Tribal- Colorado State Legal Relationship

November 2010

Disclaimer

- The views expressed herein are those of the author and do not necessarily reflect any official position of the State of Colorado. This outline is intended to assist state legislators and employees in obtaining a basic understanding of federal Indian law and to spot Indian law issues in their work with Tribes and Tribal members. Federal Indian law is in a constant state of flux so any use of this outline should be accompanied by consultation with an attorney with expertise in this area. This outline does not constitute legal advice.

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1492-1822: Indian Nations are Autonomous Sovereigns

- **Historical Developments**
- Indian nations were still, for the most part, possessed and in full control of their territories and resources.
- The French, English, Spanish, and Dutch entered into treaties of commerce and military alliances with Indian nations as independent sovereign nations.
- During the American Revolution, the colonies and Great Britain entered various military alliances with Indian nations. Indian nations fought on both sides of the conflict.

Doctrine of Discovery

- **Legal Developments**
- The idea developed that Indian peoples, as non-Christians and non-farmers (despite the fact that many indigenous cultures throughout the hemisphere engaged in intensive agriculture), had lesser or no legal rights to their land and territories, similarly to how non-Christians had been treated on other continents (Crusades precedent in Mid-East). The Doctrine of Discovery was applied to Indian lands, which posited that the first European nation to discover non-Christian lands acquired legal title to those lands.

Doctrine of Conquest

- When the United States defeated England, under the Doctrine of Conquest, it acquired the rights of the British under the Doctrine of Discovery. Any lands discovered by the British to which it claimed title were thereafter claimed by the United States.

Federal Commerce and Treaty Power

- After the American Revolution, the U.S. Constitution, through its Commerce and Treaty Clauses, vested the federal government, and the federal government alone (not private citizens, not states, not foreign governments), with the power to enter into commerce and make treaties with the Indian nations. This was codified and reaffirmed through the **Trade and Intercourse Acts**, 25 U.S.C. §177.

Federal Commerce and Treaty Power

- States had no authority to enter into treaties with lndian nations, to purchase or take lndian lands, or to engage in unregulated commerce with lndian nations.
- lndian nations were not, during this era, considered part of the United States governmental framework, although they were considered to be under the exclusive political sphere of influence of the federal government.

1823 - 1886: The Federal Government Expands its Authority over lndian Nations

- **Historical Developments**
- The westward expansion of settlers took place pursuant to the idea of "Manifest Destiny" - a divine right to establish the United States from sea to sea.
- To clear the way for agrarian settlement, some lndian nations were forcibly removed (e.g., the Cherokee Nation), some lndian nations were militarily defeated (e.g., Apache, Nez Perce), and some lndian nations defeated or militarily stalemated U.S. forces (e.g., Seminole).

- Congress enacted the **Indian Removal Act** in 1830. The Act did not authorize forcible removal, but allowed for the President to provide lands west of the Mississippi in exchange for eastern lands for those tribes that chose removal. Refusal to emigrate meant the end of federal protection and imposition of state jurisdiction. By 1850, the majority of Indian tribes had been removed from the eastern states.
- Smallpox, the elimination of the buffalo, and in some cases military defeat or stalemate forced many lndian nations to engage in treaty-making with the United States.
- Pursuant to these treaties, lndian nations ceded vast territories to the U.S. federal government in exchange for smaller areas of land (reservations), within which they were promised they could live in undisturbed peace as lndian peoples.

Marshall Trilogy

- **Legal Developments**
- During this era, the U.S. Supreme Court developed the foundational legal theories governing the relationship between lndian nations, the federal government, and state governments in three cases known as the "Marshall Trilogy": ***Johnson v. M'lntosh,*** 2 U.S. (8 Wheat.) 543 (1823); ***Cherokee Nation v. Georgia,*** 30 U.S. (5 Pet.) 1 (1831); and ***Worcester v. Georgia,*** 31 U.S. (6 Pet.) 515 (1832).

Johnson v. M'Intosh

- An individual acquired land directly from Indians and another individual subsequently acquired title in the same land from the United States. The question was whose title prevails. The court held that the Indians have the right of occupancy in the land, not the title. The right of occupancy was less than a title and was not transferable.
- The title in the land belonged to the United States as sovereign conqueror. Since the Indians had no title in the first place, they transferred the land without a title. Therefore, the individual who acquired the title from the United States had the property right in the land.

Johnson v. M'lntosh

- Indian nations, by virtue of the Doctrine of Discovery, do not own legal title to their lands, but they do have a right to use and occupy their lands. Legal title is vested in the United States federal government, but that title is subject to the right of the lndian nations to use and occupy their lands.
- lndian nations may only cede, sell or relinquish the lands they use and occupy to the U.S. federal government. They may not cede, sell or relinquish the lands they use and occupy to individuals, to states, or to foreign governments.

Cherokee Nation v. Georgia

- The State of Georgia enacted laws that abolished the Cherokee Indian Nation's right of sovereignty, self government, and right to land. The federal government took no action on behalf of the Cherokees so the Cherokees filed a claim in the Supreme Court seeking to enjoin the execution of Georgia's laws in the Cherokee Nation. The primary question was whether the Supreme Court had jurisdiction over the case. Chief Justice Marshal held that the Supreme Court has original jurisdiction over disputes between the states, and disputes between the United States and a foreign state. The court held that an Indian tribe is neither a state nor a foreign nation but rather is a domestic dependent nation. Thus, it could not bring an action in the Supreme Court.

Cherokee Nation v. Georgia

- A tribe is domestic because it is within the United States. It is dependent because it is subject to federal power. It is a sovereign because it has sovereign powers over people, property and events within its borders. The relationship between the federal government and domestic dependent lndian nations is as between a guardian and a ward. The federal government has an obligation to protect and act in the best interests of the lndian nations.

Worcester v. Georgia

- Georgia enacted a series of laws beginning in 1827 which, in effect, would have abolished the Cherokee government, distributed Cherokee land among five Georgia counties, prohibited the Cherokee legislature and courts from meeting, and annulled all tribal laws, usages, and customs. One law prohibited any "white person" from living in Cherokee territory without first obtaining a state license and taking an oath to support the laws of Georgia.
- Samuel Worcester and Elizur Butler, white missionaries, were indicted by the State for entering the Cherokee Nation without such a license, though they had the consent of the Cherokees. They were tried and sentenced to hard labor for four years. Worcester brought suit challenging the application of state law within the Cherokee Nation given the U.S. acknowledgment of the Cherokees as a sovereign under U.S. treaties with the Cherokees.
- The U.S. Supreme Court held that the Cherokee nation is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.

Worcester v. Georgia

- Within the boundaries of their reservations, domestic dependent lndian nations have complete governmental control based upon their inherent sovereign authority, subject only to acts of Congress and treaties prescribing the bounds of their authority. The court held that state laws have no effect within lndian reservations.

Federal Control over Indian Reservations

- In 1824, the Bureau of Indian Affairs in the War Department was created to supervise federal Indian matters.
- In 1849, the Bureau of Indian Affairs was transferred to the Department of the Interior.
- By 1858, federal policy had shifted from removal to concentration on fixed reservations for Indians.
- In 1862, the **Homestead Act** was passed opening lands in the west to white settlement.
- In 1871, the federal government ended the practice of making treaties with lndian nations, although it still engaged in negotiations with lndian governments regarding land cessions.
- Between 1871 and 1887 the federal courts solidified federal control over lndian reservations. In the case of ***U.S. v. Kagama,*** 118 U.S. 375 (1886), the U.S. Supreme Court held that Congress had the power to enact the **Major Crimes Act**, which established a system of criminal laws on reservations.

- In justifying this extension of federal power and jurisdiction over matters of internal tribal governance, the Court stated: "[The power of the federal government to extend its authority over tribal criminal matters] must exist in [the federal] government, because it has never existed anywhere else, because the theatre of its exercise is within the geographic limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

1887 - 1933: The Federal Government Breaks Up Indian Reservations and Attempts to Assimilate the Indian Nations

- **Historical Developments**
- During this era the first wave of settlers moved across the West and the federal government - desiring to free up treaty-protected Indian lands for successive waves of settlers - pursued a policy of dispossession and assimilation.

- U.S. policy during this period was to transfer treaty protected lndian lands to non-Indian settlers (allotment); officially making lndian peoples citizens of the United States; relocating lndian children to government-run or religious boarding schools, where they were forbidden to speak their language or practice their religions or cultures; forbidding lndian ceremonies on the reservation; and instructing Indians in farming techniques.

General Allotment Act

- **Legal Developments**
- In 1887, Congress passed the **General Allotment Act,** or **"Dawes Act,"** 25 U.S.C. §331. This Act authorized the federal government to divide lndian reservations into 160 acre plots. One plot of 160 acres was allotted per lndian family on the reservation, and any left-over lands were transferred to non-Indians under the Homestead Act. The lndian allotments were not alienable or taxable for a period of 25 years, after which these lands became alienable and taxable. The ostensible purpose of the act was to teach lndian people the value of private property and to turn them into farmers. By the time the Allotment Act was repealed in 1928, lndian reservation landholding went from 138 million acres to 48 million acres.

- Large numbers of non-Indians moved into Indian reservations and settled on former Indian lands that were changed from trust to fee simple status pursuant to the allotment and homestead acts. This wave of settlers resulted in a "checkerboard" pattern of Indian and non-Indian land ownership on reservations.
- The massive loss of Indian lands and resources impoverished Indian tribes and impeded the development of reservation economies.

Congress Has Plenary Authority over Indian Nations

- In the case of ***Lone Wolf v. Hitchcock,*** 187 U.S. 553 (1903), the Supreme Court announced that Congress has plenary authority over lndian nations. Pursuant to this plenary authority, Congress may unilaterally break treaties with the lndian nations in order to allot their reservations and give the land away to non-Indians. lndian nations do not have recourse to the federal courts to remedy violations of treaties by the federal governments.

Citizenship Act of 1924

- Under the **Citizenship Act of 1924**, all non-citizen Indians born in the U.S. were made U.S. citizens.

1934 - 1952: The Federal Government Ends Policies of Assimilation and Devolves Authority over Reservations to Tribal Governments

- **Historical Developments**
- A 1928 government-sponsored report, written by Lewis Meriam, blasted the federal policies of dispossession and assimilation as failures. Not only had lndian peoples refused to be assimilated, federal policies had resulted in a massive loss of lndian resources, greatly deepened lndian poverty and done massive damage to lndian cultural life.

Indian Reorganization Act

- **Legal Developments**
- In 1934, Congress passed the **lndian Reorganization Act (IRA)**, 25 U.S.C. §461**,** in response to the failure of assimilationist policies. Under the Act:

  Allotment of lndian reservations ends;

  lndian allotments are put into permanent trust status - not alienable or taxable;

  lndian nations were allowed to establish governments or business committees, with constitutions, charters and by-laws, to take over reservation governance, subject to the ultimate authority of the federal government.

Indian Reorganization Act (con't)

- Under the IRA, 161 constitutions and 131 charters were adopted by lndian nations.
- Typically, governing power is centralized in a tribal council, which functions both as the legislative and executive branch of government. Separate tribal courts with limited jurisdiction were also established as part of many tribal governments. A strict separation of powers is not a requirement of the IRA.
- The IRA was intended to enable the tribe to interact with and adapt to modern society as a governmental unit.

Johnson O'Malley Act

- The **Johnson-O'Malley Act of 1934** (25 U.S.C. §§452-456) was passed to subsidize education, medical attention, and other services provided by states to Indians living within their borders. The Act came about as a federal aid program during the Indian New Deal of the 1930's to help offset costs of tax-exempt Indians making use of state-owned and funded schools, hospitals, and other services.

1953 - 1967: The Federal Government Pursues a New Policy of Assimilation by "Terminating" the Legal Existence of Certain Tribal Governments and Allowing the Extension of State Jurisdiction over Certain Reservations

- **Historical Developments**
- During the period, Congress passed dozens of acts terminating the existence of specific tribal governments and reservations. In total, 109 lndian governments were terminated, affecting 1,362,155 acres of land and 11,466 lndian people. Under these acts, lndian lands were sold, state legislative and taxation authority imposed, federal programs discontinued, and tribal sovereign authority ended. These acts targeted specific tribes and did not repeal or modify other existing tribal governments.

Indian Claims Commission Act of 1946

- The Commission created a process for tribes to address their grievances against the United States, and offered monetary compensation for territory lost as a result of broken federal treaties. However, by accepting the government's monetary offer, the aggrieved tribe abdicated any right to raise their claim again in the future, and on occasion gave up their federal status as a tribe after accepting compensation. For those non-Indians who favored termination, this was thought of as a final accounting prior to ending the federal-tribal relationship.

PL 83-280

- Congress passed **PL 83-280** in 1953 (28 U.S.C. §1360). Public Law 280 ceded certain civil and criminal jurisdiction over Indian country to five (later six) states automatically and provided procedures by which other states could assume jurisdiction. States: California, Oregon, Nebraska, Minnesota and Wisconsin. Alaska was added in 1958. Amendments in 1968 made (i) subsequent state assumption of jurisdiction subject to Indian consent in a special election; and (ii) allowed for the retrocession of all or part of a state's assumption of authority.

Effect of PL 83-280 in Colorado

- A special federal law (PL 98-290) enacted in 1984 provides for State jurisdiction within the Town of Ignacio "as if" the State had assumed jurisdiction under PL 280 as amended in 1968. The Tenth Circuit in ***U.S. v. Burch***, in 1999, held that the State of Colorado had exclusive criminal jurisdiction for a Major Crimes Act violation by a Southern Ute Indian tribal member where the crime occurred in the Town of Ignacio. Federal criminal jurisdiction had been eliminated by the enactment of PL 98-290.

Effect of PL 83-280 in Colorado (con't)

- Section 4(a) PL 98-290 further provides that "such territorial jurisdiction as the Southern Ute Indian Tribe has over persons other than Indians and the property of such persons shall be limited to Indian trust lands within the reservation." Such persons and their property **on Indian trust land** (not merely just within the reservation) are subject to federal jurisdiction under 18 U.S.C. §1152 (**Indian Country Crimes Act** – applies to interracial cases).

1968 - Present: The Modern Era of Self-Determination

- **Historical Developments**
- As with previous attempts to assimilate lndian nations, the policies of the termination era were a disastrous failure. The overall effect was another massive loss of lndian land and the transformation of self-sufficient tribes into state welfare dependents.
- Recognizing these failures, Congress reestablished many of the tribes it had previously terminated, and many states retroceded the jurisdiction they had assumed under PL-280 to tribal governments.

- Congress embarked on a policy of encouraging tribal self-government, shifting the management of federal programs from the BIA to tribal governments, and creating tribally-run education systems.
- Successive Presidential administrations have affirmed a policy of protecting the integrity of tribal governments through the maintenance of federal-tribal government-to-government relationships. President Johnson proposed self-determination as a goal in 1968.

Power of Congress over Indian Affairs May Be Plenary; but It Is Not Absolute

- In ***Delaware Tribal Business Committee v. Weeks***, 430 U.S. 73 (1977), the Court held that "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." Federal legislation must be rationally related to furtherance of the federal trust responsibility to Indians. However, rational basis scrutiny is not a strong standard for review of Congressional action.

President Lyndon B. Johnson

- *Lyndon B. Johnson, "Special Message to Congress on the Problems of the American Indian: The Forgotten American," March 6, 1968:*

  "I propose a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination… The greatest hope for Indian progress lies in the emergence of Indian leadership and initiative in solving Indian problems. Indians must have a voice in making the plans and decisions in programs which are important to their daily life. …"

President Richard M. Nixon

- *Richard M. Nixon, special message to Congress, July 1970:*

  "It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. … The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. …

- "Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered. …"

President Ronald Reagan

- *Ronald Reagan, Indian Policy Statement, January 24, 1983:*

  "Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. …

  "Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination. …

President William Clinton

- *William Clinton, "Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies," April 29, 1994:*

  "I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments."

President William Clinton

- *William Clinton, Executive Order No. 13084, Consultation and Coordination with Indian Tribal Governments, May 14, 1998:*

  "The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights. …

  "In formulating policies significantly or uniquely affecting Indian tribal governments, agencies shall be guided… by principles of respect for Indian tribal self-government and sovereignty…"

President George W. Bush

- *George W. Bush, Memorandum for the Heads of Executive Departments and Agencies, "Government-to-Government Relationship With Tribal Governments," September 2004:*

  "My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States. I take pride in acknowledging and reaffirming the existence and durability of our unique government-to-government relationship and these abiding principles."

President Barack Obama

- *Barack Obama, Tribal Nations Conference, U.S. Department of Interior, Washington, D.C., Nov. 5, 2009*

  “Today's summit is not lip service. We're not going to go through the motions and pay tribute to one another, and then furl up the flags and go our separate ways. Today's sessions are part of a lasting conversation that's crucial to our shared future.

  “A major step toward living up to that responsibility is the presidential memorandum that I'll be signing at this desk in just a few moments. In the final years of his administration, President Clinton issued an executive order establishing regular and meaningful consultation and collaboration between your nations and the federal government. But over the past nine years, only a few agencies have made an effort to implement that executive order -- and it's time for that to change.

  “The memorandum I'll sign directs every Cabinet agency to give me a detailed plan within 90 days of how -- the full implementation of that executive order and how we're going to improve tribal consultation. After all, there are challenges we can only solve by working together, and we face a serious set of issues right now.”

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation

- **1975** Indian Self-Determination and Education Assistance Act
- **1978** Indian Child Welfare Act (Adoption and guardianship cases were to be handled by tribal courts with preference to Indians over non-Indians in adoption of Indian children.)
- **1978** American Indian Religious Freedom Act
- **1982** Indian Mineral Development Act
- **1982** Indian Tribal Government Tax Status Act

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation (con't)

- **1988** Indian Gaming Regulatory Act
- **1988** Tribally Controlled Schools Act
- **1989** National Museum of the American Indian Act
- **1990** Indian Child Protection and Family Violence Prevention Act
- **1990** Native American Graves Protection and Repatriation Act ("NAGPRA")
- **1990** Indian Law Enforcement Reform Act

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation (con't)

- **1990** National Indian Forest Management Act
- **1990** Indian Arts and Crafts Act
- **1990** Native American Languages Act
- **1992** Indian Energy Resources Act
- **1992** Indian Employment, Training and Related Services Demonstration Act
- **1993** Indian Tribal Justice Act

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation (con't)

- **1993** American Indian Agricultural Resource Management Act
- **1994** American Indian Religious Freedom Act Amendments. (This Congressional Act protected the rights of American Indians to use peyote in traditional religious ceremonies.)

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation (con't)

- **1994** Tribal Self-Governance Act
- **1994** American Indian Trust Management Reform Act
- **1996** Native American Housing Assistance and Self-Determination Act
- **1998** Tribally Controlled Schools Act
- **1998** Tribally Controlled College or University Assistance Act

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation (con't)

- **1999** Indian Land Consolidation Act Amendments
- **2000** Indian Tribal Justice Technical and Legal Assistance Act
- **2000** Indian Tribal Economic Development and Contract Encouragement Act
- **2000** Religious Land and Institutionalized Persons Act
- **2001** Native American Education Improvement Act
- **2003** Southwest Native American Language Revitalization Act
- **2004** The American Indian Probate Reform Act

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation (con't)

- **2005** Indian Tribal Energy Development and Self-Determination Act of 2005, Title V of the Energy Policy Act of 2005 (Tribal Energy Resource Agreements - TERA)
- **2006** Esther Martinez Native Languages Preservation Act

Themes of Protection of Tribal Culture and Life Reflected in Federal Legislation (con't)

- **2008** The Native American Housing Assistance and Self-Determination Reauthorization Act
- **2010** Indian Health Care Improvement Act
- **2010** Tribal Law and Order Act

Tribal Sovereignty and Tribal Jurisdiction

Tribal Sovereignty

- Inherent – authority as sovereign government, unless diminished by treaty or statute, retained
- Territorial - right to exclude persons from tribal land
- Delegated – delegated from federal government
- Affirmed – affirmed by the federal government

Tribal Sovereignty

- Courts have invented doctrine of implicit divestiture of tribal sovereignty to restrict sovereignty of tribes to managing tribal land, protecting tribal self-government, and controlling internal relations, restricting tribal civil and criminal jurisdiction over non-Indians or fee lands within the reservation, resulting in confusion over who does have jurisdiction in certain cases.

Tribal Jurisdiction

- **The general trend in the modern era is for federal courts to limit the jurisdiction of tribal governments, particularly with regard to non-Indians engaged in activities on the reservation or non-Indians engaged in activities on fee land within reservations.** The extent to which tribes have civil adjudicative or regulatory jurisdiction over nonmembers is a matter of federal common law, reviewable in federal court. As pointed out in *Cohen's Handbook of Federal Indian Law*, this is a complex area. (Section 7.02[1][a], p. 600). Because of federal court decisions, tribal governments have no criminal jurisdiction over non-Indians on reservations (*Oliphant*) and tribal regulatory and taxation authority over non-Indian individuals and businesses on reservations is steadily shrinking.

Civil Jurisdiction of Tribal Government and Courts

- Tribal governments have inherent jurisdiction to enact civil laws regarding the activities of tribal members within reservation boundaries. Tribal courts' jurisdiction to hear civil cases involving Indians occurring within reservation boundaries is easier to determine.

- Legislative jurisdiction concerns a government's power to regulate or tax persons or property. Adjudicative jurisdiction concerns the power of a court to decide a case or to impose an order. **Adjudicative jurisdiction requires subject matter and personal jurisdiction**. As also pointed out in *Cohen's Handbook of Federal Indian Law*, "[p]ersonal jurisdiction law is a notoriously complex area." (Section 7.02[2], p. 604)

Civil Jurisdiction of Tribal Government and Courts (con't)

- Individual tribes have enacted laws covering diverse subject matters such as zoning, building codes, taxation, business licensing, environmental controls, hunting and fishing, traffic rules, health requirements, etc. Virtually all challenges to tribal laws have arisen in cases involving non-members of the tribe.

Tribal Civil Jurisdiction over Non-Indians within Reservation

- In determining whether state laws apply to the activities or property of non-Indians on a reservation, a particularized inquiry into the interests of the federal, state and tribal sovereigns is required. **Generally, state law applies to the non-Indians unless it is preempted by federal law, or if it infringes impermissibly upon the right of reservation Indians to make their own laws and be ruled by them (*Williams v. Lee*, 358 U.S. 217 (1959)).**

- ***Nevada v. Hicks,*** 121 S.Ct. 2304 (2001) - Tribal courts have no jurisdiction over cases arising from alleged violations of civil rights committed by state police officers on the reservation, when those officers committed those acts in their official capacity in investigating an alleged off-reservation crime. Tribal legislative authority does not extend to state officers acting in their official capacity in investigating an alleged off-reservation crime on a reservation.

Tribal Civil Jurisdiction over Non-Indians on Non-Indian Fee Lands within Reservation

- Tribal governments and courts are presumed under federal jurisprudence to have limited or no authority over the activities of non-Indians on non-Indian fee lands within reservations, except when:
  - Non-Indians have entered into a consensual relationship with the tribe (usually this means a contractual or business relationship); or
  - When the conduct of non-Indians threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. ***Montana v. US.,*** 450 U.S. 544 (1981).

- ***Strate v. A-1 Contractors,*** 520 U.S. 438 (1997) Tribal courts cannot hear a civil suit between non-Indians regarding a traffic accident which occurred on a state highway within a reservation; tribal court jurisdiction and tribal legislative/adjudicative jurisdiction are co-extensive. State highway is akin to non-Indian fee land.

- ***Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation,*** 492 U.S. 408 (1989) - Tribes cannot enact zoning ordinances in areas of the reservation that are owned in fee by non-Indians and the area is so populated by non-Indians that the area has lost its "tribal character."

- ***Atkinson Trading Co. v. Shirley***, 215 S.Ct. 1825 (2001) - A tribal government may not tax non-Indians staying in a non-Indian hotel on non-Indian land within the reservation.

- ***Plains Commerce Bank v. Long Family Land & Cattle***
- Tribal Court did not have jurisdiction to adjudicate a discrimination claim concerning a non-Indian Bank's sale of its fee land within exterior boundaries of reservation. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.

Effect of Federal Statutes Authorizing State Jurisdiction over Indians and Non-Indians in Indian Country, e.g., PL 280

- In ***Bryan v. Itasca County***, 426 U.S. 373 (1976), the Supreme Court narrowly interpreted PL 280 as denying states with PL 280 jurisdiction to fully regulate and tax Indians and their property. This is another very complex area. See also PL 98-290 which applies to the Southern Ute Indian Reservation.

Tribal Taxation Authority

- ***Merrion v. Jicarilla Apache Tribe,*** 455 U.S. 130, 137 (1982) - "The power to tax is a fundamental attribute of tribal sovereignty because it is a necessary instrument of self-government and territorial management."
- Tribes can tax non-Indian companies extracting minerals from Indian lands pursuant to long-term leases with the Tribe.

- ***Washington v. Confederated Tribes of the Colville Indian Reservation,*** 447 U.S. 134 (1980) - Tribes may tax non-Indians who buy cigarettes from Indian vendors located on trust land within a reservation.

Tribal Economic Development – Major Concern for Tribes

- Tribal economic development is influenced by several factors:
  - The structure and stability of a tribe's government;
  - Mechanisms for dispute resolution;
  - The relationship between a tribe's political branch and tribal businesses;
  - A tribe's development strategy;
  - Tribal culture and norms regarding development;
  - Availability of infrastructure, such as telecommunications and technology;
  - The level and education and training of the labor force; and
  - The availability of capital financing.

Tribal Economic Development (con't)

- Federal and state governments can provide assistance by:
  - Improving physical infrastructure;
  - Improving educational opportunities;
  - Increasing employment training and skills;
  - Developing small businesses; and
  - Assisting in attracting investment capital.

Federal Government Programs for Tribal Finance Assistance

- Bureau of Indian Affairs - **Indian Financing Act**, Indian Guaranteed Loan Program
- Small Business Administration
- U.S. Department of Agriculture - Rural Business and Cooperative Programs, Rural Utilities Service (loans and grants)

Federal Government Programs to Promote Economic Development

- **Support for Tribal Institutions**
  - Administration for Native Americans, U.S. HHS
  - Environmental Protection Agency
  - Economic Development Administration, U.S. Department of Commerce (Planning Grants)
  - U.S. Department of Justice (Tribal Courts)

Federal Government Programs to Promote Economic Development (con't)

- **Infrastructure**
  - Economic Development Administration, U.S. Department of Commerce (Public Works)
  - Department of Housing and Urban Development: Indian Community Development Block Grant Program
  - Federal Highway Administration: Indian Reservation Roads Program
  - Department of Agriculture: Rural Development Program
  - Digital Divide Sources - Department of Commerce, Department of Agriculture, Federal Communications Commission, etc.

Federal Government Programs to Promote Economic Development (con't)

- **Business Development**
  - Small Business Administration (8(a) Program, HUBZone, Loans and Loan Guarantees)
  - Department of the Treasury, Office of Comptroller (improve access to financial services) – Native American Community Development Financial Institutions (CDFI) Technical Assistance Component
  - Department of Agriculture
    - Rural Enterprise Business Grants
    - Enpowerment Zone/Enpowerment Communities Initiative
  - Department of Defense (5% Credit)
  - **Buy Indian Act** (DOI Indian hiring and procurement preference)
  - Indian Arts and Crafts Board
- **Employment Training (Workforce Investment Act)**
  - Department of Labor Employment and Training Administration

Criminal Jurisdiction of Tribal Governments and Courts

- The criminal jurisdiction of tribal governments and courts is narrow. Exclusive tribal jurisdiction is limited to jurisdiction over crimes committed by an Indian in Indian country not listed as a major crime in the Major Crimes Act, if not limited by PL 280. The tribe has concurrent jurisdiction with the federal government over crimes covered by the Indian Country Crimes Act, if not limited by PL 280.

Criminal Jurisdiction of Tribal Governments and Courts (con't)

- By statute, tribes have jurisdiction over non-member Indians. 25 U.S.C. §1301(2) (Duro-fix legislation)
- **Oliphant v. Suquamish Indian Tribe**, 435 U.S. 191 (1978) – Tribal governments and tribal courts have no criminal jurisdiction over non-Indians. Crimes committed by non-Indians on the reservation go to either state or federal court, depending upon the facts. Major crimes involving Indians, like murder or rape, go to federal court.

Criminal Jurisdiction of Tribal Governments and Courts (con't)

- **Tribal Law and Order Act** amends Indian Civil Rights Act to allow for 3-year tribal court sentencing, $15,000 penalty per offense, where a tribe provides added protections to defendants. Federal law had limited tribal court authority to sentence offenders to no more than one year in prison, which limited their ability to provide justice to victims and the tribal community. Tribal courts can subject offenders to multiple charges (9 year maximum).

State Jurisdiction

Civil Jurisdiction of State Governments Outside Indian Country

- Indian tribes and their members **when outside of Indian country** are subject to nondiscriminatory state law unless federal law provides otherwise. State courts have jurisdiction over suits against individual Indians arising outside Indian country. Limits imposed by treaty, such as for off-reservation hunting, fishing and gathering rights, and statutes such as the Indian Child Welfare Act must be considered.

Civil Jurisdiction of State Governments *o*ver Indians on Reservation

- State laws generally are not applicable to lndians on a reservation, except where Congress expressly provides that state law shall apply.

State Courts Lack Jurisdiction to Hear Actions against Indians arising within Indian Country

- Case involved suit by non-Indian merchant against Indian residing on reservation to collect a debt incurred at a reservation trading post.
- The exercise of state jurisdiction would undermine the authority of the tribal courts over reservation affairs and hence would infringe upon the right of reservation lndians to make their own laws and be ruled by them (***Williams v. Lee***, 358 U.S. 217 (1959)).

State Law Application to Activities or Property of Non-Indians on Reservation

- In determining whether state laws apply to the activities or property of non-Indians on a reservation, a particularized inquiry into the interests of the federal, state and tribal sovereigns is required. **Generally, state law applies to the non-Indians unless it is preempted by federal law, or if it infringes impermissibly upon the right of reservation Indians to make their own laws and be ruled by them (*Williams v. Lee*, 358 U.S. 217 (1959)).**

State Law Application to Activities or Property of Non-Indians on Reservation (con't)

- The fact that state laws may apply to the activities of non-Indians on a reservation in certain cases creates a substantial interest for states in the areas of civil and criminal jurisdiction, including taxation, zoning, hunting, fishing and wildlife regulation, enforcement of judgments, etc. Also, the fact that Congress has extended state involvement in gaming, liquor sales, water rights adjudication, health, education and social services further expands state involvement in Indian issues.

State Law Application to Activities or Property of Non-Indians on Non-Indian Lands within Reservation

- Tribal governments and courts are presumed under federal jurisprudence to have limited or no authority over the activities of non-Indians on non-Indian fee lands within reservations such that state or federal law applies, except when:
  - Non-Indians have entered into a consensual relationship with the tribe (usually this means a contractual or business relationship); or
  - When the conduct of non-Indians threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. ***Montana v. US.,*** 450 U.S. 544 (1981).

State Taxation

- ***McClanahan v. Arizona State Tax Comm'n,*** 411 U.S. 164 (1973) -
- State cannot tax the income of individual lndians living on the reservation when that income is derived from within the reservation. Congress has not allowed for such taxation, and such taxation interferes with lndian self-government.

State Taxation

- ***Flat Center Farms, Inc. v. MT Dep't of Revenue,*** 2002 MT 140 (2002)
- Tribally chartered and owned corporation, operated by lndians and doing business within boundaries of the reservation, is not subject to state corporate license tax.

State Taxation

- ***White Mountain Apache Tribe v. Bracker,*** 448 U.S. 136 (1980)
- Arizona may not tax a non-Indian corporation doing business with a tribe on its reservation because there exists extensive federal law regulating logging on the reservation, because the tax would interfere with federal policy goals, and because the state cannot justify the tax -thus, the tax is preempted by federal law.

State Taxation

- ***Arizona Dep't of Revenue v. Blaze Constr. Co.,*** 526 U.S. 32 (1999)
- State may tax contractor for work done on federal lands for federal government. Analogous rule on tribal lands - state may tax federal contractor for work done on tribal lands for federal government. Citing *United States v. New Mexico*, 455 U.S. 720 (1982).

State Taxation

- ***Cotton Petroleum Corp. v. New Mexico,*** 490 U.S. 163 (1989) – A state may impose a tax on a non-Indian corporation extracting oil and gas from Indian lands because the federal regulatory scheme applicable to such activity can be construed as allowing state taxation, provided it is non-discriminatory taxation.

State Taxation

- ***Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation****, 425 U.S. 463 (1976)*
- State cigarette tax on non-member Indians upheld but state vendor license tax and personal property taxes on Reservation invalid.

State Taxation

- ***Washington v. Confederated Tribes of the Colville Indian Reservation,*** 447 U.S. 134 (1980) - A state may tax non-Indian buyers of cigarettes on Indian reservations because there is no federal scheme which preempts such a tax, and the resulting double tax does not undermine Indian self-government because the value of the cigarettes is generated off the reservation and the non-Indian buyers are not recipients of tribal services.

State Taxation

- ***Oklahoma Tax Comm'n v. Chickasaw Nation***, 515 U.S. 450 (1995) State could not apply its motor fuels tax to fuels sold by tribe in Indian country as incidence of tax was on tribe, and state could tax income of all persons, Indian and non-Indian alike, residing in state outside of Indian country. If legal incidence of tax rests on non-Indians, no categorical bar prevents enforcement of tax; if balance of federal, state, and tribal interests favors state, and federal law is not to contrary, state may impose levy and may place on tribe or tribal members "minimal burdens" in collecting toll. ("Chickasaw Rule")

State Personal Income Taxation of Indians

In Colorado, any income earned on an Indian reservation by a reservation tribal member (enrolled member) while domiciled on the reservation is exempt from State's personal income tax.

State Personal Income Taxation of Indians

- Income earned by Native American or on a Native American reservation that is subject to Colorado personal income tax includes:
  - Income earned on a reservation by anyone not living on that reservation;
  - Income earned by a reservation member while working off the reservation;
  - Income earned by a tribal member on a reservation other than the reservation to which they belong and reside;
  - Income earned by a taxpayer who is not a Native American Indian even if they live and work on a reservation.

Sales of Tangible Personal Property on Indian Reservation

- CO exempts reservation tribal members living on that reservation from 2.9% state sales tax on purchases made on reservation.

Tribal-State Tax Compacts

- **CRS §24-61-102. Taxation compact between the Southern Ute Indian Tribe, La Plata County and the State of Colorado.**

State Zoning

- ***Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation,*** 492 U.S. 408 (1989) - Tribes cannot enact zoning ordinances in areas of the reservation that are so populated by non-Indians that the area has lost its "tribal character." Thus, zoning authority in such cases would reside in the state.

Tribal Acquisitions of Land

- Tribes may acquire land within and outside of its reservation boundaries. Such tribes may petition Congress or the Secretary of Interior to take such land into trust for the benefit of the tribe, making it inalienable without federal approval and establishing it as part of Indian country, whether within or outside of the tribe's reservation.

Tribal Acquisitions of Land (con't)

- The criteria for deciding to place such land into trust are set forth at 25. C.F.R. part 151, including, notice to and comment by the affected state under §151.10 for on-reservation acquisitions and under §151.11 for off-reservation acquisitions.
- The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.
- The Secretary of Interior will consider, if the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls and jurisdictional problems and potential conflicts of land use which may arise.
- For off-reservation acquisitions, the Secretary will consider the location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation.
- Decisions to take land into trust are only reviewable under an arbitrary and capricious action standard, with deference given to the agency action.

State Condemnation of Indian Allotted Trust Lands

- Individual interests in allotments may be taken by eminent domain "for any public purpose under the laws of the State" in which they are located. 25 U.S.C. §357. Condemnation requires a judicial proceeding in federal court and the U.S. must be joined as a party. State courts lack jurisdiction over condemnation.

Environmental Regulation in Indian Country

- Federal environmental laws, not state law, apply in Indian country. The Environmental Protection Agency ("EPA") has the authority to implement them within Indian country. **National Environmental Policy Act ("NEPA")** applies to federal actions in Indian country [Environmental Impact Statements ("EIS"), Environmental Assessments ("EA"), Finding of No Significant Impact ("FONSI"), Categorical Exclusions ("CE").
- Tribes may have **Tribal Environmental Policy Act ("TEPA")**.

Clean Water Act – Tribal Authority – Southern Ute Indian Tribe

- **Clean Water Act** Section 518 (e) authorizes Tribal programs. Treatment as a state is found in this section.
- 518 (e) Treatment as States

  The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections…of this title to the degree necessary to carry out the objectives of this section, subject to certain requirements.
- If allowed by statute, tribes may choose to regulate more stringently than the federal minimum standards.
- The Southern Ute Indian Tribe has completed the Clean Water Act Treatment as a State process and is eligible to receive and compete for funding.
- **Safe Drinking Water Act** and **Clean Air Act** also have TAS Tribal programs.

Environmental Regulation in Indian Country - Colorado

- **CRS §24-62-101 - Intergovernmental agreement between the Southern Ute Indian tribe and the state of Colorado concerning air quality control on the Southern Ute Indian reservation.**
- **CRS §25-7-1301 through 1309 - The Southern Ute Indian Tribe/State of Colorado Environmental Commission.**

Natural Resources

- State agency has no jurisdiction to regulate oil and gas development on tribal lands. ***Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation****, 792 F.2d 782, 795 (9th Cir. Mont. 1986).*

State Regulation of Hunting and Fishing

- ***Montana v. United States****, 450 U.S. 544 (1981)* No tribal regulation of fishing of non-members on fee lands within reservation – must have consensual relationship or conduct must imperil tribal health, safety or welfare for tribe to assert tribal jurisdiction over non-Indians.

State Regulation of Hunting and Fishing (con't)

- As a consequence of *Montana v. U.S.,* states may regulate the hunting, fishing and gathering activities of non-members on fee land within Indian country.

State Regulation of Hunting and Fishing Off-Reservation by Tribal Members

- Under case law, states may impose nondiscriminatory regulations on off-reservation treaty hunting, fishing, and gathering rights engaged in by tribal members for the purpose of conservation only. Such regulations must be (i) reasonable and necessary for conservation; (ii) any treaty harvest regulation must be necessary; and (iii) the state law must not discriminate against treaty harvesters or in favor of nontreaty users.
- Under the Brunot Agreement, the Southern Ute and the Ute Mountain Ute Tribes have off-reservation treaty hunting, fishing, and gathering rights in southwest Colorado.

State Regulation of Hunting and Fishing – Colorado- Brunot Agreement

- State has September 15, 2008, Memorandum of Understanding with Southern Ute Indian Tribe regarding year-round hunting and fishing by tribal members in southwestern Colorado which is in accord with 1874 Brunot Agreement signed by President Ulysses Grant among the Southern Ute and Ute Mountain Ute Tribes and federal government.

State Regulation of Hunting and Fishing – Colorado- Brunot Agreement

- Memorandum of Understanding with Southern Ute Indian Tribe recognizes tribal and state jurisdiction over hunting of tribal members off-reservation in Brunot Agreement area and agrees on collaboration.

Water Rights

- Water rights necessary for the purpose of the Indian reservation are reserved to tribes. ***Winters v. United States***, 207 U.S. 564 (1908)
- The measurement standard is that of Practically Irrigable Acreage. ***Arizona v. California***, 373 U.S. 546 (1963).
- Indian reserved water rights are determined by federal law, not state law.

State Judicial Authority in Area of Quantification of Water Rights

- The **McCarran Amendment** (43 U.S.C. § 666) enacted in 1952 allows for the adjudication of water rights which the United States holds in trust for Indians and tribes in federal ***and*** state courts by joining the United States as a defendant in any suit "for the adjudication of rights to the use of water of a river system or other source." The Amendment does not grant states regulatory power over water within Indian reservations. State courts though have the right to hear suits for the "administration of water rights" that have been adjudicated as part of general stream adjudications.

State Judicial Authority in Area of Quantification of Water Rights

- However, since the 1970's negotiated settlements of Indian water rights have become common.

State Water Compacts - Colorado

- The State Water Compacts for the Colorado River, Upper Colorado River and the Rio Grande River did not involve tribal water rights. Indian water rights have been kept outside the scope of interstate water compacts.
- **CRS §37-61-101 Colorado River Compact**
- **CRS §37-62-101 Upper Colorado River Compact**
- **CRS §37-66-101 Rio Grande River Compact**

Historical and Cultural Resources

- State must comply with:
- the Colorado Historical Society's NAGPRA Policies and Procedures for Consultation and Repatriation (Tribal NAGPRA Coordinators have participated in Tribal consultations with the State of Colorado);
- the Colorado State Process for Consultation, Transfer, and Reburial of Culturally Unidentifiable Native American Human Remains and Associated Funerary Objects Originating from Inadvertent Discoveries on Colorado State and Private Lands;
- Colorado Statute CRS 24-80-401-411, Historical, Prehistorical and Archaeological Resources and 8CCR 1504-7, Historical, Prehistorical and Archaeological Resources Rules and Procedures;
- Unmarked Human Graves statutes - CRS §24-80-1301, et seq.; and
- National and State Historical Preservation Acts.

State Gaming Issues

- The **Indian Gaming Regulatory Act of 1988**, 25 U.S.C. §§2701-2721, allows for state involvement through the negotiation of tribal-state compacts regarding Class III gaming (casino-style games, slot machines and lotteries) and the decision of whether to permit gaming on Indian lands acquired after 1988 (unless a statutory exception applies). Tribal-state compacts must be approved by the Secretary of Interior. IGRA waives tribal immunity from suit by a state to sue for violation of any tribal-state compact in effect.

Tribal-State Gaming Compacts - Colorado

- **CRS §12-47.2-101 through 103 - Tribal-State Gaming Compact**
- **The State of Colorado has gaming compacts with the Southern Ute and the Ute Mountain Ute Tribes.**

State Regulation of Liquor Sales

- In 1953, Congress relaxed its prohibition on the sale of intoxicants on Indian reservations, subject to provisos that such sales must be made in conformity with state law and authorized by tribes under tribal ordinances approved by the Secretary of Interior.
- Federal law prohibits liquor possession, sales and distribution to Indians or non-Indians in Indian country unless they conform with both tribal and state law. ***Rice v. Rehner***, 463 U.S. 713 (1983).
- As to the Southern Ute Indian Reservation, federal law regulating alcohol sales only applies on the tribal trust lands, not all lands within the exterior boundaries of the Reservation. (PL 98-290)

Civil Rights

- Indians are generally entitled to the same rights and benefits as other U.S. and state citizens. Indians living on tribal lands are residents of the state in which the reservation is located and cannot be denied benefits on the basis of their residence on a reservation. The absence of state jurisdiction to enforce certain laws against Indians or their property (taxation, zoning, etc.) is not a sufficient reason to deny state services to Indians; nor is the availability of federal substitutes a valid reason.

State Involvement in Indian Child Welfare

- The **Indian Child Welfare Act of 1978** ("ICWA"), 25 U.S.C. §1901-1923, regulates proceedings for termination of parental rights, adoptions, and foster care placement involving Indian children. It affords rights to the Indian child, the child's parents, and the child's tribe designed to protect Indian families.
- Protection of the tribal interest "is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." ***Mississippi Band of Choctaw Indians v. Holyfield****, 490 U.S. 30, 52 (1989).*
- States and tribes are authorized to make agreements "respecting care and custody of Indian children and jurisdiction over child custody proceedings." 25 U.S.C. §1919(a)

State Involvement in Indian Child Welfare - Colorado

- The State of Colorado has policies and procedures pertaining to ICWA.

Health Care

- Indians are entitled to state health care services on the same basis as all other state citizens. In ***Penn v. San Juan Hospital, Inc.***, 528 F.2d 1181 (10th Cir. 1975), class-action plaintiffs obtained a consent decree enjoining a state hospital practice of denying Indians health care and forcing them to use an Indian Health Service facility.

Health Care (con't)

- The State of Colorado is pursuing a practice of Government to Government Transfer of Funds between the State and the Southern Ute and Ute Mountain Ute Tribes where there is a federal expectation that a portion of the federal funding received by the State is earmarked for tribal members. Colorado's State Tribal Consultation Policy required by the federal government regarding Medicaid is under negotiation.

Health Care (con't)

- Under a federal Health Disparities Grant, the Office of Health Disparities, Colorado Department of Public Health and Environment, is collaborating with the Native American health community in Denver to address urban Native American health disparity issues.

Health Care (con't)

- Medicare, Medicaid and the State Children's Health Insurance Program ("CHIP") must be fully available to Indian people, whether or not they are eligible for IHS.

Social Security Act Programs Administered by State

- A significant source of individual financial assistance comes from programs authorized under the **Social Security Act of 1935**. These programs are typically administered by the states which receive federal funding in return for agreeing to run the programs in accordance with federal requirements. Because Social Security Act programs are not administered for the benefit of Indians because of their status as Indians, tribes may not enter into self-determination or self-governance compacts to run these programs.

Social Security Programs

- These programs include Temporary Assistance for Needy Families (“TANF”) with children; Supplemental Security Income (“SSI”) for elderly people and people with disabilities; assistance for child welfare services, foster care and adoption assistance; enforcement of child support obligations; and general social services.

U.S. Department of Agriculture Programs

- Food stamps (administered by state agencies with federal funds).
- Commodity food program (only administered by states if tribes cannot).
- Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"). Tribes can receive direct funding. All state agencies are required to have plans to meet the special needs of Indians under the program.

Social Security and State Welfare Benefits

- Indians are entitled to social security and state welfare benefits on the same basis as all other state citizens. No limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation. ***Morton v. Ruiz***, 415 U.S. 199 (1974).

Public Education

- Indians are entitled to public school benefits on the same basis as all other state citizens. A limited amount of federal funding is provided to states for the education of Indian students (Johnson O'Malley Act programs; Department of Education impact aid funding; **Indian Education Act** funds; **Elementary and Secondary Education Act** funds for low-income students which includes **No Child Left Behind Act**; and **Individuals with Disabilities Education Act** funds).

Community Law Enforcement

- Tribes may benefit from U.S. Department of Justice Community Oriented Policing Services programs which provide grants to state and local law enforcement agencies to advance community policing. The BIA Office of Law Enforcement Services which enforces federal law in Indian country as well as tribal law if requested, may commission state and local law enforcement officers to carry out federal functions (Internal Law Enforcement Services Policies, 69 Fed. Reg. 6321 (2004)).

Criminal Jurisdiction of State Courts

- State courts have exclusive jurisdiction over crimes committed between non-lndians on a reservation. ***United States v. McBratney***, 104 U.S. 621 (1882). States also have jurisdiction over victimless crimes by non-Indians. ***Solem v. Bartlett***, 465 U.S. 463, 465, n.2 (1984)
- States may have criminal jurisdiction pursuant to federal statute, such as PL 280.
- As a general rule, absent a cross-deputization agreement or similar agreement, state officers have no authority to investigate crime involving Indians occurring within Indian country. ***Ross v. Neff***, 905 F.2d 1349 (10th Cir. 1990)

Criminal Jurisdiction of State Courts – Cross-Deputization of Colorado Ute Tribes Police Officers

- **To avoid a gap in police coverage since the Colorado Ute Tribes do not have criminal jurisdiction over non-Indians, the State of Colorado passed legislation permitting the cross-deputization of Colorado Ute Tribes police officers.**
- **CRS §16-2.5-106 – Southern Ute Indian police officer**
- **CRS §16-2.5-107 – Ute Mountain Ute Indian police officer**

Enforcement of Judgments

- When a court enters a final judgment, one of the parties may seek to enforce it in the courts of another sovereign (tribal/state/federal) against persons or property located there. When the full faith and credit requirement applies, the court being asked to enforce a foreign judgment, is obligated to enforce the judgment. In contrast to the full faith and credit rule, the comity doctrine allows the receiving court greater discretion to determine whether to enforce the foreign judgment. Case law is mixed on whether a tribal court judgment is entitled to full faith and credit recognition or limited to comity. Nonetheless, it is another area of state interest.

State Criminal and Civil Jurisdiction through Federal Authorization – PL 280

- Congress passed **PL 83-280** in 1953 (28 U.S.C. §1360). Public Law 280 ceded certain civil and criminal jurisdiction over Indian country to five (later six) states automatically (not requiring tribal consent) and provided procedures by which other states could assume jurisdiction. States: California, Oregon, Nebraska, Minnesota and Wisconsin. Alaska added in 1958. Amendments in 1968 made (i) subsequent state assumption of jurisdiction subject to Indian consent in a special election; and (ii) allowed for the retrocession of all or part of the state assumption of authority.

State Criminal and Civil Jurisdiction through Federal Authorization – PL 280 (con't)

- See also PL 98-290 which applies to the Southern Ute Indian Reservation.

Miscellaneous Colorado State Statutes Pertaining to Indian Affairs

- **INDIAN ARTS AND CRAFTS SALES**

  CRS §12-44.5-101 through 108 - Indian Arts and Crafts Sales Act

- **MARRIAGE AND RIGHTS OF MARRIED WOMAN**

  CRS §14-2-109 - Solemnization and registration

Miscellaneous Colorado State Statutes Pertaining to Indian Affairs (con't)

- **DEPARTMENT OF CORRECTIONS**

  CRS §17-42-102 - American Indians—freedom of worship
- **EDUCATION**

  CRS §22-1-104 - Teaching of history, culture and civil government

Miscellaneous Colorado State Statutes Pertaining to Indian Affairs (con't)

- **HIGHER EDUCATION AND VOCATIONAL TRAINING**

  FORT LEWIS COLLEGE-GRAND JUNCTION SCHOOL

  CRS §23-52-101 through 113 - Fort Lewis College

Miscellaneous Colorado State Statutes Pertaining to Indian Affairs (con't)

- **FORT LEWIS COLLEGE**

  CRS §23-52-114 - Hesperus account created
- **GOVERNMENT – STATE**

  INDIAN AFFAIRS

  CRS §24-44-101 through 108 - Commission of Indian Affairs

Miscellaneous Colorado State Statutes Pertaining to Indian Affairs (con't)

- **GOVERNMENT – STATE**

  ARTICLE 49.5 MINORITY BUSINESS OFFICE

  CRS §24-49.5-103
- **GOVERNMENT – STATE**

  UNMARKED HUMAN GRAVES

  CRS §24-80-1302 Discovery of Human Remains

Miscellaneous Colorado State Statutes Pertaining to Indian Affairs (con't)

- **HEALTH DISPARITIES GRANT**

  CRS §25-4-2201
- **DRIVERS' LICENSES**
- CRS §42-2-127 Authority to suspend license – to deny license – type of conviction – points.

Sovereign Immunity

Tribal Sovereign Immunity

- Tribes, like states, possess sovereign immunity from suit. Congress, or a tribe itself, may waive a tribe's immunity from suit. Tribal sovereign immunity does not prevent suit by the United States. A federal statute may also abrogate tribal immunity such as the Indian Gaming Regulatory Act – only for suits brought by states to enjoin a Class III gaming activity conducted in violation of a tribal-state compact between the tribe and the state pursuant to the Act.

- ***Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,*** 523 U.S. 751 (1998) - Tribe entitled to sovereign immunity from suits on contracts, regardless of whether those contracts involve governmental or commercial activities or whether they concern conduct on or off a reservation.

- ***C&L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma,*** 532 U.S. 411 (2001) - Tribe can waive sovereign immunity through arbitration provision of an off-reservation services contract, and consent to suit in state court.

State Sovereign Immunity

- Indian tribes are prohibited by the eleventh amendment from suing states in federal court without their consent.

State Sovereign Immunity (con't)

- ***Montana* v. *Gilham,*** 133 F.3d 1133 (9th Cir. 1997) - Just as tribes are immune from suit in state court absent a Congressional or tribal waiver, the state is immune from suits in tribal court because its constitutional and statutory waiver of immunity is limited to state courts, and does not subject the state to tort actions in tribal court.

State-Tribal Relations Trends

State-Tribal Relations Trends

- State-Tribal Cooperative Agreements very common in areas of law enforcement (cross-deputization), taxation, environmental regulation, gaming, enforcement of judgments, etc.
- Many states with American Indian populations have American Indian Commissions.
- U.S. Health and Human Services requiring state-tribal consultation in regard to Medicaid.
- Federal agencies extending monies to state governments with expectation that a portion of those monies will be expended on Indians residing on tribal trust lands.
- Growing trend: sovereignty recognition and consultation.

- **Please feel free to ask any questions.**
- **Thank you for coming.**