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Course: Indian Law  
Professor Name: Zuni-Cruz  
Exam Date: Thursday, May 08, 2008

## Part I

### Jurisdictional Issues for Sheriff & Patrol Officers

The jurisdictional issues raised by the presence of the county sheriff's department and the state patrol officers are whether essentially come down what right they have to be on a state highway right of way. Many of these jurisdictional considerations are included in the criminal jurisdiction analysis below, but one difference is that the state does have a very strong interest in ensuring the safety and unimpeded flow of traffic on its state highways. That interest interferes very minimally with the tribe's ability to self-govern, nor does it impact other factors that would touch on its political integrity as outlined by Montana and Hicks and discussed below. Therefore the presence of the state troopers and the county sheriffs officers, as a political subdivision of the state, is probably totally legitimate even though it is within Indian Country and with in the exterior boundaries of the reservation. The state interest, and state sovereignty cannot be said to stop at the reservation border in this case, especailly considering the highway is a right of way within which the tribe, as in State, likely has no power to exclude anymore, since it would have been ceded to the state.

### Jurisdictional Issues for Arrest of Tribal and Non-Members

When analyzing any criminal incident involving tribal Indians and non-members, it is important to consider a number of factors to determine the jurisdictional authority that might legitimately come into play. To begin with it is important to know who the perpetrators were and what their tribal status was; what they did and whether it is a major crime, or minor crime; to whom did they do it and what is the victim's tribal status; and where was

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the act done - in Indian Country or not? To begin the analysis it is important to start with determining where the act occurred. Did the protest take place in Indian Country. Because the protesters were blocking a state highway that passes through the reservation to what is ostensibly fee land within the reservation, the analysis is not entirely straight forward. Generally, where there is a state highway, there must be a right of way secured by the state so it could put the highway down on what had been Indian land. This is a similar situation to what occurred in *Strate v. A-1 Contractors* where there was an accident on a state highway within an Indian reservation. The Court found that the highway was a right of way and that the tribe had lost its power to exclude on that highway right of way, much as the Court had found years earlier that the Crow tribe did not possess the bed of the Big Horn River, though for a different legal reason. However, the Indian Country Act of 1948 18 USC 1151 states that all land within the limits of any Indian reservation under the jurisdiction of the US, notwithstanding any patents, and including rights of way running through the reservation shall be considered Indian Country. Given the Indian Country Act, it is likely that the the highway will be considered to be Indian Country. But it may be that the Indian Country has been "diminished" and so does not possess the full character and jurisdictional issues that Indian Country would otherwise have. To determine whether this Indian Country has been diminished, you must look to the test that was developed in *Solem*, which says that you must look for any explicit language of cession or other language evidencing the present and total surrender of all tribal interests such that Congress meant to divest from the reservation all un-allotted opened lands. In this case, one might look to see if there was a surplus land act associated with this tribe and if the highway right

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of way deal was part of that, or if the fee simple inholding that will be the sight of the hog farm was established under such an act. Assuming that the highway was established as part of a separate right of way agreement, there is probably language explicitly dealing with it in statute. So Congress' intent on the highway right of way may be clear that it meant for the land to be used for the State highway, and taken from the reservation's ownership. The Solem test then requires that you determine if there was any unconditional commitment by Congress to compensate the Indians for the land taken for the right of way. It is state highway, but likely, as congress' authority over Indians is plenary, they would have had to agree to the right of way at some point and would have had to arrange with the state for the compensation of the land used for the highway. So likely there is compensation and there may be explicit statutory language from Congress. Together these establish an almost insurmountable presumption that Congress meant to diminish the land in question, so that it was no longer Indian Country. The second step of the test is to determine whether at the time of the act that Congress would have had to pass to cede the right of way to the state there was a widely held contemporaneous understanding that the reservation would shrink, if so then the Court is usually willing to infer that Congress shared that understanding; that their action would have the effect of diminishing the reservation, even despite language that might otherwise suggest an understanding that the reservation boundaries would remain unchanged.

However, if this was the case Indian Country would be seriously bifurcated and chopped into pieces by the numerous rights of way that criss cross Indian lands and would effectively diminish Indian reservations. The Indian Country Statute expressly provides that

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land within reservations shall be considered Indian Country notwithstanding rights of way. So because this state highway is within the external borders of the reservation, it will likely be held to be Indian Country. (Assume this is a non-PL 280 state).

Now that we have found this protest took place in Indian Country we must then analyze the actors and determine their tribal status and how that might affect the validity of their arrests. For those Indians arrested, the question is what did they do and to whom? In this case there were 9 people who were arrested for blocking the highway. This may be considered a victimless crime, as there may not have been anyone driving on the highway and it doesn't really fall into any assault or battery type of criminal charge that is perpetrated against another. Considering that it is a victimless crime, we must then determine who among the 9 were Indians and who were not. Congress, by passing the Duro fix amendments to the Indian Civil Rights Act of 1968, established that tribes have the inherent sovereign authority to charge Indian non-members with crimes. That legislation was upheld by Lara in 2004 so that it is now confirmed. Being such, we need not worry about whether the protesters were tribal members or not - just whether they were Indian or not. For those were Indian the tribe itself would have exclusive jurisdiction to arrest or charge or prosecute any crime. This is so because as Wheeler reemphasized Indian sovereignty is strongest where it deals with governing tribal members on tribal property, and consistent with Oliphant, having the authority to charge their own members or Indians - as recognized by the Duro fix legislation and by Lara - is not "inconsistent with their status" as domestic dependent nations. This is also so because as Lara held, the constitution does not dictate tribal sovereign authority, only Congress does, and it recognized tribal inherent authority to

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charge Indians, whether members or non-members. This is only more so in this case because the criminal violation is only minor. ICRA provides for tribal punishments of non-felonies and misdemeanors, which suggests that allowing the tribes to charge Indians is consistent with Congress' purpose and intent.

As for those who might have been non-Indians, generally the feds would have jurisdiction through federal enclave law or state law as applied through the assimilative crimes act. States, as separate sovereigns, may also have concurrent jurisdiction where there is no interest of the tribe implicated either through its members, its property and if federal policy toward the tribe is not implicated. In this case, it is hard to determine whether the state would have jurisdiction over the protesters since it seems tribal interests are implicated. So most likely the county sheriff, as a political subdivision of the state, would not have authority to arrest protesters in this case, unless it is found that the tribal and federal interests are not sufficiently implicated.

As for the one individual who threw an object, we must determine the Indian status of that person and whether the object was thrown at someone and what the Indian status of that person was. If it was thrown by an Indian at an Indian it is possible that the major crimes act (MCA) could apply if the crime is one of the 14 applicable - such as maiming, or assault with intent to kill or assault with a deadly weapon. If so then the feds could have jurisdiction. The tribe could also have jurisdiction if tribal law provided for concurrent jurisdiction over major crimes. Otherwise the state would have no jurisdiction because Indian-on-Indian crimes implicate the most fundamental premise of Indian sovereignty. If it were thrown by an Indian at a non-Indian then the feds could have jurisdiction under the MCA, the General

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Crimes Act, or possibly the Assimilative crimes act; the tribe could have jurisdiction if the tribe provides for it, but again the state would have no jurisdiction. Alternatively if the object were thrown by a non-Indian against a non-Indian the state would have exclusive jurisdiction under *McBratney* and because the crimes a two non-Indian against another non-Indian does not implicate tribal interests. Finally, if it was a non-Indian throwing the object at an Indian, federal courts would have jurisdiction under the General Crimes act or the assimilative crimes act (the MCA applies only against Indian defendants), but tribes lack jurisdiction under *Oliphant* which held that tribes lack general criminal jurisdiction over non-Indians absent affirmative delegation of such power by congress because they are proscribed from exercising powers of autonomous states that are expressly terminated by Congress and are powers inconsistent with their dependent status. Further, *Oliphant* held using language from *Williams* to say that to bar the tribe from prosecuting a non-Indian does not interfere or threaten tribal self governance. To complete this analysis we need to know the Indian status of everyone involved.

#### Tribe's Responses to Hog Farm

The Tribe wants to block the hog farm. To do so it must look to *Montana v. United States* which the Court has held in *Hicks* is the pathmarking case for determining the extent of tribal authority to regulate non-members, in this case the hog farm proprietors. *Montana* held that for a tribe to legitimately regulate non-members on fee land, just like the case before us, the situation must meet two fairly narrow exceptions. Either the tribe may regulate through taxation, licensing or other means the activities of nonmembers who enter

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consensual relations with the tribe or its members through commercial dealings, contracts, or leases or the like, or a tribe may also retain the inherent sovereign power to exercise civil authority over the conduct of nonmembers on fee lands in reservations when that conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe. Because the hog farm has not entered into any commercial dealing with the tribe or its members, the first exception doesn't apply. Hicks amended Montana somewhat to hold that land ownership status is but one factor - though it may be determinative - to support regulatory jurisdiction over nonmembers. Also after Hicks the tribe must show that tribal regulatory authority is necessary to protect an interest established in the second exception. Hicks stated that necessary includes the authority to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance for members.

Hicks further held that state sovereignty doesn't end at the reservation's border and that its authority into the reservation is an accommodation between the interests of the tribes and federal government on one hand and those of the state on the other. Hicks basically reversed the old presumption that tribes have sovereignty on tribal lands over non-members that would need to be expressly abrogated by treaty or statute, to now presume that tribal power over nonmembers is absent unless one of the two Montana exceptions applies, or Congress has otherwise delegated the authority. In this case there is no congressionally delegated authority. Strate also narrowed the definition of the health and safety exception by saying that allowing the tribe to regulate the conduct of two nonmembers while driving would swallow the exception. This means that the health and safety exception must be fairly



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narrowly held and can't probably be a general conduct that can't be found to be targeted or directed against tribal health and safety.

Hicks held that for on-reservation conduct involving only Indians, state law is generally inapplicable because state interests are reduced and federal interest in encouraging tribal self-government will be at its greatest. And that when state interests outside the reservation are implicated, states may regulate the activities of even tribal members on tribal land by imposing at least minimal burdens.

In this case the tribe has a pretty good argument that it should be able to regulate, if not bar, the hog farm. While Hicks has held land ownership status is but one factor to determine regulatory authority, in this case, it is in the tribe's favor because the tribe surrounds the hog farm and any discharges and smells would impact the tribe directly and its members. So while the presence of the farm may not impact the political integrity, which would be the strongest argument for the tribe, it does present some health and safety issues that would be significant due to discharges to the groundwater, dust, smell, traffic on the highway, etc. On the other hand, the state interest is fairly high due to the economic boost from an increased tax base, and more jobs. The federal interest in this case is a bit more obscure because there is no direct federal involvement in either the hog farm project or any specific tribal activity that would be negatively impacted by the farm, except that it could be argued they have a general trust duty to oversee the protection of the tribe due to its treaty status.

Ultimately because of the direction Indian law has been taking, where the Court has been more and more unwilling to provide for tribal authority over nonmembers, despite

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land status or classical sovereignty considerations - basically land-based considerations - it is likely that the tribe will be unable, despite its health and welfare concerns, to block or regulate the farm. However, if the tribe could also show that the farm would interfere with its economic stability because it would keep out tourists or ruin some other important business that kept the tribe self-sufficient, then the court might find that tipped the balance in the tribe's favor. Otherwise, even though the farm is in the middle of the reservation, the court just might not find that regulating the farm is sufficiently necessary to preserve tribal self-government as Hicks defined necessary.

#### Research Plan

Many of the questions that need to be answered for a full legal analysis and the reasons for them were already mentioned in the preceding analysis. But to summarize: For the criminal jurisdiction questions we must know the status of the land, so we must gather information about any treaties or acts of congress that might determine whether the land was ceded. Likewise we must determine if there was a compensation. Together these would establish diminishment. We must also know the demographics and whether the land has lost its indian character - how open has it become to non indian settlement. Also what was the contemporaneous understanding at the time the right of way was established. This all will help determine diminishment. Then we must look to the indian status of the actors and determine who did what to whom. This will allow us to do a full criminal analysis to figure out what entity has criminal jurisdiction over each actor.

For the civil and regulatory jurisdiction questions we need to find out where the

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groundwater is and how likely it is going to be impacted by the farm, where the wind blows and who will breathe the pig poop. As much information as we can gather about the health and welfare impacts will help make the case that the farm will pose a significant risk to the tribe's well being. Also any information on how the farm will impact the tribe's economic stability and its tourism, if any, will be extremely helpful to persuade the court that on balance the state interests are outweighed by the impact to the tribe.

## Part II

1.

The right of a tribe to determine its own membership is fundamental to their status and their sovereignty. In the controversial Indian women's right case *Santa Clara v. Martinez* (1978) the Court put great weight on the notion that a tribe's ability and authority to determine its own membership rules is not more or less than a mechanism of social self-definition and is basic to the tribe's survival as a cultural and economic entity. In that case the court held that a Santa Clara pueblo woman could not force the tribe or its governor under the authority of the Indian Civil Rights Act's equal protection clause to overturn the tribe's ordinance against recognizing as tribal members the offspring of Santa Clara woman who marry non-tribal, but still Indian, men, when the offspring of tribal men who marry outside the tribe are recognized as members. So this right asserted by the Cherokee Nation has been held to be fundamental to their survival as a culturally identifiable and sovereign Indian nation. Congress does have the power to withhold funds from the Cherokee Nation, however.

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because Congress' power is plenary, as first established in *Lone Wolf*, but with solid roots dating all the way back to *McIntosh* where Marshall held that the power that was once held by the British crown has been taken up by the people in the form of its representative government - Congress. This power is also rooted in the Indian Commerce Clause of the Constitution, which is generally held to demonstrate that Congress has exclusive authority to manage the affairs of Indians, including the right to unilaterally abrogate treaties, as in *Lone Wolf*. Cherokee Freedman could argue that under ICRA they are being treated differently by the tribe, but that approach was already attempted and failed in *Martinez*. Another approach might be to argue that as the Cherokees are a treaty tribe, all Cherokee descendants of treaty Indians are owed a fiduciary duty by the government, and Congress as ratifiers of the Cherokee treaties, and so must assert its full political pressure against the tribe to get them to accept the Freedman.

2.

Native Hawaiians, unlike most American Indians, have not been federally recognized under the Indian Reorganization Act of 1934, so they don't have tribal status or tribal relations with the federal government. Because they weren't federally recognized, they cannot claim that their ancestry is anything other than a proxy for a race-based classification, which, absent a compelling governmental interest and narrow tailoring, is unconstitutional. Under *Morton v. Mancari* the Court held that federal recognition was a non-race-based classification and instead was a political classification of American Indians that was constitutional because it is based on their unique status as domestic dependent nations. The

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court implied that non-federally recognized tribal Indians likely would not garner the same preferences because to allow that would void the political-based classification distinction and make the preferences truly race-based. In *Rice v. Cayetano* (2000) the Court held that Hawaiian ancestry is a proxy for race-based classification. Further, the Court distinguished Native Hawaiians from American Indians by finding that Congress had not expressly delegated its trust responsibilities to the State to manage native affairs, so that, although the state was acting as if it managed relations with Native Hawaiians as a trustee, it had no authority to do so because Congress hadn't delegated that authority, nor had it even affirmatively established tribal relations with Native Hawaiians.

3.

Indian Country is defined both by federal statute and by case law. It is defined by the Indian Country Act 18 USC 1151 passed in 1948 as any land that meets one of these three criteria: (1) all land within the limits of any Indian reservation under the jurisdiction of the US, notwithstanding any patents, and including any rights of way running through the reservation; (2) all dependent Indian communities within the borders of the US whether within or without the limits of a state (from *Sandoval*); and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through them. Case law then further defines Indian Country as any Indian Country that has not been diminished or disestablished by Congress either expressly or implicitly. To determine whether Indian Country has been diminished or disestablished the Court looks for explicit language of cession or other language evidencing the present and total surrender of all tribal

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interests such that Congress meant to divest from the reservation all un-allotted open lands. When coupled with an unconditional commitment by Congress to compensate Indians for the lands, there is an almost insurmountable presumption that Congress mean to diminish or disestablish the Indian lands. However, explicit language of cession and unconditional compensation are not prerequisites for finding diminishment. The Court also looks to the events surrounding the passage of the surplus land act that might address land status, or that opened Indian lands to settlement by non-Indians, particularly the manner in which the transaction was negotiated with the tribes and the tenor of the legislative reports to Congress and whether they reveal an unequivocal widely held contemporaneous understanding that the reservation would shrink. If so, then the Court has been willing to infer that Congress shared the understanding that its act would diminish the reservation, even if there is language in the act that suggests a clear understanding that the reservation boundaries would remain unchanged. Finally, the Court also looks to, essentially, the demographics of the areaa to see if there has been de facto diminishment after the lands have been opened to non-Indian settlement - they essentially ask "Has the land lost its Indian character?"

Tribes don't have exclusive jurisdiction over all offenders within their reservations because the Court has found that there was never an understanding that tribes ever did have that power. The Court has gone back through time to find in legislative histories, Indian commissioner reports and other secondary sources support for its contention that Congress never contemplated Indian jurisdiction extending to non-Indians, especially. The Court has said that such authority is "inconsistent with their status" as domestic dependent nations,

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which have submitted their once absolute sovereignty to the sovereignty of a greater power, namely the US Congress. Further, the Court has rationalized in *Oliphant* that "it would be problematic" to subject US citizens to a foreign code of laws unknown to them and not made by them, and to be judged by a group of non-peers. Supporting this argument, is what the Court says is its duty to protect its citizens against intrusions against their liberty, with the unspoken concern that tribal courts would be unfair to non-Indians and incapable of administering justice in a fair and equitable way, as we know it. There is some suggestion that Congress did have faith in tribal courts, because congress did pass ICRA in 1968 which gave courts the authority to apply important aspects of the US constitution's bill of rights. But the ultimate message from the Court is that they don't trust tribal justice.

Jurisdiction over non-Indian crimes in Indian Country depends on who the victim is. If the victim is an Indian then the federal courts have jurisdiction under the General Crimes Act, which makes federal laws applicable to crimes committed in Indian country and applies only to inter-racial crimes, or the Assimilative Crimes Act, which permits federal prosecutions of crimes not covered by federal statute by assimilating substantive state law. But neither the state nor the tribe would have jurisdiction in such a situation. If a non-Indian committed a crime against another non-Indian the Court's precedent in *McBratney* holds that the state has exclusive jurisdiction. And finally, if there is a victimless crime committed by a non-Indian in Indian Country, such as traffic violations, then the federal courts technically can have jurisdiction through the Assimilative Crimes Act, and the state will have concurrent jurisdiction where there is no interest of the tribe, its members or its property, is involved and if federal policy toward Indians or the tribe is not implicated.

4.

The United States' historical relationship with its indigenous peoples has been largely defined by the a trilogy of early supreme court cases in the early to mid 19th century, known as the Marshall Trilogy, after then-Chief Justice John Marshall. In this trilogy of cases, beginning with *McIntosh*, he essentially adopted and adapted one theory of interaction between Europeans and Indians that, together with the other opinions in the cases, has established the context for all future relations between the government and Indians. To begin with, he determined that the right of US title to the land and its sovereignty is based on the Doctrine of Discovery, or the right of acquisition, which established that European powers derived good title to the land against all other European nations "consummated by possession" and the sole right to acquire the land from Indians either by purchase or by conquest. In many ways, despite Marshall's ambiguity toward this theory over its subjugation of the Indians, this language and its rational perpetuated and prolonged perhaps the systematic racism that defined governmental and private relations with natives for generations yet to come because it was based on their being a savage and uncivilized and godless race. At the same time the Doctrine of Discovery is also the root of nearly every fundamental Indian law theory that has and now dictate: governmental relations with tribes, such as the Indian's diminished sovereignty status as domestic dependent nations, their trust relationship with the federal government, congress' exclusive and absolute power to manage indian affairs, the canons of construction which define how the courts should read and construe indian treaties and which has now been applied to the



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sympathetic (sometimes) interpretation of federal statutes. This trilogy of cases, most notably in the concurrence of McLean in Worcester and in Johnson's concurrence in Cherokee Nation, also predicts the problematic issues of conflictingn sovereigns between the states and tribes. Together, these cases encapsulate in the collective opinions nearly the entire span of federal Indian law policy that began with a goal of assimilation, as defined by the move to allot indian lands, and moved to the idea of having them remain separate and distinct communities, as Marshall recognized was also possible in McIntosh, in the reorganization period, to the termination period where congress acted to extinguish the federal tribal trust relationship by ended relations with tribes, as was argued by Johnson in the trilogy, and then to the current policy period of self-determination which is again a reflection of the trilogy and the idea that the tribes can remain distinct communities of people. Fundamental to this trilogy and defining in the relationship between the feds and tribes is the trust relationship whcih derives from the trilogy where marshall recognized that tribes have not given up their sovereignty completely but have agreed to be protected by a more powerful sovereign, originally against the greedy interests of the states and settlers, but also against themselves, the states, and the feds ultimately. This trust relationship also has roots in the constitution itself in the indian commere clause and the doctrine of discovery itself, where by the very nature of the indians having the right of occupancy only puts their welfare and the management and protection of their lands in the hands of the more powerful sovereign. So in looking at the historical relationship of the US government with tribes there is a difficult tension between ultiately the turst relationship and congress' plenary power and the tribal sovereignty. The court has handeld this by more and more

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treating tribal sovereignty and restricting it to only the authority to regulate tribal members  
in part because of the inherent conflicts that greater sovereignty entails.