

# Criminal Jurisdiction in Indian Country

- There are three sovereign entities in the United States – federal, state, and tribal. Tribal governments are unique among the three, as they possess a separate sovereignty that has never been formally incorporated into the American constitutional framework.
- This means that there are laws “dealing specifically with Indian tribes and Indian people” that are outside the mainstream ideas of the Constitution.
- The U.S. Constitution does not apply to Indian Tribes.....However, ICRA does.

# Backbone of Criminal Jurisdiction

- **Inherent Sovereign Authority:** Indian tribes - as sovereign nations - historically have inherent jurisdictional power over everything occurring within their territory. Tribal courts are courts of general jurisdiction which continue to have broad criminal jurisdiction. Any analysis of tribal criminal jurisdiction should begin with this sovereign authority and determine whether there has been any way in which this broad sovereign authority had been reduced.

# Basic Principles

- “Jurisdiction” means an exercise of authority in all judicial matters. Criminal defendants can only be prosecuted in a court with jurisdiction over both the crime and the criminal. Further, jurisdiction can be exercised exclusively or concurrently by different sovereigns – federal, state, or tribal

# Who is an Indian?

- Generally speaking, an “Indian” is a person who has some degree of Indian blood and is either (1) a member of a federally-recognized Indian tribe or (2) recognized as “eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

# What is Indian Country?

- The definition of Indian Country is set forth by federal law (18 U.S.C. § 1151) as follows:
- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

# Cherokee NC Tribal Lands Includes

- Qualla Boundary (Swain, Jackson)
- Snowbird (Graham)
- Cherokee County
- 3,200 Acre (Swain)



## Criminal Jurisdiction over Non-Member Indians

- The Supreme Court ruled that tribal courts did not have criminal jurisdiction over non-member Indians. *Duro v. Reina*, 495 U.S. 676 (1990). Congress, however, overturned this decision and restored tribal court criminal jurisdiction over non-member Indians by adding the following language to the definition of “powers of self-government” in the Indian Civil Rights Act (25 U.S.C. § 1301) - “means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians” (Public Law 102-137).

# Criminal Jurisdiction over Non-Indians

- The U.S. Supreme Court decision [Oliphant v. Suquamish Indian Tribe, 435 U.S. 191](#) (1978) limits the ability of Native Nations to try and punish non-Indians. Under this decision, Native Nations generally do not have jurisdiction to prosecute non-Indians.
- The Violence Against Women Act Reauthorization of 2013 slightly modified this decision however. A Native Nation may choose to exercise “Special Domestic Violence Criminal Jurisdiction (SDVCJ) and exert their inherent ability to prosecute non-Indians who commit the following offenses: domestic violence, sexual assault, dating violence, and violation of protection orders. In order to exercise SDVCJ, the Nation must meet certain requirements.
- Cherokee is one of those exercising SDVCJ since 2013.

# Criminal Jurisdiction over Non-Citizens

- Under Cherokee Supreme Court cases *EBCI v. Tores* and *EBCI v. Martinez*, the Court found that Cherokee could exercise complete criminal jurisdiction over non-citizens defendants who committed crimes within its boundaries.
- These cases have not been challenged.

# Foundational Chart

## Table 1. Breakdown of Federal, State, and Tribal Jurisdiction in Indian Country

Identity of Alleged Defendant	Identity of Alleged Victim	Major Crimes as Defined by the Major Crimes Act	All Other Crimes
Indian	Indian	Federal* and Tribal	Tribal
Indian	Non-Indian	Federal* and Tribal	Federal* and Tribal
Non-Indian**	Indian	Federal* (pursuant to the General Crimes Act because the Major Crimes Act applies only to Indian defendants)	Federal*
Non-Indian	Non-Indian	State	State
Indian	Victimless / Consensual	N/A	Tribal, possibly Federal***
Non-Indian	Victimless / Consensual	N/A	State

\*Under PL 280, states can assume federal jurisdiction within Indian Country. In Montana, only the CSKT consented to PL 280 jurisdiction. Currently, the CSKT have exclusive jurisdiction over misdemeanor crimes committed by Indians and concurrent state-tribal jurisdiction over felony crimes committed by Indians.

\*\*The Violence Against Women Act allows tribes to assume federal jurisdiction over non-Indian perpetrators of specific domestic violence-related crimes as long as they meet certain procedural guarantees.

\*\*\*See *U.S. v. Marcyes*, 557 F.2nd 1361 (9th Cir. 1977); but see *U.S. v. Quiver*, 241 U.S. 602 (1916).

Source: "Tribal Nations of Montana: A Handbook for Legislators"

# Recently Passed Changes

# VAWA 2022 Special Tribal Criminal Jurisdiction

- Criminal Jurisdiction over anyone who commits the following against an Indian Victim.
  - (A) child violence;
  - (B) dating violence;
  - (C) domestic violence;
  - (D) sexual violence;
  - (E) sex trafficking;
  - (F) stalking; and
  - (G) a violation of a protection order

# VAWA 2022 Special Tribal Criminal Jurisdiction Cont.

- Criminal Jurisdiction over anyone who commits the following crimes, regardless status of victim
  - (A) Assault on Justice Personnel
  - (B) Obstructing Justice



# Sentencing Limitations

- The Tribal Law and Order Act (TLOA) 25 U.S.C. § 1302 amended ICRA, thus increasing tribal court authority to incarcerate for up to three years and/or fine up to \$15,000 for one offense. However, if a tribal court orders incarceration for more than one year, it must:
  - Provide licensed legal counsel for an indigent defendant at tribal expense (The defense attorney must be licensed to practice law by a tribe, state, or federal government in a manner that ensures professional competence and responsibility.);
  - Ensure that tribal court judges are law trained and licensed;
  - Publish criminal laws, rules of evidence, and procedure; and
  - Maintain an audio or video record of the criminal trial.

# N.C.G.S 1E- Eastern Band of Cherokee Indians

- Full Faith and Credit
- County Services
- Tribal Law Enforcement Authority and Limitations
- Application and meaning of terms
- Qualification of law enforcement officers; limitations of authority.
- Cherokee Marshals Service

# Extradition

- The EBCI is not part of the interstate compact compelling the use of extradition processes.
- Accordingly, *Eastern Band of Cherokee Indians v. Lynch*, 632 F. 2d 373 (4th Cir. 1980), states, "We repeat what our cases have decided: the members of the Eastern Band of Cherokees have a dual status. They are citizens of North Carolina."
- Therefore, there is no instance where a rendition was done from a county in North Carolina to the Indian Reservation. Typically, if another state locates a fugitive on the Indian Reservation they will send a requisition from their Governor to the Governor of North Carolina. Upon which the Governor of North Carolina shall issue a Governor's Warrant and send it to the tribe. Upon receiving the Governor's Warrant, the tribe will bring the matter before their courts and enter an order giving "full faith and credit to the Governor's Warrant." See *E. Band of Cherokee Indians v. Driver*, 2005 N.C. Cherokee Sup. Ct, LEXIS 18 (2005).

# Questions Officers Should Consider

- Was the site of the Crime Indian Country?
- Was the Crime committed by or against an Indian?
- Are there any Special Criminal Jurisdiction exceptions for jurisdiction