Intersections of Sovereignty and Transportation

- Exercise of Tribal Sovereignty
  - Develop Tribal Transp. Plans
  - Participate in Consultation
  - Develop Partnerships with Local Jurisdictions
  - Build and Maintain Roads Running Through Tribal Lands
  - Tribal Employment Rights Ordinances
  - Right of Way
  - Emergency Response

(c) NIJC 2016

www.nijc.org/ttap.html
Spheres of interest over Roads in Indian Country

Criminal Jx (Veh. Mansltr.)

Civil Adj. Jx (Car Accident)

Civil Regulatory Jx (TERO, Taxation, Permits)

Liability

Non-Owner Users

Owners, Rights & Docs.

Land Type
Sovereignty refers to the supreme power by which an independent state or nation is governed, i.e. the power to make laws and be governed by them, collect taxes, wage war, form treaties etc.

Pursuant to federal case law tribes possess “quasi-sovereign” status over their members and territory, meaning that they have internal rather than external sovereign powers.

“A Nation Within A Nation” is a status different from any other groups in the U.S.
Sovereignty Acknowledged

* Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.
  * The U.S. only negotiates treaties with sovereign entities.
  * The U.S. may expand or contracts its recognition of tribal sovereign authority.
Marshall Trilogy: U.S. Supreme Court Affirms:

- Johnson v. M’Intosh (1823): Ownership of the land is vested in the U.S. pursuant to the Doctrine of Discovery. Tribes have a right to Use and Occupy the Land.

- Cherokee Nation v. GA (1831): Tribes are Domestic Dependent Nations (not foreign nations).

- Worcester v. GA (1832): Tribes are distinct political societies subject to federal jurisdiction; state may exercise jurisdiction over Indian country only with the permission of Congress.

- Tribal Sovereignty, a limited sovereignty, is the right of tribes to make their own laws and be governed by those laws, subject only to the Plenary Power of Congress.
Sovereignty - Defined

• Sovereignty is the Right of Self-Governance.
  • It is the right of an entity to make its own laws and to be governed by them.

• It’s important to know the difference between Sovereignty and Sovereign Immunity.
  • Sovereign immunity is the right to be free from suit; the right not be sued in court.
  • “Sovereign” cannot be sued because the Sovereign’s assets are the assets of the community as a whole.
## Tribal Sovereign Status

<table>
<thead>
<tr>
<th>Inherent Tribal Sovereign Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>* Possess Inherent Sovereignty by virtue of being.</td>
</tr>
<tr>
<td>* Subject to Tribal Powers only.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Legal Sovereign Status of Tribes</th>
</tr>
</thead>
<tbody>
<tr>
<td>* Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.</td>
</tr>
<tr>
<td>* Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.</td>
</tr>
</tbody>
</table>
**Tribal Sovereign Status**

*A Working Definition of Sovereignty*

* The right to make your own laws and to be governed by those laws.

*Tribal Sovereignty may be viewed as:*

<table>
<thead>
<tr>
<th>Internal Sovereignty Includes:</th>
<th>External Sovereignty Includes:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Right to make laws, enforce laws and interpret laws;</td>
<td>• Right to enter into treaties with nations other than the U.S.</td>
</tr>
<tr>
<td>• Right to determine membership</td>
<td></td>
</tr>
</tbody>
</table>
Initially this responsibility was described as the relationship of a “guardian to its ward.”

Now it is called the Trust Relationship.

Pursuant to the Trust Relationship, the federal government owes a “fiduciary duty” to the tribes and their members to protect their interests in the lands and resources held for their benefit.
Trust Relationship

BENEFICIARY

Entity entitled to receive the principal
And/or income from the trust

TRIBES

TRUSTEE

Creates Trust, Manages Assets, Holds Fiduciary Responsibility
Reservation Lands

THE FEDERAL GOVERNMENT

SETTLOR

Entity that creates a Trust

THE FEDERAL GOVERNMENT

THE FEDERAL GOVERNMENT

(c) NIJC 2016

www.nijc.org/ttap.html
Removal and Relocation

Removal and Relocation (1828-1887), began when the Indian Removal Act of 1830 was passed in order to move Indian people westward away from the approaching white civilization. During this period, various treaties began establishing reservations. The structure of these agreements was repeatedly violated by westward expansion.
The Doctrine of Plenary Power

U.S. courts began developing legal fictions that worked to diminish tribal sovereign powers. The doctrine of Plenary Power stated that the Congress has broad authority over Indian tribes. (*Ex parte Crow Dog*, *Major Crimes Act*, *Kagama v. U.S.*)
Allotment and Assimilation (1887-1928). During this period two-thirds of the reservation lands were reduced through allotment; jurisdiction over felony crimes became federal; the boarding school system was developed and other legislation was passed to promote assimilation.
The Allotment Act – Introduced formally and legally the concept of blood quantum as a means of identifying who was an Indian.

Male heads of households were deeded allotted lands.

To establish who would control/own these land allotments, American Indians were now defined by full-blood and mixed-blood.
During the mid to late 1800’s the federal government began a new policy of “assimilating” American Indians. They removed thousands of Indian children from their families and tribes and placing them in military style boarding schools. At the boarding schools the English language was the only language allowed to be spoken. They believed that if they erased tribal languages, customs and practices they would also erase Indian cultures and ways of life.
“With the aim of ‘equality before the law’ in mind our course should rightly be no other. Firm and constant consideration for those of Indian ancestry should lead us all to work diligently and carefully for the full realization of their national citizenship with all other Americans. Following in the footsteps of the Emancipation Proclamation of 94 years ago, I see the following words emblazoned in letters of fire above the heads of the Indians - “These people shall be free!””

-Senator Arthur V. Watkins (R-Utah),
Chairman, Indian Affairs Subcommittee
The Indian Reorganization Act of 1934 & Tribal Self Government

* The IRA provided a framework for the exercise of political authority by tribes.
* However, that framework has had negative impacts upon tribes through
  • Creating One Dimensional Governments
  • Imposing Anglo American Structure and Policies
  • Adopting Boilerplate Constitutions
  • Incorporating BIA Approval Powers Clauses
The Indian Reorganization Act 1934

* The primary thrust of the law was to stabilize Indian land holdings by ending new allotments and extending the trust period for existing ones.
* Sought to promote self governance by encouraging the adoption of constitutions and to form federally chartered corporations.
* Legislated a hiring preference for Indians in the BIA.
* Established a revolving loan fund for tribal development and allowed the Secretary of Interior to accept additional tribal lands into trust.
* 181 Tribes accepted the IRA, 77 Tribes rejected it.
Tribal Governmental Powers

* **Power to Establish a Form of Government**
  * Can adopt whatever form that suits tribal practical, cultural and religious needs

* **Power to Determine Membership**
  * Descendancy, Residency, Blood Quantum, Birth to Enrolled Member, Adoption, Naturalization, Prohibition Against Dual Enrollment

* **Police Power**
  * Can regulate conduct of individuals within their jurisdiction, Public Law 280 discourages but does not limit

* **Power to Administer Justice**
  * Statutory limitation to criminal sentencing power
Tribal Governmental Powers

• Power to Exclude Persons from the Reservation
  * Does not apply to non-members with federal land patents

• Power to Charter Business Organizations
  * Tribally chartered businesses hold the same status as the tribe for purposes of federal income tax exemptions and sovereign immunity from suit

• Sovereign Immunity
  * Can not be sued without an “unequivocally expressed waiver” – Current Issue for Federal Courts
Modern Tribal Governance

- Tribal Constitution
- Legislative Process and Record
- Code of Laws, Ordinances, Resolutions
- Consistency establishes the community standard.

(c) NIJC 2016
Jurisdiction:
Use it or Lose it!
Types of Jurisdiction

Jurisdiction

Civil Jurisdiction
- Plaintiff v. Defendant
- Offense against Person
- Fines, Injunctions

Civil Regulatory
- Gov’t Agency v. Person

Civil Adjudicatory
- Person v. Person

Criminal Jurisdiction
- Government v. Defendant
- Offense against Community
- Prison, Fine, Injunctions
Spheres of interest over Roads in Indian Country

- Criminal Jx (Veh. Mansltr.)
- Civil Adj. Jx (Car Accident)
- Civil Regulatory Jx (TERO, Taxation, Permits)
- Liability
- Non-Owner Users
- Owners, Rights & Docs.
- Land Type
Consultation: meaningful and timely discussion in an understandable language with tribal governments during the development of:

- Regulations,
- Policies,
- Programs,
- Plans, or
- Matters

that significantly or uniquely affect federally and non-federal recognized American Indian and Alaska Native tribes and their governments.
That’s it!

Thank you for your time!

Raquelle Myers

nijc@aol.com