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SUPREME COURT
STATE OF WASHINGTON
2011 APR 25 P 12:00

BY RONALD R. CARPENTER
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SUPREME COURT
Respondent,)	No. 85067-4
)	
v.)	COURT OF APPEALS
)	No. 39741-2-II
ROBERT REGINALD COMENOUT, JR.,)	Consolidated w/No. 39761-7-II
and ROBERT REGINALD COMENOUT,)	
SR.,)	APPELLANTS' <i>PETITIONERS'</i>
)	SUPPLEMENTAL BRIEF
Appellants.)	
)	
)	
)	

Pursuant to the Court's permission dated March 24, 2011, the Appellants supplement their Reply Brief dated July 13, 2010, filed in the Court of Appeals. This Supplement is due April 25, 2011.

The questions certified to this Court are:

1. Does the State have criminal jurisdiction over tribal members selling unstamped cigarettes from a store located on tribal trust land that is not within the borders of a reservation?
2. Are the Appellants exempt from collecting State cigarette taxes as "Indian retailers" under RCW 82.24.295(1)?

Defendants-Appellants incorporate all earlier memoranda regarding these issues.

Appellants' additional authority amplifies on federal P.L. 280 that Washington has partially adopted in RCW 37.12.010 and 37.12.021, since the original brief has been filed; supplement pages 6 through 10 of the Reply Brief.

The Tribal Law and Order Act of 2010 (TLOA) PL 111-211 (HR 725), 124 Stat 2258 was passed on July 29, 2010. Section 221 of the Act, (124 Stat 2272) amends the part of P.L. 280 included in 18 U.S.C. § 1162. It allows an Indian tribe, with consent of the U.S. Attorney General, to have concurrent jurisdiction with "state, tribal and local governments that "enter into cooperative agreements to improve criminal law enforcement in Indian Country."

Public Law 83-280 ch. 505, 67 Stat 588, August 15, 1953, added Sections 18 U.S.C. § 1162 and 28 U.S.C. § 1360 to the federal law. Later, 280 was amended by the Indian Civil Rights Act of 1968, codified as 25 U.S.C. § 1321-26, Pub.L 90-284 Title IV § 401, April 11, 1968, 82 Stat 78. The amendment allowed states to assume partial jurisdiction of law on only certain subjects. 25 U.S.C. § 1323. Retrocession from jurisdiction was allowed. See Cohen's "*Handbook of Federal Indian Law, 2005 Ed.*" § 6.04[3][b], Nell Jessup Newton, et al., editors Lexis Nexis. The 2010 amendment to 18 U.S.C. § 1167(a) allow tribes to request the United States to "accept concurrent jurisdiction within Indian Country." Indian Country is unchanged and defined in 18 U.S.C. § 1151. The undated and not yet official Department of Justice proposed rule, A.G. Order No. RIN 1105-

1105-AB38, 28 CFR Part 50 is attached for better illustration of the changes. It summarizes the changes to P.L. 280. It has been circulated at a seminar on TLOA. The new law still allows a retrocession by a tribe under Public Law 280 as described in 25 U.S.C. § 1323 but now allows criminal jurisdiction to be transferred entirely to the Federal Government.

The new law will facilitate efficiency and effectiveness of the justice system in Indian country. The Act, effective July 29, 2010, added a new section (d) to 18 U.S.C. § 1167 stating:

Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General - -

(1) Sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) Jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

Therefore, this part of Public Law 280 is now changed. The importance to this case is that in the future, depending on subsequent agreements, the federal government may have exclusive authority over trust lands. Also, state criminal authority may be expanded.

The alleged offenses in this case occurred on July 28, 2008, so the new federal law does not affect the outcome of this case as it is not retroactive. It is included here however as the reason of broad public import, codified in RCW 2.06.030(d), may be of less importance since the federal law that could change

280 jurisdiction. It is urged by Appellants, however, that the arguments of Appellants applying state definitions could result in a conundrum of application of changes if federal and state law is not harmonized to include off-reservation trust land. 18 U.S.C. § 1151(c).

This retrocession procedure requires both state and tribe approval. The Act also allows sentencing in tribal courts to be increased to three (3) years instead of one (1) year and that tribal judges be licensed attorneys, Section 304, 124 Stat 2279, 80, amending 25 U.S.C. § 1302(b), (c) and (d). Section 304(c) of the Tribal Law and Order Act of 2010, Pub.L 111-211, Title II § 234(c), July 29, 2010, 124 Stat 2279, 2281.

Two Court of Appeals decisions decided after briefs were filed in this case amplify the retrocession of state jurisdiction of the Quinault Tribe allowed by RCW 37.12.021 and 25 U.S.C. § 1323. *State v. Yallup*, 248 P.3d 1095 (Div. III 2011) allowed a state prosecution of a Yakama tribal member for driving delinquencies when he drove his car into a canal on the Yakama Reservation. The court held that the driving delinquency was within the eight specific jurisdictional areas allowing state prosecutions. RCW 37.12.010(8). *State v. Pink*, 144 Wash.App 945, 185 P.3d 634 (2008) charging a tribal member on a firearm offense on a state highway running through the reservation was distinguished on the basis that the State did not have jurisdiction to prosecute the

Quinault tribal member as the offense was not in the specified eight jurisdictional areas.

State v. Abrahamson, 157 Wash.App 672, 674, 238 P.3d 533 (Div.I 2010) a driving under the influence by a Spokane tribal member driving on the Tulalip Indian Reservation sustained a state conviction as the eight specific areas of law giving state jurisdiction included highways on the reservation. RCW 37.12.010(8). This case reviews the Public Law 280 application in the State of Washington including the retrocession statute. RCW 37.12.021.

A third case, *State v. Jim*, 156 Wash.App 39, 230 P.3d 1080 (Div. III 2010) held that a Yakama Indian fishing off the reservation at an access site could not be prosecuted by the State. The fishing was at a place in Klickitat County that was a replacement for replacing other Indian fishing grounds protected by treaty. The Court held that a tribal member could not be prosecuted by the State even though the site was off-reservation. This case is similar to the Comenout's as here, the land in question is in trust and replaced what was trust land on the Quinault Reservation.

Since *Ex Parte Van Moore*, 221 Fed 954, 963 (D.C.S.D. 1915) to date, trust land outside the reservation is not within a state's criminal jurisdiction. This has always been the law regarding this issue. No case authority or act of

Congress has changed this ruling. Accordingly, the Comenout case must be dismissed.

DATED this 21st day of April, 2011.


AARON L. LOWE, #15120
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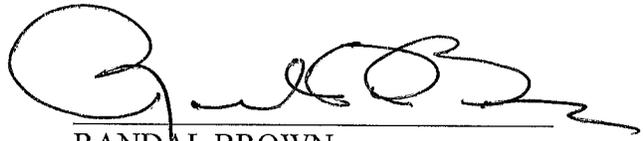

RANDAL BROWN, #24181
Attorney for Appellants

CERTIFICATE OF SERVICE

This is to certify that a copy of the Appellants' Supplemental Brief was served on Counsel for Respondent by hand delivery addressed as follows:

Kathleen Proctor
Tom Moore
Pierce County Prosecuting Attorney
County-City Building
930 Tacoma Avenue S., Rm. 946
Tacoma, WA 98402-2171

DATED this 25th day of April, 2011.



RANDAL BROWN
Attorney for Appellants

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

Docket No. OAG 142; AG Order No.

RIN 1105-1105-AB38

Assumption of Concurrent Federal Criminal Jurisdiction

In Certain Areas of Indian Country

AGENCY: Department of Justice.

ACTION: Proposed rule with request for comments.

SUMMARY: This rule proposes to establish the procedures for an Indian tribe that is subject to Public Law 280 (18 U.S.C. 1162(a)) to request that the United States accept concurrent criminal jurisdiction within the tribe's Indian country, and for the Attorney General to decide whether to consent to such a request.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [Insert date 60 days after date of publication in the *Federal Register*]. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: Comments may be mailed to Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, 950 Pennsylvania Avenue, NW, Room 2310, Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 142 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule with request for comments at <http://www.regulations.gov>.

FOR FURTHER INFORMATION, CONTACT: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514-5994 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Posting of Public Comments. Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you still want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the "For Further Information Contact" paragraph.

The reason the Department is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is that the inter-agency Regulations.gov/Federal Docket Management System (FDMS), which receives electronic comments, terminates the public's ability to submit comments at Midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments, which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

DISCUSSION

For more than two centuries, the Federal Government has recognized Indian tribes as domestic sovereigns that have unique government-to-government relationships with the United States. Congress has broad authority to legislate with respect to Indian tribes, however, and has exercised this authority to establish a complex jurisdictional scheme for crimes committed in Indian country. (The term "Indian country," defined in 18 U.S.C. 1151, includes, among other things, land within Indian reservations.) Criminal jurisdiction in Indian country typically depends on several factors, including the nature of the crime; whether the alleged offender, the victim, or both are Indian; and whether a treaty, Federal statute, executive order, or judicial decision has conferred jurisdiction on a particular government.

Here, three Federal statutes are particularly relevant: the General Crimes Act (also known as the Indian Country Crimes Act), 18 U.S.C. 1152; the Major Crimes Act, 18 U.S.C. 1153; and Public Law 280, P.L. 83-280, 67 Stat. 588 (1953), *codified in part at* 18 U.S.C. 1162.

Under the General Crimes and Major Crimes Acts, which apply to most of Indian country, jurisdiction to prosecute most crimes in Indian country rests with the Federal Government, the tribal government, or both concurrently. State criminal jurisdiction in Indian country is generally limited to crimes committed by non-Indians against non-Indian victims, as well as victimless crimes committed by non-Indians.

But there is an important exception to this general rule: In certain areas of Indian country, Public Law 280 renders the General Crimes and Major Crimes Acts inapplicable and instead gives the States jurisdiction over crimes committed by or against Indians. Specifically, Public Law 280's criminal-jurisdiction provision, 18 U.S.C. 1162, applies in parts of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. (Section 1162(a) expressly exempts some areas of Indian country in these States, such as the Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon, and some of these States have formally retroceded jurisdiction over other reservations.) In the areas of Indian country covered by section 1162, the Federal Government can prosecute violations of general Federal criminal statutes that apply nationwide, such as Federal narcotics laws, but typically cannot prosecute violent crimes such as murder, assault with a dangerous weapon, or felony child abuse.

The Tribal Law and Order Act of 2010

The Tribal Law and Order Act of 2010 (TLOA) was enacted on July 29, 2010, as Title II of Public Law 111-211. The purpose of the TLOA is to help the Federal Government and tribal governments better address the unique public-safety challenges that confront tribal communities. Section 221 of TLOA permits an Indian tribe to request that the United States accept concurrent jurisdiction to prosecute violations of the General Crimes Act and the Major Crimes Act within that tribe's Indian country. This jurisdiction will be concurrent among the Federal Government,

the State government, and (where applicable) the tribal government. Section 221 requires the Attorney General to consult with the requesting tribe and then decide whether to consent to the tribe's request. The United States will accept concurrent criminal jurisdiction only if the Attorney General consents. The State, however, need not consent. Once the United States has accepted concurrent criminal jurisdiction, Federal authorities can investigate and prosecute offenses that Public Law 280 currently bars them from prosecuting.

Assumption of concurrent Federal criminal jurisdiction

This rule establishes the framework and procedures for a mandatory Public Law 280 tribe to request the assumption of concurrent Federal criminal jurisdiction within the Indian country of the tribe. It also describes the process to be used by the Attorney General in deciding whether to consent to such a request.

The TLOA provides that the Attorney General is the deciding official for requests submitted by Indian tribes under section 221. Given the potentially high volume of requests, the large number of Department of Justice components and non-Department partners that should be conferred with, and the detailed tribe-by-tribe analyses that will be needed, the Attorney General is delegating decisional authority to the Deputy Attorney General. The Office of the Deputy Attorney General (ODAG) will receive recommendations from the Office of Tribal Justice (OTJ), the Executive Office for United States Attorneys (EOUSA), and the Federal Bureau of Investigation (FBI), after discussions with other Department components and other Federal, tribal, State, and local entities. OTJ will handle the staffing and tracking of assumption requests.

Pursuant to Executive Order 13175, the Department has held and will hold tribal consultations prior to implementing the new assumption procedures.

Unlike Public Law 280's process for transferring criminal jurisdiction from the State government to the Federal Government (termed "retrocession" and discussed further below), the process for a tribe to seek assumption of *concurrent* Federal criminal jurisdiction under TLOA section 221 does not require the State's approval. Unlike retrocession, a TLOA section 221 assumption gives the United States concurrent criminal jurisdiction without eliminating the State's criminal jurisdiction. As part of the decision-making process, however, after a tribe has submitted a request under TLOA section 221, the Department will publish a notice in the *Federal Register* inviting input from affected State and local law-enforcement authorities. But ultimately, it is the tribe's request and the Attorney General's consent that will determine whether the United States accepts concurrent criminal jurisdiction.

Retrocession of State criminal jurisdiction

The process described in this rule is separate and distinct from the retrocession process described in 25 U.S.C. 1323, which requires State concurrence. The retrocession process is still available if the State and tribe agree that State criminal jurisdiction should be transferred entirely to the Federal Government.

The process described in this rule also does not apply to Indian country that is subject to State criminal jurisdiction under some authority other than that set forth in 18 U.S.C. 1162(a)—for example, "optional Public Law 280" or State-specific statutes such as 18 U.S.C. 3243 and 25 U.S.C. 232.

Regulatory Certifications

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation. The Department

of Justice has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f); and, accordingly, this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. The process provided under TLOA section 221 allows the United States to assume concurrent criminal jurisdiction over offenses in a particular area of Indian country, without eliminating or affecting the State’s existing criminal jurisdiction, and accordingly it imposes no new burdens on the State. This regulation sets forth the procedural mechanism for the Department to consider, in consultation with other Federal, State, local, and tribal authorities, whether or not to consent to a request from an individual tribe for the Federal government to assume concurrent criminal jurisdiction within that tribe’s Indian country.

Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

This rule comports with Executive Order 13175. The rule has significant tribal implications, as it will have substantial direct effects on one or more Indian tribes and on the relationship between the Federal Government and Indian tribes. The Department therefore has

engaged and is continuing to engage in meaningful consultation and collaboration with tribal officials in developing this rule.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule provides only a framework for processing requests by Indian tribes for the assumption of concurrent Federal criminal jurisdiction over certain Indian country crimes, as provided for by TLOA section 221.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, P.L. 104-4.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure, Crime, Indians.

Accordingly, for the reasons set forth in the preamble, part 50 of chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 50 — STATEMENTS OF POLICY

1. The authority citation for part 50 is amended to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510; 42 U.S.C. 1973c.

2. New paragraph 50.25 is added to read as follows:

§ 50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

(a) Assumption of concurrent Federal criminal jurisdiction.

(1) The Tribal Law and Order Act of 2010 (TLOA) was enacted on July 29, 2010 as Title II of Public Law 111-211. Section 221(a) of the TLOA adds to 25 U.S.C. 1321(a) a new paragraph on the assumption of concurrent Federal criminal jurisdiction. The new paragraph provides that, at the request of a Federally recognized Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of 18 U.S.C. 1152 (the General Crimes, or Indian Country Crimes, Act) and 18 U.S.C. 1153 (the Major Crimes Act) within the Indian country of the requesting tribe. Section 221(b) of the TLOA adds a subsection (d) to 18 U.S.C. 1162, the criminal-jurisdiction provision of Public Law 280, P.L. 83-280, 67 Stat. 588 (1953), as amended. The new subsection, 18 U.S.C. 1162(d), provides that, once the Attorney General has consented to an Indian tribe's request for concurrent Federal criminal jurisdiction, the General Crimes and Major Crimes Acts shall apply in the Indian country of the requesting tribe, and that criminal

jurisdiction over those areas shall be concurrent among the Federal Government, the State government, and (where applicable) the tribal government.

(2) The provisions of TLOA section 221 shall apply only to the areas of Indian country listed in 18 U.S.C. 1162(a), in the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. They do not apply to Indian country in other States.

(3) The provisions of TLOA section 221 permit the United States to accept concurrent Federal criminal jurisdiction if an Indian tribe requests such an assumption of jurisdiction and the Attorney General consents to that request. Assumption of concurrent Federal criminal jurisdiction under TLOA section 221 does not require the agreement, consent, or concurrence of any State or local government.

(b) Request requirements.

(1) A tribal request for assumption of concurrent Federal criminal jurisdiction under TLOA section 221 shall be made by the chief executive official of a Federally recognized Indian tribe that has Indian country listed in 18 U.S.C. 1162(a). For purposes of this section, a chief executive official shall include a tribal chairperson, president, governor, principal chief, or other equivalent position.

(2) The tribal request shall be submitted in writing to the Director of the Office of Tribal Justice at the Department of Justice. The tribal request shall explain why the assumption of concurrent Federal criminal jurisdiction will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe.

(c) Process for handling tribal requests.

(1) Upon receipt of a tribal request, the Office of Tribal Justice shall:

(i) acknowledge receipt;

- (ii) open a file;
- (iii) promptly publish a notice in the *Federal Register*, seeking comments from affected agencies and from the general public; and
- (iv) conduct a formal consultation with the requesting tribe, consistent with applicable Executive Orders and Presidential Memorandums on tribal consultation.

(2) An Indian tribe may submit a request at any time. However, requests received by [July 31] of each calendar year will be prioritized for decision by [December 31] of that calendar year, if feasible.

(d) Factors. Factors that may be considered in determining whether or not to consent to a tribe's request for assumption of concurrent Federal criminal jurisdiction include but are not limited to the following:

(1) Whether consenting to the request will increase the availability of law enforcement resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(2) Whether consenting to the request will improve access to judicial resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(3) Whether consenting to the request will improve access to detention and correctional resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(4) Support, or opposition, by the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request.

(5) Support, or opposition, by the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, and other Federal departments, agencies, and courts.

(6) Other information received from tribal consultation.

(7) Other information received from other law enforcement sources, including State and local agencies, and from other sources.

(e) Agency comments.

(1) The deciding official shall consider any comments from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components.

(2) The deciding official shall consider any comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, and other Federal departments, agencies, and courts.

(3) The deciding official shall consider any comments from tribal, State, local, and other non-Federal sources.

(f) Decision.

(1) The decision whether to consent to a tribal request for assumption of concurrent Federal criminal jurisdiction shall be made by the Deputy Attorney General after receiving written recommendations from the Office of Tribal Justice (OTJ), the Executive Office for United States Attorneys (EOUSA), and the Federal Bureau of Investigation (FBI).

(2) The deciding official may:

(i) Consent to the request for assumption of concurrent Federal criminal jurisdiction, as of some future date certain within the next 12 months, with or without conditions;

(ii) Deny the request for assumption of concurrent Federal criminal jurisdiction; or

(iii) Request further information and/or comment before making a final decision.

(3) The deciding official will explain the basis for the decision in writing.

(4) A denial of a request for assumption of concurrent Federal criminal jurisdiction is not appealable. However, at any time after such a denial, a tribe may submit a renewed request for assumption of concurrent Federal criminal jurisdiction. A renewed request shall address the basis for the prior denial.

(g) Retrocession of State criminal jurisdiction.

Retrocession of State criminal jurisdiction under Public Law 280 is governed by 25 U.S.C. 1323(a) and Executive Order 11435, 33 FR 17339 (1968). The procedures for retrocession, which requires State concurrence, are still available where the Indian tribe and the State agree to retrocede to the Federal Government the State's criminal jurisdiction under Public Law 280.

Date

Eric H. Holder, Jr.
Attorney General