

### **1. Street scene: Police officer, man and a woman.**

The woman produces a tribal court restraining order. The man argues that it is “worthless” because it came from a tribal court.

18 U.S.C. § 2265 mandates that states and tribes provide full faith and credit for each other’s protective orders. Prior registration of such orders is not required for enforcement.

California has implemented the requirements of 18 U.S.C. § 2265 through the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act found in Family Code §§ 6400– 6409. The Act confirms that tribal court protective orders are entitled to full faith and credit. In California the mechanism to register a tribal court protective order with the California Superior Court is through the filing of the order along with a DV-600 form *Register Out-of-State Protective Order*. Once a tribal court protective order is registered in this manner, it will be entered into the California Law Enforcement Telecommunication system. However, a tribal court order does not need to be registered in order to be entitled to full faith and credit. A tribal court protective order must be enforced by law enforcement whether or not they are registered through the California Court system. Family Code § 6403 states:

Presentation of a protection order that identifies both the protected individual and the respondent and, on its face, is currently in effect constitutes, in and of itself, probable cause to believe that a valid foreign protection order exists.

Therefore, in this case the police officer who is presented with a facially valid tribal court protective order should enforce the order.

## 2. Traffic Court: Judge, police officer, defendant.

An individual is charged with driving with a broken tail light and expired registration. The Defendant argues that because he is an enrolled member of the Rincon tribe and was driving on the Rincon Indian Reservation he does not need to comply with these provisions of the state law.

Indian Reservations are part of "Indian Country" as defined in 18 U.S.C. § 1151. Indian country includes all land within the limits of any Indian reservation... including rights-of-way running through the reservation.

As a general rule states and state law has very limited application to the activities of tribal members in Indian country. California is one of six mandatory Public Law 83-280 (PL-280) states. PL-280 is a federal law enacted in 1953 which affects the allocation of jurisdiction in Indian country. Part of what PL-280 did was to transfer most of the federal government's criminal jurisdiction to the state. The criminal provisions of PL-280 are now codified in 18 U.S.C. § 1162. PL-280 did not grant states "civil regulatory" jurisdiction over Indian Country. (*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)) The Ninth Circuit has held that traffic laws are "civil regulatory" in nature and thus not applicable to an Indian in Indian country. (*Confederated Tribes of Colville Reservation v. State of Wash.*, 938 F.2d 146 (9th Cir. 1991)) This position has been affirmed by the California Attorney General 89 Ops. Cal. Atty. Gen. 6 (2006) which concludes that "California motor vehicle registration and driver's license requirements are not subject to enforcement against Indian tribal members on roads within their Indian reservation." Note, however, that provisions such as those governing driving under the influence or reckless driving which have a very important public safety component may be considered "criminal prohibitory" rather than "civil regulatory".

Here the provisions at issue are likely civil regulatory in nature rather than criminal prohibitory, therefore they would not apply to the conduct of a tribal member within their Indian reservation.

### **3. Family Court: Judge and parties in Court on a hearing for a protective order.**

The wife is asking for a stay away order against the husband to keep him away from the home they live in. The husband objects that the home is on the reservation and that he is a tribal member and she is not.

The reservation is “Indian country”. Please see discussion of general principles of state regulation of activities of tribal members in their tribes “Indian country” in scenario 2 above. The state has very limited ability to regulate the conduct of Indian tribal members on the reservations of their tribes. Generally the state has no authority to regulate the use of tribal lands and in particular no authority to order an individual out of tribal housing. “Where a dispute involves trust or restricted property, the state may not adjudicate the dispute nor may its laws apply.” *In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 296 (N.D.Cal.1977), *aff'd* 625 F.2d 330 (9th Cir.1980) (see also *All Mission Indian Housing Authority v. Silvas* (C.D. Cal. 1987), 680 F. Supp. 330 and *Owens Valley Indian Housing Authority v. Turner* (9th Cir. 1999) 185 F. 3d 1029, 1032).

Here the wife is seeking a stay away order which would effectively bar her husband tribal member from the home on the reservation. The state court has no jurisdiction to order a tribal member to stay away from a home on the reservation of that individual’s tribe. Note however, that a tribal court would likely have jurisdiction to make such an order.

#### **4. Courtroom: Several people sitting in the audience.**

Mr. Echohawk, tribal member stopped on the reservation for broken taillight and expired registration. He argues that because he was stopped on the reservation, the state traffic regulations do not apply to him. The police officer responds that he originally noticed Mr. Echohawk driving off the reservation.

See the discussion in scenario 2 above concerning application of state traffic laws to the on reservation driving of tribal members.

However, here the conduct at issue occurred off the reservation. "Absent express federal law to the contrary, Indians going beyond reservation boundaries are generally subject to non-discriminatory state law otherwise applicable to all citizens of the state." *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101. The state officer may be entitled to enter on the reservation in order to enforce the state's laws with respect to off reservation conduct. *Nevada v. Hicks*, 121 S.Ct. 2304. Therefore Mr. Echohawk may be held accountable in state court for his violation of state traffic regulations off of the reservation.

**5. Courtroom: Judge and 2 parties – one male, one female and one attorney.**

Wife is seeking a protective order against husband. As part of this seeking to keep him away from the family home. Husband objects that the house is on the reservation. He is a tribal member and she is not. He states that the court does not have any power to take action against him. Wife says that he is harassing her both on and off the reservation.

See discussion of limits of jurisdiction in scenarios 2, 3 and 4 above.

State court has jurisdiction over “criminal” activities of Indians both on and off the reservation, so judge may issue an order enjoining criminal activities.

However, state court has no jurisdiction to govern the use of tribal housing, so it is doubtful that there is authority to issue a valid stay away order from the home on the reservation.

**6. Courtroom: Application for a guardianship of the person of a minor. Grandmother is petitioner and mother is respondent.**

Grandmother argues that child is not being properly cared for. Mother denies allegations. She further states that she and her daughter are tribal members and argues that grandmother has done nothing to help her alleviate the problems caused by lack of child support payments. Mother says grandmother has made no “active efforts”.

Because the child subject to the guardianship proceedings is a tribal member, she is an “Indian child” within the meaning of the *Indian Child Welfare Act* 25 U.S.C. §1901 *et seq.* An involuntary guardianship falls within the scope of ICWA (see Probate Code § 1459.5) It constitutes a “foster care placement” within the meaning of ICWA.

Among the requirements of ICWA is that the party seeking to effect the foster care placement of an Indian child under State law “...shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” (25 USC § 1912 (d))

The active efforts requirement applies to private petitioners as well as agency petitioners. (*In re Adoption of Hannah S.*, 142 Cal.App.4th 988, 48 Cal.Rptr.3d 605 Cal.App. 3 Dist., 2006 and *In re Crystal K.*, 226 Cal.App.3d 655, 276 Cal.Rptr. 619 Cal.App.3.Dist.)

What constitute sufficient “active efforts” will vary with the circumstances of each case, but Grandmother must present evidence that she attempted to prevent the breakup of the Indian family and that these efforts were unsuccessful before a guardianship order could be issued.

What are some other requirements of ICWA?

- Appointment of counsel
- Qualified Expert Witness testimony

### **7. Courtroom: Delinquency case. Judge, District Attorney, Public Defender, Juvenile, and Tribal representative are all present.**

The Public Defender and the tribal representative are seeking a dismissal of the matter because the minor is a tribal member, the events took place on the reservation and the minor is already a ward of the tribal court. The District Attorney objects to the dismissal of the assault charge which is clearly a crime that the court has jurisdiction over.

Under the terms of PL-280 the state of California has criminal jurisdiction over the conduct of tribal members on their reservations. However, PL-280 did not divest tribes of their concurrent jurisdiction. Therefore a tribal member may also be subject to the jurisdiction of the tribal court for their criminal activities on the reservation. Because the state and the tribe are separate sovereigns, double-jeopardy does not attach and both sovereigns may prosecute for the same transaction.

However, there may be an issue as to whether the matter falls under the Indian Child Welfare Act where the minor is found to be "...in foster care or at risk of entering foster care". (Welfare and Institutions Code § 224; California Rules of Court, Rule 5.480 (1); *R.R. v. Superior Court of Sacramento County* (2009) 180 Cal.App.4th 185 but see also *In re W.B., Jr.* (2010) 182 Cal. App.4th 126 currently on appeal to the California Supreme Court.)

If ICWA applies then we must consider the requirements of 25 U.S.C. § 1911:

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. **Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction**, notwithstanding the residence or domicile of the child.

and Welfare and Institutions Code § 305.5:

(a) If an Indian child, who is a ward of a tribal court ... has been removed by a state or local authority from the custody of his or her parents or Indian custodian, the state or local authority shall provide notice of the removal to the tribe no later than the next working day following the removal and shall provide all relevant documentation to the tribe regarding the removal and the child's identity. If the tribe determines that the child is an Indian child, the state or local authority shall transfer the child custody proceeding to the tribe within 24 hours after receipt of written notice from the tribe of that determination.

## 8. Judge in Chambers on the telephone

Judge from the tribal court is calling the local state court judge to coordinate on a case that is before him.

We do not know the nature of the case, but we can assume that it overlaps in some way with matters in the local state court.

Under the *Uniform Child Custody Jurisdiction and Enforcement Act* Family Code §§ 3400 *et seq.* a tribe is to be treated like a state:

3404. (a) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. Sec. 1901 *et seq.*) is not subject to this part to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this chapter and Chapter 2 (commencing with Section 3421).

(c) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under Chapter 3 (commencing with Section 3441).

3410. (a) A court of this state may communicate with a court in another state concerning a proceeding arising under this part.

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Except as otherwise provided in subdivision (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.