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The National Congress of American Indians
Resolution #SAC-22-043

TITLE: Calling on Congress to Enact the Legislative Proposal to Improve Public Safety in Indian Country

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, on June 29, 2022, the Supreme Court issued its decision in *Oklahoma v. Castro-Huerta*, concluding that States have the right to exercise criminal jurisdiction on Indian country lands across the entire United States, despite the fact that Congress did not grant States such jurisdiction, and provided for this jurisdiction to be exercised without any tribal consent whatsoever; and

WHEREAS, the Supreme Court's June 2022 decision in *Castro-Huerta* contradicts nearly 200 years of settled jurisprudence, threatens the sovereignty of Indian Nations, and the safety of Native people across all of Indian country; and

WHEREAS, in deciding *Castro-Huerta*, the Court ignored the fact that Congress had just acted, in the Violence Against Women Act (VAWA) 2022, to restore tribal jurisdiction over non-Indian crimes of child violence against Indian children on Indian country lands, a restoration of tribal jurisdiction that includes authority to tribally prosecute the underlying crime committed in *Castro-Huerta*; and

WHEREAS, in deciding *Castro-Huerta*, the Court concluded that States have a more significant governmental interest in protecting Indian children on Indian country lands than Indian Nations; and

WHEREAS, in deciding *Castro-Huerta*, the Court violated the Constitution's separation of powers and disrespected Congress' exclusive authority to legislate over Indian affairs; and

WHEREAS, in deciding *Castro-Huerta*, the Court applied the civil jurisdiction preemption test from *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980), to conclude that numerous Congressional laws, including the General Crimes Act and Public Law 83-280 (PL-280), did not pre-empt the exercise of state jurisdiction on Indian country lands; and

WHEREAS, in deciding *Castro-Huerta*, the Court granted all States jurisdiction over Indian country lands, regardless of whether the State secured tribal consent through the procedures Congress previously put in place in 25 U.S.C §§ 1321, 1324, and in doing so, the Court called into question the legitimacy of prior retrocessions of PL-280 jurisdiction where States have, before *Castro-Huerta*, agreed to retrocede jurisdiction over Indian country lands; and

WHEREAS, following the Court's decision in *Castro-Huerta*, individual local state and county prosecutors have elected not to refer VAWA cases to Indian Nations on the basis that *Castro-Huerta* gives States the jurisdiction to prosecute these cases;

WHEREAS, nothing in federal law requires local authorities to inform Indian Nations of VAWA cases that arise within their Indian country territories, even if the local state or county authority ultimately declines to prosecute the crime committed by a non-Indian against an Indian victim; and

WHEREAS, individual States do not owe a trust duty and responsibility to safeguard the lives of Native women and children as does the federal government; and

WHEREAS, historically, when Congress has acted to grant States the criminal jurisdiction that the Supreme Court just granted to all States, the rate of prosecutions of crimes committed against Native victims declines and the threats to public safety on Indian country lands incease; and

WHEREAS, historically, when Congress has acted to grant States the criminal jurisdiction that the Supreme Court just granted to all States, federal authorities and agencies have decreased the amount of resources and funding available to federal and tribal authorities that safeguard public safety on Indian country lands; and

WHEREAS, Native women and children are more likely to be abused, assaulted, raped, and murdered than any other population in the United States; and

WHEREAS, on some reservations, American Indian and Alaska Native women are murdered at more than 10 times the national average; and

WHEREAS, the United States Department of Justice has reported that the majority of violent crimes committed against Indian victims are committed by non-Indians; and

WHEREAS, no sovereign has a greater interest in protecting the safety and welfare of Native women and children living on Indian country lands than Indian Nations; and

WHEREAS, the only known solution to addressing the high-rates of crimes committed against Indian victims is the restoration of jurisdiction and sovereignty to Indian Nations; and

WHEREAS, during the 2016 Midyear Session of the National Congress of American Indians, held at the Spokane Convention Center, NCAI passed Resolution #SPO-16-037, stating "NOW THEREFORE BE IT RESOLVED that the National Congress of American Indians does hereby call on the United States government to expand inherent tribal criminal jurisdiction over all persons committing any crime in their Indian country in a manner that ensures the defendants have the same due process protections as required under the Tribal Law and Order Act of 2010 and the 2013 Re-authorization of the Violence Against Women Act"; and

WHEREAS, the Legislative Proposal to Improve Public Safety in Indian Country proposes legislative language that NCAI, in #SPO-16-037, called on the United States government to effectuate; and

WHEREAS, the sentencing limitations currently imposed on Indian Nations in the Indian Civil Rights Act significantly impede the ability of Indian Nations to issue sentences sufficient to deter crimes from being committed on Indian country lands, and in many instances, prevent Indian Nations from administering justice when heinous crimes are committed against tribal citizens; and

WHEREAS, the Legislative Proposal to Improve Public Safety in Indian Country proposes legislative language that would eliminate arbitrary and unsubstantiated sentencing limitations under federal law that prevent Indian Nations from punishing criminals with sentences that are fully commiserate with the seriousness of the crimes they commit; and

WHEREAS, it is critical that States not be allowed to exercise jurisdiction on Indian country lands absent tribal consent; and

WHEREAS, the Legislative Proposal to Improve Public Safety in Indian Country proposes legislative language to ensure that the *Castro-Huerta* Court's manufacturing of previously nonexistent state authority in Indian country does not create confusion or reduce accountability of the federal and tribal governments primarily responsible for Indian country public safety, and ultimately, the Proposal will strengthen public safety by requiring a consensual and codified collaboration between tribal governments and States seeking to exercise jurisdiction on Indian country lands; and

WHEREAS, the Legislative Proposal to Improve Public Safety in Indian Country will eliminate doubt and will instead ensure that PL-280 retrocessions that occurred prior to *Castro-Huerta* remain in effect following the Court's flawed reading of PL-280; and

WHEREAS, the Legislative Proposal to Improve Public Safety in Indian County restores Congress's exclusive role in legislating over Indian affairs, and ultimately, if passed into law, will serve to prevent erroneous interpretations of *Castro-Huerta* by lower federal courts as States attempt to expand the Court's decision beyond the context of criminal jurisdiction.

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) does call on the United States Congress to use the Legislative Proposal to Improve Public Safety in Indian Country as the foundation for legislation that will restore tribal sovereignty, restore Congress's exclusive role in legislating over Indian affairs, and ultimately, ensure that States cannot exercise jurisdiction on tribal lands absent tribal consent. NCAI calls on Congress to pass this legislation with all due haste; and

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

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2022 Annual Conference of the National Congress of American Indians, held in Sacramento, CA, October 30-November 4, 2022, with a quorum present.

Fawn Sharp, President

ATTEST:

Stephen Roe Lewis, Recording Secretary

Legislative Proposal to Improve Public Safety in Indian Country

In 1991, after the Supreme Court's ruling in Duro v. Reina, 495 U.S. 676 (1990), Congress sought to clarify various jurisdictional issues created by the decision. This Congressional action is commonly referred to as the "Duro Fix." The way Congress enacted this language and the statutory placement of this clarifying language provides a helpful guide as to how Congress may address the new jurisdictional complications created by the Court's recent decisions. A summary of the *Duro*-related language is therefore provided for background purposes to provide context to the 2022 legislative proposal set forth below.

Duro Congressional Fix

Congress amended the Indian Civil Rights Act in 1991 to overturn the U.S. Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990). The Court had held that tribal courts lack criminal jurisdiction over non-member Indians. Congress subsequently acted to restore tribal criminal jurisdiction over all Indians—including non-member Indians.

Congress overturned *Duro* by adding language to 25 U.S.C § 1301, the definitions section that defines "powers of self-government." Prior to the *Duro* fix, that section read as follows:

> "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 . . . .

25 U.S.C. § 1301(2). Congress amended this definition to include that powers of self-government "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Thus, overturning SCOTUS's *Duro* decision and reaffirming that tribal governments possess the inherent power to exercise criminal jurisdiction over all Indians.

Amending the ICRA to Relax Restrictions and Remove Sentencing Limitations

The Indian Civil Rights Act should be amended to relax restrictions regarding tribal authority over non-Indian criminal activity and to remove sentencing limitations. These changes would ensure tribal nations are empowered to exercise criminal jurisdiction over any individual who commits a crime on tribal lands, regardless of whether they are Indian or non-Indian. In furtherance of this goal, the following preamble should be added to the ICRA:

> It is the sense of Congress that Indian tribes, as sovereigns that pre-date both the United States and the United States Constitution, maintain their inherent sovereignty to govern and engage in self-government within their territorial borders.
>
> It is the sense of Congress that the treaties the United States has signed with tribal nations, "according to the constitution of the United States, compose a part of the supreme law of the land." *Worcester v. State of Ga.*, 31 U.S. 515, 531 (1832).
>
> It is the sense of Congress that because the treaties the United States signed with

> tribal nations "have been duly ratified by the senate of the United States of America," and because they acknowledge tribal nations to be "sovereign nation[s], authorised to govern themselves, and all persons who have settled within their territory," tribal nations are therefore "free from any right of legislative interference by the several states composing [the] United States of America." *Id*. at 530.
>
> Thus, it is the sense of Congress that state laws "are unconstitutional and void" when they seek to exercise jurisdiction over tribal lands absent legislation from Congress authorizing a state's exercise of jurisdiction since under the United States Constitution, that power "belongs exclusively to the congress of the United States." *Id*. at 531.

Much like in the *Duro* fix, Congress should amend 25 U.S.C. § 1301 by adding the red language as follows:

> "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 persons, Indian and non-Indian, located on or within "Indian country" as defined by 18 U.S.C. § 1151**.**

25 U.S.C. § 1301 (proposed language).

Moreover, additional language should be added to ensure the protection of non-Indian defendants' due process rights. Suggested language is as follows:

> Any tribal nation seeking to exercise criminal jurisdiction over non-Indian defendants 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.

ICRA should also be amended to remove sentencing limitations that restrict tribal nations to sentencing criminals up to three years for certain crimes, and when stacked using the Tribal Law and Order Act, nine years total. The following proposed amendments to 25 U.S.C. § 1302 would remove the limitations on tribal sentencing altogether:

> (a) In general. – Title II of Public Law 90–284 (25 U.S.C. 1301 et seq.) (commonly known as the "Indian Civil Rights Act of 1968") is amended by undertaking the following:
>
> Subparagraphs (B) through (D) of section 202(a)(7) and section 202(b) shall be eliminated in their entirety.

These amendments would delete the following subparagraphs of Section 202(a)(7) (provided below in purple):

> (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;

These amendments would also delete Section 202(b) which provides:

(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.

Justice Gorsuch Proposed Amendment to Pub.L. 83-280 (18 U.S.C. § 1162)

As described in Justice Gorsuch's dissent, Pub.L. 83-280 must be amended to ensure that states, other than those six states with mandatory criminal jurisdiction under 18 U.S.C. 1162 (a), have no criminal jurisdiction in Indian country unless they have first obtained tribal consent to that state criminal jurisdiction and, where necessary, have amended their state constitutions or statutes to permit that jurisdiction, all in compliance with procedures outlined in 25 U.S.C § 1324. The following is suggested language to implement Justice Gorsuch's proposed amendment:

Section 2 of Public Law 82-280, as amended and codified at 18 U.S.C. 1162, is hereby further amended by adding at the end thereof the following new subsection (e):

(e) Lack of State Jurisdiction Absent Tribal Consent.

Except as provided in subsection (a) of Title 18, Section 1162, a State lacks criminal jurisdiction over crimes by or against Indians 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.

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