

# THE RECORDER

## ESSENTIAL CALIFORNIA LEGAL CONTENT

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## Indian Law 101

When dealing with tribes or their members, the outcome of the case is often dictated by tribal laws, not state or federal, explains Thomas Weathers of Alexander, Berkey, Williams & Weathers.

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Indian law is a specialized field generally dealing with Indian tribes. California has 109 Indian tribes recognized by the federal government. Many tribes have casinos and other economic ventures that have led to increased interaction between Indian communities and non-tribal communities. This increased interaction has inevitably led to increased disputes and increased legal concerns.

Even so, many practitioners have little familiarity with Indian law and its possible impact on their practices. For example, a personal injury attorney who represents a patron in a slip-and-fall matter occurring at a tribal casino may have no recourse in a state court. Or, a real estate lawyer who drafts an easement across an Indian reservation may not realize that the easement is unenforceable absent consent by the federal government. A criminal defense lawyer may not appreciate that certain clients may be prosecuted in a tribal court even after reaching a plea bargain in a state court. The list can go on and on.

Indian law may well apply in some form to any legal matter involving a tribe or an Indian. To address this growing interaction, some states now require that Indian law be tested on their bar exams. Tested or not, all practitioners would be well served to know some Indian law.

Below is a brief overview of a few basics all practitioners should know; but the topic is much too broad for any in-depth discussion in a single article. A lawyer who believes Indian law may be involved should consider consulting an experienced Indian law attorney.

### TRIBAL SOVEREIGNTY

Tribes are sovereigns that exercise inherent authority over their members and their lands similar to that of states and foreign governments. Each tribe determines its own membership (usually based on blood quantum and community affiliation). Some California tribes have a few members, while others have thousands of members. As individual sovereigns, each of these tribes may have laws and governments that differ from California and differ from other tribes. Federal law does not require a particular form of government for Indian tribes. Many tribes in California govern themselves through a tribal council of a few elected members; others may have the entire adult population vote on all government actions. Some tribes have written constitutions and written laws; others rely on oral custom and tradition. About 20 tribes in California have tribal courts. In other tribes, the tribal council also acts as the tribal court. Each tribe is unique. In dealing with an Indian tribe, a practitioner must understand the tribal government, the tribal decision making process and tribal laws.

### TRIBAL IMMUNITY

Indian tribes enjoy sovereign immunity from unconsented suit. An Indian tribe cannot be sued — whether in tort, contract, law or equity — unless Congress has authorized the suit or the tribe has clearly waived its immunity. A waiver of tribal immunity cannot be implied but must be unequivocally expressed. Absent congressional authorization or an express waiver, all courts lack subject matter jurisdiction over suits against tribes.

This immunity extends to an Indian tribe's governmental and commercial activities, such as a casino. The immunity will apply on reservation and off reservation. It will protect individual tribal officials acting in their official capacity and within the scope of

their authority. If suing an Indian tribe, a practitioner should realize that his or her client will have no court remedy absent an express waiver of immunity.

#### **TRIBAL JURISDICTION**

Tribal jurisdiction is an area where hard-and-fast rules are rare. It depends on the subject matter, the parties and the location. In general, Indian tribes lack jurisdiction over the conduct of non-Indians (nonmembers) unless the nonmember enters a consensual relationship with the tribe (e.g., contract), or the activities of the nonmember directly affect the tribe's political integrity, economic security, health or welfare. If the claim arises on the reservation, a tribal court may have jurisdiction for claims by non-Indians against Indians or Indians against Indians because such claims directly affect the tribe. But if that same claim arises off the reservation or is filed against a non-Indian, a state court will likely have jurisdiction. For criminal matters, a tribe has jurisdiction over only other Indians. In theory, an Indian can be prosecuted in three courts — tribal, state and federal — for the same offense without violation of double jeopardy. In any given legal matter, a practitioner must determine if a tribe is involved, if an Indian is involved, and which court or government has jurisdiction over a given dispute.

#### **TRIBAL TAXATION**

Tribal taxation is equally complicated. As sovereign governments, Indian tribes have the power to tax. However, federal courts have limited much of that power to taxing tribal members and tribal businesses on the reservation. Tribes have little power to tax nonmember economic activity that takes place on reservations absent a consensual relationship (e.g., contract to extract coal or oil) and no power to tax nonmember economic activity that takes place off the reservation.

Furthermore, as sovereigns, Indian tribes do not pay state or federal income taxes. However, contrary to a common misconception, with rare exceptions, individual Indians do pay federal and state income tax unless they live and work on their own reservations. While tribes may not be taxed by a state on the reservation, they may be subject to state taxes when operating businesses outside the reservation. Non-Indians may be subject to state taxes even when operating on an Indian reservation.

#### **TRIBAL GAMING**

Since the adoption of the Indian Gaming Regulatory Act in 1988, Indian gaming has become the largest single revenue-producing activity for Indian tribes, particularly in California, where tribes operate about 58 casinos. But contrary to a common misconception, not all tribes and not all Indians have grown wealthy through gaming. Much depends on casino location and other factors. In California, those tribes that operate casinos share their revenues with those tribes that do not. The increased wealth of some tribes has helped tribes better provide services and benefits for their members.

To operate a casino with slot machines, a tribe must enter a gaming compact with California governing the scope and conduct of the gaming. While each compact can be unique, California has adopted a similar compact with most of the gaming tribes. Among many other terms and conditions, this model compact also provides a limited waiver of sovereign immunity to allow patrons to bring suits against a tribe under a tort liability ordinance to be adopted by the tribe. Each tribe may have a different ordinance with different procedures and different types of recovery. For example, many tort liability ordinances require a claim to be filed within six months or be lost forever. Many others limit the types of damages and cap total recovery to the limit of the tribe's liability insurance policy. A lawyer wishing to sue a tribal casino must obtain and follow the tribe's tort liability ordinance.

#### **TRIBAL LANDS**

Title to Indian reservations may be held in trust by the federal government or in fee by the tribe or individuals. If held in trust, the land may not be sold or alienated without the consent of the federal government. If held in fee, there generally is no restraint on alienation. Most tribal trust land is held communally by the entire tribe subject to use and control by the tribal government. Due to historical circumstances, however, some tribal land is held in trust for individual Indians in allotments for their individual use and control. No trust land is subject to state property tax and all trust land may be leased only with the consent of the federal government.

Different federal statutes govern different leasing rules for different reservations. For example, some California tribes can lease their trust land (with federal government consent) for 25 years, while other California tribes can lease their trust land (with federal government consent) for 99 years. A real estate lawyer will need to review pertinent statutes and regulations when helping a client lease Indian trust land. The U.S. Bureau of Indian Affairs may be a good place to start.

#### **CONCLUSION**

Indian law is a complex body of law and rules that implicate most every other substantive area of law. If an Indian or an Indian tribe is involved in any way, a prudent attorney would consult with an experienced Indian law practitioner before advising a client.

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