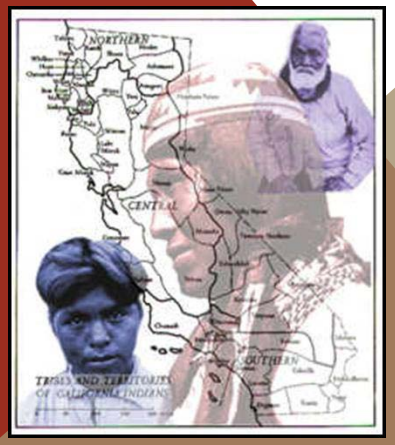
HISTORICAL AND LEGAL FOUNDATIONS THAT SHAPED TRIBAL GOVERNMENTS IN CALIFORNIA

(A.K.A. THE ROOTS OF TRIBAL SOVEREIGNTY)



SOVEREIGNTY - DEFINED

Sovereignty is the Right of Self-Governance.

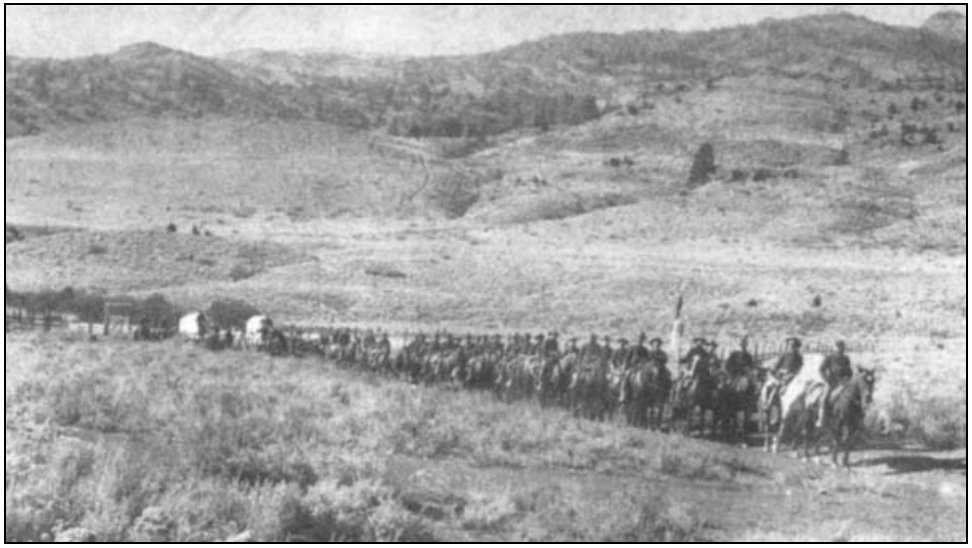
It is the right of an entity to make its own laws and to be governed by them.

It's important to know the difference between Sovereignty and Sovereign Immunity.

- **Sovereign immunity is the right to be free from suit; the right not be sued in court.**
- **"Sovereign" cannot be sued because the Sovereign's assets are the assets of the community as a whole.**

TREATY-MAKING PROCESS

- For a treaty to become valid after it is signed by U.S. and tribal government representatives, it must be sent back to Washington D.C. and approved or ratified by Congress.
- Only 374 treaties have been ratified by Congress. (Of the 374 treaties, all have been violated in some form by the U.S.



SOVEREIGN STATUS OF INDIAN TRIBES

Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.

- The U.S. only negotiates treaties with sovereign entities.
- The U.S. may expand or contracts its recognition of tribal sovereign authority.

CALIFORNIA INDIAN HISTORY 101

U.S. Federal Government negotiated 18 Treaties with California Indians setting aside 7.5 million acres of land

- negotiated from 1850-51

California Land Claims Act of 1851

- Resulting in loss of tribal villages and scattered landless Indians in California

There are 110 federally recognized tribes in California, more than 30 (possibly as many as 80) that are not federally recognized and very large urban Indian population comprised of non-California Indians.

TRIBAL SOVEREIGN STATUS

Inherent Tribal Sovereign Authority

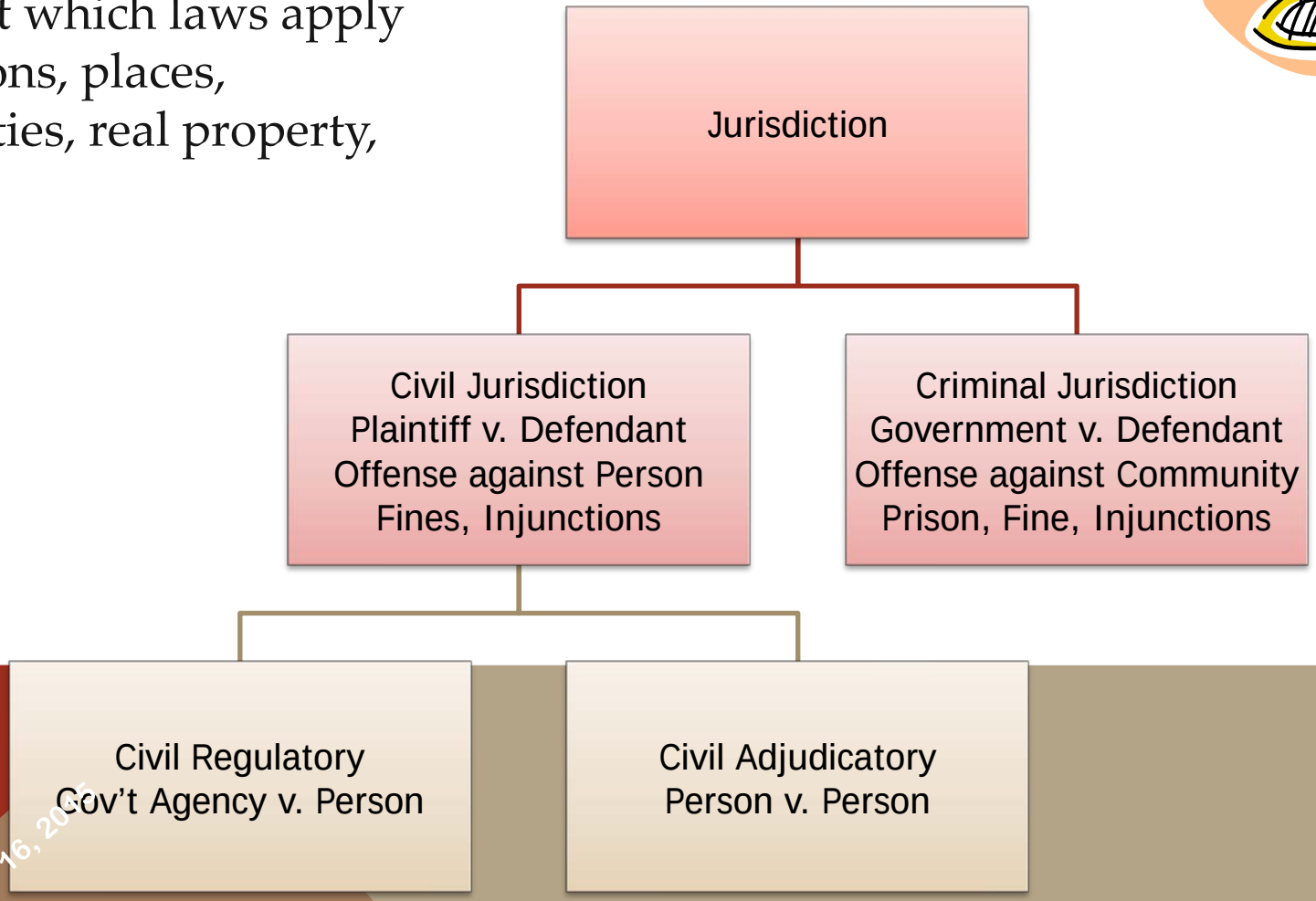
- Possess Inherent Sovereignty by virtue of being.
- Subject to Tribal Powers only.

Legal Sovereign Status of Tribes

- Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.
- Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.

TYPES OF JURISDICTION

Jurisdiction is the scope of that which laws apply (persons, places, activities, real property, etc.).



JOHNSON V. MCINTOSH (1829)

- This case applied and adopted the **Discovery Doctrine** into U.S. case law.
- Discovery Doctrine **gave the U.S. the exclusive right to extinguish the original tribal right of *possession* by purchase or conquest.**
- Discovery Doctrine only left Tribes with the **Right to Use and Occupy the Land.**
- This theory gave the discovering Government title to all land as a result of having arrived onto the continent.
- U.S. Supreme Court held that Indians did not have the power to give (nor could a non-Indian receive from an Indian) title to land upon which Indians lived.
- This case served to protect federal land grants (federal land patents) which the federal government used to settle the territories.

CHEROKEE NATION V. GEORGIA (1831)

- State of Georgia attempted to apply state law over Cherokee Nation in an effort to "annihilate the Cherokees as a political society."
- Cherokee Nation filed suit as a foreign nation directly in U.S. Supreme Court.
- U.S. Supreme Court held that Cherokee Nation was not a foreign nation but a **Domestic Dependent Nation**.

WORCESTER V. GEORGIA (1832)

- Two missionaries were sentenced to 4 years hard labor by state of Georgia for residing in Cherokee Nation without a license and without taking oath to support the Georgia Constitution and laws.
- Worcester challenged the jurisdiction of Georgia Courts.
- **U.S. Supreme Court held that Indian nations were <u>distinct, independent political communities</u> in which state law has no effect.**
- President Jackson purportedly said Marshall has made his decision, now let him enforce it. No mechanism in place to enforce, South Carolina tries to leave the Union, Jackson begs Georgia to let missionaries go. Missionaries pardoned in 1883.

FEDERAL TRUST RELATIONSHIP

- The federal government owes a responsibility to the tribes.
- Initially this responsibility was described as the relationship of a "guardian to its ward."
- Now it is called the Trust Relationship.
- Pursuant to the Trust Relationship, the federal government owes a fiduciary duty to the tribes to protect their interests in the lands and resources held for their benefit.

FEDERAL TRUST RELATIONSHIP

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

Trustee = all federal branches of government

Beneficiary = Tribes and their Members

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FEDERAL TRIBAL TRUST RELATIONSHIP

BENEFICIARY

Entity entitled to receive the principal and/or income from the trust

TRIBES

SETTLOR

Entity that creates a Trust

THE FEDERAL GOVERNMENT

TRUSTEE

Creates Trust, Manages Assets, Holds Fiduciary Responsibility

THE FEDERAL GOVERNMENT

***Common law prohibits the settlor and trustee from being the same entity to protect against mismanagement of assets.**

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CIVIL JURISDICTION

1959	Williams v. Lee	Civil Adj. Test. State court lacks subject matter jurisdiction over dispute between Indian and Non-Indian arising on reservation.
1981	U.S. v. Montana	Test to determine **Civil Regulatory** jurisdiction over a non-Indian on non-Indian owned lands within reservation. Case law post-*Montana* allowed regulatory jurisdiction if only one of the prongs were met. States only need meet #4.

MONTANA TEST FOR TRIBAL CIVIL REGULATORY JURISDICTION

1. **Is there a consensual relationship between the non-Indian and the Tribe? (May include contracts or other dealings.)** OR
2. **Does the Non-Indian's activity threaten or have a direct impact upon:**
   a. Economic Security of the Tribe,
   b. Political Integrity of the Tribe, or
   c. Health, Safety or Welfare of the Tribe.

TERMINATION AND RELOCATION

- **The U.S. Government sought to move Indians off of the Reservation into the Urban Center**
- **Through P.L. 280, the U.S. Government sought to end the Federal Trust Relationship**
- **Resulted in loss of land and homelessness**

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P.L. 280 CIVIL PROVISIONS: 28 U.S.C. § 1360.

STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

P.L. 280 CIVIL PROVISIONS: 28 U.S.C. § 1360.

STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES.

State or Territory of	***Indian Country Affected***
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community
California	**All Indian country within the State**
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

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P.L. 280 CIVIL PROVISIONS: 28 U.S.C. § 1360.

STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

P.L. 280 CIVIL PROVISIONS: 28 U.S.C. § 1360.

STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

PUBLIC LAW 280: CRIMINAL PROVISIONS § 1162.

STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

PUBLIC LAW 280: CRIMINAL PROVISIONS § 1162.

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PUBLIC LAW 280: CRIMINAL PROVISIONS § 1162.

STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY:

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

CIVIL JURISDICTION

1987	Cabazon v. California	If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.

CABAZON V. CALIFORNIA (1987)

- **California sought to apply its laws governing the operation of bingo games to bingo games operated by the Cabazon and Morongo Bands of Mission Indians.**
- **Riverside County also sought to apply its ordinances regulating bingo and card games to the tribal gaming operations.**
- **U.S. Supreme Court held that although state laws may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by P.L. 280 or by the Organized Crime Control Act of 1970.**

CABAZON V. CALIFORNIA (1987)

- **The State of California attempted to apply a law from its criminal code governing gaming under the assumption that P.L. 280 would allow state criminal law to apply to Indians on reservations.**
- **The U.S. Supreme Court found that the law was not "Criminal/Prohibitory" but the statute was rather "Civil/Regulatory" in nature.**
- *If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.*

CIVIL REGULATORY V. CRIMINAL PROHIBITORY

What sort of jurisdiction may the States assert?

Intent of the Law

|

Conduct/Act

/ \

Prohibitory **Regulatory**

(gen'ly, criminal law) **(gen'ly, civil regulatory)**

/ \

State Juris if act **Tribal Juris if tribal laws**

violates state public policy **consistent w/ State Law**

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INDIAN GAMING REGULATORY ACT

IGRA was passed by Congress in 1988 as a response to the Cabazon case.

IGRA provides for establishment of or requires:

- All Indian gaming must occur on trust lands;
- National Indian Gaming Commission oversees enforcement;
- Gaming classes I, II, III and allocation of regulatory authority between tribe and state;
- Tribal Gaming Ordinances to regulate operations, use of revenues, audits, contractors, licensing of employees;
- Off-reservation environmental impact statements prior to gaming;
- Tribal-State Compacts for Class III gaming activity

WATER RIGHTS

- **1866 Act – confirmed the rights of the miners and the rights of the appropriators of water.** This resulted from Congress' efforts to withdraw mines from the public domain of the west and operate or sell them to retire the Civil War Debt. Western Senators and Representatives fought to maintain rights of the western miners and water appropriators.
- **1870 Amendment to 1866 Act** – water rights and rights of way were effective against U.S. and its grantees. Anyone that took title to public lands took such title burdened by any easements for water rights or rights of way previously acquired while under public ownership, provided it was done with government consent.

WATER RIGHTS

- **1877 Desert Land Act** – applicable specifically to AZ, CA, ID, MT, NV, NM, ND, OR, SD, UT, WA and WY and 1891 amendment added CO. This act provided that water rights on tracts of desert land should depend upon bona fide prior appropriation; that all surplus water and other non-navigable sources of water on public lands should be held free for appropriation by the public for irrigation, mining, and manufacturing, subject to existing rights.
- **California Oregon Power Co. v. Beaver Portland Cement Co. (1935),** U.S. Supreme Court held that the Desert Land Act applied to all the public domain of the states and territories named. Court also held that the Act severed the water from the public lands, leaving the unappropriated waters of non-navigable sources open to appropriation for use by the state citizens.

WATER RIGHTS

- The battle between Prior Appropriators and Federal Patentees was decided in favor of the Prior Appropriators.
- The battle between Riparian Rights and Prior Appropriation Systems required Western States to develop their own laws to manage the competing interests.
  - California Doctrine was a dual system in which appropriative rights and riparian rights continued to coexist.
- Early state water law legislation was not comprehensive and it resulted in a ladder of priorities establishing the measure and extent of each right, the place and nature of its use, the manner in which rights could be acquired and used, and the method of giving notice to the pubic of each use.
- This left the water rights of federal entities relatively ignored until 1908, Winters Case.

WATER RIGHTS

Nature and Extent of Water Rights

- Winters v. U.S.
- AZ v. CA
- U.S. v Adair

Quantification of Water Rights

- Jurisdiction: CO River Water Cons. Dist. v. U.S.
- Adjudication: Big Horn River System
- Finality of Adjudication: NV v U.S.
- Non-Judicial Quantification
- Marketing of Tribal Water

Regulation and Administration

- **U.S. v. Anderson**: Employs Montana Test, found that Tribal and Federal regulatory jurisdiction did not displace State regulatory jurisdiction with specific reference to the amount of non-Indian fee interests in land within the reservation.

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WATER RIGHTS

- **Prior to the federal case law, water rights were determined through Prior Appropriation - from the time that a person (1) diverted water from the waterway and (2) put the diverted water to beneficial use.**
- **The Winters Doctrine (1908)**
  - Sufficient water was impliedly reserved at the time that the Ft. Belknap Reservation was created, rather than when the water was initially diverted and beneficially used.
    - A finding to the contrary would have implied that the federal government negotiated and put tribal communities on reserved lands without water for domestic purposes.

WINTERS V. U.S., 1908

1874 – Creation of the (first large) Ft. Belknap Reservation

1887 – Ft. Belknap Reservation makes diversions from the Milk River

1888 – Agreement to cede land for non-Indian settlement, leaving tribes with smaller Ft. Belknap Reservation describing the northern boundary as the middle of the Milk River

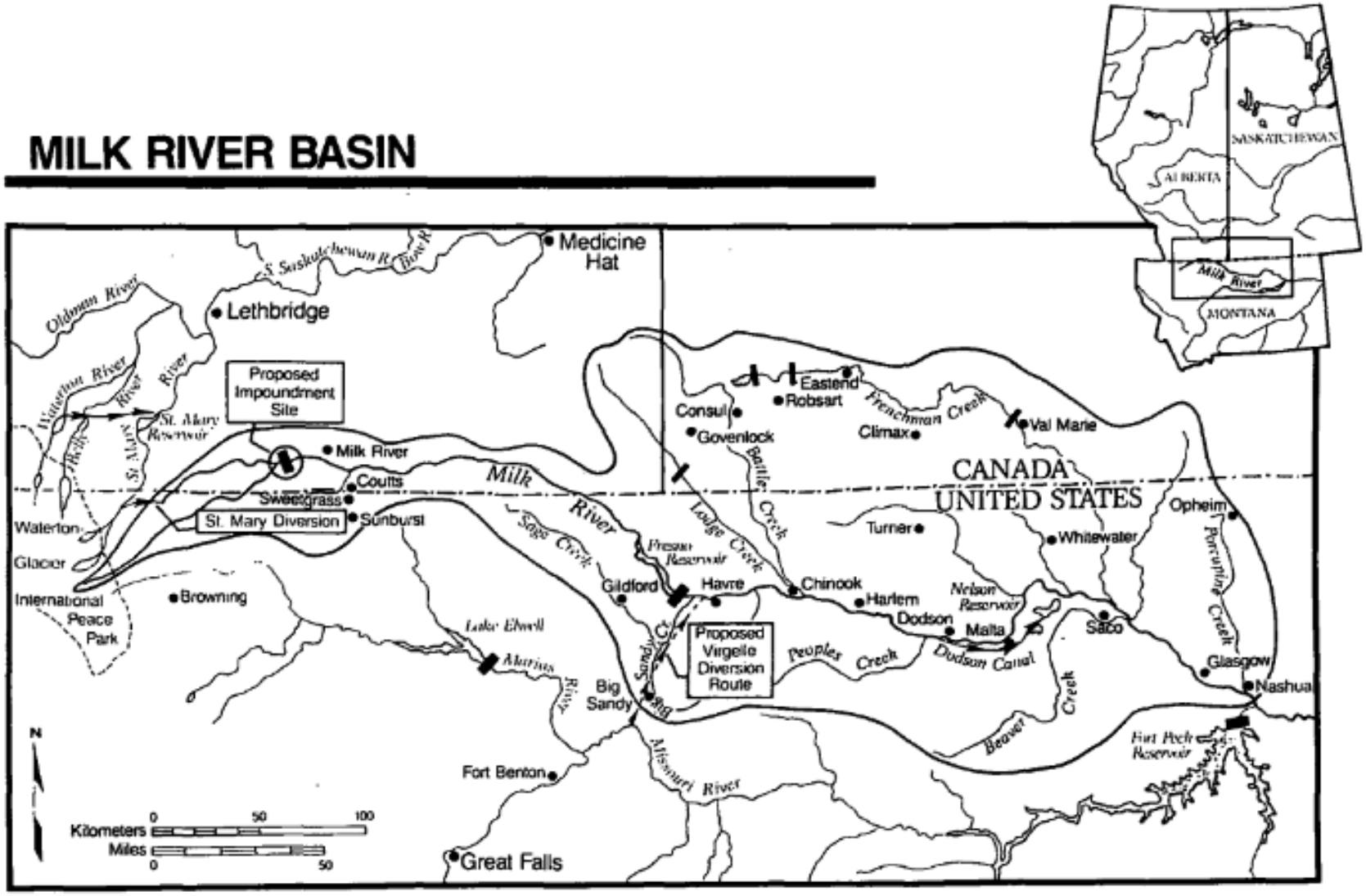
1889 – Montana Enters the Union

1895 – Settlers begin filing and posting their water claims on the Milk River (only source of water) pursuant to Montana water law

1898 – A government irrigation project on the Ft. Belknap Reservation takes 5,000 miners' inches for irrigation of reservation lands

In a drought year, upstream users diverted water that deprived the tribe of water from the Milk River. The U.S. sued on behalf of the tribe. States admitted to the Union on the Equal Footing Doctrine. Ruled that Congress implicitly reserved water for the Reservation as of 1888.

MILK RIVER BASIN



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WATER RIGHTS

Arizona v. California

- The amount of water impliedly reserved for reservations and federal parks and recreation areas determined by Practicably Irrigable Acreage (PIA).
- Primary Use v. Secondary Use

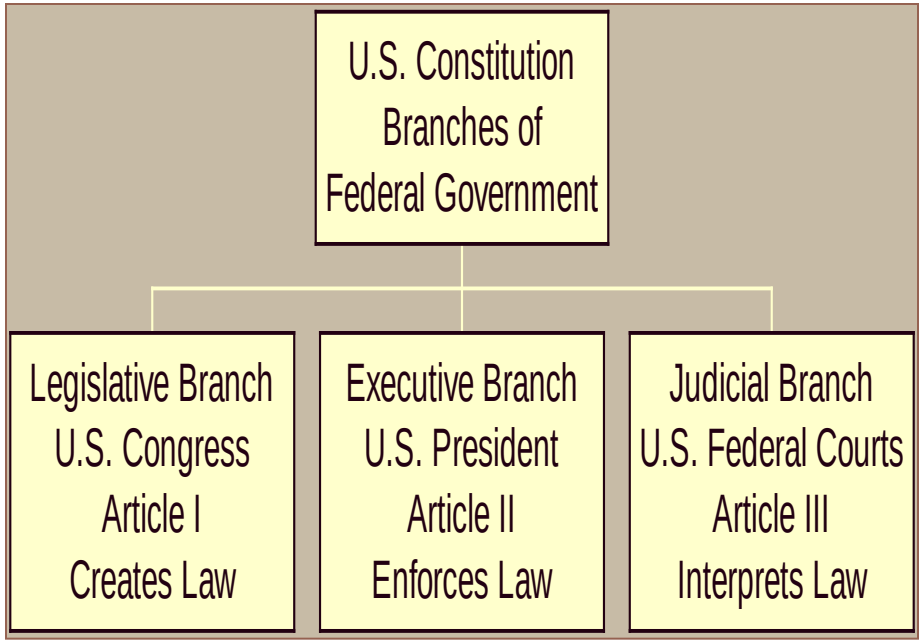
McCarran Amendment (1952, Procedure)

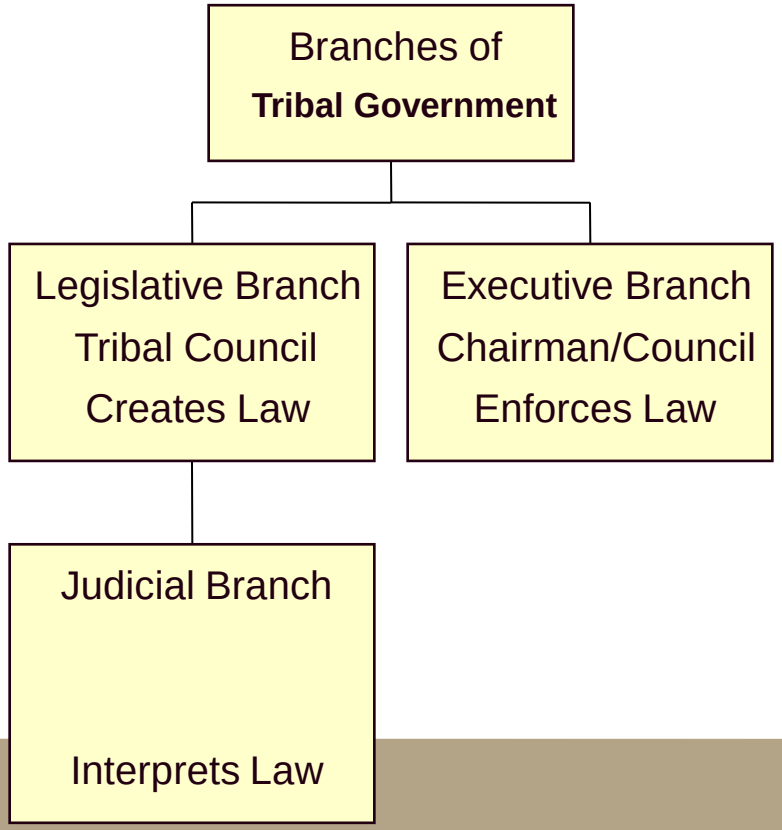
- Allows state courts jurisdiction to adjudicate Indian water rights held in Trust. Federal law applies, forum is state court.

MODERN TRIBAL GOVERNANCE

- Tribal Constitution
- Legislative Process and Record
- Code of Laws, Ordinances, Resolutions
- Consistency establishes the community standard
- Cooperation and collaboration

GOVERNMENT-TO-GOVERNMENT





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THE GOVERNMENT OF THE UNITED STATES

THE CONSTITUTION

LEGISLATIVE BRANCH

THE CONGRESS

SENATE HOUSE

ARCHITECT OF THE CAPITOL
UNITED STATES BOTANIC GARDEN
GOVERNMENT ACCOUNTABILITY OFFICE
GOVERNMENT PRINTING OFFICE
LIBRARY OF CONGRESS
CONGRESSIONAL BUDGET OFFICE

EXECUTIVE BRANCH

THE PRESIDENT
THE VICE PRESIDENT

EXECUTIVE OFFICE OF THE PRESIDENT

WHITE HOUSE OFFICE
OFFICE OF THE VICE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS
COUNCIL ON ENVIRONMENTAL QUALITY
NATIONAL SECURITY COUNCIL
OFFICE OF ADMINISTRATION
OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF NATIONAL DRUG CONTROL POLICY
OFFICE OF POLICY DEVELOPMENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

JUDICIAL BRANCH

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES COURTS OF APPEALS
UNITED STATES DISTRICT COURTS
TERRITORIAL COURTS
UNITED STATES COURT OF INTERNATIONAL TRADE
UNITED STATES COURT OF FEDERAL CLAIMS
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
UNITED STATES TAX COURT
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
FEDERAL JUDICIAL CENTER
UNITED STATES SENTENCING COMMISSION

DEPARTMENT OF AGRICULTURE | **DEPARTMENT OF COMMERCE** | **DEPARTMENT OF DEFENSE** | **DEPARTMENT OF EDUCATION** | **DEPARTMENT OF ENERGY** | **DEPARTMENT OF HEALTH AND HUMAN SERVICES** | **DEPARTMENT OF HOMELAND SECURITY** | **DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

DEPARTMENT OF THE INTERIOR | **DEPARTMENT OF JUSTICE** | **DEPARTMENT OF LABOR** | **DEPARTMENT OF STATE** | **DEPARTMENT OF TRANSPORTATION** | **DEPARTMENT OF THE TREASURY** | **DEPARTMENT OF VETERANS AFFAIRS**

INDEPENDENT ESTABLISHMENTS AND GOVERNMENT CORPORATIONS

AFRICAN DEVELOPMENT FOUNDATION
BROADCASTING BOARD OF GOVERNORS
CENTRAL INTELLIGENCE AGENCY
COMMODITY FUTURES TRADING COMMISSION
CONSUMER PRODUCT SAFETY COMMISSION
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE
DEFENSE NUCLEAR FACILITIES SAFETY BOARD
ENVIRONMENTAL PROTECTION AGENCY
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
EXPORT-IMPORT BANK OF THE UNITED STATES
FARM CREDIT ADMINISTRATION
FEDERAL COMMUNICATIONS COMMISSION
FEDERAL DEPOSIT INSURANCE CORPORATION
FEDERAL ELECTION COMMISSION
FEDERAL HOUSING FINANCE BOARD
FEDERAL LABOR RELATIONS AUTHORITY
FEDERAL MARITIME COMMISSION
FEDERAL MEDIATION AND CONCILIATION SERVICE
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
FEDERAL RESERVE SYSTEM
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
FEDERAL TRADE COMMISSION
GENERAL SERVICES ADMINISTRATION
INTER-AMERICAN FOUNDATION
MERIT SYSTEMS PROTECTION BOARD
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
NATIONAL CAPITAL PLANNING COMMISSION
NATIONAL CREDIT UNION ADMINISTRATION
NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES
NATIONAL LABOR RELATIONS BOARD
NATIONAL MEDIATION BOARD
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)
NATIONAL SCIENCE FOUNDATION
NATIONAL TRANSPORTATION SAFETY BOARD
NUCLEAR REGULATORY COMMISSION
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
OFFICE OF GOVERNMENT ETHICS
OFFICE OF PERSONNEL MANAGEMENT
OFFICE OF SPECIAL COUNSEL
OVERSEAS PRIVATE INVESTMENT CORPORATION
PEACE CORPS
PENSION BENEFIT GUARANTY CORPORATION
POSTAL REGULATORY COMMISSION
NATIONAL RAILROAD RETIREMENT BOARD
SECURITIES AND EXCHANGE COMMISSION
SELECTIVE SERVICE SYSTEM
SMALL BUSINESS ADMINISTRATION
SOCIAL SECURITY ADMINISTRATION
TENNESSEE VALLEY AUTHORITY
TRADE AND DEVELOPMENT AGENCY
UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT
UNITED STATES COMMISSION ON CIVIL RIGHTS
UNITED STATES INTERNATIONAL TRADE COMMISSION
UNITED STATES POSTAL SERVICE

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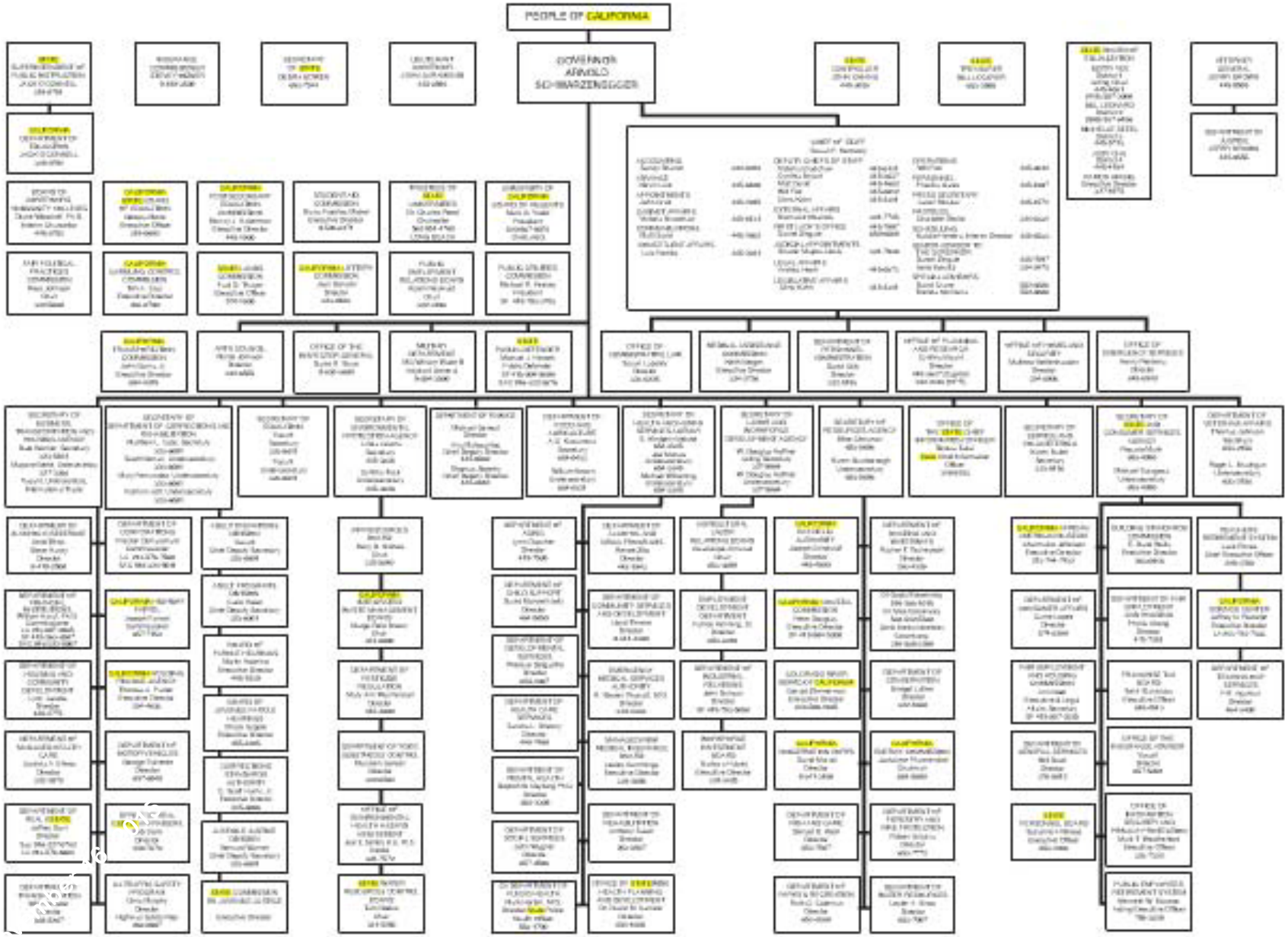
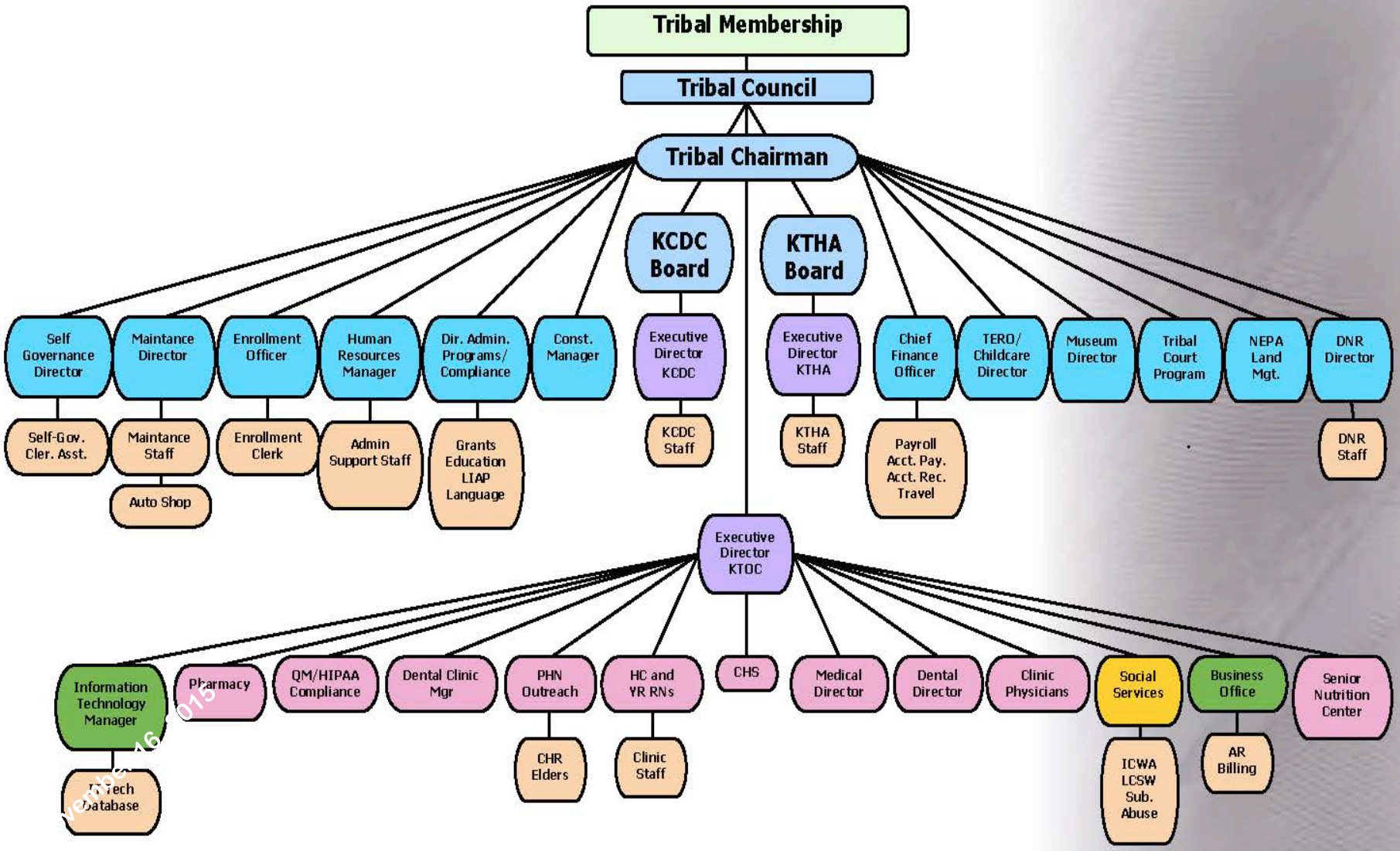
CALIFORNIA STATE GOVERNMENT • THE EXECUTIVE BRANCH



Karuk Tribe of California

Organizational Chart