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Introduction to Indian Law, Tribal Relations and Criminal Jurisdiction in Indian Country

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I. Introduction: Oregon's Nine Sovereign Tribes

Indian tribes and their members are significantly different from other minorities or "interest groups." Tribes are sovereign governments.

A. Oregon Tribes

There are nine federally recognized tribes in Oregon. Each one is different in terms of history, lands, governmental structure, criminal jurisdiction, law enforcement and tribal courts. The nine tribes have tribal lands in at least 15 counties in Oregon. The state has criminal jurisdiction on lands of six of those tribes. Six of the tribes currently have tribal police forces. All nine tribes have tribal courts, with different jurisdiction exercised.

The nine federally recognized tribes in Oregon are:

The Burns Paiute Tribe (Harney County)
The Confederated Tribes of the Coos, Lower Umpqua and Siuslaw (Coos County)
The Coquille Tribe (Coos County)
The Cow Creek Band of Umpqua Indians (Douglas County)
The Confederated Tribes of the Grand Ronde (Yamhill and Polk Counties)
The Klamath Tribes (Klamath County)
The Confederated Tribes of Siletz Indians (Lincoln County)
The Confederated Tribes of the Umatilla Indian Reservation (Umatilla County)
The Confederated Tribes of the Warm Springs Reservation (Jefferson and Wasco Counties)

B. What is Sovereignty?

What does it mean to say that Indian tribes are sovereign governments?

1. Power of self government: "Sovereignty" refers to the "inherent right or power to govern" *Canby, American Indian Law*.

Aspects of the power of self-government include:

a. The power to tax
b. The power to determine membership in the tribe
c. The power to legislate with respect to tribal affairs
d. The power to adjudicate
   Many Oregon tribes have tribal courts that resolve matters such as domestic, criminal and membership issues
e. The power to exclude from the reservation

2. Sovereign immunity.

At common law, sovereigns are immune from suit. Tribes and tribal agencies are immune from suit, except to suit by the United States. Congress can waive tribal sovereign immunity.

3. Limits on sovereignty

The tribes do not enjoy every aspect of sovereignty. A series of court decisions has described limitations on the ability to exercise power within the reservation. In *Montana v. United States,* 450 U.S. 544 (1981) the Supreme court described such tribal powers as encompassing only the inherent power to protect self government, and to control internal relations. Tribes can regulate activities of non-members who enter consensual relations with the tribe or its members and can regulate conduct of non-Indians that threatens or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." Id. at 565-66.

As examples, the Supreme Court has held that tribes did not have power to exercise criminal jurisdiction over non-members on the reservation. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978). The Supreme Court has held that tribal courts do not have jurisdiction over an accident on a state highway crossing a reservation. *Strate v. A-1 Contractors,* 117 S Ct. 1404 (1997).

II. History of Oregon Tribes and Federal Indian policy

To have some understanding of the legal status of Oregon tribes and issues of concern to them today, it is essential to have some understanding of their history and the history of federal Indian policies that have affected them. Anglo-American culture tends to focus on the present and the immediate issue at hand; tribal cultures tend to have a longer view of the relevant historical context. For instance, treaty signing 150 years ago may be to us ancient history and seem unrelated to present day realities; to a tribal representative it may be "like yesterday."

A. Pre-contact/ Traditional society

During the years before contact with Europeans, over 100 Indian bands and tribes lived in what is now called Oregon. These tribes had diverse forms of government and leadership. Many had established seasonal patterns of movement to take advantage of hunting, fishing and gathering opportunities, often with permanent winter village sites. They maintained trade networks, trading with their immediate neighbors and also at places such as Celilo, where there were large gatherings of many tribes. The tribes and bands of what is now Oregon had a rich diversity of language, at least 21 languages and 40 dialects, each with its own vocabulary and grammar.

B. Contact

1. Exploration

    a. British Spanish and American ships (1770's - 1780's)
    b. Lewis and Clark in Oregon 1805-06
    c. Hudson's Bay company - early 1800's

2. Settlement (beginning around 1830's)

    a. Missionaries discouraged use of native languages and promoted farming over the traditional hunting/fishing and gathering.

    b. Epidemic.

    Indians were not immune to diseases brought by settlers and such as smallpox and measles and suffered terrible epidemics.

    "The death toll in western Oregon was incredibly high. Estimates of the loss of life range from 75 to 90 percent. Whole villages and tribes were wiped out.

It is impossible to calculate the extent of destruction caused by these epidemics. Depopulated villages were abandoned and survivors were forced to confederate into new political groups. Indian societies were thus faced with drastic changes just at the time they also had to deal with the question of Euro-american settlement." Zucker, Hummel and Hogfoss, Oregon Indians, p. 60.

3. Indian wars 1840's - 1870's

III. Federal Indian Policy

A. Treaties and Agreements

1. During the early years of settlement, Britain, France and Spain recognized various tribal governments as foreign sovereign nations.

2. The Treaty Era

   Between 1778 and 1871, the continental congress, the congress of the Articles of Confederation and the Congress of the United States entered into more than 380 treaties with tribes. *Getches, Wilkinson and Willimans, Federal Indian Law 83 (3rd ed. 1993).*

   In Oregon, treaties were negotiated from 1851 to 1868, some by Joel Palmer, superintendent of Indian Affairs. In return for promises of protection, services and other promises (such as, for example, the right to continue fishing in their usual and accustomed places), tribes ceded significant areas of their homelands.

   Far from being mere policy or even legislation, under the federal constitution these treaties are "the supreme law of the land" and continue to bind the United States and form the basis for much of the legal relation between tribes, states, and the federal government.

B. The Marshall cases.

In three early United States Supreme Court cases, Chief Justice Marshall laid out basic principles regarding the relation between tribes, the federal government and the states, *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), *Worcester v. Georgia* (1832). The cases established that American Indian tribes are a special kind of independent sovereign, "domestic dependent nations" that are neither like states nor foreign nations.

The cases further held that the federal government has exclusive power concerning relations with the tribes, the relationship being like that of a "ward to his guardian." The federal government accordingly has a trust obligation to tribes.

However, tribes maintained preexisting power to govern internal affairs. The Supreme Court described the Cherokee nation as "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Worcester v. Georgia,* 31 U.S. (6 Pet.) 15, 561.

C. Removal/ Trail of Tears

1. The federal government developed a policy of "removal", to move all tribes east of the Mississippi River to the Indian Territory in what is now Oklahoma. The general policy was to restrict tribes to specific reservations. The Cherokee were forcibly marched on a journey they call the Trail of Tears. Oregon had its own "trail of tears" in which Indians from Southwestern Oregon were forcibly marched to coastal reservations.

2. The consequence of this policy was that many Indians were displaced from their original homelands. Traditional cultural groups were split apart. Others were combined with tribes of different traditions, some even with their traditional enemies. For example, the Paiutes were split among multiple reservations.

   Most of the federally recognized tribes in Oregon today are "confederations." For example, the Confederated Tribes of the Warm Springs Reservation is a confederation of the Warm Springs, Wasco and Paiute tribes.

3. In 1871, Congress ended the treaty-making power. 25 U.S. C. § 71. After that, most relations with tribes were set by executive order or statute.

D. Allotment and Assimilation

1. General Allotment (Dawes) Act, 1887

   In the 1870s and 1880s, the dominant federal policy changed from one focused on reservations to one based on the idea that Indians should be "assimilated" into mainstream culture. One method used to achieve this goal was to "allot" tribally-owned lands to individual Indians, with the idea that they would cultivate the land, become farmers and abandon tribal ways. Remaining "excess" land would be sold to non-Indians. Much of the land allotted to individual tribal members was eventually lost to non-Indians, much due to fraud and tax foreclosure sales.

On the Umatilla Reservation in Oregon, this acquisition by non-Indians of parcels of land within the boundaries of the reservation resulted in what is today described as a "checkerboard" pattern of Indian and non-Indian ownership on the reservation.

2. *Lone Wolf v. Hitchcock*, 1903

   This case established the right of Congress unilaterally to abrogate treaties between the federal government and Indian tribes. The decision means that the Congress had plenary power over Indian affairs.

3. Extension of US citizenship, 1924

E. Indian Reorganization Act, 1934. 25 USC § 461

In 1928, a report known as the "Merriam report" documented the failure of the allotment policy and stimulated a new change in federal Indian policy. The Indian Reorganization Act represented a decision to support the development of tribal governments, and to protect the land base of the tribes, rather than to assimilate tribes out of existence. The IRA encouraged the development of tribal governments (as long as they were based on the American system.) The Act did not provide support for traditional tribal methods of governance. The Act also provided for tribal corporations for economic development. Two Oregon tribes, the Grand Ronde and Warm Springs, accepted the IRA.

F. The Termination Era 1953-1968

1. In the 1950s, federal Indian policy reversed again with a return to the earlier "assimilation" policy. This time, Congress sought to "terminate" the existence of the tribes. Douglas Mckay, Secretary of the Interior and former Governor of Oregon, used Oregon as a "showcase" for the termination policy. In 1954, the Klamath Tribe was terminated, 25 US C § 564, and a separate statute terminated every tribe and band west of the Cascades, 25 US C § 691-708. These termination statutes ended the tribes' special relationship with the federal government, including access to federal services, and converted tribal lands to private ownership. Terminated tribes thus generally lost their economic base, and their members often disbersed.

2. Public Law 280.

   In 1953, Congress extended state criminal and civil jurisdiction with respect to Indian country in certain states, including Oregon. Under PL 280, the state gained jurisdiction in Indian reservations except the Warm Springs reservation.

The Supreme Court has made it clear that "civil" jurisdiction under Public Law 280 does not include what may be called general "regulatory jurisdiction," but rather only to adjudicatory jurisdiction such as probate, marriage and divorce. *Bryan v. Itasca County* 426 U.S. 373 (1976).

G. Restoration and Self-Determination

In the 1970's, the pendulum began to swing again.

1. Indian Self-Determination and Education Assistance Act. 25 USC § 450.

   This law authorized tribes to enter contracts to assume responsibility for administration of federal Indian programs.

2. Restoration

   Beginning with the Confederated Tribes of the Siletz in 1977, the second restored tribe in the United States, terminated Oregon tribes began to secure federal legislation to restore them to federal status. The terms of restoration depend on the specific restoration legislation.

   Other Oregon tribes restored:

   Cow Creek Band of the Umpqua Tribe, 1982
   Confederated Tribes of the Grand Ronde, 1983
   Confederated Tribes of Coos, Lower Umpqua and Siuslaw, 1984
   The Klamath Tribe, 1986
   The Coquille Indian Tribe, 1989

III. Criminal Jurisdiction

A. General

Criminal jurisdiction in Indian country involves a complex relationship between three sovereigns, federal, state and tribal governments. This complex relationship evolves from tribal inherent sovereignty over tribal lands, the special relationship of the federal government to tribes, and the plenary power of Congress over Indian affairs.

Which sovereign or sovereigns have jurisdiction with respect to a particular crime depends on many factors – the crime, where the crime took place, who is the perpetrator, who is the victim, whether it is a victimless crime, whether the tribe is subject to "PL 280".

1. The state has jurisdiction as to crimes that take place off-tribal lands, regardless whether the victim or perpetrator are Indian, the same as it has

jurisdiction over other crimes outside Indian country. *Hagen v. Utah*, 510 U.S. 399 (1994), rehearing denied, 511 U.S. 1047 (1994).

2. The state has jurisdiction over crimes that take place on Indian lands if both the victim and perpetrator are non-Indian -- under the "McBratney-Draper rule." *United States v. McBratney*, 104 U.S. 621 (1881), *Draper v. United States*, 164 U.S. 240 (1896).

3. The state has jurisdiction over victimless crimes committed by non-Indians.

4. On Indian lands, the state has not generally had jurisdiction over crimes committed by or against Indians, except where PL 280 applies. Crimes by Indians are punished by the federal government, or the tribe.

5. *Castro-Huerta v. Oklahoma (2022).* Prior to ruling, belief that there was no state jurisdiction over offenses committed by or against Indians in Indian country. State jurisdiction only existed if Non-Indian vs Non-Indian. *Now*, if Non-Indian involved, potentially State and Federal concurrent jurisdiction. If domestic violence crime, may also be Tribal jurisdiction.

B. Public Law 280 and Jurisdiction in Indian Country

1. Public Law 280

In 1953, Public Law 280 extended state jurisdiction to Indian Country in Oregon, except the Warm Springs Reservation, "over offenses committed by or against Indians" 18 U.S.C. § 1162.

"State criminal laws...shall have the same force and effect within such Indian country as they have elsewhere within the state."

Therefore, county sheriffs, district attorneys, and state courts have jurisdiction with respect to crimes on those lands, whether they involve an Indian or not. This is true regardless of the fact that tribal trust lands may be exempt from property taxes.

2. "Indian country" is defined in 18 U.S.C. § 1151 to include land within Indian reservations, "dependent Indian communities", and Indian allotments to which Indian title has not been extinguished. Therefore "Indian country" covered by Public Law 280 may also extend to land that is not reservation land of a particular tribe, such as Celilo Village, which is held in trust for the benefit of three tribes. *See State v. Jim*, 178 Or App 553 (2002) (Celilo Village not part of the "Warm Springs Reservation" within the meaning of Public Law 280).

3. Exceptions to Public Law 280

a. Retrocession

In addition to the exclusion of the Warm Springs Reservation, Public Law 280 does not apply to the Confederated Tribes of the Umatilla Indian Reservation, and the Burns-Paiute Tribe, who both obtained exemptions from Public Law 280 through "retrocession" to return criminal jurisdiction from the state to the federal government. Retrocession requires the agreement of the Governor, and acceptance by the federal government.

Cow Creek Band of Umpqua Tribe of Indians is also excepted.

b. Therefore the state has jurisdiction over crimes on "Indian country" lands of the following tribes:

- The Confederated Tribes of the Siletz Reservation
- Confederated Tribes of the Grand Ronde Community
- Confederated Tribes of Coos, Lower Umpqua and Siuslaw
- The Klamath Tribe
- The Coquille Indian Tribe

4. Public Law 280 did not eliminate pre-existing jurisdiction – so it did not deprive tribes of concurrent jurisdiction over crimes involving Indians.

C. Summary of Analysis to Determine Jurisdiction

Therefore, in order to determine who has jurisdiction with respect to a crime involving Indians or Indian lands, one should ask the following questions:

1. Where did the crime take place?

If the crime took place off-reservation, the jurisdictional analysis is the same as for other crimes.

2. If the crime took place in "Indian country," are the lands subject to Public Law 280?

If so, then the jurisdictional analysis is the same as for other crimes.

3. Who was the offender and who was the victim?

If they are both non-Indian, the state has jurisdiction.

If it is a victimless crime committed by a non-Indian, then the state has jurisdiction.

If the crime took place in Indian country not subject to Public Law 280, and either the offender or victim is Indian, then the state does not have jurisdiction.

D. Interaction of State law enforcement with tribal law enforcement systems

1. Each Tribe is different.

How this works will depend on the tribe, whether PL 280 applies, what tribal court system the tribe has, what police resources the tribe has, what agreements it may have in place with other governments, etc.

2. Tribal courts

Many Oregon tribal courts are rapidly evolving and expanding jurisdiction. Tribes generally have the power to create tribal courts and to assert criminal jurisdiction over Indian offenders (whatever the status of the victim). Tribal courts are established separately according to tribal law by each tribe.

Because tribes are separate sovereigns, tribal punishment for the same crime as prosecuted by the state or federal government is not double jeopardy.

State and local law enforcement may agree to refer Indian defendants to tribal court.

3. SB 412

Provides state peace officer authority to tribal police meeting certain requirements, including training and insurance.

As of today, all of the Oregon tribal police officers have been certified under SB 412.

IV. Government to Government Relations

A. Executive Order 96-30 (1996) "State/Tribal Government-to-Government Relations"

1. *"There are nine federally recognized Indian tribal governments located in the State of Oregon. These Indian tribes were in existence prior to the formation of the United States of America, and thus retain a unique legal status. The*

importance of recognizing the relationship that exists between the tribes and state government can not be underestimated."

2. Purpose: to establish a process which can assist in resolving potential conflicts, maximize key inter-governmental relations and enhance an exchange of ideas and resources for the greater good of all of Oregon's citizens, whether tribal members or not.

3. Requirements for state agencies include:

    a. Development of departmental statement recognizing tribal interest in state policies affecting tribal interests

    b. Identification of agency "key contacts" responsible for coordination with tribal governments (Directory of key contacts are available from the Governor's Office, will be available December 2001.)

    c. Annual meeting between the Governor, tribal leaders and representatives of state and the nine federally recognized Oregon tribes

4. The Executive Order encourages government to government agreements

B. ORS 182.162-166 (SB 770 2001)

1. Purpose: to promote positive government to government relations between the state and tribes

2. Requirements of state agencies include:

    a. Written policy regarding tribal relations

    b. Identification of state agency programs affecting tribes and personnel who deal with tribes

    c. Inclusion of tribes in development and implementation of programs that affect tribes

    d. Annual training regarding legal status of tribes, legal rights of tribal members, and issues of concern to tribes

    e. Written report on implementation

2. Annual meeting convened by the Governor.

C. Some Tips on working with Tribes

1. Empathy and patience
2. Respect
3. Learn about the tribe's historical, cultural, political and fiscal realities
4. Listen.
5. Visit.
6. Understand the tribe may have limited resources.
7. Work to develop trust
8. Understand each tribe is unique
9. Don't give up
   Don't expect to do things the usual way
   Be prepared to take time
   Be flexible and creative

D. Resources

Legislative Commission on Indian Services
Tribal websites

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