

MINUTES

**MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on April 2, 1991, at 10:05 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: none

Staff Present: Valencia Lane (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion: Senator Pinsoneault announced that the Committee would hear comments from Attorney General Marc Racicot on HJR 9 and HB 797. He also announced that Senator Mazurek would chair the meeting during discussion of HB 797 and HJR 9.

EXECUTIVE ACTION ON HOUSE JOINT RESOLUTION 9

Discussion of the bill:

Attorney General Racicot said he was appearing at the request of the Committee, not as an opponent or a proponent of the bills, but representing the Western Conference of Attorneys General. He stated that he believes HJR 9 errs in its assumption that a mistake was made by the Supreme Court in Duro v Raina. The Attorney General told the Committee that Congress can grant stipulations, and said he had concerns as negotiations with the Tribes are very complex and difficult. Mr. Racicot explained that negotiations include clean water, gaming, underground storage, and other issues, and said 150 years of federal waffling on Indian policy has contributed to this difficulty. He advised the Committee that Montana will be involved in negotiations with tribal governments for a very long

period of time, and that this needs to be done respectfully (Exhibit #1).

Senator Svrcek commented that, according to Duro v Raina, criminal jurisdiction by one tribe does not extend to jurisdiction of another tribe. He asked why this is not a reasonable expectation. Marc Racicot replied that non-tribal members simply don't have the ability to participate in the government they are being subjected to. He stated that if Congress provides this power, the concept can get strained, such as in Wheeler.

Senator Halligan said the resolution doesn't differentiate the Major Crimes Act from the Tribal Crimes Act, and if there were any statutory authority. Marc Racicot replied the resolution doesn't address constitutional provisions regarding inherent provisional territorial authority, and said Congress can do this.

Senator Halligan asked if there is a gap in jurisdiction. Mark Racicot replied that, arguably and theoretically, there is, and that Congress should address it in its pure form. He advised the Committee that he hadn't noticed any "black holes" in reservation jurisdiction.

Senator Yellowtail referred to the second paragraph on page 2 of Clay Smith's March 20, 1991 memo to the Attorney General (Exhibit #1). Marc Racicot replied that federal statute can be construed. He said the right way to address this situation is through congressional action, and commented that Congress said Duro would be postponed for a period of time.

Senator Yellowtail asked if Congress declared that, for the time being, jurisdiction cases should rest under tribal authority. Marc Racicot replied that is correct.

Senator Yellowtail asked if the Western Conference of Attorneys General should recognize that. Marc Racicot replied he doesn't have a problem with this, and that the problem is HJR 9 should not have advised that Duro v Raina is constitutionally flawed.

Senator Yellowtail asked about the language, "consent of the governed". He said the courts have reiterated repeatedly that Indian tribes are not racially distinct, but politically distinct. Marc Racicot replied he was merely reflecting what the Supreme Court said.

Senator Yellowtail commented that he believes his previous statement is correct. He asked what the difference is between a member of the Kickapoo Tribe in the Northern Cheyenne Tribe and a Californian in Montana in terms of "consent of the governed". Marc Racicot replied the Californian does participate in the process over which the notion of "consent of the governed" is concerned, but there is no guarantee that the Constitutional Bill of Rights applies on a reservation.

Senator Yellowtail asked what the implication of the 1968 Indian Civil Rights Act is in relation to this issue. Marc Racicot replied there is simply no guarantee that the protection of the Bill of Rights exists on reservations.

Senator Pinsoneault asked if Section 1152 of the Indian Crimes Act could cover this issue via intertribal agreements. Marc Racicot replied that, again, the notion of "consent of the governed" is included, and said he "knows it becomes thinner as it moves away".

Senator Towe asked what would happen if the Committee struck the portion of HJR 9 criticizing Duro v Raina. Marc Racicot replied he believes that is a salutary thing to consider.

Senator Towe asked if jurisdiction could be given on a temporary basis, pending Congress taking firm action. Marc Racicot replied he could not confirm that he has noticed a gap in jurisdiction, but, theoretically, it exists.

Senator Towe said he believes Indian tribes in the State are looking for valid reasons to exercise jurisdiction over non-tribal members. Marc Racicot replied he had no objection to this, but it is not that simple.

Senator Doherty asked if there were any problems with practical application, and said it seems that federal legislation is most practical. Marc Racicot replied that he agreed.

Senator Doherty commented that Duro v Raina deals with criminal jurisdiction, and that some people testified who have no experience in dealing with criminal jurisdiction. Marc Racicot replied that jurisdiction questions are very finite, and must be precisely defined. He said this is not done in HJR 9.

Senator Svrcek asked if a foreign national who comes to the U.S. and violates a law is not subject to the laws of this country. Marc Racicot asked Senator Svrcek if he were talking about whether citizenship guarantees jurisdiction.

Senator Svrcek asked if an Indian from one reservation would be viewed as a foreigner by another reservation. Marc Racicot replied that reservation members are citizens of the U.S. He stated that Senator Svrcek is making a judgement, and repeated that if one is not a member of that tribe, he or she doesn't have a right to participate in that tribal government.

Senator Rye asked why it can't be both ways. Marc Racicot replied that reservations are a sovereign nation with limited territorial jurisdiction.

Senator Rye asked if a non-Indian American is entering a foreign country when he or she is on a reservation.

Chairman Mazurek advised the Committee that amendments were prepared by Senators Yellowtail and Towe (Exhibits #2 and #3).

Senator Towe said he would support Senator Yellowtail's amendments if "confirm" is changed to "assure".

Amendments, Discussion, and Votes:

Senator Yellowtail made a motion to approve amendment #1 on Exhibit #1. The motion carried unanimously.

Senator Towe made a motion to approve amendments #1, 4, and 5 on Exhibit #3. The motion carried with all members voting aye except Senator Halligan who voted no.

Senator Halligan said he would rather recognize the practice of Indian tribes recognizing non-members. He made a motion to insert "the practice" following "It has been" on page 1, line 18.

Senator Pinsoneault commented that the language would be extremely broad with this amendment.

Senator Halligan withdrew his motion.

Senator Pinsoneault expressed his desire to go back to the original language of the bill (segregating amendments #2 and 3 by Senator Towe).

Senator Towe said he believes that language would be accurate for all of the reservations except the Confederated Salish and Kootenai Tribes. He commented that maybe the original language would be okay.

Senator Yellowtail stated he believes the original language is accurate enough.

Senator Towe withdrew his amendments #2 and 3.

Senator Crippen referred to line 8, and asked if the Committee is flirting with equal protection problems. Marc Racicot replied that is precisely what the Supreme Court said in Duro v Raina. He said the same notion is also involved with criminal jurisdiction over non-member Indians.

Senator Crippen asked if non-member Indians would be singled out, as opposed to other non-members, if this resolution were to pass. He said he understood from Duro v Raina that non-members are not treated the same, as the Bill of Rights does not fully apply. Marc Racicot replied that he was mistaken in his previous answer, as it involves federal jurisdiction.

Senator Harp asked about inserting "as long as it is consistent with the protection set forth in Duro v Raina", following "tribes" on page 2, line 16. Marc Racicot replied that

unless the accused can participate in the government under which he or she will be punished, it won't pass constitutional muster. He said he believes this language would help, but would also be very confusing.

Senator Towe commented that he tends to agree with Mr. Racicot. He said the Indian Civil Rights Act is flawed in many ways, but he doesn't believe they have to wait until non-members are given a voice in tribal government. Senator Towe stated that it may not be subject to equal protection, but the connections are quite valid.

Senator Crippen asked if a member of the Crow Tribe can become a member of the Northern Cheyenne Tribe. Senator Yellowtail replied that this can only be done by a blood covenant ceremony.

Senator Yellowtail made a motion that HJR 9 BE CONCURRED IN AS AMENDED.

Senator Harp made a substitute motion to amend the bill back to its original state.

Senator Yellowtail stated he does not believe it is clear what is protected in the Duro v Raina issue. He commented that he would be satisfied if the bill were consistent with protection in the U.S. Constitution.

Senator Harp said he believes the language is consistent with the subject at hand.

Chairman Mazurek asked what constitutional protection is being addressed. Dan Hoven, Helena attorney, replied that there may be ways Congress can address this.

Senator Doherty stated that what underscores the whole reason for Senator Harp's motion is wrong, and said Senator Yellowtail is right. Senator Towe agreed with Senators Yellowtail and Doherty.

Senator Harp's motion failed 4-8 in a roll call vote (attached).

Senator Svrcek made a substitute motion to approve the language proposed by Senator Halligan, by striking "this ruling contradicts the historical and traditional" on page 1, line 18, and inserting "it has been the". The motion carried unanimously.

Senator Halligan said he was surprised that Senator Harp did not follow up on his amendment. Senator Pinsoneault agreed.

Senator Halligan made a motion to insert, "so long as such actions are consistent with protection afforded or guaranteed by the U.S. Constitution". The motion carried unanimously.

Senator Pinsoneault suggested that non-members of tribes are being treated as second-rate citizens. He said he believes Congress knows what the problem is, and that Congress doesn't need a resolution to address it.

Senator Yellowtail stated that this issue is not complicated, and that there is a jurisdictional void. He said the options are federal, state, or tribal jurisdiction, and that this resolution picks the one consistent with historical practice.

Recommendation and Vote:

Senator Yellowtail's motion, that HJR 9 BE CONCURRED IN, carried 8-4 with all members voting aye except Senators Harp, Brown, Crippen, and Pinsoneault who voted no. Senator Yellowtail will carry the bill.

EXECUTIVE ACTION ON HOUSE BILL 797

Motion:

Discussion:

Chairman Mazurek asked what the effect of this bill is, if, through negotiation, no agreement is reached.

Senator Towe said the bill only changes the law authorizing the state to retroceed, and that the request to retroceed goes to the Bureau of Indian Affairs (BIA) to approve or disapprove.

Senator Pinsoneault replied that the U.S. Attorney said the request would also have to be approved by the U.S. Attorney General.

Chairman Mazurek asked Attorney General Racicot to address this. Marc Racicot replied that, if the bill were to pass, the Tribes could make the decision to retroceed and that the Governor must then issue a proclamation within a prescribed period of time. He stated that there are no published rules after that, but a large amount of discretion is left to the Secretary of the Interior who confers with the U.S. Attorney General.

Chairman Mazurek asked if there would be any negotiation between Tribal government and the Governor of Montana. Marc Racicot replied there could be with regard to when and how retrocession would occur.

Senator Towe asked if the Governor has the authority to approve or deny retrocession. Marc Racicot replied he didn't believe so.

Amendments, Discussion, and Votes:

Senator Halligan made a motion to approve the amendments on Exhibit #3_a. He said retrocession would not then be effective until it is approved at the federal level.

Senator Grosfield said he had a problem with amendment #2, as the U.S. does not act until it gets a proclamation from the Governor of Montana. Senator Halligan replied that retrocession is effective in the sense that it can't be vetoed.

Senator Grosfield stated that the purpose of a proclamation is to notify the federal government of retrocession, and that is the end of the Governor's role.

Senator Towe said he arrived at the same conclusion stated by Senator Grosfield. He referred to the letter from the Assistant Secretary of Indian Affairs which stated that, once a request was received, it would be considered.

Senator Halligan's motion to amend HB 797 carried 10-2, with Senators Pinsoneault and Grosfield voting no.

Senator Yellowtail made a motion that HB 797 BE CONCURRED IN AS AMENDED.

Senator Pinsoneault stated that he took issue with the information provided to Senator Towe by Tribal Attorney Pat Smith. He said he believes the Tribes have done more for themselves than any other tribe in the country.

Senator Pinsoneault advised the Committee that, in 1980 when he opened his law practice on the Reservation, only Evelyn Stevenson was practicing law for the Tribes. He stated Ms. Stevenson is a very competent attorney, and that the Tribes now employ nine or ten attorneys.

Senator Pinsoneault further stated that the people have failed in cross-deputization, and have been hypocrites and red-necks about this issue. He suggested sending this matter to an interim committee to study, and said he believes an answer can be attained that is satisfactory to all concerned.

Senator Pinsoneault told the Committee that Representative Davis was asked about PL 280, and replied that he didn't know what it was. Senator Pinsoneault stated that he believes 90 percent of the people on the Reservation don't understand PL 280, and urged the Committee to reject HB 797.

Senator Yellowtail said he could understand Senator Pinsoneault's frustration and overtones in this legislation. He submitted that there is not time nor the resources to investigate this matter, but the U.S. Office of Civil Rights has the authority and responsibility. Senator Yellowtail stated that the question

relates to the matter of self-determination. He said the Tribes have the prerogative of self-government, and that this has been often-confirmed.

Senator Yellowtail advised the Committee that the Tribes voluntarily entered into PL 280 twenty years ago, and now wish to voluntarily leave this authority. He said the present situation is not working, as alluded to by Senator Pinsoneault. Senator Yellowtail further stated that, in their letter to the Committee dated March 29, 1991, the Tribes agreed to partial retrocession and to operate in good faith. He asked the Committee to support the bill.

Senator Crippen stated that it is the desire of everyone to have self-determination. He said the point was made that the Confederated Salish and Kootenai Tribes are unique, and that, as a Senator, he has a responsibility to represent all people on the Reservation. Senator Crippen further stated that all the facts need to be at the disposal of the Committee in order to make an appropriate decision. He said the Committee did not get all of these facts, but received a lot of allegations.

Senator Crippen further advised the Committee that he was impressed by the Tribal Chairman's statement of compromise. He said the Legislature has the responsibility, and that this step is irrevocable. Senator Crippen stated that the Governor can't stop retrocession, and will accept it. He told the Committee he would support an interim study.

Senator Towe advised the Committee that he is Chief Counsel for the Crow Tribe, and also works with the Tribes at Fort Peck and Fort Belknap. He said there is discrimination, but is improving markedly, and that Indians have gained respect in handling responsibility, even though they haven't always handled it well.

Senator Svrcek asked if adoption of the amendments has retained state jurisdiction in situations where an Indian commits a crime against a non-Indian. Senator Towe replied that would depend upon how Congress reacts, if it is a misdemeanor, but a felony would go to federal court.

Chairman Mazurek said he believes retrocession must happen, but he has concerns and believes the issue needs more study, as stated by Senator Crippen. He said he knows the state is out of the process if HB 797 passes.

Senator Halligan said he fully expected and anticipated that the Tribes, in developing this legislation, would handle these concerns via a public hearing on civil and criminal issues. He stated he expected it to take from one and one-half to two years to address resources and program problems.

Senator Pinsoneault stated that the cart is ahead of the horse. He reported that Senator Gage agrees that this should be

done, and would make it a single-agenda item for resolution. He said there is no meaningful appeal from a tribal court decision, and that he sees a need to come back, unilaterally, in 1993.

Senator Yellowtail commented that the state is out of the process in six other reservations right now, and asked why the Flathead Reservation should be any different. He further commented that 30 or more tribes in the U.S. are out of this process.

Senator Yellowtail further stated that the Legislature didn't spend two years studying water rights or the coal tax, both of which impacted tribes. He said the Committee needs to be fair and even-handed, and that the Tribes have always conducted their affairs in good faith.

Senator Yellowtail read form page 3 of the March 29, 1991 Tribal letter concerning their commitment to cooperation. He said the commitment is there, and that there is little to be gained by further study.

Recommendation and Vote:

Senator Yellowtail's motion that HB 797 BE CONCURRED IN AS AMENDED failed 4-8 in a roll call vote (attached).

Senator Pinsoneault advised the Committee that he prepared a rough draft of a resolution, with the assistance of the Attorney General, for interim study.

Senator Towe asked that the resolution state that the Governor is not required to issue a proclamation until the issue is before the next Legislature with adequate direction on jurisdiction.

Senator Brown said he believes retrocession should include everyone on the Reservation, and commented that 75 percent of that population are non-members.

Senator Halligan agreed that a separate resolution is needed.

Senator Rye said he believes a committee resolution is in order, and that it would be a preferable alternative.

Senator Pinsoneault said he would like to have time to work on the resolution.

Chairman Mazurek said he was concerned that a resolution may not provide a strong enough statement.

Senator Yellowtail stated that Senator Halligan is right, and asked that the bill be left, up or down, to come back clean. Senator Pinsoneault concurred.

Chairman Mazurek asked Senator Pinsoneault if he would have the resolution drafted for the Committee. Senator Pinsoneault replied he would have it done by noon on Wednesday, April 3, 1991.

Senator Svrcek asked if it is proper to direct a standing committee to address this during the interim. Chairman Mazurek replied it can be requested, but not forced upon the standing committee. Senator Towe replied that it can be mandated by a Committee bill, and requested by a resolution.

Senator Brown made a motion that HB 797 BE TABLED. The motion failed 6-6 in a roll call vote (attached).

EXECUTIVE ACTION ON HOUSE BILL 825

Motion:

Discussion:

Senator Towe provided his amendments and those of Legislative Council Attorney John MacMaster (Exhibits #4 and #5).

Senator Halligan said he was concerned about eligibility when applying, as some misdemeanor crimes can involve violence. Representative Robert Clark, District 31, replied that would be reason for denial, and is covered in the bill. He said such an applicant would have to appeal to the district court.

Senator Svrcek stated that, in the bill right now, a sheriff cannot deny a permit for any offense of less than one year (Sections (a)-(h)).

Senator Grosfield stated that "or" on line 6 is the key word.

Senator Mazurek asked Representative Clark if he had concerns. Representative Clark replied that the law enforcement community is satisfied with the bill.

Senator Mazurek said he could not believe that the bill would make the sheriffs issue the permits. Representative Clark again replied that the law enforcement community is satisfied with the bill as it is.

Chairman Pinsoneault asked how many states have this legislation now. Representative Clark replied that Idaho, Florida, Washington, and Michigan have similar legislation.

Amendments, Discussion, and Votes:

Senator Towe made a motion to approve the MacMaster amendments (Exhibit #5). The motion carried unanimously.

Senator Mazurek made a motion to amend page 14, line 2, dealing with restriction of local government regulations, by deleting "concealed" and inserting "a handgun or a concealed handgun". The motion carried unanimously.

Senator Mazurek suggested deleting subsection (c) on page 11, in Section 8, and inserting "any premises which has an on-premise beer or all-beverage license". Representative Clark replied that subsection deals with restaurant/bars, and was requested by the Sheriffs and Peace Officers Association.

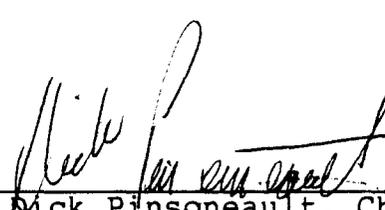
Senator Towe made a motion to delete "a full meal". The motion carried with all members voting aye except Senators Crippen and Harp who voted no.

Recommendation and Vote:

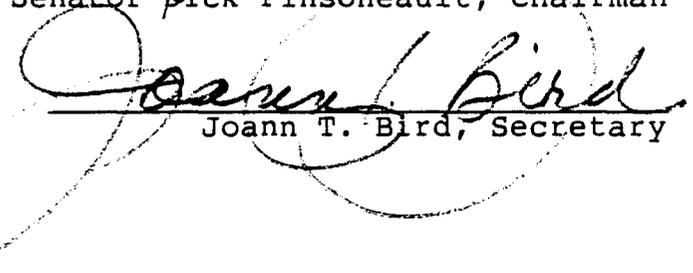
The Committee deferred final action on HB 825 until Wednesday, April 3, 1991.

ADJOURNMENT

Adjournment At: 12:30 p.m.



Senator Dick Pinsoneault, Chairman



Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1997

Date 2 Apr 97

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
April 4, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Joint Resolution No. 9 (third reading copy -- blue), respectfully report that House Joint Resolution No. 9 be amended and as so amended be concurred in:

1. Title, line 6.

Strike: "CONFIRMING"

Insert: "ASSURING"

2. Page 1, lines 18 and 19.

Following: "WHEREAS," on line 18

Strike: remainder of line 18 through "traditional" on line 19

Insert: "it has been the"

3. Page 2, line 1.

Following: "legislation"

Strike: "reversing"

Insert: "to resolve the jurisdictional dilemma raised in"

4. Page 2, lines 3 and 4.

Following: "would" on line 3

Strike: remainder of line 3 through "confirming" on line 4

Insert: "assure"

5. Page 2, line 13.

Strike: "confirming"

Insert: "assuring"

6. Page 2, line 16.

Following: "tribes"

Insert: ", so long as consistent with the protections guaranteed by the United States constitution"

Signed: 
Richard Pinsoneault, Chairman

4-7-91
Amd. Coord.

SB 4-4 210
Sec. of Senate

ATTORNEY GENERAL
STATE OF MONTANA

Z #1
2 Apr 91
HJK9

Marc Racicot
Attorney General



Justice Building
Helena, Montana 59620

MEMORANDUM

TO: MARC RACICOT
FROM: CLAY R. SMITH
DATE: March 20, 1991
RE: Partial Retrocession of Public Law 280 Jurisdiction

Two issues have arisen in connection with House Bill 797, which deals with retrocession of Public Law 280 jurisdiction over the Flathead Indian Reservation. The first is whether only part of the existing jurisdiction may be retroceded; the second relates generally to the procedure which would be followed by the United States should the Legislature authorize either complete or partial retrocession.

25 U.S.C. § 1323(a) provides:

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

Section 1323 was enacted in 1968 as part of the Indian Civil Rights Act (Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified as amended at 18 U.S.C. § 1153 & 25 U.S.C. §§ 1301-03, 1321-26, 1331, 1334)) and was designed to "authorize the United States to accept retrocession of jurisdiction, full or partial," from states which had previously been given or voluntarily assumed jurisdiction under Public Law 280. Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 493 n.40 (1979). Executive Order No. 11435 designated the Secretary of Interior as the federal officer empowered to accept such retrocession but requires the Secretary to consult with the United States Attorney General before accepting retrocession of criminal jurisdiction. Under the executive order, retrocession is effected only upon the Secretary's publishing in the Federal Register a description of the jurisdiction retroceded and the retrocession's effective date. See Val/Del, Inc. v. Superior Court, 703 P.2d 502, 508 n.2 (Ariz. Ct.

App.), cert. denied, 474 U.S. 920 (1985) ("[t]o effectively retrocede jurisdiction, there must be formal acceptance of the retrocession by the Secretary of the Interior, published in the Federal Register, specifying the date of retrocession"). The Secretary has adopted no administrative regulations with respect to retrocession acceptance procedures or criteria.

Because the United States is authorized to accept retrocession of "all or any measure" of civil or criminal jurisdiction previously assumed under Public Law 280, states presumably may seek partial retrocession. This conclusion comports with Yakima, where the Supreme Court upheld a Washington statute asserting "[f]ull criminal and civil jurisdiction to the extent permitted by Pub.L. 280 [as] ... to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved" but, except for eight categories of civil law, did not extend state jurisdiction "to Indians on allotted and trust lands unless the affected tribe so requested." 439 U.S. at 475. Since states are not required in the first instance to assume complete civil or criminal jurisdiction, it would make little sense to require retrocession offers to encompass all Public Law 280 jurisdiction previously assumed. See Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990) (concluding that Major Crimes Act, 18 U.S.C. § 1153, did not apply to prosecution for vehicle-related deaths even though Public Law 280 jurisdiction over reservation crimes had been retroceded generally, where retrocession offer accepted by the Secretary excluded "any offenses involving the operation of motor vehicles on public roads or highways"). It warrants emphasizing, however, that merely because states may seek partial retrocession does not mean the United States must accept the offer as made. Omaha Tribe v. Village of Walthill, 334 F. Supp. 823, 834 (D. Neb. 1971), aff'd, 460 F.2d 1327 (8th Cir. 1972) (per curiam), cert. denied, 409 U.S. 1107 (1973) (upholding secretarial determination to accept retrocession offer as to one, but not a second, reservation). Simply put, the Secretary has substantial discretion in retrocession matters, and there is no assurance that a retrocession offer will be accepted precisely as made.

Consequently, there appears no reason why the State cannot seek retrocession as to a portion of the Public Law 280 jurisdiction now existing with respect to the Flathead Reservation. It could request, for example, retrocession only of that jurisdiction related to civil or criminal proceedings involving members of the Confederated Salish and Kootenai Tribes. The appropriate structuring of such a partial retrocession request is a matter for legislative determination, and the Legislature appears to possess significant latitude in making that determination.

Less clear is how a transfer of jurisdiction affects pending civil or criminal proceedings or the selection of a forum for initiating prosecution of criminal offenses alleged to have been committed

before retrocession. 25 U.S.C. § 1325 governs abatement of federal proceedings upon cession of jurisdiction to states,¹ but no comparable provision governs state proceedings when retrocession is accepted. The Eighth Circuit has held that "the substance of what [a state] retroceded, or more specifically, what [a state] did with criminal actions pending in its courts is a question of state law." Tyndall v. Gunter, 840 F.2d 617, 618 (8th Cir. 1988) (finding state court jurisdiction over criminal proceeding concluded after retrocession acceptance, where state supreme court had held retrocession resolution did not intend to relinquish state jurisdiction over pending criminal matters). To avoid confusion, any retrocession legislation should include an abatement provision similar to § 1325.

¹Section 1325 reads:

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

HJR 9
2 Apr 91

Amendments to House Joint Resolution No. 9
Third Reading Copy (BLUE)

Requested by Senator Yellowtail
For the Committee on Judiciary

Prepared by Valencia Lane
March 25, 1991

1. Page 2, line 1.
Following: "legislation"
Strike: "reversing"
Insert: "to resolve the jurisdictional dilemma raised in"

2. Page 2, lines 3 and 4.
Following: "would" on line 3
Strike: remainder of line 3 through "confirming" on line 4
Insert: "confirm"

*Yellowtail
Amendments*

to resolve the jurisdictional dilemma raised in

HOUSE JOINT RESOLUTION NO. 9
Revised Garcia Yellowtail

1 INTRODUCED BY Revised Garcia Yellowtail

2 A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF

3 REPRESENTATIVES OF THE STATE OF MONTANA URGING THE UNITED

4 STATES CONGRESS TO PASS LEGISLATION CONFIRMING THAT A TRIBAL

5 GOVERNMENT WITHIN THE UNITED STATES HAS THE AUTHORITY TO

6 MAINTAIN CRIMINAL JURISDICTION OVER NONMEMBER INDIANS WHO

7 COMMIT CRIMINAL ACTS WITHIN THE BOUNDARIES OF THE RESPECTIVE

8 TRIBE'S RESERVATION AND UPON THE TRIBAL GOVERNMENT'S LANDS.

9 WHEREAS, the United States Supreme Court, in Duro v.

10 Reina, No. 88-6546, (United States Sup. Ct., May 29, 1990),

11 has ruled that Indian tribal governments and their courts do

12 not have criminal jurisdiction over nonmember Indians who

13 commit criminal acts upon the reservations or lands of the

14 tribes; and

15 WHEREAS, this ruling contradicts the historical and

16 traditional practice of Indian tribes to regard nonmember

17 Indians living in Indian country as tribal members for

18 purposes of tribal jurisdiction; and

19 WHEREAS, the Montana-Wyoming Tribal Chairman's

20 Association, composed of the tribal chairmen of the

21 federally recognized tribes of Montana and Wyoming, has

22 adopted a resolution urging the United States Congress to

1 pass legislation ~~reversing~~ ^{to resolve the jurisdictional dilemma raised in} the Duro decision; and

2 WHEREAS, the United State Congress is now considering

3 legislation that would ~~rectify the error of the United~~ ^{confirm}

4 ~~States Supreme Court in Duro by confirming~~ that tribal

5 governments have the authority to maintain criminal

6 jurisdiction over nonmember Indians.

7

8 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE

9 OF REPRESENTATIVES OF THE STATE OF MONTANA:

10 That the Montana Legislature join the Montana-Wyoming

11 Tribal Chairman's Association by formally requesting that

12 Montana's Congressional Delegation support legislation

13 confirming that tribal governments within the United States

14 have the authority to maintain criminal jurisdiction over

15 nonmember Indians who commit criminal acts within the

16 boundaries of the reservations and upon lands of the tribes.

17 BE IT FURTHER RESOLVED, that the Secretary of State send

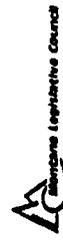
18 copies of this resolution to each member of the Montana

19 Congressional Delegation, the Tribal Chairman of each

20 Montana tribe, and the Montana-Wyoming Tribal Chairman's

21 Association.

-End-



104 124
2/25/91

Amendments to House Joint Resolution No. 9
Third Reading Copy (BLUE)

Requested by Senator Towe
For the Committee on Judiciary

Prepared by Valencia Lane
March 25, 1991

1. Title, line 6.

Strike: "CONFIRMING"

Insert: "ASSURING"

2. Page 1, line 18.

Strike: "this ruling contradicts"

Insert: "there is substantial support for"

3. Page 1, lines 18 and 19.

Following: "the" on line 18

Strike: remainder of line 18 through "traditional" on line 19

4. Page 2, lines 3 and 4.

Following: "would" on line 3

Strike: remainder of line 3 through "confirming" on line 4

Insert: "assure"

5. Page 2, line 13.

Strike: "confirming"

Insert: "assuring"

Towe Amendments

HOUSE JOINT RESOLUTION NO. 9
INTRODUCED BY Russell Dennis Hallowell

1 A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF
2 REPRESENTATIVES OF THE STATE OF MONTANA URGING THE UNITED
3 STATES CONGRESS TO PASS LEGISLATION ^{ASSURING} ~~CONFIRMING~~ THAT A TRIBAL
4 GOVERNMENT WITHIN THE UNITED STATES HAS THE AUTHORITY TO
5 MAINTAIN CRIMINAL JURISDICTION OVER NONMEMBER INDIANS WHO
6 COMMIT CRIMINAL ACTS WITHIN THE BOUNDARIES OF THE RESPECTIVE
7 TRIBE'S RESERVATION AND UPON THE TRIBAL GOVERNMENT'S LANDS.

8 WHEREAS, the United States Supreme Court, in Duro v.
9 Reing, No. 88-6546, (United States Sup. Ct., May 29, 1990),
10 has ruled that Indian tribal governments and their courts do
11 not have criminal jurisdiction over nonmember Indians who
12 commit criminal acts upon the reservations or lands of the
13 tribes; and ^{it has been held} ~~there is substantial support for~~
14 WHEREAS, ~~the existing contradictory~~ ^{the historical and}
15 ~~traditional~~ practice of Indian tribes to regard nonmember
16 Indians living in Indian country as tribal members for
17 purposes of tribal jurisdiction; and

18 WHEREAS, the Montana-Wyoming Tribal Chairman's
19 Association, composed of the tribal chairmen of the
20 federally recognized tribes of Montana and Wyoming, has
21 adopted a resolution urging the United States Congress to

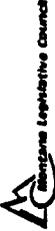
1 pass legislation reversing the Duro decision; and
2 WHEREAS, the United State Congress is now considering
3 legislation that would ~~rectify the error of the United~~ ^{assure}
4 ~~States Supreme Court in Duro by confirming~~ that tribal
5 governments have the authority to maintain criminal
6 jurisdiction over nonmember Indians.

7
8 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE
9 OF REPRESENTATIVES OF THE STATE OF MONTANA:

10 That the Montana Legislature join the Montana-Wyoming
11 Tribal Chairman's Association by formally requesting that
12 Montana's Congressional Delegation support legislation
13 ^{assuring} ~~confirming~~ that tribal governments within the United States
14 have the authority to maintain criminal jurisdiction over
15 nonmember Indians who commit criminal acts within the
16 boundaries of the reservations and upon lands of the tribes.

17 BE IT FURTHER RESOLVED, that the Secretary of State send
18 copies of this resolution to each member of the Montana
19 Congressional Delegation, the Tribal Chairman of each
20 Montana tribe, and the Montana-Wyoming Tribal Chairman's
21 Association.

-End-



2 APR 91
HB 797

Amendments to House Bill No. 797
Third Reading Copy (BLUE)

Requested by Senator Halligan
For the Committee on Judiciary

Prepared by Valencia Lane
April 1, 1991

1. Page 1, line 19.

Following: "~~proclamation~~"

Insert: ", except for state criminal jurisdiction over non-Indians,"

2. Page 1, line 24.

Following: "."

Insert: "The tribal withdrawal of consent and the governor's proclamation may not become effective until retrocession is accepted and approved by the United States in accordance with 25 U.S.C. 1323."

1 HOUSE BILL NO. 797 1 effective on passage and approval.

-End-

2 INTRODUCED BY RUSSELL, HARPER, D. BROWN, DRISCOLL,
3 DARKO, GERVAIS, STRIZICH, SCHYE, WHALEN, KIMBERLEY,
4 RANEY, DOHERTY, YELLOWTAIL, FRANKLIN, BIANCHI, HALLIGAN,
5 REAM, COBB, J. RICE, FAGG, VAN VALKENBURG,

6 NATHE, MAZUREK, MEASURE

7
8 A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING THE
9 CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBES TO ADOPT A
10 RESOLUTION WITHDRAWING THEIR CONSENT TO BE SUBJECT TO STATE
11 JURISDICTION PURSUANT TO 25 U.S.C. 1323; AMENDING SECTION
12 2-1-306, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

13
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15 Section 1. Section 2-1-306, MCA, is amended to read:

16 "2-1-306. Withdrawal of consent to state jurisdiction.
17 Any Indian tribe, community, band, or group of Indians that
18 may consent to come within the provisions of this part may
19 ~~within--2-years-from-the-date-of-the-governor's-proclamation~~, except for state criminal jurisdiction over non
20 withdraw their consent to be subject to the criminal and/or
21 civil jurisdiction of the state of Montana, by appropriate
22 resolution, and within 60-days 1 YEAR after receipt of such
23 resolution, the governor shall issue a proclamation to that
24 effect."

25 NEW SECTION. Section 2. Effective date. [This act] is

"The tribal withdrawal of consent and the governor's
proclamation may not become effective until retrocessi
accepted and approved by the United States in accordan
with 25 U.S.C. 1323. (Halligan)



α = 4
2 Apr 91

HB 825

Amendments to House Bill No. 825
Third Reading Copy (BLUE)

Requested by Senator Towe
For the Committee on Judiciary

Prepared by Valencia Lane
April 1, 1991

1. Page 1, line 22.

Following: "."

Strike: "This"

Insert: "Except as provided in subsection (2), this"

2. Page 3, lines 5 through 9.

Following: "court" on line 5

Strike: remainder of line 5 through "weapon" on line 9

3. Page 3, line 12.

Following: line 11

Insert: "(2) The sheriff may deny an applicant a permit to carry a concealed weapon if the sheriff has reasonable cause to believe that the applicant is mentally ill, mentally defective, or mentally disabled or otherwise may be a threat to the peace and good order of the community to the extent that the applicant should not be allowed to carry a concealed weapon."

Re-number: subsequent subsections

4. Page 4, line 7.

Strike: "(2)(a)"

Insert: "(3)(a)"

Strike: "(2)(c)"

Insert: "(3)(c)"

5. Page 4, lines 9 and 15.

Strike: "(2)"

Insert: "(3)"

6. Page 11, line 5.

Following: "weapon"

Insert: ", except for actions that constitute willful misconduct or gross negligence"

U

OX # 3
2 APR 91
HB 825

Amendments to House Bill No. 825
Third Reading Copy

For the Committee on the Judiciary

Prepared by John MacMaster
March 4, 1991

1. Page 12, line 19.
Following: "AND"
Insert: ", except for a person referred to in subsection (7),"

Ex. 6

HB 797

4-2-91

Tribal negotiation is the only solution

Because of an agreement reached between the federal government and the Confederated Salish and Kootenai Tribes in 1904, the tribes' reservation near Polson is a patchwork quilt of tribal and non-tribal land ownership and population.

Fewer than 25 percent of the people living on the reservation are tribal members.

There have been serious jurisdictional problems arising from this mix of tribal and non-tribal residents. One is in the area of law enforcement, which since 1965 has been a hybrid arrangement that now is threatening to break down. Tribal members say they are being discriminated against because the agreement gives the state the authority to prosecute Indians for crimes and some civil violations.

Indian leaders have accused Lake County officials of racism in the administration of criminal law, pointing out the percentage of tribal members arrested in recent years far exceeds the population ratio.

And because of this they are backing House Bill 797, sponsored by Rep. Angela Russell, D-Lodge Grass, that would allow the tribes to withdraw from the 1965 law enforcement agreement.

House Minority Leader John Mercer, R-Polson, whose district falls within the reservation, said the 1965 pact was approved after extensive talks among the tribes, county government and state officials. He feels that new discussions may be in order, but opposes the bill that would allow the tribes to withdraw without consulting all parties.

Lake County officials added that a longstanding system of "cross-deputization" of tribal and non-tribal law officers has worked well. If it is abrogated it would create a jurisdictional nightmare, Sheriff Joe Geldrich told a legislative committee.

We think HB 797 should be tabled. A dissolution of the law enforcement agreement is not in the best interest of anyone living on the reservation. New negotiations, and a possible reform of the 1965 agreement, are the best paths to follow.

It's worth pointing out that in 1990 tribal, county and state officials worked out a compromise agreement on fish and game jurisdiction. That was accomplished after several years of difficult negotiations. But it was accomplished.

We think negotiation is the only possible solution on a

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 2 April 91 Bill No. HR9 Time 11:05 a.m.

NAME	YES	NO
Sen. Brown	✓	
Sen. Crippen	✓	
Sen. Doherty		✓
Sen. Grosfield		✓
Sen. Halligan		✓
Sen. Harp	✓	
Sen. Mazurek		✓
Sen. Rye		✓
Sen. Svrcek		✓
Sen. Towe		✓
Sen. Yellowtail		✓
Sen. Pinsonneault	✓	
	4	8

Jody Bird
Secretary

Sen. Dick Pinsonneault
Chairman

Motion: (C) Harp - amend

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 2 April 91 Bill No. H.3797 Time 12 Noon

NAME	YES	NO
Sen. Brown	✓	
Sen. Crippen	✓	✓
Sen. Doherty	✓	
Sen. Grosfield	✓	
Sen. Halligan		✓
Sen. Harp	✓	
Sen. Mazurek		✓
Sen. Rye		✓
Sen. Svrcek		✓
Sen. Towe		✓
Sen. Yellowtail		✓
Sen. Pinsoneault	✓	
	6	6

Jody Bird
Secretary

Sen. Dick Pinsoneault
Chairman

Motion: (c) Brown - not to take

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 2 Apr 91 Bill No. HB 797 Time 12 n

NAME	YES	NO
Sen. Brown		✓
Sen. Crippen		✓
Sen. Doherty	✓	
Sen. Grosfield		✓
Sen. Halligan	✓	
Sen. Harp		✓
Sen. Mazurek		✓
Sen. Rye		✓
Sen. Svrcek		✓
Sen. Towe	✓	
Sen. Yellowtail	✓	
Sen. Pineseault		✓
	4	8

Jody Bird
Secretary

Sen. Dick Pineseault
Chairman

Motion: Yell - DCIAA