing prior positions of the Department and the underlying legal materials, has now concluded that the litigating position of the United States is that the United States does have this concurrent criminal jurisdiction. Your Offices therefore can bring prosecutions under 18 U.S.C. §§ 1152 and 1153, in accordance with 28 C.F.R. § 50.25(a)(2), notwithstanding any contrary view about optional P.L. 280 jurisdiction that the United States or the Office of the Solicitor General (OSG) may have previously expressed.

Because this issue is one of potentially significant public interest on certain Indian reservations in Washington, Idaho, Montana, and Florida, discussions about how best to exercise concurrent Federal criminal jurisdiction may arise during your annual consultations with the tribes in your District and as you continue to update and refine your District-level operational

plans addressing public safety in Indian country. *See* Memorandum for United States Attorneys with Districts Containing Indian Country by Deputy Attorney General David W. Ogden, at 3-4 (Jan. 11, 2010).

If your Office brings these prosecutions, and a criminal defendant challenges Federal concurrent jurisdiction, the Environment and Natural Resources Division (ENRD) stands ready to assist with briefing this issue. Please contact S. Craig Alexander, the Chief of ENRD's Indian Resources Section, and Daron T. Carreiro, ENRD's Senior Counsel for Native American Affairs, for assistance on the issue.

Legal Background

In States such as Washington, Idaho, Montana, and Florida, which “opted in” to criminal jurisdiction in Indian country under Section 7 of P.L. 280, a longstanding question has been whether the Federal Government has concurrent jurisdiction to prosecute crimes under Federal criminal statutes that would otherwise apply. *See* 18 U.S.C. § 1152 (General Crimes Act); 18 U.S.C. § 1153 (Major Crimes Act). The Department's position is that it does.

Authorities Supporting Concurrent Jurisdiction. The *United States Attorneys' Manual* provides that in optional P.L. 280 States “jurisdiction under 18 U.S.C. §§ 1152 and 1153 may be exercised concurrently by the federal government.” U.S. Department of Justice, *United States Attorneys' Manual, Criminal Resources Manual* § 688 (citing *United States v. High Elk*, 902 F.2d 660, 661 (8th Cir. 1990) (per curiam)). A regulation of the Attorney General implementing the Tribal Law and Order Act, Pub. L. No. 111-12 (2010), similarly states that “such concurrent Federal criminal jurisdiction exists.” 28 C.F.R. § 50.25(a)(2); *see Cohen's Handbook of Federal Indian Law* § 6.04[3][d][i], at 562 (2012 ed.) (interpreting 25 U.S.C. § 1321(a)(2)); Judge William C. Canby, Jr., *American Indian Law in a Nutshell* 269 (6th ed. 2015) (citing cases); IDAHO CODE ANN. § 67-5102 (1963); *see also Confederated Tribes & Bands of the Yakima Indian Nation v. Washington*, 608 F.2d 750, 752 (9th Cir. 1979) (per curiam).

Contrary Authorities. Decades before the Attorney General promulgated the regulation, however, the United States' brief in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (*Yakima*), argued — on an issue not before the Court in that case — that “wherever the State assumed jurisdiction [under P.L. 280], federal criminal law would cease to apply, federal jurisdiction having been ‘ceded’ to the State.” U.S. Amicus Br. at 75 (No. 77-388). And the Office of the Solicitor General, based on the view that concurrent jurisdiction does not exist, declined to authorize an appeal in a case in which a Federal indictment was dismissed against an Indian in Washington State who had been charged under the Major Crimes Act, because of Washington's assumption of optional jurisdiction under P.L. 280. *See* Memorandum for the Solicitor General by Deputy Solicitor General Louis F. Claiborne, *United States v. Johnson*, No. CR80-57MV (W.D. Wash. May 13, 1980) (June 20, 1980).

The Justice Department's Position. The Department of Justice no longer adheres to the position OSG took more than 35 years ago on this issue. In addition to the regulation itself (and

other authorities cited above), the following considerations support the United States' authority to prosecute a case under 18 U.S.C. § 1152 or § 1153 when the crime would also fall within state criminal jurisdiction in an optional P.L. 280 State.

P.L. 280's Text. Analysis of this issue begins with the text of P.L. 280. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *see also Chamber of Commerce v. Whiting*, 563 U.S. 582, 599 (2011); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). P.L. 280's text supports the existence of concurrent Federal jurisdiction. As originally passed, Section 2 of P.L. 280 identified by name five "mandatory" States on which jurisdiction was immediately conferred over offenses committed by or against Indians in specified areas of Indian country. *See* P.L. 280 § 2 (codified at 18 U.S.C. § 1162(a)). That Section further provided that "[t]he provisions of sections 1152 and 1153 of [title 18] shall not be applicable within the areas of Indian country listed in subsection (a) of this section" — referring back to the identified areas in those mandatory States. *See* P.L. 280 § 2 (codified at 18 U.S.C. § 1162(c)). By its terms, then, that provision suspends Federal criminal jurisdiction in Indian country only in "mandatory" (or "listed") States. That is the only provision in P.L. 280 that expressly provides for the suspension of the operation of Sections 1152 and 1153.

Significantly, additional States are authorized to "assume jurisdiction" over Indian country, as an optional matter, in separate provisions of P.L. 280. *See* P.L. 280 §§ 6 & 7. Those provisions do not state that optional States become "listed" in subsection (a) of 18 U.S.C. § 1162 or otherwise cause them to be treated identically to the mandatory States. Accordingly, the language in 18 U.S.C. § 1162(c) that triggers suspension of the operation of Federal criminal jurisdiction (*i.e.*, the language stating that those statutes "shall not be applicable" in the listed States) is not expressly made applicable to optional States. And, as a background principle, a State's assumption of jurisdiction to prosecute crimes in Indian country involving Indians does not, by itself, terminate the enforceability of the Federal criminal prohibitions in 18 U.S.C. §§ 1152 and 1153. *See United States v. Cook*, 922 F.2d 1026, 1032-33 (2d Cir. 1991); U.S. Br. in Opposition, *Tarbell v. United States*, 500 U.S. 941 (1991) (No. 90-1386).

The Presumption Against Implied Repeals. The textual argument is supported by the well-established presumption against implied repeals. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) ("repeals by implication are not favored"). Under that principle, a later-enacted Federal statute will not be interpreted to override a prior one "unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Id.* (brackets, ellipses, and internal quotation marks omitted); *see Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). The conditions for overcoming the presumption are not satisfied here. And the presumption has added force in the P.L. 280 context: Because Congress explicitly suspended Federal criminal jurisdiction in mandatory States, its failure to enact a similar provision or express cross-reference for optional States supports the conclusion that Congress meant to leave Federal prosecutorial jurisdiction in such States intact.

Policy Reasons for Distinguishing "Optional" from "Mandatory" P.L. 280 States. Differentiation of the mandatory and optional P.L. 280 States with respect to concurrent Federal

criminal jurisdiction also makes sense as a policy matter. When P.L. 280 was enacted, Congress might have perceived a reason to suspend Federal criminal jurisdiction in mandatory but not optional States. P.L. 280 arose out of separate bills designed to provide state prosecutorial jurisdiction in Indian country to certain States on an individual basis. P.L. 280 consolidated those bills and addressed all five such States — which became the original mandatory States — together. Notably, “[t]he mandatory States were consulted prior to the introduction of the single-state bills that were eventually to become Pub. L. 280,” and “[a]ll had indicated their willingness to accept whatever jurisdiction Congress was prepared to transfer.” *Yakima*, 439 U.S. at 497; *see* Hearing on H.R. 1063 Before the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. 3 (July 15, 1953) (statement of Mr. Abbott, Committee Counsel). Tribes within those States, moreover, had expressed support for the transfer of jurisdiction from the Federal Government to the States. *See* Presidential Statement on Signing P.L. 280 (Aug. 15, 1953), *reprinted in* 102 Cong. Rec. 399 (Jan. 12, 1956).

The same was not true of optional States. Most were not consulted about P.L. 280, and tribes within those States viewed far less favorably the States’ assumption of criminal jurisdiction over their members. *See Yakima*, 439 U.S. at 497. *See generally* Hearings Before the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. (July 8, 1954). Congress could therefore have believed that, in optional States, Federal criminal jurisdiction should continue to serve as a safeguard or backstop: In the event that state criminal laws were being enforced with insufficient vigor by state officials, Federal prosecution would remain as an alternative. Drawing the distinction between mandatory and optional States in this way would be consistent with Congress’s desire to address “serious hiatus[es] in law enforcement authority” in Indian country, which was one of the motivations for P.L. 280’s passage. Hearings Before the House Subcommittee on Indian Affairs, 83d Cong., 1st Sess. 2 (June 29, 1953) (statement of Mr. Sellery); *see also Yakima*, 439 U.S. at 498.

Furthermore, the view that state jurisdiction is exclusive could be particularly complicated to administer under *Yakima*’s holding: The Court permitted States to adopt “checkerboard” or partial P.L. 280 jurisdiction, geographically and substantively. *See Yakima*, 439 U.S. at 493-99. Absent concurrent jurisdiction, Federal prosecutorial authority would have to match that patchwork — existing only where the State’s authority did not. Acknowledging concurrent criminal jurisdiction thus simplifies Federal law-enforcement efforts.

Conclusion. In States such as Washington, Idaho, Montana, and Florida, which “opted in” to criminal jurisdiction in Indian country under Section 7 of Public Law 280, the Federal Government has concurrent jurisdiction to prosecute crimes under the Major Crimes Act, 18 U.S.C. § 1153, and the General Crimes Act, 18 U.S.C. § 1152.