



Coalition of Large Tribes

Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe
Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation • Navajo Nation • Northern Arapaho Tribe
Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe
Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe

Coalition of Large Tribes (COLT)

Resolution: 08-16-2022-Resolution #03-2022 (NN-Twin Arrows)

Resolution in Support of the Intertribal Legislative Proposal for Addressing Non-Indian Crime in Indian Country

WHEREAS, the Coalition of Large Tribes (COLT) was formally established in early April 2011, and is comprised of Tribes with large land base, including the Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe • Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nations • Navajo Nation • Northern Arapaho Tribe • Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe • Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe and is Chaired by President Kevin Killer, Oglala Sioux Tribe: and

WHEREAS, COLT was organized to provide a unified advocacy base on all issues affecting Tribes that govern large trust land bases and that strive to ensure the most beneficial use of those lands for tribes and individual Indian landowners; and

WHEREAS, a number of COLT member Tribes have participated in the development and advocacy in support of the attached draft Intertribal Legislative Proposal Addressing Non-Indian Crime in Indian Country and believe that the solutions offered in the draft would materially improve public safety in Indian Country, especially for large land-base tribes who suffer from a dearth of law enforcement resources and attention.

NOW THEREFORE BE IT RESOLVED, it is the policy of COLT to support the attached Intertribal Legislative Proposal Addressing Non-Indian Crime in Indian Country- as it might be amended from time to time as Tribes work to see it enacted.

NOW THEREFORE BE IT FURTHER RESOLVED, it is the policy of COLT to also support related administrative actions to the same purpose, including but not limited to: (1) seeking a Solicitor's Opinion from the Department of the Interior recognizing and affirming Tribes' inherent sovereign rights to exclude persons from our Reservations, including law enforcement personnel; and (2)



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seeking a directive from Assistant Secretary for Indian Affairs Bryan Newland instructing the BIA Office of Justice Services not to cooperate with state law enforcement unless and until specifically requested by a Tribe to do so.

BE IT FINALLY RESOLVED, that this resolution shall be the policy of COLT until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

This resolution was enacted at a duly called meeting of the Coalition of Large Tribes held on Navajo Nation, Twin Arrows Casino, 22181 Resort Blvd. Flagstaff, AZ on August 16th, 2022 at which a quorum was present, with the resolution approved unanimously.

Dated this August 16th, 2022

Attest:

Nathan Small, Secretary, Coalition of Large Tribes

Kevin Killer, Chairman, Coalition of Large Tribes

ADDRESSING NON-INDIAN CRIME IN INDIAN COUNTRY

Just as Congress passed the “*Duro fix*” in 1991, Congress must amend the Indian Civil Rights Act (ICRA) to address a looming public safety crisis. In *Oliphant v. Suquamish Indian Tribe*,¹ the U.S. Supreme Court eliminated tribal criminal prosecutorial authority over non-Indians. In *Oklahoma v. Castro-Huerta*, the Court has given States concurrent jurisdiction with the federal government to prosecute non-Indians who commit crimes against Indians.² Collectively, *Oliphant* and *Castro-Huerta* stripped Indian tribes of criminal jurisdiction over crimes on tribal lands and gave it to States, creating a well-known “maze of injustice” and “indefensible morass.” Resultantly, at least “[Seventy] percent of violent crimes generally committed against AI/ANs involve an offender of a different race. This statistic includes crimes against children twelve years and older. . . [I]n domestic violence cases, 75 percent of the intimate victimizations and 25 percent of the family victimizations involve an offender of a different race. Furthermore, national studies show that men who batter their companion also abuse their children in 49 to 70 percent of the cases.”³ Non-Indian-on-Indian crime on Indian reservations is a crisis.

Congress must reaffirm that Tribal Nations have criminal jurisdiction to punish wrongdoers who commit crimes on tribal lands:

25 U.S.C. §1301 Definitions

For the purposes of this subchapter, the term –

(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all ~~Indians~~ persons located on or within “Indian country” as defined by 18 U.S.C. § 1152;

As the *Castro-Huerta* dissenting opinion recognized, the majority’s ruling is “ahistorical and mistaken,” contrary to “a mountain of statutes and precedents making plain that Oklahoma possesses no authority to prosecute crimes against tribal members on tribal reservations until it amends its laws and wins tribal consent.” The *Castro-Huerta* majority offers “contrived interpretations”⁴ of the Court’s longstanding precedents. This results-driven posture is solely aimed at addressing the jurisdictional gap resultant from *McGirt v. Oklahoma* that decided that the Muscogee (Creek) Nation’s reservation had not been disestablished or diminished by Oklahoma’s entry into the Union and therefore, the federal government alone had prosecutorial authority for Major Crimes committed by Indians on the Creek Reservation. *McGirt* affirmed long-understood dividing lines on criminal prosecutorial authority. The *Castro-Huerta* majority invented “inherent” authority for Oklahoma whole-cloth to bridge the perceived gap in prosecutions created by: (1) the Court’s elimination of tribal criminal prosecutorial authority over non-Indians in *Oliphant*; (2) chronic federal dereliction of its Trust and Treaty obligations to secure public safety in Indian Country; and (3) difficulties in coordinating and funding law enforcement activities to respond to the legal structure recognized in *McGirt*.

But two wrongs don’t make a right. The Court was wrong to erase tribal criminal jurisdiction in *Oliphant*—on grounds that such jurisdiction was “inconsistent with [tribes’] status”⁵ as conquered peoples. Tribes are not mere conquered peoples. They are domestic nations that retain all the inherent powers they had as nation-states at the time of the founding of the United States unless and until Congress acts to limit that sovereignty in some way. Time and time again, Congress

¹ 435 U.S. 191 (1978).

² ICRA was amended in 1991 in order to overturn the Supreme Court’s decision in *Duro v. Reina*, 495 U.S. 676 (1990). The *Duro* decision held that tribal courts lack criminal jurisdiction over non-member Indians. Congress overturned the *Duro* decision (the so-called Congressional “*Duro-fix*”) by adding the language “...and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians” to the definition of “powers of self-government.” This Congressional *Duro-fix* restored tribal court criminal jurisdiction over all Indians (members and non-members).

³ U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive*, November 2014. Available: [Ending Violence So Children can Thrive \(justice.gov\)](https://www.justice.gov/ending-violence-so-children-can-thrive).

⁴ *Torres v. Texas Dep’t. of Pub. Safety*, No. 20-603 (June 30, 2022, Thomas, J., dissenting).

⁵ 435 U.S. at 208.

has safeguarded tribal criminal jurisdiction, not assailed it. The *Castro-Huerta* Court has wrongly encroached on tribal sovereignty by rewriting a revisionist history and satiating colonizers' aspirations—that States have always had jurisdiction in Indian Country—when in fact the opposite has been true from the earliest days of the republic. Long settled law that tribes are territorial sovereigns with power and authority over public safety in Indian Country is based on Treaties, the United States' Trust responsibilities, and Congress' plenary authority over Indian relations enshrined in the Constitution.

Congress can both (a) respect that tribal governments are best positioned to make decisions about their local public safety needs by relaxing previous limitations on the exercise of tribal territorial jurisdiction and enacting the above suggested changes to 25 U.S.C. §1301, and (b) also ensure proper safeguards for individual liberties by enacting a companion amendment:

Any tribe seeking to exercise criminal jurisdiction over person not otherwise provided for by other independent statutory authority may only do so if the due process requirements set forth in 25 U.S.C. § 1302(c) are ensured.

Additionally, we recommend elimination of ICRA's current sentencing limitations, restricting tribes to a sentence of three years for certain crimes, and when stacked with other crimes, nine years total. This proposed amendment would do away with the limitations on tribes' sentencing altogether.

*Subparagraphs (B) through (D) of section 202(a)(7) and section 202(b) shall be eliminated in their entirety.*⁶

Lastly, as outlined in Justice Gorsuch's dissenting opinion, PL-280 should be amended to ensure that the *Castro-Huerta* Court's recognition of a previously unknown State authority in Indian Country does not create confusion of reduce accountability of the federal and tribal governments primarily responsible for Indian Country public safety by limiting States' exercise of criminal jurisdiction on tribal lands to only those circumstances in which they have obtained tribal consent and amended their constitutions in compliance with procedures outlined in § 1324:

§ 1321. Assumption by State of criminal jurisdiction

(a) Lack of State Jurisdiction Absent Compliance with § 1321 and § 1324

Except as otherwise authorized pursuant to, or provided by, law, a State shall not have criminal jurisdiction over a crime committed by or against an Indian in Indian country unless the State complies with the procedures to obtain tribal consent outlined in 25 U. S. C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U. S. C. § 1324.

In sum, Congress' enactment of this menu of options, and coordinate appropriation of resources to federal and tribal governments will address the current crisis of non-Indian crime in Indian Country, best ensure Indian Country public safety and accountability, and honor the United States' solemn Trust and Treaty obligations.

⁶ NOTE—this would eliminate the following text (in purple) from ICRA:

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years; ...

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.