

Tribal Sovereignty and Environmental Protection

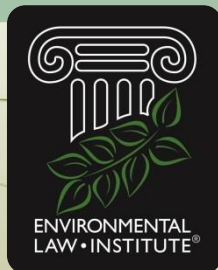
Environmental Law Institute

Center for State, Tribal & Local Environmental Programs

Cynthia R. Harris

Director, Tribal Programs

April 24, 2019



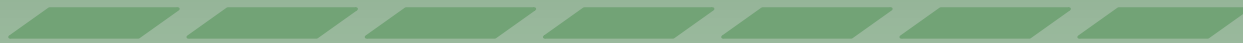
ENVIRONMENTAL
LAW • INSTITUTE



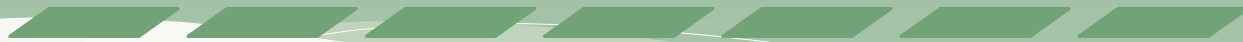
Tribal Sovereignty & and Environmental Protection

Overview...

Background



Principles of federal Indian law



Emerging issues



Tribal Sovereignty & and Environmental Protection

BACKGROUND





Tribal Sovereignty & and Environmental Protection

Background: Statistics

6.6 million American Indians and Alaska Natives (2% U.S. population)

- * 22% live on reservations, trust lands or in Native Villages (as of 2012)

573 federally recognized tribes

- * 326 reservations
- * 229 Alaska Native villages

Tribal lands

- * 56.2 million acres (3% U.S. lands) in lower 48 contiguous U.S.
- * 44 million acres of Alaska (about 42%) held by Alaska Native corporations
- * Often remote locations
- * Exceptions—i.e. Navajo Reservation (Arizona, Utah and New Mexico) is home to close to 175,000 residents

Most disadvantaged and heavily-regulated group



Tribal Sovereignty & and Environmental Protection

Background: History

Six major periods

- * Post-Contact and Pre-Constitutional Development (1492-1789)
- * The Formative Years (1789-1871)
- * Allotment and Attempted Assimilation (1871-1928)
- * Reorganization (1928-1942)
- * Termination and Relocation (1942-1961)
- * Self-Determination and Self-Governance (1961-Present)

Tribal Sovereignty & and Environmental Protection

Principles of Federal Indian Law...

Federal Indian Law vs. Tribal Law

Indian Country

Indian/Aboriginal Title

Sovereignty

Treaties

Canons of Construction

Trust Responsibility

Consultation

Jurisdiction

Self-Governance

Co-management



Benjamin West



Obama White House Archives





Tribal Sovereignty & and Environmental Protection

Principles: Federal Indian Law vs. Tribal Law

Federal Indian law

- * The relationship between Indians and Indian tribal governments and the federal government
- * Title 25 of the United States Code

Tribal law

- * The domestic law of each particular tribe
- * Tribal Law Gateway
 - * <http://www.narf.org/nill/triballaw/>
- * Tribal Court Clearinghouse
 - * http://www.tribal-institute.org/lists/tribal_law.htm

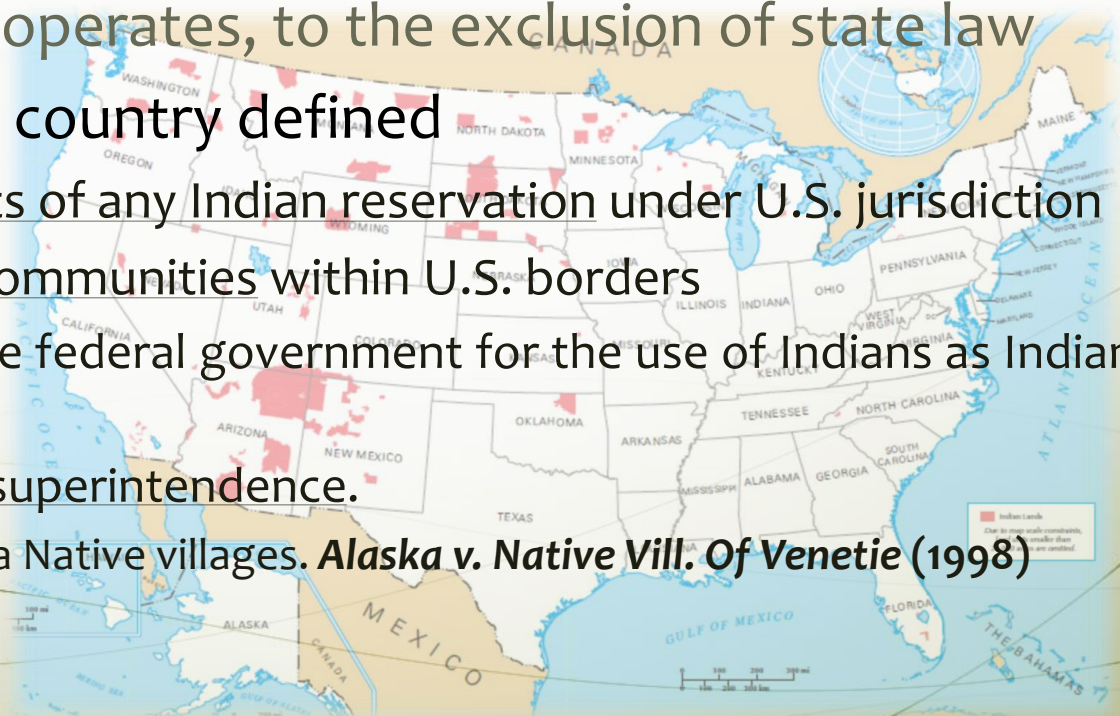
Tribal Sovereignty & Environmental Protection

Fundamentals: Indian Country

“Indian country”

- * Jurisdictional term describing the territory in which tribal and federal law generally operates, to the exclusion of state law
- * **18 U.S.C. § 1151. Indian country defined**
 - * All land within the limits of any Indian reservation under U.S. jurisdiction
 - * All dependent Indian communities within U.S. borders
 - (1) Land set aside by the federal government for the use of Indians as Indian land
 - (2) Land under federal superintendence.

Does not include Alaska Native villages. *Alaska v. Native Vill. Of Venetie (1998)*
 - * Indian allotments





Tribal Sovereignty & Environmental Protection

Fundamentals: Indian/Aboriginal Title

“Conquest gives a title which the Courts of the conqueror cannot deny”

Johnson v. McIntosh (1823) (C.J. Marshall)

- * U.S. government owns full, record title to the property, with the Indian tribe or individual as beneficiary
 - * Tribes have usufructuary right to *occupy and use*
 - * Extinguished only by an affirmative act of Congress
 - * Valid against all parties but the U.S.



Tribal Sovereignty & Environmental Protection

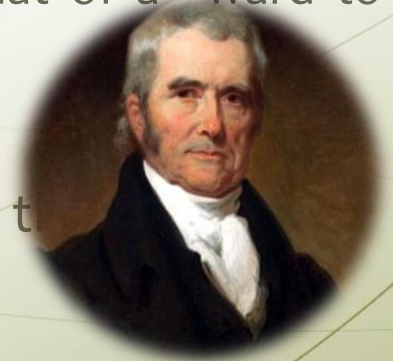
Principles: Sovereignty

Tribal sovereignty pre-dates the U.S. gov't and Constitution

- * “Domestic, dependent nations” *Cherokee Nation v. Georgia* (1831)
 - (1) Tribal sovereignty is inherent
 - (2) Tribes are a part of the U.S. (domestic and not foreign nations)
 - (3) Federal government has a protectorate relationship with tribes
 - * Relationship of tribes to Federal government is like that of a “ward to guardian”

State/tribal conflict. *Worcester v. Georgia* (1832)

- * Dominion over Indian nation-U.S. relations is vested in the federal government
- * State has no jurisdiction (except for PL 280)



Chief Justice John Marshall
Henry Inman. Library of Virginia



Tribal Sovereignty & Environmental Protection

Principles: Treaties

- * Treaties made between 1778-1871; ended with Act of Mar. 3, 1871
- * Tribes exchanged land and peace for U.S. promises for reservations, defend sovereignty, protection, services
- * May impact interests of non-Indians
 - * I.e. hunting, fishing, gathering rights
- * Abrogation: Congress must clearly express its intent. *United States v. Dion* (1983)



Tribal Sovereignty & Environmental Protection

Fundamentals: Canons of Construction

Construction of treaties and other positive law liberally, in a manner that favors Indian rights and interests

- (1) Treaties, statutes, agreements, and executive orders are to be liberally construed in favor of the Indians. *Choctaw Nation v. United States* (1943)
 - * Rationale: Treaties written in English, U.S. representatives skilled in diplomacy, interpreters employed by the U.S.
- (2) Construe treaties as the Indians would have understood them at the time they were made
- (3) All ambiguities to be resolved in favor of the Indians
- (4) Tribal property rights and sovereignty are to be preserved unless Congress's intent to the contrary is clear and unambiguous



Tribal Sovereignty & Environmental Protection

Fundamentals: Trust Responsibility

U.S. government's obligation to act fairly in its dealings with Indian nations

- * Originates in the specific terms of treaties, statutes and regulations
- * Represents government's "moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States* (1942)
- * *United States v. Mitchell* (1983). Money damages for breach



Tribal Sovereignty & Environmental Protection

Fundamentals: Consultation

Exec. Order No. 13,175 (2000)(Pres. Clinton)

- * Federal agencies must consult and coordinate with tribal governments on federal actions that impact tribes
- * But not legally binding

Mem. Of Nov. 5, 2009, *Tribal Consultation* (Pres. Obama)

- * Required each agency to implement consultation policy

EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011)

- * Ensures tribe members have significant opportunities to participate in the regulatory process (even if tribe has not assumed regulatory jurisdiction)



Tribal Sovereignty & Environmental Protection

Fundamentals: Tribal Jurisdiction

Inherent sovereignty over members and tribal lands, but very limited authority over non-members

No criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe* (1978)

Civil jurisdiction

- * Express authorization by federal statute or treaty
- * *Montana* exceptions: *Montana v. United States* (1981)
 - (1) **Consensual relationship test.** “[a]ctivities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”
 - (2) **Substantial interest test.** Non-member conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”
- * The importance of land status remains an issue. *Strate and Hicks* (tribally-controlled v. non-Indian)



Tribal Sovereignty & Environmental Protection

Fundamentals: Self-Governance

638 or self-determination contracts

- * Indian Self-Determination and Education Assistance Act of 1975 – ISDEAA
- * Administer programs or services traditionally administered by IHS, BIA and other DOI programs

Self-Governance compacts

- * Annual funding agreements
- * Tribes determine their own highest priority needs



Tribal Sovereignty & Environmental Protection

Fundamentals: Co-management

Co-management

- * Cooperative agreements, collaborative agreements
- * Significant limitations on delegating federal agency power (sub-delegation doctrine)
 - * 3 qualifications:
 1. Delegation consistent with statute granting federal agency power over the subject matter
 2. ***Federal agency retains final review or oversight***
 3. Nonfederal entity must have no conflicts of interest
- * Congress could directly delegate powers to co-management body, subject to "intelligible principle"
- * Possibly greater flexibility for tribes (esp. where tribes exercise sovereignty)

Tribal Sovereignty & Environmental Protection

EMERGING ISSUES





Tribal Sovereignty & Environmental Protection

Emerging Issues: 2020 Budget

President's proposed FY2020 budget cuts

- * Department of Interior: 13.9% cut total
 - * BIA and BIE (spinning off): \$2.93 billion (\$326 million cut)
 - * BIA: \$1.9 billion. 4,569 FTE
 - * Tribal government activities: \$326 million (\$178.9 million self-governance compact activities; \$75.3 million Consolidated Tribal Gov't programs)
 - * Natural resource management: \$184.1 million (-\$20.1 million)
 - * Tribal Climate Resilience funding eliminated
- * Environmental Protection Agency: 30% cut total
 - * Tribal General Assistance Program Grants: \$44.2 million (-21.2 million)
 - * State and Tribal Assistance Grants (STAG): \$2.77 billion (-\$1.43 billion)

Tribal Sovereignty & Environmental Protection

Emerging Issues

- * Climate change

- * Managed retreat: Alaska Native villages, Louisiana, Pacific Northwest
- * Univ. of Oregon Tribal Climate Change Project:
 - * <https://tribalclimate.uoregon.edu/>



Alaska Village Electric Cooperative

- * Dakota Access Pipeline (DAPL)

- * Tribes alleged federal gov't failed to properly consider potential impacts of pipeline spills on drinking water supply, treaty rights to fish & wildlife, sacred sites
- * Sufficiency of ACOE environmental assessment, NHPA consultation



Leslie Peterson

- * Bears Ears Nat'l Monument and the Antiquities Act

- * More than 100,000 archaeological sites
- * Obama designated 1.35 million acre monument; first-of-it-kind intertribal commission
- * Trump reduced to 200,000 acres





ENVIRONMENTAL
LAW • INSTITUTE®

Tribal Sovereignty and Environmental Protection

THANK YOU

www.eli.org