Working with Indian Tribes: A Primer for Consultations

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Chronology

- 1608-1830: Earliest treaties
- 1830-1850: Removal
- 1850-1871: Reduction of Indian land
- 1887-1909: Assimilation & allotment era
- 1934: Indian Reorganization Act
- 1949-1970: Termination
- 1970: The self-determination era
- 1990: The Federal *Era of Devolution*
Earliest Treaties

- Since the British colonial era, Tribes have reserved certain lands for their own use, while selling or ceding certain lands to non-Indian governments.

- Land that Tribal governments have withheld from sale have been called “Indian reservations”
Removal (1830-1860)

- “The Indian Question”: Increasing conflicts between the Tribes and the growing colonies

- Jefferson proposed, and Jackson disposed the “Removal Policy”

- Congress passed the Indian Removal Act in 1830
Removal (1830-1860)

- The Supreme Court reviewed the issues in the “Cherokee Cases”:
  - Johnson v. McIntosh (1823): prior occupancy
  - Cherokee Nation v. Georgia (1831): DDN
  - Worcester v. Georgia (1832): Federal jurisdiction

- Recognized “domestic dependent nations”, tribal self-government, and federal control over Indian affairs
Removal (1830-1860)

- “Trail of Tears”: Cherokee removed in winter with few provisions: 4-8,000 died
- Many other tribes also removed: 11 major tribes and many smaller ones
- Little oversight and control, and the removal process is filled with “bribery, perjury and forgery”
- Cultural impacts of Removal: Cosmology, ancestors, stories, and traditional knowledge
Reduction of Indian Land (1850-1871)

- Indian Wars in the West
- Intense Treaty negotiations, resulting in large reductions in Indian territories
- Many treaties re-negotiated, forcing further reductions in the Indian Estate
- Some tribes remained in portions of ancestral homelands, but many forced to remove to and co-inhabit new territories
Assimilation & Allotment (1887-1909)

- Dawes Act, or the Indian General Allotment Act of 1887 (1887-1934)

- The “Allotment” system divided tribal land into individual parcels and privatized communal property to assimilate tribes into non-Indian culture

- Many of the parcels were sold or given to non-Indians
Assimilation & Allotment (1887-1909)

- Indian homelands, reserved through treaties, were much reduced
  - 150 million acres in 1887, itself a fraction of ancestral land base, reduced to 50 million

- Failed to achieve goals of economic self-sufficiency or assimilation

- Created a jurisdictional nightmare with “checkerboard reservations” of tribal lands and fee lands
Indian Reorganization Act (1934)

- IRA, or Wheeler-Howard Act
- Tribal New Deal

- Positive effects: tribal constitutions, tribal laws, tribal membership rules, economic self-development

- Negative effects: Western style governance and goals disrupted traditional governance
Termination (1949-1970)

- Hoover Commission Report of 1949, urges assimilation and the end of trust status
- House Termination Resolution in 1953
- Public Law 290 allows state criminal law jurisdiction in several states
- Congress adopts tribal termination policy in 1954
Wardship and Self-Determination

- Federal Indian law and policy to this point reflects tension in the concepts of wardship and self-determination

- History of US-Tribal relations to this point not particularly exemplary
The Self-determination Era (1970)

- Nixon’s special message to congress on July 8, 1970
  - Declares “New Era” of government-to-government tribal relations
  - Calls for repeal of the Termination Act
  - Tribal self-administration of BIA programs and tribal education
  - Increased tribal representation in BIA, Interior, and control over trust lands
Federal *Era of Devolution* (1990)

- Following Nixon, successive presidents make statements on Indian Policy
  - All recognize tribal sovereign status

- Congress reinforces principle of government-to-government relations in findings (e.g. Indian Tribal Justice Act (Public Law 103-176))
Federal *Era of Devolution* (1990)

- Memorandum on Government-to-Government Relations with Native American Tribal Governments (1994)
- Executive Order 13084 on Tribal Consultation and Coordination with Indian tribal Governments (May 1998)
- Executive Order on Consultation and Cooperation with Tribal Governments (November, 2000)
Important Terminology

- Ceded territory is off-reservation land where Tribes have retained treaty rights to hunt, fish, and gather other resources.

- The federal governments’ trust responsibility includes protecting treaty rights whether on or off a reservation.
Key Term: “Trust Responsibly”

- Trust responsibility comes from Indian treaties, statutes, executive orders, and the historical relationship between the U.S. and Indian Tribes.

- Relationship was not created by a single document nor is its scope defined in any one place.
Key Term: “Trust Responsibly” (cont.)

- It requires that the federal government consider the best interests of the Tribes in its dealings with them, and when taking actions that may affect them.

- Every federal Department and Agency, including the military, is responsible for upholding the federal trust responsibility to the Tribal governments.
Tribal Sovereignty

- The most basic of all Indian rights, the right to self-government, is not a right that has been granted by Congress, the President, or the Courts.

- Rather, Tribes derive their authority to govern from their status as independent, separate, political entities.
Tribal Sovereignty (cont.)

- Tribes generally have all the powers of self-government of any sovereign

- Recognized rights and reserved rights
  - Rights are conferred by tribes to the federal government, not granted
  - Rights not conferred by treaty are reserved

- Only limitations to these powers stem from modifications of treaty or by express legislation of Congress (Cohen, Handbook of Federal Indian Law 241-42 (1982); Lone Wolf v. Hitchcock (1902))
Tribal Sovereignty (cont.)

- U.S. Supreme Court began discussing tribal sovereignty as early as 1830s

- From this point forward, the Court has generally followed a course of upholding Indian sovereignty and the ability of tribes to exercise sovereign powers.
Canons of Construction

- Originated in *Worcester v. Georgia*, based on trust relationship

- Treaties are to be interpreted as the tribes would have understood them at the time of the negotiations

- “A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians.”
Tribal Authorities

- Tribes have general power to:
  - Make laws governing conduct of Indians on reservations
  - Establish bodies such as Tribal policy and courts to enforce laws and administer justice
Tribal Authorities (cont.)

- Tribes have general power to:
  - Regulate hunting and fishing, land use, environmental pollution, and other activities of non-Indians on fee lands within reservations that may have some direct effect on the political integrity, economic security, health, or welfare of the Tribe.
Tribal Authorities (cont.)

- States have no authority over Indian affairs, Tribal governments, or reservation lands
  - Worceter v. Georgia (1832)
Tribal Roles

- Like national governments, they assert jurisdiction over their people and land; are landowners.
- Like state/local governments, they administer multiple service programs.
- Like a business, they manage resources, products, and services for profit.
### Comparison of Indian Tribes to States

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<th><strong>Indian Tribes</strong></th>
<th><strong>States</strong></th>
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<tbody>
<tr>
<td>Independent sovereign government</td>
<td>X</td>
<td></td>
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<tr>
<td>Exercise civil and criminal jurisdiction</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Regulate land use</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Own and operate for-profit businesses</td>
<td>X</td>
<td></td>
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<tr>
<td>Manage, regulate, and protect natural resources</td>
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Principles for Involving Indian Tribes

- Work with Tribes on a government-to-government basis

- Recognize Tribes as primary parties for setting standards, making policy, and managing programs on reservations

- Take appropriate steps to remove procedural or institutional impediments to their direct involvement
Principles for Involving Indian Tribes (cont.)

- Assure that Tribal concerns and interests are considered whenever a proposed action or decision will affect the reservation environment.

- Encourage communication between the Tribe(s), lead agency, and cooperating agencies.
Principles for Involving Indian Tribes (cont.)

- Take steps to level the playing field
Tribal and National Homeland Security

- Border Security / Security Monitoring
  - Several tribes are located on borders with Canada and Mexico
  - Many tribes are adjacent to or near national security areas and bases
  - Tribal borders, tribal coastlines, tribal lands and reserved lands pose security risks as access points
Tribal and National Homeland Security

- DOD and DHS activities may affect tribal trust resources
- Linkages between environmental, political, economic and cultural security with national security
Tribal and National Homeland Security

- DHS Requires Collaboration with tribes
- DHS requires its agencies to Seek Out and Coordinate with tribes early in the planning process
- DHS requires its agencies to coordinate EA/EIS as it would with a State or federal government
Tribal and National Homeland Security

- DHS requires its agencies to invite tribes to be a cooperating agency when the tribe has special expertise or jurisdiction over resources affected by the action.
- DHS cannot disclose certain tribal information that is protected by law.
- Tribes by definition of the DHS regulations can be cooperating agencies.
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