

**Ninth National Indian Nations  
Justice for Victims of Crime Conference**

Palm Springs, California  
December 2004

**JURISDICTION IN INDIAN COUNTRY**

by

James W. Zion

This workshop is designed to help you understand what “jurisdiction” means and how it applies in “Indian Country.” The workshop is for the benefit of individuals who work in tribal programs who do not have training in law, so this paper attempts to explain the law of jurisdiction in plain language, rather than lawyer legalisms. Terms that people should know, and their definitions, are in **bold** type. The presentation and this paper will address:

1. The history and definition of the term “Indian Country;”
2. The kinds of jurisdiction—territorial, subject matter, personal, and status;
3. How you can understand news reports of jurisdiction cases and disputes; and
4. How you can participate in policy discussions of jurisdiction problems in your job.

I. **BACKGROUND: WHAT AND WHERE IS “INDIAN COUNTRY”?**

A lot of American Indian Affairs Law (the American Bar Association term for the American law that deals with the relationships of individual Indians and their nations with the United States and the States) is based on history, and if you don’t know the historical origins of the legal term “Indian Country,” you won’t be able to use it well.

Let’s go back to the mid-Seventeenth Century. Europe was involved in the first world wars at the time. They raged on the continent of Europe and spilled over into the Americas. There was a series of them, and the one in North America was called the “French and Indian War,” because the enemies of the British were the French in what we know as eastern Canada today, and the Indian allies of the French. The British and French raced to take control of the Ohio River valley, and the shooting war started in 1756. It ended in 1763, when the British defeated the French and the British dominated in eastern Canada, the Atlantic coast, and the portion of the

United States east of the Mississippi River.

The British Crown had a very big problem at the time: The wars in Europe and the Americas were very expensive and the Crown didn't have the money to maintain large military forces in the Americas. Indian allies of the French continued to resist the British and although the Spanish who settled east of the Mississippi River were not an immediate threat, the Crown needed to pacify Indians to keep the Spanish from moving north and east. The American colonies were too big to protect using military force. How could the British protect their new possessions, French Quebec and the American colonies, without having to pay for a lot of troops and ships?

The solution was a document called **The Royal Proclamation of 1763**, which King George issued on October 7, 1763. There are two provisions in that document that are important to us today: First, the British government recognized Indian nations as "nations," with political integrity and independence, and second, the Crown set aside certain lands for the exclusive possession of Indian nations, "**Indian Country**," and that is the origin of the term. The British drew a line down the map of the American colonies on the east coast, along "The Fall Line," where rivers divided between flowing into the Atlantic and the Caribbean via the Mississippi River, and the proclamation said, "Do not cross this line." That prohibition was one of the causes of the American Revolution because colonists wanted to go over the mountains to rich farming lands the other side of the Appalachian Mountains.

When the fledgling United States of America became independent of Britain in 1783, the new country had the same problem the British had—it was impossible to defeat Indian nations using military force. When George Washington became the first U.S. president, he and his secretary of war, General Henry Knox, established a policy that new lands would be acquired by purchase in treaties with Indian nations rather than through war.<sup>1</sup>

That was the foundation for the westward expansion of the United States. The boundary line of Indian Country moved west to the Mississippi River before the U.S. Civil War following treaties and the removal of Indians from the east. Americans saw the war coming for a long time. The United States acquired the Southwest in the Treaty of Guadalupe-Hidalgo (1848), and California became a State in 1850. Railroads were planned, with the South pushing for a southern transcontinental route to expand slavery into the Southwest, and the North pushing for a northern route to make sure that new territories did not have slavery.

We need to understand that political controversies over Indian policy—such as ending making Indian treaties in 1871, passing the Snyder Act in 1921 to define what Indian programs Congress will fund, and even the Indian Self-Determination and Education Assistance Act of 1975—were

---

<sup>1</sup> When the United States and Great Britain negotiated a peace treaty in 1814, and the subject of Indian rights came up, John Adams boasted that the United States acquired land from Indians by buying it. When the issue of Nazi aggression came up during World War Two, Felix F. Cohen wrote an article that also said that overall, Indian land was bought. The Soviets raised similar questions during the Cold War.

the product of jealousy between the U.S. Senate and House of Representatives and between Congress and the President. Prior to the Civil War Congress appointed a treaty commission, made up of representatives of the President and of Congress, that moved through the West to negotiate treaties with Indian nations and confine them to reservations so that the West could be settled. That led to the pattern we see today, so that “Indian Country” is the various reservations set aside by treaty, statute, or presidential proclamation.

We know from recent litigation in Minnesota and Utah that States, being jealous of Indian Country, are trying to litigate away more and more Indian land, claiming that the boundaries set out in Indian treaties don’t mean what they say and that Congress somehow “diminished” reservations in legislation. Schemes to take Indian lands persist to the present, and the United States is trying to push an international scheme that holds that even if Indians have rights under international law, they will lose control over their resources.

Another major negative impact on our definition of Indian Country was caused by the General Allotment Act of 1887. Indian nations reserved their lands in Indian Country by tribe. The General Allotment Act sought to split up reservations into individual Indian ownership and then give “surplus” lands that were not needed to non-Indian settlers. That policy was a disaster, and as a result of allotments and the disposition of “surplus” lands, about two-thirds of Indian Country went out of Indian hands.

It also created the jurisdictional mess we have today where no one seems to really know who has jurisdiction over what. Any lawyer who tells you that he or she understands the American law of jurisdiction in Indian Country is misguided. That is particularly true when it comes to civil jurisdiction over non-Indians and people who are not members of a given Indian nation.

## II. JURISDICTION IN GENERAL

There are generally three kinds of jurisdiction—territorial, subject matter, and personal. There is a fourth kind of Indian Country jurisdiction that is limited to Indians—status jurisdiction, arising out of tribal membership.

Jurisdiction law generally assumes that there is a land base with boundaries and that the given government has complete control over all activities that occur within them. The situation in Indian Country is complicated by the fact that when the United States broke up Indian Country under the General Allotment Act so that individual Indian families and non-Indians have land interests within reservations, there is a “checkerboarding” of land. That means that land maps that show ownership of land by sections (a square mile of land) are in a **checkerboard** pattern, with different colors to show tribal, federal, state, or private ownership.

The general law of jurisdiction assumes that the government of a given area of land has control over all activities and everyone who enters it. Indians have been treated in a discriminatory way

when it comes to application of that idea.<sup>2</sup>

There is another general principle of jurisdiction that is important. There is “**regulatory**” jurisdiction and “**adjudicatory**” jurisdiction. The first term refers to the powers of Indian nations to pass certain laws or not. The second is the jurisdiction of Indian nation courts. Although the rules of jurisdiction over non-Indians for both are usually the same, there are some differences in the way people can get into federal court. Usually the question of whether or not an Indian nation has the power to pass a given law that will affect nonmembers or non-Indians can be heard by a federal court because that is a “federal question” or an issue of federal law. Review of Indian court decisions is somewhat different, and if there is no question of the power to pass a given law or jurisdiction over a nonmember or non-Indian, federal jurisdiction is limited to criminal cases or ones where an Indian nation has deprived someone of their liberty (including, for example, banishment).

### III. TERRITORIAL JURISDICTION

Here we are concerned with the legal definition of Indian nation land bases or “Indian Country.” Then, we address how that definition has been applied in various situations.

“**Indian Country**” is defined by a statute Congress enacted in 1948, at 18 U.S.C. § 1151, and it provides that it is:

1. All lands within the limits of an Indian reservation, “under the jurisdiction of the United States,” “notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.”

An “Indian reservation” and its boundaries are defined by treaty, a statute passed by Congress creating a reservation or adding to it, or by a presidential executive order.

The term “under the jurisdiction of the United States” means that there must be some kind of federal supervision. For example, if an Indian nation or Indian group simply buys land and it is not put under some kind of federal control, it is not part of “Indian Country” and there is State jurisdiction.

---

<sup>2</sup> For example, the Ninth Circuit Court of Appeals made a decision in the case of *Cabazon Band of Mission Indians v. Smith*, No. 02-56943, on November 3, 2004 that makes the point that State laws must not discriminate against Indians for their off-reservation activities. Cabazon police officers were charged with violations of the State traffic code for having lights on their cruisers as they went from one portion of the reservation to another! The court found that applying a State law prohibiting the use of emergency vehicle lights when local and even other State officers weren’t charged was discriminatory.

The “notwithstanding” language seems simple enough—if a piece of land is within an Indian reservation and a “patent” is issued to someone who is not a member of the tribe, such as a non-Indian the land is still part of Indian Country. A “patent” is a deed. The “rights-of-way” language seems clear—even if a tribe gives a right-of-way to the State to build a highway; to a railroad to run a rail line through; or to a business so it can run power lines or a pipeline through a reservation, that land is still Indian Country.

Maybe. In the case of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Supreme Court ignored the plain language of the Indian Country statute about rights-of-way and ruled that when it came to a suit against a *non-member* of the Three Affiliated Tribes of the Fort Berthold Indian Reservation of North Dakota, a highway right-of-way given to the State was the “equivalent” of non-Indian land for “governance purposes,” and the Indian court had no jurisdiction over a law suit arising from a traffic crash.

It seems unusual that the U.S. Supreme Court would ignore what appears to be the clear language of a law passed by Congress. Chief Justice Rehnquist attempted to explain away inclusion of fee land in “Indian Country” in footnote 6 of *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001), saying that the definition of Indian Country has nothing to do with whether or not the Navajo Nation had the power to tax a non-Indian business on a piece of fee land within the Navajo Reservation.

2. All dependent Indian communities within the borders of the United States, whether within or without the limits of a State.

What is a “**dependent Indian community**” Indian community? That question was answered in the case of *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). When reservations were created, not all members moved to them, and there were situations where Indians fled a reservation to live somewhere else. There were also situations during the economic depression that hit in 1929 where Congress used monies designed to address poverty to buy land for Indian groups. The Supreme Court said that the 1948 law was based on three Supreme Court decisions that recognized different kinds of “dependent” tribes—the Pueblos of New Mexico (who continue to own their own land, largely under Spanish and Mexican land grants); Indian allotments; and the Reno (Nevada) Indian colony.

The test for a “dependent Indian community,” based on lands, is that (1)

“they must have been set aside by the Federal Government for the use of Indians as Indian land;” and (2) “they must be under federal superintendence.”

So, for example, in a situation where the Navajo Nation bought fee land in Arizona and it was not put into trust land status with the Federal Government, Arizona State law on the regulation of billboards applied on that land.

3. Indian allotments, including rights-of-way through them.

An “**allotment**” is land set aside for individual Indians and their families under the General Allotment Act of 1887.

Although rights-of-way are part of an allotment for inclusion in Indian Country, we still face the problem of the *Strate* case holding that a right-of-way isn’t included for purposes of jurisdiction if a non-Indian is a defendant for some activity that took place on a right-of-way running through one.

There have been complaints about these restrictive definitions of “Indian Country” for a long time, particularly when it comes to nonmember or non-Indian activities. If, for example, a non-Indian spouse assaults his tribal member Indian wife on a piece of fee land within a reservation or on a right-of-way that runs through a reservation or an allotment, does that mean that an Indian court cannot enter a *civil* restraining order against the non-Indian spouse?

The *Strate* decision, at footnote 11, made it clear that tribal police can still patrol rights-of-way and arrest people to turn over to State authorities (individuals who are arrested can also be turned over to federal officials, under a different decision). However we now face the situation where both Indian nation and State officials have to know precisely where land boundaries run and what kind of land an offense or activity regulated by civil law takes place.

The definition of “Indian Country,” as construed by the U.S. Supreme Court, is nonsense.

#### IV. SUBJECT MATTER JURISDICTION

“**Subject matter jurisdiction**” is simply the question of the *kinds* of jurisdiction Indian courts have, or what *subjects* are within their jurisdiction. There are two kinds of courts in the United States, “courts of general jurisdiction,” and “courts of limited jurisdiction.” A court of general jurisdiction, usually a State court, is a court that can hear any kind of case involving anyone, so long as the case “arises” within the State because of an activity that took place within State boundaries or because a defendant in a civil case can be found within State boundaries. A court of “limited” jurisdiction refers to courts that have limited powers. Federal courts are one example, and they have only as much jurisdiction as Congress gives them by statute. Another

example of courts of “limited” jurisdiction” are federal magistrates, justice of the peace courts, magistrate courts, city courts, or other kinds of special courts, such as military courts or the federal tax court.

What kind of courts are Indian courts, and how can you tell that? Most Indian courts exist under tribal constitutions and bylaws that either give the Council the power to create them or create them directly, or under Indian nation laws. Many codes limit criminal jurisdiction to Indians in general or have special provisions for civil cases where a non-Indian defendant must consent to jurisdiction. Some codes give jurisdiction over any “cause” that “arises” within the territorial jurisdiction for civil cases (meaning anything that happens within reservation boundaries) or where a defendant is found within that court’s definition of Indian Country.

Another adverse U.S. Supreme Court decision was that in *Nevada v. Hicks*, 533 U.S. 353 (2001), involving a civil suit against State game wardens for violating the rights of an Indian who lived on reservation by searching his home—on the reservation. There is a sweeping opinion by Associate Justice Scalia that basically says that when a non-Indian is involved in a civil suit in tribal court, there is a presumption that a tribal court does not have jurisdiction—even if that person hurt a tribal member on tribal land.

All the recent disastrous U.S. Supreme Court decisions return, again and again, to the decision in the case of *Montana v. United States*, that attempted to set out the rule for civil jurisdiction over nonmember Indians. The test is whether:

1. The nonmember entered into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” and conducted some activity; or
2. The tribe retained (kept) “**inherent power**” (which many call “**sovereignty**”) to exercise civil authority over “the conduct of non-Indians on fee lands within its reservation when that conduct has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

One of the problems is that different federal appeals courts read these tests different ways: For example, the Ninth Circuit Court of Appeals has ruled that there is tribal civil jurisdiction over *only* business transactions and not situations where a non-Indian has consensual relationships with an Indian, such as an affectionate relationship. The courts in other appellate circuits are largely silent on that problem.

While the language about conduct that has a “direct effect” on “political integrity, economic security, or health or welfare” is broad and similar to the jurisdiction exercised by States, federal courts use the “direct effect” language to limit jurisdiction. For example, the case of *Atkinson Trading Company v. Shirley*, above, involved the taxation of a trading post,

licensed as an Indian trader, that did business on fee land in a Navajo community that had an almost-totally “Navajo” character. The Supreme Court rejected the contention that the trading post’s activities fell under the second part or “prong” of the *Montana* test.

One of the more confusing differences in jurisdiction law comes from the distinction between “**inherent**” and “**delegated**” powers and jurisdiction. There is general agreement in Indian law that when Congress recognized the “**existing**” powers of Indian tribes in section 16 of the Indian Reorganization Act of 1934 (including tribes without an IRA constitution, such as the Navajo Nation), it recognized “inherent” powers. That relates to the use of the word “reservation,” which means lands “reserved” by Indian tribes in treaties. Similarly, tribes reserved all powers they had as independent nations or sovereigns when they made treaties with, or entered into relations with, the United States. U.S. Supreme Court decisions and other court decisions over the past thirty years basically say: “Not so fast! No, you don’t have the authority to do this, that, or the other thing.”

It is different when Congress “delegates” or “gives” powers to Indian nations. Indian lawyers are struggling to understand the meaning of the recent decision in *United States v. Lara*, No. 03-107 (April 19, 2004). It involved the “Duro Fix,” where Congress amended the Indian Civil Rights Act of 1968 to recognize the *inherent* (retained or kept) power Indian nations have to prosecute nonmember Indians for criminal acts. The Supreme Court somewhat clarified the law of jurisdiction by seeming to say that if Congress recognizes that certain powers are “inherent,” or it “delegates” powers to tribes, it can do that. Another example is the decision in the case of *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9<sup>th</sup> Cir. 2001) that upheld that tribe’s jurisdiction to regulate logging on fee land by a non-member. The difference, the court explained, was that Congress gave the Hoopa Valley Tribe the authority to regulate all activities on the reservation in the Hoopa-Yurok Settlement Act of 1988, because of the way that law was written.

What is wrong with delegated jurisdiction? Should Indian nations actively lobby Congress or it? Are there any pitfalls in doing that? The major one that is hinted at by the U.S. Supreme Court is the principle that “the Constitution follows the flag,” and if powers and jurisdiction are given or delegated to Indian tribes by Congress, the full provisions of the U.S. Bill of Rights will apply. Is that a bad thing? Could it lead to termination? We just don’t know.

## V. PERSONAL JURISDICTION

Given that when we talk about jurisdiction over Indian members, nonmember Indians and non-Indian we are talking about people, you might think that is “personal” jurisdiction. It is “subject matter” jurisdiction.” **Personal jurisdiction** has more to do with procedure than it does the place where an action occurred, what subjects courts can deal with, and who the person is.

The basic considerations are whether people have fair notice of a law suit or action against them and whether it would be fair to subject them to the jurisdiction of the court.

There are three aspects to fair notice: the method of notifying someone, the contents of the notice, and an opportunity to prepare for court. The constitutional rule is that the way that notice is served must be such as to “likely” come to that person’s attention. The most reliable method is for a police officer, court officer, or private process server to hand the person a copy of the notice and then certify to the court that was done. The kinds of other notice depend upon a given court’s statute or court rules. Most jurisdictions now provide that notice can be given by first class mail, but the problem is the judge being satisfied that the address where notice was mailed was indeed that person’s correct address.

We usually see challenges to the way notices are written in criminal cases, but the problem can arise in civil cases too. How notices are written can be a particular problem in Indian Country, depending upon whether people read and write English or they are literate enough to understand court documents. This is linked to preparing to go to court. Another aspect of the service of notices (“**service of process**”) is the papers being served in enough time to prepare for court. Most jurisdictions have rules that when a suit is first brought, the person being sued has 20 to 30 days to respond in writing (called an “appearance”). The law does not set any specific time, but there has to be enough time to prepare to answer and go to court.

The other fairness issue has to do with where an individual is sued. If you drive to a State other than the one where you live and get in a traffic accident, it is “reasonable” to sue you there because you had a “significant” contact. However, suppose that you make malt liquor, using the name of a traditional Indian leader who had no connection with alcohol and probably feared it. Suppose further you are sued in tribal court where you do not even sell liquor. Or suppose you are a vehicle manufacturer and you are sued for a defect in a vehicle you make in a tribal court. The rule is that there must be certain “**minimum contacts**” there so that suing you there does not offend “traditional notions of fair play and substantial justice.” In looking at such situations to see if it would be fair to permit a suit to go forward courts are to consider things such as the relationship of the defendant to the jurisdiction, “the forum” (i.e. a description of the court), and “the litigation” (i.e. inconvenience). Sometimes, when a defendant does not have “contacts,” a suit will be allowed to proceed, depending upon what the defendant did. *See Calder v. Jones*, 465 U.S. 783 (1984) (person from California who claimed she was libeled, i.e. an untruthful falsehood in writing that injured her, was allowed to sue for an article published in Florida).

This is an area where, as it is with other problems of jurisdiction, it is likely that the federal courts discriminate against tribal courts and judges because of federal distrust of them.

## VI. STATUS JURISDICTION

Indian nations have a kind of jurisdiction that most States do not have, and it is related to the power to regulate the conduct of enrolled members. It is called “**status jurisdiction**,” and it goes back to Roman times. The Romans had a policy that when they invaded other countries to bring them and their people into the Roman Empire, the local people could keep their own laws and their own courts or tribunals. One of the leading examples is the trial of Christ: He was

convicted in a Jewish court and sent to the Roman governor, Pilate, for execution. Pilate thought that Christ was innocent and that he did not get a fair trial, but he “washed his hands” of the illegal conviction (and that is where we get the expression), and ordered that Christ be executed. That is likely the first example of the recognition of a “tribal court” decision in western history.

There are two traditional principles of American Indian Affairs Law that still appear to be fairly solid:

- VI. Indian nations have jurisdiction over their own members because of their status as enrolled members.
- VII. Traditional Indian law and procedures apply when only members are involved.

There are three cases that illustrate those principles:

1. *Ex parte KAN-GI-SHUN-CA*, (otherwise known as *Crow Dog*), 109 U.S. 556 (1883).  
Crow Dog was indicted in the Dakota Territory for the murder of Sin-ta-ge-le-Scka, or Spotted Tail. The homicide took place on a reservation, and it only involved tribal members. The U.S. Supreme Court ruled that Dakota Territory had no jurisdiction and that traditional Indian law (i.e. banishment) applied.
2. *United States v. Quiver*, 241 U.S. 602 (1916). Quiver was prosecuted for adultery where he and the woman in question lived on a reservation. Adultery was not an offense under Sioux traditional law (the Court said). This decision establishes, at 241 U.S. 604, that “the personal and domestic relations” of Indians must be dealt with “according to their tribal customs and laws.”
3. *Fisher v. District Court*, 424 U.S. 382 (1976). This case established that where family law is involved, and the parties are tribal members, only the tribal court has jurisdiction where the Indians live on reservation. Note, however, that when Indians live off-reservation, they can be subject to State law.

There is a special example of status jurisdiction that depends upon who the person is in the Indian Child Welfare Act, which has special protections against taking Indian children and children eligible to become enrolled.

Another consideration, to deal with special social problems, is that status jurisdiction gives Indian nations the ability to enact laws to deal with member problems no matter where the member resides. We usually see that in enrollment, voting or member benefits provisions, but it can also be used to deal with problems such as domestic violence in off-reservation areas or crime outside Indian Country. That is called **extraterritorial jurisdiction**.

## VII. CONCLUSION

As can be seen, the law of jurisdiction is tricky stuff. It is simplest when only tribal members are involved, and that is the situation where Indian customary law can apply. We have indications that members of the U.S. Supreme Court are suspicious of Indian customary law (because they don't have a clue what it is and they don't appear interested in learning) and that they feel that tribes and their justice systems regularly deny peoples' civil rights.

There is a lot of speculation about the recent *U.S. v. Lara* decision and the Supreme Court's seeming retreat from cutting Indian nation jurisdiction, but that case wasn't about Indian law—it was about national politics and courts giving more deference or respect to what Congress does. Too often Indian law decisions have little to do with the Indian policy problem before the Court.

The analysis of Indian cases in the news or when making policies requires people to ask and answer several questions, such as:

1. *Who* did what? Was that person a tribal member, a nonmember Indian, or a non-Indian?
2. Was the action a crime or something handled by civil law?
3. *Where* did the event occur? Was it in “Indian Country” or not? Was it on an easement, right-of-way, or some other land that the tribe gave use rights to? What *exactly* did the document that gave the use right say?
4. If the person was a non-Indian, was that person a State official (*Nevada v. Hicks*)?
5. If the person was a non-Indian, did that person **consent** to jurisdiction in some kind of document or did what that person did **directly** hurt a basic tribal government interest?
6. *How* did the event happen?
7. What are the facts, the facts, the facts?
8. What are the effects, effects, effects of the injury?

James W. Zion  
8126 Camino del Venado N.W.  
Albuquerque, NM 87120

(505) 839-9549  
JZion@aol.com