

Jurisdiction in Indian Country
(August 15, 2018)

I. Three separate types of sovereigns

- A. Native Nations (aboriginal nations which predate the United States)
- B. United States: federal government (1789 U.S. Constitution)
- C. States (1789 U.S. Constitution)

II. Geographical area

- A. Reserved homelands (“Reservations”) may include the following:
 - 1. Tribal lands held in trust by U.S.
 - 2. Tribal lands owned in fee simple
 - 3. Tribal member allotments held in trust by U.S.
 - 4. Tribal member lands owned in fee simple
 - 5. Land owned by non-Indians within Reservation boundaries
- B. Traditional homelands no longer part of the Reservation:
 - 1. Treaty-reserved hunting, fishing and gathering rights for tribal members on aboriginal homelands no longer part of the Reservation.
 - 2. Tribal member allotments that have never gone out of trust (e.g., Colville allotments located on the former “north half” of the Reservation).

III. Persons

- A. Tribal members
- B. Non-member Indians (members of other Tribes)
- C. Non-Indians (U.S. citizens)
- D. Non-U.S. citizens (Eastern Band of Cherokee v. Torres)

IV. Subject Matter

- A. Criminal cases
 - 1. General Crimes Act: authorized federal court jurisdiction for *non-Indian* crimes against *Indians* in Indian Country.
 - 2. Major Crimes Act: authorized federal court jurisdiction for major *Indian* crimes against *Indians* in Indian Country.
 - 3. Misdemeanors: “lesser” criminal acts
- B. Civil cases (e.g., hunting, fishing, contracts, tax, environment, zoning, marriage, divorce, probate, tribal membership, adoptions)

V. Jurisdiction in Indian Country

A. U.S. treaties, executive orders, agreements with Native Nations

B. Federal law

1. Annual appropriations acts and riders (e.g., 1871 appropriations rider ending treaty-making with Indian Tribes)
2. General Crimes Act (1817)
3. Major Crimes Act (1885) Tribal courts have concurrent jurisdiction with federal courts.
4. Indian Reorganization Act (1934) [tribal court: 6 months + \$500]
5. P.L. 83-280 (1953) [Created some state jurisdiction in Indian Country without Tribal consent.]
6. Termination Acts of Congress
7. Restoration Acts of Congress
8. Indian Civil Rights Act (1968)
 - Reaffirmed Tribal powers of self-government.
 - Required Tribal courts to provide some, but not all due process rights in the U.S. Constitution.
 - Habeas corpus action allowed in federal court to review the legality of tribal detention.
 - Increased Tribal court sentencing [1 year + \$5,000]
 - Amended P.L. 280 to require Tribal consent + authorized retrocession of P.L. 280 jurisdiction.
9. Indian Child Welfare Act (1978): State courts required to notify child's Tribe during involuntary Indian child custody proceedings originating in state court. Tribe has right to intervene or transfer the proceeding to Tribal court. ICWA established preferences for foster care + adoptive placements.
10. Tribal Law and Order Act (2010) amended Indian Civil Rights Act to extend tribal court jurisdiction to 3 years (9 years max.) *so long as* defendants are provided licensed legal counsel, the tribal court judge is licensed + law trained, tribal criminal laws, rules of evidence and procedure are published + there is an audio or video record of the criminal trial.
11. Violence Against Women Act (2013) authorizes tribal court jurisdiction over ***non-Indians*** who commit domestic/dating violence or violate a protection order on reservation.

C. U.S. Supreme Court decisions

- Worcester v. Georgia (1832) -- states have no jurisdiction in Indian Country.

1. Criminal jurisdiction

- Ex Parte Crow Dog (1883): one Lakota (Crow Dog) killed another (Spotted Tail) on the Brule Sioux Reservation. Dispute was resolved by Lakota custom and tradition. No federal court jurisdiction.
- U.S. v. Kagama (1886): upheld the constitutionality of the Major Crimes Act of 1885. Plenary power of Congress granted by the commerce clause of the constitution.
- Talton v. Mayes (1896): Supreme Court said that the U.S. Constitution, including the Bill of Rights, did **not** apply to Tribes; Native Nations are separate sovereigns, not arms of the U.S. government.
- Oliphant v. Suquamish (1978): Native Nations do not have criminal jurisdiction over non-Indians. ("inconsistent with their status").
- Duro v. Reina (1990): Native Nations do not have criminal jurisdiction over non-member Indians. [This decision was reversed by the "Duro fix" -- Congress amended ICRA definition of "powers of self-government" to add, "the **inherent** power of Indian Tribes, hereby **recognized and affirmed**, to exercise criminal jurisdiction over all Indians."]

2. Civil Jurisdiction

- Williams v. Lee (1959) upheld Tribal Court jurisdiction in non-PL 280 states over civil disputes by non-Indians with Indians in Indian Country.
- Mississippi Choctaw v. Holyfield (1989): No state jurisdiction under Indian Child Welfare Act where children are domiciled or reside on reservation.
- U.S. v. Montana (1981): No tribal jurisdiction to regulate hunting and fishing by non-Indians on non-Indian fee land within the reservation. Two exceptions: (1) consent to jurisdiction and (2) Tribes can regulate "conduct which threatens or has some direct effect" on the Tribe's "political integrity, economic security and health or welfare."

- Strate v. A-1 Contractors (1997): Tribes have no jurisdiction over non-Indians in auto accident on state right-of-way through the reservation.
- D. Tribal law and cultural sovereignty
1. Tribal constitutions
 - Coin v. Mowa (Hopi Appellate Court, 1997) Family matters handled in village; other matters handled in Tribal Court.
 2. Tribal codified law
 3. Tribal customary law
 - Apache v. Republic Life Insurance Co. (WR-CV-197-82) Based on Navajo customary law, spouse loses right to insurance benefits in event of divorce.
 - Russell Means v. District Court of the Chinle Judicial District (NN Sup.Ct., 1999) Defendant consented to criminal jurisdiction as "hadane" (in-law).
- E. State law as authorized by federal law (e.g., P.L. 280, Congressional settlement of Tribal land claims with separate jurisdiction provisions)

Chart of Tribal Court criminal jurisdiction over persons on reservation:

Tribal member	YES	Inherent jurisdiction
Non-Member I.	YES	"Duro fix" + U.S. v. Lara
Non-Indian	NO**	Oliphant v. Suquamish

**Domestic violence exceptions in 2013 Violence Against Women Act

Chart of criminal jurisdiction on reservation by three sovereigns:

	Federal	Tribal	State*
Indian v Indian	YES (Major Crimes Act) (General Crimes Act)	YES	NO
Indian v NonInd.	YES (Major Crimes Act)	YES	NO
NonInd. v Indian	YES (Gen'l Crimes Act)	NO**	NO
NonInd. v NonInd.	NO	NO	YES

*States with P.L. 280 criminal jurisdiction have *concurrent* jurisdiction with tribal courts.

**Domestic violence exceptions in 2013 Violence Against Women Act