

THE TULALIP TRIBAL COURT

6103 31ST AVENUE NE, TULALIP, WA 98271 – Tele: 360 / 716-4773 – FAX: 360 / 651-4121



ORIGINAL
Memorandum

To: Tulalip Tribal Court Bar Exam Applicants
Fm: Chief Judge Pouley, and Judge Gary Bass
Re: Tulalip Tribal Court Bar Exam
Dt: October 18, 2005

Beginning on November 1, 2005, passage of the Tulalip Tribal Court Bar Exam will be required for those seeking admission to practice before the Tulalip Tribal Court. The Court will grant a 30-day provisional license to those registered to take the bar exam. You should take the exam before your provisional license expires, as passage of the Bar Exam is required for you to continue practicing law after the 30 days. The exam is free for first take takers. The second and subsequent exams will cost \$25 dollars each.

The bar exam consists of 26 multiple choice questions. Choosing the correct answer on at least 19 of the 26 questions is required for passing. You may bring and use any written material to help you while you take the exam. You will have 120 minutes to complete the exam. The exam questions will be based on U.S. Supreme Court case law, tribal court jurisdiction (both civil and criminal) and Tulalip Tribal ordinances. Thus, applicants are expected to have general knowledge of the bounds of tribal court jurisdiction and the Tulalip Constitution and ordinances.

The questions are divided into the following categories:

- 6 Questions on the Court's civil and criminal jurisdiction
- 5 Questions on criminal law and procedure
- 5 Questions on civil rules
- 3 Questions based on the Tulalip Youth Code
- 2 Ethics Questions
- 1 Question each on the following:
 - Tulalip Constitution
 - Gaming Code
 - Exclusions
 - Domestic Relations
 - Human Resources

You may take the exam three times from the date you first took the exam within a year. If you are not a licensed attorney in one of the 50 state bars, you must read and agree to abide by the Tulalip Rules of Professional Responsibility and certify under the penalty of perjury that you have done so. To register for the exam, please complete the Tulalip Bar Exam Application Form (attached) and return it to: 6103 31st Avenue NE, Tulalip, WA 98271. For questions, contact the Tulalip Tribal Court at 360 / 716-4773. Good luck.

Honorable Judge G. Bass (WA) 716-4773
Honorable Judge T. Pouley (WA) 716-4773

Wendy Church, Court Director, 716-4778
Anna M. Moses, Court Clerk Admin., 716-4768

TULALIP BAR EXAM APPLICATION FORM

Name: _____

Phone Number: _____

Address: _____

Fax: _____

Email: _____

What are the best methods for contacting you? Phone / Email / Fax / Regular Mail

Have you previously taken the Tulalip Bar Exam? Yes / No

If Yes, when did you last take the exam? _____

Please note: the exam is free for first time takers. If you have taken the exam previously, please enclose a check for \$25 for the exam fee.

Are you an attorney licensed in one of the 50 state bars? Yes / No

If Yes, please indicate every state(s) in which you are an attorney and your bar number.

State

Bar Number

What date would you like to take the exam? (Please note the exams are administered on Fridays).

Preferred Date _____

I certify under the penalty of perjury under Tulalip Ordinance 49 Title 3 §3.9.6. that the information stated above are true to the best of my knowledge.

Signed _____

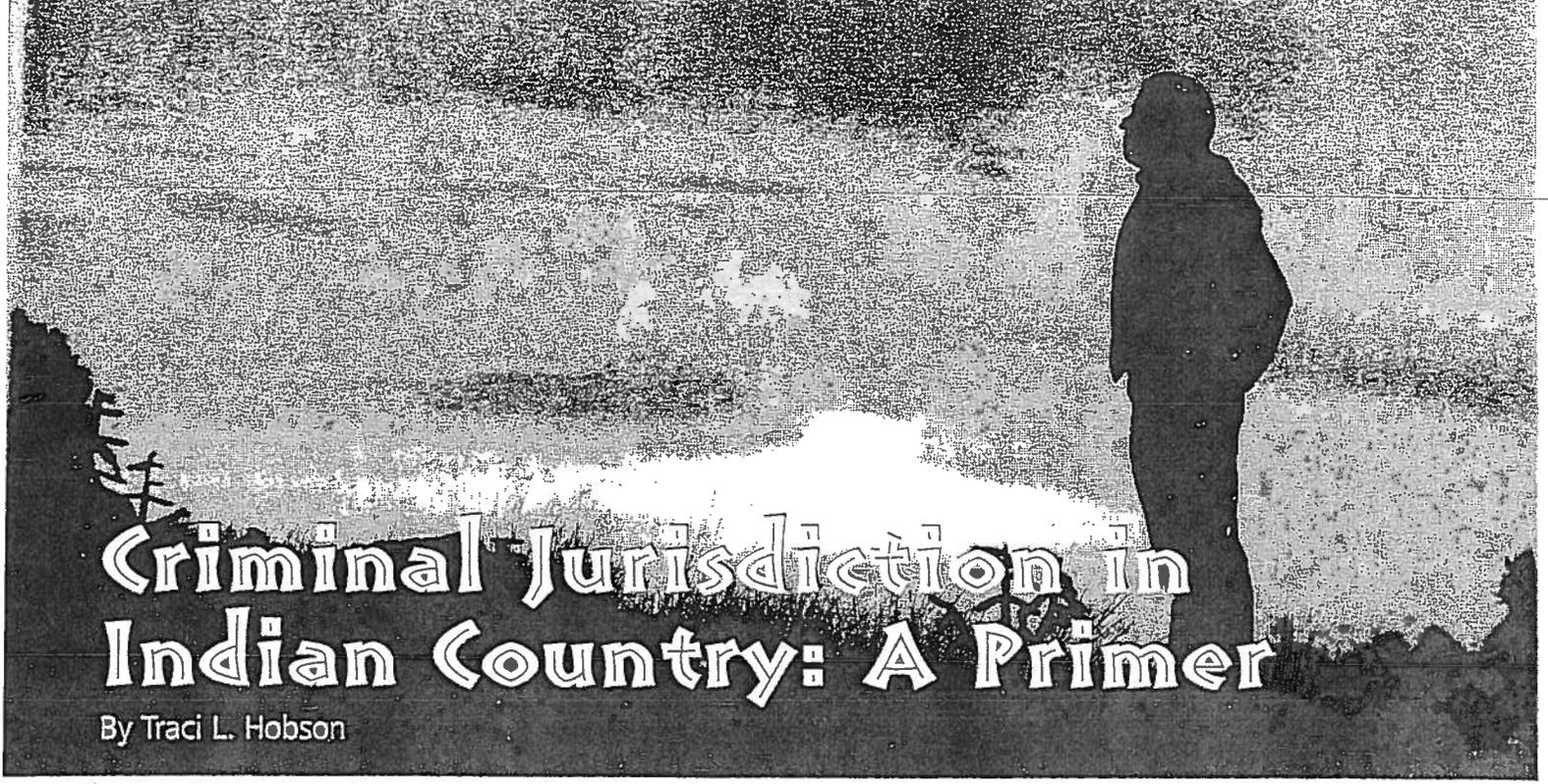
On this Month of _____, Year _____

For Non-Attorney Spokesperson Only

I certify under the penalty of perjury under Tulalip Ordinance 49 Title 3 §3.9.6. that I have read and understood the Tulalip Rules of Professional Responsibility and agree to abide by the Rules.

Signed _____

On this Month of _____, Year _____



Criminal Jurisdiction in Indian Country: A Primer

By Traci L. Hobson

Much of the litigation in the United States involving Indian tribes and territories revolves around one issue: jurisdiction. Because of the complex interweaving of tribal, federal, and state or intra-state jurisdictions in Indian Country,¹ it can be difficult to determine which entities have the authority to adjudicate a particular case. In the criminal arena, the intersection of tribal, state, and federal jurisdiction is particularly problematic. For our nation's coexisting criminal justice systems to operate as efficiently as possible, it is imperative that all judges—tribal, state, or federal—have an understanding of the jurisdictional rules that apply to criminal offenses occurring in U.S. Indian Country.²

Foundational Principles

The basic principles governing Indian law also serve as the foundation for the exercise of criminal jurisdiction in Indian country. Such principles were derived from the “Marshall trilogy,” a trio of cases decided by U.S. Supreme Court Chief Justice John Marshall during the first part of the 1800s: *Johnson v. McIntosh* (1823),³ *Cherokee Nation v. Georgia* (1831),⁴ and *Worcester v. Georgia* (1832).⁵ These cases laid out the following principles:

1. Indian tribes are limited sovereign nations that exist within the boundaries of the United States.⁶ As sovereign nations, they retain all powers of sovereignty not explicitly removed.

2. Congress has plenary power over Indian affairs.⁷ Congress's power over Indian affairs is rooted in the doctrine of discovery as explained and applied by the Supreme Court,⁸ the Constitution, federal common law, and the unique relationship between the tribes and the federal government.

3. Under the terms of the “unique relationship,” the federal government has a trust relationship with the tribes similar to that of a guardian to a ward.⁹ Like the plenary power doctrine, this principle is rooted in the doctrine of discovery and the way in which this country was settled. One responsibility of the federal government historically has been to protect the tribes from intrusions of state authority.

4. A state has no authority in Indian Country unless Congress expressly allows the state to exercise a particular power within Indian Country.¹⁰

Tribal Jurisdiction

As Chief Justice Marshall stated in his early decisions, Indian tribes are sovereign nations and have the inherent sovereign right to exercise criminal

jurisdiction over their members.¹¹ A tribe has this right until it is voluntarily relinquished by the tribe, ceded by treaty, or taken away by the federal government. The criminal jurisdiction of a tribe also extends to nonmember Indians.¹² It does not, however, extend to non-Indians;¹³ under no circumstances do tribal courts have criminal jurisdiction over non-Indians.¹⁴

Federal Jurisdiction

Federal jurisdiction in Indian Country is premised on several key factors, including the trust relationship between the tribes and the federal government, the government's inherent mistrust of tribal authorities, and the resulting federal laws regarding crimes committed in Indian Country. The primary statutes establishing and governing federal jurisdiction in Indian Country are the General Crimes Act,¹⁵ the Major Crimes Act,¹⁶ and the Assimilative Crimes Act.¹⁷

The General Crimes Act, passed in 1817, authorizes the federal government to extend its criminal laws into Indian Country.¹⁸ At that point in U.S. history, the states lacked authority in Indian Territory because it was not part of any state in the Union and because tribal jurisdiction was unclear. The Act permitted punishment of all crimes com-

mitted by non-Indians in Indian Territory, as well as some crimes committed by Indians against non-Indians in Indian Territory. The Act contains one notable exception: crimes committed by one Indian against the person or property of another Indian are not punishable by the federal government under the Act. However, depending on the nature of the crime at issue, a crime may fall under federal jurisdiction pursuant to the Major Crimes Act.

The Major Crimes Act of 1885 greatly extended federal jurisdiction over crimes committed in Indian Country. It was passed as Congress's response to the Supreme Court's decision in *Ex parte Crow Dog*,¹⁹ a case involving an Indian who murdered another Indian on tribal lands. The tribal court convicted and punished the defendant pursuant to Sioux custom and tradition, which included recompense and support of the victim's family. The federal government was not satisfied with the sentence, which it considered too lenient given the nature of the crime. The federal district court asserted jurisdiction, and the defendant was prosecuted, convicted, and sentenced to hang. On appeal, the Supreme Court held that the federal government did not have jurisdiction over the defendant. Applying the General Crimes Act, the Court ordered the defendant be released from federal custody because the tribe was the only entity that could properly exercise criminal jurisdiction. The result outraged the non-Indian community, which then rallied Congress, which subsequently passed the Major Crimes Act. This Act gives the federal government criminal jurisdiction over certain enumerated crimes committed within Indian Country. The Act has been amended several times and now includes thirteen serious, felony-level offenses.²⁰

The third act, the Assimilative Crimes Act, even further expanded fed-

eral jurisdiction in Indian Country. Under this Act, the federal government can exercise jurisdiction in any case where the crime would otherwise be punishable as a violation of the law of the state, commonwealth, territory, possession, or district in which it was committed—even though the crime may not be a violation of federal law. Basically, the Assimilative Crimes Act allows the U.S. Attorney's office to prosecute an offense not defined by federal statute by using the law of the state in which the particular Indian Country exists.

State Jurisdiction

Criminal jurisdiction of the states is limited in Indian Country unless (a) the land was ceded to the state through an act of Congress, such as PL-280, or (b) the tribe voluntarily ceded jurisdiction to the state through an intergovernment agreement or similar government-to-government agreement.²¹ PL-280 holds that Indians are generally subject to the same criminal laws as non-Indians and can be prosecuted in state court whether or not the crime at issue occurred within Indian Country. State criminal jurisdiction in Indian Country is extremely limited where PL-280 has not been adopted.

Determining Which Sovereign Has Jurisdiction

Applying the rules enumerated above, jurisdiction over crimes committed within Indian Country is determined by analyzing three key factors: (1) nature of the crime, (2) race of the victim, and (3) race of the alleged offender. The analyses assume that the criminal act occurred in Indian Country.

- **Indian perpetrator, Indian victim:** A tribe's jurisdiction over crimes committed within its territory is based on the tribe's status as a sovereign nation and the powers that are inherent to a sovereign. The tribe has criminal jurisdiction over all crimes committed within its jurisdiction by an Indian against the person or property of another Indian.²² This is true regardless of the nature and seriousness of the crime. However, tribal

courts are courts of limited jurisdiction, and federal law limits the punishment a tribe may impose. For each criminal offense, a tribe can impose a sentence of only one year in prison and a fine of up to \$5,000, regardless of the seriousness of the offense, unless the tribe applies for and receives permission from the Department of the Interior to increase the statutory maximums.

If both the defendant and the victim are Indian, the federal government's jurisdiction is concurrent with that of the tribe for "major" crimes committed on the reservation. For misdemeanor-level offenses, the tribe's jurisdiction is exclusive. Because the two governments that share jurisdiction are separate sovereigns, prosecuting the same defendant for the same crime²³ does not violate the Double Jeopardy Clause of the Constitution.

- **Indian perpetrator, non-Indian victim:** Under the above-referenced federal statutes, the federal government has jurisdiction over all crimes committed by an Indian perpetrator within Indian Country. The state lacks jurisdiction because the perpetrator is Indian and the state cannot have criminal jurisdiction without express authorization of Congress. The tribe's jurisdiction is concurrent with that of the federal government for all crimes except those specifically enumerated by federal statute such as drug crimes.²⁴

- **Indian perpetrator, victimless crime:** Under the General Crimes Act and the Assimilative Crimes Act, the federal government has jurisdiction when an Indian commits a crime considered victimless. The tribe's jurisdiction is concurrent with federal jurisdiction.

- **Non-Indian perpetrator, non-Indian victim:** Jurisdiction exists in the state in which the reservation or Indian community is located. The state is the only entity with jurisdiction, and the crime is punishable as the same crime would be in any other part of the state. The federal government and the tribe lack jurisdiction,²⁵ despite the fact that the crime occurred in Indian Country because other than location, no "Indian interest" is involved.

Traci L. Hobson is a program attorney at the National Judicial College, located in Reno, Nevada. She can be reached at 800/255-8343.

• **Non-Indian perpetrator, victimless crime:** The state has exclusive jurisdiction over victimless crimes committed by non-Indians within Indian Country. Such offenses include most traffic violations, disorderly conduct, criminal damage to property, or similar offenses that do not impact an individual.

• **Non-Indian perpetrator, Indian victim:** If the perpetrator is a non-Indian and the victim is an Indian, the federal government has exclusive jurisdiction over the defendant. The tribe lacks jurisdiction because it cannot exercise criminal jurisdiction over non-Indians.²⁶ The state lacks jurisdiction because it has no criminal jurisdiction in Indian Country, unless Congress expressly allows it or the tribe consents to this arrangement.

Conclusion

The rules governing the exercise of criminal jurisdiction in U.S. Indian Country are numerous and complex. Under the guidelines discussed here, a tribal, state, or federal court should be able to determine whether it has the authority to hear a particular case by determining the nature of the crime, the race of the victim, and the race of the alleged offender.

Endnotes

1. "Indian Country" in this article means (a) all land within the limits of any Indian reservation under the jurisdiction of the U.S. 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 the rights-of-way running through the same. 18 U.S.C.A. § 11512. The definition of Indian Country also has been the subject of much litigation. "Indian" refers to a member of a federally recognized Indian tribe.

2. Public Law 83-280 (PL-280) (1953) required six states to assume full criminal jurisdiction in Indian Country, with the remaining forty-four states permitted to accept full jurisdiction if they so chose—an option chosen by a handful. Public Law 280 states include Alaska, California, Minnesota, Nebraska, Oregon, and

Judicial Outreach to Tribal Court Judges

By Mary Ann Aguirre

The Bureau of Indian Affairs, the Office of Traffic Safety, and the National Highway Traffic Safety Administration (NHTSA) Region VI recently awarded the National Judicial College (NJC) a grant to expand the Courage to Live program to provide development training to tribal court judges in the Southwest United States.

Originally, the Courage to Live program was designed to support mainstream judicial outreach efforts to combat underage drinking and driving. It provides teaching tools and resources to judges who then work with local schools to set up prevention programs. The curriculum incorporates music, magic, interactive learning, cutting-edge technology, dynamic speakers, and real-life courtroom experiences to educate young people about the potentially tragic consequences of underage drinking and driving.

This Courage to Live program, originally sponsored by the NHTSA's Judicial Outreach Division, has been modified to incorporate the cultures and heritages of Native American communities throughout the country, offering

tribal judges, elders, police officers, and others the tools to tackle the serious problems of underage drinking and driving on tribal lands. Alcohol abuse is epidemic among Native American/Alaskan Native populations, particularly among the underage target group. Alcohol-related auto accidents are the number one killer of young people, and fatalities are two to three times greater for Native American youths. Rates for suicide, alcoholism, and child abuse and neglect within the general Native American population have also reached epidemic proportions.

Many factors explain these disturbing statistics about Native American youths, but none more than the prevalence of alcohol abuse within their families and social circles. Familial experience with alcohol is a significant cause of underage drinking, and national statistics demonstrate that alcohol abuse cuts across generational lines in Native American households. Binge drinking rates (defined as drinking five or more drinks on one occasion at least once a month) are higher for Native American youths aged



Judge James Dehn of St. Paul, Minnesota, and Sergeant Ben Coronell of Juneau, Alaska, recently participated in a Courage to Live outreach program.

twelve to seventeen than for white or African American youths.² Alcohol-related arrest rates for American Indians under age eighteen are twice the national average.

Factors other than early exposure to alcohol abuse add to underage drinking among Native Americans. These include cultural dislocation, lack of clear sanctions/punishments for alcohol abuse, strong peer pressure, school failure, unemployment, poor health, feelings of hopelessness, the emphasis on drinking in American pop culture, and of course poverty.

The Courage To Live Faculty Development Workshop curriculum provides specialized outreach to Native American judges so they can help meet the needs of Native American youths. The most recent Courage to Live program began and ended with a spiritual presentation by Sergeant Ben Coronell, a Tlingit Native from Juneau, Alaska. As part of his presentation, Sergeant Coronell displayed his grandfather's one-hundred-year-old blanket as well as an eagle mask created for the occasion by a Juneau native artist.

The program also included presentations by faculty from throughout the United States. Chico Gallegos, the associate director of The Native American Alliance Foundation, discussed the "Seven Circles of Community." His presentation high-

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lighted the social structure of Native American families and examined how the historical treatment of Native Americans has affected their communities. Other presenters addressed historical trauma, the principles of addiction, the critical role of treatment and intervention, and other topics.

Dr. Louis Phillips, a renowned education expert, also taught "Key Principles for Teaching Young People" to help the participants understand how young people learn. Judge Karen Arnold-Butger of Kansas presented her "Wrong of Passage Tool Kit" to emphasize the importance of parental involvement in prevention efforts, including the effort to break the cycle of alcoholism. Judge Gary Schurrer of Minnesota also presented "Sentencing Circles" to show how this Native American dispute resolution process can aid in intervention and treatment strategies by involving the community in sentencing defendants.

The participants also received resources for their local programs. Donna McBride, formerly with the national chapter of Students Against Drunk Driving (SADD), exposed participants to numerous videos, posters, and other materials available to tribes at no cost from agencies such as the NHTSA. Alton Do of the NIC also showed the participants how to navigate the Internet to find materials to develop their local programs. Each tribe in attendance agreed to conduct at least one underage drinking and driving program in their jurisdiction within one year of

attending the program.

To date, the NIC has provided training to several of the largest tribes in the Southwest, including the Oglala Sioux, the Navajo Nation, the Rosebud Sioux, the Cheyenne River Sioux, and the Fort Peck Assiniboine and Sioux.

NHTSA also provided the NIC with funding to prepare an action guide for judges implementing the Courage to Live program. The guidebook offers details on how judges can tailor programs to suit the needs of their specific communities. It also provides model one-day, half-day, and one-hour Courage to Live curricula for use in mainstream or tribal training. The guide also serves as the text for the tribal Courage to Live Faculty Development Trainings. The guidebook is available upon request by contacting Mary Ann Aguirre at the NIC, 800/255-8343, ext. 210.

Endnotes

1. AMERICAN INDIAN DEVELOPMENT ASSOCIATES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, INDIAN COUNTRY: LAW ENFORCEMENT AND THE CHALLENGES OF ENFORCING UNDERAGE DRINKING LAWS (FALL 2002).

2. The rate for Native American youths is 12.8 percent versus 11.9 percent for white youths and 11 percent for African American youths, even given the relatively low percentage of American Indian youths in the general population. See National Clearinghouse for Alcohol and Drug Information, Publication Vol. 5, No. 16 (Nov. 22, 2002).

3. National Highway Traffic Safety Administration, *Get the Eagle* (video), no. 1AD997 (1994).

Wisconsin. This article does not address criminal jurisdiction in PL-280 states, where it is much more clearly defined than in non-PL 280 states.

3. 21 U.S. 543 (Feb. 28, 1823).

4. 30 U.S. 1 (Mar. 18, 1831).

5. 31 U.S. 515 (Mar. 3, 1832).

6. *Cherokee Nation*, 30 U.S. at 17 (tribes are "domestic dependent nations").

7. *Worcester*, 31 U.S. 515; *United States v. Sandoval*, 231 U.S. 28 (1913). Thus at any time Congress may limit or even abolish tribal authority—including criminal jurisdiction—

within its own territory.

8. *Johnson*, 21 U.S. 543.

9. *Cherokee Nation*, 30 U.S. at 17.

10. Recent Supreme Court decisions increasingly allow states to exert authority in Indian Country. See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001).

11. See *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

12. A landmark case involving whether or not a

tribe has jurisdiction over a nonmember Indian was decided to the contrary. In *Duro v. Reina*, 110 S. Ct. 2053 (1990), the Supreme Court held that a tribe, the Salt River Pima-Maricopa Indian Community, did not have criminal jurisdiction over a nonmember Indian. Congress responded by amending the Indian Civil Rights Act, 25 U.S.C. § 1301, revising the definition of "powers of self-government" to include the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal

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heard by this court in the McGlothlin Courtroom were the most technologically sophisticated ever held. We anticipate that the 2004 appeal will equal or exceed the prior cases.

Ultimately, even in the area of courtroom technology, everything becomes or remains a human question. We discovered last year, for example, that the highly efficient practice of using electronically presented documents, especially when coupled with "call-outs"—enlarged renderings of key language—can upset jurors. Jurors may become convinced that the lawyers intentionally hide otherwise adverse evidence by showing the documents too quickly to be read, and by obscuring the text with the call-outs. Simple solutions to such concerns exist, but the problem is symptomatic of our greatest single conclusion: far more questions must be answered and far more work must be done before we will fully understand the implications of the technology that is changing our legal worlds.

Accordingly, it is fitting to end this review of the Courtroom 21 Project as it began, with a reference to George Wythe, lawyer, professor, judge, and patron jurist of the Courtroom 21 Project. Having helped create the American Revolution, he then helped Virginia and the nation to grow and prosper despite immense change. He did so in large part by emphasizing the dignity of men and women and the need for as perfect an administration of justice as imperfect people may provide. We should do no less. Courtroom technology means change, but technology is only a tool, not a goal. Our goal is the administration of justice, as it should be. So long as we keep that goal in mind, we can be confident that technology will be our useful servant.

Additional information about the Courtroom 21 Project, its installed technology, or any of the programs discussed in this article is available on our Web site, www.courtroom21.net, by phoning 757/221-2494, or by e-mailing ctrm21@wm.edu.

Endnotes

1. A signer of the Declaration of Independence, George Wythe was an extraordinary lawyer, professor, and judge who revolutionized legal teaching not only by teaching law in the university context but also by introducing moot courts and moot legislatures for students. Because of his innovative perspective, he is the "patron jurist" of the Courtroom 21 Project.

2. ELIZABETH C. WIGGINS, MEGHAN A. DUNN, AND GEORGE CORT, FEDERAL JUDICIAL CENTER SURVEY ON COURTROOM TECHNOLOGY 8 (Federal Judicial Center, draft ed., Aug. 2003).

3. Available at www.courtroom21.net.

4. In two experiments by students working under Professor Shaver's supervision, we learned that in a personal injury trial dependent upon conflicting testimony by medical experts, there is no statistically significant difference in award whether the experts testify in person in the courtroom or remotely—at least so long as the witnesses appear life-size on a screen behind the witness stand and are subject to cross-examination under oath.

5. Created in 2002, the Michigan Cyber Court is a nonjury court with civil jurisdiction that potentially could try a case by video conferencing and electronic evidence, without human beings physically present in the courtroom. The cybercourt is based on Courtroom 21's McGlothlin Courtroom. The 2001 lab trial was created to test the concept in its most difficult possible use, a case in which the prosecution used all of the technology against a capital case defendant.

Criminal Jurisdiction in Indian Country

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jurisdiction over all Indians." *Id.* § 1301(2). This action by Congress is popularly known as the "Duro Fix." The question whether the Duro Fix is a recognition of a tribe's inherent powers or a delegation of federal power currently is in litigation and scheduled for hearing by the Supreme Court on January 21, 2004. See *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 46, 2003 U.S. LEXIS 5434 (2003).

13. *Oliphant*, 435 U.S. 191 (stripping tribes of criminal jurisdiction over non-Indians).

14. *Id.* This rule may be changing due to significant domestic violence issues in Indian Country. Debate exists over whether the federal Violence Against Women Act grants tribal courts criminal jurisdiction in a limited number of cases involving enforcement of domestic violence protective orders. For a complete discussion of this issue, see Melissa Tatum, *A Jurisdictional Quandary*, 90 Ky. L.J. 123 (2001-02).

15. 18 U.S.C. § 1152 (aka Federal Enclaves Act).

16. 18 U.S.C. § 1153.

17. 18 U.S.C. § 13.

18. For a complete discussion of the General Crimes Act, see WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (2d ed. 1988).

19. 109 U.S. 556 (1883).

20. The list: murder, manslaughter, kidnapping, felony sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under sixteen years of age, arson, burglary, robbery, and felony theft.

21. As a sovereign nation, a tribe can enter into a government-to-government agreement regarding jurisdiction over specific crimes committed within its territory. This might be advisable under certain circumstances, such as domestic violence cases perpetrated by a non-Indian on an Indian, as a way of protecting tribal members while preserving and recognizing tribal sovereignty via the government-to-government agreement.

22. See *Oliphant*, 435 U.S. 191; *Wheeler*, 435 U.S. 313. *But see* note 23, *infra*.

23. However, the future of a tribe's jurisdiction over nonmember Indians is uncertain because it is not settled whether the Duro Fix is a delegation of federal power or recognition of an inherent sovereign right. See note 12, *infra*. This is also an issue when tribal status is terminated and then restored by the federal government. See *United States v. Long*, 324 F.3d 475 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 151, 2003 U.S. LEXIS 6049 (Oct. 6, 2003). See also Kenneth M. Murchison, *Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986).

24. A crime is unlikely to be prosecuted by the federal government unless it falls under the Major Crimes Act. The Bureau of Indian Affairs, charged with investigating federal crimes (or crimes assimilated from state law as if they were federal) committed on reservations, and U.S. Attorney's offices charged with the same prosecution, have limited resources and tend to concentrate their efforts on only the most serious offenses.

25. The federal government may have jurisdiction over certain crimes specifically enumerated by federal statute, such as federal drug crimes, however.

26. *Oliphant*, 435 U.S. 191.

CRIMINAL AND CIVIL JURISDICTION IN INDIAN COUNTRY

By Southwest Center for Law and Policy

I. BACKGROUND

Subject matter jurisdiction is the legal authority to hear and determine cases. Generally, tribal courts have criminal jurisdiction over persons who are members of federally recognized tribes. Tribal jurisdiction in civil cases is more complex and may extend beyond tribal affiliation to non-Indians in limited instances.

The basic criterion for tribal court jurisdiction in both criminal and civil cases is that the crime(s) or events(s) must have taken place in Indian country. Indian country is defined as:

- A. All land within the limits of any Indian reservation including allotted land and rights-of-way, but excluding privately owned ("fee") land; and
- B. All "dependant Indian communities" within the borders of the United States.¹

II. CRIMINAL JURISDICTION

Essentially, Indian tribes have the sole power ("exclusive jurisdiction") to prosecute crimes by one Indian against another in Indian country subject to federally-imposed limitations by the General Crimes Act.² and the Major Crimes Act³ Indian tribes also retain exclusive jurisdiction in so-called "victimless" crimes committed by Indians in Indian country.

The General Crimes Act, originally enacted by Congress in 1817, permitted the prosecution by the federal government of all crimes committed by non-Indians in Indian country and some crimes committed by Indians against non-Indians.

The Major Crimes Act, enacted in 1885, subjects an Indian committing a crime in Indian country to the same law and penalties as any other person to the jurisdiction of the federal government regarding the following crimes: murder, manslaughter, kidnapping, maiming, incest, aggravating assault, assault of a person under 16 years of age, arson, burglary, robbery and other specified felonies.

Outside Indian country, the state has exclusive jurisdiction over crimes committed by non-Indians against non-Indians and "victimless" crimes in Indian country.

The following chart illustrates respective federal, tribal, and state jurisdiction for crimes

¹ See 18 U.S.C. §1151.

² See 18 U.S.C. §1151.

³ See 18 U.S.C. §1153.

committed in Indian country, but does not apply to Indian country subject to state jurisdiction under Public Law 280.⁴

Crime in Indian Country By Parties	Jurisdiction	Statutory Authority
Indian against Indian (enumerated major crimes)	Federal or Tribal (concurrent)	18 U.S.C. § 1153
Indian against Indian (other crimes)	Tribal (exclusive)	18 U.S.C. § 1153
Indians against non-Indians (enumerated major crimes)	Federal or Tribal (concurrent)	18 U.S.C. § 1152
Indian without victim	Tribal (exclusive)	
Non-Indian against Indian	Federal (exclusive)	18 U.S.C. § 1152
Non-Indian against non-Indian	State (exclusive)	
Non-Indian without victim	State (exclusive)	

III. CIVIL JURISDICTION

Generally, Indian tribes have exclusive jurisdiction over a case brought by any person (member, non-member Indian, or non-Indian) against a member Indian arising within Indian country.⁵

As to non-Indians, the U.S. Supreme Court announced in Montana v. U.S.⁶ that the inherent sovereign powers of an Indian tribe do not extend to non-members of that tribe, except: (1) a tribe can regulate “activities of non-members who enter consensual relationships with the tribe or its members;” and (2) a tribe can exercise “civil authority over conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or health and welfare of the Tribe.”⁷

The Violence Against Women Act explicitly recognizes the power of tribal courts to issue protection orders over non-Indians when the tribal court otherwise maintains personal and subject matter jurisdiction. The Violence Against Women Act also recognizes the power of tribal courts to enforce violations of foreign protection orders (orders from other states, tribes, or territories) as if those orders were their own.⁸

Tribes have full civil jurisdiction to enforce protection orders against members, non-member Indians, and non-Indians through contempt, exclusion, or other appropriate remedies. Civil protection orders, whether temporary or final, are to be accorded “full

⁴ 18 U.S.C. § 1162

⁵ See Williams v. Lee, 358 U.S. 217 (1950).

⁶ 450 U.S. 544 (1981).

⁷ Id. at 565-66.

⁸ See ~~18~~ U.S.C. § 2265.

faith and credit" by state, territorial, and other tribal courts so long as the issuing court had jurisdiction to enter the order and the person against whom the order was issued was afforded due process.⁹

The following charts¹⁰ illustrate civil jurisdiction in Indian country by parties and subject matter but do not apply to P.L. 280 jurisdictions.

Divorce

Plaintiff	Defendant	Domicile of Parties	Jurisdiction
Indian	Indian	Indian country	Tribal (exclusive)
		Non-Indian country	State; Tribal if code allows (concurrent)
Non-Indian	Indian	Indian country	State (probable); Tribal (concurrent)
		Non-Indian country	State (exclusive)
Indian	Non-Indian	Indian country	Tribal (exclusive)
		Non-Indian country	State (exclusive)
Non-Indian	Non-Indian	Anywhere	State (exclusive)

Adoption and Child Custody (non-Divorce)

Proceeding	Domicile or Residence of Child	Jurisdiction
Adoption and all custody	Indian country	Tribal (exclusive)
Adoption or adoptive placement	Non-Indian country	Tribal or State (concurrent)
Foster care of termination of parental rights	Non-Indian country	Tribal preferred; State (concurrent)

IV. PUBLIC LAW 280

Public Law 280 was enacted in 1953. Essentially, Public Law 280 transfers criminal legal authority (jurisdiction) from the federal government to state governments. It also creates an increased and sometimes confusing state role in related civil matters. The mandatory PL 280 states are California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. A 1968 amendment enables any state which had previously assumed jurisdiction under PL 280 to offer the return ("retrocession") of all or any of its jurisdictions to the federal government. Tribes such as the Menominee, Winnebago, and Omaha have successfully reassumed jurisdiction under retrocession.

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State

⁹ See 28 U.S.C. §2265

¹⁰ Canby, William C. Jr., *American Indian Law*, 3rd ed., 210-11 (1998).

Criminal Cases

PL 280 gives the state criminal jurisdiction concurrent (running together) with the inherent criminal jurisdiction of tribal courts. The following chart provides a comparison of criminal jurisdiction in states with and without PL 280.

Criminal Jurisdiction on Indian Reservations (Indian Country)¹¹

	States Without PL 280	States With PL 280
Tribal Jurisdiction	Tribes have criminal jurisdiction over Indians	Tribes have criminal jurisdiction over Indians
Federal Jurisdiction	Federal jurisdiction over major crimes committed by Indians (Major Crimes Act); over Indian v. non-Indian (General Crimes Act); over special liquor, gaming, and other offenses; otherwise, same as off-reservation.	
State Jurisdiction	State jurisdiction over crimes committed by non-Indians against other non-Indians and over victimless crimes.	State jurisdiction over Indians and non-Indians generally.

Impact on Domestic Violence Prosecutions

PL 280 greatly reduces the federal role in prosecuting and investigating crimes against Indian victims. It greatly expands the role of state criminal justice systems and severely limits the role of tribal criminal justice systems.

Civil Cases

PL 280 authorizes the PL 280 state to intervene in civil matters previously under exclusive tribal jurisdiction. It authorizes general state adjudicatory jurisdiction (jurisdiction of courts to judge or adjudicate cases) but not state civil regulatory jurisdiction (jurisdiction of government administrative agencies to regulate conduct). PL 280 does not transfer federal civil jurisdiction.

The following chart provides a comparison of civil jurisdiction in states with and without PL 280.

¹¹ This chart has been adapted from Melton, Ada Pecos & Gardner, Jerry, Public Law 280: Issues and Concerns for Victims of Crime in Indian Country (available online at www.tribal-institute.org/_articles/gardner_full.htm).

Civil Jurisdiction on Indian Reservations (Indian Country)¹²

	States without PL 280	States with PL 280
Tribal Jurisdiction	Tribes have civil jurisdiction over Indians and non-Indians subject to <u>Montana</u> ¹³ constraints.	Tribes have civil jurisdiction over Indians.
Federal Jurisdiction	Same as off-reservation.	Same as off-reservation.
State Jurisdiction	None (except some suits involving non-Indians or fee lands)	State has jurisdiction over suits involving non-Indians.

¹² Id.

¹³ See supra note 6.

2nd Annual Washington State Tribal/County Criminal Justice Summit
A Guide to Indian Law in Washington



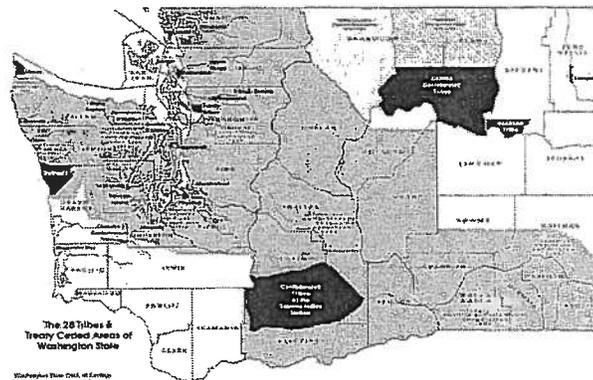
Gabriel S. Galanda

Over the past decade, the 29 federally-recognized Indian tribes in the State of Washington have become major players in the State's economy. Tribes are aggressively creating and operating new businesses in the areas of real estate development, banking and finance, media, telecommunications, wholesale and retail trade, tourism, and gaming.¹ Consider these facts:

- Washington tribes occupy more than 3.2 million acres of reservation lands.
- Washington tribes currently employ nearly 15,000 Indian and non-Indian employees. By comparison, Microsoft employs 20,000 Washingtonians.
- Washington tribes paid over \$5.3 million dollars to the State in employment taxes, in 1997 alone.
- By 2002, Washington's twenty-one gaming tribes generated \$648 million in revenue, up from \$620 million in 2001.²

A corollary to the dramatic increase in tribal economic development is the increased interaction of tribes and non-Indian citizens who seek business, employment, or recreation on Indian reservations. In turn, legal matters between Indian tribes and non-Indians continue to increase.

As Indian law issues now intersect both litigation and transactional practices, and virtually every niche of law,³ every attorney in Washington must be cognizant of general Indian law principles and stand prepared to answer common Indian law questions. Likewise, all tribal and county decisionmakers should understand the contours of Indian law, particularly issues of civil and criminal jurisdiction. For that reason, I share with you, participants in the *2nd Annual Washington State Tribal/County Criminal Justice Summit*, some legal principles that govern relations between Indians and non-Indians in Washington, in hopes that you and counsel for your tribe or county will continue the dialogue on such critical issues.



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Question: “What is Tribal Sovereignty?”

Answer: Indian tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government.⁴ Although no longer “possessed of the full attributes of sovereignty,” tribes remain a “separate people, with the power of regulating their internal and social relations.”⁵ In short, Indians possess “the right . . . to make their own laws and be ruled by them.”⁶

Much like the State government, tribal governments are elaborate entities, consisting of executive, legislative, and judicial branches. The office of the tribal chairman (like that of the state governor) and the tribal council (the state legislature) operate the tribe under a tribal constitution and code of laws.

Question: “Are Tribal Courts Different than State and Federal Courts?”

Answer: Yes. Although Washington’s 25 tribal courts are modeled after Anglo-American courts,⁷ Indian courts are significantly different.⁸ Tribal judges, who are often tribal members, are not necessarily lawyers.

Tribal courts operate under the tribes’ written and *unwritten* code of laws. Most tribal codes contain civil rules of procedure specific to tribal court, as well as tribal statutes and regulations. Such laws outline the powers of the tribal court and may set forth limitations on tribal court jurisdiction.⁹

A tribe’s code also includes customary and traditional practices, which are based on oral history and may not be codified in tribal statutes and regulations.¹⁰ Tribal judges consider testimony regarding tribal custom and tradition from tribal elders and historians, who need not base their opinions on documentary evidence as may be required by state and federal evidentiary rules.

Tribal courts generally follow their own precedent and give significant deference to the decisions of other Indian courts. However, because there is no official tribal court reporter¹¹ and because not all tribal courts keep previous decisions on file, finding such caselaw can be difficult.¹² The opinions of federal and state courts are persuasive authority, but tribal judges are not bound by such precedents. Nevertheless, Washington’s state courts extend full faith and credit to valid tribal court orders,¹³ and federal courts grant comity to tribal court rulings.¹⁴

Before handling a matter in tribal court, counsel must appreciate the character of tribal courts, pay careful attention to tribal laws and statutes, and understand the fundamental differences between tribal courts and state and federal courts.

Question: “Can Tribes Be Sued for Damages or Equitable Relief?”

Answer: Probably not. Like other sovereign governmental entities, tribes enjoy common law sovereign immunity and cannot be sued.¹⁵ An Indian tribe is subject to suit only where Congress has “unequivocally” authorized the suit or the tribe has “clearly” waived its immunity¹⁶ (for examples of waiver, see discussion below regarding tribal insurance). There is a strong presumption against waiver of tribal sovereign immunity.¹⁷

The doctrine of sovereign immunity shields tribes from suit for monetary damages and requests for declaratory or injunctive relief.¹⁸ However, tribal government officials who act beyond the scope of their authority are not immune from claims for damages.¹⁹

Tribes are also immune from the enforcement of a subpoena, e.g., to compel production of documents.²⁰ Last year, the Ninth Circuit Court of Appeals, in *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (2002), *certiorari granted*, 123 S. Ct. 618, reaffirmed that tribes are immune from

subpoena enforcement, in barring the execution of a warrant to obtain confidential payroll records for casino employees. The Supreme Court heard argument on *Bishop Paiute* in early 2003 and, though expected by many tribal advocates to reverse the Ninth Circuit, the Court remanded the case for reconsideration of other issues. As such, Washington tribes remain immune from subpoena enforcement and county law enforcement cannot use a superior court's subpoena power as a means to obtain casino records.

Tribal immunity generally extends to agencies of the tribe²¹ such as tribal casinos, resorts, and other business enterprises. As many Washington citizens flock to tribal casinos, slip-and-falls and other tort claims arising on tribal reservations have increased. Nevertheless, courts routinely dismiss personal injury suits against tribes for lack of jurisdiction.²²

Therefore, in considering whether to sue a tribe on behalf of an injured party, counsel must closely evaluate issues of sovereign immunity and waiver. Unless a plaintiff can show clear evidence of tribal waiver or unequivocal Congressional abrogation, a judge will simply dismiss any suit filed against a tribe for damages for lack of subject matter jurisdiction.

Question: "Can Tribes Be Sued to Enforce a Contract?"

Answer: Probably not. Tribes retain immunity from suit when conducting business transactions both on and off the reservation.²³ Generally, a tribe can only be sued in contract if the agreement explicitly waived tribal immunity;²⁴ a waiver will not be implied.²⁵ Nonetheless, the U.S. Supreme Court recently held that a contractual agreement to arbitrate disputes constitutes a clear waiver of immunity.²⁶ Increasingly, tribes will agree to limited waivers of immunity. Some tribes set up subordinate entities whose assets, the tribes acknowledge, are not immune from suit, levy, or execution (although assets not held by the entity remain protected by immunity).²⁷

So, if asked to sue a tribe for breach of contract, counsel should first consider the entity with which your client contracted – i.e., a tribe, which is likely immune from suit; or a subordinate entity, for which the tribe may have waived its immunity. If asked to create a contract with a tribe, counsel must explain to his or her client that there may not be any remedy available in the event of a contractual breach. Counsel should then negotiate with the tribe to reach a meeting of the minds with respect to the immunity issue. Again, some tribes will agree to a limited waiver.

Question: "Can Tribes Be Sued for Employment Discrimination?"

Answer: Probably not. Both Title VII²⁸ and the Americans with Disabilities Act (ADA)²⁹ expressly exclude Indian tribes.³⁰ Similarly, the Ninth Circuit has held that tribes are immune from suit under the Age Discrimination in Employment Act (ADEA).³¹ Tribes are also immune from suit under 42 U.S.C. 1983.³² Likewise, state discrimination laws do not apply to tribal employers.³³

Tribally-owned entities are generally not subject to state and federal discrimination laws either.³⁴ Tribal officials are also immune from suit arising from alleged discriminatory behavior, so long as they acted within the scope of their authority.³⁵ In short, any employment suit against a tribe or its officials based upon federal or state discrimination law will likely be dismissed for lack of subject matter jurisdiction.

Washington's tribes have become one of the State's largest employers. As a result, non-Indians' employment records and documents concerning tribal employment practices are increasingly becoming the focus of discovery, even in litigation against non-tribal entities. If the employee is a party, his or her employment records are discoverable if they are in the employee's custody or control. However, under

the doctrine of sovereign immunity, a court cannot subpoena a tribe to produce the employee's records.³⁶ By the same token, a court cannot compel a tribe – or Interior or BIA³⁷ – to provide documents about the tribe's employment practices, i.e., matters "internal" to the tribe.

Question: "Can Tribes Be Sued for Violation of Labor and Employment Laws?"

Answer: Maybe. The circuits are split regarding the application of federal regulatory employment laws to tribal employers. The Ninth Circuit has applied the Occupational Safety and Health Act (OSHA)³⁸ and the Employee Retirement Income Security Act (ERISA)³⁹ to tribes, reasoning that such statutes of general applicability govern tribal employment activity because Indian tribes are not explicitly exempted from the laws.⁴⁰ The Seventh and Second Circuits have adopted the Ninth Circuit's rationale and also applied OSHA and ERISA to tribes,⁴¹ and the Seventh Circuit leans toward application of Fair Labor Standards Act (FLSA)⁴² to tribal employers.⁴³

Conversely, the Tenth and Eight Circuits have refused to apply to tribes such laws as OSHA, ERISA, FLSA, and the National Labor Relations Act (NLRA),⁴⁴ because doing so would encroach upon well-established principles of tribal sovereignty and tribal self-governance.⁴⁵ While the Ninth Circuit's rulings that apply federal employment statutes of general applicability to tribes are binding in Washington, and the decisions of the Seventh and Second Circuits serve as persuasive precedent, state labor laws and workers' compensation statutes remain inapplicable to tribal businesses.⁴⁶

Question: "Where Should a Claim Be Filed that Arises on the Reservation?"

Answer: It depends. Subject matter jurisdiction of tribal, state or federal courts depends largely upon (1) whether the defendant is an Indian or non-Indian person or entity,⁴⁷ and (2) whether the act occurred on Indian fee or allotted lands, non-Indian-owned reservation lands, or even a state right-of-way on the reservation.⁴⁸ These two complex issues should be the first area of inquiry for any question regarding jurisdiction over a dispute arising on a reservation.

Tribal courts have jurisdiction over a suit by any party – Indian or non-Indian – against an Indian person, a tribe, or tribal entity for a claim arising on the reservation.⁴⁹ Jurisdiction over lawsuits between non-Indians arising on the reservation lies in state court.⁵⁰ So, assuming the plaintiff is prepared to show clear or unequivocal waiver of tribal immunity, counsel should file any tort claims arising on Indian lands or in tribal casinos, in tribal court.

Specifically, state courts have jurisdiction over any dispute arising from an auto accident occurring on a state right-of-way through the reservation, including a dispute between non-Indian citizens,⁵¹ and a suit by an Indian against a non-Indian.⁵² As such, common claims that arise on Washington State highways running through reservations should be brought in state court.

Question: "Can Non-Indians Be Sued in Tribal Court?"

Answer: It depends. Generally, a tribal court can only assert jurisdiction over a claim against a non-Indian person or entity when "necessary to protect tribal self-government or to control internal relations."⁵³ Essentially, a tribal court only has jurisdiction over the reservation activities of non-Indian parties "who enter consensual relationships with the tribe . . . through commercial dealing, contract, leases, or other arrangements."⁵⁴ As such, a tribal court likely possesses jurisdiction over any litigation arising from a contract with a tribe.

State courts may exercise jurisdiction over a non-Indian person or entity for a claim arising on the reservation.⁵⁵ Federal courts may assert jurisdiction over a claim against a non-Indian party based upon reservation activities if there is federal question jurisdiction,⁵⁶ or diversity jurisdiction.⁵⁷ Thus, absent a contractual relationship with the tribe, non-Indian parties can only be sued in state or federal court.

Question: “Can Non-Indians Challenge the Assertion of Tribal Court Jurisdiction?”

Answer: Yes. If sued in tribal court, non-Indian persons or entities can challenge the tribal court’s assertion of jurisdiction in federal court. However, federal courts typically stay their proceedings to allow the tribal court to determine its own jurisdiction.⁵⁸ Thus, before challenging a tribal court’s assertion of jurisdiction in federal court, counsel must first exhaust tribal remedies.⁵⁹

In any case, a tribal court first decides jurisdiction over non-Indian parties. If the tribal court rules that it has jurisdiction, it proceeds with the case. If the federal court later agrees that the tribal court had jurisdiction, it will not relitigate the case.⁶⁰ Therefore, counsel should thoroughly present the merits of his or her client’s case to the tribal judge, as there may not be a subsequent opportunity to do so in federal court. In doing so, counsel should be ever mindful of the unique aspects of tribal courts described above.

Question: “Who Can Be Prosecuted in Tribal Court?”

Answer: No. Tribal courts do not have general criminal jurisdiction over non-Indian crimes occurring on the reservation.⁶¹ However, tribal courts do retain the power to exclude any unwanted person from their reservations.⁶²

Jurisdiction for non-Indian criminal offenses on the reservation lies with state or federal courts:⁶³ Crimes committed on the reservation by non-Indians against non-Indians are subject to state jurisdiction.⁶⁴ Also, although unsupported by federal law, Washington state courts typically try non-Indians for traffic and other minor offenses occurring on the reservation. Federal courts have jurisdiction under the General Crimes Act⁶⁵ over reservation crimes committed by non-Indians against Indians or Indian “interests” (e.g., property).⁶⁶

The U.S. Supreme Court decision holding that tribes have no criminal jurisdiction over non-Indians arose in Western Washington.⁶⁷ As a result, Washington’s tribes are very aware of that bright-line rule, and rarely, if ever, will a non-Indian face tribal court prosecution in for reservation offenses.

Generally, in the absence of federal statutes that limit tribal jurisdiction,⁶⁸ tribal criminal jurisdiction over Indians in Indian Country is complete, inherent and exclusive.⁶⁹ Under Public Law 280 and subsequent state legislation, the State of Washington has assumed criminal jurisdiction over Indians

on Indian lands in eight enumerated areas.⁷⁰ Some Washington tribes, however, have retroceded from the state’s jurisdiction and restored criminal jurisdiction over Indians on their lands to the tribe’s courts.

In 1990, the U.S. Supreme Court ruled in Duro v. Reina,⁷¹ that state or federal courts also had jurisdiction over on-reservation crimes of Indians who are not members of the tribal community in which the crime occurred. However, Congress quickly overrode *Duro*, and affirmed the “inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians.”⁷² The Ninth Circuit upheld the statute – commonly known as “the *Duro* fix” – in an opinion issued in 2001.⁷³ Thus, absent federal statutes that limit tribal jurisdiction,⁷⁴ Washington tribal courts retain jurisdiction over crimes committed by any Indian (member or nonmember) on the reservation.

Conclusion

Washington State is witnessing firsthand both the tremendous rise in tribal economic development, and an array of legal disputes between Indians and non-Indians. Indeed, Indian law principles impact litigation and transactional practices, and intersect general tort, contract, employment, and criminal law. Further, Indian law issues implicate tribal, state and federal court practice and challenge an advocate's understandings of procedural and jurisdictional principles. For these reasons, it is vital that you recognize and understand the Indian law issues that you and/or your constituents will inevitably encounter in Washington.

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¹ See Tiller, Veronica and Robert E. Chase, *Economic Contributions of Indian Tribes to the State of Washington*, <http://www.goia.wa.gov/econdev/index.html>.

² See Alan Meister, "Indian Gaming: Economic Outlook," *Native American Casino*, October 2003.

³ See generally Matt Fleischer, *No Reservations About Indian Law*, *The National Law Journal*, May 8, 2000 ("Like corporations, tribes now need advice on employment law, trademarks, Federal Communications Commission regulations, bond financing, environmental standards and taxation.")

⁴ *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

⁵ *U.S. v. Kagama*, 118 U.S. 375, 381-82 (1886).

⁶ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

⁷ See Michael Taylor, *Modern Practice in the Indian Courts*, 10 *Univ. Puget Sound Law Rev.* 231 (1989); see generally DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (4th ed. 1998), at 390.

⁸ As the U.S. Supreme Court recently explained:

Tribal courts . . . differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," which would be unusually difficult for an outsider to sort out.

Nevada v. Hicks, 533 U.S. 353 (2001) (citations omitted); see also Taylor, *supra* note 7; GETCHES, *supra* note 11, at pp. 413-418 (discussing unique nature of tribal courts).

⁹ See Taylor, *supra* note 7, at 238-241.

¹⁰ See *Id.*

¹¹ The *Indian Law Reporter* (Indian L. Rptr.) has published selected tribal court opinions since 1983. See *Id.*

¹² See *Id.*

¹³ See, e.g., *In re Buehl*, 87 Wn.2d 649 (Wash. 1976); *Jim v. CIT Financial Services Corp.*, 533 P.2d 751 (N.M. 1975); *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982), cited in GETCHES, *supra* note 7, at 656-58.

¹⁴ See, e.g., *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997); *In Matter of Marriage of Red Fox*, 542 P.2d 918 (1975); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D.1985); *Leon v. Numkena*, 689 P.2d 566 (Ariz.Ct.App.1984); *Wippert v. Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982); *Wakefield v. Little Light*, 347 A.2d 228 (Md.1975); *In Re Lynch's Estate*, 377 P.2d 199 (Ariz. 1962), cited in GETCHES, *supra* note 7, at 656-58. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Begay v. Miller*, 222 P.2d 624 (Ariz. 1950), quoting *Hilton v. Guyot*, 159 U.S. 113 (1895).

- ¹⁵ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
- ¹⁶ *Id.*; Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 757 (1998) (“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”); *see also* Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe, 498 U.S. 505 (1991) (“Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.”).
- ¹⁷ Demontiney v. U.S., 255 F.3d 801 (9th Cir. 2001), *citing* Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989).
- ¹⁸ Santa Clara Pueblo, *supra* note 15; Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269 (9th Cir. 1991); Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985).
- ¹⁹ Imperial Granite Co., *supra* note 18. Then again, tribal officials who do act within the scope of their authority are protected from suit under the tribe’s immunity. *See* Hardin, *supra* note 18.
- ²⁰ United States v. James, 980 F.2d 1314, 1319-20 (9th Cir. 1992).
- ²¹ Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986). *Cf.* Wilson v. Turtle Mountain Band of Chippewa Indians, 459 F. Supp. 366, 368-69 (D.N.D. 1978).
- ²² *See* Barker-Hatch v. Viejas Group, 83 F. Supp. 2d 1155 (S.D.Cal 2000); Gavle v. Little Six, Inc., 524 N.W.2d 280 (Minn.App.1995).
- ²³ Kiowa, *supra* note 19; In re Greene, 980 F.2d 590 (9th Cir. 1992).
- ²⁴ Kiowa, *supra* note 19; Weeks, *supra* note 27.
- ²⁵ Maynard v. Narragansett Indian Tribe, 984 F.2d 14 (1st Cir. 1994).
- ²⁶ C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma, 532 U.S. 411 (2001).
- ²⁷ *See generally* GETCHES, *supra* note 11, at 383-88.
- ²⁸ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).
- ²⁹ 42 U.S.C. §§ 12101-12213.
- ³⁰ Pink v. Modoc Indian Health Project, 157 F.3d 1185 (9th Cir. 1998); Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. 1986); *but see* Florida Paralegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (11th Cir. 1999) (held public accommodation portion of ADA applicable to tribes but held that tribe was immune from suit).
- ³¹ 29 U.S.C. § 621-34; EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001); *but see* EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) (“ADEA is not applicable because its enforcement would directly interfere with the Cherokee Nation’s treaty-protected right of self-government”); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc., 986 F.2d 246 (8th Cir. 1993).
- ³² *See* Corrigan v. Bargala, 1999 U.S. App. Lexis 33671, 1999 WL 1217935 (9th Cir. 1999); Dry v. City of Durant, 242 F.3d 388 (10th Cir. 2000).
- ³³ *See, e.g.*, A.R.S. § 41-1464 (exempts Arizona’s tribes from state employment discrimination laws); *see also* New Mexico v. Mescalero Apache Tribe, 463 U.S. 324 (1983) (“State jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in the federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”); FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Strickland 1982), at 259 (state civil laws are “generally not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress”).
- ³⁴ *See* Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000).
- ³⁵ *See* Hardin, *supra* note 18.
- ³⁶ *See* James, *supra* note 20.
- ³⁷ *See* Klamath, *supra* note 22.
- ³⁸ 29 U.S.C. § 651 *et seq.*
- ³⁹ 29 U.S.C. § 1001 *et seq.*
- ⁴⁰ Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (right of self-government is too broad to defeat applicability of OSHA); DOL v. OSHA Review Comm’n, 935 F.2d 182 (9th Cir. 1991) (applying OSHA); Labor Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683 (9th Cir. 1991) (applying ERISA).
- ⁴¹ Smart v. State Farm Ins., 868 F.2d 929 (7th Cir. 1989) (the “argument that ERISA will interfere with the tribe’s right of self-government is overbroad”); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d. Cir. 1996) (following Ninth and 7th Circuits to apply OSHA).
- ⁴² 29 U.S.C. § 201 *et seq.*
- ⁴³ Reich v. Great Lakes Indian Fish and Wildlife Commission, 4 F.3d 490 (7th Cir. 1993).
- ⁴⁴ 29 U.S.C. § 158(a)(3) *et seq.*
- ⁴⁵ Donovan v. Navajo Forest Products, Indus., 692 F.2d 709 (10th Cir. 1982) (OSHA held inapplicable to tribe in part because enforcement “would dilute the principles of tribal sovereignty and self-government recognized in the treaty.”); *see also* EEOC v. v. Fond du Lac, *supra* note 34.

- ⁴⁶ See *Begay v. Kerr McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982); *Tibbets v. Leech Lake Reservation Business Comm.*, 397 N.W.2d 883 (Minn. 1986) (held Minnesota worker's compensation law inapplicable to tribal employer); see generally *Mescalero Apache*, COHEN, *supra* note 36.
- ⁴⁷ To make the issue of jurisdiction even more complicated, courts consider whether the party is a tribal "member" and "nonmember." In short, "nonmembers" are non-Indian persons or entities, or Indian persons who are not enrolled as a member of the tribe which is asserting jurisdiction. See *U.S. v. Wheeler*, 435 U.S. 313 (1978); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Duro v. Reina*, 495 U.S. 676 (1990); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). In order to keep this analysis more simple, the terms "Indian" and "non-Indian" will be used.
- ⁴⁸ See, e.g., *Montana v. U.S.*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989) *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Strate*, *supra* note 54.
- ⁴⁹ *Williams v. Lee*, 358 U.S. 217 (1958).
- ⁵⁰ See *Strate*, *supra* note 47.
- ⁵¹ *Id.*
- ⁵² *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).
- ⁵³ *Montana*, *supra* note 48.
- ⁵⁴ *Id.*; *FMC v. Shoshone-Bancock Tribes*, 905 F.2d 1311 (9th Cir. 1990).
- ⁵⁵ *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984).
- ⁵⁶ 28 U.S.C. §§ 1331, 1343.
- ⁵⁷ 28 U.S.C. § 1332.
- ⁵⁸ See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).
- ⁵⁹ *Id.*; *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992).
- ⁶⁰ *LaPlante*, *supra* note 58.
- ⁶¹ *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).
- ⁶² *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985).
- ⁶³ *State v. Schmuck*, 121 Wn.2d 373 (Wash. 1993).
- ⁶⁴ *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946); *Solem v. Bartlett*, 465 U.S. 463 (1984).
- ⁶⁵ 18 U.S.C. § 1152.
- ⁶⁶ *Williams v. U.S.*, 327 U.S. 711 (1946).
- ⁶⁷ In *Oliphant*, *supra* note 64, the U.S. Supreme Court held that the Suquamish tribal court – which occupies land on the Kitsap Peninsula in Western Washington – did not have jurisdiction to prosecute a non-Indian who assaulted a tribal police officer and resisted arrest.
- ⁶⁸ See, e.g., the Major Crimes Act, 18 U.S.C.A. §§ 1153, 3242.
- ⁶⁹ *Ex parte Crow Dog*, 109 U.S. 556 (1883).
- ⁷⁰ 18 U.S.C. § 1162(a); RCW 37.12.010; *McCrea v. Denison*, 76 Wn. App. 395, 398 n. 3 (1994).
- ⁷¹ 495 U.S. 676 (1990).
- ⁷² 25 U.S.C. § 1301(2).
- ⁷³ See *U.S. v. Enas*, 255 F.3d 662 (9th Cir. 2001).
- ⁷⁴ See, e.g., the Major Crimes Act, 18 U.S.C.A. §§ 1153, 3242.

Tulalip Rules of Professional Responsibility Rules for Non-Lawyers Spokespersons

(Adopted from Washington State Rules of Professional Conduct)

1. Diligence: (WA RPC 1.3)
 - a. A spokesperson shall be diligent and prompt when representing a client.
2. Communication: (RPC 1.4)
 - a. A spokesperson shall:
 - i. Keep the client informed on the case status, and
 - ii. Explain the matter so the client can make an informed decision.
3. Confidentiality: (RPC 1.6)
 - a. A spokesperson shall not reveal client's secrets or confidences except:
 - i. Reveal what is reasonably necessary to carryout the representation, or
 - ii. Client consents, or
 - iii. Prevent client from committing crime, or
 - iv. Defend a suit filed by the client against the spokesperson, or
 - v. Spokesperson may inform the court of a breach of fiduciary duty when the client is a court appointed fiduciary, guardian or trustee and the client has breached the fiduciary responsibility.
4. Conflict of Interest; General Rule: (RPC 1.7)
 - a. A spokesperson cannot represent a client if:
 - i. There would be a conflict of interest with another client, or
 - ii. There would be a conflict of interest with the spokesperson.
 - b. Conflicts rules can be waived if the spokesperson reasonably believes the representation would not be adversely affected and the client understands the conflict and waives the conflict in writing.
5. Conflict of Interest; Prohibited Transactions; Current Client: (RPC 1.8)
 - a. A spokesperson representing a client cannot:
 - i. Enter into a business transaction,
 - ii. Acquire an interest adverse to the client.
 - b. An above transaction can be waived if:
 - i. The terms are fair and reasonable to the client, and
 - ii. Terms are disclosed to the client in writing, and
 - iii. The client has opportunity to seek independent counsel, and
 - iv. The client consents.
 - c. The spokesperson cannot use client's secrets or confidence to the client's disadvantage unless the client consents in writing after consultation.
 - d. A spokesperson cannot prepare a legal document giving the spokesperson a substantial gift unless spokesperson is the client's parent, child, sibling or spouse.

- e. A spokesperson cannot negotiate for the literary or media rights to the matter of the representation until after the representation has ended.
 - f. A spokesperson cannot advance client money or guarantee financial assistance except for court costs.
 - g. A Spokesperson shall not accept compensation from someone other than the client unless:
 - i. Client consents, and
 - ii. There is no interference with the spokesperson's independence or judgment, and
 - iii. Client's secrets and confidences are protected
 - h. When representing more than one client, the spokesperson shall not make agreements for a joint settlement or joint plea agreement unless:
 - i. After the terms of all the claims or pleas are disclosed,
 - ii. All the clients consent.
 - i. A spokesperson shall not make an agreement to limit the spokesperson's malpractice liability before the representation.
 - j. A spokesperson shall not settle a claim with an unrepresented client without first advising the client to seek independent representation in writing.
 - k. A spokesperson shall not represent a client against another person who is represented by the spokesperson's parent, child, sibling or spouse.
 - l. A spokesperson shall not acquire a proprietary interest in the law suit except:
 - i. A lien granted by law to secure fees or expenses
 - ii. Reasonable contingent fees
 - m. A spokesperson shall not have sexual relations with a current client unless a consensual relationship existed at the time the representation commenced.
6. Conflict of Interest; Former Client: (RPC 1.9)
- a. A spokesperson who represented a client in a matter cannot:
 - i. Represent another client in the same matter against the former client.
 - ii. Use confidences or secrets to the disadvantage of the former client.
7. Meritorious Claims and Contentions: (RPC 3.1)
- a. A spokesperson shall not bring or defend a suit or issue unless there is a good faith argument for doing so.
8. Expedite Litigation: (RPC 3.2)
- a. A spokesperson shall try to resolve the matter in litigation quickly so long as it is consistent with the client's interest.
9. Candor Toward the Tribunal: (RPC 3.3)
- a. A spokesperson shall not knowingly:
 - i. Lie to the court

- ii. Fail to disclose a fact that is not a secret or confidence when it is necessary to avoid helping in criminal or fraudulent conduct.
- b. A spokesperson shall not offer evidence that the spokesperson knows to be false
- c. If the spokesperson offered material evidence and later realized it was false, the spokesperson shall inform the court unless doing so would breach client's confidence or secrets.
- d. A spokesperson may refuse to offer evidence the spokesperson believe is false.

10. Fairness to Opposing Party and Counsel: (Rule 3.4)

- a. A spokesperson shall not:
 - i. Obstruct another party's access to evidence or alter, destroy, conceal evidence or counsel another to do so without legal basis, or
 - ii. Falsify evidence, or
 - iii. Disobey a court order, or
 - iv. Make frivolous discovery request, or
 - v. Fail to comply with proper discovery requests.

11. Truthfulness in Statement to Others: (Rule 4.1)

- a. A spokesperson shall not knowingly:
 - i. Lie to a third person
 - ii. Failure to disclose a fact that is not a secret or confidence when it is necessary to avoid helping in criminal or fraudulent conduct.

12. Communication with Persons Represented by Counsel: (Rule 4.2)

- a. A spokesperson shall not communicate with a party who is represented by an attorney or another spokesperson without the opposing attorney or spokesperson's consent.

13. Dealing with Unrepresented Person: (Rule 4.3)

- a. When communicating with an unrepresented person on a client's behalf, the spokesperson shall not state or imply that the spokesperson is disinterested. If the unrepresented person misunderstands the spokesperson's role in the matter, the spokesperson shall make reasonable effort to correct the misunderstanding.

14. Respecting the Rights of Third Person: (Rule 4.4)

- a. In representing a client, a spokesperson shall not use means with no substantial purpose other than to embarrass, delay or burden a third person, or violate the legal right of such person.