

# **Civil rights in Indian country**

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Various civil rights laws protect Native Americans and Alaska Natives. Other laws apply to anyone who is present on tribal land or involved with a tribal nation in any way. This guide tells you about many of the civil rights laws that apply in Indian country.

## **1. Fast facts**

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This guide will tell you about some of the civil rights laws that apply if any of these are true:

- You're a Native American, Alaska Native, Hawaiian Native, or enrolled member of a federally recognized tribal nation
- You interact in Indian country, on a reservation, in an Indian community, or on tribal land including trust land, fee land and allotment land
- You live on or are on present on tribal land regardless of your tribal enrollment status
- You interact with a tribal nation in any way that could give you an Indian Civil Rights Act (ICRA) or other civil rights claim

## 2. Tribal sovereign immunity

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Tribal nations are their own separate nations that share physical boundaries with the nation of the United States. Relations between the U.S. government and tribal nations are centered on the “sovereignty” of the tribal nations to govern themselves. This is called **tribal sovereign immunity**. This means that tribal nations have a **permanent** right to have their own governments and make their own laws.

This is why tribal nations can have their own government bodies, courts, laws, rules, court orders, and government services like police or zoning boards. This also means that U.S. laws and protections don’t **necessarily** apply to the actions or place of a tribal nation **unless** a U.S. government actor is involved.

**Example:** The Bill of Rights from the U.S. Constitution **doesn’t protect you or apply to you** when you’re in a tribal nation and dealing with tribal police. But you **do** have those U.S. Constitutional based protections if you’re in a tribal nation and dealing with Washington State Patrol instead of tribal police.

Sovereign immunity **is also a defense** that a tribal nation can make to your complaint against them. It protects tribal governments from lawsuits. If you bring a court case against a tribe over the ICRA violations, the tribe has a sovereign immunity defense. You can only sue a tribe if it has given up (waived) its immunity or consented to being sued. If a tribe has incorporated

the ICRA (or interprets it as a waiver of consent), then you might be able to sue over an ICRA violation. Sovereign immunity might not protect an individual tribal official if they were acting outside their authority by violating your tribal constitutional or civil rights.

Even when sovereign immunity protects a tribe from lawsuits, the ICRA has some usefulness. Tribal courts often reverse convictions and grant remedies because of ICRA violations.

### 3. Jurisdiction in Indian country

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**Jurisdiction** is when a government or agency has **authority or power** to do something. There are types of jurisdiction:

Jurisdiction over a **person**.

- **Example:** Tribal courts will generally have personal jurisdiction over any person living in the Indian country area of that tribal nation or who is a member of their tribal nation. This means if you need a court order for most civil issues, your tribal court should be able to grant the kind of order you need.

Jurisdiction over a **place**.

- **Example:** Tribals nations will usually have jurisdiction over their lands, reservations, allotments, and other areas under their authority. Tribal nations have **exclusive** jurisdiction to be able to foreclose on mortgages

that are on Indian trust land (even if the mortgage lender is a private lender).

Jurisdiction over a person's **property**.

- **Example:** Tribal courts and tribal police will usually have jurisdiction over any vehicle that is within their reservation area or nation.

Jurisdiction over **a certain issue or type of case** (also called subject matter jurisdiction).

- **Example:** Since 2013, tribal nation courts have had full civil jurisdiction to issue and enforce protection orders against anyone if the issue arises anywhere within the Indian country of the tribe or anywhere otherwise within the tribe's authority.

Jurisdiction is important in Indian country because there are many types of jurisdictions that a person or their property could be subject to. Tribal governments have jurisdiction to make laws and regulations for their nations, peoples, resources, and lands. They also have jurisdiction to decide cases and issue orders in their courts for both criminal and civil cases.

Jurisdiction is important for every kind of case and every type of tribal law or court order. **It determines who gets to decide what for whom and when/where those decisions can be made.**

**Sometimes jurisdiction will be "exclusive"** to your tribe. This means that **only** that one type of government gets to decide about that type of case, issue, or person.

- **Example:** Tribal courts have exclusive jurisdiction over any child custody dependency proceeding that involves an Indian child who lives in Indian country. This means the tribal court **must** be the court that the child dependency case is heard in unless the tribal nation or tribal court decides otherwise.

**Sometimes jurisdiction will be “concurrent”** jurisdiction. Concurrent jurisdiction means that the authority over something is shared between two or more governments.

- **Example:** Tribal courts have concurrent jurisdiction over child custody dependency case proceedings that involve an Indian child who **doesn’t live** on the reservation or in the tribal nation. This means that the tribal court shares jurisdiction over the dependency case with the state court.

If a case can be heard in a tribal court, you will probably have to **exhaust your remedies** in **that** tribal court **before** you can try to challenge the tribal court’s authority in a U.S. federal court. “Exhausting your remedies” means that you must appeal your case all the way to the highest authority of that tribal court system. Most often this will be a tribal nation Supreme Court. There are a few exceptions to this.

Jurisdiction in Indian country can be **very** confusing. Try to get legal help (<https://www.nwiba.org/tribal-referral-list/>) from an Indian law experienced lawyer (<https://www.nwiba.org/>) if you need help figuring out jurisdiction for a case you want to file.

## 4. Due process in Indian Country

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**Due process** refers to the rules for what's supposed to happen any time any kind of official action is taken against you by a government actor to "deprive" you of something.

- **Examples of being deprived of something by a government:** A government agency suspends your license. A tribal police officer detains you in the tribal jail. Your tribal health center employer fires you before your employment contract term is complete.

Due process rights ensure that legal and other proceedings are carried out in a way that is fair to you and protects your basic rights. Due process rights are steps that should be taken before the final action can be formalized against you by the government. You have due process rights because of the U.S. Constitution. Tribal nations **don't** have to provide due process rights **the same way** that the U.S. federal, state, or local governments must **because** tribal nations ***have their own Constitutions.***

**You might have due process rights in your tribal nation** if your nation's Constitution includes those kinds of rights. Your tribal nation also might have their own customs and priorities for how due process happens. Some tribes use due process procedures that are similar to what you see in U.S. federal or state courts. But some tribal nations will use specific customs that may be very different than a typical court process.

**The 2 most common due process rights** are:

**The right to get notice** of the action that is being taken.

- **Example:** A permit you hold is being revoked by the tribal government. If your tribe has due process rights that include notice, you should have

received some kind of notice that your permit is going to be revoked.

**The right to defend yourself** against the action. This is also called a “chance to be heard.”

- **Example 1:** Your tribe notified you that your permit is going to be revoked by the tribal government and that there will be a hearing or meeting where you can come talk to the government about the pending revocation. That meeting **is** your chance to be heard.
- **Example 2:** You work for a casino. The employee handbook describes termination procedures, such as disciplinary warnings and a chance for a hearing before a review board. This handbook description of a right to a hearing creates a procedural due process right. The casino must follow the handbook procedures **before** it fires you. A warning **is** notice. A hearing before a review board **is** a chance to be heard. If the casino doesn’t provide these procedures, it may have violated your due process rights.

A tribe may have established due process rights in its own laws.

- **Example:** Tribal code itself can provide a right to notice and a hearing if the tribal government revokes a permit or license.

A tribe may have established due process rights derived from its traditions and customs.

- **Example:** A traditional practice of allowing tribal members a chance to tell their side of the story or participate in community restoration activities.

Tribes exercising criminal jurisdiction have criminal codes with basic due process protections for criminal defendants. Depending on the levels of sentencing for the tribal court or case, there may be additional due process protections under the ICRA.

The main kind of due process violation case you **can file in a U.S. federal court** (instead of a tribal court) is when you think a tribal nation has violated your due process rights related to your detainment or imprisonment. These are called “writ of habeas corpus” claims. This kind of “writ of habeas corpus” claim is when you ask a U.S. federal court to rule on whether your detainment by a tribal nation was lawful. You **can** file those in U.S. federal court instead of the tribal nation court, but usually you must have exhausted your tribal court remedies first.

## 5. Indian Civil Rights Act (ICRA)

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The ICRA is a federal law (<https://www.tribal-institute.org/lists/icra.htm>) that says Indian tribal governments can't pass or enforce laws that violate certain individual rights. Congress adopted the ICRA to make sure tribal governments respect basic rights of Indians and non-Indians. It **only** applies to federally recognized tribes.

The ICRA is sometimes called the “Indian Bill of Rights.” Like the U.S. Constitution's Bill of Rights, the ICRA protects certain personal freedoms from being disrupted by government actions. The ICRA also encourages tribal self-



governance and requires that most cases be brought in tribal courts when possible.

What individual rights does the ICRA protect?

The ICRA says that no Indian tribe can make or enforce laws that deny **anyone** certain rights. The ICRA says you have a right to:

- Freedom of speech, press, and assembly
- Freedom from unreasonable search and seizures
- Freedom from prosecution more than once for the same offense
- Not testify against yourself in a criminal case
- Not have private property taken for public use without just compensation
- A speedy and public trial, to be told the charges, confront witnesses, subpoena witnesses and, at your own expense, have a lawyer's help in all criminal cases
- Freedom from excessive bail, excessive fines, cruel and unusual punishment
- Freedom from punishment of imprisonment for more than one year and a fine of \$5,000 or both for the conviction of any one offense (unless special due process requirements are met to be able to use the higher sentencing standards)
- Freedom from punishment of imprisonment for more than 9 years for all offenses requiring sentences resulting from one criminal proceeding
- A trial by jury of at least 6 persons (upon request), if accused of a criminal offense punishable by imprisonment
- Equal protection of the laws and freedom from deprivation of liberty or property without due process of law

- Freedom from being punished through a bill or legislation without being giving a judicial trial (called freedom from a bill of attainder)
- Freedom from being charged for something that wasn't a crime when you did it (called freedom from ex post facto law)

How is the ICRA different from the Bill of Rights?

The ICRA's guarantee of free exercise of religion doesn't stop a tribe from establishing a religion. Many tribes don't separate religion from government and other areas of life. Tribal nations are their own nations, so they aren't affected by the same Constitutional rules as the U.S. government. This means they can mix religion and governance, and it **isn't** against the law. The ICRA provides the framework for the rights, but each tribe may interpret the practical application of the rights based on their own tribal cultural and customs.

The ICRA guarantees a criminal defendant the right to a lawyer at the defendant's own expense, **but** a tribe **doesn't** have to provide a lawyer for a defendant who can't afford one. A tribe might have to provide a lawyer for a defendant who can't afford one if the tribe wants to use the highest possible sentencing standards.

There is **no right** to a jury trial in **civil** cases under the ICRA.

## 6. Your tribe and the ICRA

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## How do I know if my tribe incorporated the ICRA?

A tribe expressly consents to the ICRA by incorporating it into their tribal code or constitution. You should check your tribe's code or constitution to be sure.

- **Example 1:** The Confederated Tribes of the Colville Reservation enacted a tribal civil rights law like ICRA in its Tribal Code at Chapter 1-5.
- **Example 2:** The Sauk-Suiattle Tribe's Constitution has language adopting the protections of the ICRA and the U.S. Constitution.

## Can my tribe incorporate some but not all of the ICRA?

Yes. Your tribe might only incorporate some of the ICRA.

- **Example 1:** Article VII of the Tulalip Tribes' Constitution is a Bill of Rights protecting women's rights, economic rights, civil liberties, and defendants' rights in criminal proceedings. It **doesn't** grant due process rights in **civil** cases.
- **Example 2:** Title 15 of the Jamestown S'Klallam Tribe's Tribal Code provides rights to defendants in criminal proceedings. It doesn't have any provisions protecting civil liberties.

## My tribe hasn't expressly incorporated the ICRA. Do I still have due process rights?

Maybe. It will depend on your tribe.

- ICRA still applies when a tribal court reviews tribal government actions.
- A tribe can still use federal law as a guide when there is no tribal law on the subject. Tribal code might call this a "choice of law" provision. This

may let you use the federal Bill of Rights to secure your due process rights.

- A tribe may provide due process rights in its tribal code, or in accordance with traditions and customs.

## 7. ICRA rights violations

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If you believe a tribal government has violated your ICRA civil rights, you can try any type of complaint available through tribal government. The ICRA says that tribal courts are **the place** to resolve almost all kinds of civil complaints that you have with a tribe.

The **only** kind of ICRA complaint a U.S. federal court has jurisdiction to hear are limited to Habeas Corpus issues. Habeas Corpus is when a tribe (or other government) has you held in a jail, prison, detention center, or otherwise detained and violated your due process rights in doing so.

If you sue in tribal court, the tribal government may raise a defense of **sovereign immunity**. This means you can't sue the government without the tribe's **consent**. You might be able to avoid this defense by naming as defendants the tribal official themselves who allegedly violated the ICRA. The tribal court can issue an order for the official to stop the unlawful conduct.

You can't get money damages from the tribe unless the tribe has consented to you suing it.

## 8. Enrollment and disenrollment rights

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Most tribes have laws and procedures for excluding (banning) people from tribal lands. Typically, you must get notice of the intended exclusion explaining:

- Why they want to exclude you
- The process for fighting the exclusion in tribal court

A person or tribal government who doesn't follow tribal code provisions or provide due process in this type of case may have violated tribal law or the ICRA.

If the tribe excludes you in a way that you believe violates your due process rights, it's unclear where you should file an ICRA claim. Some courts have held that your permanent exclusion from your Indian reservation may be "detention" within the meaning of habeas corpus. That would normally mean federal court review. But federal court may only be available if you're facing a criminal sanction.

**Example:** A tribe's exclusion code says it must give written notice of the intended exclusion and reason for it. It says you can have a

trial before a tribal judge. The code creates a procedural due process right before the tribe can exclude you from the reservation. If the tribe doesn't provide you these procedures, you may have a claim for due process violations under ICRA and/or tribal law.

Try to get legal help (<https://www.nwiba.org/tribal-referral-list/>) from an Indian law experienced lawyer (<https://www.nwiba.org/>) if you need help with an exclusion case.

## 9. Religious rights

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The American Indian Religious Freedom Act (<https://www.law.cornell.edu/uscode/text/42/1996>) (AIRFA) is a special federal law that protects certain religious freedoms for Native Americans, Native Hawaiians and Alaska Natives. The AIRFA protects your right to:

- Practice traditional ceremonies privately at home (including if you live in prison)
- Practice traditional ceremonies openly in public areas
- Access ceremonial and sacred sites
- Keep and use sacred objects
- Have freedom to worship in traditional ways including with traditional ceremonies and rites
- Free exercise of your Native American religion

- Have federal authorities work with you (and your tribe) to preserve cultural practices and sacred objects
- Have federal authorities work with you (and your tribe) to protect the safety of sacred sites including maintaining confidentiality about site locations if needed
- Use the Native American Graves Protection and Repatriation Act of 1990 (<https://www.law.cornell.edu/uscode/text/25/chapter-32>) (NAGPRA) to ask for the return (<https://www.bia.gov/service/nagpra/how-to>) of Native American remains, funerary objects, sacred objects, and objects of cultural patrimony. Lineal descendants, culturally-affiliated Indian Tribes, and Native Hawaiian organizations can use NAGPRA (<https://www.bia.gov/service/nagpra>) to ask for the return of these items to your family, tribe or organization.

Learn more about the diverse ways that different tribal nations have used these religious freedom protections (<https://www.potawatomi.org/blog/2021/08/11/2021-marks-43-years-since-the-passage-of-the-american-indian-religious-freedom-act/>).

## 10. Arts, crafts, and regalia protections

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The Indian Arts and Craft Act

(<https://www.law.cornell.edu/uscode/text/25/305e>) (IACA) protects Indian art and goods by banning the sale of **fake** Indian art or goods. Fake Indian goods are anything that's represented as Indian-made but in fact isn't Indian made. The IACA requires truthful labeling as to Indian heritage and tribal affiliation of producers of Indian arts and crafts.

The IACA could protect your art, crafts, regalia and goods if you are:

- A member of a federally or officially state recognized Indian tribe or
- Someone a federally or officially state recognized Indian tribe has certified as an Indian artisan

If an Indian person made the product, it could be protected. A piece of art, craft, or regalia made by a group of people could also be protected if everyone involved were Indians.

Protect our cultural heritage from the Association on American Indian Affairs can tell you more about how the IACA might apply to you. The Department of Interior's Indian Arts and Crafts Act brochure (<https://www.doi.gov/sites/doi.gov/files/uploads/know-the-law2011.pdf>) has helpful tips and examples.

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