Introduction to Federal Indian Law
What makes a situation a Federal Indian law issue?

- Depends on the players
- Depends on the location

Scenario 1, an Indian is stopped by an APD officer for running a red light in Albuquerque, is it an Indian law issue?

Scenario 2, an Indian is stopped by a City Police Officer for running a red light in Espanola, is it an Indian law issue?
INTRODUCTORY CONCEPTS

A. Federal Indian Law
B. The Issue -- Jurisdiction
C. The Players
   1. Government (23 tribes, feds, NM)
   2. Non-Government (tribal members, NM, NI)
   3. Additional actors (tribally owned businesses, corporations, enterprises)
“Indian Country” is defined by federal law --

A. Reservation

1. Treaty

2. Executive Order

3. Congressional Act

4. DOI SOI declared land to be a reservation

Lands held in trust as an informal reservation.
B. Allotments

1. Within reservation included within definition of reservation.

2. Outside reservation held in trust by the U.S. for individual Indians. Example, Navajo allotments outside formal Navajo reservation, each one is “Indian country” under the statute.
C. Dependent Indian Community

- Term comes from U.S. v. Sandoval case describing Pueblo land grants. So, the primary example is a parcel of land held in fee by a Pueblo, including non-Indian owned parcels within the boundaries of DIC.
- Trust land is clearly Indian country whether Reservation or DIC.
So what lands give us heartburn?

- Land held in fee by a tribe or tribal member outside of reservation
- Land on which Indians reside but is held in fee by non-Indians
- Land surrounding Indian settlements, whether held by the U.S. or non-Indians.
Main concern in NM

- Navajo checkerboard land. Navajo allotments and trust land is adjacent to private fee land and federal public land.

- Spin the roulette wheel!
D. Pueblo land – Spain and Mexico recognized the right of Pueblos to land. When U.S. acquired New Mexico, the Treaty of Guadalupe obliged it to recognize the title to land held by Pueblos. They were called “land grants” and issued to each Pueblo in fee. U.S has no land ownership interest in the property, and not held in trust.

But, Pueblos cannot sell land grants land without federal approval.
At the time of the Treaty of Guadalupe Hidalgo, Pueblos were in full occupation and possession of their property. They possessed fee simple title to the property they occupied, restricted only in the power to alienate land and subject to Congressional extinguishment.
Today, there are non-Indians who own land fee parcel within some Pueblos. Supreme Court initially found Pueblos were not Indian tribes under federal law and therefore there was not prohibition on non-Indians acquiring land within a Pueblo grant. *U.S. v. Candelaria.*

30 years later, the Court found Pueblos were Indians and said non-Indians should not acquire land within Pueblo grants. *U.S. v. Sandoval*
Pueblo Land Act in 1924

- Congress enacted Pueblo Land Act to resolve the title problems. Act allowed non-Indians to assert adverse possession resulting in parcels in grants being owned by non-Indians. Examples are Espanola and portions of Taos.
Titles were established, and the rights of possession and other rights of use and occupancy were determined. This resulted in some loss of land and water by the Pueblos and dispossession of non-Indians to Pueblo lands. In 1933, the Pueblo Compensation Act compensated the Pueblos for their loss of lands and water and the non-Indians settlers of Pueblo land who could establish their claims under the 1924 Act.
E. Other Interests

1. ROW (highways, interstates, utility lines) U.S. grants ROW by the tribe or individual Indian must consent.

2. Leases held by a non-Indian business. Tribe grants lease and some require BIA approval.
Tribal Sovereignty

- What is tribal sovereignty?
- Where does it come from?
Fundamental concept within Indian law

- Tribes are sovereign governments.
- They possess powers of self-government that pre-existed the formation of the United States.
Tribal Sovereignty is Inherent

This means it exists separately from any delegation by the federal government. Separate from U.S. or the states.

- 1. Tribes are NOT subject to restrictions of the Bill of Rights of the U.S. Constitution.
- 2. However, subject to restrictions in the Indian Civil Rights Act (1968), tribal laws or constitutions.
3. While tribes have inherent sovereignty, the Supreme Court has described tribes as “dependent, domestic nations” to explain the status of tribes in the United States.

This theory is that tribes sought protection of the U.S. by entering into treaties with it and implicitly surrendered the full sovereignty.

Trust relationship – a double edged sword
Tribes Possess Sovereign Immunity

1. Applies in every court, and beyond its own territory.
2. May waive, but waiver must be clearly expressed.
3. Congress may abrogate it to allow suit by states or private parties.
4. Arbitration clause may also waive the immunity, but more likely allows suit to compel arbitration or enforce an arbitration decision.
5. Tribal officials share immunity, but may be sued for prospective relief.

6. But wait! Exception -- 93–638 contracts, tribal employees treated as FEDERAL EMPLOYEES and covered by the Federal Tort Claims Act. This means you have to sue the U.S. for tort claims.
Example 1

- Tribe A signs and performs a contract in Albuquerque, 200 miles for the Reservation. It does not waive its immunity. A dispute begins, and the other party sues the tribe for breach of contract in Bernalillo County District Court.

- Tribe is immune from suit unless it has expressly waived its immunity.
Example 2

- Officer A of San Jose Pueblo, who is employed under a federal 93–638 contract, speeds through an intersection in hot pursuit of an offender, and hits several cars. Who do drivers sue?

- United States in federal court if Officer A acted within the scope of his employment.
Restrictions on Tribal Power

1. Treaty. Some tribes have agreed to limitations on their authority through a provision in treaty.

2. Federal statute. Congress can limit the authority or tribal governments merely by passing a federal law. E.g. Indian Civil Rights Act, the Indian Gaming Regulatory Act.
3. Judicial. “Inconsistent with dependent status”. Created by federal common law through the Supreme Court. It means that when tribes came under the U.S. they implicitly surrendered certain powers.

However in United States v. Lara, Supreme Court held that Congress may in effect overrule the Supreme Court’s decision on the limitations on tribal power due to their “dependent status” and restore inherent tribal authority.
Three Sources of Tribal Authority

1. **Inherent.** We just covered this one.

2. **Treaty.** Treaties are bilateral agreements between a tribe and U.S. entered into before 1871. Navajo Nation and Apache Tribes have ratified treaties, but the Pueblos do not.

3. **Delegation.** Congress has delegated certain types of authority to tribes to regulate non-Indian conduct on tribal lands where tribes might not have authority. CAA and liquor regulations.
What is criminal jurisdiction?
Criminal Jurisdiction

- This area addresses which government (tribe, federal, state) can arrest, search for evidence, and prosecute and punish an offender under its criminal laws.

- Distinction between Indians and non-Indians becomes very important.
In the area of criminal jurisdiction

- Two critical threshold considerations:
  1. The status of offender and victim (Indian or non-Indian).
  2. The type of crime (victim or victimless crimes AND, for victim crimes committed by Indian offenders, major or non-major crime).
3. Within the boundaries of Indian Country, it does not matter the status of land (trust, allotment, fee, state highway or ROW).

- It includes non-Indian owned fee land within Pueblo grants, which could be a 7–Eleven in downtown Espanola or even the Taos plaza!
4. Double Jeopardy. As a tribe is a separate sovereign from the U.S., both may prosecute the same crime without violating double jeopardy. Of course, this assumes that both have jurisdiction.

Example, United States v. Wheeler (1978) tribal member prosecuted by tribe for assault and then the feds for rape.
Federal Jurisdiction

- Tribes originally possessed exclusive jurisdiction over crimes committed by one tribal member against another in Indian country, even when the crime was murder. *Ex parte Crow Dog* (1883).
Constitutional limitations

- Tribal criminal jurisdiction over Indians in Indian country derives from inherent sovereignty so that constitutional limitations on states and the federal government do not apply. *Talton v. Mayes* (1896) (grand jury under Fifth Amendment does not apply to tribal governments).
Three Important Federal Criminal Laws

- Indian Country Crimes Act, 18 USC 1152, extending federal enclave law to interracial crimes in Indian country;

- Major Crimes Act, 18 USC 1153, 3242, punishing Indian offenders for committing felonies in Indian country; and

- Assimilative Crimes Act, 18 USC 13, permitting federal prosecution for state law violations.
Jurisdiction Maze or Crazyquilt

- Rules for criminal jurisdiction can be highly technical
- Raise policy issues regarding the proper role of the three governments in Indian country.
A. Federal Jurisdiction

1. Interracial crimes. Any crime committed by an Indian against a non-Indian and any crime committed by a non-Indian against an Indian.

2. Major crimes. Certain enumerated crimes in federal statute committed by Indian offenders. The federal government has jurisdiction over all Indians who commit such crimes, whether the victim is Indian or non-Indian. Tribe also has jurisdiction to prosecute, no double jeopardy.
Major Crimes Act (1885)

- Murder
- Kidnapping
- Felony Sexual abuse
- Assault with intent to commit murder
- Assault with a dangerous weapon
- Assault resulting in serious bodily injury
- Assault against a person under 16
- Arson
- Robbery
- Manslaughter
- Maiming
- Incest
- Burlary
- Theft
- Felony Child Abuse or Neglect
Tenth Circuit

- United States v. Appawoo, 553 F.2d 1242 (10th Cir. 1977).

- Indian defendant may be sentenced to longer prison term for violation of MCA than non-Indian would for the same crime under state law, because application of MCA is constitutional and not a denial of equal protection.
What doesn’t the fed gov’t have jurisdiction over?

3. Feds have NO jurisdiction over an Indian crime (non-major) committed by an Indian against another Indian or over a non-Indian crime committed by an Indian or non-Indian.

If the tribe prosecutes the Indian for a non-major crime against a non-Indian, the federal government loses jurisdiction over him or her under federal statute.
Indian Country Crimes

4. Indian Country crimes. There are specific federal crimes that apply only in Indian country.

- For example, it is a crime to embezzle money from an Indian gaming facility.
5. Crimes of nationwide applicability. There are certain federal crimes that apply to everyone within the United States, such as gun and drug offenses. The United States may prosecute Indians within Indian country for such crimes, unless there is a treaty or other tribal right protect them from prosecution.
Tribal Jurisdiction over Non-Indians

- In *Oliphant v. Suquamish Indian Tribe* (1978), the Supreme Court held that Indian tribes do not have criminal jurisdiction over non-Indians.
Jurisdiction over Tribal members

B. Tribal Jurisdiction

1. Tribes have no jurisdiction to prosecute non-Indians.
2. They may however, detain them until state or federal law enforcement arrives to arrest the offenders.
3. Tribes may also exclude them from tribal lands within Indian country.
However, VAWA Special Domestic Violence Criminal Jurisdiction

- 2013 reauthorization of the Violence Against Women Act (VAWA) affirmed tribes have inherent power to assert criminal jurisdiction over ALL persons, who commit domestic violence, dating violence, or who violate protection orders in Indian country.

- VAWA provides for interested tribes to voluntarily opt-in and exercise criminal jurisdiction over non-Indians who commit these crimes and harm a native person.
VAWA Jurisdiction

- For a tribe to have jurisdiction, the non-Indian must have “sufficient ties” to the Indian tribe by:
  - (1) Residing in that tribe’s Indian country,
  - (2) Being employed in that tribe’s Indian country, or
  - (3) Being a spouse, intimate partner or dating partner of
    - a. A tribal member, or
    - b. A non-member Indian who resides within that tribe’s Indian country.
- Victim must be an Indian.
Also, SDVCJ requires non-Indian has certain rights and tribes must --

- Guarantee all rights under the Indian Civil Rights Act
- Provide indigent defendant with effective assistance of a licensed defense counsel.
- Ensure judge has sufficient legal training.
- Make all criminal laws, rules of evidence and criminal procedure publically available.
VAWA

- Maintain record of criminal proceedings

- Provide a jury that is a cross-section of the community and cannot exclude non-Indians from the jury pool.

- Provide notice to a non-Indian detained under the act of the right to file habeus corpus petition under the Indian Civil Rights act. A federal court may stay the detention on the request of the non-Indian.
2. Tribes may prosecute non-members the same as members of the tribe.

3. Tribes have exclusive jurisdiction over non-major crimes committed by Indians against Indians and victimless crimes committed by Indians (for example, traffic violations), but has concurrent jurisdiction over Major Crimes committed by Indian with the United States.
4. Under the Indian Civil Rights Act, as amended by the TLOA, tribes can only imprison a defendant for 1 year and/or may fine a defendant a maximum of $5,000 per offense. A tribe may expand its sentencing authority to 3 years and a fine of a maximum of $15,000 per offense, with a maximum combined sentence of 9 years. If a tribe sentences a defendant to a total sentence of over 1 year, the tribe must fulfill the following requirements:
TLOA Requirements

- a. Tribe must provide the right to effective assistance of counsel equal to the U.S. Constitution.
- b. Tribe must provide an indigent a defense attorney licensed in “any jurisdiction” in the U.S.
- c. Tribal judge must be licensed by “any jurisdiction” in the U.S. and have sufficient legal training to preside over criminal cases.
- d. Tribe’s criminal laws, rules of evidence and rules of procedure must be published, and
- e. Tribal court must record the criminal trial.
C. State Jurisdiction

- States have little criminal jurisdiction over crimes in Indian Country. This is why it makes so much difference to New Mexico whether a particular parcel of land is Indian Country.
The Rules

1. The state has *no* jurisdiction over Indians in Indian Country.

2. A state may not arrest an Indian within Indian country including as a result of a hot pursuit from state territory into Indian country. The state must follow the extradition procedure of the tribe.
3. A state may investigate a tribal member on tribal lands for an alleged crime that occurred within state territory. State may also search a tribal member after hot pursuit if the tribe does not have a law prohibiting it.

4. The state has exclusive jurisdiction over crimes committed by a non-Indian against a non-Indian and victimless crimes committed by non-Indians.
D. Cross Deputization Agreements. The tribe, state, or local law enforcement, or federal agencies, reach agreement called a cross deputization or cross commission agreement, which allows each jurisdiction to act as the other in certain circumstances where they lack authority to arrest or cite an offender.
Outside of Indian country, a state has general criminal jurisdiction over all persons including Indians. Within Indian country, however, state jurisdiction is limited to crimes that do not concern tribal interests. State exclusive jurisdiction in Indian country involving non-Indian v. non-Indian, and victimless crimes by non-Indians. No state jurisdiction: Indian v. Indian (Tribal / federal) and non-Indian v. Indian (federal).
Civil Jurisdiction
When we talk civil jurisdiction, we are talking about the power of a sovereign to regulate activity within Indian country and the power of its courts to adjudicate cases arising within Indian country.
Tribal Jurisdiction

- Ability to regulate and adjudicate within territory depends on status of individual and land.

  1. **Authority of Tribal Members.** Essentially unfettered authority except as restricted by tribe’s own laws and Indian Civil Rights Act. Status of land makes no difference as long as within Indian country.
2. Authority Over Non-Members. Major Issue in Indian country. Beginning in mid-80’s Supreme Court began carving out a rule that severely limits authority over non-members. Applies to regulatory and adjudicatory authority of tribe.
Court has held that tribes have no authority over non-members, unless one of two tests is met. This rule comes from the case of *Montana v. United States* and is referred to as the Montana test. The two pronged test is:

a. **Consensual relationship.** Non-member must have entered into some agreement with the tribe or a tribal member such as a lease, contract, paid taxes, fees, commercial business dealings.
Tenth Circuit has followed Supreme Court’s suggestion that there must be a nexus between consensual agreement and the authority exerted by the tribe.
b. If the conduct threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Don’t be fooled this is not a broad prong. The Supreme Court has interpreted this exception to mean those powers necessary to protect tribal self-government or to control tribal internal relations.
Also, in dicta, the Court has suggested that the non-Indian’s conduct must be catastrophic to tribal self-government.
Example

- Non-Indian enters into contract to sell office supplies to a tribal department. Does this mean that the NI consents to tort suit by a tribal member when she crashes her personal car into a tribal member’s house.

- Probably not under the 10th Circuit approach. Tribal member will have to find a separate consensual relationship.
Example

- Nora, non-Indian lives on a parcel of fee land within a Pueblo grant. The Pueblo government decides to enact a tax on all vehicles garaged within its boundaries. They issue Nora an assessment. She sells burritos at the Pueblo Senior Center for the elder meal program.
- Does tribe have jurisdiction to assess the tax?
Tribal Courts

- **a. Full Faith and Credit.** New Mexico courts must give full faith and credit to tribal court decisions.
- **b. Comity.** Tenth Circuit believes that tribal court decisions should not be given full, faith and credit, but only comity.
Specific Rules for Specific Situations

- a. Contract or tort claim by non-Indian against a tribal member. Tribal court NOT state court has jurisdiction. Note, if there is diversity of jurisdiction, federal court has concurrent jurisdiction, but remember exhaustion rule.

- b. Actions under the Indian Civil Rights Act, you must bring in tribal court (even if diversity), except for habeus corpus actions. If being held in tribal detention, you can bring action in federal court.
c. Domestic Relations. Tribes may marry individuals and issue divorce decrees. They may divide marital property, make child custody decisions. UCCJEA and NM treats tribes as states. Tribes that have not adopted the UCCJEA don’t necessarily follow the statutes rules on jurisdiction.

Note. The NM Supreme Court recently held that fee land owned by non-Indians within Pueblo land grants is “the State” for purposes of residency requirements under the UCCJEA.
1. Federal Regulation. In most circumstances the federal government may regulate activities within Indian country. There is a question whether a “generally applicable law” such as the Fair Labor Standards Act applies to Indian tribes and its business entities.
State Authority

- It used to be that states had zero jurisdiction in Indian country. Well, the Supreme Court has expanded the reach of state authority somewhat.
- New Mexico will have authority over an activity UNLESS:
Infringement

1. State may NOT exert authority over an activity in Indian country if the state’s action would infringe on the rights of Indians to make their own laws and be ruled by them. NM courts have created the Chino test to decide whether infringement occurs.
   a. Whether the parties are Indian or non-Indian.
   b. Where the cause of action arose.
   c. The interests to be protected.
Preemption

- State may NOT exert authority over an activity in Indian country if preempted by federal law. Broader in scope than under constitutional law. State law will be preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at state are sufficient to justify the assertion of state authority. Balancing of interests of the three sovereigns.
Specific Situations

- a. No state court jurisdiction over action by non-Indian against tribal member. Non-Indian plaintiff must file in tribal court or federal court, not state court.
- b. State court jurisdiction over action by Indian against non-Indian. An Indian plaintiff can file an action against the non-Indian in state court.
- c. Jurisdiction over action by non-Indian against non-Indian.
Thank you!