

HOUSE BILL REPORT

ESHB 2233

As Passed House:
February 10, 2012

Title: An act relating to creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country.

Brief Description: Creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country.

Sponsors: House Committee on State Government & Tribal Affairs (originally sponsored by Representatives McCoy, Hunt, Haigh, Pedersen, Appleton, Morris, Billig, Fitzgibbon, Eddy, Sells, Tharinger, Jinkins, Hasegawa, Pollet, Wylie, Upthegrove and Roberts).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 1/18/12, 1/26/12 [DPS].

Floor Activity:

Passed House: 2/10/12, 54-42.

Brief Summary of Engrossed Substitute Bill

- Creates a procedure by which the state may retrocede to the federal government criminal and/or civil jurisdiction over Indian tribes located in the State of Washington.
- Requires the state to retain the civil jurisdiction necessary for the civil commitment of sexually violent predators.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Hunt, Chair; Appleton, Vice Chair; Darneille, Dunshee, Hurst, McCoy and Miloscia.

Minority Report: Do not pass. Signed by 4 members: Representatives Taylor, Ranking Minority Member; Overstreet, Assistant Ranking Minority Member; Alexander and Condotta.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Thamas Osborn (786-7129).

Background:

History of Public Law 280 and the State's Assumption of Jurisdiction Over Indians and Indian Country.

As of the early 1950s, the federal government and Indian tribes jointly exercised criminal and civil jurisdiction over Indians and Indian country. However, in 1953 Congress enacted Public Law 280 (PL 280), partly in response to the perception that joint federal/tribal jurisdiction led to inadequate law enforcement in Indian country. Under the PL 280, both criminal and civil jurisdiction over Indians and Indian country were transferred from the federal government to selected states. Other specified states were given the *option* to assume such jurisdiction in the future. The selected states that were granted immediate jurisdiction, i.e., the "mandatory states," were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. The so-called "optional states" under the PL 280 were Washington, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, and Utah.

The PL 280 also established that for a state to acquire criminal or civil jurisdiction over the Indians and Indian country within its borders, it must pass legislation explicitly assuming such jurisdiction. The State of Washington did exactly that in 1963 when the Legislature enacted RCW 37.12.010, authorizing the state to assume civil and criminal jurisdiction over Indians and Indian country within its territory. However, under this statute the assumption of jurisdiction by the state requires the tribes consent. Such consent requires that the tribe formally request the state to assume such jurisdiction. Upon receiving this request, the Governor must issue a proclamation affirming the state's jurisdiction over Indians and Indian country in accordance with applicable federal laws.

Although the state's 1963 legislation establishes that the state's jurisdiction over a tribe occurs only upon the request of a tribe, the statute explicitly identifies eight substantive areas of criminal and civil law over which the *state retains jurisdiction* even without a tribe's consent: compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles on public streets, alleys, roads, and highways.

Amendment of the PL 280 and the Authorization of State Retrocession.

In 1968 Congress amended the PL 280 to include a so-called "retrocession" provision authorizing a state that has previously assumed jurisdiction over Indians and Indian country to return all or some of its criminal and/or civil jurisdiction back to the federal government, subject to the approval of the United States Department of the Interior (Interior). The term "retrocession," therefore, refers to the process of a state returning its jurisdiction over an Indian tribe back to the United States government.

Civil Retrocession Under State Law Following the Amendment of the PL 280.

Despite the 1968 amendment of the PL 280, state law neither authorizes the state to retrocede its civil jurisdiction over Indians and Indian country nor does it provide any mechanism for tribes to request retrocession.

Criminal Retrocession Under State Law Following the Amendment of the PL 280.

Following the amendment of the PL 280, the state Legislature enacted a legal procedure by which a tribe can request the state to retrocede criminal jurisdiction over Indians and Indian country. This procedure requires the approval of the Governor and the Legislature and applies only to specific tribes identified in statute.

Under this statutory procedure, in order to request that the state retrocede its criminal jurisdiction back to the federal government, an Indian tribe must submit a resolution to the Governor expressing its desire for state retrocession of criminal jurisdiction acquired by the state over Indians or Indian country. Upon receipt of the resolution, the Governor may issue a proclamation retroceding the state's criminal jurisdiction back to the United States. The power of the Governor to authorize criminal retrocession is discretionary. In effect, then, the Governor has veto power over any criminal retrocession proposal put forth by an Indian tribe or group. In turn, in order for retrocession to become effective, the Governor's retrocession proclamation must be submitted to a duly authorized federal officer and then approved by the Secretary of the Interior. However, it should be noted that the state's criminal retrocession statutes categorically prohibit the retrocession of either civil or criminal jurisdiction over the following eight areas:

- compulsory school attendance;
- public assistance;
- domestic relations;
- mental illness;
- juvenile delinquency;
- adoption proceedings;
- dependent children; and
- operation of motor vehicles on public streets, alleys, roads, and highways.

After retrocession, the federal government rather than the tribe and/or the state has jurisdiction over so-called major crimes committed by Indians on Indian lands. Major crimes under the federal law include homicide, assault, rape, kidnapping, arson, burglary, and robbery, as well as other serious felonies.

Over the years, seven tribes in Washington have sought and received retrocession of state jurisdiction over criminal acts by Indians committed on tribal lands. These tribes are the Quileute, Chehalis, Skokomish, Muckleshoot, Tulalip, Swinomish, and the Colville Confederated Tribes of Washington.

Tribes that remain subject to state jurisdiction may enter into arrangements with local law enforcement agencies for providing law enforcement on tribal lands. However, tribes subject to full state criminal jurisdiction are not eligible for federal funding for law enforcement purposes. Those tribes that have sought and obtained retrocession of state jurisdiction have become eligible for federal law enforcement funding.

Governor's Retrocession Workgroup.

In June of 2011 the Governor convened a Joint Executive-Legislative Workgroup (Workgroup) in order to examine both civil and criminal tribal retrocession issues. The Workgroup was created in response to the tribal retrocession bills considered by the House and Senate during the 2011 Legislative session and consisted of a broad range of gubernatorial appointees, including:

- tribal leaders;
- legislative members from the House and Senate;
- designees from the United States Attorney's Offices for the Eastern and Western Districts of Washington;
- a designee of the Washington State Attorney General;
- professors of Indian Law from the University of Washington and Seattle University;
- state, local, and tribal law enforcement officials;
- an official from the Office of Superintendent of Public Instruction; and
- various executive branch and state agency officials.

The Workgroup conducted a series of meetings during the summer and fall, the last of which involved the consideration of legislative options.

Summary of Engrossed Substitute Bill:

Overview of the Retrocession Bill.

In broadest terms, the bill creates what is, in essence, a three-step retrocession procedure in which the Governor is granted plenary power to approve or deny a proposed retrocession.

The three procedural steps are as follows:

- A tribe must submit a retrocession resolution to the Governor.
- The Governor must approve or deny the retrocession through a process that includes government-to-government meetings with the tribe, as well as non-binding recommendations from the two houses of the Legislature.
- If the Governor approves of the proposed retrocession, a formal retrocession request is forwarded to the Interior, which has ultimate authority with respect to the authorization of a proposed retrocession.

Retrocession Procedure Required Under the Bill.

More specifically, the bill includes the following procedural requirements that must be met before criminal and/or civil retrocession may occur:

- The governing body of a tribe must pass a resolution requesting that the state retrocede back to the federal government all or part of its civil and/or criminal jurisdiction over the tribe. Before a tribe submits a retrocession resolution to the Governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.
- The tribe's retrocession resolution must be forwarded to the Governor, accompanied by information about its plan regarding its exercise of jurisdiction following the proposed retrocession.
- The Governor must convene a government-to-government meeting with the tribe within 90 days of receiving the retrocession resolution.
- The Governor must consult with elected officials from the counties, cities, and towns proximately located to the area of the proposed retrocession.
- Within 120 days of the Governor's receipt of the tribal resolution, the appropriate standing committees of the state House and Senate may conduct public hearings on the tribe's request for state retrocession. Following such public hearings, the

designated legislative committees may submit non-binding, advisory recommendations to the Governor.

- Within one year of her or his receipt of the retrocession resolution, the Governor must issue a proclamation either approving or denying all or part of the resolution. This one-year deadline may be extended by the mutual consent of the tribe and the Governor. Also, both the tribe and the Governor have unilateral authority to extend the one year retrocession decision deadline by another six months.
- If the Governor approves the proposed retrocession, the proclamation must be submitted to a duly designated officer of the Interior, which must then approve or deny the retrocession request. The proclamation does not become effective until it is approved by the federal government in accordance with federal retrocession procedures.

Notwithstanding the state's retrocession of criminal and/or civil jurisdiction, the state shall retain the civil jurisdiction necessary for the civil commitment of sexually violent predators.

The act clarifies that:

- its provisions do not affect the validity of any retrocession procedure commenced previously under other specified statutes;
- any tribe may utilize the retrocession procedure authorized under the act in order to complete a pending retrocession process or to obtain retrocession with respect to any civil or criminal jurisdiction retained by the state following a previously completed partial retrocession; and
- other specified statutes related to retrocession are not applicable to a retrocession initiated under the authority of the act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is a bill that establishes a process by which a tribe may formally request that the Governor issue a proclamation retroceding back to the federal government the state's jurisdiction over a tribe. The Governor has veto power and the Legislature is required to hold hearings and make recommendations. This is a much better bill than that considered last year insofar as it creates a more readily understandable process. The concepts in the bill were derived from four work sessions held last year by the Workgroup. These work sessions functioned as a forum for sorting the many issues raised by retrocession.

The Yakama Nation has been working hard to reach out to surrounding communities to implement mutual aid agreements. The tribe recognizes the importance of working in tandem with adjacent jurisdictions to ensure a smoother jurisdictional transition process. The county, cities, and the tribes should work together as one community. In the past the tribe had an excellent relationship with the state patrol and the law enforcement authorities in

adjacent jurisdictions. We need to establish this again. The tribe has made great strides in developing its law enforcement infrastructure. It now has a new, state of the art jail facility and juvenile detention center. In addition, the tribe has devoted considerable resources to better training for law enforcement, as well as fish and game officers. The tribe contributes a great deal to the state and local economies, and is responsible for the creation of many jobs. Also, the Yakamas are very focused on responding to truancy issues.

The Colville Tribe is a successful model for the beneficial aspects of retrocession. The Colvilles have been doing very well since retrocession, and have a close working relationship with adjacent law enforcement authorities. Retrocession has the effect of lessening the burdens on surrounding law enforcement jurisdictions.

(Other) The Washington State Association of Counties is concerned about the effects of the transition upon health-related services.

(Opposed) Yakima County is concerned about the bill, but is working with Representative McCoy regarding amendatory language. The main concern is how the transition will occur. The mechanics of how services will be transferred is a problem. The county is working on a service transition plan.

Persons Testifying: (In support) Representative McCoy, prime sponsor; Harry Smiskin, Dawn Vyvyan, George Colby, and Virgil Lewis, Yakama Nation; and Miguel Perez-Gibson and Ricky Gabriel, Colville Tribes.

(Other) Brian Enslow, Washington State Association of Counties.

(Opposed) Briahna Taylor, Yakima County.

Persons Signed In To Testify But Not Testifying: None.