Tribal Lands & Jurisdiction: Fundamental Principles of Indian Law

Inter-Tribal Task Force
Tribal Real Estate Training
April 6-7, 2017
Rothschild, WI
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Overview

I. History of Federal Indian Law Policy
II. Key Principles
III. Tribes, the Federal Government and the States
IV. Issues of Jurisdiction
V. Tribal Law & Government
VI. Key Land Policy & Case Illustration
I. History of Federal Indian Law Policy

- Chief Justice John Marshall – 4th Justice of the U.S. Supreme Court (the “Marshall Trilogy”), 1801-1835
- Presided over 3 major cases that became the basis for federal Indian law
Johnson v. M’Intosh (1823)

- Issue: Can tribes sell their own land? Answer: No.
- Illinois and Piankeshaw Nations conveyed land to non-tribal individuals seeking court recognition of the proper sale.
- Court found that title to land held by the conquering country (U.S.)
- Tribes cannot convey land to private parties without federal consent
- Tribal sovereignty is not full sovereignty – it is diminished
Cherokee Nation v. Georgia (1831)

• Issue: Does state law apply to tribal jurisdiction?
• Answer: No. Never reached merits of case due to jurisdiction
• Distinguishes tribes as “domestic dependent nations”, not “foreign states” for jurisdictional case reasons (diversity jurisdiction)
• Indians have rights to land they occupy – only feds can change that
• Tribes are in a state of “pupilage”
• Establishes the guardian-ward nature of the federal-tribal relationship
• Protects tribes from states
Worcester v. George (1832)

- Issue: Can the state of GA impose criminal penalties to those on Cherokee territory? Answer: No.
- State laws do not apply to tribal territory
- Upholds terms of federal treaty with tribe
- Requires consent of tribe to subjected to state law
- State has no authority to tax on tribal jurisdiction
History of Federal Indian Law Policy

Pre-Constitution (1492-1789)

Formative Years (1789-1871)

Allotment and Assimilation (1871-1928)

Indian Reorganization (1928-1942)

Termination (1943-1961)

Self-Determination & Self-Governance (1961-present)
II. Key Principles

- What is “Indian Country?”
- What is an “Indian Tribe?”
- What is Tribal Sovereignty?
- Canons of Construction
- Federalism & Anti-Federalism
Indian Country

- All lands within the limits of any Indian reservation, including rights-of-way running through the reservation
- All dependent Indian communities within the U.S.
- All Indian allotments
Indian Tribe

- The U.S. Supreme Court has classified Indian tribes as:
  - “domestic dependent nations”
  - “distinct, independent political communities”
- There are 567 federally recognized Indian tribes in the U.S.
Tribal Sovereignty

- Main source of federal power: U.S. Const. authorizes Congress the power to regulate commerce with the Indian tribes: “the Indian Commerce Clause” (art. I, § 8)
- Congress has the intrinsic power to deal with domestic tribal affairs
- Executive power over the Indian tribes involves the ability to enter into treaties (Congress ended this authority in 1871)
- Courts interpret the actions of the President and Congress; strike a balance between the rights of tribes against competing interests
Tribal Sovereignty

- Inherent powers of self-government, by reason of their original tribal sovereignty, not by virtue of any delegation of powers.
  - Membership
  - Form of tribal government
  - Govern members and territories
  - Administer justice
  - Power to exclude

“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” U.S. v. Wheeler, 435 U.S. 313, 323 (1978).
Tribal Sovereignty

A tribe retains its sovereignty until Congress acts to divest that sovereignty.

- Limitations may arise through treaties and statutes – clear and unambiguous

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<th>Limitations on conveyances of tribal property</th>
<th>General Allotment Act</th>
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**Tribal Sovereignty**

- The U.S. Supreme Court’s theory of “implicit divestiture”
  - Those tribal powers in conflict with the United States’ overriding territorial sovereignty
    - No criminal jurisdiction over non-Indians
    - Limitations on inherent civil authority over nonmembers
  - Authority inconsistent with the Tribe’s dependent status

Federalism & Anti-Federalism

Federalism:
- application of federal law

Anti-Federalism:
- application of state/local law

The Supremacy Clause
- Federal statutes are the supreme law of the land (Art. 6, Cl. 2)
III. Tribes, Federal Government & States

- How do tribes interact with the federal government?
- How do tribes interact with state governments?
Treaties

- Between federal government and Indian tribes
  - Treaty Clause, U.S. Const. art. II, § 2, cl. 2
    - Executive authority with Senate consent
  - Commerce Clause, U.S. Const. art. I, § 8, cl. 3
    - “regulate Commerce with…the Indian Tribes.”
  - Not a grant to tribes, but a cession and reservation by the tribes
  - Congressional responsibility to carry out
  - Abrogation
Federal Trust Responsibility

- Federal government’s unique relationship with Indian tribes
  - Evolved from treaties, statutes, and courts
  - Reaffirmed through legislation, invoked through administrative action, court decisions

- Scope

- Enforcement
  - Breach of trust claims
  - Administrative Procedures Act
State Authority

- General Rule: No State Authority in Indian Country
  - Congressional plenary authority
  - Federal preemption
  - Infringement
    - right of Indians to make their own laws and be ruled by them – *Williams v. Lee*
  - State’s interest
    - Minimal burden – *Moe v. CSKT, Colville*
State Authority

- Congressional grant of authority
  - Public Law 280 (1953)
    - Most crimes and some civil matters
    - Wisconsin (except Menominee)
  - Gaming Regulation
  - Liquor laws
IV. Issues of Jurisdiction

- Criminal Jurisdiction
- Civil Jurisdiction
- Wisconsin is Unique – PL 280
  - Public Law 280 (1953)’s “mandatory” five states includes California, Minnesota, Nebraska, Oregon, and Wisconsin; and then Alaska upon statehood
  - Transfers federal authority to state authority
  - No retrocession of jurisdiction in P.L. 280
Criminal Jurisdiction

- Tribes possess criminal jurisdiction over members and other non-member Indians
- Tribes do not possess criminal jurisdiction over non-Indians
- Wisconsin is unique – PL 280 (except Menominee)
- Federal jurisdiction
  - Major Crimes
  - 2013 reauthorization of the Violence Against Women Act: recognizing tribes’ inherent sovereign right to protect Native women from domestic violence
- Cooperative law enforcement
Civil Jurisdiction

Tribal authority has been limited by courts

- **Identity:** tribal citizens and non-citizens
- **Location:** land status
Civil Jurisdiction

U.S. Supreme Court:

• “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes.” *Montana v. U.S.*, 450 U.S. 544, 563-65 (1981).

• The regulation of hunting and fishing by nonmembers on non-Indian fee lands within reservation boundaries bore “no clear relationship to tribal self-government or internal relations” and hence was not part of the Crow Tribe’s inherent sovereign authority.
Civil Jurisdiction

Two exceptions to the Montana rule exist, which establish Indian tribes retain inherent sovereign power of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands:

- Consensual relations with tribe or its members
- Actions that threaten or have direct effects on political integrity, economic security, or health or welfare
Civil Jurisdiction

Wisconsin is unique – PL 280

Adjudicatory authority

Except Menominee

Regulatory authority

PL 280 does not transfer this authority to the State
V. Tribal Law & Government

- Traditional
- Modern
- Sovereign Immunity
- Resource management
Tribal Law & Government

Traditional forms of government

• Significant variation throughout the U.S.
• Highly structured vs. decentralized
• Wisconsin examples

Modern forms of government

• Indian Reorganization Act (1934)
• Constitutions
• Corporate charters
Tribal Law & Government

**Tribal Councils**
- Wisconsin examples
- Broad authority

**Tribal Courts**
- Criminal, Children, Probate, Civil, Drug
- Traditional dispute resolution
Tribal Law & Government

Tribal Executives

- President, Governor, Chairman, Chief
- Separation of Powers
- Tribal Departments

Tribal Law

- Customary/traditional law
- Codified law
- Common law
- Administrative law
Sovereign Immunity

- Immunity from suit or process
- UNLESS –
  - Congressional abrogation unequivocally expressed
  - Explicit and express tribal waiver
- Scope
  - Off-reservation activities
  - Governmental and commercial activities
VI. Key Land Policies and Cases

- Land & Land Status
- Key Policies
- Cases
Land and Land Status

- Trust land
  - Tribe or individual Indian

- Fee land
  - Tribe or individual Indian
  - Non-Indian

- Fee to Trust
  - Indian Reorganization Act
    - Protecting and increasing Indian trust land base
    - Section 5 (25 U.S.C. § 465)
Land and Land Status

Social, Cultural, Religious importance

Economic importance
- Resources
- Economic development

Federal Trust
- Trustee and beneficiary
- Ownership in common
- Trust land v. Fee land

Statutory restraints on alienation
Key Land Policies – U.S./Tribes

- Treaties
  - Peace
  - Reservations and land cessions
- Nonintercourse Act 1834 - Limitations on conveyances of tribal property (highly litigated)
- Dawes Act 1887 - General Allotment Act (termination policy)
- Public Law 280 (1953) (diminishing of jurisdiction)
Key Land Policies

- Various Land Claims Settlement Act (ongoing)
- 25 U.S.C.
  - Various regulations
  - Ex., Indian Land Consolidation Act (1983)
Case Illustration


Holding that tribally-owned fee lands, even if within the tribe’s reservation boundaries, is subject to eminent domain, unless it is taken into trust by the United States.
Questions?

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