



PRACTICE IN TRIBAL COURTS: Pointers on Action in Indian Country

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Summary of the presentation

- ▶ Native American Law
- ▶ The Tribes and Pueblos in New Mexico
- ▶ Preliminary matters before going to a tribal court
 - ▶ Licensing
 - ▶ Jury trials
 - ▶ Appeals
- ▶ Criminal Practice in Tribal Courts
- ▶ Civil Practice in Tribal Courts
 - ▶ Civil
 - ▶ Family
 - ▶ Probate
 - ▶ Traffic

Native American Law

- ▶ U.S. Supreme Court
- ▶ Congress
- ▶ New Mexico Appellate Courts
- ▶ New Mexico Legislatures
- ▶ Tribal Codes
- ▶ Tribal Appellate decisions. Westlaw, etc. (See e.g. Bahe v. Platero, SC-CV-48-12, (2012), 11 Amer.Tribal Law 104)
- ▶ Tribal Custom and Tradition, unwritten laws
- ▶ Felix Cohen's Handbook of Federal Indian Law

Native American Law

- ▶ Recent U.S. Supreme Court decisions
- ▶ *Oklahoma v. Castro-Huerta*, 597, U.S. __ (2022). State jurisdiction to prosecute non-Indians for crimes against Indians in Indian Country. (see *Worcester v. Georgia*, 31 U.S. 515 (1832): States do not have jurisdiction over matters arising in Indian Country unless expressly authorized by Congress).
- ▶ *Haaland, et al., v. Brackeen, et al.*, (No. 21-376, decided June 15, 2023): ICWA upheld
 - ▶ See concurring opinion by Justice Gorsuch for a history of Indian Law
- ▶ *Denezpi v. United States*. 142 S.Ct. 1838 (2022). Dual-sovereignty doctrine allows successive prosecutions in federal court and Court of Indian Offenses. (See *Bartkus v. Illinois*, 359 U.S. 121 (1959) (state/federal prosecutions) and *Heath v Alabama*, 474 U.S. 82 (1985) (State/state prosecutions)).

Congress

- ▶ Indian Civil Rights Act (ICRA) 25 U.S.C. § 1301, et seq.: funding for tribal courts
- ▶ Tribal Law and Order Act of 2010 (various statutes)
- ▶ Violence Against Women Act (2005, reauthorization 2013, 2022)
- ▶ Major Crimes Act, 18 U.S.C. § 1153 (See *Ex Parte Crow Dog*, 109 U.S. 556 (1883))
- ▶ Federal Public Law 83-280 (PL 280). 1953. transferring criminal jurisdiction from federal to 6 states, and option to others (NM is not one of the 6 states and did not opt in).
- ▶ Indian Reorganization Act, 25 U.S.C. § 5101 et seq.
- ▶ Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5101 et seq.
- ▶ Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.

New Mexico cases and statutes

- ▶ *Mendoza v. Isleta Resort and Casino*, 460 P.3d 467 (N.M. 2020). Worker's Compensation and gaming compact. Recognizes tribal sovereignty
- ▶ *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2017-NMSC-007. Tribes are "domestic dependent nations that exercise inherent sovereign authority." Waiver can occur through Congress or "express, unequivocal" tribal action.
- ▶ *State v. Romero*, 2006-NMSC-039. (Gutierrez, below, is a party). Criminal jurisdiction, Indian Country.
- ▶ *Garcia v. Gutierrez*, 2009-NMSC-044. Divorce, child custody. Conflicting tribal and state court decisions.
 - ▶ *Comity, full faith and credit*
- ▶ *Hinkle v. Abeita*, 2012-NMCA-074. Civil jurisdiction. Notes that *Montana*, *Hicks*, and *Strate* apply to tribal jurisdiction, not state court jurisdiction. Continues the application of the "infringement test." (whether assertion of state jurisdiction infringes on tribal sovereignty)

New Mexico cases and statutes

- ▶ Uniform Child-Custody Jurisdiction and Enforcement Act, NMSA 1978 § 40-10A-101 et seq.,
 - ▶ § 40—10A-104: Application to Tribes,
 - ▶ § 40-10A-110, Communication between Courts.
 - ▶ §40-10A-112, Cooperation between courts
- ▶ Uniform Interstate Family Support Act, NMSA 1978 §40-6A-101, et seq.
 - ▶ NMSA 1978 §40-6A-102(AA): “Issuing State” includes tribes tribes and pueblos.
- ▶ DWI's. Tribal DWI convictions can be used for enhancement of State convictions.
 - ▶ NMSA 1978 § 66-8-101(G)

The Tribes and Pueblos of New Mexico

- ▶ Pueblos: Acoma, Cochiti, Isleta, Jemez, Laguna, Kewa, Nambe, Ohkay Owingeh, Picuris, Pojoaque, Sandia, San Felipe, San Ildefonso, Santa Ana, Santa Clara, Taos, Tusuque, Zuni, Zia, and Ysleta Del Sur (Texas)
- ▶ Tribes: Navajo Nation, Ft. Sill Apache, Mescalero Apache, Jicarilla Apache
- ▶ All are separate jurisdiction with separate laws

Tribes: information and licensing

- ▶ Tribal websites
 - ▶ May included codes. Note: TOLA, VAWA, ICRA requirements and funding.
- ▶ Licensing
- ▶ NM Supreme Court Letter of good standing
- ▶ Pro hac vice. Check the jurisdiction
- ▶ Introductions. Try to meet with judges and court staff
- ▶ Remote appearances by video/audio.
- ▶ Appeals: various processes in place.

Criminal actions in tribal court

- ▶ Felony or misdemeanor?
- ▶ Federal funding has westernized many tribal court systems.
- ▶ ICRA felony and VAWA non-native prosecution requirements:
 - ▶ Trained and state-licensed public defender
 - ▶ Judge who is licensed and has criminal law experience
 - ▶ Publicly available laws
 - ▶ Recorded proceeding
 - ▶ Challenges to prosecuting non-Natives

Criminal actions in tribal court

- ▶ Who is the Defendant, who is the victim, and where did the crime occur?
- ▶ Does double jeopardy apply?
- ▶ Trials: right to remain silent
- ▶ Future use of plea agreements
- ▶ Negotiations with the U.S. Attorney
- ▶ Rules of Procedure, rules of evidence.
- ▶ Pretrial conference: need to know expectations and rules
- ▶ Discovery and pretrial interviews

Criminal actions in tribal courts

- ▶ Jury trials
 - ▶ 6-person
 - ▶ Jury pool
 - ▶ VAWA restrictions

Criminal actions in tribal courts

- ▶ Sex Offenders: SORNA
- ▶ Domestic violence and federal firearm restrictions
 - ▶ 18 U.S.C. 921(a)(33). Tribal court convictions are included.
 - ▶ 18 U.S.C. 922(g), federal firearm restrictions if domestic restraining order in place, felony conviction, or misdemeanor domestic violence conviction.

General civil actions in tribal court

- ▶ Custom and tradition
 - ▶ Experts and conflicting expert opinions
- ▶ Peacemaker Court

General civil actions in tribal court

- ▶ Civil
 - ▶ Party tribal affiliation
 - ▶ Location of cause of action
 - ▶ Rules of procedure and evidence
- ▶ Torts
- ▶ Contracts
- ▶ Debt collection
- ▶ Repossession

Family law in tribal court

- ▶ Marriage
 - ▶ Traditional marriage
- ▶ Separation
- ▶ Child custody
- ▶ Child support

Probate in tribal court

- ▶ Probate initiated in tribal court
- ▶ State court recognition
- ▶ Federal probate
- ▶ Custom and tradition

Traffic citations in tribal court

- ▶ Rules of Procedure and Evidence
- ▶ Jurisdiction: civil v. criminal
- ▶ Discovery

Resources

- ▶ UNM School of Law Library
- ▶ UNM School of Law Indian Law Clinic
- ▶ New Mexico Legal Aid, Native American
- ▶ New Mexico Supreme Court Committee: Tribal State Judicial Consortium

Practice in tribal Courts

▶ Questions

THE END