

CHAPTER THREE

TRIBAL SOVEREIGNTY AND THE FEDERAL TRUST RELATIONSHIP

Introduction

This chapter focuses on tribal sovereignty and the federal trust relationship with Indian tribes. While it is beyond the scope of this study to provide a detailed historic treatise concerning Indian nations, the intent of this chapter is to provide a sufficient historical backdrop for understanding how and why Indian nations exist in our American polity as a whole. Furthermore, it is not the intent of this chapter to explain the details of federal Indian law but to account for the long-standing trust relationship between the federal government and Indian tribes. Part I will discuss Indian tribes as pre-Constitutional nations. Part II will discuss the federal trust relationship with Indian tribes.

Part I – Indian Tribes as Pre-Constitutional Nations

Prior to colonization, Indian tribes existed as diverse self-governing nations who regulated their internal and external relations. Unlike European sovereign monarchies, tribes did not have formal government institutions but their communities performed all of the necessary political functions such as keeping the peace and performing duties in the interest of the tribe.¹ Their concept of nationhood was based on consensus among community members and the majority of tribes believed that no person or entity had the right to govern another.² The members of a tribe ruled collectively as one body and performed all functions of governance.³ Their creation stories advocated that all members of tribes shared and participated equally in all privileges and responsibilities and that their Creator made the land for all life forms to exist in harmony.⁴

The European “Doctrine of Discovery”

Unlike tribes, however, the Europeans introduced the concept of sovereignty that was based on feudalism and its inherent inequality of people.⁵ Sovereignty stemmed from the Hobbesian view that authority was needed to protect society from rampant

individual self-interest.⁶ Furthermore, if left uncontrolled, individual self-interest would revert backwards to a wild state of nature.

Unfortunately, during the early colonization of the New World, most Europeans considered tribes as little more than heathens and savages and in order to avoid conflict among themselves, European powers introduced the “doctrine of discovery” to regulate competition for colonial territory. Under this doctrine, European monarchs believed that they could claim legal title to all lands, including Indian tribal lands in the New World, on the basis of discovery.⁷ The European monarchs felt that as compensation to the tribes they bestowed civilization and Christianity upon them in exchange for their lands. Furthermore, European monarchs felt that they could obtain Indian lands without tribal consent by waging “just and lawful” wars against them on the grounds that they were savages who did not work the land and did not have any form of government.⁸

As the Europeans settled the New World, Indian nations often entered into treaties with other nations and their colonies surrounding their lands such as the British, Dutch, French, Spanish, and other entities. Although, there was formal, government-to-government relationships between tribes and these other nations, the treaties were written in the language of the Europeans and their intent was to promote European interests and not necessarily those of the tribes.⁹

The Colonies and Indian Tribes

The British Crown and its American colonies dealt with the Indian tribes formally as foreign sovereign nations and both the Crown and several of the colonies entered into treaties with various Indian tribes.¹⁰ As the colonies grew in strength and population, however, individual colonists encroached upon Indian lands. In order to maintain peace with the Indian tribes and discourage their alliance with France, King George III in the Proclamation of 1763 forbade the encroachment of colonists into the Indian Territory west of the Appalachians, implicitly recognizing Indian ownership.¹¹ When the colonies revolted against the Crown, an action that escalated into the Revolutionary War, the majority of Indian tribes allied themselves with the Crown because of their fear of further encroachment by settlers on their lands.¹²

Following its independence, the fledgling United States government found itself with the same problems that had faced the Crown, which was settler intrusion into tribal lands and threatened tribal retaliation. If tribal affairs were left to the individual states, settler land hunger would result in new wars with the tribes, which the young nation was in no position to fight. If stability were to be achieved, it had to be accomplished by placing Indian affairs in the hands of the central government.¹³ The Continental Congress sought through the Articles of Confederation to draw a line between internal and external affairs.¹⁴ In internal matters, states were sovereign and Congress could act only through them.¹⁵ In foreign affairs, however, Congress held a ruling hand, composing a committee of all of the states on matters of foreign policy, war, and Indian affairs.¹⁶ Treaty making by the newly formed United States followed the government-to-government pattern set prior to the Revolution, which sought primarily to establish peace and territorial boundaries, and to regulate trade and the extradition of criminals.¹⁷ Treaty making will be discussed later in this chapter.

The Importance of Tribal History and Culture to Tribal Governance

“Strong metaphorical and symbolic relationships are evident throughout Indian history,” according to historian Donald L. Fixico.¹⁸ The real world of Indian tribes includes a combined reality of the physical and metaphysical and there is a strong affinity to the land and between elements of the earth including geographic sites, flora, fauna, water, and landscape.¹⁹

Deloria has examined the dynamics of exchange and interaction between the United States government and the Indian tribes, in areas such as federal Indian policy, treaty making, trade, councils, and war.²⁰ These dynamics of exchange, according to Deloria, must be analyzed within the context of cultural influences, which often involve contact history, oral history, social history, environmental history, agricultural history, policy history, and military history.²¹ This is particularly important in terms of government policies directed toward tribal lands.

In *American Indians, American Justice*, Deloria and Clifford M. Lytle describe how tribes such as the Iroquois had highly complicated forms of government that could be traced far back into pre-contact days and, according to some tribal traditions, some as

far back as their creation and migration stories. For them, such systems of governance were sacred and often beyond anything that the Europeans possessed.²² In tribal cultures, there was little distinction made between the political and the religious worlds. They believed that people did not own the land and resources; rather, each individual had a responsibility toward all aspects of life.²³

To illustrate the interconnectedness between tribes and their land, we turn to the great Iroquois diplomat and orator, Sagoyewatha. In the summer of 1805, a council of principal chiefs and warriors of the Six Nations of Indians, principally Senecas, assembled at Buffalo Creek, in the State of New York, at the request of Reverend Jacob Cram of the Boston Missionary Society.²⁴ A government agent of the Indian Affairs Bureau under the War Department and an interpreter accompanied him. At the council, Sagoyewatha, also known as “Red Jacket,” spoke out against the sale of Indian lands, the encroachment of European culture and religion, and in defense of Indian sovereignty.²⁵ The following is an excerpt from his timeless speech:

There was a time when our forefathers owned this great island ...but an evil day came upon us. Your forefathers crossed the great water, and landed on this island. Their numbers were small. They found friends and not enemies. They told us they had fled from their own country for fear of wicked men, and had come here to enjoy their religion. We took pity on them ...we gave them corn and meat, they gave us poison [liquor] in return. They wanted more land; they wanted our country. Wars took place ...and many of our people were destroyed. You have now become a great people, and we have scarcely a place left to spread our blankets.²⁶

Sagoyewatha’s speech not only illustrates the interconnectedness between tribes and their land but also the importance of community in tribal cultures. In tribal societies an individual’s responsibility to the community are more important than an individual’s rights within society. This concept is entirely different from that of other cultures where individual rights are paramount. That is why the American political concepts of majority rule and minority rights were so foreign to tribal systems of governance.²⁷ Furthermore, as Deloria notes in *God Is Red*, the importance of land has a spiritual dimension to American Indians.

The basic divergence of viewpoints between American Indians and the rest of American society must be seen ... in the conception of land. American Indians hold their lands – places – as having the highest

possible meaning, and all their statements are made with this reference point in mind.²⁸

The spiritual dimension attached to tribal land base weighs heavily in the concept of tribal sovereignty. It for these many reasons that Indian tribes as pre-existing sovereigns enjoy a unique political relationship with the United States. Furthermore, as pointed out by Stephen Cornell in his book *The Return of the Native*, “Indian resources were essential building blocks in the rise of the United States to economic power.”²⁹

Part II– The Federal Trust Relationship

Tribal governance is predominantly based on notions of prior sovereignty and the federal trust relationship. Frank Pommersheim notes in *Braid of Feathers* that the federal “trust relationship [is one] in which the federal government has a unique fiduciary and managerial responsibility to Indian land and natural resources as well as ongoing responsibilities to provide health, education, and social services.”³⁰ The federal trust relationship is also comprised of 379 treaties ratified by Congress as well as executive agreements, direct consultation with Congress on Indian affairs, federal statutory obligations, and court decisions.³¹

Power, Sovereignty, and Governance

Power, is an act and it has to do with relationships between two or more actors in which the behavior of one is affected by the behavior of the other and often used with the threat of force or coercion.³² Sovereignty, on the other hand, is the power of people to govern. It is the power that comes from within and the ability to make decisions without outside interference. This seems to be an easy concept to grasp but it is not because there are competing definitions of sovereignty based on different interests. Sovereignty from a non-Indian perspective implies “power over individuals” for purposes of state regulation and legitimacy.

From a tribal perspective, however, Wilkins describes sovereignty as; “an understanding that every tribal person has the right and the responsibility to be an actor, not merely an object, in decisions affecting his or her community.”³³ Governance is conducting the policy and affairs of a state, organization, or people. It is, therefore, the

exercise of sovereignty.³⁴ As we shall see, power, sovereignty, and governance are all interconnected but there are different meanings depending upon who the actors are and where their interests lie.

Felix S. Cohen, in his authoritative and extensive work entitled *Federal Indian Law*, explains the nature of the residual sovereignty of Indian tribes:

Perhaps the most basic principles of all Indian law supported by a host of decisions ... is the principle that those powers which are lawfully vested in Indian tribes are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty, which have never been extinguished. Each Indian tribe begins its relationship with the federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.³⁵

Indian Tribes and the Constitution

The Constitution refers to Indians in two clauses. The Commerce Clause grants to Congress the sole authority to regulate commerce “with Indian tribes.”³⁶ According to Monette, some have proposed this language to mean that tribes possess sovereignty more similar to that of the Union than that of states.³⁷ The reference to “Indians not taxed” in the Apportionment Clause applied to the apportionment of state taxes and representation in the Union.³⁸ Monette notes, however, that its significance to the sovereign status of tribes remains unclear.³⁹

Indian tribes have always had formal, government-to-government relationships with a variety of European powers. The colonial powers, and later the federal government, recognized the sovereign status of tribes and it developed into a unique political relationship with the United States. According to Deloria, tribes should be understood as “nations within the nation” of the United States, and sovereignty is the foundation upon which this relationship was built.⁴⁰ Unlike all other political entities within the borders of the United States, tribes derive their powers through their sovereign existence, past and present.⁴¹ The manner in which each tribe traditionally exercised

these rights varied according to its distinct cultural practices and the needs imposed by its environment.

The issue of tribal sovereignty is at the very heart of tribal existence. Proponents of tribal sovereignty claim that tribes are stepchildren in the family of the government. They have many powers equal to the states but remain subordinate to the federal government and the government is the trustee of tribal lands, but more often acts as the taker of tribal lands and therefore raises a potential conflict of interest. Conversely, those who are opposed to Indian sovereignty claim that Indians, as American citizens, are subject to the same laws as everyone else and should not have special status.

Treaties

A treaty is a contract between sovereign nations.⁴² The European powers negotiated treaties with Indian nations and recognized them as sovereign nations. In these treaties, tribes never gave up their right to exist as sovereign nations and to exercise their own forms of governance. When the United States was organized as a nation, government officials continued the practice of creating treaty agreements with American Indian nations whenever land boundaries needed to be clarified or when the government wanted American Indian lands.⁴³

Before the adoption of the Constitution in 1789, the United States and several of the states concluded many such treaties.⁴⁴ They sought to establish peace and territorial boundaries, and to regulate trade and the extradition of criminals, among other subjects.⁴⁵ For example, the 1778 Treaty with the Delaware Tribe, the first between the United States and an Indian tribe, pledged friendship and respect for the separate territory of the two nations.⁴⁶ Also, the Northwest Ordinance of July 13, 1787 stated the following:

The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.⁴⁷

The Ordinance, in which lands east of the Mississippi became part of the Northwest Territory, was one of the first legislative acts to affect American Indians

directly.⁴⁸ It recognized and undertook the protection of the sovereignty of Indian nations in the Northwest Territory. From 1789 until 1871, the U.S. government made hundreds of treaties with Indian nations across the continent.⁴⁹ The Constitution authorized the President, with the consent of two-thirds of the Senate, to enter into a treaty on behalf of the United States and declared that treaties were “the supreme law of the land.”⁵⁰

George Washington, as a former military commander, was keenly aware of the military power that the Indian tribes possessed at the time and the importance of establishing good relations between the tribes and the new republic. In Philadelphia, on December 29, 1790, at the height of his Presidency, George Washington addressed the Chiefs of the Seneca Nation. The following excerpt is from that address:

I, the President of the United States, by my own mouth, and by a written Speech signed with my own hand and sealed with the Seal of the United States, Speak to the Seneca Nation, and desire their attention, and that they would keep this Speech in remembrance of the friendship with the United States.... The general Government only has the power, to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding. Here then is the security of your lands.... The general Government will never consent to your being defrauded. But it will protect you in all your just rights.⁵¹

President Washington’s address confirms the commitment and seriousness by the United States in dealing with Indian nations on a government-to-government basis. In effect, President Washington committed the government long ago to protect Indian nations in terms of the sovereignty of their lands.

Some treaties promised the Indians specific goods or services, such as medical care or food and clothing, and almost every treaty assured the Indians that they could live on their reservation permanently and would not be forced to move. However, tribal individuals and leaders who purportedly represented their tribe at treaty conferences usually ceded large portions of their ancestral lands in return for services and a certain portion of these lands being set aside for the exclusive use of tribal members and descendants. Rarely did the U.S. government return Indian homelands to their original inhabitants. As discussed later in this chapter, under parts of the Alaska Claims Settlement Act, some lands were returned.⁵²

Although few treaties were negotiated between the outbreak of the Civil War and the end of 1871, in 1871 a rider on an appropriations bill ended treaty making with Indian tribes.

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligations of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.⁵³

The effect of the provision was to replace treaties with agreements that the Executive Branch negotiated and both Houses of Congress enacted into law.⁵⁴

Between 1778 and 1871 the United States ratified approximately 379 treaties with Indian tribes.⁵⁵ Although they clearly recognized tribal authority, they served as the instruments by which tribes ceded portions of their lands and other rights to the United States. The eminent legal scholar Felix Cohen noted that:

The legal force of Indian treaties did not insure their actual enforcement. Some important treaties were negotiated but never ratified by the Senate, or ratified only after a long delay. Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of only a small part of the signatory tribes. The federal Government failed to fulfill the terms of many treaties, and was sometimes unable or unwilling to prevent States, or white people, from violating treaty rights of Indians.⁵⁶

The Constitution recognizes treaties as laws and on the same level as acts of Congress, which means that they preempt state law. However, treaties may be abrogated by an act of Congress.⁵⁷ Treaties with tribes as well as international treaties stand on the same footing as federal statutes and they can be repealed or modified by later federal statutes.⁵⁸

In *License for Empire*, Dorothy Jones notes that the treaty system skewed the disparity of power between Indian tribes and the United States. Instead of expressing mutual compromise and accommodation, according to Jones, it represented the domination of the Indians by the United States in which the Indians had little to say in their own destiny.⁵⁹ Deloria notes that the acquisition of land, while not usually a stated government objective, was never far from the minds of the members of Congress and of government officials in the late eighteenth and nineteenth centuries. Deloria argues that in terms of treaty making, the federal government is constitutionally prohibited from

entering into treaty relationships with any entity other than fully sovereign national governments. It follows, then, that each treaty entered into by the United States with a tribe served the purpose of conveying formal federal recognition of that tribe as a nation. According to Deloria, this relationship is described as constituting “the nations within” the United States.⁶⁰ Also, Indian Tribes continued to negotiate treaties with Great Britain between 1777-1798, fifteen treaties with Spain between 1784-1819, and twenty-four treaties with Mexico between 1821-1850.⁶¹

U. S. Supreme Court Cases and the Plenary Power of Congress

As the population of the colonies increased, so did the desire for more land for settlement.⁶² The legal status of the tribes as sovereign nations, however, began to be challenged by non-Indians. Initially, land purchases and agreements were made between the colonies and the tribes through the use of treaties. Many of the treaties with Indian nations, however, served to limit the sovereignty, rights and independence of the respective tribes.

The Supreme Court attempted to resolve the issue of Indian tribal sovereignty. Unfortunately, the Court did not resolve the issue of tribal sovereignty in the Marshall trilogy of cases but made it more confusing. These cases offered three competing perspectives on Indian sovereignty and subsequent policies pick and choose from these cases regarding the policymaker’s prevalent view of Indian sovereignty.

Three Supreme Court cases that have come to be known as the “Marshall Trilogy,” named after Chief Justice John Marshall, form the bedrock of federal Indian law. In the first case, *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), the Court ruled that tribes could not convey land to private parties without the consent of the federal government. The Court based its opinion on the United States’ adoption of the “doctrine of discovery,” which held that a title to Indian lands vested in the European power that claimed them.⁶³

The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.⁶⁴

The Court noted that after conquest and the establishment of the United States the rights of the tribes to complete sovereignty was diminished, and that the power of tribes to dispose of their land to anyone except the United States, was denied.⁶⁵

In the second case, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that the Cherokee people had shown that they were indeed sovereign by virtue of their self-government and treaty relationship with the United States but that the Cherokee Nation was not foreign since it was wholly within the United States. The Court characterized tribes as “domestic dependent nations” which is considered the basis of the trust relationship between the federal government and the tribes.⁶⁶

In the third case, the Supreme Court ruled in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), that the relationship between the United States and the Cherokee Nation resembled that of a “guardian to a ward” and precluded relations with other colonial powers but did not divest the tribe of its sovereignty.⁶⁷ Therefore, tribes would remain distinct political communities with limited sovereignty.

Collectively, these three Supreme Court cases held that tribes possess limited sovereignty; this limited tribal sovereignty is subject to the United States but not to the individual states; and that the limited tribal sovereignty imposes a trust responsibility upon the United States.⁶⁸ In sum, tribes lost the ability to transfer their lands or enter treaties with any entity except the United States. However, tribes were otherwise unchanged, distinct political entities that could continue to rule their own territories within the United States.⁶⁹ However, the Court was not the final arbiter of Indian policy. Congress, the Executive Branch, and the Courts have alternated over time in terms of their prominence in Indian affairs. Congress began to solidify its “plenary power” over Indian nations in 1886 via court cases and federal statutes. Yet, the Executive Branch took precedence during this time by negotiating Executive Agreements with Indian nations.

To the extent that tribes are discussed in the Constitution, they are recognized as having a status outside of its parameters. Again, they are outside of American federalism.⁷⁰ The constitutional references fit with the fact that tribes did not take part in the federation of powers at that time.⁷¹ Therefore, the relationship between the tribes and the United States is a relationship between sovereigns.

In a constitutional sense, however, tribes are strange sovereigns. Unlike foreign countries, tribes are subject to the ultimate sovereignty of the United States, and their members are United States citizens. Yet, tribes are “domestic dependent nations” and not states of the Union, and absent Congressional action, tribes retain their inherent right of self-government, and no state may impose its laws on their territories.⁷² Therefore, state law could not interfere with relations established between the federal government and tribes.

The courts have described the status of the Indian nations at various times as “quasi-sovereign nations,”⁷³ “dependent nations,”⁷⁴ having “residual sovereignty,”⁷⁵ and having “semi-sovereign existence.”⁷⁶ These descriptions take for granted that Indian tribes exist outside of the American federalism and that they were never brought into the political sovereign structure of the United States by the Constitution. Furthermore, this implies that there is a separation among sovereigns, i.e., between governments, which are further defined by executive orders, court rulings and legislation. They cannot, however, deal as totally independent nations. For example, they cannot enter into a treaty with a foreign country such as Germany.

The legal relationship of sovereignty, however, may not fit neatly into the way Indian tribes view the concept. Professor Vine Deloria expresses this line of reasoning as follows:

Sovereignty is not a traditional Indian concept – it comes from the feudal system of medieval Europe where power flowed up pyramid-style. Historically, the political structure of Indian tribes has not been like a pyramid with most of the power concentrated in the hands of a few. Rather tribes have been organized in clusters of families and clans or related families. When a group became too large, it split apart forming separate bands.⁷⁷

The courts have reasoned that tribes by their very existence derive their authority to govern from their own sovereignty.⁷⁸ This stems from the original acknowledgement of the legitimacy of tribal government outside of the United States.⁷⁹

One of the most important concepts affecting tribal sovereignty is the plenary power of Congress in Indian affairs. This was argued in the case of *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). This case involved a treaty between the federal government and the Kiowa and Comanche tribes. The Supreme Court held that Congress

itself had the power to abrogate a treaty. The Court noted that the “plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.” According to Pommersheim, congressional power in the area of Indian affairs is unique in two aspects: (1) congressional power is without limitation, and (2) its power in Indian affairs is beyond judicial review.⁸⁰ Pommersheim notes that these powers are contrary to those of a constitutional republic grounded in specified and limited powers. He argues that this unchecked exercise of congressional authority opened the way for further abrogation of treaties and termination of federal-tribal relationships in some cases.⁸¹ Furthermore, he notes that the plenary doctrine is extra constitutional with limited accountability and affects federal-tribal and state-tribal relations.

Wilkins, however, argues that plenary power has several different meanings depending upon its application. It may mean exclusive legislative power on Indian related legislation.⁸² Plenary power may also mean Congressional power under the Commerce Clause to preempt state law. Such was the case in requiring western states to have in their organic acts prior to being admitted into the Union, a state constitutional disclaimer stating that they would not tax Indian lands or property without tribal and federal consent and without first amending the state constitution.⁸³ Finally, plenary power may mean absolute or unlimited power when it is not limited regarding congressional objectives and unlimited power regarding congressional objectives.⁸⁴ The problem, according to Wilkins, is that in Indian law and policy all three definitions may apply at once such as when Congress exercises its prerogative as the exclusive voice of the federal government in dealing with tribes and or when it acts to preempt state intrusion into Indian country.⁸⁵

Two recent Supreme Court decisions in 1991 affected the sovereign immunity of both tribes and states. In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court decided that states are immune from liability to tribes for monetary damages. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Court decided that tribes are immune from liability to states for monetary damages. In both *Potawatomi* and *Noatak*, the Court applied federalism logic

and political principles to both the state and the tribes, ruling that their respective sovereignties derived inherently from their own sources.⁸⁶

Questions of power and sovereignty are the issues when tribes seek help from the federal courts or try to resist federal decision-making, such as federal environmental statutes and regulations. The issues raised usually include executive and congressional authority, the implementation of the Supreme Court decisions by the Executive and the allocation of power between states, tribes, and the federal government. In this sense, United States Indian policy is much more convoluted and complex.

Tribal Governance

Although tribes enjoy the powers of sovereigns, their available resources differ from those of other sovereigns. In general, tribes do not have the fiscal resources or the revenue base that states and local governments possess to support their activities. Consequently, tribes have been dependent on federal financing for their programs. Also, most tribes are small in population and the size of their government structure compared to the rest of America, which has led to tribes finding innovative solutions for governing and for providing services that have been adapted to their needs and priorities. Therefore, not all sovereigns have the same power and available financial resources. There are, furthermore, varying arrangements of tribal governance among the many different tribes. Since tribal governance incorporates such issues as tribal culture, history, social interactions, laws, jurisdiction, and sovereignty, it is critical to understand the very nature of tribes as a first step in understanding why Indian people wish to retain their ways of governance.

Tribes are so different from one another that referring to a “typical Indian community” seldom makes any sense. American Indians, who also include Alaska Natives, live in every state in the Union—in small towns, in villages, in big cities, on and off reservations. Four states (Arizona, California, New Mexico, and Oklahoma) have Indian populations of 100,000 or more.⁸⁷ The six states where tribes make up five percent or more of the population are Alaska, Arizona, New Mexico, Oklahoma, Montana, and South Dakota.⁸⁸

Tribes and their lands are significant factors that affect the relationships of today's tribal peoples with other Americans and with the federal, state, and local governments. There are 558 federally recognized tribes, some with tribal membership as small as 200, and a few tribes having as many as 200,000 members.⁸⁹ Federal recognition may be based on treaty, statute, executive or administrative order, or from a history of dealing with the tribe as a political entity.⁹⁰ Federal recognition of a tribe, which is administered by the Bureau of Indian Affairs under the U.S. Department of the Interior, may confer additional benefits to the tribe such as federally administered health care and educational programs.

Sometimes the terms "tribe" and "reservation" are used interchangeably when referring to an Indian government, but the two are not necessarily equivalent. Tribal governments existed long before "reservations" came into being. Some 300 Indian reservations in the United States, most of which were established within the last 150 years, cover nearly 53 million acres of land in 32 states.⁹¹ They are called reservations because, in treaty negotiations with the United States, tribal leaders reserved for their tribes and their tribe's descendants certain homelands and certain rights in exchange for other lands and activities. Today, reservations range in size from the 15 million acre Navajo Indian reservation in Arizona to the 1.32 acre Likely Rancheria of the Pit River Tribe in California.⁹²

Tribal governments exist off reservations as well as on reservations. In fact, there are some 39 federally recognized Indian governments in Oklahoma but considerably fewer reservations.⁹³ Some tribes, such as the Shoshone and the Arapaho in Wyoming, share a reservation but have separate tribal governments. Some tribes, such as the Navajo Nation, span across multiple states (Arizona, Colorado, New Mexico, and Utah). Also, some reservations like that of the St. Regis Mohawk tribe span across St. Lawrence and Franklin Counties in New York State and the provinces of Quebec and Ontario in Canada. Approximately half of the nation's Indian people reside on or near reservations.⁹⁴

Tribes may choose whatever forms of government that best suit their practical and cultural needs.⁹⁵ For example, tribes do not have to adopt governments patterned after the United States, including such elements as separation of powers. Since the

Constitution does not limit tribes, they do not have to separate their government from their religion. After Congress passed the Indian Reorganization Act, most tribes did, however, adopt constitutions developed by the Bureau of Indian Affairs (BIA) and patterned loosely after the U.S. Constitution.⁹⁶

Some tribes, such as the Seneca in New York and Muskogee (Creek) and Choctaw in Oklahoma have adopted constitutions that describe their traditional form of government.⁹⁷ However, the constitutions of some tribes remain unwritten. The Santo Domingo Pueblo government in New Mexico has operated under the same unwritten constitution for centuries.⁹⁸

Many tribal governments have blended traditional and nontraditional elements into their governments. For example, Article 1 of the Constitution of the Cherokee Nation of Oklahoma states the following:

The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law that is in conflict with any Federal law.⁹⁹

Tribal governments may appoint traditional elders to the tribal council for life or provide that secular decision making be approved by the religious leadership. Although many tribal courts have borrowed heavily from the federal court system and have developed rules of procedure and evidence, tribal courts often rely on tribal tradition and frequently look for traditional or informal methods of dispute resolution.¹⁰⁰

Tribes can enact legislation and adopt civil and criminal laws. This authority includes but is not limited to: determination of domestic rights and relations; regulation of commercial and business relations; power to raise revenues for the operation of the government; establishment of rules of inheritance; land use regulation; and power to administer justice through law enforcement and judicial systems.¹⁰¹ Tribal governments also possess another aspect of sovereignty: immunity from lawsuit. No party except the United States may sue a tribe without a waiver of immunity from the tribe itself or from Congress.¹⁰²

Tribes have the power to determine tribal membership. Rights such as voting, holding office, receiving tribal resources (e.g., grazing and residence privileges on tribal lands) and participation in per capita payments usually depend on tribal membership.¹⁰³

The Indian Civil Rights Act of 1968 imposes restrictions similar to those contained in the Bill of Rights on tribal governments in dealings with tribal citizens and others who come under lawful tribal jurisdiction.¹⁰⁴

Tribal Jurisdiction and Public Law 83-280

There are constant struggles among the various units of governance within the United States to determine which have jurisdiction to hear a case or regulate a particular area. While the most familiar occur between the federal government and state governments, the most complicated may be those that involve tribes because they involve the powers of the federal government and state government as well. Federal Indian law divides legal jurisdiction more strongly between civil and criminal halves than in other fields because of the different ways that they have developed.¹⁰⁵

In 1953, Congress enacted Public Law 83-280 (PL 280), delegating limited jurisdiction over Indian country to several states. In PL 280, Congress extended state criminal jurisdiction into Indian country and repealed federal criminal laws relevant to Indian country in selected states.¹⁰⁶ PL 280 divides the states into so called mandatory and optional states. The six mandatory states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) received full jurisdiction delegated by PL 280.¹⁰⁷ The optional states which included Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington assumed all or partial jurisdiction.¹⁰⁸

PL 280 did not repeal tribal criminal jurisdiction, but the criminal laws of affected tribes could not conflict with state law.¹⁰⁹ Also, the Supreme Court clarified the distinctions between civil and criminal laws and established that civil and regulatory state laws were not applicable in affected tribes; however, criminal state laws were applicable.¹¹⁰ For example, PL 280 would not extend state laws regulating pollution discharges into Indian country but would extend state laws prohibiting murder.

PL 280 exempted certain actions from civil and criminal state jurisdiction. States could not alienate, tax, or encumber any assets held in trust by the United States for the benefit of tribes or individual Indians.¹¹¹ States could not regulate any assets that conflict with a treaty, statute, or agreement that prevented states from regulating tribal hunting and fishing rights confirmed by treaty or statute.¹¹²

Criminal Law Jurisdiction

Criminal jurisdiction in Indian country is both ambiguous and complex. Its governing principles are contained in hundreds of statutes and court decisions that have been issued randomly during the past two hundred years.¹¹³ The following summarizes criminal jurisdiction in Indian country: (1) Congress has the ultimate authority to decide which government can exercise criminal jurisdiction in Indian country, and (2) unless Congress has decided otherwise, a tribe can prosecute tribal members but not nonmembers, and a state has no criminal jurisdiction over tribal members in Indian country.¹¹⁴

Civil Law Jurisdiction

Indian tribes have the inherent right to regulate civil jurisdiction in Indian country. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court decided that Indian tribes could exercise “a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.”¹¹⁵ Also, in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), the Court decided, “tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”¹¹⁶

Therefore, virtually every activity by a non-Indian on the reservation that involves Indians or Indian property is subject to the tribe’s civil jurisdiction. In short, with regard to the reservation activities of non-Indians, civil jurisdiction lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.¹¹⁷

The Special Status of Certain Tribes

Certain tribes occupy a special status under federal Indian law. These groups include Alaska Natives, the Pueblo of New Mexico, Oklahoma Indians, New York Indians as well as tribes that are not federally recognized.¹¹⁸ Special status involves unique historical issues concerning tribal land and resource policymaking. For purposes of brevity, only the special status of Alaska Natives will be discussed in this study.

Alaska Natives

The native inhabitants of Alaska have a unique relationship with the United States. When Alaska was purchased from Russia in 1897, its native population was scattered into hundreds of villages located principally along the southern and far northwestern coasts.¹¹⁹ Hunting and fishing were the main sources of livelihood. Until recently, Congress dealt with the Alaska Natives in the same manner as other Indian groups. No treaties were ever signed between the United States and any of the native groups, and there was no conflict on native lands being ceded. The Citizenship Act of 1924, which extended U.S. citizenship to all Indians born in the United States, included the Aleuts, Eskimos and the Indians of the Alaska Territory.¹²⁰

The Indian Reorganization Act of 1934 included Alaska Natives among its beneficiaries (and more than one hundred seventy Indian nations have organized under this Act).¹²¹ Most other federal Indian laws and programs have been interpreted to apply to the native peoples of Alaska in terms of recognition of the United States having a trust responsibility with them, entitling them to all the benefits of this relationship.¹²²

Land title, however, in Alaska is under mixed ownership. The federal government, the state government, Alaska Natives, non-native cities and towns, and individuals claim ownership to lands--and in some cases, to the same lands.¹²³ In 1971, Congress passed a comprehensive law regarding the land rights of Alaska's native inhabitants.¹²⁴ Congress agreed to compensate the Alaska Natives for taking their land and also agreed to give them ownership rights to certain parcels of land. This law, the Alaska Native Claims Settlement Act (ANSCA), changed the nature of the government's relationship with the Alaska Natives.¹²⁵ However, the provisions of ANSCA did not affect the Metlakatla Indian Reservation on Annette Island that was established in 1891 by Congress in the then "Alaska Territory." It is the only federally recognized Indian reservation in Alaska today.¹²⁶

The ANSCA gave Alaska Natives \$962.5 million in compensation for extinguishing all of their aboriginal land claims and ownership rights to 40 million acres of land.¹²⁷ Of the 40 million acres, the surface estate in 22 million acres was divided among the two hundred Native villages according to their population, with each village selecting the land it wanted to live on. The remaining 18 million acres and the subsurface

estate of the entire 40 million acres were conveyed to twelve native regional corporations. The 22 million acres patented to the villages are dually owned. The villages own the surface lands, while the regional native corporation owns the subsurface lands. Each Alaska Native is enrolled in a region. Each region and each village is organized and incorporated under Alaska State law.¹²⁸

Under ANSCA, Alaska Natives were permitted to enroll and be issued one hundred shares of stock in one of thirteen regional corporations and in one of more than two hundred village corporations, according to their place of origin.¹²⁹ ANSCA required each regional corporation to use its land and resources for the profit of the shareholders. It prohibited shareholders from selling their shares until 1991. Thereafter, these shares could be sold to any person, including a non-native. Lands owned by the native corporations were to be exempt from state and local taxation during the period 1971-1991.¹³⁰ However, in 1988 Congress amended ANSCA and extended the restrictions on sales of stock and on state taxation indefinitely. Congress also permitted each corporation to issue and sell new stock to non-natives, and rejected the natives' request to allow these corporations to transfer their land to tribal governments in order to give the lands further protection.¹³¹

In addition to the governing bodies of the village corporations, the villages typically have traditional village councils (led by a chief or president) or a council organized under the Indian Reorganization Act.¹³² Both types of bodies function as official representatives of the village to the outside world and to the BIA. To make matters still more confusing, many villages are simultaneously cities incorporated under the State of Alaska, with a city council and a mayor, city school system, utility boards, etc. One point, however, must be clarified. Although ANSCA applied principally to aboriginal land claims, ANSCA did not diminish the rights of Alaska Natives to participate in federal Indian programs. Alaska Natives are entitled to receive the same services available to Indians elsewhere in the United States.¹³³

In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) that gave the native population priority rights in hunting and fishing for subsistence needs over all other uses of natural resources.¹³⁴ ANILCA also prohibits federal agencies from allowing anyone to use public lands in Alaska if such use would

have a harmful effect on Alaska Native subsistence rights. In addition, the Reindeer Industry Act provides federal funds and property to Alaska Natives for sustaining the economic use of reindeer.¹³⁵

The unique legal structure of Alaska Native organizations has raised questions about whether they enjoy all of the governmental prerogatives of tribes in the lower forty-eight states. Questions about their relationship to the federal government and the degree of sovereignty for purposes of self-government, sovereign immunity, and governmental control over their lands have been raised. On these questions, the federal courts and the Supreme Court of Alaska have frequently reached different results. The State of Alaska has strongly opposed native governments and has attempted on numerous occasions to have Congress erode their powers. In general, the State has taken the position that Alaska Native Villages lack the powers of self-government enjoyed by Indian tribes. Although Alaska Natives may obtain government services, in 1998 the Supreme Court ruled that Alaska Natives could not govern ANCSA corporately held land as Indian country.¹³⁶

Modern Tribal Governments

Angie Debo notes in *And Still the Waters Run*, that most traditional tribal governments had ceased by the early part of the century.¹³⁷ The passage of the Wheeler-Howard Act also called the Indian Reorganization Act (IRA) of 1934, attempted to restore such traditional governments and to restore a system of communal land tenure and tribal autonomy.¹³⁸ As a result, about half of all federally recognized tribes have organized governments patterned after the IRA guidelines, the Oklahoma Indian Welfare Act of 1934, or the Alaskan Reorganization Act of 1936.¹³⁹ A typical government has a governing board, often called the tribal council. Some tribal governments do not provide for the separation of powers and the same governing board may perform the executive, legislative, and judicial functions.¹⁴⁰

Tribal governance structures are greatly influenced by their communities. For example, subsistence communities will tend to elect a more traditional governance structure, whereas, non-traditional communities will tend to have more modern governance structures.¹⁴¹ All voters elect council members at large or by district. The

chairperson and other officers who form the executive committee are members of the council, elected either by the people or by the council from among its membership. The judicial function may be performed either by the council itself or by tribal members appointed by the council. In some cases, tribal members may elect judges, allowing for a greater separation of powers.¹⁴² The following descriptions illustrate some of the various types of modern tribal governments in existence today.

The Beaver Kwit'chin Village Corporation, located near Fairbanks, Alaska is unincorporated under Alaska law. A traditional council, headed by a first chief, governs the community. They do not have a constitution modeled under the provisions of the Indian Reorganization Act.¹⁴³ The Tatitlek Aleut Village Corporation, located thirty miles east of Valdez, Alaska, in Prince William Sound, is an unincorporated village under Alaska law. However, it has an IRA village council, headed by a president.¹⁴⁴ The Gila River Indian Community located in Sacaton, Arizona, is organized under an IRA constitution. A governor, lieutenant governor, and seventeen council members govern the community. Terms of office are for three years and there are seven community districts.¹⁴⁵

The Hoopa Valley Tribe located in Homboldt, California is organized under a non-IRA constitution. An eight-member elected Tribal Council with members representing each of its seven districts governs the tribe. A chairperson is elected from within the Tribal Council and serves for a two-year term.¹⁴⁶

As previously stated, the St. Regis Mohawk Community straddles the border between the U.S. and Canada, spanning portions of two New York State counties and two Canadian provinces. Tribal councils exist for both the U.S. and Canadian portions of the tribe. The U.S. council is made up of three chiefs, three sub-chiefs, and a tribal clerk. Each serves a three-year term. The Canadian council consists of a chief and eleven councilors.¹⁴⁷

The Meherrin Indian Tribe is a non-federally recognized but state recognized tribe located in Hertford County, North Carolina. The tribe was incorporated by the state as a non-profit corporation in 1977. Its charter with the State of North Carolina established the position of chief, tribal chairman, secretary, treasurer, and six tribal members.¹⁴⁸

Summary

During the pre-Constitutional era, Indian tribes were distinct sovereign nations in their own right and dealt with other nations surrounding their borders through treaties. During the founding of our nation, Indian tribes were dealt with as diplomatic peers by our government. There are competing definitions of sovereignty since it means different things to different people. From a non-indigenous perspective, sovereignty implies not only power from within but also it is strongly attached to ownership of property by either an individual or the state. From an indigenous perspective, sovereignty means that tribal people have the right and the responsibility to act in decision-making that affects their community.

The federal trust relationship embodies the unique relationship between the United States and Indian tribes. It is comprised of the 379 treaties ratified by Congress as well as executive agreements, direct consultation with Congress on Indian affairs, federal statutory obligations, and court decisions. Many of these relationships such as treaties are embedded and carry even today the full effect of law.

Certain tribes occupy a special status under federal Indian law such as in the case of Alaska Natives. Tribes have their own governance structures and may or may not have governance structures modeled under the provisions of the Indian Reorganization Act of 1934.

Chapter Four will discuss federalism, tribal perspectives, and multi-sovereign relationships. Many governmental policies that were instituted were highly controversial and reveal painful episodes in our nation's history that are still experienced by tribes today.

NOTES

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¹⁴⁷ Ibid, 478.

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