

## Enforcement Issues on Tribal Land

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For Govt Only

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## Overview

- ◆ Focus is legal issues
- ◆ Various government entities
- ◆ Explanation of terms
- ◆ Jurisdiction issues
- ◆ How the federal role is different
- ◆ Current issues and suggestions

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## Early 20<sup>th</sup> Century

- Approx. 16,000 people in Calif. w/ tribal affiliation
- Many landless and impoverished
- 1917 Native Americans were declared citizens, male Native Americans with tribal affiliation could vote
- Several attempts to seek redress for lost land; a few rancherias created

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## 1950s: Federal Gov't Reduces its Role

- 1958-1970 Termination Act. Twenty three rancherias were terminated with the promise of “programs” that were never funded. 44 Calif. tribes were terminated.
- 1953 Congress passed Public Law 280, which brought California Indian Reservations under the criminal and civil jurisdiction of the state (more later)

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## Today: Federally Recognized Tribes

- ◆ There are 573 federally recognized tribes in the United States
- ◆ 231 are located in Alaska
- ◆ 109 in California
- ◆ Remainder are in 32 other states

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## Term: Federally Recognized Tribes

- ◆ Federal tribal recognition grants to tribes the right to self-government, as well as certain benefits.
- ◆ Process is controlled by the federal Bureau of Indian Affairs

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## Today in California

- ◆ 109 federally recognized Indian tribes in California and 78 entities petitioning for recognition
- ◆ Number of enrolled tribal members is ~ 46,000 (as of 2003). Calif population is 40 million.
- ◆ Largest is the Yurok Tribe with more than 5,600 enrolled members.

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## Term: Enrolled Tribal Member

- ◆ Tribes establish the requirements for membership (enrollment)
- ◆ Enrollment and disenrollment are decided by the tribe's council; no right to appeal to outside courts
- ◆ Number of enrolled tribal members is ~ 46,000 (as of 2003).

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## State Recognized Tribes

- ◆ There are no state recognized tribes in California.
- ◆ Calif. does have laws re CEQA that require consultation with all tribes that are on the Native American Heritage Commission contact list

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## Indian Country v. Indian Reservation

- ◆ "Reservation" is federal land reserved for use by an Indian band, village, or tribe.
- ◆ "Indian country" encompasses reservations (plus more). Term used in most federal statutes.

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## Term: Indian Country

- ◆ All land within the limits of any Indian reservation
- ◆ All dependent Indian communities
- ◆ All Indian allotments, the Indian titles to which have not been extinguished.
- ◆ All federal trust lands held for Native American tribes is Indian country.
- ◆ 18 U.S.C. 1151

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- ◆ Most who identify as Native Americans live off reservations.
- ◆ Not everyone who lives on Tribal land is an enrolled Tribal member.

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## Land Ownership

- ◆ Trust
- ◆ Allotments
- ◆ Fee
- ◆ Land can be changed but usually requires approval of the Dept. of Interior.

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## Trust Lands

- ◆ Held in trust by the United States government for the use of a tribe.
- ◆ United States holds the legal title, and the tribe holds the beneficial interest
- ◆ The tribe may not convey or sell trust land without the consent of the federal government
- ◆ Federal law has procedures for taking fee lands into trust for a tribe
  - This requires "fee to trust" conversion notices

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## Allotment Lands

- ◆ General Allotment Act 1887 (and later acts)
- ◆ Land title remained in the United States in trust for 25 years, (or longer if extended) then was conveyed to the Indian allottee in fee, free of all encumbrances.
- ◆ The result was a checkerboard pattern of land ownership within many reservations
- ◆ Land passed out of trust status
- ◆ Once land was held "in fee", could be sold

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## "Fee" Lands

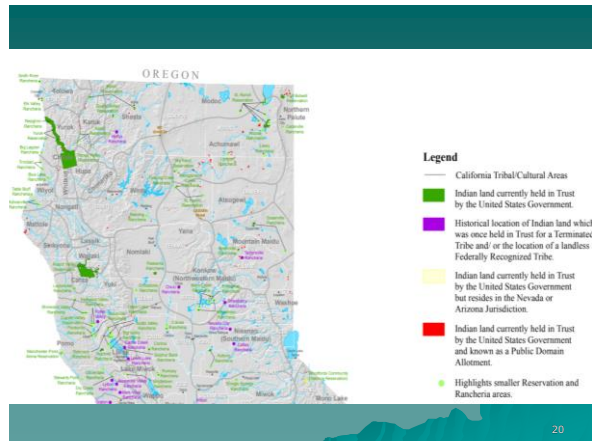
- ◆ Land owned "in fee simple" i.e. owned without restrictions
- ◆ Owner can sell, lease, rent as allowed under the local.
- ◆ AKA "patented lands" and "deeded lands"

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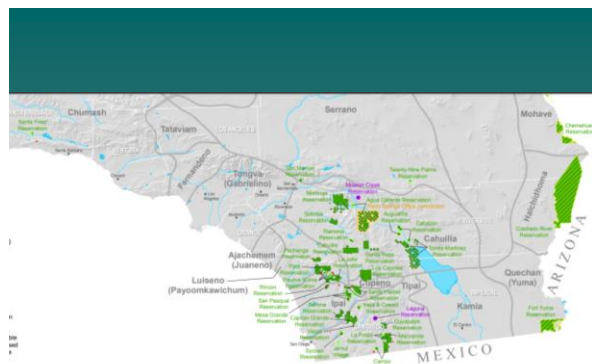
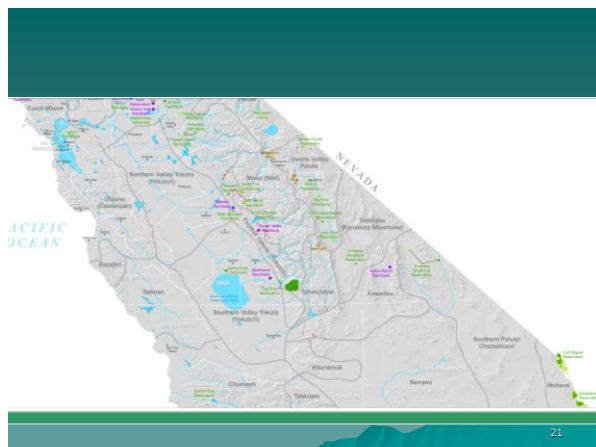
## California Tribal Land

- ◆ Tribal Acreage in California  
989,643 acres (2003)
- ◆ ~100 separate reservations or Rancherias
- ◆ Many tribes very little or no land

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## tribal Homelands and Trust Land Map

### San Diego County

- ◆ Has 18 Indian reservations
- ◆ More than any other county in the country.
- ◆ Reservations are very small, total land ~124,000 acres.

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### Terms: Tribal Environmental Protection Agencies (TEPA)

Not all tribes have one

Most TEPA's are very small (1-5 staff).

Some TEPA's are run by private consultants.

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## Terms: Sovereignty

The supreme authority a nation exercises over its domestic affairs and foreign relations.

The supreme political authority of an independent state.

Federal govt, states and tribes all have some sort of sovereignty

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## Terms: Tribal Sovereignty

Tribal sovereignty is dependent on, and subordinate to, the Federal Government.

The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.

*Washington v. Confederated Tribes of Colville Indian Reservation* (1980) 447 US 134

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## Term: Sovereign Immunity

- ◆ A judicial doctrine that prevents the government from being sued without its consent.
- ◆ The doctrine stems from the ancient English principle that the monarch can do no wrong.

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## Terms: Tribal Sovereign Immunity

- ◆ Civil lawsuits against Indian tribes and tribal business entities are barred unless there has been a waiver by the tribe or Congress
- ◆ Example of a "waiver": contractor for a tribe got a NDPES permit from a Regional Board. Discharge point was off their land.
- ◆ More below

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## Tribal Sovereign Immunity

Individual tribal members have no sovereign immunity from suit unless they are acting in official capacities on behalf of a tribe.

Puyallup Tribe v. Washington Game Dept. (1977)  
433 U.S. 165, 172

Turner v. Martire (2000) 82 Cal.App.4th 1042,  
1046

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## Tribal Sovereign Immunity

- ◆ The Supreme Court has suggested civil suits would be allowed against tribal officials in the official capacities for declaratory or injunctive relief
- ◆ B/c when they violate federal law they are not w/in official capacity
- ◆ Santa Clara Pueblo v. Martinez 436 U.S. 49, 58 (1978),

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## Kiowa v. Manuftg. Technologies (1998)

Held: that tribe was entitled to sovereign immunity from civil suit re promissory note related to tribal commercial activities.

But: "...the judge-made doctrine of tribal immunity-a doctrine developed almost by accident." Justice Kennedy

Dissenters: Thomas & Ginsburg

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## Federal Government Sovereign Immunity

Most federal environmental statutes waive sovereign immunity for the federal government; therefore the federal government is subject to the regulatory and enforcement jurisdiction of state and local government.

Waivers in RCRA, EPRCA, CAA, CWA

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## Federal Sovereign Immunity v. Tribal Sovereign Immunity

State (and locals) have clear jurisdiction on federal land and on federal facilities under most federal environmental statutes but unclear authority in Indian Country.

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## Who has environmental regulatory and enforcement jurisdiction in Indian Country?

- ◆ The federal government?
- ◆ The tribe?
- ◆ The state?
- ◆ Local govt?

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## Role of the Federal Government

- ◆ A trust relationship with tribes
- ◆ A fiduciary duty to the tribes to protect their interests in the lands and resources held for their benefit
- ◆ This is why most federal training on tribal issues is not applicable to state and local agencies

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## Federal Law Applies in Indian Country

Federal laws generally applicable throughout the United States apply with equal force to reservations. U.S. v. Farris, 624 F.2d 890 (1980).

EPA can enforce federal environmental laws in Indian lands.

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## Role of the Federal Government

- ◆ How can you take enforcement action against an entity you have a trust relationship with?
- ◆ EPA requires approval from DC for admin or civil enforcement on Indian land. 2001 OCEA "guidance" on 1984 policy

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## Federal Environmental Statutes and Tribes

Tribal sovereignty is defined and limited by Congress

Rice v. Rehner  
Washington v. Confederated Tribes of Colville Indian Reservation

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## Tribes are Treated as States

- ◆ Clean Air Act, 42 USC 7601(d)
- ◆ Clean Water Act, 33 USC 1377(a)
- ◆ Safe Drinking Water Act, 42 USC 300j-11
- ◆ CERCLA (Superfund) 42 U.S.C. 9626(a)

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## RCRA (Hazardous Waste)

Tribes defined as "Municipalities"  
42 USC § 6903(13)

Tribes can be sued under RCRA citizen's suit provisions.

States/local govt can file against a tribe as a "citizen" plaintiff.

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## Jurisdiction of Tribal Courts

- ◆ Criminal cases: for misdemeanor crimes committed by a tribal member against the person or property of another tribal member in Indian Country (max sentence 1 year and \$5,000)
- ◆ There can be separate criminal cases by the tribe, the feds and the state. Double Jeopardy does not apply as they are separate sovereigns

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## Jurisdiction of Tribal Courts

Civil cases: jurisdiction over non tribal members is limited.

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## State Jurisdiction in Indian Country: Early Law

- 19<sup>th</sup> Century cases by the Supreme Court held there was "no state jurisdiction on tribal lands."  
(Chief Justice Marshall trilogy)
- You can find this phrase on web sites and training materials -- its very out of date and wrong.

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## Current: States Criminal Jurisdiction

- ◆ The states have exclusive criminal jurisdiction over crimes committed on Indian land between non Indians, as well as victimless crimes committed by non Indians
- ◆ Regardless of PL 280 status

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### Washington v. Colville Confederated Tribes (1980)

- ◆ Upheld the imposition of Washington's cigarette and sales taxes on on-reservation purchases by nonmembers of the Tribes.
- ◆ State could seize unstamped products
- ◆ Important re cannabis?

447 U.S. 134

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### Rice v. Rehner (1983)

California could require a store on an Indian reservation obtain a state liquor license; b/c the state has

- 1) an interest in the liquor traffic and
- 2) the sale of liquor in an Indian reservation has a significant impact beyond the limits of the reservation.

463 U.S. 713

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### Rice v. Rehner

"Congress has opened the doors of reservations to state laws in marked contrast to [19<sup>th</sup> century law and cases AKA Marshall Trilogy]."

"Any applicable regulatory interest of the state must be given weight and automatic exemptions as a matter of constitutional law are unusual."

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### Rice v. Rehner

"Even on reservations, state laws may be applied unless such application would interfere with reservation self- government, or would impair a right granted or reserved by federal law".

"The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."

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## County v. Yakima (1992)

- ◆ Complicated tax issue.
- ◆ Supreme Court Justice Scalia " the 'platonic notions of Indian sovereignty' that guided [19<sup>th</sup> century] have, over time, lost their independent sway."

112 S. Ct. 683

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## Nevada v. Hicks (2001)

"State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries."

Justice Scalia. 533 U.S. 353 ( 2001) execution of a state search warrant on Indian land

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## Nevada v. Hicks (2001)

[when] "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in Confederated Tribes...."

Unanimous Decision

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## Nevada v. Hicks (2001)

- ◆ State officers can enter a reservation to investigate violations of state law occurring off the reservation.
- ◆ 25 U.S.C. § 2806 affirms that "the provisions of this chapter alter neither ... the law enforcement, investigative, or judicial authority of any ... State, or political subdivision or agency thereof...."

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## Gobin v. Snohomish County (2002)

In exceptional circumstances, a state may assert jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional intent to do so.

304 F.3d 909 (9th Cir. 2002), cert. denied, 538 U.S. 908 (2003). Land within reservation owned in fee simple

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## Calif. Supreme Court

Tribes may be sued by Fair Political Practices Commission for campaign funding reporting violations.

Tribal sovereign immunity did not apply.

Agua Caliente Band of Cahuilla Indians v. Superior (2006) 40 Cal. 4th 239

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Current status of state environmental regulatory jurisdiction in Indian Country

No direct controlling case law.

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## State Regulatory Jurisdiction in Indian Country

- ◆ Cases have upheld state regulatory laws on alcohol sales, drunk driving, fireworks, taxes and child custody.
- ◆ Cases have gone against state regulatory laws in gambling, boxing and speeding tickets.

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## Congress Acts: Public Law 280 (1953)

18 USC 1162, 28 USC 1360

- ◆ Grants California (and 5 other states) broad criminal jurisdiction over offenses committed by and against Indians within all Indian country within the state.
- ◆ Search warrants issued by state courts may be executed on Indian lands.

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## PL 280

- ◆ Took away the federal government's authority to prosecute crimes in Indian country
- ◆ State jurisdiction for crimes was greatly expanded.
- ◆ Tribal governments can request US Department of Justice re-assume federal criminal jurisdiction
  - Hoopa Valley Tribe, California

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## PL 280

Only authorizes enforcement of statewide criminal laws.

Local and county ordinances and laws are not enforceable on tribal lands.

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Not all state statutes with criminal provisions are applicable on Indian land, even in a PL 280 state.

See Calif. v. Cabazon 480 U.S. 202 (1987)

H: Doesn't apply to gambling

What about state environmental statutes with criminal penalties?

Unknown, no cases. Would seem to meet Rice v. Rehner standards

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## PL 280 Impacts

- ◆ Costs of enforcement fell to local government w/o any supporting revenue
- ◆ Reservation trust lands are exempt from state and local property taxes
- ◆ Tribal members living and earning income on reservations are exempt from paying state income and sales taxes

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## PL 280: Civil

- ◆ Allows Indians to be sued in state courts in civil cases
- ◆ States acquired the authority to hear civil lawsuits against reservation-based Indian defendants
- ◆ Does not to apply state civil regulatory statutes, such as health codes on reservations.

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## Who has environmental regulatory jurisdiction on Indian land?

The federal government, but enforcement limited by:

- Enforcement Policies
- Limited field resources
- Federal trust responsibility
- PL 280 re criminal

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## Who has environmental regulatory jurisdiction on Indian land?

The tribes

- Limited resources
- Inherent conflicts of interest

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## Who has environmental regulatory jurisdiction on Indian land?

- ◆ The state/local govt? Unknown

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## Uncertainty in Jurisdiction Invites

- ◆ Violations and Exploitation

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## California's Unique Challenges

- ◆ Highest number of tribes of any state
- ◆ Very decentralized state environmental regulatory program
- ◆ State environmental requirements go beyond federal requirements
- ◆ High levels of environmental impacts

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## Calif. Environmental Regulatory Programs

California has more stringent requirements than federal law

- Air
- Water
- Hazardous waste
- Hazardous materials
- Solid waste
- Pesticides

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## If you think Indian Country is involved in your case

- ◆ Try to get information about the status of the exact land involved
  - Fee?
  - Trust?
- ◆ Who are the people and businesses involved
  - Business owned by the tribe?
  - Enrolled tribal members?
  - Any local or state licenses? Permits?

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## Problem Areas: Sham Recycling

- ◆ When “recycling” is actually storage without a market usually end up as illegal disposal and abandonment
- ◆ Businesses will set up shop, gather a lot of hazardous materials that have no market with no value then walk away leaving a mess that is expensive to clean up

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## Potential Problem Areas

- ◆ Used or waste tires
- ◆ E(electronic)-waste
  - CRT glass
- ◆ Alternative fuel production
  - Biodiesel
- ◆ “Soil additives” that are industrial waste (Cogen waste)
- ◆ Filter cake
- ◆ Asphalt shingles

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## Soil Additives? Or Disposal of Haz Waste?

- ◆ Ash
  - Bottom, fly, boiler etc.
- ◆ Ash from cogen plants
- ◆ By products from metal production
- ◆ By products from food production
- ◆ Sewage sludge
- ◆ Mining waste
- ◆ Fireworks

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## Tires on the Cabazon Res.

- ◆ 2010, the "recycling" facility contained approximately 60,000 tires
- ◆ May 11, 2011, 90,000 tires
- ◆ May 17, 2011, fire
- ◆ May 26, 2011, Tribe issued an NOV
- ◆ June 2011, EPA issues a unilateral Order under RCRA

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## Also on Cabazon 2011

- ◆ Western Environmental Inc.
  - contaminated soil recovery and recycling facility
  - accepted petroleum and pesticide contaminated soils
- ◆ More than 215 odor complaints
- ◆ 2018 update no longer a tenant on Cabazon land. The Tribe is operating cleanup of the site.

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## Biodiesel

- ◆ Production process uses hazardous materials and produces hazardous by products particularly contaminated glycerin
- ◆ Production presents severe fire hazards
  - Catalysts: potassium hydroxide, Methanol

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## Biodiesel Additives

- ◆ Antioxidants to stabilize the fuel
  - most of which are hazardous substances.
- ◆ Biocides and fungicides to reduce microbial activity.

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## Biodiesel and Fire Hazards



Try this exercise—  
Google  
biodiesel and  
fire

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## Cannabis and Tribal Land

- ◆ Proposition 64, made no provisions for tribes.
- ◆ State position: tribes can do whatever they want with cannabis on their reservations.
- ◆ “But they cannot operate in the licensed California market”

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## Why Are Tribes “left out”?

- ◆ To be included, the tribes would have to waive sovereign immunity so the state can inspect and regulate on tribal land
- ◆ Tribes will not agree to this

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## Cannabis and Tribal Land

- ◆ Production and sales still violate federal law
- ◆ US DOJ Cole Memo and Indian Policy Statement suggest they will not enforce on state/tribal lands unless (eight priorities)
- ◆ Tribal governments and local federal prosecutors “will consult on a government-to-government basis as issues arise.”

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## What Has Happened

- ◆ Tribes have started cannabis business anyway
- ◆ No licenses, don't pay state fees
- ◆ No inspections of facilities or products
- ◆ So their products are cheaper
- ◆ Classic unfair competition
- ◆ Supposed to sell only to tribal members

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## lipay Nation of Santa Ysabel

San Diego County

Opened a dispensary

Marijuana is grown and a laboratory operates, run by private cannabis companies.

May sell the marijuana grown on the reservation only at its dispensary or to other tribal operations. Who checks?

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## Cannabis Production Hazards

- ◆ Mold
- ◆ Carbon Dioxide
- ◆ Carbon Monoxide
- ◆ Pesticides
- ◆ Disinfectants and cleaning chemicals

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**Legal Cannabis Growing Operations Hazards & Health Risks**

Excessive UV exposure

Exposure to Pesticides

Excessive CO<sub>2</sub> exposure

Accidental exposure to Ethylene Oxide (EO)

**DANGER!** Carbon Monoxide (CO)

**DANGER!** Eng exposures while handling plant buds

**Personal Protective Equipment (PPE) Suggestions**

**Respirators**  
Respiratory protection may help reduce exposure to pesticides or chemicals.

**Eye & Face Protection**  
Goggles can be used to protect from contact with toxic pesticides and chemicals.

**Skin Protection**  
Coveralls, lab coats, aprons, boots, and especially gloves can be used to protect skin contact and exposure to EO, pesticides and herbicides.

## Plant Oil Extraction

- ◆ High-pressure machinery
- ◆ Butane
- ◆ CO<sub>2</sub>, and/or
- ◆ Flammable/combustible liquids,
- ◆ Risk of fire or explosion

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## Enforcement Options

- ◆ The tribe
- ◆ The federal government
  - BLM, EPA re enviro issues
- ◆ State criminal action under PL 280?
- ◆ PL 280 stops federal criminal enforcement of MJ crimes?

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## Enforcement Options

- ◆ State/local gov't as a "citizen" under civil provisions of federal laws
- ◆ Civil action against individuals, contractors, esp. for violations not on Indian land. B&PC 17200?
- ◆ State action per Washington v. Colville Confederated Tribes

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## Enforcement Options

Civil actions for injunctions against tribal officers in their official capacities as tribal sovereign immunity does not bar a suit for prospective relief against tribal officers acting in violation of federal law.

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## Hemp: 2018 Farm Bill

- ◆ Allows a tribe seeking to assert "primary regulatory authority" over hemp to submit a plan to the Department of Agriculture that explains production and testing
- ◆ 2019 Yurok Tribe passed a tribal Hemp ordinance

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## Contacting Tribal Government

- ◆ Tribal Councils
- ◆ Tribal Chairs or Presidents
- ◆ Tribal EPAs
- ◆ Establish appropriate point of contact

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## Some Resources

- ◆ California Native American Heritage Commission [www.ceres.ca.gov/nahc/](http://www.ceres.ca.gov/nahc/)
- ◆ Federal Bureau of Indian Affairs [www.doi.gov/bureau-indian-affairs.html](http://www.doi.gov/bureau-indian-affairs.html)
- ◆ National Environmental Tribal Council [www.ntec.org/](http://www.ntec.org/)
- ◆ Tribal Court Clearing House [www.tribal-institute.org/index.htm](http://www.tribal-institute.org/index.htm)

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## Take Aways/Summary

- ◆ California is a PL 280 state
- ◆ You are not the federal government
- ◆ There are no clear answers

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