

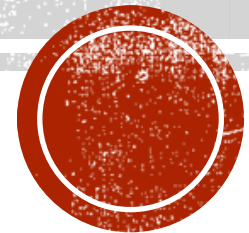


2019 CALIFORNIA INDIAN LAW ASSOCIATION CONFERENCE

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TRIBAL LAW & POLICY:

How Tribal Law Can Advance Government & Business



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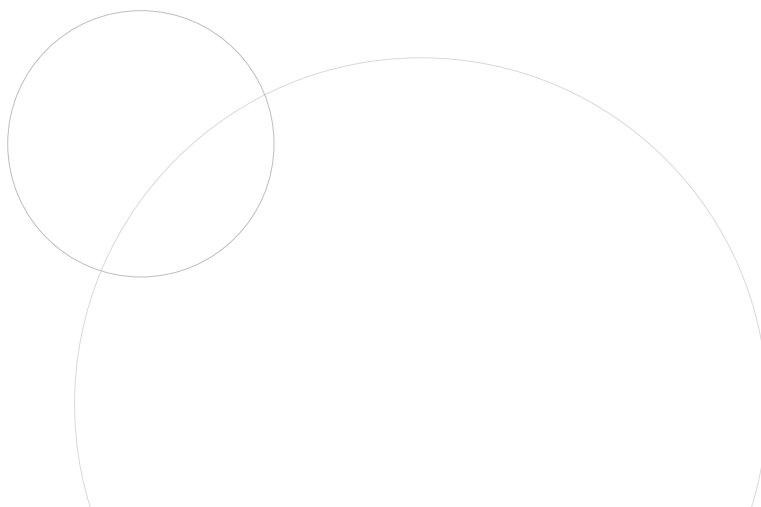
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OVERVIEW

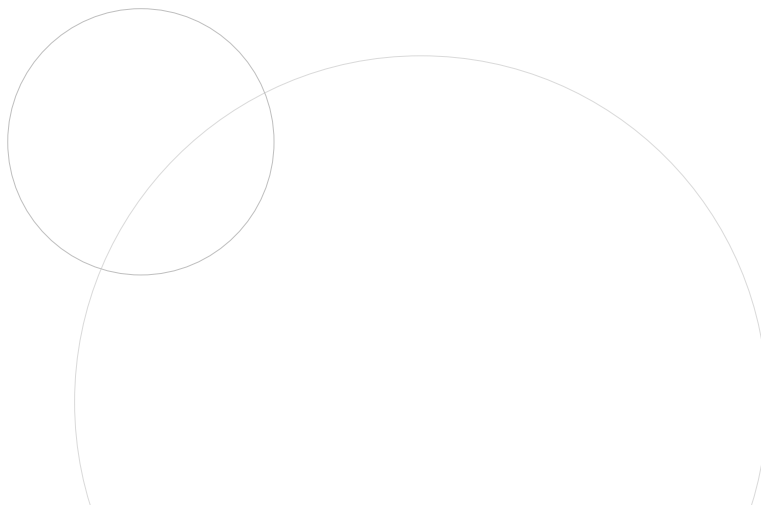
- Tribal Law—Origins, Intersections, and Access Challenges
- Tribal Law Development—Practical Considerations and Opportunities





WHAT IS THE LAW? TRIBAL LAW IN CA

- At its most elemental, law is a system of rules by which a sovereign:
 - regulates the actions of individuals/entities; and
 - Takes potential enforcement action through the imposition of penalties.
- Inherent Tribal Sovereignty
- Government structures and law development (Rancherias, Missions, Colonies, Reservations, Executive Orders, Termination and Restoration, etc).





MODERN TRIBAL LAW

- Federal Indian law concerns the relationship between federal, state, and tribal governments, but tribal law is the law that tribes develop and apply to their own members and territories.
- Tribal Laws:
 - Tribal Constitutions, Articles or Bylaws
 - Tribal Codes, Ordinances, Resolutions, and other Materials
 - Tribal Court Opinions
- Judicial decisions: Tribal courts are courts of general jurisdiction, operating within federal Indian law and under jurisdiction conferred by tribal law.



CHALLENGES IN FORMING TRIBAL LAW

- Limited Jurisdiction and Authority
- Difficulty Translating Custom and Tradition into Written Law
- Lack of Understanding and Respect for Tribal Governance Structures
- Outdated Law, Policies and Procedures
- Resistance to Change



WHERE DO WE FIND TRIBAL LAW?

- “Today, in the United States, we have three types of sovereign entities,” explains U.S. Supreme Court Justice Sandra Day O’Connor, “the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and plays an important role in the administration of justice in this country.” *See, Sandra Day O’Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 Tulsa L.J. 1, 1 (1997).*
- However, tribal law, unlike federal and state law, can be very difficult to find.
- Many tribes do not make their laws publicly available.
- Where it is available, tribal law is scattered across web sites, databases and print publications.
- There is no standard and no two sources are alike in format and content.
- *So, how do we advise tribal clients on the application of tribal law if it is hard to find?*



Plains Commerce Bank v. Long Family Land & Cattle

Docket No.	Op. Below	Argument	Opinion	Vote	Author	Term
07-411	8th Cir.	Apr 14, 2008	Jun 25, 2008	5-4	Roberts	OT 2007
		Tr. Aud.				

Holding: (1) Plains Commerce Bank has Article III standing to pursue this challenge; and (2) the tribal court did not have jurisdiction to adjudicate a discrimination claim concerning the non-Indian bank's sale of its free land.

Judgment: [Reversed](#), 5-4, in an opinion by Chief Justice John Roberts on June 25, 2008. Justices Stevens, Souter, Ginsburg, and Breyer joined the majority opinion as to Part II. Justice Ginsburg filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Justices Stevens, Souter, and Breyer joined.

SCOTUSblog Coverage

- [Opinion Recap: Plains Commerce Bank v. Long Company](#) (Eliza Presson)
- [Argument preview: Plains Commerce Bank v. Long Family Land & Cattle](#) (Scotus Staff)
- [Court to rule on death penalty for child rape](#) (Lyle Denniston)

Briefs and Documents

Merits briefs

- [Brief for Petitioner Plains Commerce Bank](#)
- [Brief for Respondent Long Family Land and Cattle Company, Inc., Ronnie Long and Lila Long](#)
- [Reply Brief for Petitioner Plains Commerce Bank](#)

CHIEF JUSTICE ROBERTS:

When tribal law is not known, state and federal courts have no choice but to disregard it, along with the tribal norms and values that it represents. In oral argument in *Plains Commerce*, decided by the USSC in 2008, Chief Justice Roberts pointed out that in addition to applicable federal and state law, the court should also consider “whatever tribal precedent there may be.” Counsel replied, “*That’s correct although we have not been able to find precedent.*”





1999 AND THE START OF PUBLICATIONS

- 1999: Tribal-State Gaming Compacts resulted in a new wave of tribal laws relative to Indian gaming:
 - Patron Dispute Policy
 - Tribal Environmental Policy Ordinance
 - Patron Dispute Policy
 - Gaming Facility Standards Ordinance
 - Tort Claims Ordinance
- But the old question remained: Who gets to see them?
 - Pre-1999 Compact era – very few tribal laws were made public
 - Not all tribes had a website
 - Tribal Law Databases became increasingly popular, but lagged due to resistance to publish.



WHY AREN'T TRIBAL LAWS ACCESSIBLE?

- Tribal leaders are often very wary of disclosing tribal codes and ordinances out of historical distrust of outsiders.
 - A belief that non-tribal members will use the codes to sue the tribe in a shakedown for money.
- Tribal laws may be very old and outdated
 - If tribal laws are outdated and not in a digital format it may be difficult to make them available, (i.e., paper copies only can be viewed or copied at the Tribal Office).
- Cost and organizational capacity may be lacking
 - Tribal Attorneys may assist with the drafting of new codes, but once they are in the tribal government sphere, non-lawyers may have physical control without the ability to publish online.
- The primary function of a tribal government may not be consistent with public disclosure of tribal laws
 - Are the tribal government officials elected/appointed to serve the membership or are they speaking to the outside world too?



PRACTICAL ISSUE- THE MONTANA TEST

MONTANA V. UNITED STATES, 450 U.S. 544 (1981).

THE TWO EXCEPTIONS TO THE GENERAL RULE THAT TRIBES LACK REGULATORY AUTHORITY OVER NON-INDIANS ON NON-INDIAN OWNED FEE LAND WITHIN A RESERVATION:

- 1) THE TRIBE MAY REGULATE THE ACTIVITIES OF NON-MEMBERS WHO ENTER INTO CONSENSUAL RELATIONSHIPS WITH THE TRIBE OR ITS MEMBERS;
- 2) TRIBES MAY REGULATE "THE CONDUCT OF NON-INDIANS ON FEE LANDS WITHIN ITS RESERVATION WHEN THAT CONDUCT THREATENS OR HAS SOME DIRECT EFFECT ON THE POLITICAL INTEGRITY, THE ECONOMIC SECURITY, OR THE HEALTH AND WELFARE OF THE TRIBE.

BUT WHAT IF TRIBAL LAW CANNOT BE FOUND SO THAT ONE CAN AGREE (CONSENT) TO IT?

HOW CAN A REGULATION APPLY IF IT CANNOT BE FOUND?



IRS | Cases Involving the Scope of Indian Lands and Jurisdiction

The question of whether tribes have inherent authority over non-Indians on fee lands within a reservation had been debated and litigated for a number of years in both the civil and criminal contexts prior to the U.S. Supreme Court's 1981 ruling in *Montana v. United States*, 450 U.S. 544 (1981).

In a 1959 case, *Williams v. Lee*, the Court had noted that tribal courts have exclusive jurisdiction over claims that arise in Indian country (as defined by statute) that implicate Indian interests. In *Montana*, however, in a case involving the Crow Tribe, the Court held that the Tribe lacked inherent authority to preclude fishing by nonmembers on waterways within the reservation in which the tribe did not hold the beneficial interest to the underlying land. It found no clear treaty or statutory right to regulate nonmember conduct on fee lands.

The Court also set forth two exceptions to the general rule that tribes lack regulatory authority over non-Indians on non-Indian fee land within the reservation.

- First, it stated that "the tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members."
- Second, it stated that tribes may regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."

Where the "Montana test" is satisfied, a tribe may exercise authority over non-Indians on fee land within the reservation. The test also governs when U.S. may authorize tribes to regulate non-Indian fee lands within reservations under the Clean Water Act. The Court later applied the Montana standard to tribal civil adjudicatory authority in *Strate v. A-1 Contractors*.

Updated August 22, 2017





TRIBAL LAW AND ORDER ACT OF 2010

Tribes that do not make their law available are barred from participating in two federal programs that would otherwise grant them increased jurisdiction over crimes occurring in Indian Country (PL 280 issue)

Expanded sentencing authority for tribal courts in criminal courts

California tribal courts may still lack the ability to enforce criminal laws in Indian Country under PL 280, but the trend is clear– due process does require that tribal laws are available to non-Indians for them to be recognized.

Violence Against Women Act of 2010

VAWA strengthens tribal jurisdiction over non-Indian perpetrators, but is conditioned upon making tribal criminal laws and procedures publicly available.



NEW TRIBAL COMPACT REQUIREMENTS

- In all recent compacts, Tribes have agreed to adopt:
 - State minimum wage & Fair Labor Standards Act
 - State sexual harassment/workplace discrimination policy
 - State workers' compensation/unemployment benefits policies
 - Federal workplace safety standards
 - State tort law for injuries to gaming patrons; and
 - Local building/fire safety codes



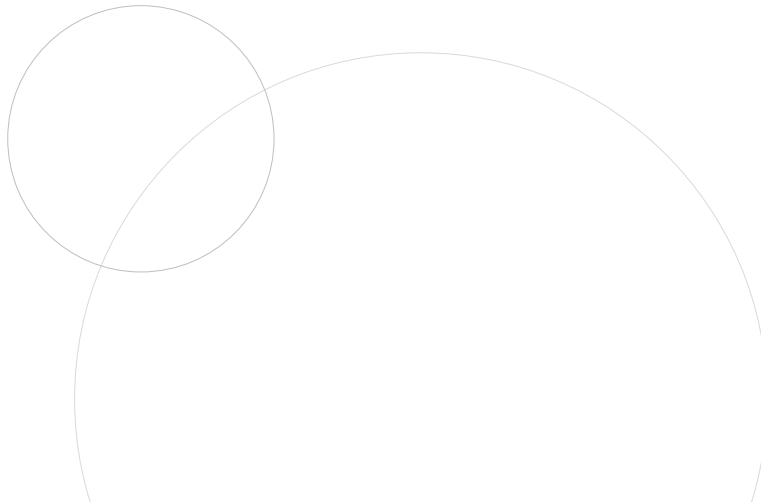
MOVING FORWARD...

- Tribal Law Development Necessary for the Exercise of Full Sovereign Power
- Facilitate Development
- Economic Partnerships and Revenue Generation for Tribal Government
- Support Ability to Raise Capital



TRIBAL LAW DEVELOPMENT NECESSARY FOR EXERCISE OF FULL SOVEREIGN POWER

- Promotes Strength and Stability of Tribal Government
- Promoted Tribal Leadership Development
- Ensures Continuity in Changing Tribal Political Environments





FACILITATE DEVELOPMENT

- Leverage Tribal Sovereign Status and Special Federal Laws
- Examples-
 - H.R.1119 - Responsibly Addressing the Marijuana Policy Gap Act of 2019 (Sec. 207— Tribal Marijuana Sovereignty Act)
 - H.R.257 - Hardrock Leasing and Reclamation Act of 2019 (provisions that prohibit mining on sacred sites on public lands).
 - 82 FR 7149 Amended HHS "Federal Policy for the Protection of Human Subjects" Common Rule (require federally-funded researchers to comply with applicable tribal, state, and local law).
 - P.L.113–168, General Welfare Exclusion Act (provisions on rulemaking in consultation with a tribal advisory committee and statutory deference to tribal governments).

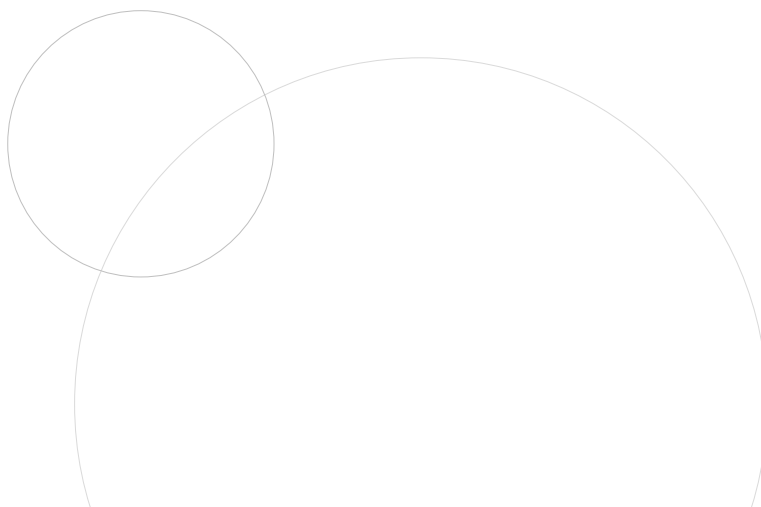
●●●● ECONOMIC PARTNERSHIPS AND REVENUE GENERATION

- Tax Credits
- Tribally Chartered Corporations
- Tax Codes
- Licensing Fees



SUPPORT ABILITY TO RAISE CAPITAL

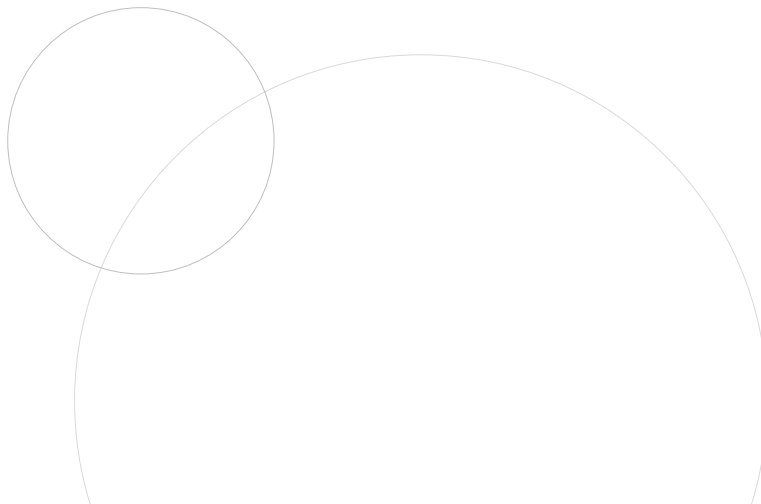
- Traditional forms of financing generally unavailable
- Create Certainty Necessary for Participation in Capital Markets
- Control What Property Can Be Used as Collateral





CLOSING

- Resolve Conflicting Values
- Close the Gap Between Written Law and Unwritten Custom and Tradition
- Replace Old Paternalistic Law
- Ensure Tribal Law Reflects Tribal Values
- Facilitate Collaboration and Partnership at State/Federal Level





THANK YOU!

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