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Understanding Tribal Sovereignty: An Essential Primer for Productive Native American Relations

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About Us



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Agenda

1. Introduction
2. Recognition of Tribal Sovereignty in the United States
3. Tribal Self-Determination and Self-Governance
4. Tribal Sovereignty and Municipal Governments
5. Contemporary Issues
6. Q&A

Introduction

- American Indian tribes possess ancient sovereignty. Tribal sovereignty is recognized and protected by the U.S. Constitution and Congressional policy.
- We aim to provide legal professionals in the continental United States with a primer on tribal sovereignty and its relationship to local governments in the continental United States.

Tribal Sovereignty in the United States

Tribal Sovereignty

- Tribal sovereignty is ancient.
- Before the American Revolution, the British ‘crown’ had authority to regulate Indian affairs.
- U.S. Constitution vests Congress with ‘plenary’ authority over Indian affairs.
- American Indian tribes remain “distinct, independent political communities, retaining their original natural rights” in matters of self-government.

Tribal Self-Determination & Self-Governance

Tribal Self-Determination & Self-Governance

- From 1776 to 1871, the United States entered into treaties with tribes.
- In 1824, United States created the Bureau of Indian Affairs.
- From 1870s to 1950s, Congressional policy was “uneven,” reaching its nadir in 1953 when it adopted House Concurrent Resolution 108.
- From 1960s to present, Self-Determination/Governance era.

Tribal Sovereignty & Municipal Governments

Tribal Sovereignty & Municipal Governments

Government to Government Relations

- Tribes have jurisdiction over nearly all levels of governmental service which lead to pervasive opportunities for consultation.
  - Tribes also can exercise co-management functions with state and federal agencies as well as federally delegated programs.
- Tribes have sovereign to sovereign relationships with states and the federal government.
  - Consultation is a formal two-way government-to-government dialogue between official representatives of the tribes and of the municipal government.

Tribal Sovereignty & Municipal Governments

Government-to-Government Relations cont.

- Informal, staff consultations are common.
- Best practice for municipal governments is to invest in positions/resources to become knowledgeable about the governing structure of the tribe(s), their governmental affairs functions, and state and intertribal coordination organizations, policies and liaison functions.

Tribal Sovereignty & Municipal Governments

Civil & Criminal Jurisdictional Issues

- Tribal Civil Jurisdiction: Tribes generally have exclusive authority to regulate and adjudicate relations among their members. Tribes retain sovereignty authority over non-members in certain circumstances. *See Montana v. United States*, 450 U.S. 544 (1981).
- State Civil Jurisdiction: Absent Congressional authorization, states generally lack jurisdiction in Indian country. States generally have jurisdiction over Indians outside of Indian country, subject to tribal sovereign immunity.

Tribal Sovereignty & Municipal Governments

Civil & Criminal Jurisdictional Issues cont.

- Tribal Criminal Jurisdiction: Tribes have inherent sovereign authority to punish their members. Tribes mostly lack criminal jurisdiction over non-Indians.
- State Criminal Jurisdiction: Absent Congressional authorization, states generally lack jurisdiction in Indian country. Public Law 280 contains a delegation of criminal jurisdiction to certain states.

Tribal Sovereignty & Municipal Governments

Taxation

- Tribal Taxes: Tribes have sovereign authority to impose taxes on non-Indians for activity on trust lands. The *Montana* test applies to (and limits) taxation of non-Indians on fee lands.
- State and Local Taxes: Absent Congressional authorization, states generally lack the power to tax Indian tribes and their members in Indian country.

Contemporary Issues

Contemporary Issues

Infrastructure Investment and Jobs Act of 2021

- Inadvertent Discovery of Native American Human Remains and Cultural Items: Municipal governments should be familiar with applicable federal and state laws.
- Rights-of-Way Over Indian Lands: Projects requiring acquisition of rights-of-way over Indian land will require compliance with 25 C.F.R. Part 162. These grants are issued by the BIA but require a majority of Indian landholder consent.

Contemporary Issues

Fee to Trust Land Acquisitions

- Reconstituting Indian country is a central national policy to promote tribal self-determination and self-governance.
- This process, administered by Interior, is governed by 25 CFR Part 151, which addresses discretionary on-reservation (including contiguous) and off-reservation acquisitions.
- The process considers the need of the tribe for additional land, the purposes for which the land will be used, the impact (if any) on state and local property taxes, jurisdictional problems and potential land use conflicts, and the ability of the BIA to discharge its trust responsibilities.

Contemporary Issues

Fee to Trust Land Acquisitions cont.

- Consultation is required with state and local governments, including Tribal governments, having regulatory jurisdiction over the proposed acquisition property.
- The BIA has initiated consultation with tribes on potential revisions to 25 CFR Part 151.

Questions?

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