

The background features a large, faint, circular seal of the Judicial Council of California. The seal contains the text "JUDICIAL COUNCIL OF CALIFORNIA" around the top and "1926" at the bottom. The central image depicts a Native American figure holding a bow and arrow, with a landscape and a building in the background.

Tribal and State Jurisdiction in California Indian Country

The seal of the Judicial Council of California is a circular emblem. It features a central figure of a woman in a classical style, holding a spear and a shield. Above her is a banner with the word "EUREKA". The seal is surrounded by a ring of stars. The outer border of the seal contains the text "JUDICIAL COUNCIL OF CALIFORNIA" and the year "1926" at the bottom.

Case Scenarios 1 - 3

Discussion

Federal Law Principles of Tribal Sovereignty

- Tribes are separate sovereign governments
- Tribal sovereignty generally extends over tribal territory
- Tribal sovereignty is inherent but subject to limitation by Congress



Tribal Sovereignty

- Is the power of American Indian tribes grounded in their inherent and retained sovereignty to make their own laws and be governed by those laws
- It is the right of tribes to have control over their lands, resources and the people who come onto those reservations
- Tribes are separate and distinct sovereigns in the same way that the federal and state governments are separate and distinct sovereigns



Tribal Sovereignty

- Tribal sovereignty pre-exists the Union
- Tribes exercise retained inherent sovereignty
- Tribes are not parties to the Constitution and tribal authority is not derived from or limited by the constitution
- Tribes are subject to the will of the federal government, but generally free of the power of the states



Indian Country

- Historically: area left under exclusive control of tribes
- Now: defined in federal statute

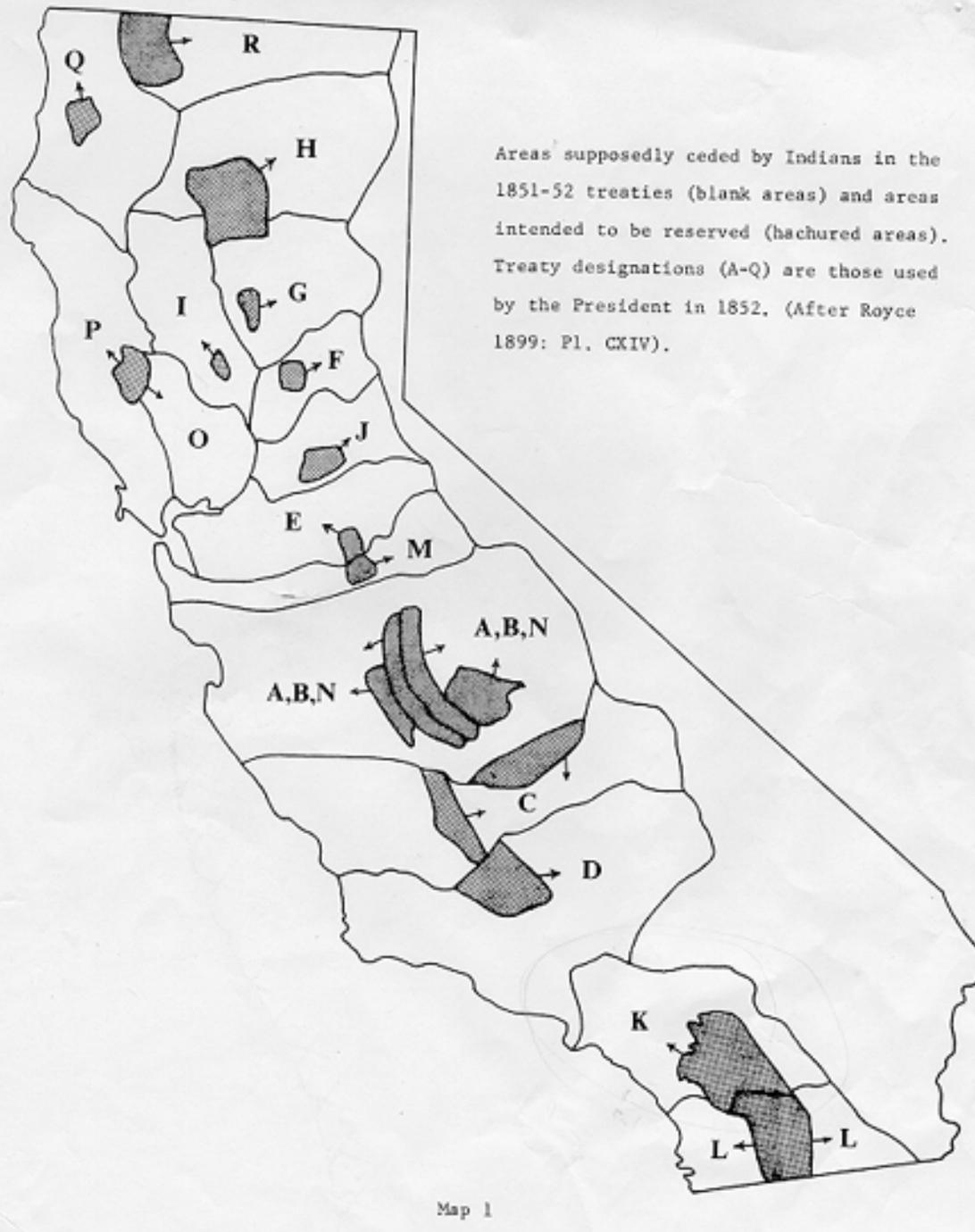


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California Indian Pre-contact Tribal Territories



Areas reserved in the 18 un-ratified treaties Entered into with the Indians of California between 1851 & 1852. Approximately 7.5 million acres



Indian Country Defined

(18 U.S.C. 1151)

- "Indian country" means
 - (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation
 - (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
 - (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.



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Tribal & Federal Lands

- BIA (Tribal)
- BLM
- BOR
- Private Land
- FS
- FWS
- NPS
- DOD



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Map Development - January 2000

Jurisdiction in Indian Country

- Presumptively federal and tribal concurrent jurisdiction
- Presumption against state and local jurisdiction



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Jurisdiction in Indian Country

- Starting point –
 - Tribes have plenary & exclusive jurisdiction over their members and their territory
 - BUT no criminal jurisdiction over non-Indians



Public Law 280

- Enacted in 1953
- 28 USC § 1360; 18 USC § 1162
- Grants California criminal jurisdiction in Indian Country concurrent with tribes
- Also grants limited civil jurisdiction:
 - Civil adjudicatory, *Bryan v. Itasca County*, 426 U.S. 373 (1976)
 - Not civil regulatory



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P.L. 280

- Took federal jurisdiction over major crimes (General Crimes Act and Major Crimes Act) out of Indian Country in 5 states;
 - Gave California, Minnesota, Nebraska, Oregon, and Wisconsin (commonly referred to as the “mandatory states”) concurrent criminal and limited civil jurisdiction with the Tribes.
 - Alaska was added in 1958



P.L. 280

- There are two parts to P. L. 280:

- 18 U.S.C. section 1162—criminal

- 28 U.S.C section 1360 ---civil



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Public Law 280

Jurisdiction Before PL 280

- Federal government has plenary power (*Kagama* decision)
- Federal government has jurisdiction over Major Crimes (Major Crimes Act, 1885)
- State has no authority over tribes
- Tribes maintain civil and criminal jurisdiction over all

but major crimes

Jurisdiction After PL 280

- Federal government has plenary power (*Kagama* decision)
- State government has jurisdiction over crime
- Tribes maintain civil jurisdiction
- Only affects tribes in named states
- Treaty rights not affected



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Criminal Jurisdiction in Indian Country After PL-280

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State: exclusive
Non-Indian	Indian	State: exclusive
Indian	Non-Indian	Concurrent State and tribal jurisdiction, exclusive of federal government
Indian	Indian	Concurrent State and tribal jurisdiction, exclusive of federal government
Non-Indian	Victimless	State: exclusive
Indian	Victimless	Concurrent State and tribal jurisdiction, exclusive of federal government



Exceptions To The Grant of State Concurrent Jurisdiction

- No state jurisdiction to:
 - probate trust lands
 - tax trust lands
 - regulate use of trust lands
 - encumber trust lands
 - determine ownership or right of possession of trust lands
 - deprive or control the right or privilege afforded under federal law to hunt, fish, trap



What P.L. 280 Didn't Do...

- Divest Tribes of criminal or civil jurisdiction.
(Up until 1978 BIA took the legal position that PL 280 divested the Tribes of jurisdiction)
- Make county and city laws applicable to Indians (animal control, zoning, etc.)
- Abrogate tribes' **federally** protected hunting and fishing rights



What P.L. 280 Didn't Do...

- Terminate Tribes
 - Federal recognition was maintained
 - Trust status of land was maintained
 - Federal obligation to continue services to tribes remained (major area of concern currently)
- Did not authorize State jurisdiction over Tribes



What Jurisdiction Looks Like in California?

- Criminal— Felony and misdemeanors concurrent state and tribal. Tribal jurisdiction is subject to the same federal court limitations as in non-P.L. 280 states— *Oliphant* no jurisdiction over non-Indians and Indian Civil Rights Act \$5,000 and one year (Tribal Law & Order Act amended to \$15,000 & 3 years), as Tribes in non-PL 280 states.
- Civil---concurrent state and tribal (limited to private causes of actions between individuals)
- *Regulatory---remains exclusively tribal*



What is Regulatory Jurisdiction?

- The body of laws a government establishes that either prohibits, limits or proscribes certain conduct and activities of its citizens.
 - Can be a criminal law— “criminal prohibitory”
 - Can be a civil regulation--- “civil regulatory”



Why Does it Matter?

- Remember states have concurrent “criminal” jurisdiction in Indian Country under PL 280.
- If a state regulation is found to be “criminal prohibitory” it can apply in Indian Country
- If the state regulation is found to be “civil regulatory” it cannot be applied in Indian Country.



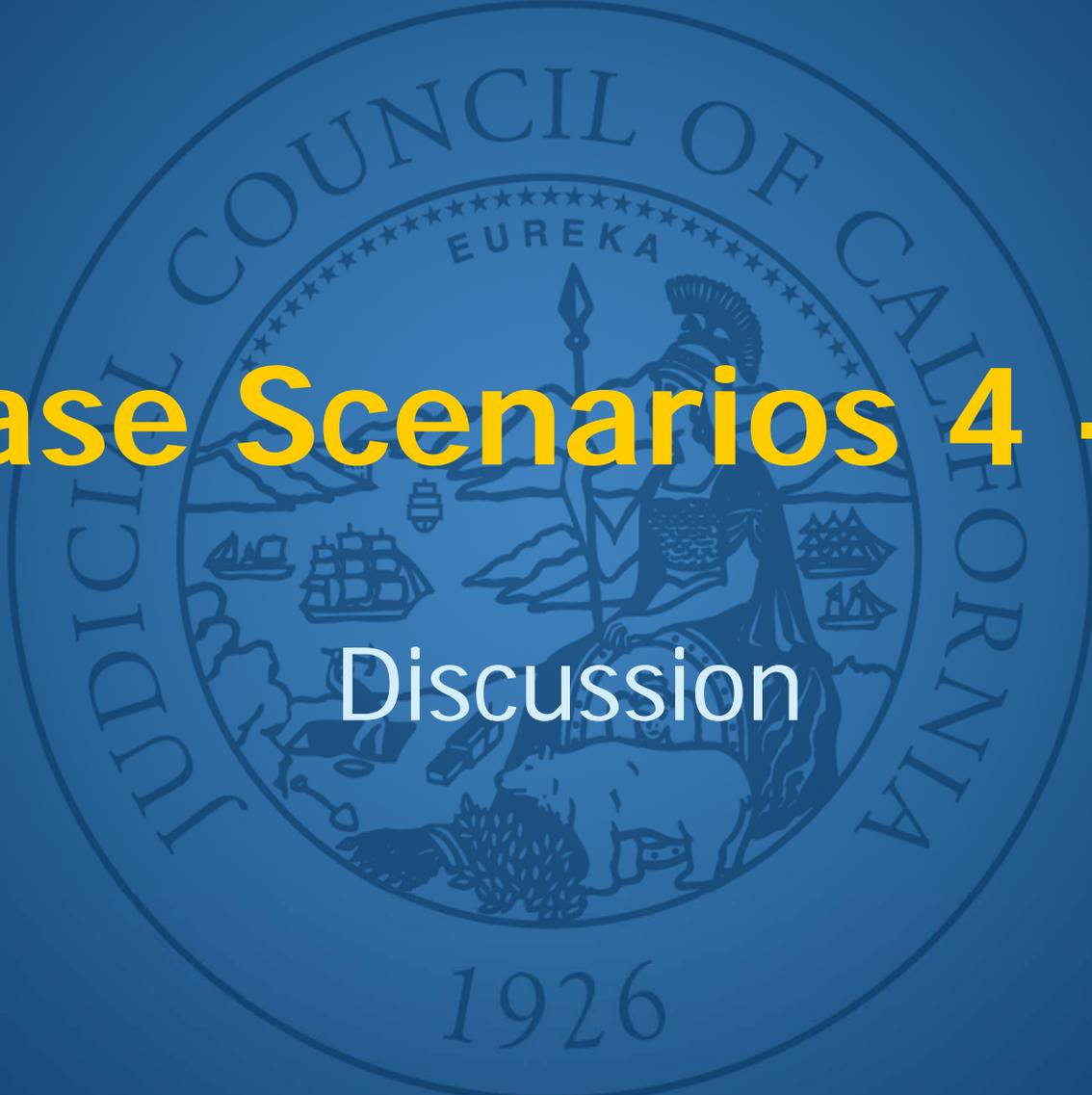
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How Do You Tell Them Apart?

(1) Ask whether the conduct being regulated is permitted but subject to limitations, exceptions or exemptions -- or completely prohibited?

(2) Always look at the public policy behind the state law -- the greater degree of protecting people and property from injury and damage, the more likely the law will be criminal prohibitory.



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Case Scenarios 4 - 7

Discussion

Applying the Test

- State traffic and driving laws—Broad public policy is to ensure and protect persons and property on road ways;
- Narrow conduct at issue is driving without a valid drivers license, not using a seat belt, and speeding;
- There is no real heightened or substantial difference in the public policy behind the narrow conduct and the broader policy of public safety;
- Therefore we focus on traffic and driving laws in general, and we find that driving is permitted but subject to regulation;
- Civil regulatory jurisdiction.



Applying the Test

- What if the narrow conduct was driving under the influence or reckless driving?
- This conduct might be seen as traffic or driving laws with different and heightened public policy because violations create a greater risk of direct injury to persons and property;
- As such we focus on this narrow conduct and ask is reckless driving and driving under the influence prohibited?
- Yes and the laws would be seen as criminal prohibitory



Examples of Civil Regulatory Jurisdiction

- High-stakes bingo and poker regulations
- CA boxing laws
- CA Labor Laws
- CA environmental laws
- Workers Compensation
- Land use laws (zoning, rent control)
- Certain Motor Vehicle Code provisions (registration and driver's license)

Fire Codes
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Examples of Criminal Prohibitory laws

- Murder
- Rape
- Assault
- Robbery
- Etc.
- Never allowed, completely prohibited.
Strong public safety concern.



Conflicting Decisions

- Fireworks — In CA law is criminal prohibitory but in Wisconsin it is civil regulatory
- Involuntary proceedings to terminate parental rights—9th Cir. says not civil regulatory but Wisconsin AG in 1981 said proceedings were
- Traffic violations—depends on the state some found these laws to be civil regulatory and others found them to be prohibitory.
- Hunting and Fishing



Regulatory Jurisdiction Summary

State **civil regulatory** laws do not apply in Indian Country

State laws deemed to be **criminal prohibitory** are applicable in Indian Country



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How Has P.L. 280 Impacted Tribes in California?

- The misconception that law divested Tribes of their jurisdiction has hampered development of tribal courts and law enforcement (BIA 1978)
- Misconception that law enforcement is the responsibility of the state and thus no federal funding for tribal courts and law enforcement is provided to Tribes in PL 280 states
- CA. Court battles regarding what is “civil regulatory” vs. “criminal prohibitory” the latter being applicable on the reservation.



Inherent Tribal Authority to Make Tribal Laws

- As sovereign nations, Tribes have the inherent authority to make their own laws and be governed by them. For example:

- Enrollment
- Elections
- Assignments or land laws
- Environmental laws
- Housing laws
- Building Code
- Children's Code
- Peace and Security



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Overlap

- Tribal law may overlap with state criminal laws and there is no “double jeopardy,”
- Tribal member may be prosecuted in tribal court and state court for the same act,



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Protections

- State and federal constitutional protections apply to tribal people being prosecuted in the state court for crime committed on the reservation;
- Tribal member prosecuted in tribal court is protected under the Indian Civil Rights Act.



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Indian Civil Rights Act

- Federal law passed in 1968 (25 U.S.C. §1302);
- It includes most of the Bill of Rights and the 14th Amendment from U.S. Constitution;
- Because Tribes were not parties to the U.S. Constitution they are not subject to the restrictions the Constitution places on federal and state governments;
- Congress passed ICRA in an effort to protect all “people” (Indian and non-Indian) from arbitrary tribal government practices.



Indian Civil Rights Act

No Indian Tribe in exercising powers of self-government shall...

- Prohibit Freedom of religion, speech, press, assembly, right to grieve
- Unreasonably search, seizure, or issue warrants
- Subject anyone to double jeopardy
- Compel anyone to self-incriminate
- Take private property for public use without just compensation



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Indian Civil Rights Act

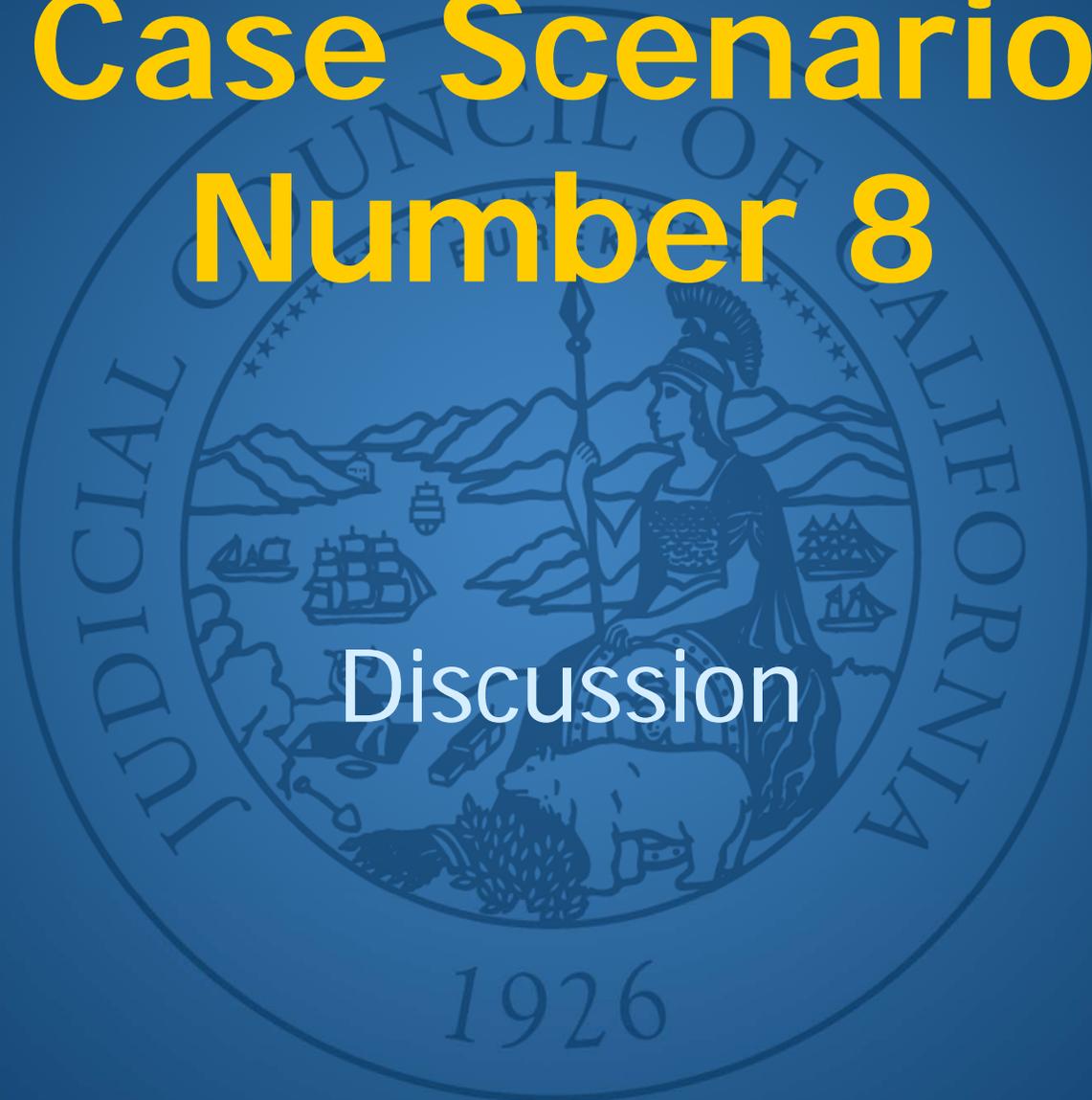
- Deny (in a criminal proceeding) the right to a speedy public trial, to confront and call witnesses, to know the accusations against him or her, and have an attorney at his or her own expense
- Require excessive bail, or impose excessive fines, or inflict cruel and unusual punishment, and
 - Impose penalty or punishment, for a conviction of any offense,
 - Greater than 3 year imprisonment, or
 - A fine of \$15,000, or
 - both
- Deny equal protection and due process
- Pass a bill of attainder or ex post facto law
- Deny a jury trial of 6 peers in cases punishable by imprisonment



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Case Scenario Number 8

Discussion



California Tribal Court State Court Forum

Purpose: To improve the working relationships between its members and enable the courts of each to issue and enforce their respective orders to the fullest extent allowed by law



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Forum Activities

- Collaboration/Creative Problem Solving Together
- Education
- Legislative Proposals
- Rule and Form Proposals
- Local Protocol Development



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Education

- Reviewing judicial educational materials and making recommendations for content changes to address questions of federal Indian law;
- Planning educational sessions for forum members and state court judges; and
- Developing judicial educational curriculum.



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Legislation- Draft Proposals

- To clarify and simplify the process by which tribal civil judgments will be recognized by the state courts of California and enforced just as any state civil judgment would be and
- To give tribal court access to state juvenile court records



Rule and Form Proposals

- To revise the rule governing sending the record in juvenile appeals to clarify that if an Indian tribe has intervened in a case, a copy of the record of that case must be sent to that tribe (see <http://courts.ca.gov/xbcr/cc/SPR11-12.pdf>); and
 - To establish an efficient and consistent statewide procedure for California state courts to register protective orders issued by tribal courts in California; registration of tribal court protective orders will help ensure that law enforcement agencies enforce these orders uniformly and consistently (see <http://courts.ca.gov/xbcr/cc/SPR11-53.pdf>).



Local Protocols

- Developing local rules and protocols to address where state and tribal court jurisdiction overlap;
- Developing a toolkit to assist tribal and state court judges wishing to develop local rules and protocols; and
- Identifying and recommending statewide solutions.



Forum and AOC Tribal Projects Funded Through Grants

- California Department of Social Services
- California Emergency Management Agency (CalEMA)
- U.S. Department of Health and Human Services, Court Improvement Program (CIP)



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