OVERVIEW OF FEDERAL INDIAN LAW

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Prior to European Contact

- Indigenous peoples inhabited the Americas for thousands of years
  - Population estimates vary – at least 12 million w/ > 500 different languages, many complex cultures
- Different concept of the land
- Spirituality intertwined with governance and daily lives
  - Spiritual beliefs varied but some common themes were shared
    - Earth, land, air, water sacred
    - All things have spirits and are to be respected
1492-The Big Picture
Major Themes of Federal Indian Law

- Trust responsibility
- Sovereignty
- Self Determination
- Pre-decisional Consultation
- Government-to-Government Relationships
- Treaty Rights (on and off Tribal lands)
- Plenary power of Congress
Colonial Period (1492 – 1776)

Acquiring Indian Land

- **Doctrine of Discovery**
  - Indians possessed “aboriginal title”
    - Right of occupancy only
  - “Discovering” nation obtained pre-emptive right to extinguish aboriginal title by treaty, purchase, or conquest

- **Settlers**
  - Exploitation of land and resources
  - Make the Indians more like “us”
Treaties

- Both parties are sovereign powers
- Indian nation or Tribe has a transferable “title”
- Acquisition of Indian lands controlled by the government, *not* the states
- Note: 390 treaties with tribes between 1778 and 1871 were made and broken or abrogated
- Treaties are still the supreme law of the land
Early U.S.-Indian Relations (1776 - 1830)

- **U.S. Constitution**
  - Commerce Clause, Art. I, Sec. 8
  - Treaty Clause, Art. II, Sec. 2
  - Supremacy Clause, Art. VI

- **Trade and (non) Intercourse Acts**
  - Forbade purchase of land directly from Tribal Nations by states
  - Forbade non-Indians from settlement, hunting or grazing on Indian lands
  - Trade w/Indians subject to regulation & license
  - Basically, Indians and non-Indians treated differently.
Removal Era (1820 -1850)

- Cherokee Cases (Marshall Trilogy)
  *Chief Justice Marshall v President Jackson*
    - *Johnson v. McIntosh* (1823)
      - Doctrine of discovery endorsed
    - *Cherokee Nation v. Georgia* (1831)
      - Tribes “domestic dependent nations”
    - *Worcester v. Georgia* (1832)
      - Tribal sovereignty recognized
      - State jurisdiction denied
      - Applied to all tribes-conquered, treaty dependent or not yet encountered
Removal Era

- Indian Removal Act of 1830
  - Indians can move peacefully, or be forced out of eastern homelands
  - Massive disruption of territories, homelands
  - Trail of tears—not just Cherokee
    - Seminole, Choctaw, Chickasaw, Creek, etc
    - Delaware
      - Signed first Treaty in 1778
      - Moved from Delaware, to Ohio, Indiana, Missouri, and, finally, Indian Territory (Oklahoma)
      - Two bands fled into Canada during time of greatest “persecution”
1830

Indian Land
The Reservation Era (1850 -1887)

- Further removal became difficult
  - Solution: reservations
  - Goal: acculturate, assimilate & Christianize
  - Causing further erosion of Tribal sovereignty, identity

- 1871: Congress ended treaty-making with tribes
  - Senate no longer ratified treaties
  - Tribes no longer considered independent sovereign nations
  - Rights could be limited by simple act of Congress

- The Major Crimes Act (1884)
Allotment and Assimilation (1887 – 1934)

- Land greed and belief in benefits of assimilation combine in...
- General Allotment Act of 1887 (Dawes Act)
  - Mechanism to divide communally held lands
  - Result:
    - 90M acres of tribal lands lost
    - Poverty, ill health, unemployment, illiteracy
    - Disruption of family structures
    - Boarding schools
- Meriam Report (1928)
Indian Reorganization Act (1934)

- Assumption: tribes not only would be in existence indefinitely, but should be
- Ended practice of allotment (FDR)
- Recognized tribes inherent right to adopt constitutions
  - Subject to approval of the Secretary of Interior
  - Model followed non-Indian pattern
- Act provided framework for self-governance that set the stage for future legislation
Indian Reorganization Period—Corps of Engineers Actions

- Beginning of MO River Basin development
  - 1945 Act - Condemned Osage rights for Hulah Dam & Reservoir Project
  - Pick-Sloan program – 6 dams; displaced many tribes

- War Department Civil Appropriations Acts --
  1945 Thru 1952
  - Various authorizations for Secretary of War to condemn Tribal lands for Corps of Engineers dam and reservoir projects
Termination & Relocation (1953 – 1968)

- House Concurrent Resolution 108 (1953)
  - Adopted official policy of “termination”
  - Tribal Nations subjected to state laws, lands sold
  - Trust relationship with 109 Tribal Nations terminated

- Pub. L. No. 280 extended state civil and criminal jurisdiction to Indian country in 6 states (1953)

- BIA encouraged reservation Indians to relocate to metropolitan centers

- Act of August 13, 1954—Western Oregon Indian Termination
  - Terminated 67 tribes; more tribes than all other termination Acts
Termination Era: Corps Activities

  - 1954 – Corps authorized to compensate Tribes from having flooded the Columbia River; 1956 – relocated Indians living in The Dalles Dam Project Area; lost most important gathering place, Celilo, in the Pacific NW
  - 1957 -- Seneca Nation hired engineers to prove to Corps that Kinzua Dam could be built more effectively 30 miles downstream, keeping them from losing 10,000 acres of land; Corps would not consider the alternative
  - 1958 -- Miccosukee opposed the Everglades Project, citing negative impacts; Corps proceeded
    - In 1994 the Everglades and Kissimmee River Restoration Projects implemented to reverse the effects of 1958 project
Self-Governance
Where Tribes are Today

- Self-Governance is fundamentally designed to provide Tribal governments with more control and decision-making authority over the Federal financial resources provided for the benefit of Indian people.

- More importantly, it fosters the shaping of new partnerships between Indian Tribes and the U.S. in their government-to-government relationships.

- Self-Governance provides the opportunity for Tribal governments to exercise their sovereignty with minimal Federal intrusion and involvement.
Tribal Self-Determination (1968 to Present)

- Indian Civil Rights Act of 1968
  - Amended Pub. L. No. 280 to require tribal consent
  - Imposed Bill of Rights upon tribes
  - Tribal court system

- President Nixon declared termination a failure
  - Stressed importance of trust responsibility
  - Urged legislation to promote tribal self-determination

- Indian Self-Determination and Education Assistance Act (Pub. L. No. 93-638) of 1975
Tribal Self-Determination (cont.)

**Recent Presidential documents**

- **President Clinton**
  - E.O. 13175 (2000): Consultation with Tribal Gov’ts

- **President Obama**
  - Memorandum for the Heads of Executive Departments and Agencies, Tribal Consultation, November 5, 2009
Indian Country Today is about 55 million acres, or 2% of US land.
It’s Complicated

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