California Tribal Courts Under PL-280 Jurisdiction

Hon. Christine Williams  
May 19, 2021

Pop Quiz
• 574 Tribes in America
• How many are PL-280?
• Majority are under total or partial PL-280 jurisdiction
• Just Alaska and California alone total over 330 Tribes

Perceptions of PL-280
• Dismissed as non-dominant or alternative system
• Supports the inequities in federal support and funding

Federal Intervention on Tribal Jurisdiction
• The erosion of inherent sovereignty

Inherent Sovereignty
• Pre-Contact - Time immemorial – inherently sovereign
• Not given by anyone
• Slowly eroded over time by federal and state intervention

Limits on Tribal Jurisdiction
• Congress has passed laws limiting tribal jurisdiction
• Three Main Acts of Congress
  • Indian Country Crimes Act (aka General Crimes Act)
  • Major Crimes Act
  • Public Law 280 (aka PL-280)
• First two address criminal jurisdiction, the third addresses criminal and civil jurisdiction
• All of these limitations are paternalistic at best and racist, more likely
Indian Country Crimes Act
- 1790 federal jurisdiction extended as a buffer between Indians and non-Indians
- After several revisions it is now the Indian Country Crimes Act or General Crimes Act
- Extends Federal Jurisdiction over crimes in Indian Country involving a non-Indian and an Indian
- Concurrent with Tribes
- Non-Indian v. non-Indian crime = state jurisdiction exclusive
- Indian v. Indian = Tribal jurisdiction exclusive

CA History Note
- California became a state in 1850
- After ICCA, 1851-1852: 18 Treaties = Landless Indians
- Feds were not acting as a "buffer" in CA
- CA was legislating to exterminate the Indian Population without any Federal intervention

Major Crimes Act
- In 1885 Congress divested all tribes of jurisdiction over major criminal offenses and granted jurisdiction to the Federal Government
- Identity (Indian or non-Indian) of parties does not matter only type of crime
- Originally 7 major crimes now basically all felonies
- Non-major crimes, not involving a non-Indian (Indian v. Indian) still exclusively under tribal jurisdiction

PL-280
- In 1953 Congress transferred the jurisdiction that had been granted to the Federal Government by the ICCA and the MCA to certain "mandatory" states
- Tribes were not consulted
- It also granted some civil jurisdiction to these states

The Mandatory States
- California
- Alaska
- Minnesota
- Nebraska
- Oregon
- Wisconsin

1968 Amendments
- State and Tribes critical of PL-280 from the beginning
- In 1986 the Act was amended requiring any states voluntarily opting into PL-280 Jurisdiction to obtain tribal consent
- Almost no expansion of PL-280 Jurisdiction since then
- Also provided for retrocession
Currently

- Currently, now in 2021
- TRIBES STILL DO NOT HAVE COMPLETE JURISDICTION WITHIN THEIR OWN BOUNDARIES
- There is still a belief that tribal courts are not fit to exercise complete jurisdiction over non-Indians
- There is still a belief that tribal courts are not fit to exercise complete jurisdiction over all types of crimes even when their own members are involved

Jurisdiction

- Jurisdiction is authority over people and things
- We will discuss who has what authority over which people and what matters as it relates to Tribal Courts in California
- AND how is that determined from case to case

State Jurisdiction Under PL-280

- State has criminal jurisdiction over crimes in "Indian county" to the same extent the state has jurisdiction anywhere else in the state
- Essentially removed the reservation boundaries for purposes of state criminal jurisdiction in California
- Revoked the MCA & ICCA in the mandatory states
- Also extended state civil jurisdiction and laws of general application into Indian country

Limits on State Jurisdiction

- When can the state exercise jurisdiction?
- General Test of Criminal Prohibitory (Yes) versus Civil Regulatory (No)
- States cannot exercise jurisdiction over:
  - Regulation
  - The ownership, possession or disposition of trust lands
  - Hunting and fishing guaranteed by treaty, statute, or other Federal mandate
  - Taxation
  - Wholly internal tribal matters
    - Enrollment
    - Elections

Tribal Jurisdiction - Concurrent

- Generally, Tribes in PL-280 states do not have exclusive criminal or juvenile jurisdiction
- Generally, Tribes have concurrent jurisdiction over Indians in criminal and civil matters arising in Indian country
  - Recent Federal law expanded criminal jurisdiction over non-Indians in specific circumstances [see Tribal Law and Order Act]
- Tribes can exercise civil jurisdiction over non-Indians when there is a relationship to the jurisdiction
- Tribes have concurrent jurisdiction in all juvenile matters involving their "Indian children" both on and off the reservation
  - May require transfer to Tribal Court
Resumptions of Tribal Jurisdiction

Violence Against Women Act (VAWA)
- VAWA reauthorization of 2013
- Special Domestic Violence Criminal Jurisdiction
- Tribes can prosecute non-Indians who have a connection to the tribe and who commit domestic or dating violence, or who violate a protection order against an Indian
- Exception if victim and defendant are both non-Indians

Conditions for Exercising Special Criminal Jurisdiction
- Tribe must:
  - Provide defendant with all rights guaranteed in ICRA
  - Provide defense counsel (if sentenced to jail)
  - Provide trial by jury drawn from fair cross section
  - Provide any other required Constitutional right

Retained Jurisdiction
General overview for PL-280 Tribes

The jurisdiction you exercise is powerful

Send a message
- Laws are a social construct that proclaim the values of a community.
- Enacting and enforcing laws sends a message about what you expect from people and how you will respond to those who violate those expectations…
- Punitively …
- Or restoratively
- In these times of civil unrest, we could benefit from positive messages and models
What Tribal Jurisdiction is Left?
- Criminal violations – Peace and Protection, Law and Order
- Family Law
- Civil Disputes
- Housing and Land Use
- Juvenile – Indian Child Welfare
- Domestic Violence
- Natural and Cultural Resources
- Internal Governance
- Whatever law tribes can create and enforce!

Peace & Protection/Law & Order
Keeping the Peace and Quality of Life on the Reservation

Civil or Criminal
- Criminal over Indians
- Civil over non-Indians
- Does the test to determine if states can exercise jurisdiction apply to Tribal laws and enforcement?

Tribal Family Law
Marriages, Divorces, Custody disputes & Adoption

Indian Child Welfare Act (ICWA)
- Federal Law passed to establish minimum standards to apply to STATE COURT proceedings involving Indian Children
- Intended to counteract institutional bias against Indian families in state court proceedings
- Does not apply in Tribal Court

Domestic Relations
- Marriage: People can wed under tribal law
- Divorce: People can un-wed under tribal law
- Child Custody and Support: tribes can issue orders regarding visitation, custody and support
Marriage & Domestic Partnerships
- Concurrent jurisdiction between Tribes and States
- If you are married under state law, then the Tribe will recognize you as married, unless the marriage violates tribal laws
- If you are married by Tribal law, the state will recognize that marriage as well, unless the marriage violates state law
- Tribes can use written marriage law, code or ordinance OR tribal custom
- What about non-Indians?

Divorce
- Tribes can dissolve marriages (and DP’s)
- Concurrent Jurisdiction with States
- Doesn’t have to be a marriage under tribal law
- What about non-Indians?

Child Custody and Support
- Concurrent jurisdiction between Tribes and States
- Custody disputes between parents are NOT covered by ICWA
- Tribes and tribal businesses can not be compelled to garnish wages pursuant to State Child Support Orders
- Income from Tribes and tribal businesses is allowed to be considered for purposes of calculating support amount
- Tribal Court can recognize and enforce orders from other courts
- Recommend seeking Tribal Court recognition of state court order or MOU with Tribe for enforcement of support orders

Adoption
- Tribes have concurrent jurisdiction with the State over adoption of Indian children
- Tribes can issue adoption orders
- Tribes can use written law, code or ordinance OR tribal custom
- Tribal Customary Adoption in CA

Domestic Violence
- Tribal Court Protection Orders
- Project Passport
- State Court Recognition
- Special Domestic Violence Criminal Jurisdiction
Prevention
- Batterer's Intervention Programs
- Victim Impact Circles
- Cultural Sentencing

Housing & Lands
- Our Homes, Our Community

Housing
- Leases
- Land Assignments
- Evictions

Land Use
- Tribes can decide:
  - What is allowed in the community and where?
  - What are the consequences for violating the laws or policies around land use?

Internal Tribal Governance
- Resolutions from within Our Own Community

The Big E's
- Enrollment
- Elections
- No one else has jurisdiction over these areas unless the Tribe grants it
Natural & Cultural Resources

Our Community Foundation

Hunting and Fishing

- Hunting and fishing guaranteed by treaty, statute, or other Federal mandate

Environmental Protection

- Tribal EPA Department
- Protection of Natural Resources; Land, Water, Air

Cultural Resources

- Tribal Historic Preservation Officers
- Protection of Cultural Resources on Tribal Lands

Closing Message

- "We are all working to repatriate our customs and traditions."
- Support your clients or your communities to use tribal courts to repatriate culture...awaken what sleeps, dormant
- Pass legislation that means something to the community you serve and enforce it.
- It is not that we should give up the fight for justice in the U.S. courts
- But we must also focus inward and develop tribally informed responses to justice needs

- Wok Hlaw - thank you