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**\* TRIBAL SOVEREIGNTY AND JURISDICTION \***  
**(It's a Matter of Trust)**

**By:**

*Wm. F. Kussel Jr.*

**I. SPECIAL RELATIONSHIP BETWEEN INDIAN TRIBES AND FEDERAL GOVERNMENT**

**A. Trust relationship**

1. Amalgamation of legal duties (written and implied), understandings, anticipations and moral obligations.
  - a) Federal Government is trustee owing certain fiduciary duties to the several federally recognized Indian Tribes.
  - b) Indian Tribes characterized as "domestic dependant nations" *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
  - c) Called "wards of the nation" in *U.S. v. Kagma*, 118 U.S. 375 (1886)
2. Federal Enforcement of Trust Responsibilities
  - a) Courts are willing to enforce certain fiduciary trust responsibilities
    - (1) Federal government is legal titleholder to most Indian lands - beneficiary is the tribe and its individual members.
    - (2) Income from Indian lands - frequently administered by federal government.
  - b) Federal government is responsible for protection of Indian interests: assets, lands, water, income from trust property, proprietary treaty rights.
  - c) Bureau of Indian Affairs (BIA)
    - (1) Main agency entrusted to carry out the trust relationship between the Indian tribes and federal government.
    - (2) Situated within the Department of Interior.
    - (3) Headed by the Commissioner of Indian Affairs (Washington D.C.)
      - (a) Reports to Assistant Secretary of Indian Affairs.
      - (b) 12 Area Offices have high degree of delegated decision-making power.
    - (4) Past policy of BIA
      - (a) Represented nearly all governing authority in Indian

Country.

(b) Pervasive presence in Indian Country.

(5) Present policy of BIA

(a) Narrowly directed in fulfillment of federal trust responsibilities.

(b) Emphasis upon federal policy of "tribal self-determination".

(c) "Indian Self Determination Act" (25 USC §450 et seq.)

## II. TRIBAL SOVEREIGNTY

### A. Overview

1. The right and / or the power of self-government.
2. Includes the power and / or the right to make and enforce laws for the benefit and protection of the tribe.
  - a) Police powers.
3. Source of power.
  - a) Inherent power.
    - (1) Tribe is its own source of power.
    - (2) No need of authority from the federal government.
    - (3) Inherent power described: *Iron Crow v. Ogalala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

### B. Modern views

1. Indian Tribes possess inherent governmental power over all internal affairs,
  - a) Tribes retain the power necessary to protect tribal self-government or to control internal relations not inconsistent with the dependant status of tribes. *Montana v. U.S.*, 450 U.S. 544, 564 (1981).
  - b) " A tribe may also retain inherent power to exercise civil authority over 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 or welfare of the tribe." *Montana*, 450 U.S. at 566.
2. The states are precluded from interfering with the tribe's self-government.
  - a) "Tribal Sovereignty is dependant on, and subordinate to, only the Federal Government, not to States." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).
  - b) Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557 (1975).
  - c) "When a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under Sec. 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *California v. Cabazon Band of Mission*

*Indians*, 480 U.S. 202, 208 (1987)

(1) If intent of state law is to prohibit certain conduct, then it falls within criminal jurisdictional grant of PL 280.

(2) If it is intent of state to allow conduct subject to regulation, then it is civil/ regulatory which is outside of the jurisdiction of the state to regulate.

(a) *Cabazon* shorthand test: whether the conduct at issue violates State's public policy.

3. Tribal sovereignty is not absolute.

a) Subject to plenary power of Congress to limit tribal jurisdiction and restrictions placed on it by the federal courts.

b) Major Supreme Court case limiting tribal criminal jurisdiction:

*Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978).

(1) Held per Justice Rehnquist that tribal court could not exercise criminal jurisdiction over non-Indians in tribal court.

(2) Justice Rehnquist stated that tribal sovereignty is limited in three ways:

(a) Tribes are not permitted to exercise powers that are surrendered by treaty; and

(b) Tribes are not permitted to exercise powers that are prohibited by federal statute; and

(c) Tribes are not permitted to exercise powers that are inconsistent with their status of a domestic dependant nation.

(3) *Oliphant* did not preclude the tribes from exercising civil jurisdiction and it left open the questions criminal contempt powers of the tribal courts.

### III. JURISDICTION AFTER *OLIPHANT*.

A. Tribes have no general criminal jurisdiction over non-Indians.

1. Possible exceptions to rule:

a) Tribal court would have power keep order in the courtroom through use of criminal contempt.

b) Tribal court may be able to enforce subpoenas against non-Indians because exercise of this power is not inconsistent to the dependant sovereign status of a tribe and is essential to the proper functioning of the court.

c) Power to exclude non-Indians.

B. Tribes retain civil jurisdiction.

1. Exclusive for reservation based claims against Indians.

2. Tribes may exercise civil jurisdiction, in certain instances, against non-Indians as part of their inherent power.

3. Civil jurisdiction acknowledged in *Montana v. United States*, 450 U.S. 544 (1981); tribe can regulate actions of non-Indians whose actions affect the "political integrity or welfare of the tribe."

#### IV. JURISDICTION AFTER *DURO V. REINA*

##### A. *Duro v. Reina*, 495 U.S. 676 (1990)

1. Non-member Indian sought writ of habeas corpus and writ of prohibition over crime committed on reservation. U.S. District Court for the District of Arizona held for petitioner. Court of Appeals for 9th Circuit vacated and remanded. U.S. Supreme Court held that a tribe could not assert criminal jurisdiction over a non-member Indian.
2. Court commented that "tribes also possess their traditional and undisputed power to exclude persons who they deem to be undesirable from tribal lands. . . Tribal law enforcement authorities have the power if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain and transport him to the proper authorities." *Duro*, 495 U.S. at 695.

##### B. "*Duro Fix*" - 25 U.S.C. *Sec. 1301 Definitions*

(1) *For purposes of this subchapter, the term--*

2. "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
3. "Powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
4. "Indian court" means any Indian tribal court or court of Indian offense; and
5. "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies.

##### C. Effect of *Duro Fix*

1. *Duro* limitation no longer applicable.
2. Non-Public Law 280 tribes have criminal jurisdiction over all "Indians".
3. Congress amended 25 U.S.C. § 1301, to allow tribal courts to exercise jurisdiction over all "Indians."
4. "Indian" defined by case-law.

#### V. STATE CRIMINAL JURISDICTION

##### A. Public Law 280, 18 U.S.C. §1162

1. *Sec. 1162. State jurisdiction over offenses committed by or against Indians in the Indian country*

*a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:*

State or Territory of Indian County Affected

Alaska ..... All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended

California ..... All Indian country within the State

Minnesota ..... All Indian country within the State, except the Red Lake Reservation

Nebraska ..... All Indian country within the State

Oregon ..... All Indian country within the State, except the Warm Springs Reservation

*Wisconsin ..... All Indian country within the State (except the Menominee Indian Reservation)\**

*b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.*

c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

d) \* Added by author for clarification

2. State has criminal jurisdiction over Indians and non-Indians.

B. Non-Public Law 280 Tribes

1. No state criminal jurisdiction over Indians.
2. State criminal jurisdiction over non-Indians where there is a victimless crime.
3. Federal policy prior to July 1994; concurrent state /federal jurisdiction where non-Indian committed crime against Indian or Indian property.
4. After July 1994; federal policy that federal government has exclusive jurisdiction over non-Indians who commit crimes against Indians or Indian property.

VI. FEDERAL CRIMINAL JURISDICTION ON NON-PUBLIC LAW 280 TRIBES

A. As to "Indians" - Major Crimes Act, 18 U.S.C. §1153

1. *Sec. 1153. Offenses committed within Indian country*

a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

B. As to non-Indians - General Crimes Act, 18 U.S.C. §1152

1. *Sec. 1152. Laws governing*

a) *Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.*

b) *This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian*

*committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.*

2. Federal Policy prior to July 1994.
  - a) Concurrent state-federal jurisdiction for prosecution of non-Indians who commit crimes against Indians and Indian property.
3. Federal Policy after July 1994.
  - a) Exclusive federal jurisdiction for prosecution of non-Indians who commit crimes against Indian or Indian property.
  - b) State has jurisdiction against non-Indian for victimless crimes.

#### VII. JURISDICTIONAL COMPLICATIONS FOR NON-PUBLIC LAW 280 TRIBES

- A. No problem where victim and perpetrator are both Indian - exclusive tribal jurisdiction, unless a major crime.
- B. No problem where victim and perpetrator are both non-Indian - State jurisdiction.
- C. No problem where victim is non-Indian and perpetrator is Indian - exclusive tribal jurisdiction as to perpetrator, unless a major crime.
- D. Problem where victim is Indian and perpetrator is non-Indian - federal government has exclusive jurisdiction.

1. Procedural difficulties: arrest, detention and prosecution.

#### VIII. POSSIBLE SOLUTIONS TO CRIMINAL JURISDICTION PROBLEMS IN NON-PUBLIC LAW 280 TRIBES

- A. Short term
  1. Tribal court civil restraining orders.
    - a) Enforcement possibilities: contempt, exclusion, detention for federal authorities, civil remedial forfeitures.
- B. Long term
  1. Special United States Attorney
    - a) Prosecution of non-Indians for crimes on reservation against Indians or Indian property.

#### IX. CIVIL SUITS AGAINST INDIAN TRIBES AND THEIR ENTERPRISES IN FEDERAL DISTRICT COURT.

- A. Three significant issues exist:
  1. Federal jurisdiction.
  2. Tribal sovereign immunity.
  3. Exhaustion of tribal remedies.
- B. Federal jurisdiction
  1. 28 U.S.C. §1332 (Diversity Jurisdiction)
    - a) Not available between Indians residing on reservation and non-Indians residing in the same state. *Oneida Indian Nation of New York State v. Oneida County, N.Y., C.A.2 (N.Y.) 1972, 464 F.2d 916, reversed on other*

grounds 94 S.Ct. 772, 414 U.S. 661, 39 L.Ed.2d 73, on remand 434 F.Supp. 527.

b) Not available between Indians of different reservations residing within the same state as the non-Indian defendant for an accident occurring on the reservation. *Schantz v. White Lightning*, D.C.N.D.1973.

c) Where Indian tribe's constitution referred to tribe as being "in the nature of a non-profit corporation" did not establish that tribe or ski resort which it operated was a corporation for purposes of diversity jurisdiction with respect to plaintiff's suit for injuries received when he was struck in back of his head by chairlift at ski resort. *Gaines v. Ski Apache*, C.A.10 (N.M.) 1993, 8 F.3d 726.

2. 28 USC §1331 (Federal Question)

a) "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

(1) Federal statutes

(2) Federal common law

(a) Rules that are fashioned by court decisions are "laws" as the term is used in §1331.

b) Whether and Indian tribe retains the jurisdiction to compel a non-Indian property owner, residing within the external boundaries of the reservation, to submit to tribal court jurisdiction is a "federal question." *National Farmers Union Ins. Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

3. Tribal Sovereign Immunity

a) Actions against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

b) Indian tribes enjoy the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

c) Includes tribal enterprises because "an action against a tribal enterprise is, in essence, an action against the tribe itself." see *Local IV-302 Int'l Woodworkers Union of Am. V. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D.Wis.1984)(Warren, J.).

d) Includes tribal gaming commission and tribal casino chartered by the Tribal Legislature. see *Barker v. Menominee Nation Casino*, 897 F.Supp. 389 (E.D.Wis.1995)(Warren, J.)

e) Indian Civil Rights Act ("ICRA"), 25 USC §§1301 *et seq.* does not create a federal cause of action against an Indian tribe for deprivation a substantive rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

(1) Except for *habeas corpus* proceedings, suits in federal court



against Indian tribes for ICRA violations, are barred by sovereign immunity. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir.1984).

(2) 10th Circuit exception: where the aggrieved party *actually* sought a tribal remedy and the tribal court failed to exercise jurisdiction.

### C. Tribal Exhaustion Rule

1. Where federal and tribal courts both appear to have concurrent jurisdiction over civil matter, the federal court must dismiss or stay action until the aggrieved party has exhausted his or her tribal remedies. *see Barker v. Menominee Nation Casino*, 897 F.Supp. 389 (E.D.Wis.1995)(Warren, J.)

a) 10th Circuit exception: where the tribal court failed to exercise jurisdiction. *Dry Creek Lodge, Inc. V. Arapahoe and Shoshone Tribes ("Dry Creek II")*, 623 F.2d 682 (10th Cir.1980)

2. The question as to whether a tribal court had jurisdiction over non-Indian property owner, involves a careful examination of tribal sovereignty and the extent to which it has been altered, divested or diminished, must first be addressed in tribal court. *National Farmers Union Ins. Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

a) The federal court should not provide any remedies until the aggrieved parties have exhausted their tribal remedies.

b) The federal court may review the tribal court's finding of jurisdiction.