



# Tribal Employment Rights Ordinances and Transportation Projects

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# What is TERO?



- A Tribal Employment Rights Ordinance (TERO) is a **legislative act** adopted by the governing body of a federally recognized tribe.



# What is the purpose of a TERO?



A TERO generally governs the contracting provisions between a tribe and any contractor and may include provisions concerning:

- Announcement and advertising of jobs;
- Tribal preference in hiring goals;
- Indian preference in hiring goals;
- Permits to do business on tribal lands;
- TERO tax;
- Training and/or skills requirements;
- Discrimination;
- Fees;
- Personnel policies;
- Inspections
- Dismissal/Lay offs; and
- Non-compliance.



# Challenges to TERO?



- The primary challenge to TERO comes in the form of law suits that allege discrimination in employment.
  - Law suits have been brought by the EEOC, employees/private citizens, and corporate contractors.
  - They argue that TERO provisions concerning tribal preference and Indian preference are discriminatory.



# The Terminology



## Tribal Preference

(preference to a person from a certain tribe)

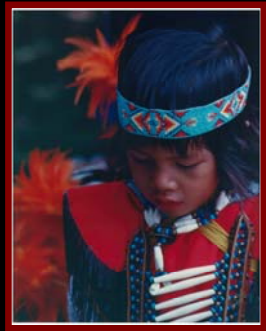
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## Indian Preference

(preference to a person who is Indian)



# Discrimination suits regarding Race, Ethnicity, and National Origin apply Strict Scrutiny Review



In order for a law to survive Strict Scrutiny it must serve a compelling government interest and must be narrowly tailored to achieve that interest

A legal challenge arises to a law that discriminates On the basis of race Or ethnicity

Federal Courts Apply the Equal Protection Clause and Title VI, Civil Rights Act Which prohibit discrimination



Good News!

# TERO Litigation and Issues

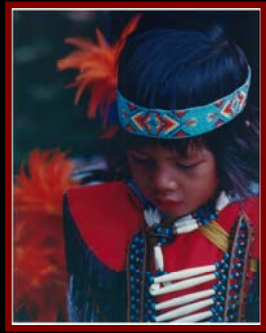


- Is Tribal preference (preferring one tribe over another) **discrimination in employment** based upon “**national origin**”? (No, Not Always.)
  - Title VII of the Civil Rights Act of 1964, generally prohibits employment discrimination based upon national origin.
  - Title VII specifically exempts tribes when the tribe is using **Tribal Funds** for the position
  - The Self Determination Act also carves out an exemption so long as the salary and benefits for a position are solely funded by **Self-Determination Act Funds**, See 25 U.S.C. §§ 450e(b-c)



Bad News!

# HOWEVER, . . .



- If the funds used for the position are non-Self-Determination Act funds/contracts, the Self-Determination Act, §450(e)b, **requires Indian preference NOT tribal preference.**
  - Equal Employment Opportunity Commission (EEOC) v. Peabody Western Coal Company, 400 F3d 774 (9<sup>th</sup> Cir. 2005); now see 2006 WL 2816603 (D.Ariz.)
  - Dawavendewa v. Salt Water Project Agricultural Improvement and Power District, 154 F.3d 1117, 1123 (9<sup>th</sup> Cir. 1998) (Dawavendewa I)
  - Executive Order 11,246



Good News!

BUT, . . .

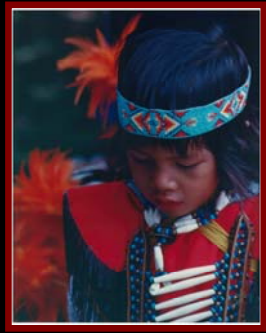


- On remand, in **Dawavendewa II**, the district court dismissed the complaint for failure to join the Navajo Nation as an indispensable party.
- The 9<sup>th</sup> Circuit affirmed recognizing that a decision in the case might impair the Navajo Nation's ability to govern its own reservation and ruled that Navajo Nation was necessary and ultimately indispensable party.
- Navajo Nation asserted sovereign immunity and the case was dismissed.



Good News!

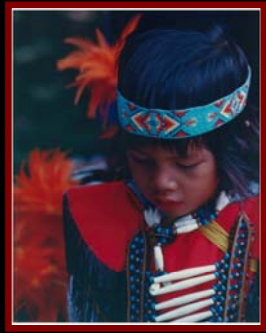
AND, . . .



- The U.S. Supreme Court denied certiorari for **EEOC v. Peabody Western Coal Co.**
- On remand, the Arizona district court granted the Navajo Nation's motion to dismiss (converting it into a motion for summary judgment) finding that:
  - Navajo Nation properly asserts sovereign immunity and is an indispensable and necessary party to the suit;
  - EEOC is currently seeking affirmative relief that is contrary to Title VII's exemption of Indian tribes from suit and is contrary to the Rules Enabling Act.
  - the Navajo-Hopi Rehabilitation Act expressly authorizes the Navajo employment preference provision; and
  - that the EEOC fails to include the Secretary of Interior, a necessary party that cannot be joined to this litigation and is indispensable.



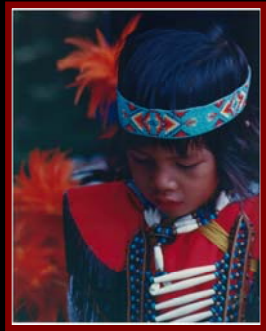
# RECOMMENDATION #1



- Tribes should ask for federal legislation that amends the Self-Determination Act and exempts them from Executive Order 11,246 requiring Indian preference for non-Self-Determination funded positions.
  - *Allowing tribes to implement tribal preferences promotes the federal Indian policy of self-determination.*
  - *(Kennedy and Bucher, A Second Look at Tribal Indian Preferences, NW Indian Law Journal, Jan. 2006)*



# RECOMMENDATION #2



- Until Tribes obtain exemption from the application of Executive Order 11,246,
  - Tribes must employ **tribal preference** provisions for Tribally funded and Self-Determination Act funded projects that are on tribal lands and under tribal jurisdiction, even if partially; and employ **Indian preference** provisions for all other projects to avoid a discrimination based upon “national origin” challenge.





# CalTrans TERO Policy



# Director's Policy #19



- Establishes a government to government relationship with federally recognized tribes in California
  - Consults with Tribal Governments prior to making decisions, taking actions or implementing programs that may impact their communities



# TERO and CalTrans



- On February 14, 2005, a dispute developed between the Smith River Rancheria and the California Department of Transportation (the Department) concerning the tribe's assertion that its TERO) must be applied to all projects and contractors.
- A contractor for a project involving a state right-of-way falling within reservation boundaries refused to sign a form acknowledging the applicability of TERO to the project.
- Consequently, the Department's Civil Rights Division requested an opinion from the Department's Legal Division concerning the Department's legal obligation to enforce TERO provisions in its contracting.



# TERO CalTrans



- The Legal Division's opinion presented two questions, as follows:
  1. Can the Department recognize and comply with the Native American TERO hiring preferences and reimburse its contractors that recognize the TEROs?
  2. Can the Department pay a tribe imposed TERO tax for projects and if so, can it pay the tax on State owned right-of-ways on the reservation?



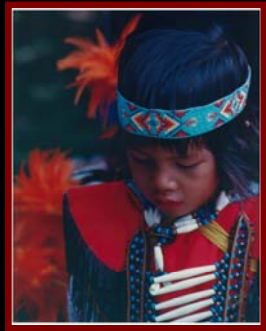
# TERO and CalTrans



- The Legal Division's opinion concluded that Art. 1, sec. 31(a) of the California Constitution (a.k.a. **Proposition 209**) prohibited state agencies from granting preferential treatment in the operation of public employment, contract or education.
- Consequently, the Legal Division halted its practice of employing and enforcing TERO provisions in its contracts for all projects near tribal lands.



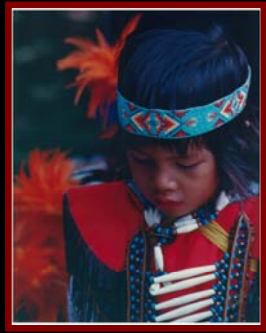
# California Constitution, Art. 1, Sec. 31 (a.k.a. Prop. 209)



- (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (b) This section shall apply only to action taken after the section's effective date.
- (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
- (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.
- (f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.
- (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
- (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.



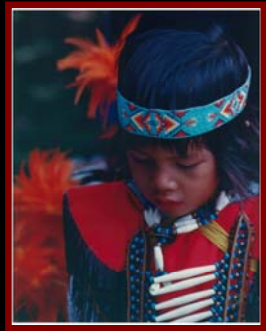
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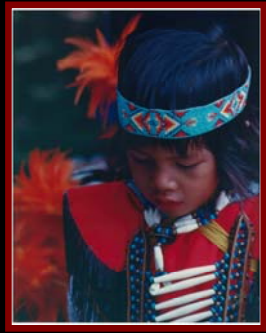
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# Framing the Question



- Does Prop. 209 prohibit CalTrans from using TERO provisions in its contracting for transportation projects on or near tribal lands?
  - On tribal lands? **No**. State civil regulatory law is inapplicable on tribal lands within tribal jurisdiction.
  - Near tribal lands? **Only if** TERO being used would violate state or federal law because it is discriminatory on the basis of race, ethnicity or national origin.



# National Origin



- EEOC v. Peabody Western Coal Co.
- Dawavendewa v. Salt River Project Agricultural Improvement and Power District
- Although both suits were dismissed on the basis that an indispensable party had not and could not be joined, tribes may avoid such challenges by requiring **Indian preference** rather than tribal preference when a project involves:
  - non-tribal, non-self-determination act funds,
  - corporate contractor working off of tribal lands/outside tribal jurisdiction.



# What about Race and Ethnicity?



- According to the dictionary:
  - “Race” is a group of persons related by common descent or heredity
  - “Ethnicity” is affiliation as a result of racial or cultural ties



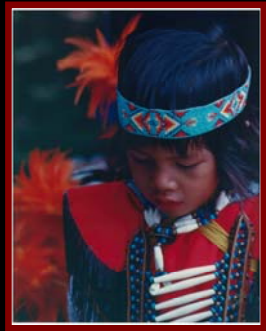
# “Indian”



- The term “Indian” is an academic term (anthropological and ethnological) but for most of us it is merely a legal term.
- A person may be an Indian if they meet the criteria set forth by a federally recognized tribe which may include but is not limited to:
  - a measurement of blood quantum, and/or
  - whether a person is:
    - a descendant of a person recognized on government census rolls,
    - a descendant of another enrolled Indian, and/or
    - a descendant of a person who received a distribution from government settlement of treaty or land disputes.
- So, a person may be a federally recognized Indian if they are ethnologically 1/4 Indian and 3/4 African American



# “Indian”



- Biological and ethnological factors are not determinative of Indian status. Laws and ordinances governing tribal enrollment are controlling.
- Thus, a person adopted into a federally recognized tribe may be a member of a tribe and not have any blood relation to any other member of the same tribe.
- A person who is 100% biologically Indian may be disenrolled from the tribe and will not be considered a federally recognized Indian for the purposes of tribal and federal programs.



# Morton v. Mancari, 417 U.S. 535 (1974)



- The U.S. Supreme Court upheld an Indian preference in hiring provision enforced by the Bureau of Indian Affairs. (Federal Law)
- The U.S. Supreme Court characterized the term Indian as a **political classification** not a racial classification.
- The Court recognized that an entire title of the U.S. Code (Title 25 - Indians) could not have been effectively adopted by Congress if Indians were in fact a racial classification.



# Places of Concern



- The concern will be for the employment of TERO provisions in CalTrans projects/contracts on lands “near” tribal trust lands and rights-of-way (under the exclusive jurisdiction of the state).



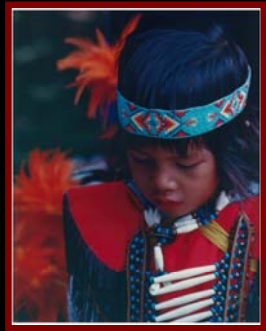
# Tribal Sovereignty



- Federal case law tells us that federally recognized tribes are legally “domestic, dependent nations” with a limited sovereign status
- Tribes have the right to make their own laws and be governed by those laws.



# Limitations upon Tribal Sovereignty



- Tribal Sovereignty may be viewed as:

## Internal Sovereignty Includes:

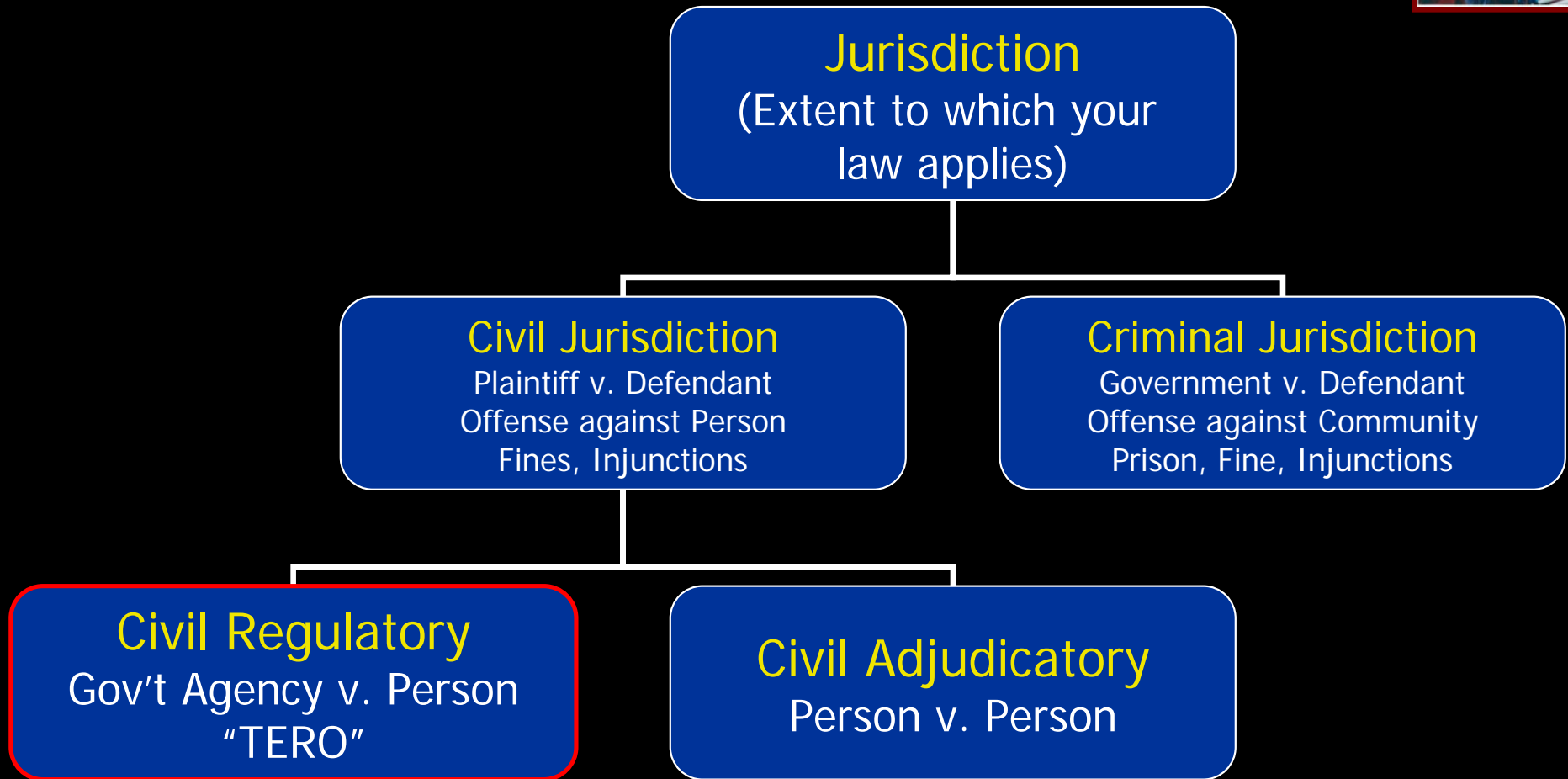
- Right to make laws, enforce laws and interpret laws;
- Right to determine membership

## External Sovereignty Includes:

- Right to enter into treaties with nations other than the U.S.



# A Note on Jurisdiction



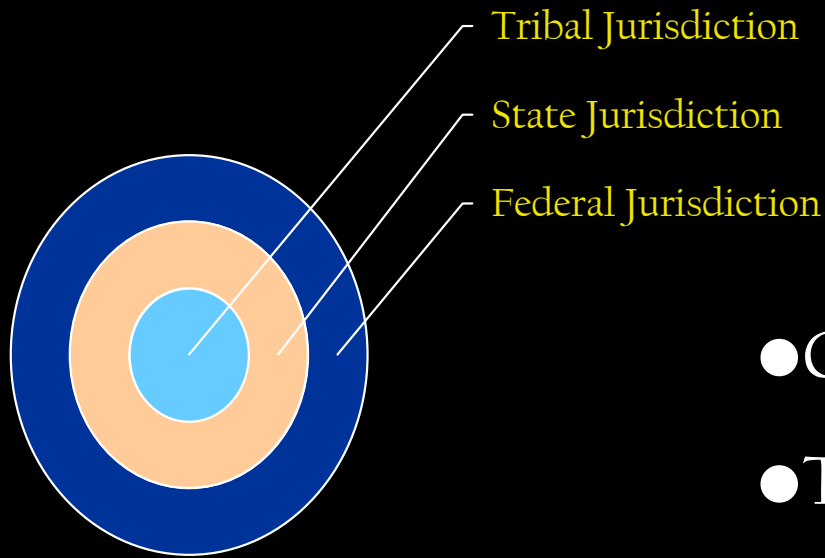
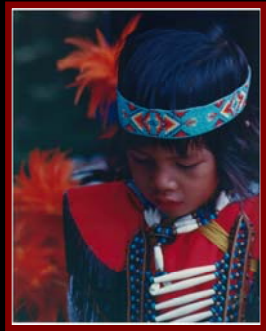
# Assertion of Jurisdiction



- To establish valid jurisdiction over a case, any court must establish that it has:
  - **Personal Jurisdiction**
    - Persons or parties to the case are subject to the personal jurisdiction of the tribal court by presence, agreement or statute.
  - **Subject Matter Jurisdiction**
    - Dispute is addressed by existing tribal law.
  - **Territorial or *In Rem* Jurisdiction**
    - The property, if any, related to the dispute is within the jurisdiction of the tribe.



# Where will the work be performed?

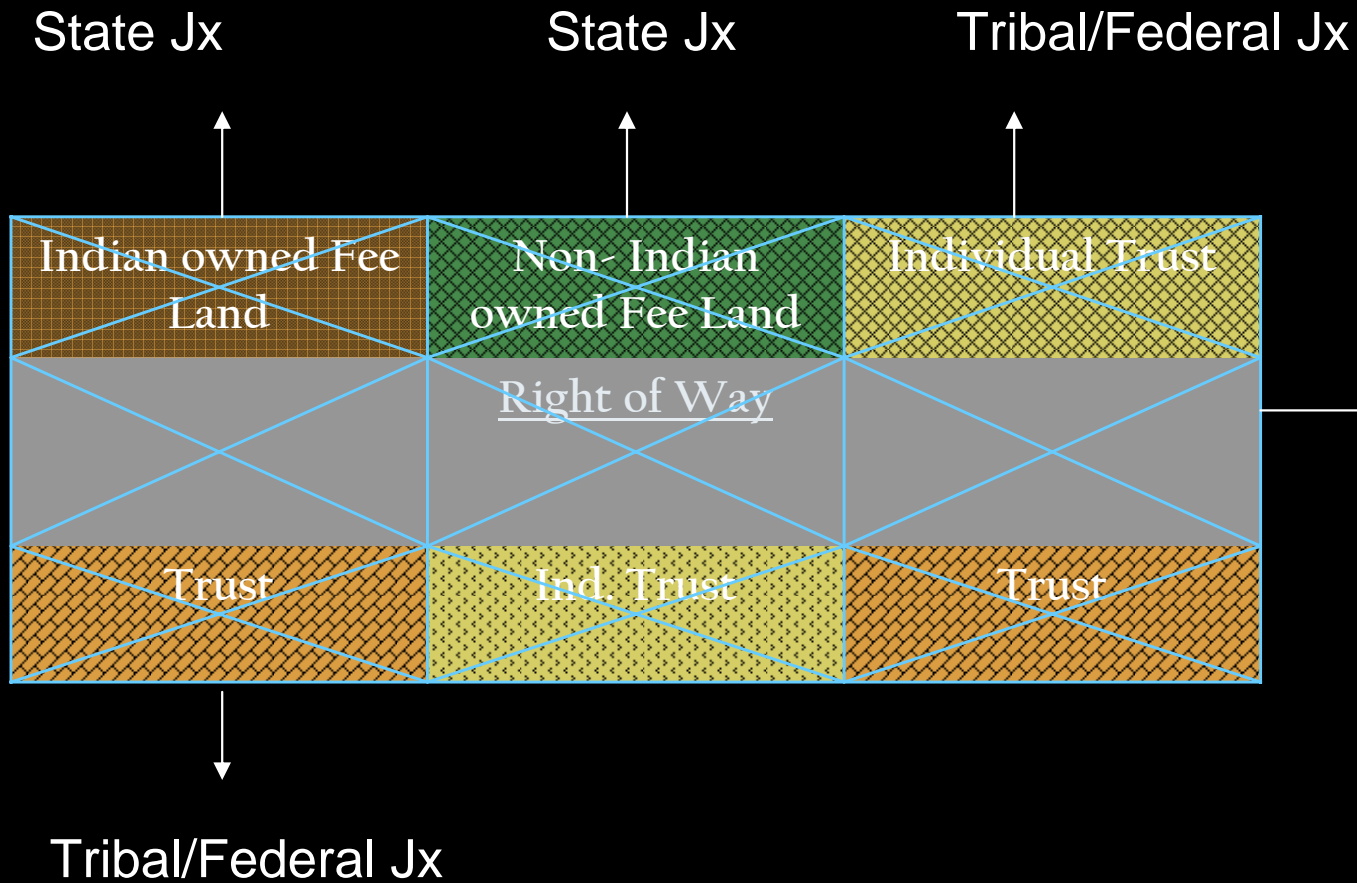
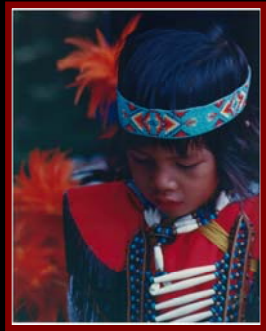


- General Allotment Act (1887 - 1934)
- Termination Plans (1953 - 1983)

Indian owned Fee Land	Non- Indian owned Fee Land	Individual Trust
	<u>Right of Way</u>	
Trust	Ind. Trust	Trust



# Why Does Land Status Matter?



? -  
 Depends on how the right of way was crafted, Jx, and the activity on the land



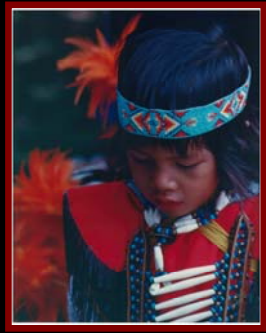
# Montana Test



- ✓ There is a presumption of state civil regulatory jurisdiction over a non-Indian's activities on non-Indian owned fee land **UNLESS**:
  - ✓ **There is a consensual relationship between the non-Indian and the Tribe?** (May include contracts or other dealings.) OR
  - ✓ **The Non-Indian's activity threatens or has a direct impact upon:**
    - ✓ Economic Security of the Tribe,
    - ✓ Political Integrity of the Tribe, or
    - ✓ Health, Safety or Welfare of the Tribe.



# Rights of Way



- The presence of a Right of Way does not mean that the state has exclusive jurisdiction over the Right of Way.
- Rights of Way may be presumed by the state. If the state claims a Right of Way exists, they should produce the documentation showing BIA approval.
- The ruling in Hardwick v. U.S. was that the Termination Plans were void. Rights of Way dating from the Termination Era may be void and/or should be renegotiated.



# RECOMMENDATION #3



- Seek out the documents supporting rights-of-way running through tribal lands.
  - The burden will be on the state to prove that it in fact has an exclusive right-of-way (subjecting it to state civil regulatory jurisdiction).



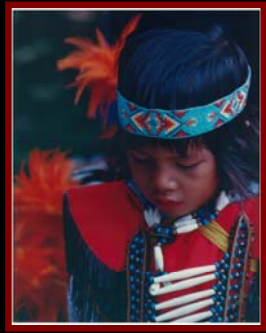
# Taxation



- The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe[']s power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. *Merrion v. Jicarilla*, 455 U.S. 130, 137 (1982)



# Taxation



- Thus, when a nonmember avails himself of the substantial privilege of doing business on tribal lands within the reservation and benefits from the provision of tribal governmental services such as fire and police protection, the tribal government may levy an appropriate tax on the nonmember so as to raise revenue to support those and other governmental services.[6] *Merrion v. Jicarilla*, 455 U.S. 130, 137-38. (1982)



# Taxation



- When the taxed nonmember activity takes place on nontribal lands a tribe likely will have no such jurisdiction.[7] *Merrion v. Jicarilla*, 455 U.S. 130, 137-38. (1982)
  - See *Burlington Northern R.R. Go. v. Blackfeet Tribe*, 924 F.2d 899, 904 (9th Cir. 1991) (concluding that tribes possessed jurisdiction to tax railroad property on easement, since their "power to tax nonmembers derives from [their] continuing property interest"); *Mustang Fuel Corp. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (tribe possessed inherent authority to impose oil and gas severance tax on nonmember production from allotted lands held in trust for tribal members where such lands constituted Indian country); *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 462-64 (9th Cir. 1996) (Navajo Nation had exclusive authority to impose severance tax on production from settlement area allocated to its reservation).





# What about the Trust Relationship and Responsibility?



# Trust Relationship



**Trustee = all federal branches of government**

*Res (lands and resources held in trust for Tribes or their members)*

*Beneficiary = Tribes and their Members*

- A legal trust comes to an end. The Trust Relationship will end only when the tribes cease to exist (legally or otherwise).



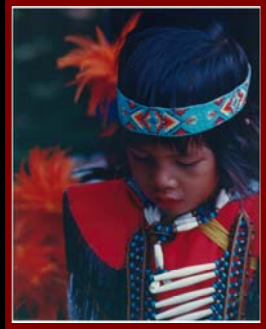
# Federal Trust Responsibility



- The question needs to be asked . . .
  - As California tribal self-governance interests (hiring and assertion of jurisdiction over rights of way) begin to erode, what actions will federal agencies take to fulfill their fiduciary obligation and to perform their trust responsibility in this matter?



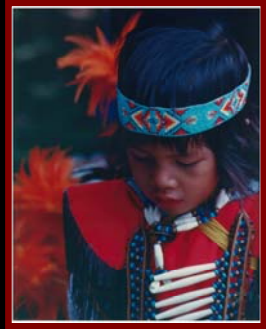
# Legislation and Case Law



- Title VII, Civil Rights Act of 1964
- Self-Determination Act of 1950, §450e(b-d)
- California Constitution, Art. 1, Sec. 31 (a.k.a. Prop. 209)
- Executive Order 11,246
- California Department of Transportation Director's Policy #19
- Yashenko v. Harrah's NC Casino Co., LLC, No. 05-1256, U.S. Court of Appeals (4<sup>th</sup> Cir. 2006)
- Equal Employment Opportunity Commission (EEOC) v. Peabody Western Coal Company, 400 F.3d 774 (9<sup>th</sup> Cir. 2005); now see 2006 WL 2816603 (D.Ariz.)
- Malabed v. North Slope Borough, 335 F.3d 864 (9<sup>th</sup> Cir. 2003)
- Dawavendewa II, 276 F.3d 1150 (9<sup>th</sup> Cir. 2002)
- Montana DOT v. King, 191 F.3d 1108 (1999)
- Dawavendewa v. Salt Water Project Agricultural Improvement and Power District, 154 F.3d 1117, 1123 (9<sup>th</sup> Cir. 1998) (Dawavendewa I)
- Strate v. A-1 Contractors, 520 U.S. 438 (1997)
- Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)
- FMC v. Shoshone Bannock Tribes, 905 F. 2d 1311 (9<sup>th</sup> Cir. 1990) (denied Cert., 499 U.S. 943) (1991)
- Tillie Hardwick v. U.S., No. C-79-1710-SW
- Merrion v. Jicarilla, 455 U.S. 130, 137 (1982)
- U.S. v. Montana, 450 U.S. 544 (1981)
- Morton v. Mancari, 417 U.S. 535 (1974)



# Thank you!



If you would like to participate in a **working group** concerning the use of TERO in CalTrans projects near tribal lands in California, please share your contact information with me at break or e-mail your contact information to me at [nijc@aol.com](mailto:nijc@aol.com).



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