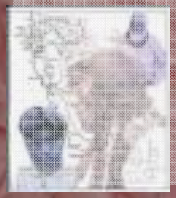
HISTORICAL AND LEGAL FOUNDATIONS THAT SHAPED TRIBAL GOVERNMENTS IN CALIFORNIA



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TRIBAL SOVEREIGNTY - DEFINED

- Sovereignty is the Right of Self-Governance.
- It is the right of a tribe to make its own laws and to be governed by those laws.
- ***Tribal Sovereignty is shaped by federal and tribal law making and legal interpretation .***
  - … *Federal Jx = legally carved aspects of tribal sovereignty*
  - … *Tribal Jx = inherent aspects of tribal sovereignty*

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TRIBAL SOVEREIGN STATUS

Inherent Tribal Sovereign Authority	Legal Sovereign Status of Tribes
…Possess Inherent Sovereignty by virtue of being. …Subject to Tribal Powers only.	…Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers. …Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.

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TREATY-MAKING PROCESS

- For a treaty to become valid after it is signed by U.S. and tribal government representatives, it must be sent back to Washington D.C. and approved or ratified by Congress.
- Only 374 treaties have been ratified by Congress. (Of the 374 treaties, all have been violated in some form by the U.S.
- Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.
  - … The U.S. only negotiates treaties with sovereign entities.
  - … The U.S. may expand or contracts its recognition of tribal sovereign authority.

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CALIFORNIA INDIAN HISTORY 101

- U.S. Federal Government negotiated 18 Treaties with California Indians setting aside 7.5 million acres of land
  - … negotiated from 1850-51
- California Land Claims Act of 1851
  - … Resulting in loss of tribal villages and scattered landless Indians in California
- There are 109 federally recognized tribes in California, more than 30 (possibly as many as 80) that are not federally recognized and very large urban Indian population comprised of non-California Indians.

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JOHNSON V. MCINTOSH (1823)

- This case applied and adopted the Discovery Doctrine into U.S. case law.
- Discovery Doctrine gave the U.S. the exclusive right to extinguish the original tribal right of *possession* by purchase or conquest.
- Discovery Doctrine only left Tribes with the Right to Use and Occupy the Land.
- This theory gave the discovering Government title to all land as a result of having arrived onto the continent.
- U.S. Supreme Court held that Indians did not have the power to give (nor could a non-Indian receive from an Indian) title to land upon which Indians lived.
- This case served to protect federal land grants (federal land patents) which the federal government used to settle the territories.

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CHEROKEE NATION V. GEORGIA (1831)

- State of Georgia attempted to apply state law over Cherokee Nation in an effort to "annihilate the Cherokees as a political society."
- Cherokee Nation filed suit as a foreign nation directly in U.S. Supreme Court.
- U.S. Supreme Court held that Cherokee Nation was not a foreign nation but a Domestic Dependent Nation.

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WORCESTER V. GEORGIA (1832)

- Two missionaries were sentenced to 4 years hard labor by state of Georgia for residing in Cherokee Nation without a license and without taking oath to support the Georgia Constitution and laws.
- Worcester challenged the jurisdiction of Georgia Courts.
- U.S. Supreme Court held that Indian nations were distinct, independent political communities in which state law has no effect.
- President Jackson purportedly said Marshall has made his decision, now let him enforce it. No mechanism in place to enforce, South Carolina tries to leave the Union, Jackson begs Georgia to let missionaries go. Missionaries pardoned in 1883.

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TRUST RELATIONSHIP

- The federal government owes a responsibility to the tribes.
- Initially this responsibility was described as the relationship of a "guardian to its ward."
- Now it is called the Trust Relationship.
- Pursuant to the Trust Relationship, the federal government owes a fiduciary duty to the tribes to protect their interests in the lands and resources held for their benefit.

Trustee = all federal branches of government

Res (lands and resources held in trust for Tribes or their members

Beneficiary = Tribes and their Members

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CIVIL REGULATORY JURISDICTION

1981	U.S. v. Montana	Test to determine **Civil Regulatory** jurisdiction over a non-Indian on non-Indian owned lands within reservation. Case law post-*Montana* allowed regulatory jurisdiction if only one of the prongs were met. States only need meet #4.

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MONTANA TEST FOR TRIBAL CIVIL REGULATORY JURISDICTION

1. Is there a consensual relationship between the non-Indian and the Tribe? (May include contracts or other dealings.) OR
2. Does the Non-Indian's activity threaten or have a direct impact upon:
   a. Economic Security of the Tribe,
   b. Political Integrity of the Tribe, or
   c. Health, Safety or Welfare of the Tribe.

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TERMINATION AND RELOCATION

- The U.S. Government sought to move Indians off of the Reservation into the Urban Center
- Through P.L. 280, the U.S. Government sought to end the Federal/Tribal trust relationship
- Resulted in loss of land and homelessness

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P.L. 280 CIVIL PROVISIONS: 28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

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28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES. (P.L. 280 CIVIL PROVISIONS)

State or Territory of	***Indian Country Affected***
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community
California	**All Indian country within the State**
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

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28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES. (P.L. 280 CIVIL PROVISIONS)

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

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28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES. (P.L. 280 CIVIL PROVISIONS)

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

(c) NIJC 2010 17

PUBLIC LAW 280: CRIMINAL PROVISIONS § 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

(c) NIJC 2010 18

§ 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY: (PUBLIC LAW 280: CRIMINAL PROVISIONS)

State or Territory of	***Indian Country Affected***
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

§ 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY: (PUBLIC LAW 280: CRIMINAL PROVISIONS)

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

§ 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY: (PUBLIC LAW 280: CRIMINAL PROVISIONS)

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(c) NIJC 2010 21

CIVIL JURISDICTION

1987	Cabazon v. California	If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.

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CABAZON V. CALIFORNIA (1987)

- California sought to apply its laws governing the operation of bingo games to bingo games operated by the Cabazon and Morongo Bands of Mission Indians.
- Riverside County also sought to apply its ordinances regulating bingo and card games to the tribal gaming operations.
- U.S. Supreme Court held that although state laws may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by P.L. 280 or by the Organized Crime Control Act of 1970.

CABAZON V. CALIFORNIA (1987)

- The State of California attempted to apply a law from its criminal code governing gaming under the assumption that P.L. 280 would allow state criminal law to apply to Indians on reservations.
- The U.S. Supreme Court found that the law was not "Criminal/Prohibitory" but the statute was rather "Civil/Regulatory" in nature.
  - … *If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.*

CIVIL REGULATORY V. CRIMINAL PROHIBITORY

What sort of jurisdiction may the States assert?

Intent of the Law
|
Conduct/Act
/ \

Prohibitory	Regulatory
(gen'ly, criminal law)	(gen'ly, civil regulatory)
/	\
State Juris if act	Tribal Juris if tribal laws
violates state public policy	consistent w/ State Law

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MODERN TRIBAL GOVERNANCE

- Tribal Constitution
- Legislative Process and Record
- Code of Laws, Ordinances, Resolutions
- Consistency establishes the community standard
- Consultation, cooperation and collaboration
- Intergovernmental Agreements

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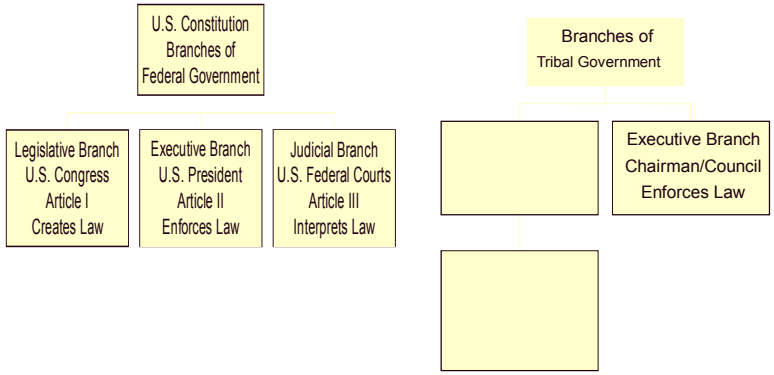
GOVERNMENT-TO-GOVERNMENT



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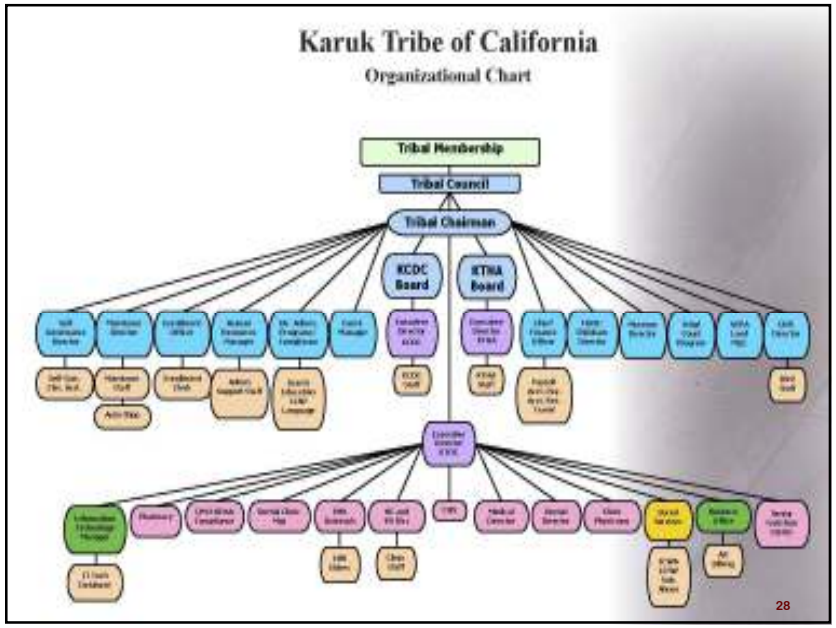

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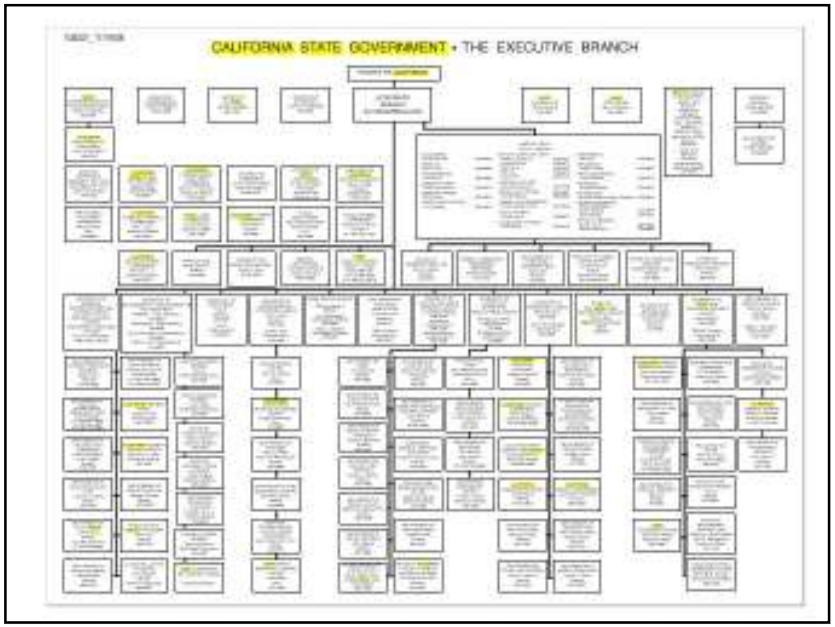
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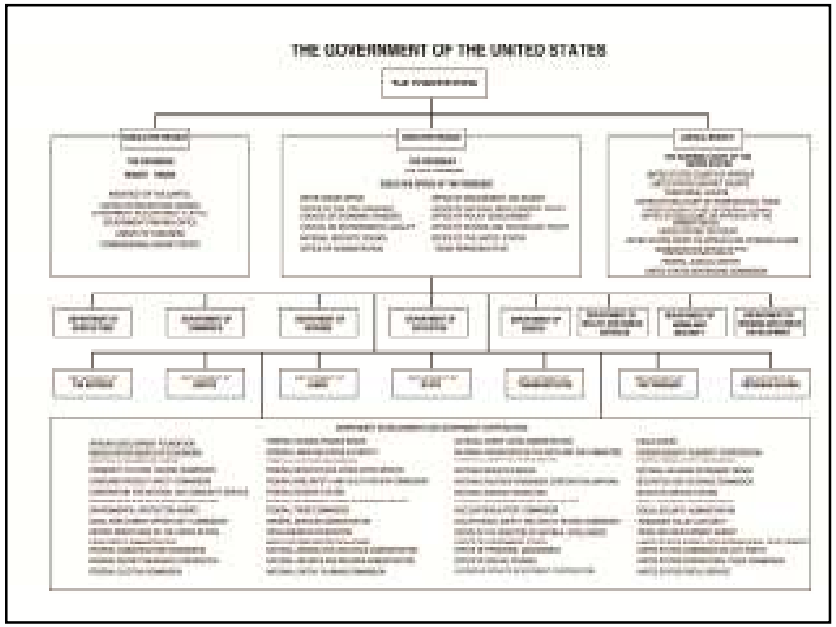
THE GOVERNMENT OF THE UNITED STATES

A DEFINITION OF CULTURE*

- Culture (is) a system of behaviors, values, ideologies, and social arrangements.
- These features, in addition to tools and expressive elements such as graphic arts, help humans interpret their universe as well as deal with features of their environments, natural and social.
- Culture is learned, transmitted in a social context, and modifiable.
- Synonyms for culture include "life ways," "customs," "traditions," "social practices," and "folkways." The terms "folk culture" and "folk life" might be used to describe aspects of the system that are unwritten, learned without formal instruction, and deal with expressive elements such as dance, song, music and graphic arts as well as storytelling.

* Taken from NATIONAL REGISTER BULLETIN GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES BY PATRICIA L. PARKER and THOMAS F. KING U.S. DEPARTMENT OF THE INTERIORNATIONAL PARK SERVICE NATIONAL REGISTER, HISTORY AND EDUCATION NATIONAL REGISTER OF HISTORIC PLACES1990; REVISED 1992; 1998

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TRIBAL CULTURAL RESOURCES

- What are they to us?

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TRIBAL CULTURAL RESOURCES DEFINED

SEC. 4. Section 21074 -

(a) **"Tribal cultural resources"** are either of the following:

(1) **Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe** that are ***either*** of the following:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A ***cultural landscape*** that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

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