



UNIVERSITY OF
ARKANSAS

School of Law

Tribal Governments & Business Entities

Day 3

January Intersession 2018

Wednesday, Jan 10:

Sovereign Immunity and Other Retained Powers

- Michigan v. Bay Mills (don't need to read, Leeds will cover)
- [Santa Clara v. Martinez](#) (students read for class)
- CaseStudy: Recent Patent Cases (Leeds will discuss)

Montana v. US

- Tribes can regulate nonmembers on land belonging to the tribe or held in trust by the feds
- But presumption of no power over non-Indians on fee lands

Montana v. US

- Tribe may regulate non-Indians
 - Where there's a grant of authority from feds
 - Where the tribe maintains a right to exclude
 - Where the non-Indian enters into consensual relations with the tribe (and its members?)
 - Where the non-Indian conduct threatens or has a direct effect on health & welfare, political integrity, economic security, etc.

18 USC 1151

Indian Country

- Criminal statute (but helpful)
- All lands within territorial boundaries including rights of way
- All lands that are restricted (US title)
- Dependent Indian communities

Dependent Indian Community

- Tribe cannot unilaterally create Indian country by purchase of land
 - Buzzard v. OTC (10th Cir)
- Better argument when feds set lands aside for particular tribal function
 - Housing examples

Navajo Nation Tax Example: Kerr McGee

- Navajo is non-IRA tribe
- Entered into oil and gas leases
- Later passes tax code (severance)
- Upheld as inherent right of a government to tax
 - Look to see where it has been taken away
 - If not, governmental authority survives

Curtis Act Example

“all tribal courts in Indian Territory shall be abolished and no officers of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts.”

Public Law 280

- Extends state jurisdiction in Indian country in selected states
- provides for possible retrocession of jurisdiction upon petition of tribes

PL 280 States

- CA, MN, NE, OR, and WI originally
 - Added AK
 - Others added later
 - Total of 11
 - Now there is a tribal consent provision
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- Discuss Cabazon

General Principle

- Doctrine of sovereign immunity extends to tribes in business dealings as well as in tribal government functions

Santa Clara v. Martinez

- Discuss Indian Civil Rights Act background
 - Talton v. Mayes
- Intent to waive sovereign immunity will not be implied
 - Particularly when other remedies exist
 - Even if non-judicial remedies

Sovereign Immunity

- Waive own immunity? T-Y; S-Y
- Can feds waive it? T-Y; S-N (Art.I)
 - Seminole/Florida
- Assert it against the US? T-N; S-N
- Assert against a State? T-Y; S-N

Sovereign Immunity Concerns

- See if tribe has created a subordinate entity for these purposes and has (a limited) waiver of sovereign immunity
- § 17 (of the IRA) corporation, perhaps sue-and-be-sued clause in the charter
 - But you'll want more assurance
- Bargain for a limited waiver in the contract (tribes might be willing to waive as to tribal court proceedings)

Cossey v. CNE

- Non-Indian customer of tribal casino brings tort claim in state court for damages
- Tribe appears specially for purposes of contesting jurisdiction

Cossey Issues

- What impact does the tribal-state gaming compact have?
 - On sovereign immunity?
 - On subject matters that can be heard in state court?
 - On application of tribal or state laws?
 - What is a “court of competent jurisdiction”?

Dual Hats

- Bay Mills case
- Kiowa Tribe case
- St Regis Mohawk patent deal