

May 5, 1999

Mr. Don Fortney
Sheriff of Lewis County
P.O. Box 206
Nezperce, ID 83543

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Sheriff Fortney:

You have asked the Attorney General's Office to provide legal guidance regarding the effect of the recent action of the Nez Perce Tribal Executive Committee in rescinding NP 65-126, the tribe's assent to jurisdiction of the State of Idaho over the crimes enumerated therein. Specifically, you asked:

Does the Nez Perce Tribal Government's unilateral rescission of their prior consent to concurrent jurisdiction affect the state's jurisdiction over the civil and criminal matters set forth in Idaho Code § 67-5101 . . . ?

Does the Nez Perce Tribal Government's unilateral rescission of their prior consent to concurrent jurisdiction affect the state's jurisdiction over matters set forth in Idaho Code § 67-5102 and enumerated in NP 65-126 . . . ?

Our conclusion is that, by rescinding NP 65-126, the tribe has effectively revoked its consent to state jurisdiction over the enumerated offenses and has, thus, deprived the state of jurisdiction over those offenses. Our further conclusion, however, is that the state retains jurisdiction over the matters listed in I.C. § 67-5101.

ANALYSIS

A. Jurisdiction in Indian Country

Indian country is defined in 18 U.S.C. § 1151 as, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."¹ "When addressing the question of state jurisdiction in Indian country, we are guided by the canon of construction that federal and state 'statutes passed for the benefit of Indians are to be construed in the Indians' favor.'" State v. Major, 111 Idaho 410, 415, 725 P.2d 115, 120 (1986) (citations omitted).

The states have no jurisdiction over Indians in Indian country without congressional consent. McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 170-71, 93 S. Ct. 1257, 1261, 36 L. Ed. 2d 129 (1973).

Generally, jurisdiction in Indian country is determined by both the status of the parties involved and the nature of the crime. For instance, intra-Indian crimes were exempted from the federal jurisdiction of the General Crimes Act of 18 U.S.C. § 1152, but that section was limited by the subsequent enactment of the Major Crimes Act, 18 U.S.C. § 1153, which provided for federal jurisdiction over 14 enumerated crimes. Thus, jurisdiction over crimes by Indians against Indians is in tribal court unless the crime is one enumerated in the Major Crimes Act. Proper jurisdiction for crimes committed between non-Indians in Indian country is in state court. U.S. v. McBratney, 104 U.S. 621 (1881) (the “McBratney Rule”). Jurisdiction for crimes committed by non-Indians against Indians on Indian land is federal court. *See* Duro v. Reina, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990); State v. Verdugo, 901 P.2d 1165 (Ariz. Ct. App. 1995); *see generally* 18 U.S.C. §§ 1152, 1153; Cohen’s Handbook of Federal Indian Law (1982 ed.). The Idaho Supreme Court has held that the Idaho state courts have jurisdiction over “victimless” crimes, such as DUI, committed by non-Indians on the reservation. State v. Snyder, 119 Idaho 376, 807 P.2d 55 (1991); *see also* State v. Warden, 127 Idaho 763, 906 P.2d 133 (1995).

Public Law 280 is an exception to the general jurisdictional framework in Indian country. *See, generally*, Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 504 (1976). In Public Law 280, Congress gave Idaho and other states the “consent of the United States” to assume jurisdiction over criminal and civil matters “at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.” Public Law No. 280, § 7, 67 Stat. 588, 590 (1953). When Public Law 280 was enacted, the states were not required to obtain consent of the tribes before asserting state jurisdiction.

In 1963, pursuant to Public Law 280, Idaho enacted I.C. § 67-5101, assuming jurisdiction over the following matters:

- A. Compulsory school attendance
- B. Juvenile delinquency
- C. Dependent, neglected and abused children
- D. Public Assistance
- F. Domestic Relations
- G. Operations and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.

Idaho also enacted a statute allowing the individual tribes to extend to the state further concurrent jurisdiction. I.C. § 67-5102 (1963). In addressing that statute, the courts have referred to “what, in effect, is a bilateral agreement between the State of Idaho and the [tribe] to confer jurisdiction to the state courts.” Boyer v. Shoshone-Bannock Indian Tribes, 92 Idaho 257, 262, 441 P.2d 167, 171(1968).

On April 13, 1965, the Nez Perce passed NP 65-126, consenting to concurrent state court jurisdiction over enumerated offenses including disturbing the peace, contributing to the delinquency of minors, simple assault, battery and receiving stolen property. Tribal Resolution 65-126, quoted in State v. Major, 111 Idaho 410, 418, 725 P.2d 115, 123 (1986); State v. Marek, 112 Idaho 860, 869, 736 P.2d 1314, 1323(1987). Thereby, the tribe and the State of Idaho entered into a compact extending state jurisdiction to the enumerated offenses.

In 1968, Congress passed the Indian Civil Rights Act, 25 U.S.C. § 1321(a) (1983), which amended Public law 280 to require formal tribal consent to the further assumption of jurisdiction by the states. The Act repealed § 7 of Public Law 280, but specifically did not “affect any cession of jurisdiction made pursuant to such section prior to repeal.” In State v. McCormack, 117 Idaho 1009, 1012, 793 P.2d 682, 685 (1990), the court noted that the limiting language of § 1321 “does not require further tribal consent . . . because that jurisdiction [in I.C. § 67-5101] had been granted and assumed prior to enactment of § 1321.” See also State v. Michael, 111 Idaho 930, 932, 729 P.2d 405, 406 (1986) (“ . . . those areas over which the state had assumed jurisdiction in 1963 remain under state jurisdiction”).

Thus, until recently, it was clear that the state courts of Idaho had jurisdiction over both the matters set forth in I.C. § 67-5101 and the offenses listed in NP 65-126.

B. Recent Action by the Nez Perce Tribe

On March 9, 1999, the Nez Perce Tribal Executive Committee (NPTEC) rescinded NP 65-126. In a subsequent letter to local law enforcement, the Tribal Chairman indicated two bases for the tribe’s action. First, the tribe felt that the need for state jurisdiction over crimes committed on the reservation had been nullified by the establishment and training of the tribal police force. Second, the tribe considered it “essential to the sovereignty of the Nez Perce Tribe that the law enforcement jurisdiction transferred by NP 65-126 be returned to the exclusive control of the Tribe.” The letter apparently referred to the decision of the Ninth Circuit Court of Appeals in County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998). In that case, the court held that the tribe’s compact with the state to extend state jurisdiction to the offenses enumerated in NP 65-126 “was tantamount to alienation of the land to non-Indians for this limited purpose.” *Id.*, at 514. The tribe provided notice of its action to local law enforcement.

C. The Current Status of Idaho State Court Jurisdiction in Indian Country

1. I.C. § 67-5101

The validity of I.C. § 67-5101 was not affected by the enactment of the Indian Civil Rights Act and is not subject to assent by the tribes. Therefore, the areas over which the state assumed jurisdiction in I.C. § 67-5101 remain under state jurisdiction.

2. The Minor Offenses Enumerated in NP 65-126

I.C. § 67-5102 provides that “[a]dditional state jurisdiction . . . may be extended to particular reservations or Indian country with the consent of the governing body of the tribe . . .” It is clear that the Nez Perce Tribe has now revoked its consent to state jurisdiction over the minor offenses enumerated in NP 65-126. When the compact between the tribe and the state was originally entered into pursuant to I.C. § 67-5102, the additional jurisdiction became effective when the tribe forwarded the resolution to the Office of the Attorney General. When NPTEC revoked jurisdiction over crimes set forth in NP 65-126, however, it did so in a unilateral manner. It later provided notice to local law enforcement agencies, which notice was forwarded to the Office of the Attorney General. The issue arises whether this unilateral action on the part of the tribe was an effective revocation of consent to additional state jurisdiction. We conclude that it was.

The statute provides that additional jurisdiction may be effected by “negotiation with the tribe or by unilateral action by the tribe.” Thus, although the tribe must eventually provide notice, the tribe is free to extend additional jurisdiction as it sees fit. There does not appear to be any authority for the proposition that the tribe was required to follow this same procedure in order to effectively revoke its consent to the additional state jurisdiction. Rather, it appears that the key is tribal consent, without which the state may not exercise additional jurisdiction.

CONCLUSION

It is the conclusion of this office that NPTEC’s action in rescinding NP 65-126 effectively deprived the state courts of Idaho of jurisdiction over the offenses set forth in that ordinance, but did not have any effect on the jurisdiction of the Idaho courts over the matters listed in I.C. § 67-5101. Further, the state courts retain jurisdiction over matters unrelated to Public Law 280, such as crimes between non-Indians that may occur on the reservation and victimless crimes, such as DUI, committed in Indian country by non-Indians.

Sincerely,

ALISON A. STIEGLITZ

Deputy Attorney General
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¹ There currently is a dispute about whether the Nez Perce Reservation includes lands ceded pursuant to the Agreement of May 1, 1893, 28 Stat. 326. The state has taken the position that the reservation does not include such lands, while the tribe has taken the position that it does. Obviously, the outcome of the dispute will determine what lands constitute “Indian country” as defined in 18 U.S.C. § 1151.