

Jurisdiction in Indian Country

A VERY BRIEF OVERVIEW

Maylinn Smith, Director
Indian Law Clinic
School of Law
The University of Montana,
Missoula, MT 59812
406-243-2544
maylinn.smith@umontana.edu

RULE #1

Nothing is EVER simple in Indian Law

Types of Jurisdiction

- Personal
- Subject Matter
- Limited
- General
- Regulatory
- Criminal
- Civil

What about Tribes?

**WHAT IS THE SCOPE OF
TRIBAL JURISDICTION?**

Tribal Jurisdiction in the Beginning

“The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.” *Worcester v. Ga.*, 31 U.S. 515 (1832).

Legal Presumptions about Tribal Jurisdictional Authority

- Tribes began with full jurisdiction over all on reservation activities.
- Until recently, tribes retained all sovereign powers, unless relinquished through treaty or expressly limited by Congress – meaning that if Congress wanted to limit tribal sovereignty it had to do so by passing a specific law.
- Recently federal court have begun limiting tribal sovereignty even without specific Congressional action.
- Tribes generally retain jurisdiction over purely internal tribal matters.

What Sovereigns Can Have Jurisdiction in Indian Country?

- Three different governments maybe able to exercise jurisdiction in Indian Country
 1. State
 2. Tribal
 3. Federal
- The question of which government has jurisdiction in any given circumstance can be a difficult one to answer.

Tribes have both Limited and General Jurisdiction

- What questions need to be asked?
 - Who is involved?
 - What is involved?
 - What is the status of the land where the incident or issue occurred?
 - What laws are involved
 - Legislative
 - Judicial
 - Treaties

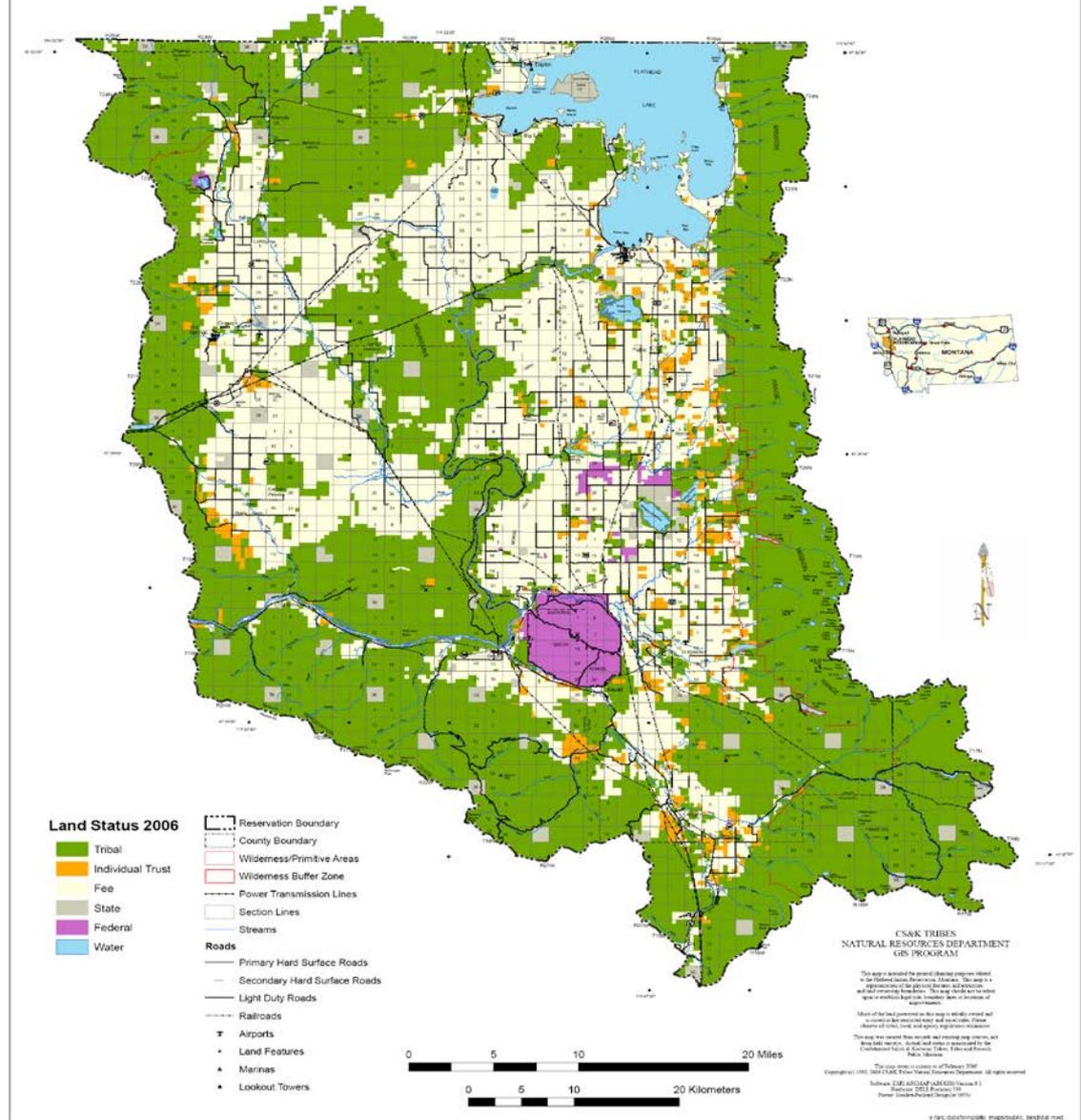
Evaluating the Scope of Tribal Adjudicative Jurisdiction

- Who are the parties involved?
 - Generally, any Indian or non-Indian may be the plaintiff
 - There are limitations on whether the tribe may exercise jurisdiction over a non-Indian defendant.
- Where did the conduct giving rise to the suit occur?
 - If the person being sued is a nonmember, the conduct must have arisen on tribal land in order for a tribe to presumptively have jurisdiction over the action.

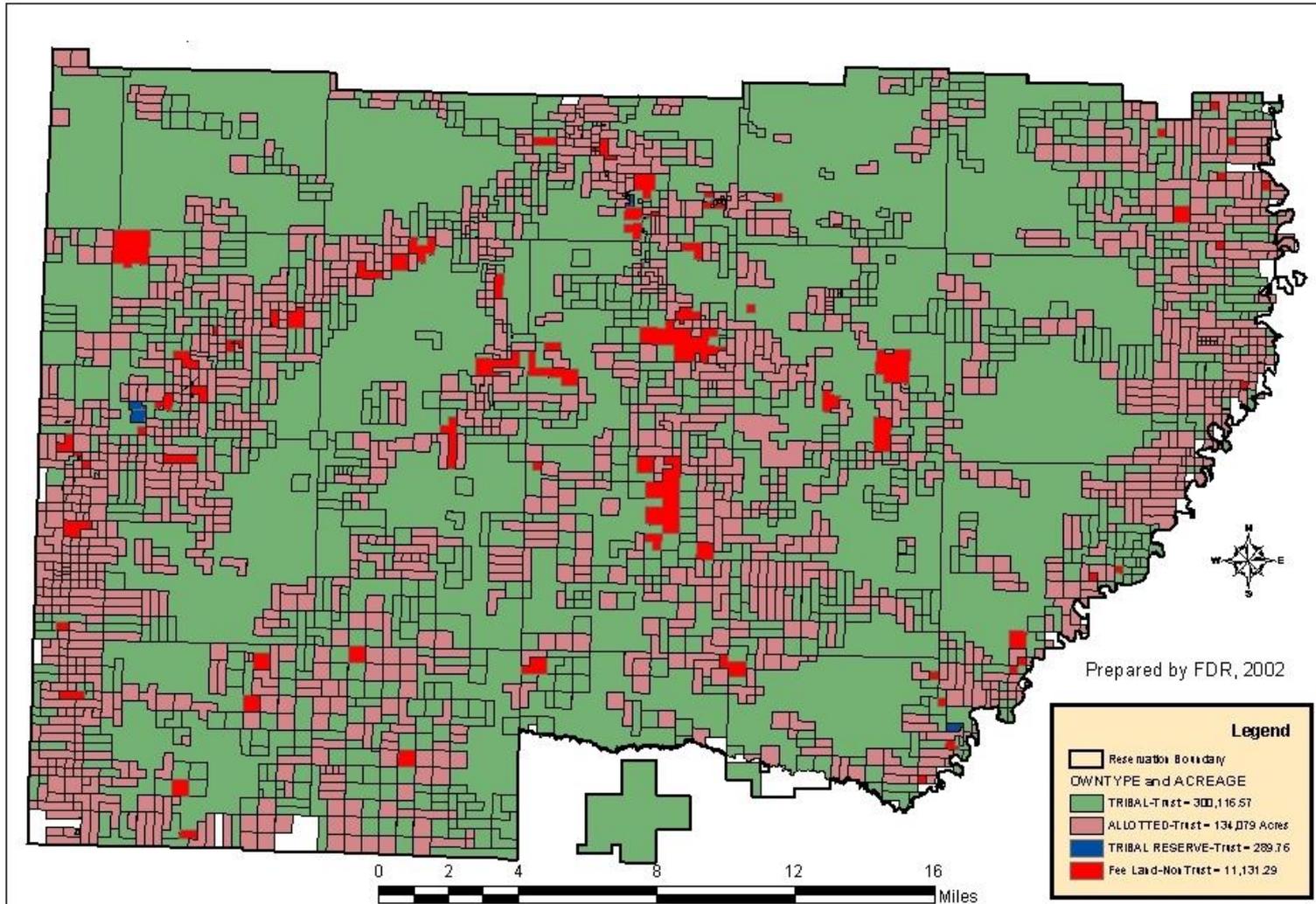
THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE
FLATHEAD NATION



What does a
map of an
Indian
Reservation
look like?



NORTHERN CHEYENNE RESERVATION-LAND STATUS



Land Status within Indian Country is a Significant Component

- Title held in Trust by the United States
 - Land cannot be sold or transferred [alienated] or encumbered without strict adherence to federal statutory requirements.
 - Includes Assignments to individual tribal members
- Fee lands
 - non-Indian owned, Indian owned, Tribal owned
- Federal Lands
- State Lands

Scope of Criminal Jurisdiction within Indian Country

- Factors that must be considered when looking at Criminal jurisdiction within Indian Country:
 - What historic considerations impact tribal jurisdiction?
 - What limitations are placed on tribal jurisdiction by tribal custom and traditions, treaties or federal statutes?
 - What is “Indian Country”?

Major Crimes Act

- Extends federal jurisdiction into Indian Country for enumerated major crimes
- Only applies to offenses where the Perpetrator is Indian

Criminal Jurisdiction in Indian Country

General Rules

- States generally have no jurisdiction over crimes committed in Indian Country, unless the requirements of Public 280 have been met.
- Tribes generally have jurisdiction over all crimes committed by all Indians, regardless of membership, that occur within Indian Country.
- The federal government generally has concurrent jurisdiction with tribes over all felonies/enumerated crimes committed by Indians against Indians, Indians against non-Indians, and all misdemeanors and felonies committed by non-Indians against Indians that occur within Indian Country.

18 U.S.C. §1152 Laws governing

- Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. **This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.**

18 U.S.C.A. § 13. Laws of States adopted for areas within Federal jurisdiction

- Federal Government can use State laws to address criminal activity that occurs within federal enclaves, if there is no applicable statute.

“Indian Country” Defined

- The first step in determining what government has jurisdiction is defining **whether the crime was committed in Indian Country.**
- “Indian Country” means
 - 1) all land within the limits of an Indian reservation;
 - 2) all dependent Indian communities within the territory of the United States; and
 - 3) all Indian allotments held in trust by the United States.

18 U.S.C. § 1151

Who is an “Indian” for Purposes of Criminal Jurisdiction

- The second step is determining whether any of the actors involved in the crime are “Indian.”
- It is a fundamental right of every tribal nation to define who its members are, but for purposes of criminal jurisdiction, the U.S. government uses its own definition of who is an “Indian.”
- To be considered an Indian under §§ 1152 or 1153, the individual must have a sufficient connection to an Indian tribe that is *recognized by the federal government*. Affiliation with a tribe that does not have federal recognition does not suffice.

Felony/Enumerated Crimes continued . . .

- The Major Crimes Act, 18 U.S.C. § 1153, imposes federal jurisdiction for the following “enumerated crimes” committed by Indians on the reservation:
 - murder
 - manslaughter
 - kidnapping
 - maiming
 - sexual abuse
 - incest
 - felony assault as defined by 18 U.S.C. §113
 - an assault against an individual who has not attained the age of 16 years
 - Felony child abuse or neglect
 - arson
 - burglary
 - robbery
 - embezzlement and theft

What happens is a crime is committed by Non-Indian Against a Non-Indian?

- U.S. v McBratney, 104 U.S. 621 (1881)
 - Offense committed by non-Indian against a non-Indian within Indian country
 - State has jurisdiction based on equal footing doctrine.

Does the United State Constitution Apply within Indian Country?

- Not to tribal actions
- Indian Civil Right Act
 - Many of the same guarantees as Bill of Rights
 - No right to counsel
 - No bar against separation of church and state
 - Limited sanctions
 - 1 year and/or \$5000
 - New legislation 3 years and/or \$15000 [Tribal Law and Order Act]

What Questions Do You Have?