Jurisdiction in Indian Country

compiled for the State-Tribal Relations Committee (STRC), Sept. 2023, by Casey Pallister, STRC staff

CIVIL JURISDICTION IN INDIAN COUNTRY[1]

Jurisdiction is the general authority of a government to exercise power over persons or property. Civil jurisdiction is divided between regulatory/legislative and adjudicatory authority. Civil regulatory/legislative authority is a government's general authority to regulate persons or property through zoning, licensing, taxation, traffic laws, and other methods, whereas civil adjudicatory authority concerns the power of a court to decide cases and to impose order.

In 1832, the U.S. Supreme Court answered the question of jurisdiction in Indian country thus: state laws have no force without congressional approval.[2] This test was simple and entirely geographically based.

Over time, however, the U.S. Supreme Court gradually retreated from this stance, particularly for cases involving non-Indians. The Court now generally relies on parallel tests to determine which state laws can be enforced in Indian country without congressional consent: **the infringement test** and **the federal preemption test.** Additionally, state laws must be viewed against a backdrop of tribal sovereignty, a tribe's inherent right to be self-governing. These tests and the factors and analysis required to apply them are complex, confusing, and sometimes inconsistently considered by various courts. Thus, determining who may exercise civil jurisdiction in Indian country is often difficult.

Does a tribe have exclusive civil jurisdiction over all people and land within reservation boundaries?

No. The U.S. Supreme Court has increasingly limited tribal authority over non-Indians and land owned by non-Indians within Indian country. The Court has held that, generally, a tribe's inherent sovereign powers do not extend to the activities of nonmembers except for:

- the actions of nonmembers in consensual relations with the tribe or its members, such as commercial dealings, contracts, leases, and other arrangements;[3] or
- the conduct of nonmembers on fee land within a reservation when the conduct threatens or directly affects the tribe's political integrity, economic security, or health and welfare.[4]

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[1] *Tribal Nations in Montana: A Handbook for Legislators* (2020) pp. 58-60.

[2] *Worcester v. Georgia*, U.S. 515, 561 (1832).

[3] *Morris v. Hitchcock*, 194 U.S. 384 (1904).

[4] *Montana v. United States*, 450 U.S. 544, 565 (1981). However, see *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), in which a divided Court ruled that the Yakima Nation's zoning of non-Indian owned fee land within a substantially checkerboarded area of the reservation is impermissible, yet tribal zoning was upheld when there was little non-Indian ownership and when lands were important to the tribe's culture and natural resources.

A state may regulate non-Indians and lands held by non-Indians on reservations unless:

- federal law or the federal regulatory scheme, including tribal regulations, prohibits it; or
- the exercise of state jurisdiction, in the absence of federal law, interferes with the right of the tribe to govern itself.[5]

How have the courts defined the civil adjudicatory authority of Indian tribes?

In Indian law cases, one must first determine which court (state or tribal) has the authority to decide the matter. Tribes have exclusive civil adjudicatory authority under two circumstances:

- when a plaintiff brings a claim against a tribal member defendant for conduct occurring within the tribe's reservation boundaries; and
- when a tribal member plaintiff brings a claim against an Indian defendant for conduct occurring within the tribe's reservation boundaries.

Although both the U.S. and the Montana Supreme Courts previously stated that civil jurisdiction over the activities of non-Indians on reservations presumptively lies in tribal court unless limited by Congress,[6] more recent U.S. Supreme Court cases imposed additional limitations on the civil adjudicatory authority of tribes. Under these cases, tribes generally do not have civil adjudicative authority over non-Indians, unless:

- the non-Indian enters consensual relations with the tribe or its members; or
- the non-Indian's conduct within its reservation threatens or directly affects the tribe's political integrity, economic security, or health and welfare.

Notably, the U.S. Supreme Court narrowly construes these exceptions and suggests that land ownership may no longer be a dispositive element in determining the necessity of an exercise of tribal civil adjudicatory authority over non-Indians.

What is the infringement test, and how is it applied?

In 1959, the U.S. Supreme Court modified its earlier absolute test and ruled that without congressional authority, a state may not infringe "on the right of reservation Indians to make their own laws and be ruled by them."[7] This principle, commonly known as the infringement test, protects the inherent right of Indian tribes to be self-governing and applies in subject areas where federal legislation is absent.

[5] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).
[6] *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Milbank Mutual Insurance Co. v. Eagleman*, 218 Mont. 58, 705 P.2d 1117, 1120 (1985).
[7] *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Therefore, if Congress is silent on an issue, the question of which government has jurisdiction will be determined by focusing on the inherent sovereign authority retained by the tribes and on whether state action has infringed on that authority.

What constitutes federal preemption, and how is it applied?

When Congress passes legislation regulating a matter over which it has jurisdiction, it preempts state law under the Supremacy Clause of the U.S. Constitution. If a state enacts legislation to regulate a matter that is already heavily regulated by the federal government, the court will evaluate or "balance" the interests of the state against the federal and tribal interests and make a "particularized inquiry into the nature of the state, federal and tribal interests at stake."[8]

Because the test depends on the facts and circumstances of a case, results can vary from case to case, from state to state, and from issue to issue.[9]

May a non-Indian avoid tribal court by taking a civil complaint directly to federal court?

No. Although the question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of the tribal court is a "federal question," courts have consistently held that a non-Indian must first exhaust tribal court remedies.[10] This requirement is often referred to as the **exhaustion requirement.** In other words, when the tribal court determines it has the authority to adjudicate a civil case, the defendant must wait until the completion of all tribal court proceedings and appeals before challenging the tribal court's civil adjudicative authority in federal court. Federal court will then review only the tribal court's determination of jurisdiction. Should the federal court determine the tribal court did not have authority to adjudicate the case, the civil case would then have to be raised again in either federal or state court, depending on the circumstances. Courts believe this exhaustion policy supports Congress's

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[8] *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). Montana has applied its own test that appears to combine and require application of both the infringement and preemption tests. The Montana test used to determine whether the state has jurisdiction over reservation Indians requires a court to determine whether (1) the assertion of subject matter jurisdiction by Montana's administrative and judicial tribunals is preempted by federal law; and (2) the assertion of subject matter jurisdiction by Montana's administrative and judicial tribunals would unlawfully infringe on [a tribe's] right to make its own laws and be ruled by them. See *First, Jr. State v. ex rel. LaRoche*, 247 Mont. 465, 470, 808 P.2d 467 (1991).

[9] The Court can, and has, changed its mind on issues. In 1988, Montana's tax on coal produced on the Crow Reservation was invalidated because, among other things, the Court believed that a state would interfere with the tribe's taxing authority and, if taxes were imposed by both governments, would interfere with federal policies supporting tribal self-sufficiency and economic development. See *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988). In 1989, however, the Court allowed New Mexico to impose a severance tax on oil and gas although the tribe was already taxing the same resource production. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court stated that no proof existed that double taxation rendered the resource unmarketable, nor was federal regulation so comprehensive as to preempt the state's tax. See also *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), cert. denied, 112 S. Ct. 204 (1991), in which the Court ruled that sustaining a tribal tax that creates double taxation may be unfair but legal.

[10] *National Farmers Union Insurance Co. v. Crow Tribe of Indians,* 471 U.S. 856-857 (1985).

commitment to tribal self-determination and encourages tribal courts to explain to parties the precise basis for accepting jurisdiction.

The U.S. Supreme Court defined four exceptions to the exhaustion requirement (application of one of these exceptions means that the federal court will review the tribal court's determination of jurisdiction prior to the tribal court's adjudication rather than after):

- when the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;
- when the tribal action patently violates express jurisdictional prohibitions;
- when exhaustion is futile because of the lack of an adequate opportunity to challenge the court's jurisdiction; or
- when no federal grant authorizes tribal governance of nonmembers' conduct on non-Indian owned land.

CRIMINAL JURISDICTION IN INDIAN COUNTRY[11]

Every government exercises a power, called criminal jurisdiction, to prohibit certain behavior within its borders by enacting criminal laws and punishing those who violate them. Like civil jurisdiction, criminal jurisdiction in Indian country is complex and depends on several factors, including the location of an alleged crime, the identity of the persons involved, and the type of crime alleged.

What federal statutes impact criminal jurisdiction in Indian country?

The following federal statutes, discussed further in this section, may impact criminal jurisdiction in Indian country:

- the Indian Civil Rights Act
- the General Crimes Act
- the Assimilative Crimes Act
- the Major Crimes Act
- Public Law 83-280
- the Tribal Law and Order Act
- the Violence Against Women Act

What powers does an Indian tribe generally retain over criminal jurisdiction in Indian country?

As sovereign nations, tribes retain the power to exercise jurisdiction over crimes committed by an Indian in Indian country, subject to limits imposed by tribal law or congressional action.

[11] *Tribal Nations in Montana: A Handbook for Legislators* (2020) pp. 61-62.

Does a tribe have criminal jurisdiction over a non-Indian committing a crime in Indian country?

Generally, no. In 1978, the U.S. Supreme Court ruled that, absent congressional authority, Indian tribes may not exercise criminal jurisdiction over crimes committed by non-Indians in Indian country.[12] Therefore, jurisdiction over crimes committed by non-Indians resides either with the federal or state government, depending on the type of crime committed and the identity of the victim. On the Flathead Reservation, as a result of Public Law 83-280 (see below), the state exercises jurisdiction over crimes committed by non-Indians and, in consultation with the CSKT, jurisdiction over certain felony crimes committed by Indians.

However, there are exceptions. As discussed below, a tribe may choose to exercise special domestic violence criminal jurisdiction over certain non-Indian perpetrators pursuant to the provisions of the Violence Against Women Act reauthorization of 2013.

Furthermore, tribes retain the power to exclude, or banish, non-Indians from Indian country if no federal law grants the non-Indian the right to be there. Notably, if a rightfully excluded non-Indian refuses to stay out of Indian country, the tribe must rely on the federal government to enforce the banishment based on federal trespass law.

Does a tribe have criminal jurisdiction over nonmember Indians committing a crime in Indian country?

Generally, yes. In response to a 1990 U.S. Supreme Court ruling, Congress amended the Indian Civil Rights Act (ICRA) to expressly recognize the inherent powers of a tribe to exercise criminal jurisdiction over *all* Indians, whether or not they are members.[13] The Court subsequently upheld the amendment.[14]

Does the Bill of Rights of the U.S. Constitution apply to the Indian tribes?

No. Indian tribes predate the U.S. Constitution and do not derive their authority from it. They are not subject to the constitutional limitations that the Fifth Amendment places on the federal government. Tribes are not considered states and are not subject to the 14th Amendment's restrictions on state action. Furthermore, tribes are not constrained by the other provisions of the Bill of Rights.

In 1968, Congress passed the ICRA, which requires that tribal governments provide many of the same rights as the U.S. Constitution's Bill of Rights, including the right to due process. The ICRA does not, however, include all of the rights provided by the Bill of Rights. For example, the ICRA does not include a mandatory right to counsel provided by the tribe for an indigent defendant.[15]

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[12] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
[13] *Duro v. Reina*, 495 U.S. 676 (1990).
[14] *U.S. v. Lara*, 541 U.S. 193 (2004).
[15] Notably, in *U.S. v. Bryant*, 579 U.S., 136 S.Ct. 1954, 1965 (2016), such uncounseled tribal court convictions were upheld as nonviolative of the Sixth Amendment right to counsel when used in subsequent proceedings to prove

Notwithstanding the ICRA's limitation on tribal governments, individual Indians have the same civil rights, and the same recourse to federal courts, as non-Indian citizens.

Does a criminal defendant's constitutional right against double jeopardy protect the defendant from prosecution by both an Indian tribe and the federal government?

No. Because the source of power to punish offenders is an inherent part of tribal sovereignty, rather than a grant of federal power, a criminal defendant's constitutional right against double jeopardy does not foreclose prosecution in both federal and tribal court.[16]

AT A GLANCE: FEDERAL, STATE, AND TRIBAL JURISDICTION IN INDIAN COUNTRY[17]

Identity of Perpetrator	**Identity of Victim**	**Major Crimes as Defined by the Major Crimes Act**	**All Other Crimes**
Indian	Indian	Federal* and Tribal	Tribal
Indian	Non-Indian	Federal* and Tribal	Federal* and Tribal
Non-Indian**	Indian	Federal* (pursuant to the General Crimes Act because the Major Crimes Act applies only to Indian defendants)	Federal*
Non-Indian	Non-Indian	State	State
Indian	Victimless/Consensual	N/A	Federal*** and Tribal
Non-Indian	Victimless/Consensual	N/A	State

* Under Public Law 83-280, states may assume federal jurisdiction within Indian country. In Montana, the CSKT consented to P.L. 280 jurisdiction in 1963. The CSKT have since reassumed exclusive jurisdiction over misdemeanor crimes committed by Indians and concurrent state-tribal jurisdiction over felony crimes committed by Indians. Tribal governments for the other reservations in Montana never took the steps to consent to P.L. 280.

** The Violence Against Women Act allows Indian tribes the option to assume federal jurisdiction over non-Indian perpetrators for specific crimes (domestic violence, dating violence, and criminal violations of protective orders). However, in order to exercise such additional authority, Indian tribes must provide certain procedural guarantees.

*** *See United States v. Smith,* 925 F.3d 410 (9th Cir. 2019) (following the 8th Cir.), cert. denied, 140 S.Ct. 407 (2019).

elements of recidivist statutes or to enhance sentencing, as long as they were ICRA-compliant and thereby valid when entered.

[16] *U.S. v. Wheeler*, 435 U.S. 313 (1978).

[17] *Tribal Nations in Montana: A Handbook for Legislators* (2020) p. 68.

STATE-TRIBAL LAW ENFORCEMENT AGREEMENTS IN MONTANA[18]

Under the authority of the State-Tribal Cooperative Agreements Act, 18-11-101, et seq., MCA, the state entered into enforcement agreements with three tribal governments in Montana that expand state and local law enforcement agencies' authority to enforce laws within reservation boundaries. The details of each agreement are specific to negotiations with the particular tribe.

The Blackfeet agreement, signed in 2004, is limited to allowing Montana Highway Patrol officers to enforce traffic laws on roads within that reservation.

The Confederated Salish and Kootenai Tribes have a broader agreement with the state, Flathead, Missoula, and Sanders counties, and the municipalities of Hot Springs, Ronan, and St. Ignatius that allows the nearest officer, regardless of whether an alleged crime took place on or off tribal lands, to respond when serious circumstances do not first allow for the assessment of whether the persons involved are Indian or not. The agreement also allows all officers in these jurisdictions to issue citations to Indians and non-Indians for violations of traffic laws and laws regarding minors in possessions of alcohol. First signed in 1994, officials most recently renewed this agreement in 2015.

The Fort Peck Executive Board has the broadest agreement, signed in 2000. It cross-deputizes officers from the tribe, Wolf Point, Poplar, Roosevelt County, and the Montana Highway Patrol to cite and arrest Indians and non-Indians within the reservation's boundaries.

[18] STRC Report, "Addressing an Epidemic: Missing and Murdered Indian Women" (Sept. 2018) pp.9-10.