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# INTRODUCTION TO FEDERAL INDIAN LAW

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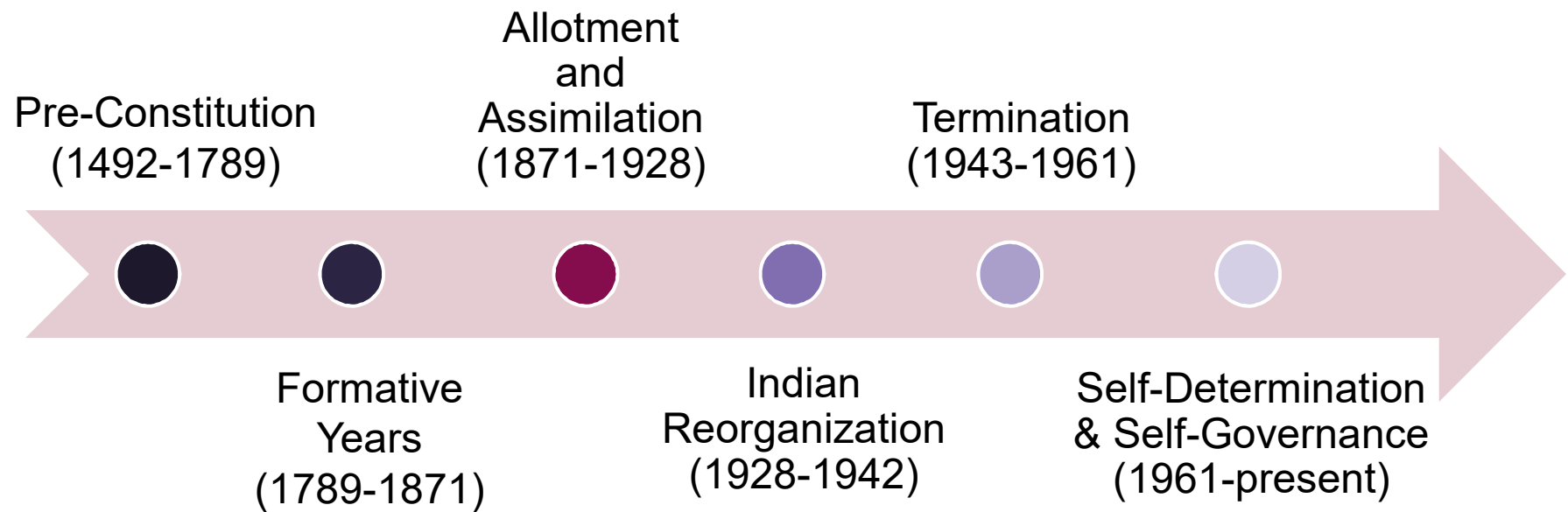


# Overview

- I. History of Federal Indian Law Policy
  - II. Key Principles
  - III. Tribes, the Federal Government and the States
  - IV. Issues of Jurisdiction: Treaties & Federal Trust Responsibility
  - V. Tribal Law & Government
  - VI. Land & Land Status
  - VII. Legal Challenges to Tribal Land Use & Preservation
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- I. Pre-Constitution (1492-1789)
  - II. Formative Years (1789-1871)
  - III. Allotment and Assimilation (1871-1928)
  - IV. Indian Reorganization (1928-1942)
  - V. Termination (1943-1961)
  - VI. Self-Determination & Self-Governance (1961-present)
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# History of Federal Indian Law Policy



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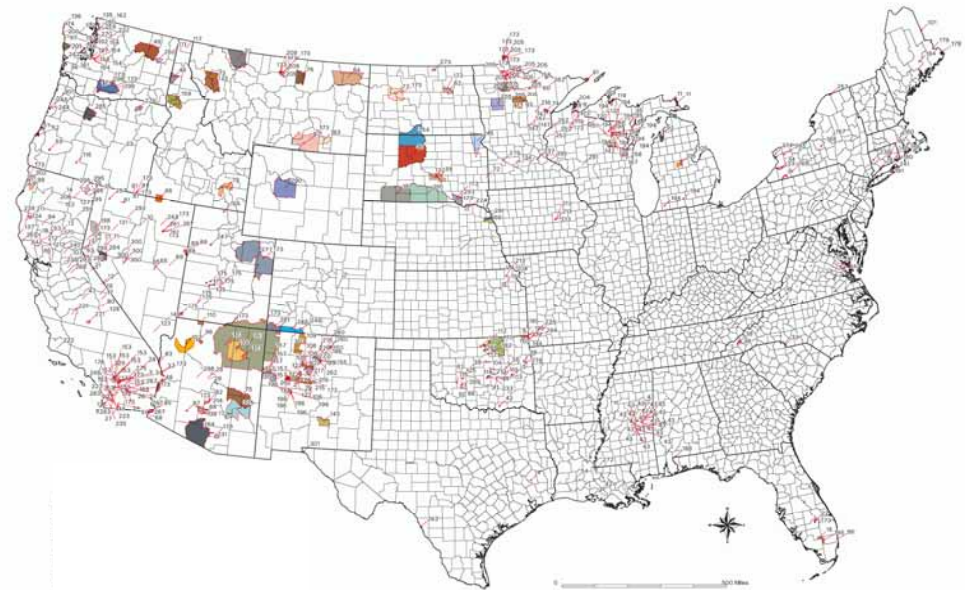


## Key Principles

- ▶ What is “Indian Country?”
  - ▶ What is an “Indian Tribe?”
  - ▶ What is Tribal Sovereignty?
  - ▶ Canons of Construction
  - ▶ Federalism & Anti-Federalism
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# Overview of Indian Land = 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



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## Indian Tribe

- ▶ The U.S. Supreme Court has classified Indian tribes as:
  - ▶ “domestic dependent nations”
  - ▶ “distinct, independent political communities”
  - ▶ There are 573 federally recognized Indian tribes in the U.S.
  - ▶ There are 11 federally recognized tribes in Wisconsin.  
Note that the Fond du Lac Band of Lake Superior Chippewa (Minnesota) owns trust land and possesses treaty rights within Wisconsin.
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# 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).
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# Tribal Sovereignty

- ▶ A tribe retains its sovereignty until Congress acts to divest that sovereignty.
  - ▶ Limitations may arise through treaties and statutes – clear and unambiguous
  - ▶ Limitations on conveyances of tribal property
    - ▶ General Allotment Act
    - ▶ Major Crimes Act
    - ▶ Indian Civil Rights Act
    - ▶ PL 280 (includes Wisconsin)
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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
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# Canons of Construction

- ▶ Interpretation of federal Indian law (observing trust responsibility)
  - ▶ “[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law.” *Montana v. Blackfoot Tribe*, 471 U.S. 371, 413 (1980).
  - ▶ The Rule: Treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians (see, e.g., *Choctaw Nation v. U.S.*, 318 U.S. 423 (1943) and all ambiguities are to be resolved in favor of the Indians (see, e.g. *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 174 (1973)).
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## Federalism & Anti-Federalism

- ▶ Federalism: application of federal law
  - ▶ Anti-Federalism: application of state/local law
  - ▶ The Supremacy Clause
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# 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
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# 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
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## State Authority in Indian country

- ▶ 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
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## State Authority in Indian country

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

- ▶ Criminal Jurisdiction
  - ▶ Civil Jurisdiction
  - ▶ Wisconsin is Unique – PL 280
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## Issues of Jurisdiction

- ▶ Tribes possess criminal jurisdiction over members and other non-member Indians
  - ▶ Tribes do not possess criminal jurisdiction over non-Indians (except Violence Against Women Act tribes)
  - ▶ Wisconsin is unique – PL 280 (except Menominee)
  - ▶ Federal jurisdiction
  - ▶ Major Crimes
  - ▶ Cooperative law enforcement
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## Civil Jurisdiction

- ▶ Tribal authority has been limited by courts
    - ▶ Identity: tribal citizens and non-citizens
    - ▶ Location: land status
  - ▶ 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.
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## 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:
    1. Consensual relations with tribe or its members
    2. Actions that threaten or have direct effects on political integrity, economic security, or health or welfare
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## Tribal Law & Government

- ▶ How do tribes interact with the federal government?
  - ▶ How do tribes interact with state governments?
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# 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
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# 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
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# Sovereign Immunity

- ▶ Immunity from suit or process
  - ▶ UNLESS –
    - ▶ Congressional abrogation unequivocally expressed
    - ▶ Tribal waiver, clearly done
  - ▶ Scope
    - ▶ Off-reservation activities
    - ▶ Governmental and commercial activities
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# 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
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# 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)



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## Legal Challenges to Tribal Land Use

- ▶ Non-Intercourse Act. Prohibits sale, tax or encumbrance of tribal trust land.
  - ▶ Undermined effectiveness of traditional real estate mortgage.
  - ▶ *"The Agent who will be appointed by the United States will be your friend and protector. He will not be suffered to defraud you, or to assist in defrauding you of your lands, or of any other thing, as all his proceedings must be reported in writing, so as to be submitted to the President of the United States."* George Washington to the Seneca Nation, 1791.
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# Legal Challenges to Tribal Land Use

- ▶ Indian Long-Term Leasing Act of 1955
    - ▶ Allowed tribes to lease trust lands to tribal entity, tribal members, or nontribal party with BIA approval.
    - ▶ Allowed leasehold interests to be assigned, encumbered and used for collateral.
    - ▶ Permits leasehold mortgages.
    - ▶ BIA approval process lengthy and complex.
    - ▶ 99 year terms (with exceptions).
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## Take Aways

- ▶ Tribes have a special political government-to-government relationship with the federal government
  - ▶ The federal government "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942)
  - ▶ Tribes exercise sovereignty pursuant to statutory affirmations, restrictions and court precedent within their jurisdictions
  - ▶ States generally have no jurisdiction in tribal jurisdictions
  - ▶ Federal Indian law sets for special restrictions and rights to tribes
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# Questions?

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