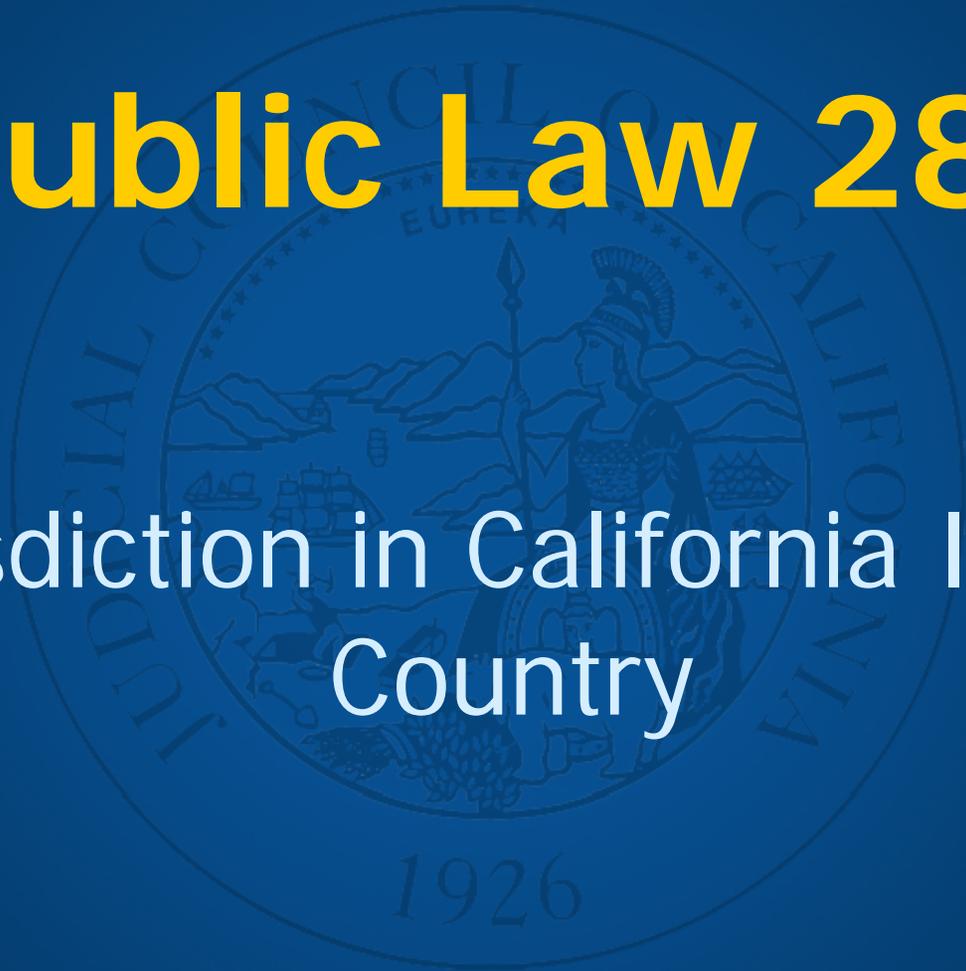


Public Law 280

Jurisdiction in California Indian
Country



Key points in Ca Indian History

- Pre-contact
 - Evidence of Indian occupation in Ca. dating to at least 8,000 B.C.
 - Over 300,000 Indians in California
 - 35 distinct languages
 - Over 500 bands & 105 tribal groupings
 - Occupied lands throughout California

California Indian Pre-contact Tribal Territories



Key points in Ca Indian history

- 1579 Sir Francis Drake spends 5 weeks on CA coast. Claims entire area for British Crown
- 1769 First Spanish Mission founded near San Diego



Key Points in Ca Indian history

- By 1800, Indian population reduced to 150,000
- Treaty of Guadalupe Hidalgo (Feb. 2, 1848; by which U.S. acquired California)
- Gold discovered at Sutter's Mill on January 24, 1848



Key Points in Ca Indian history

- CA statehood 1850
- 1851-1852 federal agents negotiate 18 treaties with CA Indians reserving 8.5 million acres of land
- CA delegation urges Senate not to ratify treaties

Key Points in Ca Indian history

- 18 treaties never ratified and placed under seal
- California Act of Admission (Sept. 9, 1850)
 - Congress did not reserve federal jurisdiction over Indian land
 - Public lands not disposed of by Act of Congress passed to State of California



California's First Governor, 1849-1851

Governor Peter H. Burnett declared:

“That a war of extermination will continue to be waged between the races, until the Indian race becomes extinct, must be expected”



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Early California Laws re. Indians

- White persons could apply to a Justice of the Peace for the removal of Indians from lands white person wanted;
- Any person could go before a Justice of the Peace to obtain Indian children for indenture (ie. slavery)
- Justice of Peace could declare Indian vagrant on word of a white person and sell their labor at auction. (ie. slavery)
- “[I]n no case [could] a white man be convicted of any offense upon the testimony of an Indian, or Indians.
- State paid for militia’s to conduct raids against the Indians



Key Points in CA Indian History

- Estimated CA Indian population 1870 12,000
- 1900 Less than .5 million acres of reserve lands for all the Indians in California.



CA Indians today

- 2000 Census reported over 600,000 in California with American Indian / Alaska Native heritage, more than any other state.
- Currently 109 federally recognized tribes second only to Alaska
- Approximately 550,000 acres of tribal trust lands and another 63,000 acres of Individual trust allotments.



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Key Concepts in Indian Law:

- Tribal Sovereignty
- Domestic dependent nations
- Plenary congressional authority
- Fiduciary/trust relationship
- Government to government relationship
- Sovereign Immunity
- "Indian Country"



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Tribal Sovereignty

- Tribal sovereignty pre-exists the U.S. Constitution
- 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



“Domestic dependent nations”

- Although sovereign, tribes are not “foreign nations”.
- Have only internal, not external sovereignty

Worcester v. Georgia (1832) 31
U.S. 515



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Inherent tribal sovereignty been both recognized & limited since Johnson v. McIntosh (1823)

- By discovery ...
 - Tribes are "domestic dependent nations" w/out external powers
 - Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)
 - Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)
 - Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)
- By treaty/agreement
 - Often negotiated agreements subsequently unilaterally amended by Congress
- Via Congress' "Plenary Power"
 - Even absent constitutional authorization, Congress has complete federal legislative authority over tribes
 - United States v. Kagama, 118 U.S. 375 (1886)
- Via U.S. Supreme Court "Plenary Review Power" and characterization of "dependent status"
 - "... the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes..." Nevada v. Hicks, 533 U.S. 353, 359 (2001)

Plenary Authority of Congress

- Tribes subject to the “plenary” authority of congress
- Congress can limit or terminate tribal sovereignty but must do so clearly and plainly



Tribal Sovereignty

- Limited by
 - treaties
 - federal laws (eg. Indian Civil Rights Act)
 - Judicial decisions



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Tribal Sovereignty

- Tribes exercise civil and criminal jurisdiction over:
 - Territory
 - Members
 - Non-member Indians
 - Non-Indians (civil jurisdiction only)

But

- No power of external sovereignty and are subject to “plenary” authority of congress



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Jurisdiction in Indian Country

- Jurisdiction can depend on:
 - Status of the land (trust or not);
 - Status of the parties (Indian or not)
 - Nature of the action
 - Relationship of the parties (to tribe)



Jurisdiction in Indian Country

- Starting point –
 - Tribes have plenary & exclusive jurisdiction over their members and their territory.



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Marshall Trilogy

- Johnson v. McIntosh (1823) – Indian tribes may not convey land to private parties absent consent of Congress.
- Cherokee Nation v. Georgia (1831) – Indian tribes are not separate sovereigns but are “*domestic dependent nations*” existing in a state of pupilage to the United States much like “*a ward to his guardian.*”
- Worcester v. Georgia (1832) – State laws have no effect in Indian country.



- Ex Parte Crow Dog (1883) – Federal court conviction of Indian who murdered another Indian in Indian country overturned- tribal sovereignty in situation not abrogated by Congress



Extension of federal jurisdiction

- General Crimes Act (1834) 18 U.S.C. 1152;
- Major Crimes Act (1885) 18 USC 1153;



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Extension of state jurisdiction

- Jurisdiction over crimes between non-Indians in Indian Country;



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Public Law 280

- Enacted in 1953
- Codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360
- Six mandatory states, including CA



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“Indian Country”

- (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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“Indian Country”?

- Indian country includes:
 - 1. Indian reservation (18 USC §1151(a));
 - 2. Dependent Indian communities (18 USC §1151(b)); and
 - 3. Indian allotments (18 USC §1151(c)).
- Includes land owned by non-Indians if they are within the boundaries of an Indian reservation
- Within Indian Country, tribe may exercise its sovereign powers and state power is limited.



4 Types of Land in Indian Country

- Tribal Trust Land
 - Allotted Trust Land
- Fee Land
- State Rights of Way

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6/24/2011

TRIBAL TRUST LANDS

- The United States holds the legal title to the trust land but the Tribe, as a whole, retains the undivided residence/use interest
 - May be assigned to individuals
 - Tribal trust land is held communally by the tribe and is managed by the tribal government
 - The Tribe may not convey or sell trust land without the consent of the federal government



ALLOTTED TRUST LAND

- The United States holds the title but the entire residence/use interest is in an individual
 - In some cases, federal allotment acts divided tribal lands into individual parcels
 - In California, in some cases, individual allotment were carved out of the public domain



FEE LANDS

- When an individual or entity (Indian or non-Indian) acquires former allotted trust land and where the trust status has been removed
- Examples:
 - Expired trust patent
 - Inheritance by nonmember
 - Valid sale to nonmember



STATE RIGHT-OF-WAYS

- “State right-of-ways are equivalent to non-Indian fee lands.”

State v. A-1 Contractors, 520 U.S. 438 (U.S. 1997)



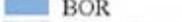
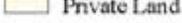
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6/24/2011

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CALIFORNIA

Tribal & Federal Lands

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



Map Production: January 2009
 Federal Lands: U.S. Geological Survey, 1995.
 Indian Lands: U.S. EPA R9 GIS Center, 1995.



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Limitations on tribal jurisdiction

- No criminal jurisdiction over non-Indians
- Limited jurisdiction over “fee” lands
- Limited civil jurisdiction over non-Indians



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Public Law 280

- Transferred federal criminal jurisdiction under 1152 and 1153 to affected States
- Opened state courts as forums for dispute resolution;



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Public Law 280

- Did NOT
 - Divest tribes of criminal (or other) jurisdiction
 - Grant states “civil regulatory” jurisdiction
 - Extend local laws to Indian Country



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Criminal Jurisdiction in Indian Country Before 1953

- Federal jurisdiction included:
 - Federal and state defined offenses committed by Indian v. non-Indian and vice versa
 - Specified major crimes by and against Indians
 - Crimes related to federal trust responsibility (ie. Liquor, hunting and fishing regulation regardless of Indian status

Criminal Jurisdiction in Indian Country Before 1953 (cont.)

- Tribal Jurisdiction:
 - Exclusive as to all other crimes committed between Indians or without victims
 - The Indian Civil Rights Act of 1968
 - Limited tribal authority to punish crimes with imprisonment of up to one year
- State Jurisdiction
 - Exclusive as to crimes between non-Indians



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



PL-280 Exceptions

- Hunting, trapping and fishing rights secured by treaty, agreement, or statute (eg 18 USC 1165)
 - Mid-1990's tribes begin contracting with federal government to enforce these laws and receive federal commissions
- Taxation of real and personal property held in trust or subject to a restriction against alienation



PL-280 Exceptions

- The State cannot:
 - Probate trust lands
 - Regulate trust land use
 - Encumber trust lands
 - Determine ownership or the right to possess trust lands



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State/Local View of PL-280

- PL-280 created a headache
 - Confusion over scope of jurisdiction
 - Role of tribal sovereignty
 - Civil regulatory vs. criminal prohibitory jurisdiction
 - Lack of federal funding for increased jurisdiction
 - Lack of taxing authority over federal Indian lands



Tribal View of PL-280

- Opposition at time of passage
 - Lack of consent/consultation
 - Failure to recognize tribal sovereignty and self-government
 - Imposition of unwelcome jurisdiction
 - Perception of discrimination by state agents
- Suspicion that optional States would increase their jurisdiction at will



Critical View of PL-280's Results

- Why has PL-280 been a source of lawlessness?
 - Absence of law enforcement
 - Federal withdrawal
 - Absence of or lack of state resources
 - Lack of funding for tribal law enforcement
 - De facto jurisdictional vacuums
 - No priority where jurisdiction is concurrent
 - Crime victims uncomfortable reporting to local officials



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Tribal Experience with PL-280

- Tribal experience typically is unsatisfactory
 - Absence of police presence
 - Long response times
 - Need for better community relations
 - Increase in lawlessness



Implications of PL-280

- Jurisdiction may depend on:
 - Status of parties (Indian or not);
 - Status of lands (Indian Country or not);
 - Nature of action (criminal / civil regulatory)
- Jurisdiction may be:
 - Exclusively tribal;
 - Exclusively state;
 - Concurrent



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Criminal Prohibitory vs. Civil Regulatory

- No “bright line” rule
- Nature of penalty not determinative
- Whether part of “penal code” not determinative



Criminal Prohibitory vs. Civil Regulatory

- Key question –

Is conduct generally prohibited as offending fundamental state public policy? OR

Is conduct generally allowed, but regulated so that only small subset of conduct prohibited?



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Criminal Prohibitory vs. Civil Regulatory

- Shorthand test for criminal-prohibitory conduct:
 - Whether the conduct violates state public or implicates public safety



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Civil Regulatory eggs.

- Taxation of property
- Gambling regulation
- State hunting a fishing regulations
- Local land use regulations
- Building codes
- Workers compensation
- Marriage & Family Relations
- Vehicle regulation



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Criminal Prohibitory acts.

- Murder
- Rape
- Assault
- Robbery
- Etc.



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Tribal Justice Systems

- Currently 19 tribal courts in California
- Over 300 tribal courts across the country



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Tribal Justice systems

- Key component of tribal sovereignty and self-government
- Better reflect the values and serve needs of tribal communities



Tribal Justice systems

- Can be established variety of ways –
 - Tribal constitution
 - Tribal code or ordinance
 - Tribal tradition (not necessarily written)



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Tribal Justice Systems

- May not look or operate like a state or federal court
- Judges may not be “attorney” trained
- Need not have same right to appointed counsel, jury, etc.



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Differences in Justice Paradigms*

* adapted from *Indigenous Justice Systems and Tribal Society*, by Ada Pecos Melton

American Indian

- Holistic
- Oral customary law
- Spiritual realm invoked in ceremonies and prayer
- Focus on restoring community & relationships

Anglo-American

- Vertical
- Written statutes, etc
- Separation of church and state
- Focus on punishment and retribution

Working with Tribal Courts

- Tribes not “states” for full faith & credit purposes
- Federal law requires FF & C in:
 - Indian Child Welfare Act
 - Violence Against Women Act
 - Child Support Enforcement

UCCJEA

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Working with Tribal Courts

- Outside mandated FF & C areas tribal orders entitled to “comity”
- Can enforce through California CCP 1713 et seq. Uniform Foreign Money Judgments Recognition Act



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Working with Tribal Courts

- How to address concurrent jurisdiction?
 - When to abstain
 - When to transfer
 - When to share jurisdiction



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Family violence cases

- See family violence scenario

