CROSSING JURISDICTIONAL PATHS:

THE GROWING INTERSECTION BETWEEN STATE AND TRIBAL REGULATION

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PERKINSCOIE
COUNSEL TO GREAT COMPANIES

Crossing Jurisdictional Paths:
The Growing Intersection between State and Tribal Regulation

- State Regulation Inside Indian Country
  - Ronak Patel, Riverside County,Deputy County Counsel
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- Tribal Regulation Outside of Indian Country
  - Odin Smith, Perkins Coie
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The Question of Jurisdiction

CROSS JURISDICTIONAL CONFLICTS ARISING IN AND OUT OF INDIAN COUNTRY

- Crimes
- Environmental Regulation
- Zoning and Land Use
- Taxation
- Online Gaming
- Marijuana
- Courts
- Adoption



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The Applicable Framework for Evaluating Jurisdictional Disputes

THE WHERE, WHO AND WHAT

- Where is the regulation taking place?
  - Is the land within Indian country?
  - Is the land trust land?
  - Indian-owned fee land?
- Who is being regulated?
  - Tribal member?
  - Indian?
  - Non-Indian?
- What activity is being regulated?
  - Criminal or civil?



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What is Indian Country and Why That Doesn't End the Inquiry



MAJOR CRIMES ACT—18 U.S.C. § 1151

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

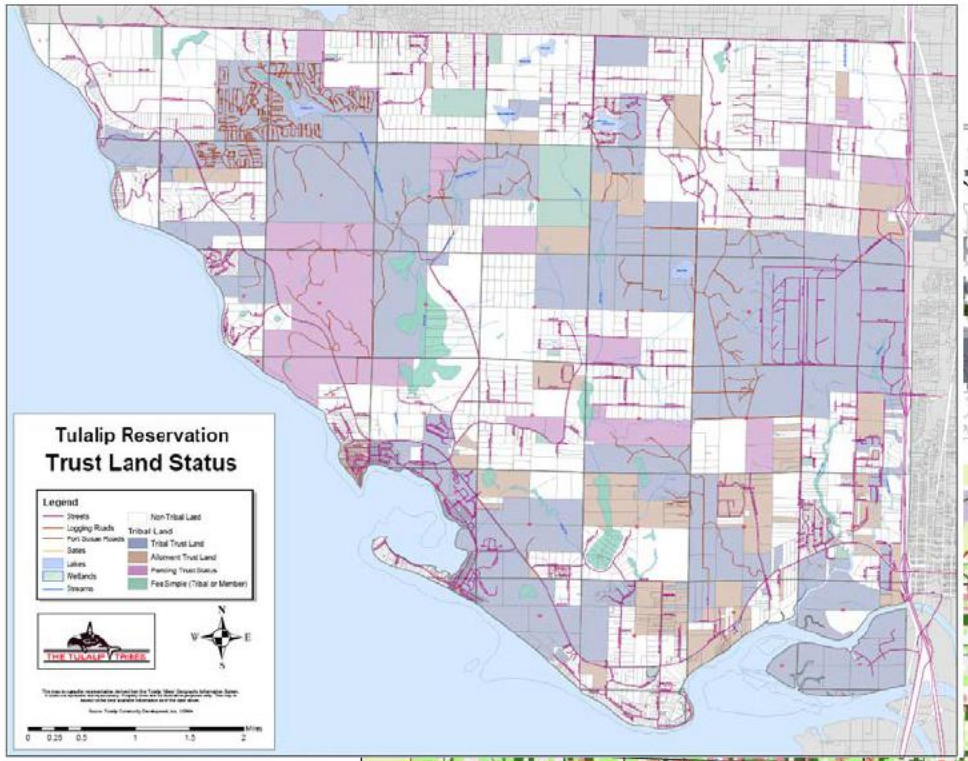
All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state

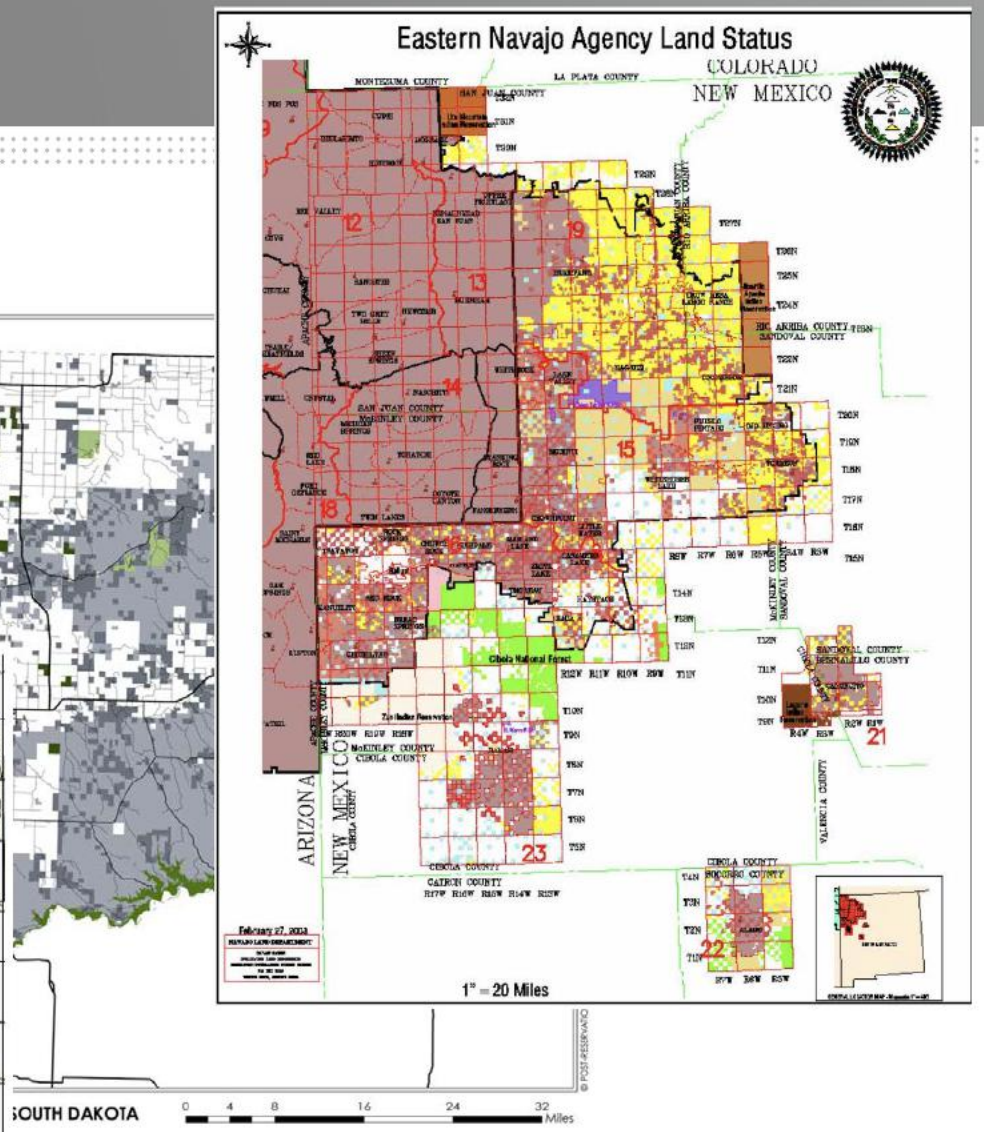
All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same

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Checkerboard Reservations





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Reservation, Allotment, and Reorganization

KNOW THE HISTORY OF THE TRIBE AND LAND INVOLVED



- When was the Reservation established and pursuant to what authority?
- Was the Reservation allotted and when? What laws?
- What land is allotted?
- What land is in fee?
- Vote under the Indian Reorganization Act?
- Reacquisition of land in trust?
- New trust lands?

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Tribal Jurisdiction in Indian Country

GENERAL RULES ARE ONLY THE START OF THE INQUIRY

- Tribes have civil and criminal jurisdiction over their own members
- Degrees of civil jurisdiction over all non-members, Indians or non-Indians
  - Consensual relations
  - Direct (catastrophic) effects on the political integrity, economic security or the health or welfare of the tribe
- Criminal jurisdiction over members and non-member Indians
- No criminal jurisdiction over non-Indians who commit crimes on the reservation, except Violence Against Women Act Reauthorization
- Tribes have environmental regulatory authority within reservation boundaries over all lands

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State Jurisdiction in Indian Country

NO EASY RESOLUTION

- States cannot regulate Indians in Indian country, absent congressional authorization
- States have very limited jurisdiction over Indians in Indian country
  - Tribes have inherent authority over tribal members
  - States cannot impose sales taxes on tribes or tribal members for on-reservation sales, nor income taxes on tribal members living on reservation
- States can regulate non-Indians and sometimes Indians on fee lands in Indian country
- States can regulate non-Indians on trust and restricted lands in Indian country under *Bracker* balancing

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Federal Tax Preemption in Indian Country

NORMAL PREEMPTION PRINCIPLES

- **Express Preemption**
- **Implied Preemption**
  - Field Preemption
    - Congress intended federal law to exclusively occupy the field
  - Conflict Preemption
    - Where compliance with both federal and state regulations is impossible; or
    - Where the exercise of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"

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White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)

PREEMPTION OF STATE REGULATION OF NON-INDIANS IN INDIAN COUNTRY

- *Bracker* balancing is "a flexible pre-emption analysis sensitive to the particular facts and legislation involved."
- Courts must evaluate the interests involved:
  - Federal interests, as set forth in federal statutes and regulations
  - Tribal interests include tribal sovereignty and economic interests
  - State interests include the provision of governmental services and regulation of non-Indians



- A state tax "is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."

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Federal Tax Preemption in Indian Country

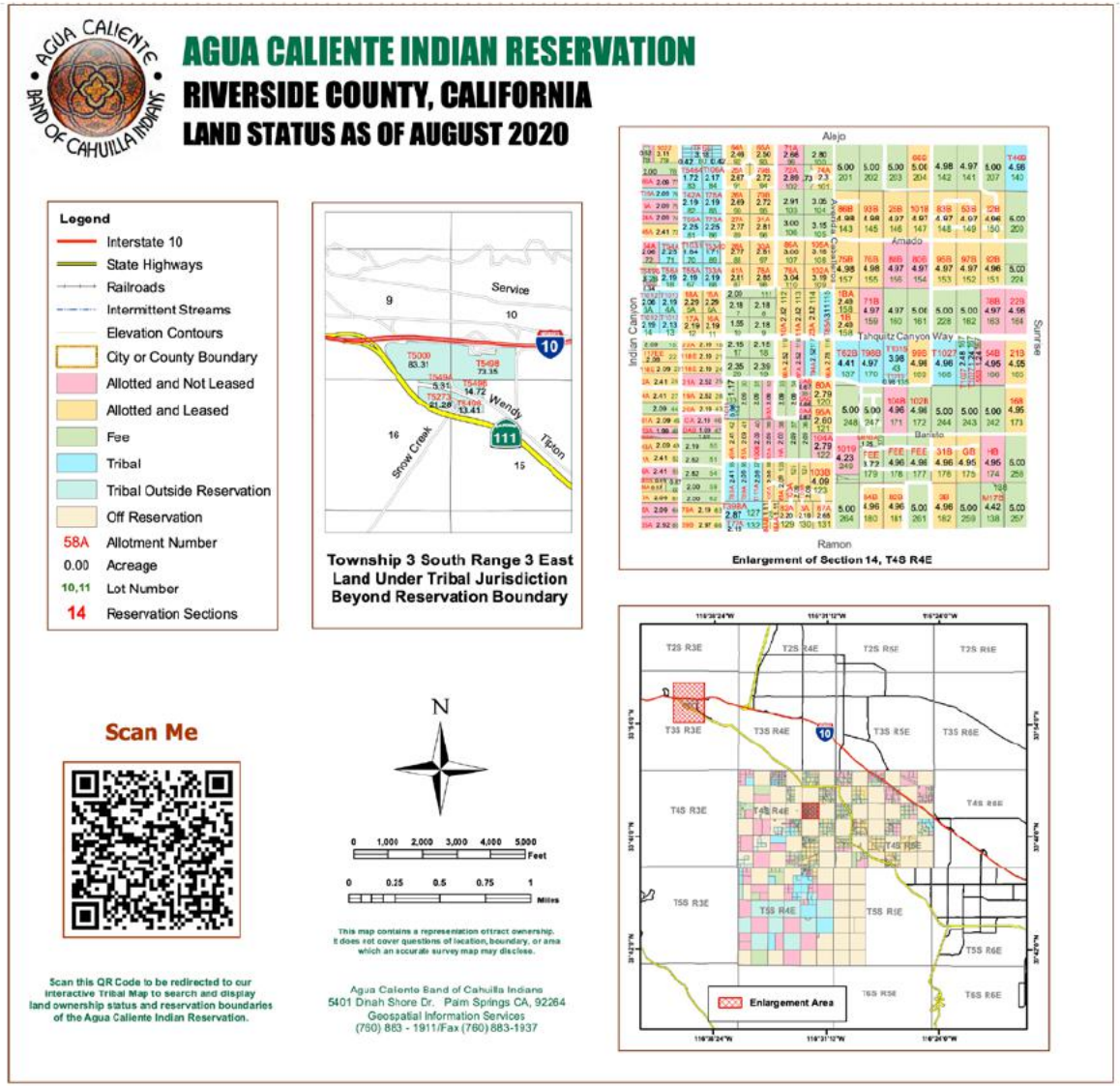
GENERAL RULES

- States cannot tax Indians in Indian country.
  - Tribal lands and property
  - Tribal income
  - Indian income earned on reservation
  - On-reservation sales to tribes and Indians
- States can generally tax tribes and Indians outside of Indian country.
- States can tax non-Indians in Indian country if, after balancing the federal, tribal, and state interests, the state's interest justifies the tax.

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Taxation in Riverside County: A Case Study

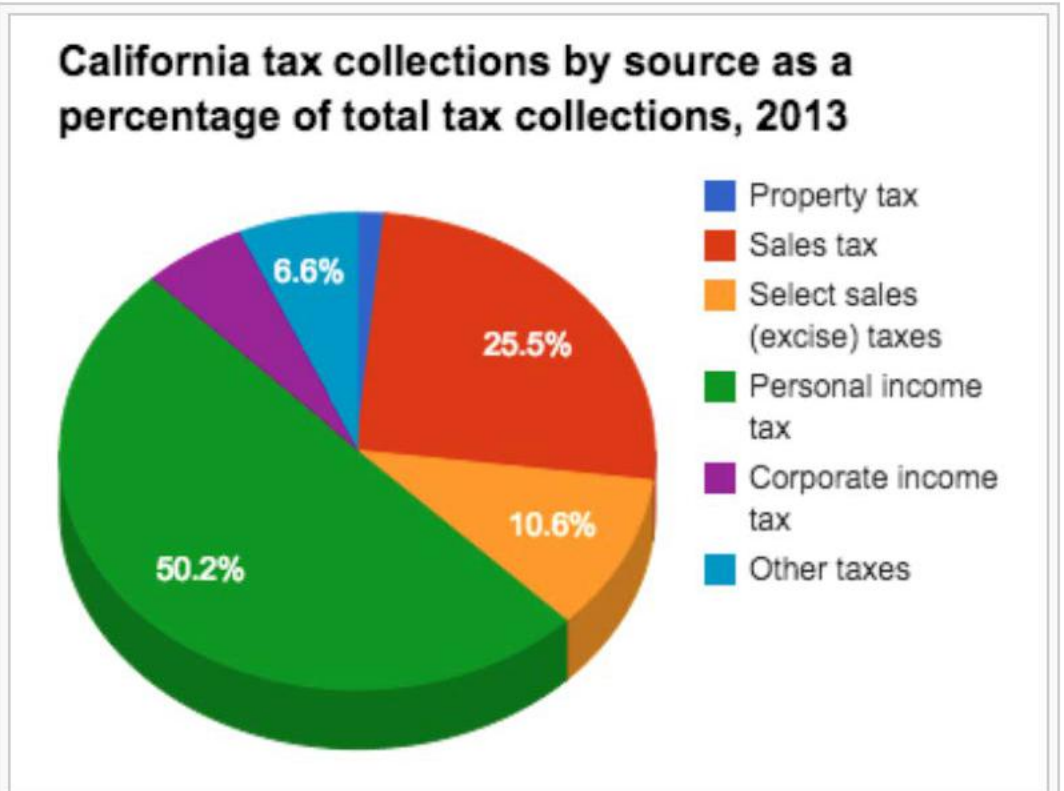




Tax Preemption in Indian Country

WHAT'S AT STAKE?

- Personal Property
- Possessory Interests
- Gas
- Cigarette
- Hotel



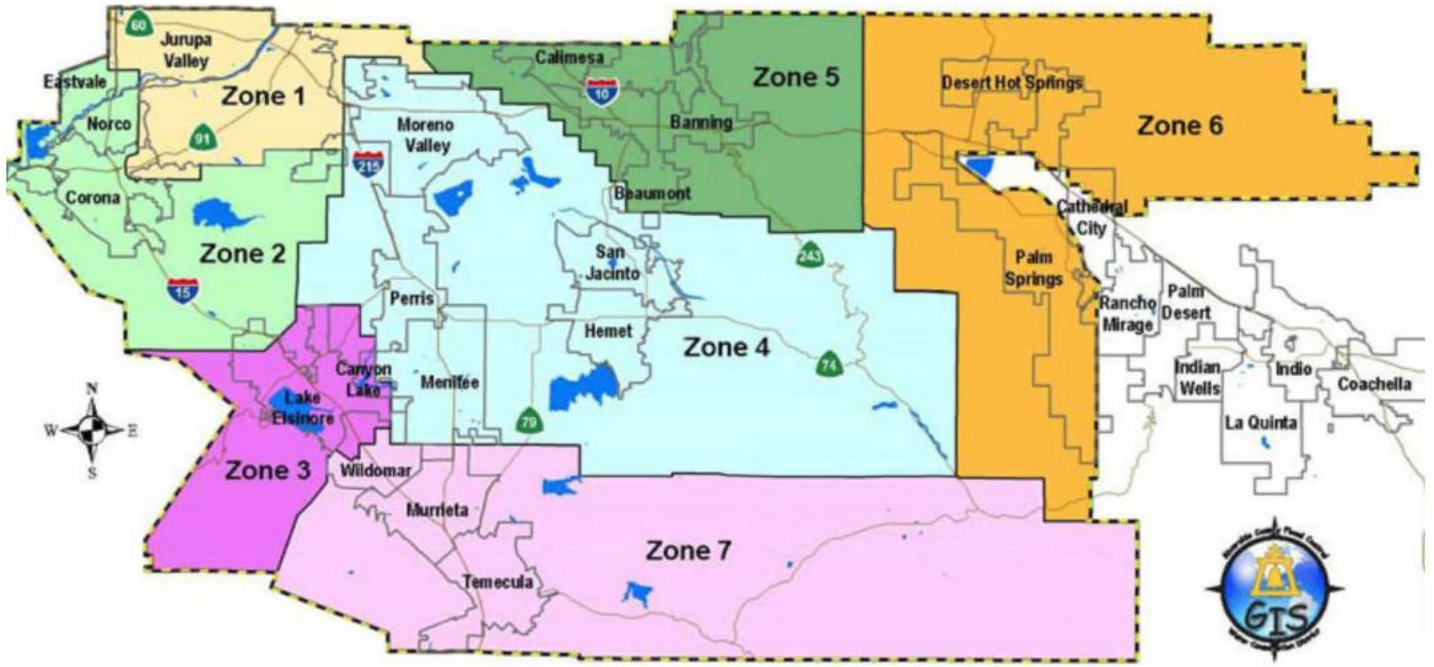
Tax collections by source as a percentage of total tax collections in 2013.

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The Provision of Governmental Services

- Complicated History
- Multiple Jurisdictions
  - County
  - Cities
  - School District
  - Water Districts
  - Library District
  - Vector Control District
- Tax Rate Areas



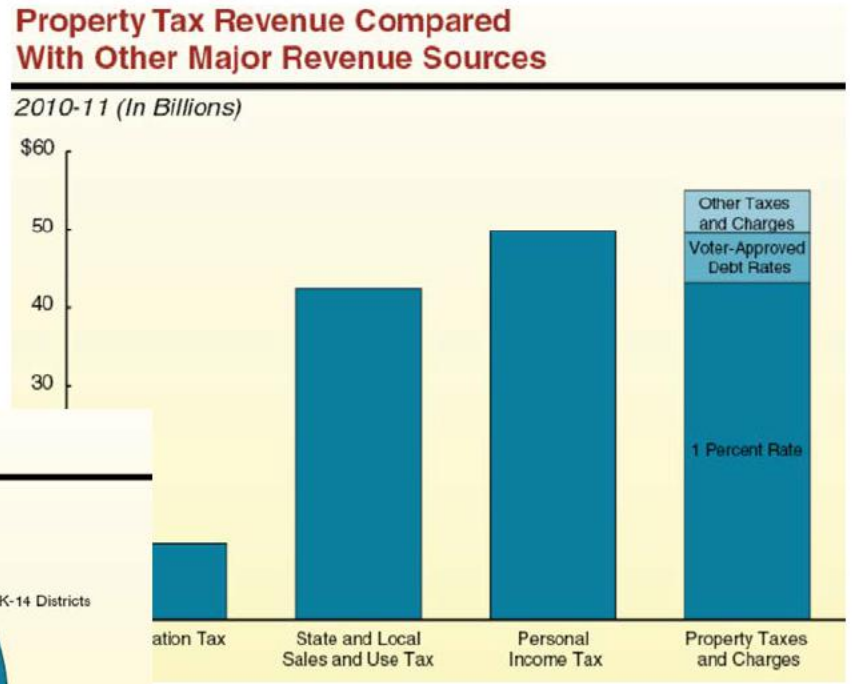
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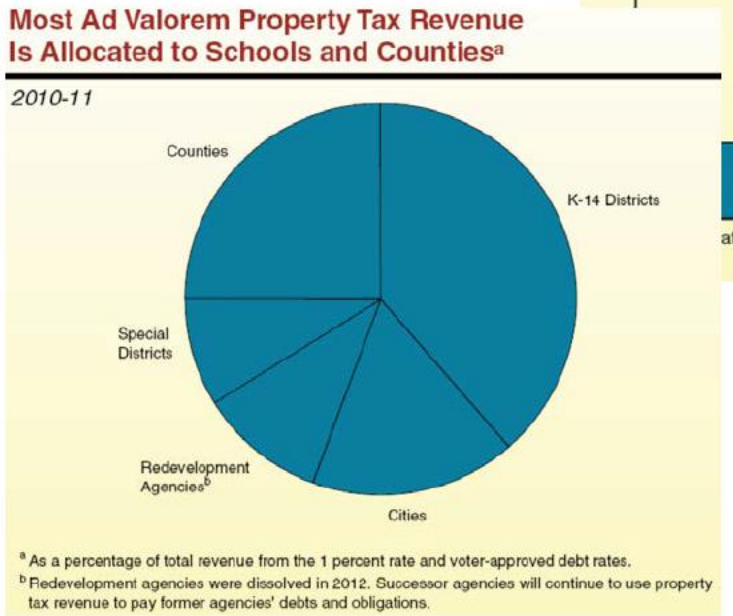
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Property Taxes in California

IMPORTANT CONSIDERATIONS

- Major revenue source
- Constitutionally capped at 1%
  - Annual increases capped at 2%
  - Local increases must be approved by voters
- Used to fund essential services at the local level
- Education





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California Possessory Interest Tax (PIT)

RIVERSIDE COUNTY IS CONSTITUTIONALLY AND STATUTORILY REQUIRED TO TAX PROPERTY

- Riverside County implements state law and collects tax on property interests, including "possessory interests" in tax-exempt property.
- A "possessory interest" is "the possession of, claim to, ownership of, or right to possession of land and improvements," except when coupled with ownership of a fee simple or life estate.
- "Taxable possessory interests" are "possessory interests in publicly-owned real property."

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Round 1

THE 1971 CHALLENGES TO THE PIT IN INDIAN COUNTRY

- In the late 1960s, the Agua Caliente Tribe sued Riverside County in federal court challenging the application of the PIT to lessees of Agua Caliente lands.
  - *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972)
- Palm Springs Spa filed a parallel challenge in state court seeking a refund of taxes paid on the grounds that the PIT violated the state and federal constitutions.
  - *Palm Springs Spa, Inc. v. County of Riverside,* 18 Cal.App.3d 372, 95 Cal. Rptr. 879 (1971)
- To resolve the respective cases, Riverside County, the Tribe, and Palm Springs Spa presented evidence regarding the economic impacts of the PIT at trial.



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Resolution of *Palm Springs Spa* and *Agua Caliente*

THE CALIFORNIA COURT OF APPEALS AND NINTH CIRCUIT UPHELD THE PIT IN 1971

- In *Palm Springs Spa,* the court upheld the PIT because:
  - The PIT did not fall on the Tribe and any deficiency was enforced against the leaseholder only
  - The PIT did not conflict with federal statutes or unduly burden federal interests
  - The PIT did not infringe on tribal sovereignty
- The Ninth Circuit reached the same conclusion in *Agua Caliente*
  - PIT would not result in an encumbrance of tribal land and the Tribe was never liable for the tax
  - The tax was permissible in the absence of federal "legislation dealing with Indians and Indian lands demonstrat[ing] a congressional purpose to forbid the imposition of it"

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The Effect of the PIT on Economic Growth

THERE HAS BEEN TREMENDOUS ECONOMIC GROWTH ON THE RESERVATION SINCE 1971

- Tribal members lease approximately 4,300 acres under 19,900 leases.
- The total value of the possessory interests in Agua Caliente land exceeds $2.2 billion.



Desert Sun: Jay Calderon



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Changes in Federal Regulations

DISRUPTING SETTLED LAW

- The Secretary issues 25 C.F.R. § 162.017 in 2013, which asserts that certain taxes are preempted including:
  - permanent improvements on the leased land
  - activities under a lease conducted on the leased premises (e.g., business use tax, privilege, public utility, excise, gross revenue taxes)
  - the leasehold or possessory interest
- *"Subject only to applicable Federal law"*
- Indian Trader Regulations, Rights-of-Way Regulations

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Does 25 C.F.R. § 162.017 Alter Existing Federal Law?

***DESERT WATER AGENCY V. UNITED STATES*, CASE NO. 5:13-CV-00606-DMG (C.D. CAL. 2013).**

- The Desert Water Agency sued the Department of Interior in 2014 to determine the effect of the regulatory changes.
- According to the United States, 25 C.F.R. § 162.017 "has no legal effect at all" and "does not purport to preempt any specific state taxes . . . or to alter the judge-made and judge-administered balancing test that has governed Indian preemption cases since at least 1980."
- This view is consistent with the text of the leasing statute, 25 U.S.C. § 415; the regulations, which do not directly address existing case law; and limits on the authority of federal agencies preemptive power.

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Round 2

THE EFFECT OF 25 C.F.R. § 162.017 ON RIVERSIDE COUNTY

- Four lawsuits
  - The Agua Caliente Tribe sued in federal court.
  - Three plaintiffs on behalf of a putative class action sought a writ of mandate ordering the County to issue notices of overpayment in state court.
  - Hundreds of plaintiffs in two consolidated actions sought refunds of PIT taxes paid up to four years prior to 25 C.F.R. § 162.017.
- Years of litigation
  - Motions practice
  - Discovery
  - Trial
  - Appellate review

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Financial Impact to Counties

PIT REVENUES ARE IMPORTANT THROUGHOUT CALIFORNIA

- For 2013/2014 fiscal year, Riverside County collected approximately $39.2M in PIT revenue. Approximately $28M was collected from Agua Caliente allotted lands.
- California is home to over 100 federally recognized tribes and has the highest Native American population in the country.
- If the possessory interest tax were invalidated, over two dozen counties that currently provide services to these federally recognized tribes and non-Indian residents that live on tribal land or within reservation boundaries would lose millions in tax revenue for years to come.
- Counties could be forced to issue refunds for the past four years if the PIT is invalidated, which includes collecting tax revenue already distributed to cities and special districts.

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Agua Caliente v. Riverside County

DISTRICT COURT PROCEEDINGS

- The court denied the County's motion for judgment on the proceedings, ruling that the law had changed since 1971, but ultimately granted summary judgment
- Court rejected argument that Section 5 of the IRA preempted the PIT
- Court determined that PIT was valid under *Bracker* balancing:
  - "Although the federal interests in regulating Indian leasing are strong, they must bend to the state interests here, where the tax is valid and its revenues are closely related to the substantial services provided to taxpayers and nonpayers alike."
  - "The Tribe has submitted no evidence that the PIT has chilled economic development on the Reservation, prevented—legally or structurally—the Tribe from imposing its own PIT, or otherwise actually interfered with tribal governance."
  - "The County "demonstrated with ample evidence the relationship between the tax and the taxed activity—namely, non-Indian use and enjoyment of the Indian lands."

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Agua Caliente v. Riverside County

DISTRICT COURT RULING

- Court rejected argument that Section 5 of the Indian Reorganization Act preempted the PIT
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Agua Caliente v. Riverside County

NINTH CIRCUIT PROCEEDINGS

- Majority of the panel upheld the tax based on the 1971 decision, which:
  - Considered the congressional purpose behind the legislation, the PIT's legal incidence, and the indirect economic effect of the PIT on the tribe and tribal members.
  - Rejected the Section 5 argument.
- The concurring opinion upheld the tax because:
  - "[P]ervasive regulation does not always require preemption."
  - "Any impact the collection of the PIT may have on the Tribe is 'too indirect and too insubstantial to support [a] claim of pre-emption.'"
  - "[T]he County has readily identified 'service[s] performed by the State that would justify the assessment of taxes.'"

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The State Cases

NEARLY OVER

- *Herpel, et al. v. Riverside County*
  - Superior Court ruled in favor of Riverside County in 2018 after trial on stipulated facts
  - California Court of Appeals affirmed in 2020
- *Albrecht, et al. v. Riverside County*
  - Superior Court ruled in favor of Riverside County in 2019 after bench trial
  - Briefing in the California Court of Appeals should be complete by November 2020

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Riverside County Is Not Alone

TAX CHALLENGES

- Seminole Tribe (lease receipt tax)
- Tulalip Tribe (sales tax)
- Lac Courtes Oreilles, Lac du Flambeau, Red Cliff and Bad River Bands of Lake Superior Chippewa (property tax)
- Pala Band Mission Indians (fuel tax)
- Video Gaming Technologies (personal property tax)



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Resolving Taxation Disputes

PREPARATION

- Know the history of the tribe and land involved
- Research the applicable federal statutes, including regulatory changes over time
- Understand changes in federal Indian policy and doctrinal shifts in the case law
- Have a thorough understanding of the state law in question, including:
  - Who bears the incidence of the tax or regulation?
  - How are tax revenues used?
  - What are the consequences of non-payment?
- Be prepared to develop extensive facts for *Bracker* balancing through discovery or possibly trial

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JURISDICTIONAL DISPUTES OUTSIDE OF INDIAN COUNTRY

Jurisdictional Disputes Outside of Indian Country

OFF-RESERVATION TRIBAL RIGHTS GENERALLY

- Tribes and tribal members are generally subject to state jurisdiction outside of Indian Country ("off-reservation").
- Tribes are increasingly influencing state and local regulation off-reservation.
- Three general categories involve:
  - Tribal rights to on-reservation resources that affect off-reservation resources;
  - Tribal treaty rights to off-reservation resources; and
  - Tribal consultation rights regarding off-reservation resources.
- Examples include: on-reservation water rights; off-reservation treaty fishing rights; and off-reservation cultural resources consultation.

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FEDERAL RESERVED WATER RIGHTS AND WATER QUALITY LAW

Reserved Water Rights

BACKGROUND

- The Supreme Court has recognized federal law-based water rights for Indian reservations and retained public lands (*Winters* rights).
  - *Winters v. United States*, 207 U.S. 564 (1908) – When an Indian reservation is established, there is an implied right to sufficient water to fulfill the purposes of the reservation.
- In prior appropriations jurisdictions (first in time, first in right), many tribes hold senior water rights based on either the dates their reservations were established or "time immemorial."
- Water rights have expanded substantially through state court decisions.

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Reserved Water Rights: Groundwater

IS THERE A RESERVED RIGHT TO GROUNDWATER?

- The Supreme Court has not addressed this issue directly, but state courts have recognized that reserved water rights apply to groundwater.
- The Arizona and Montana Supreme Courts:
  - Held that the question when determining a tribe's reserved water rights is whether the water is necessary to the purpose of the reservation; whether the water is surface water or groundwater is immaterial.
  - Did not determine whether groundwater was actually necessary to the purpose of the respective reservations.
- More recently, the Ninth Circuit not only recognized that reserved water rights can include groundwater, it also analyzed whether groundwater was necessary for the purpose of the Agua Caliente Reservation.

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Reserved Water Rights: Groundwater

AGUA CALIENTE BAND OF CAHUILLA INDIANS V. COACHELLA VALLEY WATER DISTRICT, 849 F.3D 1262 (9TH CIRCUIT 2017)

- The Agua Caliente Band, with the U.S. government, sued the Coachella Valley Water District and the Desert Water Agency to establish and quantify rights to groundwater in the Coachella Valley aquifer.
- The Ninth Circuit held:
  - In the western United States where groundwater may be the only viable water source, "a reservation without an adequate source of surface water must be able to access groundwater."
  - There are limitations on the *Winters* doctrine: it only reserves water to the extent it is necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to (attached to or underneath) the withdrawn land.

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Reserved Water Rights: Groundwater

FUTURE TRENDS

- Although the Ninth Circuit limited tribal groundwater rights to groundwater appurtenant to the reservation land, a number of tribes have asserted and may continue to assert rights to off-reservation surface and groundwater.
- See, as an example, *Havasupai Tribe v. Anasazi Water Co, et al.*, No. 17-16651, 2017 WL 7689608 (9th Cir. 2017):
  - The Havasupai Tribe asserted rights to an off-reservation aquifer because that aquifer fed Havasu Creek, the reservation's main water source.
  - The Tribe argued that the Anasazi Water Company's use of the aquifer constituted unlawful interference and asked the court to enjoin further withdrawal of groundwater to prevent a reduction of the flow of Havasu Creek.
  - Court did not address the merits; dismissed the case on other grounds; the Tribe is in settlement discussions with the Arizona Department of Water Resources.

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Reserved Water Rights: Quantification

HOW ARE RESERVED WATER RIGHTS QUANTIFIED?

- The Supreme Court first addressed quantification of water rights in 1963, when it developed the practicably irrigable acreage standard (PIA):
  - Reservations are entitled to as much water as is necessary to irrigate all "practicably irrigable" reservation land.
- The Arizona Supreme Court (1) rejected the PIA because it could lead to inequitable treatment of tribes based on their geographic location and (2) established the homeland standard:
  - Reservations must be allocated water necessary to achieve their purpose as a permanent homeland, tailored to the reservations' minimal needs.
  - This standard also was applied in a recent case in front of the Idaho Supreme Court concerning the Coeur d'Alene Tribe's water rights for instream flows located on both tribal-owned and non-tribal-owned lands on its reservation.

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Reserved Water Rights: Quantification

FUTURE TRENDS

- Quantification is a highly contested issue in recent and ongoing litigation:
  - Tribes' standing to sue for quantification of water rights:
    - In the second phase of the *Agua Caliente* litigation, the Central District of California found that the Tribe did not have standing to seek quantification of its water right.
    - Although non-use does not eliminate a tribe's federally reserved water right, tribes must show a current or planned future use that is being injured in order to justify the need for quantification of such rights.
  - September 2019: The Idaho Supreme Court held that the Coeur d'Alene Tribe has water rights for instream flows located on the Reservation, on both tribal-owned *and non-tribal-owned lands*, for homeland purpose. The Tribe is now litigating the amount of water to fulfill the Reservation's purpose.
- Quantification will become increasingly important as climate change and increased droughts impact water supplies in Western states.

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Water Quality Standards

OVERVIEW

- Water quality standards (WQS) provide the regulatory and scientific foundation for protecting water quality under the Clean Water Act (CWA).
- Originally, CWA did not provide tribes with a mechanism to regulate water quality.
- In 1987, Congress authorized EPA to allow tribes to be "treated as a state" (TAS) for the purpose of certain CWA provisions.
  - Tribes may qualify as states for purposes of WQS programs.
  - If EPA grants TAS status to a tribe, then the tribe can enact its own WQS within the boundaries of the reservation, CWA § 518.
- Since the creation of TAS status, courts have addressed the reach of WQS created by tribes.

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Water Quality Standards

KEY CASES EXPANDING THE REACH OF TRIBES' WQS

- *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998):
  - Court upheld EPA's decision to grant TAS status to the Flathead Tribes to promulgate WQS applicable to pollutant emissions sources on reservation land, regardless of whether the sources were located on land owned by members *or non-members*.
- *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996):
  - Court upheld EPA's enforcement of more stringent tribal standards against upstream off-reservation polluters.
- *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001):
  - Court acknowledged that a tribe with TAS status "has the power to require upstream off-reservation dischargers . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters . . . ."

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Water Quality Standards

FUTURE TRENDS

- Tribes recently have challenged state WQS as insufficient to protect their sustenance fishing rights.
- New Legislation in Maine:
  - February 2015: EPA rejected Maine's WQS as inadequate to protect the right of tribal members to fish without endangering their health.
  - June 2019: Litigation spurred Maine to pass legislation establishing more stringent water quality criteria to protect sustenance fishing by local tribes.
- Ongoing litigation in Washington:
  - June 2019: Washington sued EPA to block the agency's May 2019 revisions to state WQS, arguing that the revisions improperly loosened the guidelines.
  - The Sauk-Suiattle Indian Tribe and Quinault Indian Nation joined the case, alleging that the new WQS will disproportionately affect them because they eat more fish than typical Washingtonians.

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OFF-RESERVATION TREATY RIGHTS: FISHING RIGHTS

Off-Reservation Treaty Rights: Fishing Rights

OFF-RESERVATION TREATY RIGHTS GENERALLY

- Many tribes possess treaty rights to utilize off-reservation resources for hunting, fishing, and other purposes.
- Under the federal trust responsibility to Indian tribes, the federal government and its agencies have a responsibility to ensure that its actions do not abrogate tribal treaty rights.
- Under the Supremacy Clause, treaties are accorded precedence equal to federal law; treaty rights are binding on all federal and state agencies, and take precedence over State constitutions, laws and judicial decisions.
- States have only limited power to regulate the exercise of treaty rights.

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Off-Reservation Treaty Rights: Fishing Rights

OFF-RESERVATION FISHING RIGHTS IN WASHINGTON

- Many tribes in Washington have off-reservation treaty rights to fish in "usual and accustomed" areas, known as "U&A rights."
- U&A rights include both the right to access U&A areas, and the right to take half of the harvestable fish found in such areas.
- Washington tribes have at times successfully opposed federal authorizations of in-water structures on the basis of U&A rights, both on the grounds of: (1) the obstruction of physical access to U&A areas; and (2) that development would harm the tribes' rights to 50% of the harvestable fish in those areas.

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Off-Reservation Treaty Rights: Fishing Rights

U&A RIGHTS: RIGHTS OF ACCESS

- The U.S. Army Corps of Engineers (Corps) has relied on U&A rights to deny authorization to place structures in navigable waters under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, where such structures would result in a more than *de minimis* infringement on physical access to U&A areas
- In 2016, the Corps denied a Section 10 permit on this basis for the Gateway Pacific rail-to-ship coal terminal proposed for Cherry Point, north of Bellingham, Washington.
- Based on tribal member affidavits and other reports, the Corps concluded that a more than *de minimis* infringement would occur based on the physical occupation of 122 acres of fishing area, increased vessel traffic, and impairment of the area for future fishing activities.

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Off-Reservation Treaty Rights: Fishing Rights

U&A RIGHTS: ENVIRONMENTAL SERVITUDE

- In the "Culverts Case," a number of tribes in Washington sued to have state-owned fish-passage-blocking culverts removed or replaced with salmon-friendly culverts, due to the significant decline in the salmon population.
- In 2016, the Ninth Circuit affirmed a district court decision ordering the State to replace barrier culverts, holding that the State violated its treaty obligations by building and maintaining culverts that degrade fish habitat.
- The Supreme Court affirmed the judgment by an equally divided Court after Justice Kennedy recused himself.

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OFF-RESERVATION CULTURAL RESOURCES: CONSULTATION RIGHTS

Cultural Resources: Consultation Rights

DUTIES TO CONSULT WITH TRIBES

- National Historic Preservation Act (NHPA)—comprehensive review and consultation requirements regarding impacts to historic resources
- Native American Graves Protection and Repatriation Act (NAGPRA) and the Archeological Resources Protection Act (ARPA)—protect Native American human remains and other cultural resources found on federal and tribal lands from unauthorized excavation or removal
- Executive Order 13175—directs federal agencies to consult with Indian tribes regarding regulatory policies and actions that have tribal implications
- State law example: California's AB 52, which requires public agencies to consult with Indian tribes with respect to projects subject to the California Environmental Quality Act (CEQA)

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Cultural Resources: Consultation Rights

EXAMPLES

- Lake Powell Pipeline—Tribe objects to route that avoids reservation because of impacts to off-reservation cultural resources; prefers route that crosses reservation
- Jordan Cove LNG Terminal—State of Oregon issued Consistency Objection under the federal Coastal Zone Management Act, based in part on impacts to impacts to off-reservation tribal cultural resources

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