Southern Ute Indian Tribe

Presentation to American Indian Affairs Study Committee

August 14, 2024 | State Capitol

Legislative Priorities

- Tribal and Reservation Exclusion
- State Recognition of Tribal warrants and commitment orders
- Indian Child Welfare Act (ICWA) amendments
- Sports Betting

Tribal and Reservation Exclusion

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Southern Ute Indian Tribe Reservation Boundary

DURANGO
BAYFIELD
PAGOSA SPRINGS
IGNACIO

550
160
140
172
151
84

SUIT BOUNDARY
TRIBAL TRUST LAND
ALLOTED LANDS
TRIBAL FEE
BLM
USFS
STATE of COLORADO

0 5 10 20 Miles

Jurisdiction on Reservation is Complex

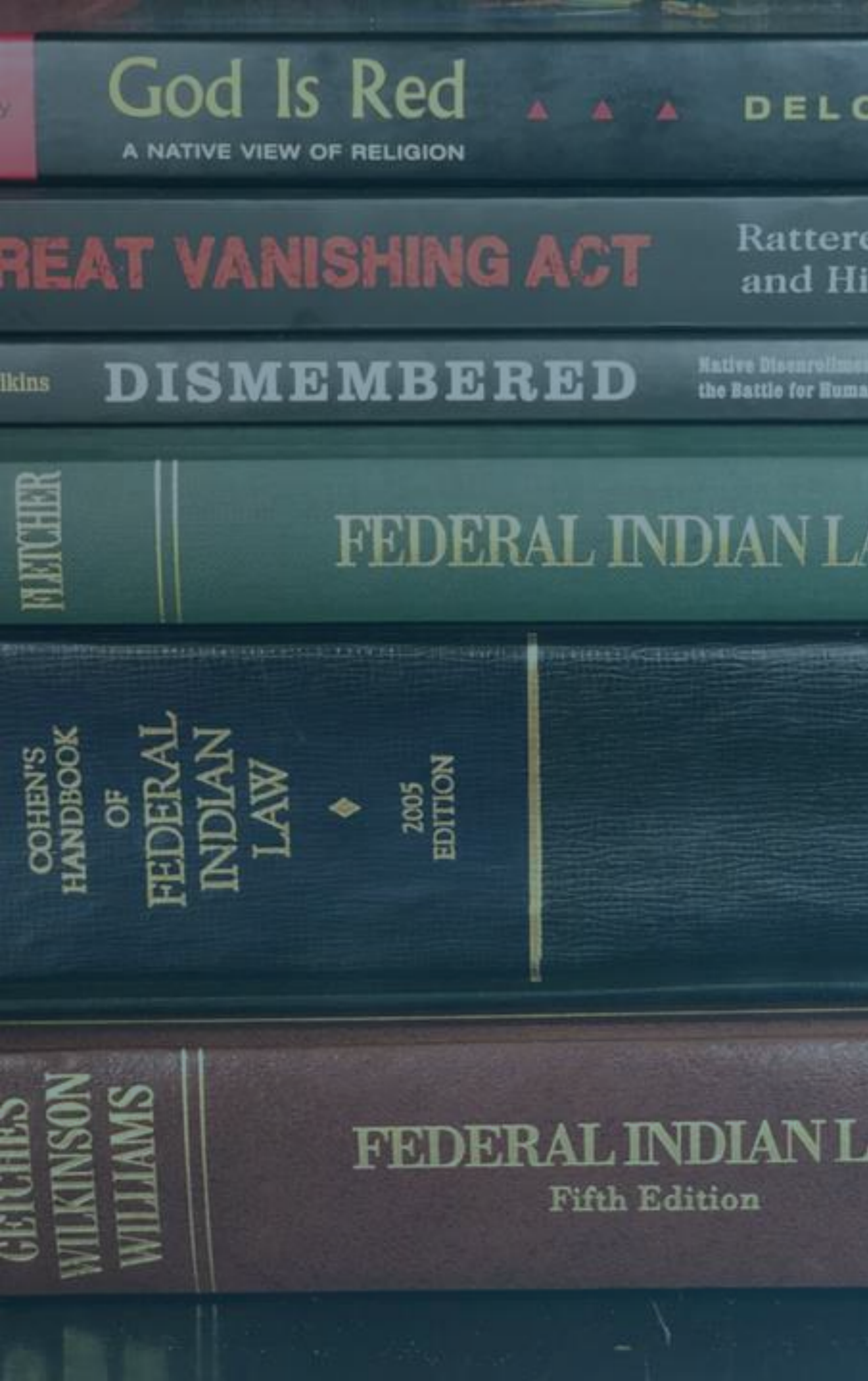
- Jurisdiction on Reservation is mix of Tribal, federal, and state law.
- General rule is that state authority is preempted in Indian Country.
- Jurisdiction within Reservation varies based upon Indian/non-Indian status of the actor and land status.

State Laws of General Applicability Contribute to Confusion

Tribe actively monitors proposed legislation to identify bills that purport to apply generally throughout the State but that if construed to apply to the Tribe or the Reservation, would be an unlawful infringement on the Tribe’s sovereignty or would be preempted by federal or tribal authority.

Generally Applicable Laws Create Ambiguity

- Unclear how most legislation will impact the Tribe and the Reservation.
- Tribe has in some cases been able to confirm the intent of the bill sponsor and insert a Tribal and Reservation exclusion.
- Many laws are passed without consideration of their effect within the Reservation, which leads to ambiguity and increases likelihood of jurisdictional disputes.



Legislative Concept

- The General Assembly would enact a law establishing an express rule of construction applicable to future Colorado laws addressing how such laws relate to the Tribe and the Reservation.
- Reservation Exclusion will clarify the law, eliminate confusion, and avoid jurisdictional disputes.

Proposed New Rule of Construction

- In the absence of a clear statement that a law is intended to apply to Indians, the Tribe, Tribally-controlled entities, or real property interests owned by any of them within the Reservation, the new State law would be construed to ***NOT*** apply to such Indian persons, entities, or interests within the Reservation.

- The proposed rule of construction is consistent with well-established federal canons of construction, reflected in numerous and recent U.S. Supreme Court decisions.

Proposed Language - Findings & Purpose

- **2-4-502. Findings and legislative declaration.** The general assembly finds and declares that, in the absence of clear expressions of legislative intention, whether legislation is intended to apply to the Tribe, its members, tribally controlled entities, or to Indians conducting activities within the Reservation, the resulting ambiguity substantially increases the likelihood of unnecessary jurisdictional disputes between the State of Colorado, the Tribe, or those entities or individuals who are subject to either of their laws.

- **2-4-503. Purpose.** The purpose of this Part is to establish a rule of construction of laws passed by the general assembly following the date of this enactment that will govern their interpretation and application to the Tribe and to the conduct of Indians, tribally controlled entities, or persons other than Indians, and lands, within the Reservation.

Proposed Language – Rule of Construction

- **2-4-504. Rule of Construction.**
  - (1) Unless any law passed by the general assembly following the date of this enactment contains a clear, contrary expression, such law will be presumed to not apply to the Tribe or to tribally controlled entities, Indians, or their lands within the Reservation.
  - (2) Any laws passed by the general assembly following the date of this enactment shall be presumed to apply to persons other than Indians and to their conduct on lands within the Reservation in which no interest is owned by the Tribe or tribally controlled entities, or in which no interest is owned by Indians and held in trust or restricted status by the United States.
  - (3) The criminal and civil laws of the State of Colorado shall be presumed to apply to Indians and persons other than Indians within the boundaries of a municipality located within the Reservation; however, nothing herein is intended to limit the concurrent jurisdiction of the Tribe over the conduct of Indians within a municipality.

Proposed Language – Tribal Consent

- **2-5-505. Consent of the Tribe to Application of State Laws.**
  - (1) Subject to any applicable limitations set forth in federal or tribal law, nothing herein contained is intended to preclude or limit the authority of the Tribe's governing body from enacting legislation on behalf of the Tribe, tribally controlled entities, or members of the Tribe consenting to the application of a law, passed by the general assembly either prior to or after the date of this enactment, within the Reservation.
  - (2) Notwithstanding the rule of construction set forth in § 2-4-504(1), the Governor, in exercising the powers of the Governor's office, and state agencies may determine the Tribe or its governmental divisions to be eligible for participation in programs and grant funding to be used within the Reservation and that are designed to improve infrastructure, health care and treatment, telecommunications, transportation, education, law enforcement, housing, environmental protection, wildlife resource management, or other governmental functions and services, even if the legislation creating such programs do not explicitly mention the Tribe or the Reservation.

Other Provisions

- Preservation of Sovereign Immunity
- Preservation of Legal Remedies
- Process for Memorandums of Understanding

SETINA
Ford
Tribal warrants and commitment orders
David C. Smith, Legal Department Director

Recognition of Tribal Arrest Orders

- As a general rule, only the Tribal courts have jurisdiction over criminal acts committed by Native Americans within the boundaries of the Reservation.
  - Limited exceptions under federal law for more serious crimes.

- A defendant can evade the jurisdiction of the Tribe simply be leaving the Reservation.

- Chief Judge Wilson in LaPlata County has entered a court rule that recognizes tribal warrants.

Proposed Language - Recognition of Tribal Arrest Orders

- An amendment to Title 16, Art. 3 on Arrests.

- Part 7 – Tribal Court Warrants
  - 16-3-701 – Any state court will give full faith and credit to an arrest warrant issued by a Tribal court of a federally recognized Tribe with a Reservation within the exterior boundaries of the State of Colorado.
  - 16-3-702 – Upon receipt of a Tribal court warrant, an arresting officer in the state of Colorado may apprehend the person identified in the warrant and arrangements shall be made with the Tribal jurisdiction for transportation of the person to the law enforcement authority of the Tribal jurisdiction.

Proposed Language - Recognition of Commitment Orders

- 27-65-132 – Tribal Court Commitment Orders
  - (a) Any order of commitment entered by a Tribal Court of a federally recognized Tribe with a Reservation within the exterior boundaries of the State of Colorado concerning a person over which it has jurisdiction shall be recognized to the same extent as a commitment order entered by a court of this State.
  - (b) Any health care provider may communicate with the officers of a Tribal Court regarding a patient under its care pursuant to a Tribal Court commitment order to the same extent as it can communicate with the officers of a state court pursuant to a state court commitment order.

CO Indian Child Welfare Act

James Washinawatok II, Sr. Tribal Attorney

CO Indian Child Welfare Act

- **Background**
- **Process**
- **CO ICWA bill**
- **Next steps**

- In 1978, Congress passed ICWA, 25 U.S.C. §§ 1901-1963, to reduce the alarming rate of Native American children being taken and placed with white families.
- In 1981, the State of Colorado and the Southern Ute Indian Tribe entered into an ICWA Agreement, incorporating ICWA and the federal regulations, among other things.
- In 2002, Colorado adopted certain provisions of the federal ICWA to the Colorado Children's Code. *See* C.R.S. §§ 19-1-103, 19-1-126, 19-2-513, 19-3-212, 19-3-502, 19-3-602, 19-5-103, and 19-5-208.

Background

Background continued

- In 2019, Colorado adopted amendments to align Colorado's statute with the updated ICWA regulations to ensure continuing compliance with federal law. *See* C.R.S. § 19-1-126.

- In 2023, the General Assembly enacted SB 23-211 (signed into law May 4, 2023) with broad support to adopt and incorporate ICWA and the ICWA regulations as Colorado law. *See* C.R.S. § 19-1-126(4).

- Sixteen states have passed comprehensive state ICWA laws (6 last year) – (1) California, (2) Iowa, (3) Michigan, (4) Minnesota, (5) Nebraska, (6) New Mexico, (7) Oklahoma, (8) Oregon, (9) Washington, and (10) Wisconsin, with (11) Connecticut, (12) Wyoming, (13) Montana, (14) North Dakota, (15) Nevada, and (16) Maine most recently adopting their laws in 2023.

Process

Various supporters involved in process:

- ICWA experts and practitioners
- Counties: La Plata, Jefferson, Denver, many others
- Colorado Counties, Inc.
- Colorado Office of the Child’s Representative
- Colorado Office of Respondent Parent’s Counsel
- Denver Native American community: Denver Indian Family Resource Center, Denver American Indian Commission
- The Kempe Foundation
- Native American Rights Fund
- Tribes: Ute Mountain, Navajo, Southern Ute

CO Indian Child Welfare Act draft

- Goals – Further strengthen ICWA at the state level. Also respond to a few Colorado court decisions that determined that Tribes may under certain circumstances not receive notice to determine if a child is a tribal member in the state court system.
- While the Supreme Court upheld ICWA's constitutionality in *Haaland v. Brackeen*, No. 21-376, ICWA remains subject to challenge. The Colorado General Assembly can combat this threat by further upholding ICWA's recognized "gold standard" in child welfare protection.

CO ICWA continued CO case interpretations

- Before 2019, when a county agency had reason to believe that a child was a member or eligible to be a member of a tribe, the agency must send the tribe(s) notice. *B.H. v. People of the State of Colorado, In the Interest of X.H.*, 138 P.3d 299 (June 26, 2006).
- After the 2019 CO law passed, the Court of Appeals narrowed that requirement. The Court of Appeals determined that asserting possible Indian heritage alone is not "reason to know" that a child is an "Indian child", so no notice required. *In re A-J.A.B.*, 2022 COA 31, ¶58.
- The Colorado Supreme Court upheld this narrow standard noting that while asserting Indian heritage gave a court "reason to believe" that the child was an Indian child under Colorado law in 2006, such assertions that specify a tribe or multiple tribes do not give a court "reason to know" that the child is an Indian child under Colorado law in 2022, § 19-1-126(1)(b). Mere assertions of Indian heritage, without more, are not enough. *People in the Int. of E.A.M.*, 2022 CO 42 at ¶56.
- Also, in 2021, the Colorado Supreme Court held that a county agency has no obligation to assist eligible children in becoming enrolled in a tribe, even though it might be "best practice" for the agency to do so. The court reasoned that helping a child enroll was not among the "active efforts" required of county agencies in ICWA cases. Nor was it required among the "reasonable efforts" necessary for the child under Colorado law. *See People in Interest of K.C. and L.C.*, 2021 CO 33.

1. **Enrollment** - Department will assist in enrolling child, unless parent objects, if the Department has "reason to know" that the child is an Indian child.

2. **Determining Indian child's Tribe** – The court shall inquire and determine if the child is an Indian child by requiring, among other things, the petitioning party provide in writing showing a good faith effort to determine if the child is an Indian child by contacting family and tribe(s) that the child may be eligible to enroll.

CO ICWA draft Key changes

CO ICWA
Key changes continued

3. **Reason to know** – When conducting its inquiry, the court has "reason to know" that a child is an Indian child if:

    - There is an assertion of Indian heritage of affiliation with a specific tribe.
    - Evidence is presented that the child is or may be an Indian child or the parent is or may be a tribal member.
    - Any other indicia provided that the child is or may be an Indian child.

4. **Placement preferences –** If no established tribal preferences:

    1. extended family;
    2. foster home approved, licensed, or specified by tribe;
    3. another member of child's tribe;
    4. another Indian family culturally similar to child's tribe;
    5. state licensed foster home; or
    6. suitable institution approved by tribe.

5. **Tribal customary adoption –** adoption through tribal custom or tradition without terminating parental rights.

6. **Due diligence -** If there is "reason to know" a child is an Indian child, but the court lacks sufficient evidence to determine that the child is an Indian child, the court shall confirm that the petitioning or filing party used due diligence to identify and work with all of the tribes with reason to know that the child may be a member to verify if the child is a member, or a biological parent is a member and the child is eligible for membership, including *documenting all contact with the respective tribe that must include at least two contacts with the tribe within 75 days of the finding, unless the tribe has provided written documentation indicating membership, eligibility or ineligibility of the child.*

7. **Inquiry and due diligence -** Court shall make written findings whether the petitioning or filing party satisfied inquiry and due diligence requirements, the child is an Indian child, there is or is not reason to know that the child is an Indian child.

CO Indian Child Welfare Act draft Key changes continued

CO ICWA
Key changes continued

8. **Emergency removal and inquiry –** person initiating petition must make good faith effort to determine if there is "reason to know" that the child is an Indian child and make contact.

9. **Foster care and termination of parental rights –** Sections included.

10. **Placement preferences –** If no established tribal preferences, (1) extended family; (2) foster home approved, licensed, or specified by tribe; (3) another member of child's tribe; (4) another Indian family culturally similar to child's tribe; (5) state licensed foster home; or (5) suitable institution approved by tribe.

11. **Tribal customary adoption –** adoption through tribal custom or tradition without terminating parental rights.

12. **Cultural compact –** If a child is placed for adoption with family not of the child's tribe, the court shall require the adoptive family to enter into a cultural compact, at the tribe's discretion, to ensure cultural connection.

1. Continue discussing with group.
2. Incorporate any further revisions.
3. Submit final draft next month

Next Steps

Sports Betting

David C. Smith, Legal Department Director

The Gaming Compact and Sports Betting

- In 1995, Southern Ute Indian Tribe ("Tribe") and the State of Colorado ("State" or "Colorado") entered into a Gaming Compact

- In November 2019, the people of Colorado approved Proposition DD, which legalized online sports betting in Colorado.

- The Gaming Compact provides that "the Tribe may conduct any or all Class III Games that are Explicitly Authorized by the laws of the State, each game having a maximum single bet as Explicitly Authorized by State law," Gaming Compact § 3(a).

- "'Explicitly Authorized' means [,] with respect to gaming activities and bet amounts, those gaming activities and bet amounts that are identical to the activities and bet amounts that are authorized in the State of Colorado." Gaming Compact § (1)(f).

The Gaming Compact and Sports Betting

- Any gaming activities that are legal for any entity in Colorado are legal for the Tribe.

- Once the State has legalized any type of gaming activity, the Tribe may engage in the same type of activity under Tribal authority and regulation.

- Once the State says yes to a type of gaming, all decision-making and regulatory lies with the Tribe for its gaming activities.

Revenue Sharing

- There are NO provisions in the Gaming Compact that require the Tribe to share any portion of its gaming proceeds with the State.

- This reflects the public policy of the State of Colorado to encourage the development and maintenance of strong Tribal governments and to treat them as partners and colleagues.

- Proceeds from Tribal gaming are used by Tribal governments to provide public services for the community.

- The Tribe provides extensive public services to both its membership and other Colorado citizens living in the region.

No State Regulatory Authority

- The Sports Betting legislation did not specifically address Tribal gaming.
- Polis Administration has asserted regulatory authority Colorado does NOT have under the Gaming Compact with the Tribe.

Proposed Legislative Solution

- Amend Colorado's sports betting laws, C.R.S. § 44-30-1501, *et. seq*, to clarify that Colorado's two tribes may engage in sports betting throughout the state, and that they are not required to pay any amount of money earned on sports betting to the State.

- While this is already the law, this legislative fix will avoid lengthy litigation.

No Possibility of Tribal Sports Betting licenses for non-Tribal entities

- Indian Gaming Regulatory Act ("IGRA") requires tribes to maintain a "sole proprietary interest" in their gaming operations.
- Tribes can operate a single sports betting app for their own gaming enterprises and *CANNOT* license and market exceptions to any Colorado tax to outside providers.
- Even under IGRA, if the Tribe were to enter any limited-term management agree for online sports betting, it would be financially unviable.
- In other words, there is no legal or practical possibility of vendors abandoning State sports betting licensure in favor of some Tribal sports betting licensure.

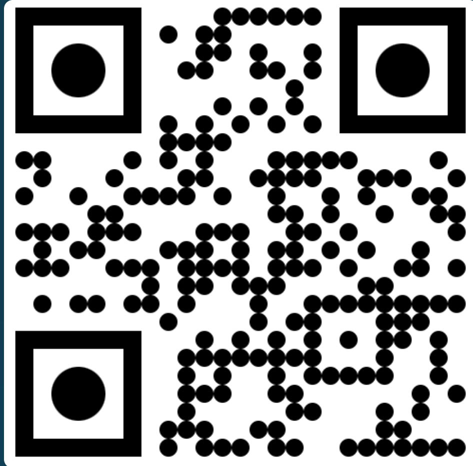
Tribal Sports Betting Benefits Tribal Members and Colorado Citizens

- And the Tribe is required by federal law as well as its own tribal codes to ensure the primary beneficiaries of any gaming operation is the Tribe itself and its government programs, so it would not be able to gain any substantial competitive advantage by evading the 10% State tax.

- This change would be perceived as a gesture of respect towards the Colorado tribes and protect the State's reputation as the state that can always be counted on to do the right thing when it comes to Indian affairs.

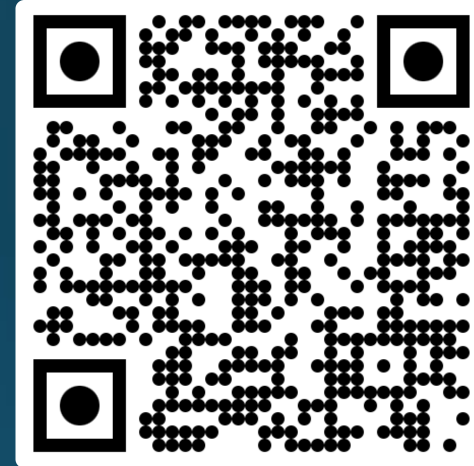
Questions?

Contact Information



Maynes, Bradford, Shipps & Sheftel, LLP Website

Southern Ute Legal Department Website



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