

Environmental Justice in Indian Country

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Framework of Presentation

- Tribal Sovereignty
- Federal-Tribal Trust Relationship
- Indian Reservations – Separate and Apart
- Jurisdictional Conflicts
- Consultation
- Tribal Transit – A need for Intergovernmental Cooperation & Collaboration



Tribal Sovereignty

- A Working Definition of Sovereignty
 - The right to make your own laws and to be governed by those laws.



Tribal Sovereignty

- **Inherent Sovereignty of Tribes**
 - Possess Inherent Sovereignty by virtue of being.
 - Subject to Tribal Powers only.
- **Legal Sovereign Status of Tribes**
 - Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.
 - Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.



Tribal Sovereignty

- Tribal Sovereignty may be viewed as:

Internal Sovereignty Includes:

- Right to make laws, enforce laws and interpret laws;
- Right to determine membership

External Sovereignty Includes:

- Right to enter into treaties with nations other than the U.S.



Federal – Tribal Trust Relationship



Trust Relationship

- A legal trust comes to an end. The Trust Relationship will end only when the tribes cease to exist (legally or otherwise).

Trustee = all federal branches of government

Res (lands and resources held in trust for Tribes or their members)

Beneficiary = Tribes and their Members



Indian Reservations

Separate and Apart



Indian Reservations

- 562 Federally recognized Indian Tribes in the United States.
- 60 million acres of land held in trust by the U.S. for Indian Tribes and their Members.
- There is great variation in the populations and land holdings for each tribe.
- The Indian Reservation Roads are public roads which provide access to and within Indian reservations, Indian trust land, restricted Indian land, and Alaska native villages.
 - Approximately 25,000 miles are under the jurisdiction of BIA and tribes and another 24,000 are under State and local ownership.
- Some tribes have transportation programs but many do not.



Jurisdictional Conflicts



Federal Policy Impacts upon Land and Jurisdiction in Indian Country

- Land Cession Agreements
- Treaties
- Illegal appropriation
- General Allotment Act
- Termination Plans



General Allotment Act (Dawes Act) of 1887

Checker-boarding of Indian Lands

I	NI	I	Tribal	Trust
NI	NI	NI	Lands	
I	NI	I	NI	I
Land			I	NI
Patents			NI	I



Land Holdings and Jurisdiction

- Lands held in Trust
 - subject to tribal and federal regulatory jurisdiction,
 - no state regulatory jurisdiction, even in P.L. 280 state
- Lands held in Trust for an Individual Indian
 - (Original allotted lands); same as above
- Lands held in Fee
 - subject to state regulatory jurisdiction
 - By an Indian
 - By a non-Indian
 - By the tribe



These jurisdictional conflicts involving road ownership end up in the Supreme Court and Impact Federal Indian Law

- *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997).



Strate v. A-1 Contractors (1997)

Addressing the jurisdiction of a tribal court over an action arising out of an auto accident involving non-Indians on a state highway right-of way on the Ft. Berthold Reservation, ND, **the Court held that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction**, finding that subject to controlling provisions in treaties and statutes, and the exceptions outlined in Montana v. U.S., the civil authority of Indian tribes and tribal courts does not extend to the actions of non-tribal members on non-Indian fee lands.



Montana Test for Tribal Civil Regulatory Jurisdiction on Non-Indian owned Lands within a Reservation

1. Is there a consensual relationship between the non-Indian and the Tribe?
(May include contracts or other dealings.) **OR**
2. Does the Non-Indian's activity threaten or have a direct impact upon:
 - a. Economic Security of the Tribe,
 - b. Political Integrity of the Tribe, or
 - c. Health, Safety or Welfare of the Tribe.



Consultation



Government-to-Government vs. Consultation

- Government-to-Government
 - A policy that seeks governmental partnerships
- Consultation
 - A statutory task (i.e., sec. 106, SB 18, presidential proclamations)
 - Consultation is defined generally as a meaningful exchange of ideas and negotiations to resolve issues at hand



Consultation Tips

- Consultation is not the basis of a gov-to- gov relationship.
- Don't respond to mandates. Do what is right!
- Communicate (environmental justice)
- Create mutually acceptable protocols.
- Indian view – consultation includes negotiation – a give and take. Mutual Respect – face to face in a time sufficient environment.
- Don't regard consultation as written notice --- no e-mail.
- Seek to end the consultation session in mutual agreement.



Regional & Local Planning Organizations

- Some are engaged in outreach to tribal governments.
- Others are extremely resistant.



Tribal Transit

A Need for Intergovernmental
Cooperation & Collaboration



Tribal Transit

- New supplemental funding for tribal transit through Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)
- Working relationships between tribal governments and the state DOTs vary from adversarial to partnerships.

