
American Indian Law for the Boeing Attorney

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November 13, 2014

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Tribal Sovereignty

- Indian tribes are **governments**—“the third sovereign.”
 - *See* U.S. Const., Art. I, Sec. 8.
- Indian tribes:
 - are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government.
 - *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).
 - are a “separate people, with the power of regulating their internal and social relations.”
 - *United States v. Kagama*, 118 U.S. 375, 381–82 (1886).
 - enjoy “the right . . . to make their own laws and be ruled by them.”
 - *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Tribal Sovereignty

- As “distinct, independent political communities . . . **the laws of [a state] can have no force**” therein.
 - *Worcester, supra.*

Tribal Sovereignty Vis-à-vis Federal/State Laws of General Applicability

- Non-members in Indian Country are generally subject to federal laws of general applicability.
 - *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).
- State laws generally remain inapplicable to non-members in Indian Country.
 - *See Worcester, supra*; Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* 259 (1982) (state civil laws are “generally not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress”).

Tribal Sovereign Development

- As sovereigns, tribes enjoy the power to tax.
 - *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).
- But unlike other governments, tribes lack a solid tax base from which to fund services and programs.
 - *See e.g.* 25 U.S.C. 465 (preempts Indian realty taxation).
- Therefore, tribal economic development, most notably Indian gaming, generates needed operational funding.
- Indian land development is catalyzed by federal tax incentives; a state regulatory void; and tribal rulemaking.

Tribal Sovereign Development



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Tribal Sovereign Immunity

- Tribes enjoy “common law immunity from suit traditionally enjoyed by sovereign powers.”
 - *Michigan v. Bay Mills Indian Community*, __ U.S. __ (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).
- Extends to Tribal agencies, instrumentalities, enterprises, officers and employees; to “commercial” or “off-reservation” activities.
 - *Bay Mills, id.*; *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 755-56 (1998).
- A Tribal party can generally only be sued if the Tribe has clearly and unequivocally waived their immunity.
 - *Santa Clara, supra*; *Kiowa, id.*

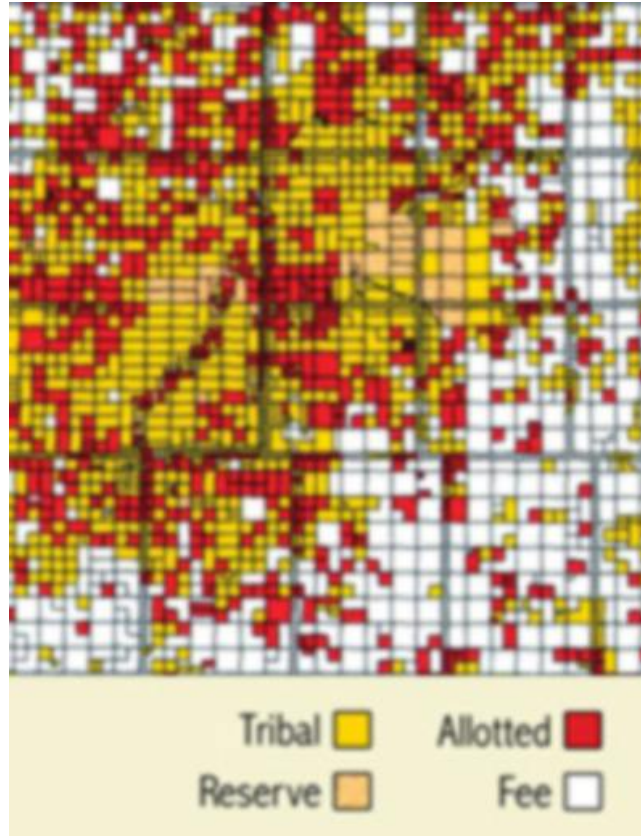
Tribal Sovereign Immunity

- Tribes sovereign immunity shields tribes from third-party subpoena for witnesses or documents.
 - *Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012); *United States v. James*, 980 F.2d 1314, 1316 (9th Cir. 1992); *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893, 902 (9th Cir. 2002).

Tribal Territorial Sovereignty

- Indian tribes generally have regulatory authority over anybody's activities on Indian reservation lands.
 - *Confederated Tribes of the Colville Indian Reservation, supra; Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011).
- Including on-reservation, non-Indian owned fee lands.
 - *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 460 (1989); *Gobin v. Snohomish County*, 304 F.3d 909, 914 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003).
 - See 18 U.S.C. 1151(a) (defines “Indian country” as “all land within the limits of any Indian reservation . . .”).

The Tribal “Checkerboard”



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Tribal Adjudicatory Authority

- Tribal Courts have jurisdiction over non-members, on reservation **trust lands**:
- “where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe’s inherent powers to exclude and manage its own lands, and there are no competing state interests at play...” *Water Wheel, supra*.

Tribal Adjudicatory Authority

- And over non-members on reservation fee lands,
 - (1) who enter into “consensual relations” (e.g. contract or lease) with the tribe or its members, or
 - (2) whose actions threaten the “political integrity, the economic security, or the health or welfare of the tribe.”

Montana v. United States, 450 U.S. 544, 566 (1981).

Tribal Extra-Territorial Authority

- Indian tribes are guaranteed various rights that extend beyond Indian reservation lands.
 - Treaties guarantee usufructary rights to fish, hunt, gather and worship on “ceded lands.”
 - *Minnesota v. Mille Lac Band of Chippewa Indians*, 526 U.S. 172, 178 (1999).
 - Treaties also ensure access rights to those lands for such purposes.
 - *U.S. v. Washington*, 157 F.3d 630 (9th Cir. 1998).
 - More generally, Tribes can regulate “off-reservation activities that have significant effects within the reservation.”
 - *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001).

Tribal Extra-Territorial Authority

- Illustrative: extra-reservation tribal rights and remedies:
 - *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982): holding that Tribes had authority to enact shoreline protection ordinance that extends to the southern bed of Flathead Lake.
 - *Confederated Tribes and Bands of the Yakama Nation v. USDA* (E.D. Wash 2010): enjoined the United States from permitting a private company's importation of Hawaiian municipal waste into the Yakama Nation's ceded lands.
 - *U.S. v. Washington* (W.D. Wash 2013): ordered the state to replace culverts under state owned roads that block the passage of salmon to critical habitat.

Tribal Airspace Regulation

- Can Tribes regulate over-reservation airspace?
 - Tribal regulatory power may be federally preempted by the Federal Aviation Act and other federal law.
 - *See In re: Pilot Hazmat Training for Public Aircraft Operations*, DOT, FAA, Legal Opinion, 2010 WL 3378548 (Aug. 17, 2010): holding that FAA has jurisdiction to regulate an arm of a Tribe that contracted with DOE to transport hazardous materials.
 - Even so, Tribes will still attempt to regulate over-reservation airspace for sake of the “political integrity, the economic security, or the health or welfare of the tribe.” *Montana, supra*.
 - Example Tribal statute: Federal and state agents “are prohibited from accessing, entering or remaining upon any lands, territories, waters, **or airspace of the [Tribe]** except when expressly permitted or invited by the...Tribal Council...” *See also Water Wheel, supra*.

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Tribal Airspace Regulation

- Can Tribes *de facto* regulate over-reservation airspace?
 - The FAA has adopted “The American Indian and Alaska Native Tribal Consultation Policy and Procedures.”
 - Developed in accordance with Presidential Executive Order 13175, which directs federal agencies to establish regular and meaningful consultation and collaboration with Tribes in developing federal policies of any tribal implication.
 - Requires the organization to “consult with Tribes before taking **any actions that may significantly or uniquely affect them.**”
 - Enforceable against the FAA under Section 702 of the federal Administrative Procedures Act (“APA”), and in turn against private actors potentially.

Tribal Airspace Regulation

- Can Tribes *de facto* regulate over-reservation airspace?
 - Tribes might very well be able enforce the FAA's Tribal Consultation Policy against private actors—e.g. Unmanned Aircraft System (“UAS”) operators—via the FAA.
 - Recall *Confederated Tribes and Bands of the Yakama Nation v. USDA* (E.D. Wash 2010): enjoined the United States from permitting a **private company's** importation of Hawaiian municipal waste into the Yakama Nation's ceded lands.
 - Found that because the USDA's actions affected the Nation's ceded lands, there were “serious questions about whether [it] adequately consulted with the [Tribe] as required by its Treaty of 1855 and federal Indian trust common law.”

Tribal Good Neighbors

- In all, Tribes and their neighbors:
 - “are beginning to smooth over the rough edges of federal Indian law – jurisdictional confusion, historical animosity . . . competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority – through cooperative agreements.
 - In effect, a new political relationship is springing up all over the nation between states, local units of government, [private industry] and Indian tribes.”
 - Prof. Matthew Fletcher

Tribal Contact List Websites

- <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/>
- <http://www.ncai.org/tribal-directory>
- <http://www.goia.wa.gov/tribal-directory/tribaldirectory.pdf>

Thank You

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