

Tribal Issues in Estate Planning

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Why does this matter?

Even if you never plan to practice in tribal court, a basic working knowledge of federal- and state- Indian law issues relating to estate planning is an important tool to have. There are an increasing number of tribal members and their extended families who want and need competent estate planning, as well as a growing number of tribal families who need assistance with an aging family member, or a family member with a disability or mental health issue. As the tribal population grows it is likely that you will have the opportunity to practice in this area directly or indirectly.

The basic process for estate planning and elder law with tribal clients is very similar to the process for non-tribal clients, with the addition of identifying potential tribal overlays:

- A. Determine tribal affiliation and status of client, and potential interested parties.
- B. Identify estate assets, priorities and/or program needs
- C. Identify potential governing law(s) and jurisdiction(s)
- D. Prepare documents and overall plan incorporating all of the above, with clear instructions
- E. Follow up.

One added concern with any tribal work is the issue of sovereignty, and the concern that every court case has the potential to impact all of Indian Country because of the unique tribal-federal relationship. Every case can potentially either erode or expand tribal self-governance, even what may seem like a simple probate matter.

The outline below is intended to be a very basic overview of issues and resources, it's intended to provide a starting place.

1. Jurisdiction & Venue
 - a. Tribal Membership – what is it?
 - i. Federally recognized tribe.

Federally recognized tribes have the legal authority to establish governments, have a land base, establish and enforce their own laws, exercise (limited) sovereignty, and exercise other powers similar to

states. They have a direct relationship with the federal government. They also have the authority to establish membership requirements. Membership in a federally recognized tribe, or inheriting from a member of a federally recognized tribe, may implicate federal Indian probate law.

ii. Non-federally recognized tribe.

There are many tribes that are not currently federally recognized, either because Congress previously dis-established them, or because they have not yet attained federal recognition. Descendants of these tribes may at some time have federal recognition, and identifying relevant information can be important to future generations, both personally, culturally and legally.

iii. Blended families

Many enrolled tribal members marry non-enrolled people, or people from other tribes. There may be multi-state, multi-national, and multi-tribal issues.

iv. Generational issues arising out of diminishing tribal membership eligibility.

A growing number of tribal members have descendants who are not eligible for tribal membership. AIPRA currently allows inheritance for “up to two generations of an Indian.” So even non-members may have tribal interests.

Some legal structures that may also be employed to provide for succession for non-members: using corporate entities, trusts, interfamily agreements, etc.

There is no trust code in Indian Country.

b. Land “Ownership – the bundle of sticks is real!

i. Tribal Trust Land – Land held for the tribe by the federal government, and assigned by the tribe.

1. Land Assignment – the tribe can make land and use assignments at the tribal level. Succession will be administered and governed at the tribal level.
2. Inheritance rights – Sometimes these are formally codified, sometimes they are based on custom and tradition, sometimes a combination.

- ii. Allotment/Individual Trust Land – Land held in trust by the federal government and assigned directly to tribal members.
 - 1. Federal process – The federal government administers succession to allotted land, it is a painstaking federal bureaucratic process and is governed by federal succession laws.
 - 2. Federal assignment limitations – Can provide for non-tribal member spouse and up to two generations from the Indian landholder. Often structures on the land are not part of the allotment.
 - iii. Individually Owned Fee Land – There is fee land within many reservations. This can be bought, sold, and inherited by members and non-members. Jurisdiction is messy.
 - iv. Tribally owned fee land – Many tribes purchase traditional lands from private landholders, and some of this land has been transferred into trust, but some of it is owned by the tribe as fee simple land. These lands are subject to state and tribal laws.
 - c. State, federal, tribal, multiple, jurisdictions? Navigating ancillary probate in tribal jurisdictions, comity, and where does it make the most sense to initiate probate?
 - d. Court, Village Government, Peacemaking, Etc. Because tribes have diverse governance structures, proceedings may be in a court, before an administrative body, at a Village Council meeting, in a traditional setting that does not permit attorneys. The governing law may be codified, it may be cultural, it may be “Western”, it may be religious, or it may be a combination.
2. Finding the Law
- a. Sources of Law
 - i. Codes and Rules
 - 1. Tribal – Tribal codes can be hard to track down. It’s always best to contact the tribal council office, tribal counsel, and/or courts directly to confirm where current codes are maintained.
 - 2. “Approved Tribal Probate Code” None in Arizona.
 - 3. Federal
 - Title 26, United States Code
 - American Indian Probate Reform Act & Regs
 - <https://www.tribal-institute.org/lists/understanding.htm>

Currently there are 574 federally recognized tribes and Alaska Native entities in the USA <https://www.usa.gov/tribes>

There are currently 22 federally recognized tribes with AZ land base (links to each tribe)

- [Ak-Chin Indian Community](#)
- [Cocopah Tribe](#)
- [Colorado River Indian Tribes](#)
- [Fort McDowell Yavapai Nation](#)
- [Fort Mojave Indian Tribe](#)
- [Fort Yuma-Quechan Tribe](#)
- [Gila River Indian Community](#)
- [Havasupai Tribe](#)
- [Hopi Tribe](#)
- [Hualapai Indian Tribe](#)
- [Kaibab Band of Paiute Indians](#)
- [Navajo Nation](#)
- [Pascua Yaqui Tribe](#)
- [Pueblo Of Zuni](#)
- [Salt River Pima-Maricopa Indian Community](#)
- [San Carlos Apache Tribe](#)
- [San Juan Southern Paiute Tribe](#)
- [Tohono O'Odham Nation](#)
- [Tonto Apache Tribe](#)
- [White Mountain Apache Tribe](#)
- [Yavapai-Apache Nation](#)
- [Yavapai-Prescott Indian Tribe](#)

Not yet recognized: Hia-Ced O'odham community

Interesting interactive map you can click on to see which tribe's indigenous lands you live on: <https://native-land.ca/>

Essential Indian law cases

Montana v. United States, 450 US 544 (1981)

The Marshall Trilogy (Johnson v. M'Intosh (1823), Cherokee Nation v. Georgia (1831), Worcester v. Georgia (1832))

Summary of holdings:

Aboriginal land claims: Aboriginal people retain the rights of use and occupancy, that only the United States government can settle aboriginal land claims, and

that the US has a legal duty to protect aboriginal title until land claims are officially settled.

Tribal Sovereignty: Tribes are sovereign nations with the authority to govern themselves. The source of their authority to govern is 'inherent,' meaning that it comes from tribes being self-governing long before explorers and settlers came to the New World.

Federal Trust Responsibility: The Federal Government has a responsibility to protect Indian lands and resources, and to provide essential services to Indian people. This comes from the fact that the federal government took away the vast majority of Indian lands, and in return promised to provide these things.

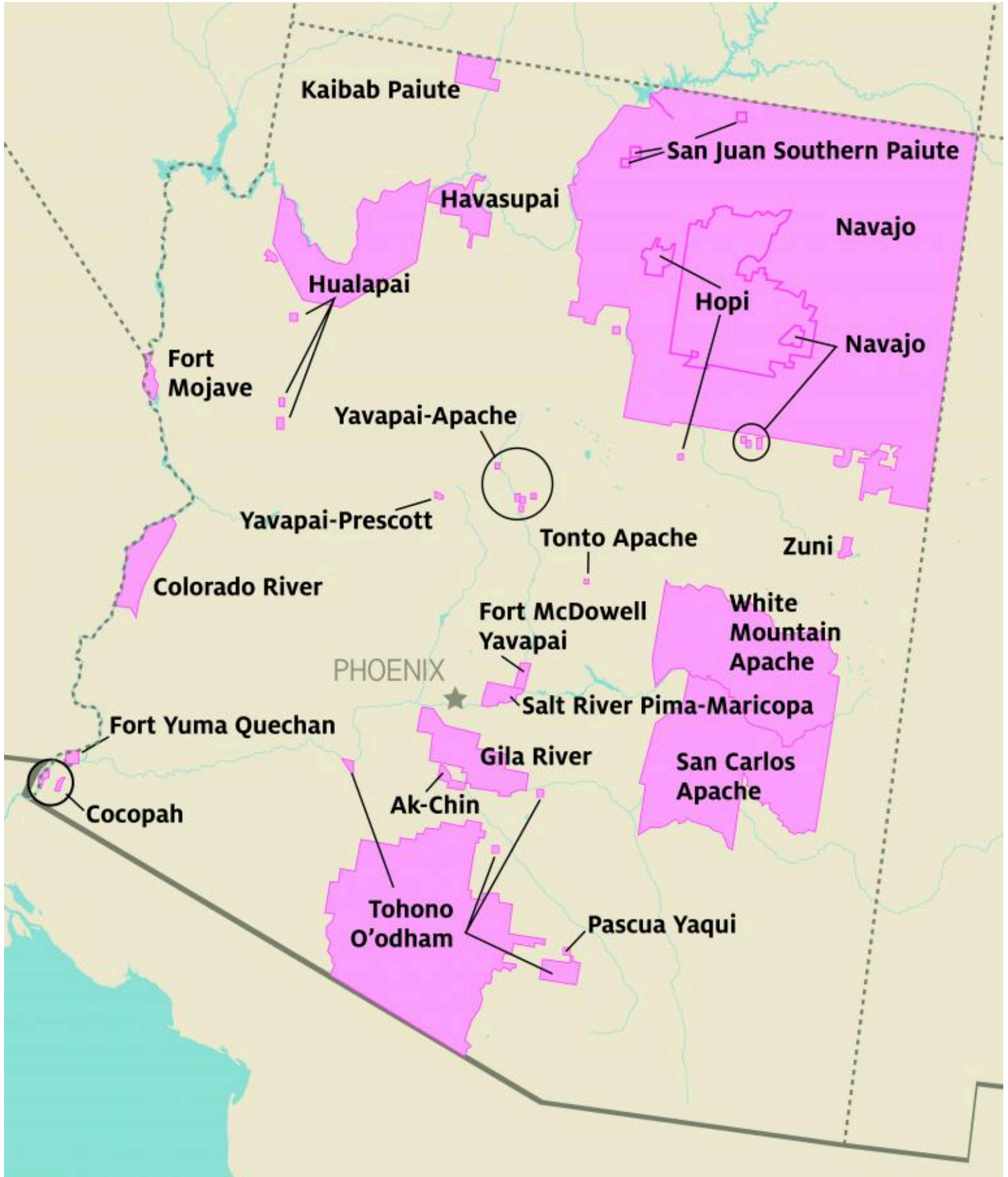
<https://www.uaf.edu/tribal/academics/112/unit-1/marshalltrilogy.php>

McGirt v. Oklahoma (2020) Recent and surprising expansion of tribal jurisdiction in Oklahoma.

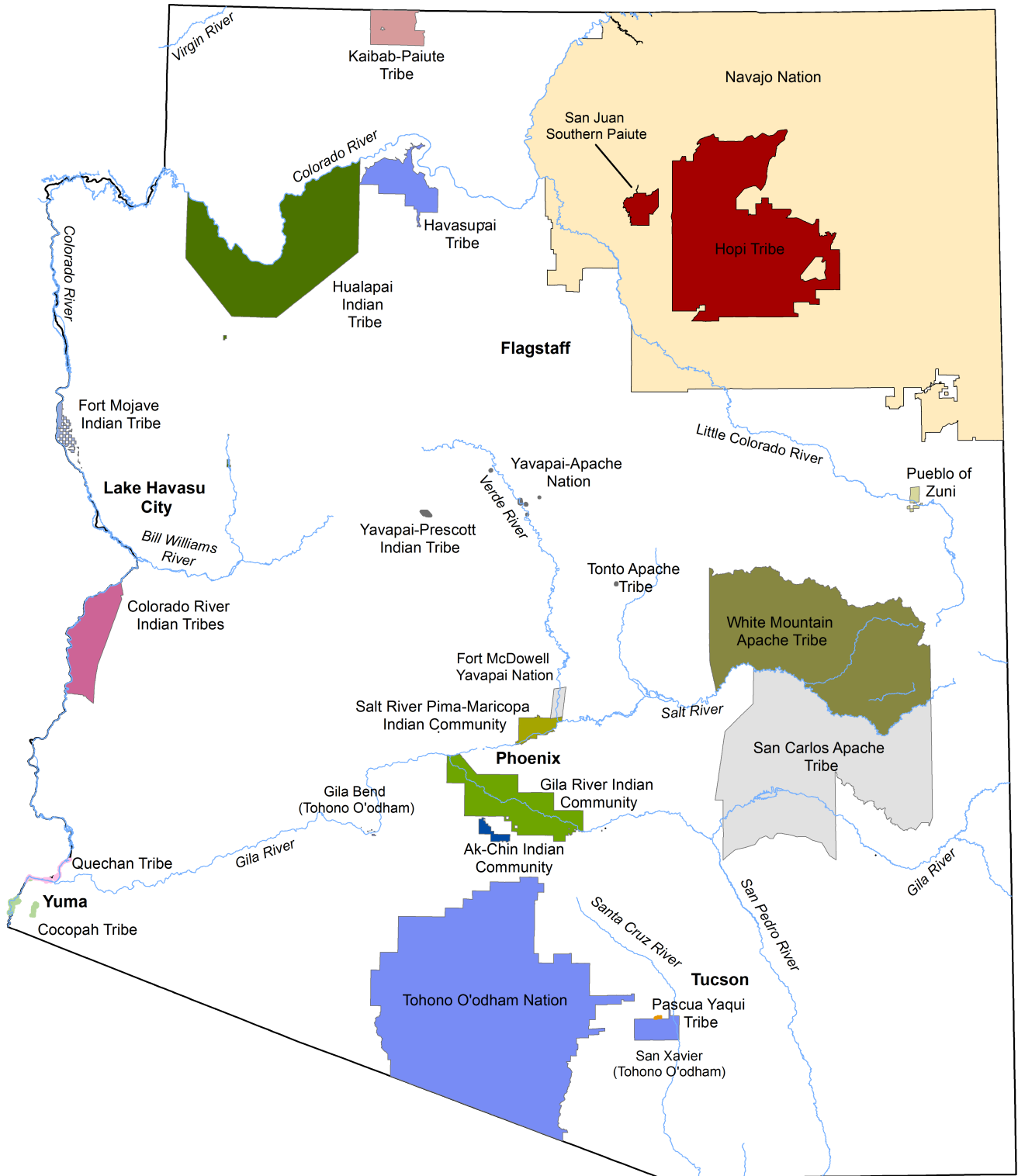
More recently there has been an Arizona appeals case and US Supreme Court case dealing with ICWA, but also addressing tribal jurisdiction, sovereignty, and the rationale for tribal involvement in the lives of minors who are tribal members:

Haaland v. Brackeen, 599 U.S. 255 (2023)

Matter of Guardianship of A.K., No. 1 CA-CV 23-0485, 2024 WL 3948105 (Ariz. Ct. App. Aug. 27, 2024)



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