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John K. Van de Kamp, Attorney General

Topical Index

where the sum of the evidence before the trial court was that a named person (not the defendant) and his family occupied a certain room (the room in which the defendant was found), that a person resembling the defendant had been seen in that area, and that the officers entered and arrested the defendant. The defendant lacked the necessary standing because he failed to establish that he had any legitimate expectation of privacy in the room.

It is thus clear that the remedy of suppressing evidence in criminal trials has been sharply restricted by the "standing" doctrine in light of Proposition 8, perhaps more so than many attorneys realize. It is not enough that the defendants' own property was seized, that the search was directed against them or even that they were legitimately on the premises or inside vehicles searched. They must additionally show that the search violated their subjective and objective personal right to privacy under the Fourth Amendment by establishing some possessory or other interest which includes the right to control the property or exclude others from the particular area to be searched, and they must further establish that their interest is a legitimate, noncriminal interest, i.e., one society is prepared to recognize as reasonable.

Officers will of course continue to face civil liability for damages and even potential criminal penalties for damage, illegal detentions, arrests or seizures. However, the exclusion of evidence at criminal trials will be an increasingly unlikely result of such conduct in light of the standing doctrine.

LAW ENFORCEMENT IN INDIAN COUNTRY

by Thomas Greene *

I. INTRODUCTION

The movies have emblazoned images of Native Americans as horse-mounted marauders[1]; tragic victims of violent European settlement[2]; and as noble friends and allies.[3] While each of these images is based on some fragment of history, they universally cloud the breadth, diversity, and achievements of Native Americans. Another inaccuracy in these movie images is that they locate Native Americans on the plains or high mesa country somewhere other than California. In fact, California has a substantial Native American population.[4] Native Americans from a multiplicity of tribes live in urban settings: California tribes have 101 reservations or rancherias scattered across 28 California counties.[5]

* Supervising Deputy Attorney General, State of California. Only the first installment of this article appears in this issue. The remainder will be presented next month.

[1] *Stagecoach* (United Artists: 1939)

[2] *Soldier Blue* (Avco-Embassy: 1970)

[3] *Broken Arrow* (20th Century Fox: 1950)

[4] Indian population estimates vary widely. One tribal legislative representative has asserted that 300,000 Indians live in California, or more than in any other state. (*Law Enforcement on Indian Lands*, Hearing before the Senate Judiciary Committee, California Legislature (Jan. 1985) p. 2.) 1980 Census data estimate the Indian population in California to be 72,090, but this is believed to represent a substantial undercount. (U.S. Bureau of Indian Affairs, *Report of the California Indian Task Force* (Oct. 1984) p. 23.)

[5] Appendix A, Map, Indian Lands in California, U.S. Bureau of Indian Affairs; Appendix B, California Reservations listed by county with population statistics by county and reservation. The appendices mentioned herein will be placed at the end of the second part of this article, which will appear in POLR next month.

California's Native Americans present special responsibilities and chalienges to law enforcement. Part of this is a matter of resources. Tribal lands are often located in remote areas, making service problematic. Part of the challenge is cultural. California's Native Americans draw on ancient and diverse cultures which require understanding in order to establish effective working relationships with the tribes and individual Indians. Part of the challenge is legal. The law has developed unique accommodations with Native American culture and the tradition of Indian sovereignty. Respect for the religious use of peyote in certain circumstances, immunity from many taxes, and the authorization of high stakes Indian bingo are but three aspects of the law as it currently applies to Indians or their trust property.

This article focuses primarily on the California tribes, as distinct from Native Americans who live in California but whose tribal land is located in other states. It is one part of a broader effort by the Attorney General to increase understanding and improve law enforcement services for the tribes. Later in the year, the California Department of Justice will be sponsoring post-certified classes on law enforcement issues in Indian Country. In addition, efforts are ongoing to improve resources committed to law enforcement in areas where the tribes are located.

The goal of this article is to provide line officers and law enforcement administrators with an overview of the principal legal issues involving the California tribes. A special effort has been made to identify areas in which the law is clear, and where it is not clear. Those areas in which one is most likely to receive conflicting advice are identified. A final section discusses practical ways to improve working relationships with the tribes. Because so many of the current issues of concern to law enforcement revolve around the historic development of Indian law, this article begins by examining the roots of this unique body of law.

II. INDIAN LAW IN CONTEXT

A. The Early Eastern Experience

The first English and French settlers in North America clung to narrow ribbons of land along the coast. They encountered powerful, well organized Indian tribes with whom they dealt as distinct nation-states. These Indian nations became crucial allies in the great power struggle of the time between the French and English. James Fenimore Cooper's *Last of the Mohicans* gives us a

perhaps biased but still useful snapshot of Indian tribes as the principal combatants in the struggle for North America waged by the "superpowers" of that era. In recognition of the power and importance of the tribes, the Crown sought to maintain a monopoly on negotiations with the tribes.[6] This same approach was taken by the new American republic[7] and is reflected in the United States Constitution.[8]

[6] Cohen, Handbook of Federal Indian Law (1982) p. 57, fn. 60.

[7] *Id.*, at p. 58, fn. 65.

[8] U.S. Const., art. 1, § 8, cl. 3.

[9] *Worcester* v. *Georgia* (1832) 31 U.S. (6 Pet.) 515, 519; see also *Cherokee Nation* v. *Georgia* (1831) 30 U.S. (5 Pet.) 1. For a discussion of the political and other forces which affected the Cherokee cases, see Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality* (1969) 21 Stan. L. Rev. 500.

[10] *Ibid.*; see also Collins, *Implied Limitations on the Jurisdiction of Indian Tribes* (1979) 54 Wash. L. Rev. 479, 480–482.

[11] *United States* v. *McBratney* (1882) 104 U.S. 621; *United States* v. *Ward* (C.C.D. Kan. 1863) 28 Fed.Cas. 397.

[12] Cohen, *op. cit. supra*, fn. 6, at pp. 127–129.

The initial approach of the United States to the tribes was generally to set aside, by treaty, areas for their use within which Indian law and culture operated without substantial outside interference. The tribes constituted a "distinct, independent political community", to quote the words of Chief Justice Marshall in 1832.[9] The major elements of early 19th century Indian policy were (i) an assumption of the paramount role of the federal government in Indian affairs, (ii) the characterization of Indians as wards or dependents of the federal government, and (iii) retention by the tribes of control over their own affairs within territories reserved for them, subject only to federal authority.[10] These legal concepts were developed when the tribes were physically beyond westward settlement. When settlements encroached too closely, the tribes were moved further west. When Indians did not "choose" to move to new areas, they were forced to, as in the "Trail of Tears" of the Cherokee from Georgia to Oklahoma. With the opening of the Far West and development of the mid-continent later in the century, Indians could no longer be kept physically separate from settlers. Indian policies and Indian law began to change as a consequence. For example, in the 1860's, states were imputed to have authority over non-Indians on reservations.[11] By the 1870's, the tribes were no longer dealt with as quasi-foreign states through treaties; federal statutes and administrative actions came to increasingly dominate Indian affairs. Federal policy in general shifted from separation to assimilation.[12] The General Allotment Act of 1887 created mechanisms by which Indians could own and sell land allotted to them.[13] This was intended in part to provide a secure land base for the the tribes, and to turn individual Indians into self-sustaining agriculturists.[14] One apparently unintended consequence of this Act was a massive selloff of Indian land, some 90 million acres between 1887 and 1934.[15]

B. The Early California Experience

While the French and English were settling the East Coast, the Spanish were in California. Despite the good things that are written about the mission period, this time was a disaster for California Indians. During this 65-year mission period, California's original Indian population of 133,000 to 150,000 plummeted.[16] This was due to the introduction of European diseases as well as a land use system which made natives the property of the settlers to whom land was awarded by the Spanish Crown.

[13] 24 Stat. 388.

[14] Cohen, *op. cit. supra*, fn. 6, at pp. 130–132.

[15] *Id.*, at p. 138.

[16] U.S. Bureau of Indian Affairs, Report of the California Indian Task Force (October, 1984) p. 8.

[17] *Ibid.*

[18] Cohen, *op. cit. supra*, fn. 6, at p. 97.

[19] See *Elsner* v. *Gill Net No. One* (1966) 246 Cal.App.2d 30, 33–34, for a history of the creation of the Hoopa reservation. The creation of reservations by statute reflects the erosion of the view of the tribes as sovereign nations to be dealt with by treaty. In addition, the House of Representatives, which has no constitutional role in the making of treaties, demanded a hand in Indian relations and land allocations. (See *Cohen, op. cit. supra*, fn. 6, at pp. 105–107.)

[20] *Report of the California Indian Task Force, supra*, fn. 4, at p. 9; Cohen, *op. cit. supra*, fn. 6, at p. 97; see also Kroeber, Handbook of the Indians of California, Smithsonian Inst. Bull. 78 (1925) p. 891.

[21] 16 Stat. 544, 566 (codified at 25 U.S.C. § 71); see Cohen, *op. cit. supra*, fn. 6, at pp. 105–107.

[22] 25 Stat. 388; *Cohen, op. cit. supra*, fn. 6, at pp. 133–138.

[23] *Id.*, at pp. 139–141.

[24] 43 Stat. 253.

By the beginning of the American period, many of California's Indian cultures, particularly in the south, were on the verge of destruction. During 1851–1852, federal treaty commissioners negotiated 18 treaties with remaining California Indians.[17] These treaties would have set aside approximately 8.5 million acres of land for California Indians. However, because of protests by the California Legislature, all of these treaties were rejected by the United States Senate in 1852.[18] Subsequently, in 1864, the largest reservation in the state, Hoopa Valley, and three other reservations were authorized by statute.[19] Around the turn of the 20th century, the Smiley Commission and later the investigations of C. E. Kelsey brought to light the homeless and destitute condition of California Indians. This led to creation, again by statute, of the modern system of rancherias or mini-reservations, one as small as three acres, in California. Many of the 15,000 California Indians left in the state who were settled on these rancherias had not been connected tribally prior to European settlement.[20]

C. The Twentieth Century

This century has been marked by dramatic swings in federal Indian policy, between assimilation or mainstreaming and separation. The century began with assimilation as articulated federal Indian policy. The era of treaty making offically had ended in 1871.[21] In 1887, the General Allotment Act had been enacted, providing for fee simple title to tribal lands for individual Indians.[22] Boarding schools were developed to speed assimilation of Indian youth into the mainstream away from the cultural influences of friends and family.[23] By the Citizenship Act of 1924, Indians were made citizens of the United States.[24]

In the late 1920's and early 1930's, federal policy stepped back from assimilation. The most significant aspect of this era was the end of the allocation program, and the strengthening of the tribes through enactment of the Indian Reorganization Act of 1934.[25] The IRA created structures by which the tribes could develop their own economies and was directed at preserving Indian cultural values and communal institutions. This was attacked by some as slowing the modernization of the tribes, and contrarily by others as inimical to traditional Indian values.[26]

By the late 1940's and early 1950's, federal policy shifted back toward assimilation. In 1953, Public Law 280 was enacted which appeared to grant to five willing states, including California, virtually complete criminal and civil jurisdiction over "Indian country" within their borders.[27] This law was followed by statutes providing for the termination of reservations and rancherias with tribal land and assets to be divided among tribal members.[28]

[25] 48 Stat. 984; Cohen, *op. cit. supra*, fn. 6, at pp. 144–151.

[26] *Id.*, at p. 153.

[27] 67 Stat. 588–90. The original provisions of the Act were codified at 18 U.S.C. § 1162 (criminal matters) and 28 U.S.C. § 1360 (civil matters).

[28] See, e.g., 70 Stats. 58 (Lower Lake Rancheria); 71 Stat. 283 (Coyote Valley Rancheria); 72 Stat. 619 (rancherias).

[29] *Bryan* v. *Itasca County* (1976) 426 U.S. 373.

[30] See, e.g., *Table Bluff Band* v. *Andrus* (N.D. Cal. 1981) 532 F.Supp. 255; *Smith* v. *United States* (N.D. Cal. 1978) 515 F.Supp. 56

[31] Cohen, *op. cit. supra*, fn. 6, at pp. 180–204.

[32] 82 Stat. 75, 28 U.S.C. § 1323.

A few years later, the pendulum again began to swing away from assimilation. The United States Supreme Court imposed limitations on the apparent scope of Public Law 280.[29] Courts reversed termination decisions on a number of grounds.[30] The federal government began to make efforts to strengthen tribal governments and the economic viability of the reservations.[31] Public Law 280 itself was amended to authorize the return of state jurisdiction over Indian country to federal authorities at the request of the states.[32] In 1968, the Indian Civil Rights Act was passed to strengthen due process protections in proceedings before tribal courts.[33] And in 1978 the Indian Child Welfare Act was passed to help protect Indian family structures.[34]

The challenge as seen by the courts is to harmonize the letter and spirit of these new initiatives with pre-existing law.[35] This has led to legal ambiguity with respect to a number of issues. These ambiguities are all too often faced in the first instance by the deputy in the field.

III. PUBLIC LAW 280: JURISDICTIONAL AMBIGUITY AND THE PROBLEM OF CONFLICTING ADVICE

Public Law 280, key parts of which are reproduced in Appendix C, is the principal determinant of state or local authority in "Indian country" in California.[36] Title 18, section 1161 is the key statutory provision concerning criminal matters. This provides a broad grant of authority to law enforcement authorities to enforce criminal laws with apparently narrow exceptions concerning (i) taxation or encumbrance of Indian trust property, and (ii) federally protected hunting, fishing, or trapping rights. Title 28, section 1360 contains very similar language concerning civil matters. The major thrust of Public Law 280 was to make state criminal law enforceable on the reservations.[37] After two decades of litigation, this basic policy of the statute remains intact. California criminal law remains *fully applicable and enforceable* in Indian country.

[33] 82 Stat. 77, 25 U.S.C. §§ 1301 *et seq.*

[34] 92 Stat. 3069; see discussion in *In re Junious M.* v. *Diana L.* (1983) 144 Cal.App.3d 786.

[35] *Bryan* v. *Itasca County, supra*, 426 U.S. at pp. 386–387; see also *Moe* v. *Salish & Kootenai Tribes* (1976) 426 U.S. 463, 472–475.

[36] The potential scope of residual state jurisdiction apart from P.L. 280 is beyond the scope of this article. The term "Indian Country" is defined in 18 U.S.C. § 1151.

[37] H.R. Rep. No. 848, 83rd Cong., 1st Sess. S-6 (1953).

[38] *Bryan* v. *Itasca County, supra*, 426 U.S. 373

What has caused confusion are questions about the enforceability of state regulatory laws and local ordinances in Indian country. The central policy challenge is created by *not* imputing to the Congress an intent to eliminate the authority of tribes to regulate their own internal affairs.[38] It is the scope of this residual tribal authority or sovereignty, usually determined inferentially by finding a limitation on state or local authority, that creates confusion. This is the price we pay to maintain the viability of our native Indian communities. But, keep in mind that this does *not* affect the enforcement of core provisions of the Penal, Health and Safety, Vehicle and other Codes which are criminal in nature.

[39] *Barona Group of Capitan Grande Band of Indians* v. *Duffy* (9th Cir. 1982) 604 F.2d 1185, cert. den. (1983) 461 U.S. 929.

[40] *Ibid.*

[41] *Id.*, at pp. 1189–1190.

[42] *Id.*, at p. 1190.

[43] *United States* v. *Farris* (9th Cir. 1980) 624 F.2d 890 cert. den. (1981) 449 U.S. 1111 (concerning whether gambling on the Puyallup Indian reservation violated state law for purposes of the federal Organized Crime Control Act, 18 U.S.C. § 1955); *United States* v. *Marcyes* (9th Cir. 1977) 557 F.2d 1361 (Washington State fireworks ban though regulatory in appearance enforceable because sales of prohibited fireworks against public policy).

The courts are still developing analytic tools to allocate reliably jurisdictional opportunities and responsibilities between the tribes and state and local governments. The first major step involved distinguishing between so-called criminal/prohibitory and civil/regulatory laws.[39] Under this approach, criminal/prohibitory statutes are enforceable; civil/regulatory statutes are not. Based on this analysis, for example, California's bingo laws were held to be civil/regulatory in nature, and therefore unenforceable on recognized reservations and rancherias.[40] The court looked at a number of factors including: (i) that various groups such as fraternal societies were allowed to hold legal games under California Penal Code section 326.5; (ii) the general public was allowed to play bingo at authorized games; and (iii) allowance of bingo was consistent with current federal policies in favor of Indian self-determination and economic self-sufficiency.[41] While recognizing the

closeness of the question, the court concluded that, although the Indian "bingo operation does not fully comply with the letter of the statutory scheme, it does at least fall within the general tenor of its permissive intent." [42] In reaching this conclusion, the court expanded on other cases which used a "public policy" test to determine whether a statute was unenforceable by state or local authorities under P.L. 280.[43] Since various groups could offer games, albeit subject to strict regulation, bingo was not considered to be against general state public policy.

The inherent clumsiness of the criminal/prohibitory-civil/regulatory distinction has been criticized.[44] In 1983, the United States Supreme Court in the *Rehner* case developed a new test which took into account the "tradition of Indian sovereignty" as well as the "balance of state, federal, and tribal interests." [45] In this case, which involved the applicability of California liquor law to Indian country, the Court concluded that "tradition simply has not recognized a sovereign immunity or authority in favor of liquor regulation by Indians." [46] The Court went on to find that the state's interest in the "spillover" effects of unrestricted liquor sales outweighed any more general sovereignty interests in the tribes.[47]

Arguably, *Rehner* provides a potentially more precise, culturally sensitive test for what non-criminal laws can be enforced in Indian country in California. Some have criticized this decision as a major blow to the cause of Indian sovereignty.[48] The problem for the law enforcement officer, however, is that the appropriate balancing of tribal, state, and federal interests against the backdrop of Indian sovereignty in any particular case is not readily apparent. Indeed, appellate courts after full briefing do not find the results of the application of this test readily apparent.[49]

[44] See *State* v. *Seneca-Cayuga Tribe*, ___ Okla. ___ (No. 60, 074, July 2, 1985).

[45] *Rice* v. *Rehner* (1983) 463 U.S. 713, 719–720.

[46] *Id.*, at p. 722.

[47] *Id.*, at pp. 722–725.

[48] See Note, *Confusion in the Land of Indian Sovereignty: The Supreme Court Takes a Detour* (1983) 25 Ariz. L.Rev. 1059.

[49] See, e.g., *Cabazon Band of Mission Indians* v. *County of Riverside* (9th Cir. 1986) 783 F.2d 900, probable jurisdiction noted (June 10, 1986) 34 U.S.L. Week 3803.

One result is that one can get wildly different advice from a lawyer depending on whether he or she represents Indians, the state, or the federal government. Tribal lawyers tend to push for maximum tribal authority.[50] Attorneys for state and local agencies generally argue for a broader state and local role.[51] And the federal government has vacillated between the two positions.[52]

Management decisions to enforce or not enforce arguably *non*-criminal laws must take into account the jurisdictional ambiguity that exists in this area; the interests of those providing legal advice; the judgment of law enforcement's own attorneys, particularly city or county counsel and district attorneys; the best interests of the Indian citizens in the jurisdiction; and good sense. With this caveat in mind, the next installment of this article will turn to a discussion of specific questions concerning law enforcement in Indian country.

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(Part 2 in next issue)

[50] See Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians* (1975) 22 UCLA L.Rev. 535, 562; Cohen, Handbook of Federal Indian Law (1982) pp. 348–379; National Assoc. of Attorneys General, Legal Issues in Indian Jurisdiction (Dec. 1974) pp. 1–4.

[51] *Ibid.*

[52] *Legal Issues in Indian Jurisdiction, op. cit. supra*, fn. 50, at pp. 1–4.

RECENT DEVELOPMENTS CONCERNING OBSERVATIONS MADE DURING OVERFLIGHTS

Two recent United States Supreme Court decisions on warrantless observations conducted by law enforcement from aircraft deserve special attention. Rather than describing the decisions individually in our Recent Cases section, the editors have decided to present the relevant information by, in essence, reprinting an Attorney General's memorandum which has been sent to all district attorneys, city prosecutors, sheriffs, and chiefs of police by Chief Assistant Attorney General Steve White.

On May 19, 1986, the United States Supreme Court ruled in a five-to-four decision that warrantless police identification of suspected marijuana, located within an enclosed residential yard, from an airplane at 1,000 feet, by naked eye, did not violate the Fourth Amendment. (*California* v. *Ciraolo* (1986) ___ U.S. ___ [54 U.S.L. Week 4471].) Under *Ciraolo*, a person who hides readily identifiable marijuana plants within a fenced yard does not demonstrate a reasonable expectation of privacy from such aerial observation because "[a]ny member of the public flying in this air space who glanced down could have seen everything that the . . . officer observed."

However, the Court cautioned that warrantless aerial observation of residential yards might violate the Fourth Amendment due either to flights which involve "physical intrusiveness" or which utilize "modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to the police or fellow citizens."

In a companion case, an identical five-to-four majority held that the Environmental Protection Agency did not violate the Fourth Amendment when it took detailed aerial mapping photographs of a 2,000-acre manufacturing compound for inspection purposes. (*Dow Chemical Co.* v. *United States* (1986) ___ U.S. ___ [54 U.S.L. Week 4464].) The Court said that Dow was not like Ciraolo's home, noting that the factory "covered an area the equivalent of a half dozen family farms." The Court stated that warrantless use of sophisticated surveillance equipment not generally available to the public might be constitutionally prohibited. However, the photographs in this case did not show "intimate details."

Prior to *Ciraolo* and *Dow*, the California Supreme Court held that a warrantless aerial observation violated