

INDIAN LAW & ORDER COMMISSION

TESTIMONY OF PETE SHEPHERD

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On July 22, 2011, Oregon Governor John Kitzhaber signed into law SB 412 (2011).¹ The law establishes a roadmap any of Oregon's federally-recognized tribes may follow to secure law enforcement authority equal to that granted by state law to police officers employed by the State of Oregon and its political subdivisions. SB 412 closed – at least until July 1, 2015 -- decades of uncertainty about the authority of tribal officers to enforce Oregon law in Indian Country or outside of it.

In Section 202 of the Tribal Law and Order Act of 2010 ("TLOA"), Congress concluded that the complicated jurisdictional scheme existing in Indian Country has negative impacts on public safety, has been exploited by criminals, and requires a high degree of cooperation among law enforcement officials. Advocates for SB 412 summed up these findings more simply: "Victims of crime don't care who's wearing the badge."

Tribes and their police employees who satisfy all of the requirements of SB 412 will be authorized to enforce state law anywhere in Oregon. Until July 1, 2013, their authority is limited to offenses committed within Indian Country, fresh pursuit, offenses committed in the authorized tribal officer's presence, or by express approval of a state or local law enforcement agency. §6.² The authority is unlimited from July 1, 2013 to June 30, 2015. §8. The law "sunsets" on July 1, 2015. §37 *et seq.*

The conditions established by SB 412 are designed to create a mirror-image in tribal law (or in tribal policy or regulations) of the state law requirements applicable to state and local police officers and their employers. The following chart gives three examples of the mirror-image principle at work.

¹ <http://www.leg.state.or.us/l1reg/measpdf/sb0400.dir/sb0412.en.pdf> (image of the enrolled bill).

² Citations are to sections of the enrolled bill.

Policy	State Law	Mirror Image In Tribal Law/Policy
Civil Tort Liability: Tort victims should have adequate remedies.	Oregon Tort Claims Act.	§2(4)(d)(E): Tribe must waive sovereign immunity – in tribal court – to same extent as the state has waived its immunity to suit in state court.
Regulatory Authority: Police should continuously satisfy uniform professional standards.	Department of Public Safety Standards and Training (DPSST) sets and enforces professional standards for police departments and police officers.	§2(3) and (4)(a): A provision of tribal law must require the tribal government and its officers to satisfy and remain in compliance with DPSST's requirements.
Facilitation of state court criminal prosecutions: Prosecutors depend on the investigating and arresting officers.	<i>E.g.</i> , state court prosecutor must satisfy state court defendants' statutory pretrial discovery rights.	§2(4)(e): Tribes generally must adopt a written pretrial discovery policy describing how the tribe will assist the district attorney.

POLITICAL CHALLENGES

SB 412 was nearly still-born. A succession of amendments, many of which tribes accepted as politically essential but considered unnecessary for any substantive reason -- or even viewed as pregnant with potential insult -- gradually scrubbed from the debate all rational policy objections. But the remaining objections nevertheless were sufficient to endanger the bill to the very end of the session. The residual objections:

- “Lack of true reciprocity.” Some local law enforcement officials vigorously opposed the bill on the ground that while tribal officers could enforce state law anywhere, state and local law enforcement officers could not enter a non-PL 280 jurisdiction to enforce state law.
- “Lack of Political Accountability.” A few legislators in both houses concluded that tribal governments – including tribal courts -- were not constituted in a way that permitted them to hold their police accountable to tribal civilian authority in the same way that state courts, city councils, county commissions, and the Legislature itself were thought by these members to hold their respective police authorities accountable.

- “Past Friction.” Oregon’s past history of occasional friction between tribal police and their non-tribal counterparts repeatedly surfaced as “evidence” of the alleged lack of professionalism by contemporary tribal police departments.

TEN INGREDIENTS FOR SUCCESS

Many elements helped overcome resistance. Some of the elements were in place long before the first draft of SB 412 emerged.

1. Oregon’s Long History of Government-to-Government Relations. State executive branch agencies are required to consult regularly with tribes on a government-to-government basis. Such consultations had been used for over a decade by tribes as a forum in which to discuss public safety issues arising from the uncertain authority of tribal law enforcement officers to enforce state law. Those discussions exposed the key policy and political issues long before SB 412 was first drafted.
2. Oregon’s Legislative Commission on Indian Services. The Commission creates a direct connection between tribes and the Legislative branch. Legislators serving on the Commission tend to develop an acute appreciation for tribal sovereignty. Some of these members, including House Co-Speaker Arnie Roblan and Senate Minority Leader Ted Ferrioli, were well-informed and influential champions for SB 412.
3. Long-Term Professionalism of Tribal Police Officers. For every claim of past friction, supporters of SB 412 could marshal many examples of the high performance and professional dedication of tribal law enforcement officers. Many of those officers are distinguished alumnae of state, local, or federal law enforcement agencies.
4. Compelling Substantive Case. This Commission needs no help in identifying the public safety benefits that flow from improving collaboration, information sharing, and joint enforcement between tribal law enforcement officers and their federal, state, and local colleagues. Most state legislators came to appreciate this as well.
5. Tribal Unity. Though necessarily speaking only for our respective tribal clients, the advocates for SB 412 met constantly to evaluate strategy, consider substantive amendments, and divide lobbying work. Fissures quickly were identified and resolved. Each tribe subordinated less important individual concerns to the larger interests at stake.
6. Framing As Public Safety Issue. Tribes learned that the vindication of sovereignty so important to them in consideration of SB 412 was unimportant to most legislators. To most legislators, SB 412’s appeal lays in the potential to improve public safety for all Oregonians – tribal members and non-tribal members alike.
7. Flexibility. Some of the objections tested the tribes’ patience and seemed calculated to kill the bill by a thousand cuts. Tribes nevertheless sought to frame those objections as

legitimate interest-based concerns and then actively framed amendments to blunt those concerns.

8. Law Enforcement Support or Neutrality. The Oregon Association of Chiefs of Police supported SB 412. Governor Kitzhaber supported SB 412, and the Oregon State Police therefore did not oppose it. The Oregon Department of Justice and Oregon District Attorneys Association neither supported nor opposed it. The support or neutrality of these officials was essential in counterbalancing the opposition of the Oregon State Sheriffs Association.
9. Emergence of Tribes as Electoral Powers. Over the past 20 years, Oregon's tribes have gradually become recognized as potentially significant electoral influences. This is not exclusively a result of political donations. It is primarily a reflection of the fact that tribes have emerged as very important economic forces in their respective communities.
10. Bi-Partisan Support. Originally introduced by Senator Floyd Prozanski, a Democrat, and passed from his Senate Judiciary Committee on a party-line vote, SB 412 ultimately attracted the strong support of key legislators from both parties.

RECOMMENDATIONS

Section 235 of TLOA charges the Commission with completing a term paper of major-league proportions. I join your Chair³ in recommending that the Commission's charter be extended by Congress for another year so that the Commission will have the full two years originally anticipated for completion of its report.

Second, I recommend that the Commission include in its final report a recommendation that Congress provide funding to the United States Department of Justice to create, through a broadly collaborative process, an annotated model state statute authorizing tribal officers to exercise state and local law enforcement powers. This would yield several important benefits.

First, the collaboration between state, local, and tribal law enforcement authorities and the organizations that represent such authorities undoubtedly would expose opportunities to improve law enforcement cooperation. Second, an agreement as to the terms of a model statute aligning tribes, US DOJ, and, through the collaborative process, the national associations of state and local law enforcement agencies would be of great political benefit to tribes seeking to influence state lawmaking. Third, the annotations and commentary typically associated with

³ Testimony of Chairman Troy A. Eid before the United States Committee on Indian Affairs (September 22, 2011).

model statutes could provide tribes with technical and legal information needed to educate and persuade legislators. Finally, the model statute would broaden the development of authoritative judicial interpretations to the extent it became law in more than one state. It would have this effect because the interpretation of a model statute given by the courts of one state – or by a tribal court – would likely be persuasive as to the interpretation given the same provision by a different court.⁴

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Respectfully submitted by:

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⁴ For an analysis of Oregon's rules for statutory interpretation, using SB 412 as an illustrative example, see P. Shepherd, *Oregon State Statutory Interpretation: Blind to History, But Useful in Application*, 47 Willamette Law Review p. 587 (Summer, 2011).