

The Basics of Tribal Sovereignty, Tribal Civil and Tribal Criminal Jurisdiction

*Webinar #1— First in a Three-Part Series
for Legal Advocacy Providers*

SUZANNE M. GARCIA
LEGAL SPECIALIST
TRIBAL LAW & POLICY INSTITUTE



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Introductions



Today's Learning Objectives

The basics of inherent Tribal sovereignty

The basics of Tribal civil jurisdiction

The basics of Tribal criminal jurisdiction

Key topic

🌽 Indian Country - as defined in [section 1151](#)

- a) all lands within the limits of any Indian reservation under jurisdiction of the US Gov., notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- b) all dependent Indian communities and
- c) all Indian allotments, the Indian titles to which have not been extinguished, including all rights-of-way running through the same

WHY USE HISTORY TO FRAME THE ISSUES?

“Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored....[I]f the laws governing Indian affairs are viewed ...without reference to the varying times in which particular provisions are enacted, the body of the law ... is a mystifying collection of inconsistencies and anachronisms. To recognize the different dates at which various provisions were enacted is the first step towards order and sanity in this field.”

Felix S. Cohen , *Handbook of Federal Indian Law* xxvii-xxviii (1942) statement by then-solicitor of the Dept. of the Interior Nathan R. Margold.



Tribal Sovereignty and Keeping Citizens Safe and Holding Offenders Accountable

“The essence of tribal sovereignty is the ability to govern and to protect and enhance the health, safety, and welfare of tribal citizens within tribal territory. Tribal governments maintain the power to determine their own governance structures and enforce laws through police departments and tribal courts. The governments exercise these inherent rights through the development of their distinct forms of government, determining citizenship; establishing civil and criminal laws for their nations; taxing, licensing, regulating, and maintaining and exercising the power to exclude wrongdoers from tribal lands.”

Tribal Nations and the United States: An Introduction - A Publication of the National Congress of American Indians (NCAI), Updated February 2020 Edition



RECOGNITION OF TRIBAL INHERENT SOVEREIGNTY

Tribal Nations' Diversity is key

- ☛ Each Nation has its own unique government, social structures, culture, norms, and values
- ☛ Each Nation had different experiences with those first contacts with other countries. That can affect jurisdiction

Treaties

- ☛ First treaties signed in the early 1600s
- ☛ Example of early dealings as sovereign to sovereign – Tribes understood as foreign nations
- ☛ United States Constitution's Supremacy Clause: - "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

RECOGNITION OF TRIBAL INHERENT SOVEREIGNTY

Constitution

- Congress shall have the power “to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

Supreme Court of the United States (SCOTUS): Marshall Trilogy

- Johnson v. M’Intosh, 21 U.S. 543 (1823)
- Cherokee Nation v. Georgia, 20 U.S. 1 (1831)
- Worcester v. Georgia, 31 U.S. 515 (1832)

HISTORICAL ERAS OF FEDERAL INDIAN LAW AND POLICY

Contact Period (1492 – 1774)

- Dominated by sovereign-to-sovereign relationships

Confederation Period (1774 – 1789)

- Indian support for new government
- Prevent wars and neutralize Indians to prevent their support of the English

Treaty Making Era (1778 – 1871)

- Constitution
- Trade and Intercourse Act of 1790
- Marshall Trilogy



HISTORICAL ERAS OF FEDERAL INDIAN LAW AND POLICY

Removal Era (1830 – 1850)

- Removal Act of 1830
- Trail of Tears
- “Indian Territory”
- Treaty of Guadalupe Hidalgo 1848

Reservation Era (1850 – 1891)

- Gold discovered in California
- Reservation system established
- Ex Parte Crow Dog, 109 U.S. 556 (1883)
- Major Crimes Act of 1885



HISTORICAL ERAS OF FEDERAL INDIAN LAW AND POLICY

Allotment and Assimilation Era (1887 – 1934)

- General Allotment Act – “Dawes Act” of 1887
 - Converted into individual “allotments”
 - “Surplus land” for sale to non-Indians
- Boarding schools –
- Talton v. Mayes, 163 U.S. 376 (1896)

Indian Reorganization Act Era (1934 – 1953)

- Indian Reorganization Act of 1934
 - Ended allotment
 - Reaffirmation of tribal inherent powers



HISTORICAL ERAS OF FEDERAL INDIAN LAW AND POLICY

Termination Era (1953 – 1968)

- Reversal of reorganization era reforms
- Tribal federal recognition terminated – 109 nations denied or terminated
- 1.3 million acres of tribal land lost
 - Ross, Jeffrey Ian, ed. *American Indians at Risk [2 volumes]*. ABC-CLIO, 2013.
- Public Law 280 (1953)

“Self-Determination” Era (1968 – Present)

- Indian Civil Rights Act of 1968
- *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978)
- *Montana v. United States*, 450 U.S. 544 (1981)
- *Carcieri v. Salazar*, 555 U.S. 379 (2009)
- Tribal Law and Order Act of 2010
- Violence Against Women Act of 2013, 2022





Basics of Civil Jurisdiction

BASICS OF CIVIL JURISDICTION – REPRESENTING SURVIVORS

Subject Matter Jurisdiction:

- Tribal Code
 - Over what kinds of cases have they exerted jurisdiction?
- Sometimes: Local practice – when there is concurrent jurisdiction, what have sovereigns agreed upon?

Personal Jurisdiction

- Status of people involved
 - Member/Citizen of Tribe
 - Member/Citizen of another Tribe
 - Non-Native Person

PL 280 States and other exceptions –Concurrent jurisdiction



BASICS OF CIVIL JURISDICTION – CUSTODY

Residency of child can be a factor in child custody cases - UCCJEA

Section 104 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) state court to recognize and enforce tribal court orders, treating a Tribe as if it were a state for the purposes of applying the Act, as long as the tribal proceeding was conducted in substantial conformity with the UCCJEA's jurisdictional standards. This provision facilitates cross-jurisdictional cooperation in child custody matters, promoting the welfare of Indian children by ensuring that custody determinations made by tribal courts are given due respect and enforceability in state courts



BASICS OF CIVIL JURISDICTION – PROTECTION ORDERS

VAWA speaks to this at [18 U.S.C. 2265\(e\)](#):

For purposes of this section, a court of an Indian Tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, ***in matters arising anywhere in the Indian country of the Indian Tribe*** (as defined in [section 1151](#)) or otherwise within the authority of the Indian Tribe.



PERSONAL JURISDICTION – REPRESENTING SURVIVORS

Member Indian

Broad, expansive, and generally exclusive except in PL 280 states where it is concurrent. This authority is a direct expression of inherent tribal sovereignty to govern its people and to protect and enhance the health, safety, and welfare of tribal citizens within tribal territory. The laws of the tribe are presumed to apply.

Non-member Indian

More extensive than over non-Indians but more limited than over members. In civil matters, non-member Indians can be treated similarly to non-Indians

Non-Indian

Presumptively limited. A tribe's civil authority over a non-Indian is limited unless the non-Indian's activities fall under one of the two *Montana* exceptions as further defined in case law.





Basics of Criminal Jurisdiction

CRIMINAL JURISDICTION IN INDIAN COUNTRY - GENERALLY

Scope of Tribal sovereignty was restricted and then expanded by Congress (Plenary Power)

- Think Marshall Trilogy – “domestic dependent nations”
- Shifts in federal Indian law and policy

Looking at Tribal Criminal Jurisdiction

- Inherent sovereignty – unique tribal forms of justice enforced on tribal lands
- Ex Parte Crow Dog – exclusive tribal jurisdiction over crimes committed by an Indian in Indian Country
- Major Crimes Act – federal jurisdiction over “major” crimes committed by Indians in Indian Country
- Oliphant – no tribal criminal jurisdiction over non-Indians committing crime in Indian country
- VAWA - Special Domestic Violence Criminal Jurisdiction

BASICS OF CRIMINAL JURISDICTION – REPRESENTING SURVIVORS

Subject Matter Jurisdiction:

- Tribal Code
 - Over what kinds of cases have they exerted jurisdiction?
- Kind of case (crime committed)

Personal Jurisdiction

- Status of people involved
 - Member/Citizen of Tribe
 - Member/Citizen of another Tribe
 - Non-Native Person





Walking Through the Charts

NON PUBLIC LAW 280

TRIBAL SOVEREIGNTY: TRIBAL CRIMINAL JURISDICTION NON PL 280

Indian Offender

Victim Status	Crimes	Jurisdiction
Indian or Non-Indian Victim	Violations of Tribal Criminal Laws	Tribal
	Inherent Tribal Authority/Tribal Codes	
	Major Crimes Act General Crimes Act	It's complicated



TRIBAL SOVEREIGNTY: TRIBAL CRIMINAL JURISDICTION NON PL 280

Non- Indian Offender

Victim Status	Crimes	Jurisdiction
Indian Victim	Violations of certain tribal criminal laws <i>if Tribe has implemented Special Tribal Criminal Jurisdiction</i>	Tribal
	Violations of Major Crimes and Federal Enclaves Laws	Federal – It's complicated
	Violations of State Criminal Laws in Indian country Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) ST	State



TRIBAL SOVEREIGNTY: TRIBAL CRIMINAL JURISDICTION NON PL 280

Non - Indian Offender

Victim Status	Crimes	Jurisdiction
Non- Indian Victim	Violations of two criminal Laws <i>if the Tribe has implemented Special Tribal Criminal Jurisdiction</i>	Tribe
	Violation of State Criminal Laws <i>U.S. v. McBratney, 104 U.S. 621 (1881)</i>	State



Walking Through the Charts

PL 280

TRIBAL SOVEREIGNTY: TRIBAL CRIMINAL JURISDICTION PL 280

Indian Offender

Victim Status	Crimes	Jurisdiction
Indian Victim Non-Indian Victim	Violations of Tribal Criminal Laws Inherent Tribal Authority/Tribal Codes	Tribal
	Violation of State Criminal Laws	State



TRIBAL SOVEREIGNTY: TRIBAL CRIMINAL JURISDICTION PL 280

Non-Indian Offender		
Victim Status	Crimes	Jurisdiction
Indian Victim	Violations of Tribal criminal laws <i>if the Tribe has implemented Special Tribal Criminal Jurisdiction</i>	Tribal
	Violations of State Criminal Laws	State

TRIBAL SOVEREIGNTY: TRIBAL CRIMINAL JURISDICTION PL 280

Non-Indian Offender		
Victim Status	Crimes	Jurisdiction
Non-Indian Victim	Violations of 2 Tribal criminal laws <i>if Tribe has implemented Special Tribal Criminal Jurisdiction</i>	Tribal
	Violations of State Criminal Laws	State

The Violence Against Women Reauthorization Act of 2022 (VAWA 2022)

Went into effect on Oct. 1, 2022

Built on the framework in VAWA 2013 to expand tribal authority to **prosecute non-Indians in tribal courts for certain crimes**

Tribes must opt in and meet certain requirements

Changed WHAT and in some cases WHO can be charged in tribal court



Changes to WHAT can be charged in Tribal Court

VAWA 2022 amends 25 USC §1304:

- Added to categories of conduct that can be prosecuted in tribal court:
 - Domestic violence (2013)(amended 2022)
 - Dating violence (2013) (amended 2022)
 - Protection order violations (2013)(amended 2022)
 - Sexual violence (2022)
 - Stalking (2022)
 - Sex trafficking (2022)
 - Child violence (2022)
 - Obstruction of justice (2022)
 - Assaults against justice personnel (2022)

Collectively these are referred to as “covered crimes.”

Changed WHO can be charged in Tribal Court

The VAWA 2022 amendments to 25 USC §1304:

- Clarifies that for cases involving **obstruction of justice or assaults against tribal justice personnel** by a non-Indian, the tribe has jurisdiction *even if the victim is also non-Indian*;
- Removed the existing requirement under VAWA 2013 that limits tribal jurisdiction to those non-Indians who live or work in the Indian country of the tribe or are in a qualifying relationship with a member of the tribe or non-member Indian resident (*often referred to as the “sufficient ties” provision*);

What 25 USC §1304 Does NOT Cover

Cases where the Victim and Defendant are **both non-Indian** except in cases of “assault of tribal justice personnel” and “obstruction of justice”.

Crime that **took place outside the Indian country** of the participating tribe.

Questions?

THANK YOU!



UPCOMING WEBINARS – LEGAL SERVICES TRACK

Applying for and Drafting Enforceable Tribal Protection Orders

**Privacy, Confidentiality, and Privilege Issues When Attorneys
and Advocates Work Together**



Contact Information

Bonnie Clairmont

Victim Advocacy Program Specialist

Email: bonnie@TLPI.org

Suzanne M. Garcia

Legal Specialist

Email: Suzanne@tlpi.org

Kelly Stoner

Victim Advocacy Legal Specialist

Email: Kelly@tlpi.org

Marlon Footracer

Program Support Specialist

Marlon@tlpi.org

Team email to all: TLAPS@tlpi.org

TLAPS website: TribalLegalServices.org

TLPI website www.Home.TLPI.org



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