Jurisdiction and Courts in Indian Country

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Determining Land Status & Citizenship

- The inquiry begins with the status of the land for any issue involving jurisdiction and American Indians. Is the land within the tribal territorial boundaries? Is the land held in trust status by the U.S.? Is the land fee simple and who is the owner?
- The next question is who is involved in the jurisdictional inquiry – American Indian legally defined? Non-Indian?
- Finally, if Non-Indian, what activity is involved?
- Answering these questions will lead to determining whether there is exclusive tribal jurisdiction; concurrent tribal jurisdiction with concurrent federal jurisdiction; concurrent tribal jurisdiction with concurrent state jurisdiction; or exclusive state jurisdiction.

Indian Country Defined in U.S. Law

- 18 U.S.C. § 1151 (Criminal Statute part of Major Crimes Act): Except as otherwise provided in sections 1152 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

- Indian Country = three categories
- **1)Reservations,**
- **2) Trust/restricted lands/allotments, and**
- **3) Dependent Indian communities (under federal supervision, similar to the Pueblos)**

Legal Definition of An American Indian

- Enrolled in a federally recognized Tribe – will be recognized as an American Indian by the U.S.
- Enrolled in a state recognized Tribe – will be recognized as an American Indian in that state only
- Not enrolled and eligible for enrollment in a federally recognized Tribe: a child will come within the provisions of the Indian Child Welfare Act
- Federal criminal charges and not enrolled:

  8th Circuit uses a series of factors for a jury to consider to determine if person can be charged federally under the Major Crimes Act as an American Indian although not eligible for federal services for Indians

□ Self-identified as an American Indian – recognized for state educational institutions, mainstream representations, and the U.S. Census Bureau

◊ Due to Federal Blood Quantum Requirement – many tribal descendants are now without federal recognition as American Indians.

Idaho Tribal State Court Forum

- http://www.isc.idaho.gov/tribal-state/tribalcourt
- After a hiatus since 1994, the Forum resumed on March 20th, 2013 in Moscow, Idaho at a meeting hosted by the University of Idaho College of Law.
- In the process of updating the Tribal-State Court Bench Book, directory of Tribal and State Courts, and links on the website.
- Tribal Citizens are also U.S. citizens and state citizens by virtue of the 1924 Indian Citizenship Act

Tribal Jurisdiction Overview

- Tribes have civil and criminal jurisdiction over their own members
- Degrees of civil jurisdiction over all non-members, Indians or non-Indians, who enter the reservation and engage in proscribed forms of conduct defined by the U.S. Supreme Court.
- Criminal jurisdiction over members and non-member Indians
- No criminal jurisdiction over non-Indians who commit crimes on the reservation, even when those crimes are against the Tribe's own members - new possibility for domestic violence special jurisdiction
- Tribes have environmental regulatory authority within reservation boundaries over all lands.

Criminal Jurisdiction in Indian Country

- Indian Country = Reservations, trust lands, and dependent Indian communities (similar to the pueblos)
- Major Crimes Act, 18 U.S.C. 1153: All felonies and listed crimes are the subject of federal law within Indian country; Federal criminal jurisdiction over any crimes listed in a state criminal code with an alleged Indian perpetrator in Indian Country per the Indian Country Crimes Act
- P.L. 280 imposes state criminal jurisdiction within Indian Country as delegation from the federal government.
- Tribal court criminal penalties: max. of $5,000 fine and/or one year incarceration; Tribal Law and Order Act of 2010 – with legal representation and other federal requirements max. of $15,000 fine and/or three years incarceration.

Tribal members and other Indians: Criminal Jurisdiction

- Within Indian Country, offenses in the Major Crimes Act and against non-Indians are subject to federal and tribal jurisdiction. Tribal code will include offenses at misdemeanor level for prosecution.
- In Duro v. Reina, 495 U.S. 676 (1990), the U.S. Supreme Court held that a Tribe does not have jurisdiction over non-member Indians.
- Duro fix: Congress passed legislation recognizing inherent sovereignty of Tribes over all Indians within the tribal territory. (Amendment to the Indian Civil Rights Act)
- In U.S. v. Lara, 541 U.S. 193 (2004), U.S. Supreme Court acknowledged and upheld Duro fix by Congress; No double jeopardy for Indian prosecution for same crimes in Tribal Court and federal court.

Crimes by non-Indian against Indian: Criminal Jurisdiction

- Within in Indian Country, Indian Country Crimes Act – fed jurisdiction (when Indian perpetrator not in the MCA and over) non-Indian perpetrator and Indian victim
- 18 U.S.C. 1152 – federal jurisdiction along the 'federal enclaves' reasoning
- Oliphant v. Suquamish Tribe, 435, U.S. 191 (1978), U.S. Supreme Court held that Tribes have no criminal jurisdiction over non-Indians committing crimes within Indian Country.
- Gap in criminal jurisdiction when state fails to enforce against non-Indians, for crimes that do not reach felony level (U.S. Attorney General discretion over prosecution) ex. Domestic violence statutes

Crimes by non-Indian against non-Indian = State Jurisdiction

- Within Indian Country
- In United States v. McBratney, 104 U.S. 621 (1882), U.S. Supreme Court held that, absent treaty provisions to the contrary, the state has exclusive jurisdiction over a crime committed in the Indian country by a non-Indian against another non-Indian.
- State jurisdiction
- If non-Indian crime against property within Indian Country, then state jurisdiction may be displaced by federal if there is a clear tribal interest in the property.

General Information on P.L. 280

- Mandatory for six states when acted given jurisdiction over all crimes, concurrent jurisdiction with federal over Major Crimes Act offenses (67 Stat. 588) [California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska]
- Optional - States who have opted for P.L. 280 have jurisdiction over offenses committed by non-Indians and those committed by Indians that do not rise to the level of the Major Crimes Act offenses. States list offenses it has accepted for Indians (67 Stat. 590). Tribes continue to have concurrent jurisdiction over such crimes, but may not receive tribal court funding assistance federally
- 1968 Indian Civil Rights Act stated that Tribes must consent to any further state law assumptions of criminal and civil jurisdiction under P.L. 280 (25 U.S.C. 1321 & 1322); also allowed retrocession of state jurisdiction previously assumed under P.L. 280 (25 U.S.C. § 1323)
- No federal funding provided under P.L. 280

Tribal Civil Jurisdiction over Non-Members: Montana, National Farmers Union, Iowa Mutual, & Strate

- Montana v. United States, 450 U.S. 544 (1981) hunting and fishing of non-Indians on fee lands within reservation boundaries - Tribes lack civil jurisdiction over non-Indians on fee lands unless one of the two prongs met in test: 1) consensual relations or 2) directs effects on the political integrity, economic security or the health or welfare of the tribe
- National Farmers Union v. Crow Tribe, 471 U.S. 845 (1985) Tribal Exhaustion Doctrine (T.E.D.) prior to removal to federal district court by non-Indian
- Iowa Mutual v. LaPlante, 480 U.S. 9 (1987) T.E.D. expanded to diversity actions
- Strate v. A-1 Contractor, 520 U.S. 438 (1997): Montana expanded to rights of way and all non-members' activity

Indian Child Welfare Act of 1978, 25 USC 1901 et seq.

- Enacted in response to the federal Indian Adoption Project and efforts in western states to adopt Indian children into White homes based on finding Indian homes below poverty levels or extended family members as primary caretakers
- "Child custody" proceedings under ICWA:
- 1) foster care placements
- 2) termination of parental rights
- 3) pre-adoptive placements
- 4) adoptions
- Does not include divorce proceedings

ICWA Tribal Jurisdiction

- Exclusive Tribal Jurisdiction for the Tribe:
- 1) if the child resides within the reservation where a member
- 2) is domiciled within the reservation where is a member (domicile of child is the domicile of the parents)
- or 3) is a ward of the tribal court
- Controversy over the reach of Public Law 280 as conferring civil jurisdiction along with criminal jurisdiction: California has been aggressively asserting civil jurisdiction as a mandatory PL 280 state which resulted in the highly criticized Doe v. Mann decision in 2005 by the Ninth Circuit. U.S. Supreme Court decisions have not found civil authority of states under PL 280: Bryan v. Itasca County (1976) and California v. Cabazon Band of Mission Indians (1987).

ICWA and state courts

- State courts MUST transfer proceedings for foster care placements or termination of parental rights to tribal courts upon request of the Tribe or Indian custodian absent good cause or objection from either parent.
- Tribes have the right to intervene in state court actions covered by ICWA and right to notice of pending involuntary proceedings in state courts
- Foster care placement – clear and convincing evidence
- Termination of parental rights – evidence beyond a reasonable doubt

ICWA Placement Preferences

- When state courts have jurisdiction to make a foster care placement they must follow these placement preferences:
- (a) Adoptive placements; preferences – 1) member of child's extended family; 2) other members of the child's Tribe, or 3) other Indian families
- (b) Foster care – least restrictive setting, within reasonable proximity of home – 1) extended family, 2) foster home licensed, approved or specified by Tribe, 3) Indian foster home approved by non-Indian licensing authority, or 4) an institution approved for children approved by an Indian Tribe or operated by an Indian organization suitable to meet child's needs.

Doing Business with Tribes

- Contact Tribal Tax Office for business license and taxation obligations
- Most Tribes require resolution of disputes in Tribal Court, review the Tribal Code to determine what applies for business activity. Contracts should clearly state what law will apply if a dispute arises and what court is competent to hear dispute.
- Gaming vendors are licensed and must conform to Tribal gaming laws – the Indian Gaming Regulatory Act and the National Indian Gaming Commission require strict tribal regulation in this area.
- Tribal governments and entities have tribal sovereign immunity from suit unless expressly waived by the Tribe or the U.S. Congress.

Tribal Environmental Regulation

- U.S. Supreme Court has not decided any cases in the area dealing specifically with environmental regulation. Circuit decisions will be discussed.
- Three major federal environmental statutes with process for federal programs to be implemented by states
- Between 1986 and 1990 statutes amended to include Tribes "treatment as states/Tribes as states" (TAS):
- 1) Clean Water Act
- 2) Safe Drinking Water Act
- 3) Clean Air Act

Tribes and Clean Water Act

- CWA, 33 U.S.C. § 1251 et seq, allows states to set water quality standards, subject to review and approval.
- EPA then issues permits based on maintaining the water quality standards (WQS) set.
- 33 U.S.C. § 1377 authorizes Tribes to be treated as states "TAS" status, Tribes in Oklahoma restricted
- Montana v. U.S. EPA, 137 F.3d 1135 (9th Cir. 1998): Montana challenged TAS status for S&K Tribes over entire reservation area; Ninth Circuit upheld
- EPA interprets "Indian lands" based on 18 U.S.C. § 1151, broadest interpretation to include all lands within boundaries

Tribes and Clean Air Act

- Clean Air Act, 42 U.S.C. § 7401 et seq
- EPA has interpreted the CAA as a federal delegation of authority to Tribes (under other environmental statutes Tribes must submit showing as to tribal jurisdiction over regulatory area)
- Arizona Public Service Co. v. EPA, 211 F.3d 1280 (D.C.Cir. 2000): Arizona challenged EPA's interpretation of federal delegation to Tribes and EPA's construction of "reservation" to include trust lands and Pueblos; D.C. Cir upheld EPA's interpretation

Tribes and Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901

- Washington, Dept. of Ecology v. U.S. EPA, 752 F.2d 1465 (9th Cir. 1985): Wash. challenged EPA's decision not to allow Wash. to apply its hazardous waste regulations within reservation boundaries; Ninth Circuit upheld EPA's determination that Wash. lacked jurisdiction within reservation boundaries; Federal jurisdiction in place
- RCRA does not have TAS provisions
- Backcountry against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996): Campo Band of Mission Indians submitted solid waste permitting plan for EPA approval; EPA approved. Two non-Indian landowners and two non-profit orgs challenged EPA's interpretation allowing Tribe to have permitting plan. D.C. Cir. reviewed RCRA and held Indian tribes included in definition of municipality, only states allowed to have solid waste permitting plan.

Indian Gaming Industry and Tribal Nations in General

- California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) – no state regulatory authority under P.L. 280, only criminal authority
- Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq. (1988) - imposed federal, and for certain levels of gaming, state regulation in compacts, over tribal enterprises and dictates the five ways in which the Tribal Nation may expend its revenues
- Class III Compacts include provisions on law and order in tribal gaming facilities

Protection of Tribal Sacred Sites

- Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439 (1988) – as long as not coerced to violate belief, no violation of free exercise clause for Native spirituality
- American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1978) – no cause of action to enforce
- Executive Resolution 13,007 – federal agencies must consult with Tribes prior to action that may impact sacred site
- Tribal codes may provide process for off-reservation protection of sacred sites

Tribal Consultation

- On the federal level, Executive Order No. 13175 Consultation and Coordination with Tribal Governments (Nov. 6, 2000) and Presidential Memorandum, Tribal Consultation (Nov. 5, 2009) for federal agencies to engage in meaningful consultation and collaboration prior to taking action impacting tribal interests
- Idaho Council on Indian Affairs
- July 3, 2002 Idaho State-Tribal Governmental Relations proclamation