

Understanding Tribal Sovereignty

Helen B. Padilla, Esq.

Director

American Indian Law Center, Inc.

October 2007

Introduction

- The Basics of Tribal Sovereignty
- Tribal Governments and Tribal Laws
- Important Considerations

The Basics of Tribal Sovereignty

- Recognition of the unique political status and cultural identity of Indian Nations.
- Historical foundation of the relationship between the U.S. government and Indian Tribes.

Tribal Sovereignty

- The foundation for government-to-government relationships lies in the treaties that were signed.
- Treaties between Great Britain and France, then the U.S. and the Indian Nations.

Tribal Sovereignty

- Treaties- Importance:
 - Recognition of Indian Nations as governments with internal self-governing powers.
 - Established the initial framework for U.S. Indian Policy.
 - Established paramount federal power to the exclusion of the states.

Tribal Sovereignty

- This treaty relationship between sovereign governments became the basis for the concept described by Chief Justice Marshall in three important Supreme Court cases during the early 1800's.
- The "Marshall Trilogy" defined the nature of tribal sovereignty and laid the foundation for the treatment of Indian nations under federal law.

Principles of Federal Indian Law

- Territorial Sovereignty
- Domestic Federalism
(Plenary Power Doctrine)
- Trust Relationship

Territorial Sovereignty

- Tied to geographical boundaries.
- Tribal sovereignty enjoys its fullest expression within tribal territory, often designated as “Indian Country”.
- Tribal authority to make their own laws and be ruled by them.
- Tribal jurisdiction, including regulatory authority, taxing authority and tribal court jurisdiction.

Domestic Federalism- Plenary Power of Congress over Indian Nations

- Indian Commerce Clause in the U.S. Constitution mentions Congress' authority (Article I § 8).
- 19th Century Indian law cases utilize this concept to subordinate Indian nations to federal authority.
- Lack of state power within Indian Country.

Domestic Federalism- Plenary Power of Congress over Indian Nations

- The concept of Indian Tribes as “domestic dependent nations” establishes the supreme authority of the federal government within the federal system for purposes of governmental interactions with Indian nations.

Trust Relationship

- Initial recognition that the federal government has a “duty to protect” the Indian Nations described in *Cherokee Nation v. Georgia* (1831).
- This duty has continued to be recognized, refined and carried forward in federal cases since first announced in the Marshall trilogy.

Trust Relationship

- A legal doctrine that led to federal control over many activities, including oversight of Indian property, resource management, law enforcement, provision of social services such as health, education, housing, income assistance for the poor and child welfare.
- Also includes the duty to assist in tribal self-determination and the maintenance of tribal governmental structures.

Trust Relationship (Three Important Aspects)

- 1. The “general” trust relationship represents the U.S. government’s historical obligation to protect tribal lands and tribal self-government, and to observe the “utmost good faith” towards Indian people.

Trust Relationship (Three Important Aspects)

- 2. The “limited trust duty” that arises out of congressional statutes, such as the Indian Self Determination and Education Assistance Act, which create specific duties in order to serve the purpose of the statute.

Trust Relationship (Three Important Aspects)

- 3. The “full fiduciary duty” which arises from comprehensive federal management of tribal assets and, if breached, triggers liability for damages.

Example: Cobell Individual Indian Monies mismanagement case.

Relationships Between Sovereigns

- Given Tribal Sovereignty and other principles of Indian law, the interactions between the three sovereigns located in the U.S. is complicated:
 - Federal Government
 - Tribal Government
 - State Government, including local (counties, municipalities)

Tribal Governments and Tribal Laws:

New Mexico's Tribes, Nations, and Pueblos

- New Mexico has over 205,000 Indian citizens.
- Approximately 10.5% of New Mexico's population. (The second largest % in the U.S.)
- New Mexico has 22 Tribes, Nations, or Pueblos, each with its own unique form of government.

Tribal Governments and Tribal Laws:

New Mexico's Tribes, Nations, and Pueblos

- Indian Tribes are sovereign governments.
- Concern for:
 - Preservation of language, culture, land and sacred places.
 - Health, Welfare, Education, Housing, and Safety of their people.

Tribal Governments

- Provide a broad range of governmental services on tribal land, including:
 - Education
 - Housing
 - Healthcare
 - Law Enforcement/Emergency Response
 - Environmental Protection
 - Basic Infrastructure and more.

Tribal Governments

Different Forms of Government

Structured by:

- Traditional Law and Custom
- Indian Reorganization Act (IRA) Constitutions
- Non-IRA Constitutions
- Tribal Legislation and Codes
- Common Law/Court or Leadership Decisions
- Combination of more than one of the above.

Tribal Court Systems

- Traditional – Dispute resolution according to customary practice.
- Modern/Traditional – Judicial structure incorporating modern judiciary and traditional dispute resolution.
- Modern – Separate judiciary or a delegation to separate judiciary.

Tribal Laws

- No matter what type of government structure, tribal law is intertwined with federal Indian law.
- Issues:
 - Federal Recognition
 - Membership/Enrollment
 - Congressional Plenary Power
 - Federal Trust Responsibility
 - Major Crimes

Other Laws Impact Tribal Law

- State Law may impact Tribal Law:
 - Tribal/State Gaming Compacts
 - Intergovernmental Agreements
 - Memorandums of Understanding
- In the case of no applicable tribal law, tribal courts may look to other Tribes' laws, federal law, or state law.

Tribal Partnership Issues

- Who do you approach?
- Tribes are governments but may also have economic development and business enterprises.
- Jurisdictional questions and venues for disputes.

(Tribal court vs. State/Federal Courts)

Tribal Partnership Issues

- Investment Capital
- Applicable Tribal, Federal and/or State Laws or Policies
- Customary Practices
- Time
- Elected Officials/Changes in Tribal Administration
- Different Tax Implications

Tribal Partnership Issues

- As governments, Tribes retain their sovereignty, including sovereign immunity.
- Sovereign immunity- An Indian Tribe is subject to suit only where Congress has “unequivocally” authorized the suit or the Tribe has “clearly” waived its immunity.
- There is a strong presumption against waiver of tribal sovereign immunity.

Recommendations

- Be Prepared
- Remember that Tribes are governments.
- Know common interests / needs.
- Familiarize yourself with government structure and applicable laws.
- Know court structure and time limitations.
- Take advantage of different tax structures, time elements, and opportunities available for Tribes.

Resources

- New Mexico Tribal Court Handbook, 2001 Edition, NM State Bar Indian Law Section Website.
- Tribal Law Journal (e-journal) University of New Mexico, School of Law v. 1- 2000)
<http://tlj.unm.edu/>
- National Indian Law Library,
<http://www.narf.org/nill/Nillindex.html>
- U.S. Census Bureau Website
- Indian Law Reporter (American Indian Lawyer Training Program, 1974)
- National Tribal Justice Resource Center (National American Indian Court Judges Association)
<http://www.tribalresourcecenter.org/>
- Tribal Court Clearinghouse
<http://www.tribal-institute.org/lists/decision.htm>