Sovereignty, Jurisdiction, and Lands Matter

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The lights of a county law enforcement vehicle flashed in my rearview mirror. I had just left the reservation and was driving on a part of the road where everyone ignored the posted speed limits—unless, of course, there were donkeys wandering around. There were no donkeys that day. I was speeding, no question about it. So, I pulled over and waited for my inevitable ticket.

The officer approached and asked if I had a driver's license, registration, and proof of insurance. I said I did. To my surprise, he told me that I could go without even looking at the documents. I left, relieved. Coincidentally, my tribe was the plaintiff in a federal lawsuit against the county law enforcement department that had just pulled me over, alleging that his department was trying to enforce the state's civil regulatory vehicle laws *specifically* against tribal members who were driving within the tribe's reservation. I was a tribal member, off-reservation, who would have had a hard time challenging a speeding ticket.

The lawsuit was *Chemehuevi Indian Tribe v. McMahon, et al.*[1], a great example of why it is critical to understand sovereignty, jurisdiction, and land status if you practice law in Indian country. The federal complaint alleged that the county sheriff and deputy sheriffs ("*McMahon* Defendants") were racially profiling, arresting, and issuing citations for violations of the state's vehicle code to tribal members while driving within the boundaries of their reservation. The Chemehuevi Indian Tribe and several of its members sought monetary damages, as well as declaratory and injunctive relief, on the grounds that: (1) the sheriff and deputy violated federal law by issuing motor vehicle citations without jurisdiction on reservation land; (2) the sheriff and deputy interfered with tribal self-government; (3) state authority was preempted; and (4) the sheriff and deputy committed civil rights violations. The tribe and the members also sought to enjoin the county's prosecution of the members for the alleged violations.

Understand Tribal Sovereignty and Jurisdictional Authority

The U.S. Constitution grants broad powers to the federal government and reserves the rest to the states or the people. This is an incomplete understanding of jurisdiction in our country. Some may think that the state of California would have jurisdiction over tribal members who reside on the Chemehuevi Indian Reservation because the reservation is within the state of California. They would be wrong.

Tribal sovereignty predates the U.S. Constitution because tribes were already governing themselves before colonization. Tribal sovereignty is inherent, not something given or delegated by the federal government or any state. In fact, it is crucial to remember that state law does not apply to Indians within their Indian country, unless the U.S. Congress has enacted a law specifically granting states such jurisdiction.[2]

This situation means that *only* Congress can expressly grant state jurisdiction over Indian persons residing on their reservations. An example of this would be Public Law 280, where Congress granted *some* states limited criminal jurisdiction over offenses committed in "Indian country"[3] or *limited* civil jurisdiction to hear private litigation

involving individual Indian residents of reservations in state court proceedings.[4] In 1955, the state of Nevada elected to assume jurisdiction under Public Law 280, subject to some conditions.[5] One of the conditions is that the tribe "occupying any such area *has consented* to the continuation of state jurisdiction … or *has consented* to the assumption of state jurisdiction over such area[.]"[6]

It is worth re-emphasizing that even *if* a state has assumed jurisdiction under Public Law 280, it is not carte blanche jurisdiction. If state jurisdiction is challenged, a court must determine whether the law is: (1) a criminal statute of statewide application, and thus fully applicable to Indian residents of the reservation; or (2) civil in nature, and thus applicable only as between private state court litigants.[7] This is often referred to as a criminal/prohibitory and civil/regulatory distinction test.

In *McMahon*, the conduct at issue was driving an automobile. Instead of prohibiting driving, the state regulated it by allowing people to drive if they registered the vehicle and had a license. The relevant statutes were civil/regulatory requirements, not criminal prohibitions, and do not apply to Indian persons driving on their reservations within Indian country. Again, not even Public Law 280 grants a state jurisdiction to enforce its civil regulatory laws against Indians while within their Indian country. That would be for the respective tribe to regulate.

The only way the *McMahon* defendants could enforce the civil regulatory laws against Indians would be if the Indians were not driving within Indian country.

Understand the Significance of Land Status

One of the most important considerations in practicing federal Indian law or tribal law is the question of whether respective land is Indian country or not. For example, state law does not apply in Indian country unless Congress passed a law clearly saying that it does. Federal law defines "Indian country," in part, as "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[.]"[8]

Some Indian reservations are remnants of a tribe's original land base, and some were created by the federal government for the resettling of Indians who were forced from their homelands. Not all tribes have reservations but, if they do, the reservations are generally owned by the federal government in trust for the respective tribe. Federal law (e.g., treaty, legislation, executive order, etc.) often establishes the reservation boundaries. It is important to note that "adjudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands. One inquiry does not necessarily have anything in common with the other, as title and reservation status are not congruent concepts in Indian law."[9]

The *McMahon* defendants answered the federal complaint by arguing that a specific section within a surveyed township (Section 36) was not included within the Chemehuevi Indian Reservation's boundaries. When faced with the question of whether land is Indian country or not, a lawyer should do what the Ninth Circuit Court of Appeals did in *McMahon*: look to the history of the reservation.

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In *McMahon*, the court found that public lands had been surveyed and that some lands were granted to the state, but that those grants excluded lands in the occupation or possession of any Indian tribe. It found that Congress had ordered the U.S. Secretary of the Interior to select reservations for certain tribes that included lands that were in the actual occupation and possession of Indians. Congress sent special agents to investigate and recommend territories for reservations. For the tribe, the recommendation included Section 36—which was included in an executive order that directed the lands to be withdrawn from all form of settlement. The court also found that both Congress and the Supreme Court had expressly recognized the executive order's valid establishment of the tribe's reservation boundaries.

The tribe successfully obtained a federal court decision that the land in question was within the tribe's reservation boundaries (i.e., Indian country). The tribe's members successfully argued that since the *McMahon* defendants did not have jurisdiction to enforce the state's civil regulatory laws within the tribe's reservation boundaries, their detentions and citations violated the U.S. Constitution and federal statutes. Accordingly, the members had a civil rights cause of action and, as the prevailing parties, were able to recover their attorney's fees against the *McMahon* defendants.[10]

The officer had full jurisdiction to give me, an Indian, a ticket because I was driving outside of my reservation. That is not contentious. Nor should it be contentious that, on the other side of the boundary line in the middle of the desert, the officer would not have had jurisdiction. Tribes governed themselves long before any state was created and should continue to do so today.

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ENDNOTES:

1. *Chemehuevi Indian Tribe v. McMahon, et al.*, 934 F.3d 1076 (9th Cir. 2019), *cert denied*, 140 S. Ct. 1295 (2020).
2. *Worcester v. Georgia*, 31 U.S. 515 (1832); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).
3. 18 U.S.C. § 1162.
4. 28 U.S.C. § 1360.
5. NRS 41.130 and NRS 194.040.
6. NRS 41.130(3) (emphasis added).
7. *See California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).
8. 18 U.S.C. § 1151.
9. *McMahon*, 934 F.3d at 1076 (*quoting Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987) (internal quotation marks and footnote omitted)); *see Solem v. Bartlett*, 463, 466-68 (1984).
10. 42 U.S.C. § 1983; 42 U.S.C. § 1988(b).