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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

Docket No. OAG 142; AG Order No. 3314-2011

RIN 1105-AB38

**Assumption of Concurrent Federal Criminal Jurisdiction
in Certain Areas of Indian Country**

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: This rule establishes the procedures for an Indian tribe whose Indian country is subject to State criminal jurisdiction under 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.

EFFECTIVE DATE: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION, CONTACT: Mr. Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, at (202) 514-8812 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

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 the prosecution of crimes committed in Indian country. (The term “Indian country” is defined in 18 U.S.C. 1151.) 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 (also known as the Indian Major Crimes Act), 18 U.S.C. 1153; and Public Law 280, Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 588, *codified in part as amended 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, the Public Law 280 criminal-jurisdiction provision codified at 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, which are known as “mandatory” Public Law 280 jurisdictions, 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.

In contrast, the provision originating in Public Law 280 that is codified at 25 U.S.C. 1321 provides a basis for other States to elect to assume criminal jurisdiction in Indian country on an optional basis, subject to the consent of the affected tribe. In the Indian country of these tribes, known as “optional” Public Law 280 jurisdictions, the Department concludes that the applicable statutes, including the Tribal Law and Order Act of 2010 (TLOA), provide that the Federal Government has concurrent jurisdiction under the General Crimes and Major Crimes Acts. *See* U.S. Department of Justice, United States Attorneys’ Manual, tit. 9, Criminal Resource Manual § 688 (Federal Government may exercise concurrent criminal jurisdiction in “the so-called ‘option states’ . . . which assumed jurisdiction pursuant to Public Law 280 after its enactment”); *United States v. High Elk*, 902 F.2d 660, 661 (8th Cir. 1990) (per curiam) (holding that Federal courts retain Major Crimes Act jurisdiction in those States that voluntarily assumed jurisdiction under Public Law 280); *cf. Negonsott v. Samuels*, 507 U.S. 99, 105-06 (1993) (holding that a different Federal statute conferred criminal jurisdiction on a State without divesting the United States of concurrent criminal jurisdiction). *But cf. United States v. Burch*, 169 F.3d 666, 669-71 (10th Cir. 1999) (holding that a 1984 “direct congressional grant of jurisdiction over [crimes committed in one town in] Indian country” vested Colorado with exclusive jurisdiction akin to mandatory jurisdiction under Public Law 280).

The Tribal Law and Order Act of 2010

The 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(b) of the new law, now codified at 18 U.S.C. 1162(d), permits an Indian tribe with Indian country subject to mandatory State criminal jurisdiction under Public Law 280 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. As the statute states, this jurisdiction will be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. *See* 18 U.S.C. 1162(d)(2). Section 221(b) provides for the United States to assume concurrent criminal jurisdiction at the tribe's request, and after consultation between the tribe and the Attorney General and consent to Federal jurisdiction by the Attorney General. The State 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 that is subject to Public Law 280. 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 18 U.S.C. 1162(d). 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 may be needed, the

Attorney General is delegating decisional authority under 18 U.S.C. 1162(d) to the Deputy Attorney General. The Office of the Deputy Attorney General will receive recommendations from the Office of Tribal Justice, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation, and also will consider any comments from other Department components (including the Bureau of Prisons and the Office of Community Oriented Policing Services) and other Federal, tribal, State, and local entities. The Office of Tribal Justice will handle the staffing and tracking of assumption requests.

The Department will begin to accept tribal requests for the assumption of concurrent Federal criminal jurisdiction on the date this rule becomes effective. Any tribe that previously submitted a request should resubmit its request and ensure that it conforms to the requirements of this final rule.

In accordance with Executive Order 13175 of November 6, 2000, which requires consultation between Federal agencies and tribes on certain matters, the Department has held tribal consultations regarding these assumption procedures.

Retrocession of State criminal jurisdiction

Assumption of concurrent Federal criminal jurisdiction under this rule does not require the approval of any State. The statute being implemented, 18 U.S.C. 1162(d), authorizes the Federal Government to assume such jurisdiction pursuant to a tribe's request and with the consent of the Attorney General; it does not require State consent to the change in Federal jurisdiction. After a tribe has submitted a request under 18 U.S.C. 1162(d), 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.

The process described in this rule is separate and distinct in this respect from Public Law 280's "retrocession" process for transferring criminal jurisdiction from the State government to the Federal Government. *See* 25 U.S.C. 1323(a). The retrocession process is initiated by the State, not the tribe, and thus cannot occur without the State's consent.

The process described in this rule is also distinct from the retrocession process in the further respect that the State will not lose any criminal jurisdiction as a result of the Federal Government's assumption of jurisdiction under this rule. As 18 U.S.C. 1162(d) makes clear, the jurisdiction assumed by the Federal Government under that provision is concurrent with State jurisdiction and, where applicable, tribal jurisdiction. By contrast, Federal acceptance of jurisdiction through the retrocession process under 25 U.S.C. 1323(a) eliminates criminal jurisdiction previously held by the State in areas covered by the retrocession.

Where 18 U.S.C. 1162(d) Does Not Apply

The process described in this rule applies only to Indian country that is subject to "mandatory" Public Law 280 State criminal jurisdiction under 18 U.S.C. 1162. As indicated above, the Department concludes that the United States has concurrent jurisdiction over General Crimes Act and Major Crimes Act violations in areas where States have assumed criminal jurisdiction under "optional" Public Law 280. Accordingly, although the TLOA provides for the United States to "accept" concurrent criminal jurisdiction in these areas "[a]t the request of an Indian tribe, and after consultation with and consent by the Attorney General," 25 U.S.C. 1321(a)(2), the Department's view is that such concurrent Federal jurisdiction exists, whether or not the United States formally accepts such jurisdiction with the Attorney General's consent pursuant to individual tribal requests under this provision. Accordingly, the Department is not establishing procedures in this rule for processing individual requests from tribes for acceptance

of concurrent Federal jurisdiction in areas subject to State criminal jurisdiction under “optional” Public Law 280.

Comments on the Proposed Rule

In response to the proposed rule published on May 23, 2011, *see* Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 FR 29675 (May 23, 2011), with a comment period through July 7, 2011, the Department of Justice received eight sets of comments: three from tribal governments, one from a non-profit organization, two from associations of county officials, one from a county attorney, and one from a private individual. These eight sets of comments included a number of comments related to other sections of the TLOA; only those comments relating to the proposed rule establishing procedures for making requests for concurrent Federal criminal jurisdiction are addressed here.

Information to Determine Whether the Assumption of Concurrent Federal Criminal Jurisdiction Will Improve Public Safety

One comment requested information in the rule that would indicate the effectiveness of Federal law enforcement in Indian country where concurrent Federal criminal jurisdiction already exists. In addition, the comment requested information about Federal law enforcement agency resources to help tribes determine whether the agencies are equipped adequately to be effective. Similarly, another comment requested information regarding Federal funding and staffing so that State agencies can gauge Federal law enforcement capacity.

The Department declines to adopt these suggestions. The extent of Federal law enforcement in Indian country where concurrent jurisdiction already exists is influenced by a wide variety of factors, some of which may be unique to a particular tribe. Therefore, generalizations about Federal law enforcement in Indian country could result in inaccurate and

largely unhelpful guidance for tribes considering whether to submit requests pursuant to this rule. Moreover, information about Federal law enforcement agency resources is subject to change each fiscal year and thus can be an unreliable predictor of future resources.

Tribal, Federal, State, and Local Communication and Participation

One comment requested an amendment to 28 CFR 50.25(c) to include a requirement that the Department provide notice (with an opportunity for comment) to State and local agencies that are responsible for investigating and prosecuting criminal violations in the Indian country of the tribe.

The Department concurs with this suggestion and is amending the final rule to require that tribes requesting assumption of concurrent Federal criminal jurisdiction identify such agencies in their requests, and that the Office of Tribal Justice provide written notice to those agencies within 30 days of receiving the request.

Two comments asked that the rule require the Office of Tribal Justice to provide the requesting tribe a copy of comments and recommendations submitted by others, and allow the tribe an opportunity to respond in writing.

The Department generally concurs with this suggestion, but reserves the right to exercise discretion in determining what to share with the tribe. For example, the Department has an obligation to protect personally identifiable information and law enforcement sensitive information. The final rule is being amended to note that the Office of Tribal Justice may provide the requesting tribe with appropriately redacted copies of comments and will allow the tribe an opportunity to respond in writing.

One comment suggested that the rule require a public meeting to solicit comments, which should be taken into consideration when evaluating tribal requests.

The Department declines to adopt this suggestion. Requests will be published in the *Federal Register* and notice will be sent in writing to the State and local agencies referenced above. Those agencies and the public will have ample opportunity to provide comments. While the Department reserves the option to hold public meetings in appropriate cases, the Department declines to make such meetings mandatory in all cases.

One comment asked that the rule require the Deputy Attorney General and the Office of Tribal Justice to meet personally with the tribe to discuss the request, comments, and recommendations submitted by others.

The Department declines to adopt this suggestion. The rule requires that the Office of Tribal Justice consult with the requesting tribe before forming a recommendation to the Deputy Attorney General. The Department believes the process established by the rule will provide requesting tribes sufficient opportunity for meaningful consultation on their requests and on any comments or recommendations from other parties.

Measurable Criteria for Determining the Need for Concurrent Federal Criminal Jurisdiction

One comment asked that 28 CFR 50.25(d) include criteria for evaluating current law enforcement agencies' successes or failures. This comment also asked for the inclusion of a provision identifying criteria for assessing existing resources and the application of those resources by agencies servicing the tribe requesting the assumption of concurrent Federal criminal jurisdiction. An additional comment proposed that the final rule should require a "prima facie" showing by the tribe that concurrent Federal criminal jurisdiction is necessary.

The Department declines to adopt these suggestions. The Department will determine which specified factors are relevant to evaluating a request for assumption of concurrent Federal jurisdiction in any particular case. Such factors will include an assessment of current law

enforcement agencies' resources and the application of those resources within the Indian country of the tribe. Moreover, the tribal request must "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." 28 CFR 50.25(b)(2). There is no need to require a "prima facie" showing that concurrent Federal criminal jurisdiction is necessary.

One comment noted that the list of factors for consideration in the proposed rule, 28 CFR 50.25(d)(4) through (7), is too broadly written and does not adequately characterize the standards the Department will apply when evaluating a request. The comment requested that the listed factors be more clearly defined, and relate to public safety, law enforcement needs, and implementation of the TLOA.

The Department partly concurs with this suggestion and is adding a new 28 CFR 50.25(d)(1), which expressly provides for consideration of whether consenting to the request will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe.

Threshold Requirements for Tribal Requests

Three comments suggested that consideration of or consent to tribal requests be conditioned on the inclusion of specific features in that tribe's justice system, such as due process protections for defendants, publicly available criminal codes, procedural and evidentiary rules, protections for victims' rights, and procedures to protect victim information.

The Department declines to adopt these suggestions. The Department will review information about a requesting tribe's justice system as one factor in evaluating a tribal request. But these comments suggest a mistaken belief that assumption of concurrent Federal criminal jurisdiction will alter the criminal jurisdiction of the tribe making the request. Neither this rule

nor the statute it implements, 18 U.S.C. 1162(d), alters existing tribal, State, or local jurisdiction. Therefore, there is no need to impose such additional requirements on a requesting tribe.

Periodic Assessments and Amendments

One comment suggested that the rule should include a provision for periodic review and should allow for future amendments.

The Department declines to adopt these suggestions. The statute being implemented in this rule, 18 U.S.C. 1162(d), does not provide for revisiting decisions to consent to the assumption of concurrent Federal criminal jurisdiction; rather, it indicates that such concurrent Federal criminal jurisdiction is established when the Attorney General consents to a tribal request. To the extent the comment refers to this rule, all regulations are subject to potential future amendment; an explicit statement to that effect in this rule is unnecessary.

Redundancy and Confusion

One comment noted that in the proposed rule, 28 CFR 50.25(d)(4) through (7) overlaps considerably with 28 CFR 50.25(e) and (g), and that 28 CFR 50.25(h) overlaps considerably with 28 CFR 50.25(d) and 50.25(e). The comment asked that these provisions be consolidated to reduce redundancy and avoid possible confusion.

The Department partly concurs with this suggestion. The Department is deleting from the final rule 28 CFR 50.25(e) through (g) of the proposed rule, which the Department agrees are substantially redundant of provisions in 28 CFR 50.25(d).

One comment asked that the Department remove the words “assumption” and “acceptance” of Federal concurrent jurisdiction because the statute being implemented in the rule, 18 U.S.C. 1162(d), provides for such jurisdiction automatically by operation of law when certain conditions are met.

The Department declines to adopt this suggestion. Using the words “assumption” and “acceptance” adds clarity to the rule.

One comment suggested that the Department remove references to section 221 of the TLOA to avoid confusion and instead refer directly to 18 U.S.C. 1162(d).

The Department concurs with this suggestion and is amending the final rule accordingly.

Time Frames

One comment suggested that the Department change the language in 28 CFR 50.25(c)(2) from “promptly” to “within 30 days of receipt,” and provide a 60-day comment period.

The Department concurs with the suggestion to change the language in 28 CFR 50.25(c)(2) from “promptly” to “[w]ithin 30 days of receipt of a tribal request.” The Department also concurs with the suggestion that the comment period be defined, and is amending the rule to include a 45-day comment period. This somewhat shorter comment period will help the Department reach a decision within the timeframe contemplated in the rule.

One comment asked that the rule be amended to account for factors that may prompt a tribe to request assumption of concurrent Federal criminal jurisdiction outside of the two prioritized timeframes.

The Department declines to adopt this suggestion. The rule as written allows a tribe to submit a request at any time and allows the Deputy Attorney General to make a final decision on such a request at any time. *See* 28 CFR 50.25(c)(5).

One comment asks that the rule identify a time limit on the duration of the comment period provided to State and local law enforcement agencies, to avoid delaying the assumption of concurrent Federal criminal jurisdiction.

The Department concurs with this suggestion and is amending the rule to specify a 45-day comment period.

Partial Jurisdiction

One comment noted that 18 U.S.C. 1162(d) does not provide authority for assumption of jurisdiction over a subset of violations of the General Crimes and Major Crimes Acts because the TLOA makes 18 U.S.C. 1152 and 1153 indivisibly applicable. The same comment also notes that 18 U.S.C. 1162(d) does not provide authority for assumption of jurisdiction over only part of the Indian country of the tribe because 18 U.S.C. 1162(d)(1) states that 18 U.S.C. 1152 and 1153 “shall apply in the areas of the Indian country of the Indian tribe.”

As noted in the proposed rule, the Department added this provision in response to requests from tribal leaders during tribal consultation. While the Department initially believed that the language of the statute was sufficiently ambiguous to permit requests for assumption of concurrent Federal criminal jurisdiction over a subset of violations of the General Crimes and Major Crimes Acts or in a limited geographic portion of the tribe’s Indian country, upon further review the Department now concludes that such an interpretation does not have sufficient support in the language or legislative history of the TLOA. Moreover, such partial jurisdiction could create practical difficulties, complicating further the complex criminal jurisdictional rules of Federal Indian law. Accordingly, the rule is being modified to remove the reference to partial assumptions of concurrent criminal jurisdiction. We note, however, that for those tribes whose Indian country is located partly in a State with mandatory criminal jurisdiction under Public Law 280 and partly in a State that does not have such mandatory Public Law 280 jurisdiction, the tribe’s request for the assumption of concurrent Federal criminal jurisdiction under this rule

would pertain only to that part of the tribe's Indian country that is located in a State with mandatory criminal jurisdiction under Public Law 280.

State Interests

One comment suggests providing notice to and accepting input from State governors or their designees.

The Department concurs with this suggestion and is amending the final rule to require that the Office of Tribal Justice copy the relevant governor's office on the notices sent to State or local law enforcement agencies when a request for assumption of concurrent Federal criminal jurisdiction is received.

Appeals

One comment asks that the rule include a provision stating that granted requests are non-appealable in the same way denied requests are non-appealable under 28 CFR 50.25(h)(4) of the proposed rule.

The Department concurs with this suggestion and is amending the final rule accordingly.

Additional Changes

The Department is amending the rule to note that requests will be accepted as soon as the rule becomes effective. As noted above, tribes that have submitted requests prior to the effective date should resubmit the requests and ensure that their requests conform to the requirements of the final rule.

Regulatory Certifications

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866 of September 30, 1993 ("Regulatory Planning and Review"), as

amended. 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 the distribution of power and responsibilities among the various levels of government. The statutory process provided under 18 U.S.C. 1162(d) 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 this rule does not expand or change this authorization. This regulation merely establishes procedures providing for the Deputy Attorney General, by delegation, to make an informed decision in considering, in consultation with other Federal, tribal, State, and local 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. Even if the Deputy Attorney General exercises his discretion to assume concurrent jurisdiction under this regulation, the State retains all of its existing jurisdiction. Furthermore, the Department of Justice will work with the relevant State and local agencies to determine how best to share concurrent criminal jurisdiction with the State and (where applicable) the tribe and to coordinate investigations and prosecutions, just as the Department works with States and tribes in other areas with concurrent criminal jurisdiction. Therefore, in accordance with Executive Order 13132 of August 4, 1999, 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 of February 5, 1996.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

This rule comports with Executive Order 13175 of November 6, 2000. 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 in meaningful consultation and collaboration with tribal officials in developing this rule. More specifically, the Department of Justice participated in six consultations with tribal officials on the Tribal Law and Order Act of 2010. The dates and locations of those tribal consultations were as follows:

- October 14, 2010, in Billings, Montana
- October 20, 2010, in Albuquerque, New Mexico
- October 28, 2010, in Miami, Florida
- November 16, 2010, in Albuquerque, New Mexico
- December 8, 2010, in Palm Springs, California
- March 23, 2011, in Hayward, Wisconsin

The last two consultation sessions focused on section 221 of Public Law 111-211, and the March 23, 2011 consultation expressly addressed a draft version of the proposed rule.

During these consultations, some tribal officials expressed a desire to see the Attorney General consent to each and every tribal request for concurrent Federal criminal jurisdiction. Other tribal officials raised more specific concerns. In direct response to the latter, the Department of Justice significantly rewrote portions of the proposed rule that is now being finalized. Seven changes included in the final rule are particularly noteworthy.

First, rather than providing that the Department will attempt to give priority only to those tribal requests received by August 31 of any calendar year, the final rule provides that the Department will attempt to give priority to requests received by August 31 or by February 28. This change effectively doubles the number of annual cycles in which the Department will attempt to consider tribal requests on a prioritized basis.

Second, the final rule clarifies why it is unnecessary, under the Department's view of the applicable statutes, for tribes in "optional" Public Law 280 jurisdictions to submit individual requests for formal acceptance of concurrent Federal criminal jurisdiction.

Third, the final rule clarifies that Federal agencies are to supply comments and information relevant to each tribal request, rather than merely announcing their overall support or opposition for each request.

Fourth, the final rule reiterates that the assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) does not require the agreement, consent, or concurrence of any State or local government.

Fifth, the final rule expressly provides that the Department's Office of Tribal Justice may give appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request, following the denial of an earlier request.

Sixth, the final rule states that the assumption of concurrent Federal criminal jurisdiction will commence within six months of the decision to assume jurisdiction, if feasible, rather than merely mandating action within twelve months.

Seventh and finally, the final rule requires that notice of a decision consenting to the request for assumption of concurrent Federal criminal jurisdiction will be published in the *Federal Register*.

The Department of Justice thus believes that many of the concerns that tribal officials expressed about 18 U.S.C. 1162(d) and the draft proposed regulation at the tribal consultations in 2010 and 2011 have now been met.

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 18 U.S.C. 1162(d).

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 million 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, Pub. 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, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

This final rule contains a new “collection of information” covered by the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501-3521. Under the PRA, a covered agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number assigned by the Office of Management and Budget (OMB). 44 U.S.C. 3507(a)(3), 3512. The information collection in this final rule requires Indian tribes seeking assumption of concurrent criminal jurisdiction by the United States to provide to the Department certain information relating to public safety within the Indian country of the tribe. The Department submitted an information collection request to OMB for review and approval in accordance with the review procedures of the PRA. OMB approved the collection on September 27, 2011, and assigned OMB control number 1105-0091. The Department of Justice did not receive any comments specifically about the proposed collection.

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 amended as follows:

PART 50 — STATEMENTS OF POLICY

1. The authority citation for part 50 is revised 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. 1921 et seq., 1973c; and Public Law 107-273, 116 Stat. 1758, 1824.

2. Section 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) Under 18 U.S.C. 1162(d), the United States may accept concurrent Federal criminal 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, or Indian Major Crimes, Act) within areas of Indian country in the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin that are subject to State criminal jurisdiction under Public Law 280, 18 U.S.C. 1162(a), if the tribe requests such an assumption of jurisdiction and the Attorney General consents to that request. Once the Attorney General has consented to an Indian tribe's request for assumption of concurrent Federal criminal jurisdiction, the General Crimes and Major Crimes Acts shall apply in the Indian country of the requesting tribe that is located in any of these "mandatory" Public Law 280 States, and criminal jurisdiction over those areas shall be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) does not require the agreement, consent, or concurrence of any State or local government.

(2) Under 25 U.S.C. 1321(a)(2), the United States may exercise concurrent Federal criminal jurisdiction in other areas of Indian country as to which States have assumed "optional" Public Law 280 criminal jurisdiction under 25 U.S.C. 1321(a), if a tribe so requests and after consultation with and consent by the Attorney General. The Department's view is that such concurrent Federal criminal jurisdiction exists under applicable statutes in these areas of Indian country, even if the Federal Government does not formally accept such jurisdiction in response to petitions from individual tribes. This rule therefore does not establish procedures for processing requests from tribes under 25 U.S.C. 1321(a)(2).

(b) Request requirements. (1) A tribal request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) shall be made by the chief executive official of a federally recognized Indian tribe that occupies Indian country listed in 18 U.S.C. 1162(a). For purposes of this section, a chief executive official may 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 first page of the tribal request shall be clearly marked: “Request for United States Assumption of Concurrent Federal Criminal Jurisdiction.” 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. The tribal request shall also identify each local or State agency that currently has jurisdiction to investigate or prosecute criminal violations in the Indian country of the tribe and shall provide contact information for each such agency.

(c) Process for handling tribal requests. (1) Upon receipt of a tribal request, the Office of Tribal Justice shall:

- (i) Acknowledge receipt; and
- (ii) Open a file.

(2) Within 30 days of receipt of a tribal request, the Office of Tribal Justice shall:

- (i) Publish a notice in the *Federal Register*, seeking comments from the general public;
- (ii) Send written notice of the request to the State and local agencies identified by the tribe as having criminal jurisdiction over the tribe’s Indian country, with a copy of the notice to the governor of the State in which the agency is located, requesting that any comments be submitted within 45 days of the date of the notice;

(iii) Seek comments from 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; and

(iv) Seek comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(3) As soon as possible but not later than 30 days after receipt of a tribal request, the Office of Tribal Justice shall initiate consultation with the requesting tribe, consistent with applicable Executive Orders and Presidential Memoranda on tribal consultation.

(4) To the extent appropriate and consistent with applicable laws and regulations, including requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, governing personally identifiable information, and with the duty to protect law enforcement sensitive information, the Office of Tribal Justice may share with the requesting tribe any comments from other parties and provide the tribe with an opportunity to respond in writing.

(5) An Indian tribe may submit a request at any time after the effective date of this rule. However, requests received by February 28 of each calendar year will be prioritized for decision by July 31 of the same calendar year, if feasible; and requests received by August 31 of each calendar year will be prioritized for decision by January 31 of the following calendar year, if feasible. The Department will seek to complete its review of prioritized requests within these time frames, recognizing that it may not be possible to do so in each instance.

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

(1) Whether consenting to the request will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe.

(2) 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.

(3) 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.

(4) 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.

(5) Other comments and information received from 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.

(6) Other comments and information received from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(7) Other comments and information received from tribal consultation.

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

(e) 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, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation.

(2) The Deputy Attorney General will:

(i) Consent to the request for assumption of concurrent Federal criminal jurisdiction, effective as of some future date certain within the next twelve months (and, if feasible, within the next six months), with or without conditions, and publish a notice of the consent in the *Federal Register*;

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

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

(3) The Deputy Attorney General shall explain the basis for the decision in writing.

(4) The decision to grant or deny a request for assumption of concurrent Federal criminal jurisdiction is not appealable. However, at any time after a denial of such a request, 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. The Office of Tribal Justice may provide appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request.

(f) 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 of November 21, 1968. The procedures for retrocession do not govern a request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d).

____ November 28, 2011 _____
Date

Eric H. Holder, Jr.
Attorney General

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