



# Understanding Tribal Sovereignty and the Government-to-Government Relationship

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## *Learning Objectives*

- ◆ Gain a basic understanding of what "Tribal Sovereignty" means and what it means to us as Indian people.
  - ◆ The shaping of federal Indian policy.
  - ◆ Supreme Court decisions and how these cases shaped federal Indian policy.
  - ◆ Tribal sovereign powers.
  - ◆ Limitations to tribal sovereignty
- ◆ With tribal sovereignty comes responsibility.
  - ◆ What are those responsibilities?
  - ◆ How do we exercise our sovereignty?
  - ◆ How do we protect our sovereignty?

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## **KIVA** What is Sovereignty?

### ◆ Webster's definition of Sovereign:

*"Above or superior to all others; chief; greatest; supreme; supreme in power; rank; authority; independent of all others; a group of persons or a state that posses sovereign authority".*

### ◆ Webster's definition of Sovereignty:

*"The state or quality of being sovereign; the status; dominion; rule or power of a sovereign, supreme and independent political authority".*

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## **KIVA** Someone else's definition of Tribal Sovereignty

*"Tribal sovereignty means that, it's sovereign. I mean, you're a -you're a - you've been given sovereignty and you're viewed as a sovereign entity. And therefore the relationship between the federal government and tribes is one between sovereign entities."*

President George W. Bush, Circa 2004

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## **Sovereignty at its basic, is:**

- ◆ The lifeblood of Indian tribes - it permits tribes to decide on the matters that really count: children, families, crimes, finances, and land.
- ◆ The Inherent right or power to govern – to regulate itself – to set its own laws on their lands.
- ◆ A matter of “jurisdiction” (territory, personnel and subject matter).
- ◆ Limited by treaties, Supreme Court decisions, tribal constitutions, because of their “dependent status”, Congress’ plenary authority to legislate Indian affairs.

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## ***What does Tribal Sovereign Status Mean?***

- ☐ Entering into treaties with tribes as foreign nations & by allowing tribes to regulate their own internal affairs, the colonial powers & later the federal government recognized the sovereign status of Indian tribes.
- ☐ What does this mean today?
  - ☐ Tribes possess inherent governmental powers over all internal affairs.
  - ☐ Right to Self-Determination
  - ☐ States are precluded from interfering with tribes in their self-government.
  - ☐ “Government-to-Government” relationships .
  - ☐ Federal consultation and participation requirements.

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## Overview of Federal Indian Law and Policy

- ◆ Shifts in federal Indian law and policy.
- ◆ Two main views (two ends of the spectrum):
  - ◆ Tribes are enduring bodies for which a geographical base would have to be established and protected.
  - ◆ Tribes are or should be in the process of decline or disappearance; tribal members should be absorbed into the mass of non-Indian society.

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## Overview of Federal Indian Law and Policy

- ◆ Establishment of federal government as "protector" of Indian lands.
- ◆ U. S. Supreme Court decisions
  - ◆ Chief Justice John Marshall – "The Marshall Trilogy"
- ◆ Federal Indian case law sets the legal-political foundation on how the federal government deals with Indian tribes.

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## Themes in Indian Law

- ❑ Tribes are independent entities with inherent powers of self-government.
- ❑ Independence of tribes is subject to exceptionally great powers of Congress to regulate & modify the status of tribes.
- ❑ Power to deal with and regulate tribes is wholly federal. States are excluded unless Congress delegates power to them.
- ❑ Federal government has responsibility for the protection of the tribes & their property, including encroachment by the states and their citizens.

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## The “Marshall Trilogy”

- ◆ Johnson v. McIntosh (1823)
  - ◆ Ruling: “Laws of Discovery” gave discovering sovereigns a title good against all other Europeans and with it “the sole right of acquiring the soil from natives”.
  - ◆ “Doctrine of Discovery”.
  - ◆ Doctrine of “Indian Title” or “Aboriginal Title”
  - ◆ “Right of Occupancy” or “Possessory Interests (the right to possess ancestral lands but do not own it unless Congress gives them title to it).”

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## **The “Marshall Trilogy”**

### ◆ Cherokee Nation v. Georgia (1831)

- ◆ Ruling: Cherokee Tribe successfully documented that it was a “state”, but it cannot be deemed a “foreign state”.
- ◆ Tribes are more correctly denominated “Domestic Dependent Nations”.
- ◆ Relationship of a Guardian to a Ward (foundation for federal “Trust Responsibility”).

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## **The “Marshall Trilogy”**

### ◆ Worcester v. Georgia (1832)

- ◆ Ruling: The Cherokee Nation, then is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force”.
- ◆ This case laid the foundation for jurisdictional law excluding states from having any power over Indians.

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## What do these “powers” mean today?

- ◆ Tribal powers extend over both their members and their territory
- ◆ Power to determine and maintain its own form of tribal government.
- ◆ Power to determine tribal membership.
- ◆ Power to legislate and interpret own tribal laws and ordinances

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## What do these “powers” mean today?

- ◆ Power to administer justice.
- ◆ Power to exclude persons from tribal territory.
- ◆ Power over non-Indians.

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## KIVA Limitations of Tribal Powers

There are three fundamental principles concerning powers of Indian tribes:

- ◆ An Indian tribe possesses, in the first instance, all the powers of any sovereign state.
- ◆ Conquest renders the tribe subject to the legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe.
- ◆ These powers are subject to qualification by treaties and by express legislation of Congress.

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Why do I need to know this stuff?



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## How do we exercise our sovereignty?

- ◆ Being responsible citizens – as board members, commissioners, or members of our community:
  - ◆ Understand your roles and responsibilities as board members, be an informed member
  - ◆ Maintain accountability and integrity
  - ◆ Always being cognizant of your Mission Statement
  - ◆ Always being cognizant of your Values
  - ◆ Develop and maintain a Strategic Plan
  - ◆ Develop a Code of Ethics and follow them
- ◆ Create partnerships.

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## How do we exercise our sovereignty?

- ◆ Play a greater role in the shaping of Indian policy
  - ◆ Play a greater role in the federal Indian appropriations
  - ◆ Exercise your lobbying powers
- ◆ Take advantage of federal programs
  - ◆ Indian Self-Determination and Education Assistance Act
  - ◆ Native American Housing Assistance and Self-Determination Act

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## **KIVA How do we protect our sovereignty?**

- ◆ What are those tribal resources and values at risk?
  - ◆ Cultivate tribal culture. Incorporate tribal values into everyday activities.
  - ◆ Incorporate these values into tribal policies, organic documents, strategic planning processes.
  - ◆ Require program managers to be sensitive to these values.
  - ◆ Educate federal agency policy makers on your cultural values.

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## **KIVA How do we protect our sovereignty?**

- ◆ Take advantage of the Government-to-Government Relationships between the federal government, states, and local governments.
  - ◆ Create partnerships with federal, state, and local governments.
  - ◆ Memoranda of Agreements; Memoranda of Understanding; & Compacts
  - ◆ Model: "Statement of Relationship Between White Mountain Apache Tribe and the U.S. Fish & Wildlife Service"
  - ◆ A great opportunity to express your sovereignty (define your boundaries)

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## How do we protect our sovereignty?

- ◆ Develop best management practices (codes and ordinances).
  - ◆ Sensitive Species Recovery Plans
  - ◆ Water Quality Codes
  - ◆ Zoning Ordinances
  - ◆ Cultural and Historic Preservation Laws
  - ◆ Tribal Law and Order Codes

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## How do we protect our sovereignty?

- ◆ Develop meaningful economic development strategies.
- ◆ Be mindful that some federal statutes may not automatically apply to Indian tribes.
- ◆ Be mindful there will always be threats and challenges to tribal sovereignty by Congress, states and local governments.

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## KIVA What is Tribal Sovereignty?

◆ Felix Cohen on tribal sovereignty wrote, in part:

*"Perhaps the most basic principle of all Indian law...is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has 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, these tribes could no longer be safely permitted to handle. The statutes 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".*

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## Thank you for your time

"Of all rights that can belong to a tribe, sovereignty is doubtless the most precious"

*Emerich de Vattel, "The Law of Nations"*

"Wherever we went, the soldiers came to kill us, and it was all our own country. It was ours already when the Wasichus made the treaty with Red Cloud, that said it would be ours as long as grass should grow and water would flow. That was only eight winters ago, and they were chasing us now because we remembered and they forgot"

*Black Elk Speaks*

"We all must be incrementalists. We should not be daunted by the scope or duration of the undertaking. We should pledge to improve conditions by at least one notch each coming year"

*Charles F. Wilkinson*

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