Origins and Development
Of Tribal Sovereignty
Part 2

May 22, 2019
Sovereignty

Sovereignty is the ability to make laws and be governed by them. The text defines it as the inherent right or power to govern and plan. p. 72

At the time of the European discovery of America, the tribes were sovereign by nature and necessity; they conducted their own affairs and depended upon no outside source of power to legitimize their acts of government.

The colonial powers and federal government recognized the sovereign status of the tribes.
Marshall did emphasize the affirmative governmental power of the tribes.

In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that the Cherokees could not be recognized as a “foreign state”.

Marshall did acknowledge that tribes qualify as a “state”: “So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion in a majority of the judges, been completely successful.

*This idea of tribes as states can be useful for tribes. For example, under CWA, tribes can be treated as states (TAS).*
Tribes can apply for TAS/CWA

Clean Water Act
Because a tribe is a sovereign, it is in a very different position from a city or other subdivision of a state. When a question arises as to the power of a city to enact a particular regulation, there must be some showing that the state has conferred such a power to the city; the state, no the city, is the sovereign body from which the power must flow.

A tribe, on the other hand, is its own source of power. Note. Why you need MOA.
A tribe’s right to establish a court or levy a tax is not subject to attack on the ground that Congress has not authorized the tribe to take these actions.

The tribe is sovereign and needs no authority from the federal government. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir.1956).

The relevant question is whether any limitation exists to prevent the tribe from acting within the sphere of its sovereignty, not whether any authority exists to permit a tribe to act.
Issue: This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within the reservation.

Crow Indians had the sole right to use and occupy the reserved land under the 1868 treaty.

Court concluded that the title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union.

The Court held that the tribe could not regulate non-Indian fishing and duck hunting on the Big Horn River.
In 1981, the Court held that where there was no showing that tribal interests were affected, a tribe lacked inherent power to regulate hunting and fishing by non-Indians on non-Indian-owned land within its reservation. Montana v. United States, 450 U.S. 544 (1981).

Ownership of land within a reservation had not previously been held relevant to determinations of jurisdiction.

The Court recited that tribes retained inherent power to protect self-government and to control “internal relations,” which the Court described quite narrowly.
In Montana, the Court stated: “But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”

The Court then added two qualifications to its ruling. Tribes retained inherent sovereign power, even on fee lands: (1) to regulate by taxation, licensing or other means, activities of non-members who enter into consensual relationships with the tribe or its members, as by commercial dealings; and (2) to regulate conduct of non-Indians that threatens or directly affects “the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 565-66.
Although Montana announced an exception to the general rule that a tribe has governmental power over its territory unless some statute or treaty takes it away, subsequent Supreme Court opinions have tended to refer to the “Montana rule,” not the “Montana exception.”

As a “rule” limiting inherent tribal sovereignty, it continues to gain strength; indeed it appears to have become the foundation case for contemporary Indian law in the Supreme Court.

Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances. (Oliphant v. Suquamish the Court held that tribes lacked criminal JX over nonmembers)
This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members.

In 1990, petitioner Fredericks and respondent Lyle Stockert were in a traffic accident on North Dakota state highway running through the Fort Berthold Indian reservation.

The highway strip is open to the public and North Dakota maintains the road under a right-of-way granted by the United States to the State’s Highway Department.

Fredericks automobile collided with a gravel truck driven by Stockert and owned by A-1 Contractors.
In *Strate*, the Court held that a tribal court lacked jurisdiction over a civil case between nonmembers traversing the reservation. The Court held that the grant of right-of-way to the state, rendered the highway the equivalent of non-Indian fee land. 520 U.S. at 454.

The Court stated that “Montana thus described a general rule that absent a different congressional direction, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation.” *The tribe’s interest in safe driving within the reservation was NOT sufficient to qualify for the Second Montana exception (matters affecting the tribe’s political integrity, economic security, health, or welfare) because such construction would “would severely shrink the [Montana] rule.”* WHAT?
In Atkinson Trading Co. v. Shirley, the Supreme Court held that a tribe under the rule of Montana, lacked the power to tax non-Indian activities on non-Indian land within the reservation.

The tax was a hotel occupancy tax imposed on hotel guests but collected by the resident hotel owner. Even though the hotel guests enjoyed the protection of tribal police, fire and emergency services the Court rejected arguments that there was a consensual relationship with the tribe. (to bring them within the first Montana exception)
Respondent Hicks is a member of the Fallon Paiute-Shoshone Tribes of western Nevada. He lives on the reservation and was suspected of having killed a California bighorn sheep off reservation.

A State game warden obtained a state court a search warrant and a search warrant obtained from tribal court.

Respondent’s home was unsuccessfully searched by three wardens and tribal officers.

Respondent claimed there was sheep-heads were damaged and they exceeded the bounds of their warrant and sued against state wardens and tribal officers and judge.
In 2001, the Court held that a tribal court had no jurisdiction over tort claims against state officers for allegedly excessive actions they took in executing a search warrant at the residence of a tribal member on trust land within a reservation. The officers were investigating an alleged off-reservation game violation. The Indian tribal member whose property had been searched and allegedly damaged brought a tort suit in tribal court for trespass, abuse of process, and violation of civil rights.

The Supreme Court held that the tribe had no jurisdiction to regulate non-Indian officers for their conduct in conducting a search arising from an alleged off-reservation crime even thought the search was of an Indian residence on trust land. *ownership of land is only one factor.
Hicks is a very expansive opinion in applying Montana to limit tribal sovereign power, and to extend state power, in Indian country. The decision gives no weight to the fact that the plaintiff was a tribal member.

It also seems to ignore the cooperative arrangements reflected in the state court’s requirement in Hicks of a tribal warrant, or in tribal-state extradition agreements that have been worked out during the past fifty years.
Hicks is thus the culmination of a series of cases that has reversed the usual presumption regarding sovereignty when the tribe’s power over nonmember is concerned.

Instead of presuming that tribal power exists, and searching to see whether statutes or treaties negate that presumption, the Court presumes that tribal power over nonmembers is absent unless one of the Montana exceptions applies or Congress has otherwise conferred the power. Hicks, 533 U.S. at 359-60.
Tribal Sovereignty has operated to a considerable degree as a shield against intrusions of state law into Indian country.
Chief Justice Marshall’s view was that state laws could simply “have no force” in Indian territory. Worcester v. Georgia, 31 U.S.(6 Pet.) 515, 561(1832).

That rule was modified some fifty years later, however, to permit state law to apply to a crime by a non-Indian against a non-Indian on an Indian reservation. United States v. McBratney, 104 U.S. 621(1881).

But the Supreme Court has almost always held the line against permitting state law to apply to Indians in Indian country.
In *Williams v. Lee*, 358 U.S. 217 (1959), a unanimous court ruled that state courts had no jurisdiction over a civil claim by a non-Indian against an Indian for a transaction arising on the Navajo reservation.

The Court stated that state law had been permitted to intrude only where "essential tribal relations" were not involved, and that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of the reservation Indians to make their own laws and be governed by them."

To permit state court jurisdiction in this instance, said the Court, "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 220.
Because Congress is rarely explicit in preemting state law, the preemption analysis following McClanahan often involves a weighing and balancing of the competing state and federal interests.

“State jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.” New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

Congressional Acts – General applicability
As a consequence, most cases involving the application of state law in Indian Country are decided on preemption grounds.

In general, the Supreme Court in applying its preemption analysis has considered tribal self-determination to be a weighty federal interest.

It has declined, however, to entertain a presumption that all on-reservation activities affecting the tribes are beyond the reach of the state power. Ramah Navajo School Bd.
Because preemption analysis is highly fact-specific and depends on the interplay of the particular statutes, treaties, regulations, and interests involved, it is less predictable that a more formalistic prescription for protecting Indian sovereignty.

When preemption is employed, generalizations become more suspect, and cases must be analyzed in light of their own facts.
The States have been categorically precluded from directly taxing reservation lands or reservation Indians. See County of Yakima.

States also have been largely unsuccessful in taxing non-Indian contractors doing business with tribes on reservation. White Mtn. Apache

States have succeeded in taxing cigarette sales to non-members of the tribes on reservations, and even requiring the tribal seller to collect and remit the tax. Washington v. Colville Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).
What states can and cannot regulate

- A state has been held not preempted from regulating liquor sales by a tribal member on reservation. Rice v. Rehner, 463 U.S. 713 (1983)

- States have been preempted, however, from regulating hunting and fishing by non-Indians on the reservation when the tribe regulated extensively. New Mexico v. Mescalero Apache.

- States have been preempted from regulating high stakes bingo and poker games operated by tribes on reservation. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
Protection of tribal sovereignty under the preemption analysis of McClanahan has therefore been substantial but not unwavering.

The one area in which the Supreme Court appears willing to protect tribal sovereignty from state intrusion without weighing the importance of the state interest. *The state courts will not be allowed to exercise civil jurisdiction that interferes with tribal court jurisdiction involving tribal members on the reservation. Williams v Lee.

The Supreme Court’s decision in Nevada v. Hicks expanded the reach of state law into Indian country by upholding the power of state officers to execute a search warrant at an Indian residence on Indian trust land within a reservation when the officers were investigating an off reservation act.
We can argue about the extent to which courts may properly limit tribal sovereignty, there has never been any doubt that Congress is free to do so.

Congress’ power over Indian affairs is plenary. It has been deemed to arise from the Indian Commerce Clause or even from the fact of conquest.

Plenary power is subject to constitutional restraint when, for example, Congress deals with recognized Indian property interests. See Youpee.
The fact that tribes enjoy the sovereign’s common law immunity from suit is well established.

The immunity applies to activities of the tribe whether on or off the reservation, and whether the activity is deemed governmental or commercial. The immunity extends to agencies of the tribes. Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th cir.2000).

It applies in both state and federal court.
Tribal sovereign immunity is a controversial subject, partly because tribal immunity retains its full vitality in an era when other governments are limiting their general immunity.

The Supreme Court has noted that the immunity can operate harshly and might need revision, but it has left any change in the doctrine to Congress. Kiowa, 523 U.S. at 758-50.

Tribes need to be careful and protect sovereign immunity with good practices.
Although Congress has occasionally waived tribal immunity for specific purpose, it has made no changes in the overall doctrine.

Thus, states that have abandoned their own immunity from tort liability must nevertheless honor the immunity of the tribes. See Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968).
Tribes are not immune from suits by the United States. EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1075 (9th Cir. 2001).

The United States remains immune, however, from suit in tribal court. U.S. v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986). States are also immune from suit in tribal court.
If the tribal official acts beyond his or her authority, or beyond the authority that the tribe had the power legally to confer, the official may be sued. See Dawavendewa v. Salt River Project, 276 F.3d 1150, (2002).

However, if tribal officials act “within” the scope of their lawful authority and relief would run against the tribe itself, their share the tribe’s immunity from suit; the suit is one against the officials in their official capacity. See Fletcher v. United States, 116 F.3d 1315, 1324 (10 cir.1997).
It is clear that Congress can waive a tribe’s immunity from suit, but that waiver must be clearly expressed.

Statutes are all different: the Hazardous Materials Transportation Act clearly indicates that its enforcement mechanism applies to Indian Tribes, tribal sovereign immunity cannot bar enforcement of the statute.
There is no doubt that a tribe can waive its own immunity. One method is by contract. See Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992).

Although the intention to waive must be clear, the waiver need not include the precise term “sovereign immunity.”

Sokaogon Gaming
The Supreme Court has held that a tribe waives its immunity by entering a form construction contract with a clause requiring arbitration of any disputes and agreeing that arbitration awards may be enforced “in any court having jurisdiction.” C & L Enterprises, Inc. V. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001).

A waiver of immunity arising from an arbitration agreement is limited to arbitration and its enforcement.
If a tribally-chartered corporation operates independently of the tribal government and does not engage in governmental functions, however, it may not qualify for immunity in the first place because it is not an arm of the tribe. See Dixon v. Picopa Constr. Co., 160 Ari. 251, 772 P.2d 1104 (1989).

A tribe may also waive its immunity by its conduct, particularly in litigation. By bringing an action, a tribe consents to a full adjudication of the claim it sues upon. United States v. Oregon
Lands presently set aside for Indians, whether by treaty, statute or executive order, may be held in various patterns of tenure.

Nearly all of the land is in trust, with the United States holding naked legal title and the Indians enjoying the beneficial interest.

When a tribe purchases fee land, there is no restraint on alienability.
The Secretary of the Interior is authorized, however, to acquire lands in trust for the benefit of Indians. 25 U.S.C. § 465.

The Secretary may accept land in trust for a tribe when it is within a reservation, is already owned by the tribe or when the Secretary determines that “acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. §§ 151.3
Communal tribal ownership: the United States holds legal title, and the undivided beneficial interest is held by the tribe as a single entity.

There are two major advantages to this type of ownership. The first is that the land base of the tribe is given maximum protection because continuity of beneficial ownership.

The second is management of the land is relatively easy when decisions over leasing and development can be made by a single owner, even though that owner must go through its own form of institutional decision making.
Federally recognized tribe refers to a tribe that had a formal political relationship with the U.S. government by treaty, agreement, act of Congress, executive order, or court decision.

A non-federally recognized tribe is one with which the U.S. government does not acknowledge a political relationship.

Benefits of federal recognition: is that services, assistance, and funds are available to recognized tribes through BIA and IHS.
Tribes have a right to make their own laws and be governed by them. Plan for their people.

Indian tribes are distinct political entities – governments with executive, legislative and judicial powers.

Issues that arise will frequently depend on questions of tribal tradition and customs which tribal forums may be in a better position to evaluate than federal courts. (Santa Clara Pueblo v. Martine 1978)

European governments negotiated treaties with the Indians – a practice followed by Great Britain.
Contact information

- Margo Hill, JD – mhill86@ewu.edu or call 509-828-1269

EWU Tribal Planning Programs