

CSAC Institute Course on County- Tribal Relations

Professor Katherine Florey
University of California, Davis
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Brief overview of tribal sovereignty

- Trade and Intercourse Era: 1785-1817
 - Government-to-government interaction, treaties, the “disappearing Indian”
 - Tribes functioned mostly as autonomous, self-governing sovereigns.
- Removal Era: 1817-1848
 - State-tribal friction, culminating in the Cherokee cases
 - “Domestic dependent nations”
 - First discussion of “trust” relationship between the U.S. and tribes
 - *Worcester v. Georgia*: State law has no force in Indian country
 - Trail(s) of Tears

De Tocqueville on 1831 Choctaw Removal

- “The conduct of the Americans of the United States toward the aborigines is characterized ... by a singular attachment to the formalities of law. ... The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame ... but the Americans ... have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.”

Tribal sovereignty, cont.

- Reservation Period: 1848-1886
 - Nationally, movement of tribes to reservations, growing federal power over tribes
 - 1871: Congress slipped a measure ending treaty-making into appropriations bill, likely because House wanted more say in Indian policy.
 - U.S. v. Kagama: Congress has plenary power over matters involving tribes.
 - California: Mass killings and no land
 - Pressured by California representatives, Senate refused to ratify treaties negotiated with California tribes to provide reservations.
 - California tribes generally landless until early 20th century, when public outcry caused Congress to set aside small amounts of land for many tribes (origin of Rancheria system).
 - Local governments paid bounties for Indian scalps from 25 cents to \$5; money also allocated from California legislature for killings of Native people.
 - Native population of California reduced around 90 percent.
 - These atrocities are generally considered to meet the definition of genocide.

Tribal sovereignty, cont.

- Allotment and assimilation, 1887-1928
 - Reservations broken up and converted to private land
 - Public pressure resulted in much of the best reservation land being “opened” to white settlers.
 - Tribe members allotted plots of land supposed to be held in trust for them for 25 years; in reality, system became corrupt and trust restrictions frequently removed so destitute Indians could sell land to eager settlers.
 - Created “checkerboard” pattern in which pockets of private land, some owned by non-Indians, exist within reservation boundaries, complicating jurisdiction.
 - Many Native children, especially in California, sent against their will to coercive boarding schools to promote assimilation.
- Indian New Deal
 - Meriam Report: Harshly critical of U.S. policy toward Indians
 - Felix Cohen: First systematic Indian law scholar; worked for Justice Department until fired for being too pro-tribe
 - Indian Reorganization Act of 1934: designed to restore some tribal autonomy, though criticized for top-down administration

Tribal sovereignty, cont.

- Termination Era: 1947-1961
 - Attempt to end “special status” of tribes and Native people
 - Some tribes had recognition and political existence terminated by Congress.
 - Rancheria Act of 1958 attempted to terminate 41 California Rancherias; majority, though not all, have had recognition later restored, some through a major legal case.
 - Public Law 280
 - Allowed states, among them California, to opt in to increased jurisdiction over tribes
 - Tribal consent initially not required, though today would be required for any additional states that wished to opt in
 - Court decisions limited in scope to criminal “prohibitory” law; state cannot enforce civil law or criminal penalties for minor infractions that don’t reflect strong public policy.
 - Generally considered to be disastrous – unfunded mandate for states that also removed federal funding for tribal crime control efforts, so reservation crime difficult to control in P.L. 280 states
 - Mostly very harmful to tribal financial stability and cohesiveness

Tribal sovereignty, cont.

- Self-determination era, 1961-present
 - Recognition of failures of termination and need for tribal self-governance with federal assistance
 - Nixon address to Congress 1970
 - Tribal self-determination legislation: NAGPRA, ICWA, IGRA (sort of), many others
 - Remarkably consistent bipartisan policy, BUT
 - Supreme Court has moved in opposite direction, restricting tribal rights and jurisdiction: “common law for a new age of colonialism” (Frickey)

Basics of tribal governments today

- Tribes aren't subject to the Constitution; they are subject to a statutory version of it (the Indian Civil Rights Act), but it is difficult to enforce outside of tribal court.
- Many tribes are working hard to provide "good Native governance," including strong institutions like courts, but are hindered by lack of funding.
- Tribes and tribe-owned businesses have sovereign immunity from suit, although it can be waived by tribe or abrogated by Congress.
- Tribes may assert regulatory authority over their members and tribe members can be sued in tribal court (in fact, they **MUST** be sued in tribal court if case arose in Indian country and plaintiff is non-Indian).

Basics of tribal governments today

- However, tribes lack civil regulatory and adjudicatory jurisdiction over nonmembers unless (in Ninth Circuit) conduct in question occurs on tribal land within Indian country OR (throughout U.S.) one of two narrow exceptions from *Montana v. United States*, 450 U.S. 544 (1981), is met.
 - For exceptions to apply, nonmember must be in “consensual relationship” with tribe or conduct at issue must pose grave threat to tribal health and welfare.
 - *Dollar General* case just decided 4-4 by Supreme Court last month.
 - Results in affirmance of Fifth Circuit ruling sustaining tribal court jurisdiction over nonmember corporation under *Montana*.
 - Victory for tribes, but provides little clarity on law.
- Tribes generally have no criminal jurisdiction over non-Indians.

State jurisdiction in Indian country

- Historically, state law had no force in Indian country, but much erosion of this status quo.
- All states have jurisdiction over crimes against non-Indians by non-Indians in Indian country.
- As a P.L. 280 state, California can enforce its criminal law in Indian country
 - But California cannot enforce merely “regulatory” laws, even if they are found in the Criminal Code; California must have consistent public policy of prohibiting activity in question.
- States have some ability to tax activity by nonmembers in Indian country.
 - Complicated balancing/preemption test that focuses on whether value was added to product on reservation (if yes, less likely to be taxable) and whether tax is directly related to services provided by the state, such as maintenance of local roads used by nonmembers.

State jurisdiction in Indian country

- States cannot tax tribe members' income earned within Indian country.
- Following the passage of the Indian Gaming Regulatory Act, games like bingo are co-regulated by the tribe and U.S., whereas casino-style games occur according to the terms of compacts negotiated between states and tribes.
 - IGRA limits terms that can be put into compacts to gaming-related matters, but this has been interpreted broadly; in practice, compacts often require tribes to meet additional state-imposed requirements.
 - For example, California insisted tribes extend some labor protections to casino workers, although tribes determined on their own what those protections would be.
- Note that the conduct of tribe members outside of Indian country is subject to general state law; such conduct may also be subject to tribal law on core tribal matters, such as domestic relations.

Challenges

- Many gray areas where neither state nor tribe has clear jurisdiction
 - Example: Nonmember living on his or her privately owned land within a reservation refuses to restrain a vicious dog
 - Relevant state laws are probably not sufficiently prohibitory to be enforceable under P.L. 280
 - Tribal law can't be enforced because no consensual relationship or serious threat to tribe's existence under *Montana*
 - Possible solutions:
 - Have the tribe send a letter; not everyone is an expert in Indian law and many people will do what the local government asks of them
 - In cases where either tribe or state may have authority but it is unclear which, cross-deputization or other jurisdiction-sharing agreements may be possible
- Nonmembers may not always understand the nature of tribal sovereignty and their expectations may not align with reality.
 - For example, a nonmember injured in a slip-and-fall accident in a casino generally must sue in tribal court rather than state court.

Federal recognition of tribes

- Federal recognition provides tribes with enormous benefits: federal programs, greater degree of sovereignty, etc.
- Most tribes acquired federal recognition through informal lists maintained by Bureau of Indian Affairs.
- In 1970s, move to create formal process for tribes arbitrarily excluded from lists.
 - Recognition process requires tribe to provide historical evidence of tribal identity, political cohesion, common ancestry, and more.
 - This can be difficult because of:
 - Absence of historical records
 - Deliberate attempts by U.S. government to break up tribes and promote assimilation
 - Inter-marriage
 - Costs of research
 - BIA backlog/delays
 - Opposition from casino opponents and current gaming tribes
 - Regulations streamlined in June 2015 to reduce need for historical evidence, but recognition still an arduous process.

Indian country vs. trust land vs. “Indian lands”

- Indian country
 - Tribes have greater regulatory/adjudicatory power within Indian country
 - Statutorily defined as:
 - All land within reservation limits, including fee lands and rights of way
 - All “dependent Indian communities within the borders of the United States”
 - Indian allotments for which Indian title has never been extinguished
- Trust land
 - Land held in trust for tribe or its members by U.S.
 - Tribal powers at their height with respect to trust land within Indian country

Indian country vs. trust land vs. “Indian lands”

- “Indian lands”
 - Term used in Indian Gaming Regulatory Act to define where gaming is allowed
 - Defined as:
 - Land within reservation borders
 - Land held in trust or subject to restriction against alienation (and over which tribe has “governmental power”)
 - No gaming in general on land put in trust after 1988, but exceptions:
 - Land within or contiguous to reservation
 - Land part of land claim settlement
 - Land part of newly recognized tribe’s initial reservation
 - Tribal land where terminated tribe restored to federal recognition
 - Other land at Secretary of Interior’s discretion (after consultation with state/local officials and tribe) and with governor’s approval

Taking land into trust

- The 1934 Indian Reorganization Act authorizes the Secretary of Interior to acquire new trust land on behalf of tribes.
- Process begins with tribe purchasing land and then petitioning BIA for trust status.
- Regulations permit taking land into trust when:
 - Within borders of existing reservation
 - When tribe already owns an interest in the land
 - Where Secretary of Interior determines it is needed for tribal self-determination, economic development, housing
- Controversial *Carcieri v. Salazar* decision (2009) held that federal government could not take land into trust for tribes recognized after 1934.
- *Match-E-Be-Nash-She-Wish Band v. Patchak* (2012) permits challenges to land already taken into trust when *Carcieri* was decided.
 - However, statute of limitations under Administrative Procedure Act requires that such challenges be made within six years after land taken into trust.

General takeaways

- Importance to tribes of sovereignty and autonomy in the face of historical assaults
- Clear expectations and knowledge of the law are helpful
- Much evidence that greater communication and interchange between state/local governments and tribes helps improve relationships
- Many legal gray areas