

Tribal Sovereignty and Federal Indian Law

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Presentation Today: The Basics

- Tribal Sovereignty
- Tribal Sovereignty Attributes
- Federal Indian Law Principles
 - Criminal Jurisdiction
 - Civil Jurisdiction

What is Sovereignty?

- Sovereignty is inherent
- It comes from within a people or culture
- It cannot be given to one group by another
- Some say it comes from spiritual sources and others feel it comes from the people themselves

Tribal Sovereignty

- Tribal sovereignty existed before the United States existed
- Over 10+ million Indians in the area now known as the U.S.
- Operated as sovereigns
- Entered into compacts, treaties and alliances with one another

- Tribal sovereignty is the inherent power of Indian people
- It does not come from the U.S. government or the U.S. Constitution
- States were delegated their sovereign authority from the federal government
- Federal government held onto certain powers

- Tribes today are still independent sovereigns, they are not voluntary associations, states or trust territories

Attributes of Tribal Sovereignty

1. Separate Land Base
2. Self-Government
3. Viable Tribal Economy
4. Cultural Vitality

These attributes are intertwined with each other

1. Tribal Land Base

- Tribal land base is the most essential component of sovereignty
- Distinct tribal territories remain essential to fulfilling the promise of separatism

Tribal Land Base

- Indian land is irreplaceable (creation stories, landscapes)
- Intergenerational habitation of land – land dependent for resources, expectations of stable land base and maintaining homeland for present and future generations

Tribal Land Base

- Treaties contemplated established homelands
- United States has a fiduciary duty to protect lands
- Territory for exercise of governmental powers, residing populations, economic base and for the exercise of cultural vitality

INDIAN LAND: Is the land “INDIAN COUNTRY”?

A. Reservations

B. Allotments

C. Dependent Indian Community

D. Pueblo Lands

A. Reservation Lands

1. Treaty
 2. Executive Order
 3. Congressional Act
 4. DOI SOI declared land to be a reservation
- Lands held in trust are informal reservation.

B. Allotments

1. Within reservation included within definition of reservation.
2. Outside reservation held in trust by the U.S. for individual Indians. Example, Navajo allotments outside formal Navajo reservation, each one is “Indian country” under the statute.

C. Dependent Indian Community

- Term comes from *U.S. v. Sandoval* case describing Pueblo land grants. Today, communally held land is owned by Pueblo and Tribal members receive land assignments of 1 – 2 acres.
- The primary example is a parcel of land held in fee by a Pueblo, including non-Indian owned parcels within the boundaries of DIC.
- Trust land (land held by the U.S.) is clearly Indian country whether Reservation or DIC

D. Pueblo Land

- Spain and Mexico recognized the right of Pueblos to land. When U.S. acquired New Mexico, the Treaty of Guadalupe obliged it to recognize the title to land held by Pueblos. They were called “land grants” and issued to each Pueblo in fee. U.S has no land ownership interest in the property, and not held in trust.
- But, Pueblos cannot sell land grants land without federal approval.

So what land are we worried about?

- Land held in fee by a tribe or tribal member outside of reservation
- Land on which Indians reside but is held in fee by non-Indians
- Land surrounding Indian settlements, whether held by the U.S. or non-Indians.
- Navajo checkerboard land. Navajo allotments and trust land adjacent to private fee land and federal public land.

Attribute 2. Ability to Govern

- Self-government is a vital component of tribal existence
- Various forms of government with differing degrees of autonomy
- Ability to govern its own members
- Ability to govern other non-members and non-Indians who come within tribal territory

Ability to Govern

- Goal of self-determination era is to support tribal self-government
- Environmental matters, health and safety issues to protect tribal members, residents and land base

Sovereign Powers Exercised by Nations

- Power to select own form of government
- Power to make and enforce laws
- Power to define and regulate the use of its territory
- Power to determine citizenship or membership
- Power to impose and collect taxes

- Power to regulate domestic relations
- Power to regulate property
- Power to make war and peace
- Power to form alliances with foreign nations through treaties, contracts, agreements

Attribute 3. Viable Tribal Economy

- Integral to overall sovereignty and welfare of the nation
- Economies land based, capitalizing on resources on or near reservation
- Infrastructure building (institutions such as tribal courts, businesses, tribal law development, tribal courts)

Viabile Tribal Economy

- Enterprises, corporations, sole proprietors,
- Banks, stores, laundromats, restaurants, housing,
- Contributions to the economy, community events,
- Keeping the money on the reservation
- Each tribal culture influences the internal governance and economics of their land base

Attribute 4. Cultural Vitality

- Cultural, spiritual, religious dimensions of tribal life play a critical role in overall sovereignty
- Creation stories define who we are and often tied to lands, waters and surrounding ecosystems
- Inform and guide tribal laws (written and unwritten)
- Community participation and celebration of the tribal traditions

- The practice of ceremonies and traditions reaffirm who each nation is and their bond with the world, knowledge is passed from one generation to another
- Hunting, fishing and gathering practices are fundamental expressions of tribal culture
- When Indian nations lose their defining cultural characteristics, it risks losing its political autonomy as well

Federal Indian Law

A. The Issue -- Jurisdiction

B. The Players

1. Government (23 tribes, feds, NM)
2. Non-Government (tribal members, non-members, non-Indians)
3. Additional actors (tribally owned businesses, corporations, enterprises)

Fundamental concept within Indian law

- Tribes are sovereign governments.
- They possess powers of self-government that pre-existed the formation of the United States.

Tribal Sovereignty is Inherent

This means it exists separately from any delegation by the federal government. Separate from U.S. or the states.

1. Tribes are not subject to restrictions of the Bill of Rights of the U.S. Constitution.
2. However, tribes are subject to restrictions in the Indian Civil Rights Act of 1968, tribal laws or constitutions. *Santa Clara Pueblo v. Martinez* (1978).

Supreme Court

- 3. While tribes have inherent sovereignty, the Supreme Court has described tribes as “dependent, domestic nations” to describe the status of tribes in the United States. *Cherokee Nation v. Georgia* (1830)
- This theory is that tribes sought protection of the U.S. by entering into treaties with it and implicitly surrendered the full sovereignty.
- Trust relationship is a double-edged sword – Protective and plenary

Tribes Possess Sovereign Immunity

1. Applies in every court, and beyond a tribe's own territory.
2. Tribe may waive, but waiver must be clearly expressed.
3. Congress may abrogate it to allow suit by states or private parties.
4. Arbitration clause may also waive the immunity, but more likely allows suit to compel arbitration or enforce an arbitration decision.

Example 1

- Tribe A signs and performs a contract in Albuquerque, 200 miles from the Reservation. It does not waive its immunity. A dispute begins, and the other party sues the tribe for breach of contract in Bernalillo County District Court.
- Tribe is immune from suit unless it has expressly waived its immunity.

Example 2

- Officer A of San Jose Pueblo, who is employed under a 638 contract, speeds through an intersection in hot pursuit of an offender, and hits several cars. Who do drivers sue?
- United States in federal court if Officer A acted within the scope of his employment under 638 contract.

Three Sources of Tribal Authority

1. **Inherent.** We just covered this one.
2. **Treaty.** Treaties are bilateral agreements between a tribe and U.S. entered into before 1871. Navajo Nation and Apache Tribes have ratified treaties, but the Pueblos do not.
3. **Delegation.** Congress has delegated certain types of authority to tribes to regulate non-Indian conduct on tribal lands where tribes might not have authority. Clean Air Act and liquor regulations.

Restrictions on Tribal Power

1. Treaty. Some tribes have agreed to limitations on their authority through a provision in treaty.
2. Federal statute. Congress can limit the authority of tribal governments merely by passing a federal law. E.g. Indian Civil Rights Act, the Indian Gaming Regulatory Act.

Judicial Developed Restriction

- 3. Inconsistent with dependent status. *Oliphant v. Suquamish Tribe*. Created by federal common law through the Supreme Court. It means that when tribes came under the U.S. they implicitly surrendered certain powers.
- However in *United States v. Lara*, Supreme Court held that Congress may in effect overrule the Supreme Court's decision on the limitations on tribal power due to their "dependent status" and restore inherent tribal authority.

CRIMINAL JURISDICTION IN INDIAN COUNTRY

- This area addresses which government (tribe, federal, state) can arrest, search for evidence, and prosecute and punish an offender under its criminal laws.
- Distinction between Indians and non-Indians becomes very important.

In the area of criminal jurisdiction

Two critical threshold considerations:

1. The status of offender and victim (Indian or non-Indian).
2. The type of crime (victim or victimless crimes AND, for victim crimes committed by Indian offenders, major or non-major crime).

3. Within the boundaries of Indian Country, it does not matter the status of land (trust, allotment, fee, state highway or ROW).

- It includes non-Indian owned fee land within Pueblo grants, which could be a 7-Eleven in downtown Espanola or even the Taos plaza!

Double Jeopardy

4. Double Jeopardy. As a tribe is a separate sovereign from the U.S., both may prosecute the same crime without violating double jeopardy. Of course, this assumes that both have jurisdiction. Example, *United States v. Wheeler* (1978). Navajo man convicted by Tribe for aggravated assault and then prosecuted by federal government for rape.

A. Tribal Criminal Jurisdiction

1. Tribes may prosecute member of tribe for crimes committed on reservation.
2. Tribes may prosecute non-members the same as members of the tribe.
3. Tribes have exclusive jurisdiction over non-major crimes committed by Indians against Indians and victimless crimes committed by Indians (for example, traffic violations), but has concurrent jurisdiction over Major Crimes committed by Indian with the United States.

Tribal Criminal Jurisdiction

4. Tribes have no jurisdiction to prosecute non-Indians. *Oliphant v. Suquamish Tribe* (1978)

They may however, detain them until state or federal law enforcement arrives to arrest the offenders.

Tribes may also exclude them from tribal lands within Indian country.

Violence Against Women Act Exception

Under the Violence Against Women Act, tribes may assert jurisdiction over domestic violence crime, including violation of a protection order, committed by non-Indians against Indian spouses or intimate partners. VAWA took effect in 2015.

- For a tribe to have jurisdiction, the non-Indian must:
 - (1) Reside in that tribe's Indian country, or
 - (2) Must be employed in that tribe's Indian country, or
 - (3) Must be a spouse, intimate partner or dating partner of
 - a. A tribal member, or
 - b. A non-member Indian who resides within that tribe's Indian country.

Tribal Law and Order Act (TLOA)

- Under the Indian Civil Rights Act, as amended by the TLOA, tribes can only imprison a defendant for 1 year and/or may fine a defendant a maximum of \$5,000 per offense.
- A tribe may expand its sentencing authority to 3 years and a fine of a maximum of \$15,000 per offense, with a maximum combined sentence of 9 years.
- If a tribe sentences a defendant to a total sentence of over 1 year, the tribe must fulfill the following requirements:

TLOA Requirements

- a. Tribe must provide the right to effective assistance of counsel equal to the U.S. Constitution.
- b. Tribe must provide an indigent a defense attorney licensed in “any jurisdiction” in the U.S.
- c. Tribal judge must be licensed by “any jurisdiction” in the U.S. and have sufficient legal training to preside over criminal cases.
- d. Tribe’s criminal laws, rules of evidence and rules of procedure must be published, and
- e. Tribal court must record the criminal trial.

Also,

- Tribes must provide all the protections above, and a jury that is a cross-section of the community and cannot exclude non-Indians from the jury pool.
- Tribes must provide notice to a non-Indian detained under the act of the right to file habeas corpus petition under the Indian Civil Rights act. A federal court may stay the detention on the request of the non-Indian.

B. Federal Jurisdiction

1. Interracial crimes. Any crime committed by an Indian against a non-Indian and any crime committed by a non-Indian against an Indian.
2. Major crimes. Certain enumerated crimes in federal statute committed by Indian offenders. The federal government has jurisdiction over all Indians who commit such crimes, whether the victim is Indian or non-Indian. Tribe also has jurisdiction to prosecute, no double jeopardy.

Major Crimes Act

- Murder
 - Felony Sexual abuse
 - Assault with a dangerous weapon serious
 - Assault against a person under 16
 - Robbery
 - Maiming
 - Burglary
 - Felony Child Abuse or Neglect
- Kidnapping
 - Assault with intent to commit murder
 - Assault resulting in bodily injury
 - Arson
 - Manslaughter
 - Incest
 - Theft

What doesn't the fed gov't have jurisdiction over?

- 3. Feds have NO major crime jurisdiction over an Indian crime committed by an Indian against another Indian or over a non-Indian crime committed by an Indian or non-Indian.
- If the tribe prosecutes the Indian for a non-major crime against a non-Indian, the federal government loses jurisdiction over him or her under federal statute.

- 4. Indian Country crimes. There are specific federal crimes that apply only in Indian country.
- For example, it is a crime to embezzle money from an Indian gaming facility.

C. State Jurisdiction

1. States have little criminal jurisdiction over crimes in Indian Country. This is why it makes so much difference to New Mexico whether a particular parcel of land is Indian Country.
2. A state may investigate a tribal member on tribal lands for an alleged crime that occurred within state territory. State may also search a tribal member after hot pursuit if the tribe does not have a law prohibiting it.
3. The state has exclusive jurisdiction over crimes committed by a non-Indian against a non-Indian and victimless crimes committed by non-Indians.

4. Cross Deputization Agreements. The tribe, state, or local law enforcement, or federal agencies, reach agreement called a cross deputization or cross commission agreement, which allows each jurisdiction to act as the other in certain circumstances where they lack authority to arrest or cite an offender.

Civil Jurisdiction in Indian Country

- When we talk civil jurisdiction, we are talking about the power of a sovereign to regulate activity within Indian country and the power of its courts to adjudicate cases arising within Indian country.
- Employment
- Gaming
- Taxation
- Business licensing

A. Tribal Civil Jurisdiction

Ability to regulate and adjudicate within territory depends on status of individual and land.

- 1. Authority of Tribal Members.** Essentially unfettered authority except as restricted by tribe's own laws and Indian Civil Rights Act. Status of land makes no difference as long as within Indian country.
- 2. Authority Over Non-Members.** Major Issue in Indian country. Beginning in mid-80's Supreme Court began carving out a rule that severely limits authority over non-members. Applies to regulatory and adjudicatory authority of tribe.

Montana test

- Court has held that tribes have no authority over non-Indians, unless one of two tests is met. This rule comes from the case of *Montana v. United States*. The two pronged test is:
 - a. Consensual relationship. Non-member must have entered into some agreement with the tribe or a tribal member such as a lease, contract, paid taxes, fees, commercial business dealings.
 - Tenth Circuit has followed Supreme Court's suggestion that there must be a nexus between consensual agreement and the authority exerted by the tribe.

- b. If the conduct threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the tribe.
- Don't be fooled this is not a broad prong. The Supreme Court has interpreted this exception to mean those powers necessary to protect tribal self-government or to control tribal internal relations.
- Also, in dicta, the Court has suggested that the non-Indian's conduct must be catastrophic to tribal self-government.

Example

- Mining company has been extracting resources on reservation for many years under leases entered into with the tribe. Company has manufacturing plant on fee lands within the reservation where it employs several hundred employees but only a few tribal members. Tribe enacts Indian employment preference law and applies law to Company's plant. Company argues Tribe has no authority to regulate its employment practices. Can Tribe regulate?

Example

- Non-Indian enters into contract to sell office supplies to a tribal department. Does this mean that the NI consents to tort suit by a tribal member when she crashes her personal car into a tribal member's house.
- Probably not under the 10th Circuit approach. Tribal member will have to find a separate consensual relationship.

Example

- Nora, non-Indian lives on a parcel of fee land within a Pueblo grant. The Pueblo government decides to enact a tax on all vehicles garaged within its boundaries. They issue Nora an assessment. She sells burritos at the Pueblo Senior Center for the elder meal program.
- Does tribe have jurisdiction to assess the tax?

Tribal Courts

- a. Full Faith and Credit.** New Mexico courts must give full faith and credit to tribal court decisions.
- b. Comity.** Tenth Circuit believes that tribal court decisions should not be given full, faith and credit, but only comity.

Specific Rules for Specific Situations

- A. Contract or tort claim by non-Indian against a tribal member with action taking place on reservation. Tribal court NOT state court has jurisdiction. Note, if there is diversity of jurisdiction, federal court has concurrent jurisdiction, but remember exhaustion rule.
- B. Actions under the Indian Civil Rights Act, you must bring in tribal court (even if diversity), except for habeus corpus actions. If tribal members being held in tribal detention, you can bring action in federal court following a showing of exhaustion of tribal court remedies.

- c. Domestic Relations. Tribes may marry individuals and issue divorce decrees. They may divide marital property, make child custody decisions. UCCJEA and NM treats tribes as states. Tribes that have not adopted the UCCJEA don't necessarily follow the statutes rules on jurisdiction.
- Note. The NM Supreme Court recently held that fee land owned by non-Indians within Pueblo land grants is "the State" for purposes of residency requirements under the UCCJEA.

Federal Civil Jurisdiction

In most circumstances the federal government may regulate activities within Indian country. For example, the Environmental Protection Agency regulates when a tribe does not have a law in place.

There is a question whether a “generally applicable law” such as the Fair Labor Standards Act applies to Indian tribes and its business entities. *San Manuel Band v. NLRB*.

State Civil Jurisdiction

- The 1832 landmark case of *Worcester v. Georgia* held that state law shall have no force on reservation. It used to be that states had zero jurisdiction in Indian country.
- But, the Supreme Court has expanded the reach of state authority somewhat.

Infringement test

1. State may NOT exert authority over an activity in Indian country if the state's action would infringe on the rights of Indians to make their own laws and be ruled by them.
2. NM courts have created the Chino test to decide whether infringement occurs.
 - a. Whether the parties are Indian or non-Indian.
 - b. Where the cause of action arose.
 - c. The interests to be protected.

Preemption

- State may NOT exert authority over an activity in Indian country if preempted by federal law. Broader in scope than under constitutional law.
- State law will be preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at state are sufficient to justify the assertion of state authority.
- Balancing of interests of the three sovereigns.
- E.g. Mescalero Apache Tribe v. New Mexico

Specific Situations

- A. No state court jurisdiction over action by non-Indian against tribal member. Non-Indian plaintiff must file in tribal court or federal court, not state court.
- B. State court jurisdiction over action by Indian against non-Indian. An Indian plaintiff can file an action against the non-Indian in state court.
- C. Jurisdiction over action by non-Indian against non-Indian in state court.

Thank you

“Sovereignty is an expression of who we are -- the Shoshone and Bannocks of Idaho, Utah, Nevada, Wyoming. Sovereignty comes from within our people, based on our culture and traditions. We exercise sovereignty in many ways – by selecting our form of government, defining our membership, and negotiating with the United States. Each decision, we [Business Council] make or choose not to make is an exercise of our tribal sovereignty.”

Kesley Edmo, Sr., Chairman
Fort Hall Business Council