

# The Importance of Land: Strategies for Re-Asserting and Protecting Territorial Sovereignty

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# Outline of Presentation

- ▶ Understanding the Legal Terminology.
- ▶ Your Reservation History: How Do These Legal Concepts Apply?
- ▶ The Law of Reservations:
  - Boundaries
  - Land Ownership
  - Jurisdiction
- ▶ Why is Land Important?

# Key Legal Terms

- ▶ Tribal Sovereignty.
- ▶ Jurisdiction.
- ▶ Traditional Territories.
- ▶ Ceded Territory
- ▶ Indian Country
- ▶ Reservation
- ▶ Reservation Boundary
  - Disestablishment
  - Diminishment

# Key Legal Terms

## Land Ownership Concepts

- ▶ Aboriginal Title (aka: Indian Title; Recognized Title)
- ▶ Recognized Title
- ▶ Public Domain Lands.
- ▶ Reserved Lands.
- ▶ Lands Held in Common.
- ▶ Trust Lands
- ▶ Restricted Fee Lands
- ▶ Fee Lands
- ▶ Allotments
- ▶ Certificates
- ▶ Homesteads (General Homestead Law/Indian Homestead Laws)

# Key Legal Terms: Sovereignty

- ▶ What is Sovereignty? Black's Law Dictionary defines sovereignty as having "supreme authority in a political community."
- ▶ In the context of Indian tribes, the U.S. Supreme Court has recognized and discussed sovereignty in two (2) contexts:
  - Internal relations within the political community of Tribal citizens (i.e. form of government; citizenship/membership criteria; domestic relations.
  - "Geographic component" - meaning sovereignty over persons, property and activities within political boundaries of the land area within which the political community exists:
    - ▶ this includes the right to define the type of economic development activities to promote; the right to determine the social/cultural values the community wishes to promote; land use and environmental protection standards. This attribute of sovereignty involves the exercise of authority over all persons (citizens and non-citizens) within the geographic limits of the community.

# CULTURAL CONTEXT OF TRIBAL SOVEREIGNTY

- ▶ In Western thought, the concept of “sovereignty” means inherent authority and dominion – i.e. power and control.
- ▶ In Indian Country, sovereignty also embodies a notion of “cultural integrity” – i.e. the means through which people organize to care for themselves, their traditions, their resources, and their legal and political rights.

# Your Ancestor's Intent

- ▶ The history of your Reservation demonstrates that the Treaty negotiators were very much focused on preserving this broader sovereignty.
  - Retain a homeland for Tribal citizens in perpetuity;
  - Preserve access to off-reservation resources necessary to maintain culture, economy;
  - Territory/homeland was vital: protect the place they came from; maintain unique culture.

# TRIBAL GOALS

- ▶ Ultimately, the goal of Tribal government is to promote and preserve sovereignty in its broader sense.
- ▶ Protect Tribal Homelands – Reservations and Traditional Territories – as places to foster healthy communities and fostering political identity/culture.
- ▶ Requires the ability to regulate/impact activities of others and at least the ability to co-regulate or co-manage the land, resources and social/economic activities within that territory.

# Key Legal Terms: Jurisdiction

- ▶ Jurisdiction: authority over a certain geographic area or certain persons.
  - Refers to authority to regulate land, activities occurring on or relating that area, or authority to regulate people.
  - Also refers to authority of courts to resolve disputes involving a particular subject matter or specific persons.

# Key Legal Terms: Aboriginal Territory or Traditional Territory

- ▶ **Traditional Territory:** The geographic area an Indian tribe or Nation occupied, used and controlled prior to the arrival of Europeans. Traditional territories could be exclusive to members of a particular tribe or Nation or could be shared (i.e. overlapping hunting territory).

# Key Legal Terms: Ceded Territory

- ▶ Ceded Territory: The term “cede” means to “surrender, relinquish, or to assign or grant”. Ceded territory is that portion of an Indian tribe or Nation’s traditional territory that is ceded to the United States in a treaty. For example, the 1836 Treaty provided that the “Ottawa and Chippewa nations of Indian cede to the United States all the tract of country within the following described boundaries ... [including] all the lands and inlands within these limits, not hereinafter reserved.”

# Key Legal Terms: Indian Country

- ▶ Federal definition: “[T]he term ‘Indian country’, as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation, ... and (c) all Indian allotments, the Indian titles to which have not been extinguished”  
18 U.S.C. §1151
- ▶ This definition has been described as “the benchmark for approaching the allocation of federal, tribal, and state authority [sovereignty/jurisdiction] with respect to Indians and Indian lands”.

# Key Legal Terms: Reservation

- ▶ Reservation: A reservation is that portion of an Indian tribe or Nation's traditional territory that is retained, or held back from, a cession of part of the Nation's territory.
- ▶ For example, in the 1836 Treaty, the Little Traverse Bay Bands' Chiefs/Headmen negotiated the following provision: "From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts ... One tract of fifty thousand acres to be located on Little Traverse bay"

# Key Legal Terms: Reservation (cont.)

- ▶ Reservations can also be “established” by the United States government when land previously ceded to the United States that is part of the public domain is set-aside or reserved for “Indian purposes” –i.e. for use by an Indian tribe as its homeland.
- ▶ Article 1 of the 1855 Treaty provided: “The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan embraced in the following descriptions, to wit: ... Fourth. For the Cross Village, Middle Village, L’Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34 to 39, inclusive, north, range 5 west – townships 34 to 38 inclusive, north, range 6 west – townships 34, 36, and 37 north, range 7 west, and all that part of township 34 north, range 8 west, lying north of Pine River”.

# Key Legal Terms: Reservation Boundary

- ▶ A reservation boundary is a political or jurisdictional boundary – much like national boundaries or state lines. It is not a boundary based on political authority - not land ownership.
- ▶ The term “reservation boundary” has essentially the same meaning as the term “Indian Country” under federal law: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, .... and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 USC 1155.
- ▶ The extent of Tribal regulatory authority over non-Indians and non-Indian land even within the boundaries of its Reservation is subject to a number of complex factors.

# Key Legal Terms: Disestablishment

- ▶ Disestablishment: describes the termination of the boundaries of a Reservation.
  - Requires clear intention to terminate reservation.
  - Cede or relinquishment of Reservation back to United States and payment of money for lands returned.
  - Very rare

# Key Legal Terms: Diminishment

- ▶ Diminishment means that the Reservation is not terminated – but its boundaries are altered or reduced in size.
- ▶ As a practical matter, the boundaries are changed based on land ownership.
- ▶ Diminishment is determined by changes in land ownership over a period of time.
- ▶ Key Principle: Treaty language or subsequent enactments that “open a reservation to settlement by non-Indians” vs. “restore unallotted lands to the public domain” or “cede unallotted land back to the United States.”

# Legal Terms Re: Land Ownership Aboriginal Title or Indian Title

- ▶ Indian/Aboriginal Title: Indian title is a concept European powers came up with (and which was adopted by the U.S. Supreme Court). In essence, it stated that Indian tribes did not possess the full rights of ownership over their lands – because Indians were not civilized (i.e. Christian), they only held a right of occupancy that was subject to the superior rights of the European powers who could claim sovereignty over lands “discovered” by them.
- ▶ The entire body of Indian law as it exists today is premised on these doctrines. It is important to recognize the flaws inherent in the racist foundations of Indian law to identify how best to advance Tribal goals of reaffirming Tribal sovereignty within the Reservation. The Tribe will need to promote its agenda and take actions within a legal/political system that has incorporated those principles and understand how those principals can/will be used to oppose Tribal objectives.

# Key Legal Terms Re: Land Ownership

## Public Domain

- ▶ Public Domain lands are lands owned by the federal (or a state) government that are available for disposition. (i.e. lands that have not been appropriated or reserved for a specific purpose or which have not been transferred to a specific person).
- ▶ These are lands that were considered to be available for settlement by non-Indians.
- ▶ Origins in Northwest Ordinance of 1787 and Land Ordinance of 1785.

# Key Legal Terms Re: Land Ownership

## Lands Held in Common

- ▶ Lands Held in Common: Traditionally, all lands within a Tribe's traditional territory were "owned in common". Lands held in common were under the sovereign control of the Bands' governments for the benefit of all of the people. Lands were not owned by individuals who could exclude other persons from using the land – land/resources were shared to benefit the entire community.
- ▶ Most original reservations, including the 1836 Reservation on Little Traverse Bay, were to be "held in common". The phrase "to be held as Indian lands" was also used to describe this.
- ▶ Lands taken into trust for the benefit of the Tribe are also "held in common". The Tribal government can grant exclusive rights to occupy Tribal lands to individuals under leases or assignments.
- ▶ Historical importance of this concept in terms of the Bands' loss of recognition as a sovereign.

# Key Legal Terms Re: Land Ownership Trust Lands

- ▶ Trust Lands: Trust lands are lands in which the legal title – or ownership of – the land is held by the United States (or some other sovereign) “in trust for the benefit of” the Tribe or an individual Indian.
- ▶ Trust land is not subject to state/local taxation or regulation (which would interfere with the trustee’s ability to manage/use the land for the benefit of the Tribe).
- ▶ Trust lands cannot be sold by the beneficiary (Tribe/individual) without an act of Congress authorizing the sale.

# Key Legal Terms Re: Land Ownership Allotment

- ▶ Allotment: An allotment is a plot of land that is allocated to an individual Tribal member from lands that were previously held in common by (or for the benefit of) the Tribe.
- ▶ Beginning in the 1850's the United States adopted a policy to allot (or divide) Reservations by granting individual Indians land, or selling parts of reservations to individual Indians. The allotment process had two purposes: (1) change Indian culture by ending communal ownership of land/resources – end the traditional Tribal government's control over land/resources by putting those resources in individual ownership; and (2) "civilizing" Indians by making them private property owners so they would focus on farm, learn about private property ownership, and individual reliance vs. communal, tribal lifestyles.

# Key Legal Terms Re: Land Ownership Certificate

- ▶ Certificates: were issued to document an individual's selection of and claim to an allotment.
- ▶ A certificate gave a person a claim to possession of the property but not "ownership" what was legally enforceable.
- ▶ Certificates were evidence of the person's right to an allotment but Courts have held that Certificated could be cancelled.
- ▶ Certificates issued under the 1855 Treaty appear to be different from those issued under other treaties – rights are defined in the treaty.
- ▶ In theory, another person could not legally claim rights to lands to which a person held a certificate unless and until that certificate was cancelled.

# Key Legal Terms Re: Land Ownership

## Restricted Fee

- ▶ Restricted Fee Lands: Restricted fee lands are lands in which legal title to land is conveyed to an individual; however, the individual's rights of ownership are restricted. In most cases, the individual cannot mortgage or sell the property without the approval of the United States. In other cases, the lands may be exempt from state/local taxation as long as they are owned by Indians (i.e. Keweenaw Bay; LTBB – allotments under 1855 Treaty?) Restricted fee lands are usually treated like trust lands when it comes to jurisdictional rules – i.e. subject to tribal/federal jurisdiction, not state/local.

# Key Legal Terms Re: Land Ownership Fee Lands

- ▶ Fee lands: A person who owns lands in fee has unrestricted ownership of the land – the person can sell or mortgage the land without needing any approval from the Federal government.
- ▶ The type of ownership conveyed is usually reflected in the form of the grant/deed conveying the property and the use of certain language in the grant or conveyance.
- ▶ KEY: Trend in Indian law – ties diminishment of boundaries and jurisdiction to fee ownership – once fee ownership is transferred from an Indian to a non-Indian, jurisdiction is lost.

# LTBB Reservation History

## Application of Legal Terms/Concepts

- ▶ IT HAS ALWAYS BEEN ABOUT THE LAND.
- ▶ EVERY SIGNIFICANT EVENT THAT HAS HAD A NEGATIVE IMPACT ON THE TRIBE FROM 1836 TO 1994 HAS BEEN TIED TO LAND.
- ▶ FUTURE SUCCESS OF LTBB WILL BE TIED TO LAND

# Significant Events

- ▶ 1836 Treaty
- ▶ Acquisition of Lands
- ▶ 1855 Treaty
- ▶ Appropriations Act of March 3, 1871
- ▶ Acts of 1872, 1875, 1876
- ▶ Administrative “termination” of Bands.
- ▶ Closure of Indian Affairs Office in MI
- ▶ Indian Reorganization
- ▶ Termination – Partial Consent Sales
- ▶ 1994 Reaffirmation
- ▶ 1999 Victories Casino
- ▶ Future.....?

# 1836 Treaty

- ▶ Sentiment of Tribal Leaders re: land cessions.
- ▶ 1836 Treaty: The LTBB Chiefs and Headmen, under tremendous pressure, sought to maintain a homeland in their traditional territories by withholding/reserving lands for a permanent homeland:

“From the cession aforesaid the tribes reserve for their own use, to be held in common the following tracts ... One tract of fifty thousand acres to be located on Little Traverse bay”

- ▶ Leaders also reserved in Article 13, “the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement” to assure access natural resources on lands ceded to the United States.
- ▶ These provisions were intended to preserve a homeland and access to resources to sustain their economy, subsistence and culture.

# 1836 Treaty (cont.)

- ▶ The 1836 Treaty was amended by U.S. Senate to change the land reservations from permanent homelands to lands reserved “for the term of five years from the date of ratification of this treaty, and no longer; unless the United States shall grant them permission to remain on said lands for a longer period”
- ▶ Article Fourth also included “the sum of two hundred thousand dollars, in consideration of the changing the permanent reservations in article two and three to reservations for five years only, to be paid whenever their reservations shall be surrendered”.
- ▶ These changes were ratified by a portion (majority?) of the Chiefs who originally negotiated the 1836 Treaty.

# Parties Intent in Negotiating 1855 Treaty

- ▶ Mannypenny: "Measures should now be taken ... to secure permanent homes to the Ottawas and Chippewas, either on the reservations or on other lands in Michigan belonging to the Government, and at the same time, to substitute, as far as practicable, for their claim to lands in common, titles in fee to individuals for separate tracts."

# Negotiation of 1855 Treaty

- ▶ Purpose was to secure “permanent” homeland or residence in Michigan.
- ▶ Identify areas with no whites to be withdrawn: Grand River example.
- ▶ “Strong title” requested – wanted certainty with tenure in Michigan.
- ▶ Request to increase size of allotments rejected.
- ▶ Desire to protect rights of children.
- ▶ Discussion re: taxes – discussion indicated that federal negotiators understood that the Reservations would be under Indian rule – any taxes would be assessed by Indians themselves.

# 1855 Treaty

- ▶ In *LTBB's* case, the lands reserved in the 1855 Treaty included the same lands reserved in the 1836 Treaty.
- ▶ What was the status of the 1836 Reservation at the time this treaty was negotiated?
- ▶ The 1855 Treaty uses the words "withdraw from sale .. all the unsold public lands within the State of Michigan". Language could be read as assuming that the 1836 Reservations had been surrendered and were "public lands" at the time the 1855 treaty was negotiated.
- ▶ Provided for the allotment of lands to individuals.
- ▶ Included provisions granting "preemption" rights to lands occupied by "actual [non-Indian] settlers"; also included a so-called "surplus land" provision which contemplated opening the "all lands remaining unappropriated by or unsold to the Indians after the expiration of [the allotment/exclusive Indian purchase] term, may be sold or disposed of by the United States as in the case of all other public lands."

# Legal Status of Lands within 1855 Reservations

- ▶ Cash entries (1840s): Communal lands or individual fee? Restricted Fee?
- ▶ Most lands were not public domain but were already Reservation lands outside scope of statutes permitting appropriation or disposal.
- ▶ Only those portions of the 1855 Reservation that were not reserved under 1836 Treaty could have been appropriated or disposed of.
  - These lands continued to be reserved lands held in common.
- ▶ Lands were to be “withdrawn from sale” and held in trust for Indian purposes until appropriated (allotted) or sold (exclusive Indian purchase) under the terms of the Treaty.

# Mechanics of 1855 Reservation

- ▶ Lands withdrawn – consistently referred to as an Indian Reservation.
- ▶ Allotment Process:
  - List of eligible persons prepared by July 1856.
  - Selections of 80/40 acre parcels within Reservations.
  - All lands not appropriated/selected within 5 years (no earlier than July 1860) may be entered by Indians only – “sold without restrictions, and certificates and patents ... issued ... in the usual form”.
  - At the end of another 5 year period (no earlier than July 1865) “[a]ll lands remaining unappropriated by or unsold to the Indians ... may be sold or disposed of by the United States as the in the case of all other public lands.”
- ▶ Lands held by certificate (trust lands); fee lands were intended to be restricted fee (exempt from state tax) – i.e. KBIC allotments.

# Remedies to problem

- ▶ 1864 Executive Order enlarging the Reservation.
- ▶ Act of June 10, 1872: “lands remaining undisposed of in the reservation established by the 1855 treaty reopened for homestead entry by the Indians” for six months.
- ▶ Act of March 3, 1875: Extends homestead entry period, directs issuance of 320 patents to original allotments.
- ▶ Act May 23, 1876: Extends homestead entry period.
- ▶ In each case, required that lands undisposed of at the end of the Indian homestead entry period be restored to market and/or subject to entry under the homestead laws.
- ▶ Difference between Indian Homestead requirements and General Homestead Law of 1862.

# Land Title Questions

- ▶ Map describing the federal statutory (or treaty) authority under which parcels of land within the Reservation was conveyed by the federal government.
- ▶ Each category of land subject to different legal analysis – each depends, in part, on the status of the Reservation at the time of conveyance.
- ▶ In the case of land that were conveyed to the Bands (i.e. cash entries after 1836 Treaty) or Band members (allotment certificates; allotment patents; homestead patents), also need to evaluate how those lands left Tribal/Tribal citizen ownership.
- ▶ This is a tremendous amount of documentation

# Intervening Change

- ▶ Act of March 3, 1871, 25 USC 71: Prohibited the Executive Branch from treating Indian tribes within the limits of the United States as a foreign nation for purposes of entering into further treaties.
- ▶ All matters involving relations with Indian tribes would be the subject of legislation.
- ▶ Purpose: To give the House a greater role in Indian affairs, particularly as it related to land.
- ▶ Practical impacts – changed the relationship between Indian tribes, federal government and states.
  - Viewed Indian issues as internal/state-related issues.

# Administrative “Termination”

- ▶ Article 5 of 1855 Treaty – new interpretation which held that when “fee patents” were issued under terms of the Treaty and financial obligations met, the “tribal organization” of the Ottawa and Chippewa would be dissolved.
- ▶ This interpretation gained momentum due, in part, to efforts of officials who wanted to end efforts to protect Odawa lands and remedy frauds.

# Indian Reorganization Act

- ▶ LTBB leaders attempted to petition for reorganization under the IRA.
- ▶ DOI officials believed that a “Reservation”, which included “trust lands held in common” was necessary to eligibility.
- ▶ DOI believed that acquisition of land base was necessary part of process.
- ▶ Loss of status of recognition of sovereignty tied to loss of lands.
- ▶ Key provision: Authorized Secretary of Interior to “restore to tribal ownership the remaining surplus lands of any Indian reservation ... opened, to sale, or other form of disposal ... by any of the public land laws of the United States.” 25 USC 463(a)

# 1994 Re-affirmation Act

- ▶ Recitals and legislative history to Act recite the relationship between the sovereignty of the LTBB and its Reservation.
- ▶ Illegal termination resulted from failure to protect Reservation lands.
- ▶ P.L. 103-324: Recognizes the relationship between restoration of the Bands' land base and the Bands' sovereignty.

# What is the Legal Status of the LTBB Reservation Boundaries?

- ▶ Remember the definition of “Indian Country”
- ▶ What legal principles apply?
- ▶ How does LTBB’s situation fit within those principles?
- ▶ How to move forward?

# How Are Reservation Boundaries Diminished or Disestablished?

- ▶ Starting point: "Once a block of lands is set aside for an Indian reservation and no matter what happens to title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."
- ▶ Exceptions:
  - "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests [to a portion of the reservation's lands] strongly suggests that Congress meant to divest from the reservation all unallotted opened lands."
  - Language of cession coupled with an unconditional commitment from Congress to compensate the tribe for its opened land creates "an almost insurmountable presumption that Congress meant for the reservation to be diminished."
- ▶ Court has said that no particular set of words are needed to find diminishment.
- ▶ In the mid to late-1800s there was a "common understanding of the time" that tribal ownership (i.e. in common lands) was "a critical component of reservation status."

# Legal Issues – Reaffirmation of Reservation Boundaries

## ▶ Factors impacting analysis:

- Treaty language
- Events surrounding negotiation of Treaty.
- Subsequent Executive Orders and Congressional enactments.
- Events following implementation of Treaty:
  - ▶ Continuing recognition of status.
    - Impacted by federal government's administrative termination
    - Impacted by Tribe's historic and current governmental activities
  - ▶ Land ownership trends
    - Impacted by frauds
    - Impacted by federal government's failure to protect lands.
    - Impacted federal government's administrative termination.

# U.S. Supreme Court Decisions

- ▶ The United States Supreme Court has decided eight cases that address Reservation diminishment or disestablishment:
  - ▶ City of Sherrill v Oneida Nation, 544 U.S. 197 (2005)
  - ▶ South Dakota v Yankton Sioux Tribe, 52 U.S. 329 (1998)
  - ▶ Hagen v Utah, 510 U.S. 399 (1994)
  - ▶ Solem v Bartlett, 465 U.S. 463 (1984)
  - ▶ Rosebud Sioux Tribe v Kneip, 430 U.S. 584 (1977)
  - ▶ DeCoteau v District County Court, 420 U.S. 425 (1975)
  - ▶ Mattz v Arnett, 412 U.S. 481 (1973)
  - ▶ Seymour v Superintendent, 368 U.S. 351 (1962)

# Other Cases of Note

- ▶ Wisconsin v Stockbridge Munsee Community: reservation diminished
- ▶ Keweenaw Bay Indian Community v Michigan: boundaries affirmed
- ▶ Saginaw Chippewa Indian Tribe v Michigan: (case pending)
- ▶ Mille Lacs County v Mille Lacs Band

# Key Facts – 1855 Treaty

- ▶ Purpose was to secure “permanent” homeland or residence in Michigan.
- ▶ “Strong title” – contract with 5 year limit.
- ▶ Identify areas with no whites to be withdrawn.
- ▶ Request to increase size of allotments.
- ▶ Expectation these would be Indian only areas
- ▶ Discussion re: taxes.
- ▶ Possibility of allowing non-Indians to acquire lands within the Reservations “may” be opened not “shall”.
- ▶ Sold in the same manner as other public lands – “not restored to the public domain”.

# Loss of Recognition of Status of LTTB as a Sovereign

- ▶ The federal government completely mismanaged implementation of the 1855 Treaty.
- ▶ Article 5 of 1855 Treaty later (1872) incorrectly interpreted as terminating/dissolving the governmental status of the Band-signatories, which termination took effect when land/payment terms of 1855 Treaty were considered to have been completed.
- ▶ Status of political boundaries of the Reservation was lost from federal/state institutional memories – did not even recognize the existence of the sovereign (LTTB) which would have exercised political authority within those boundaries.

- ▶ Little Traverse's Unique Situation:
- ▶ Analysis of current legal status of Little Traverse's Reservation is affected by 2 factors:
  - Illegal "termination" of recognition of the status of the Tribe makes reliance on subsequent events unreliable.
  - Public Law 103-324 reaffirms the status of the Tribe and supports reaffirmation of the Tribe's reservation boundaries.

# Process

- ▶ Secretary of the Interior: Opinion recognizing continued status of Reservation boundaries.
  - Not binding on state/local government – subject to legal challenge.
- ▶ Litigation
  - All or nothing – litigation risk.
- ▶ Congressional Action.
  - White Earth: tied to land claims; emphasize role of federal officials and state officials.

# Jurisdiction

- ▶ What authority does the LTBB have within its Reservation?
- ▶ Why do recognized Reservation boundaries matter?
- ▶ Why does land matter?

- ▶ **“The Indian nations had always been considered distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European [power].**

...

**The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self government, by associating with a stronger, and taking its protection.”**

**Worcester v. Georgia**

# **Oliphant v Suquamish Tribe (1978)**

**The power of tribes to try and punish non-Indians was inconsistent with the “overriding sovereignty of the United States and therefore must therefore be considered to have been [implicitly] divested” when Tribes put themselves under the protection of the United States.**

**New theory of implicit divestiture or diminishment of Tribal sovereignty over non-members.**

# Montana v United: Extending “Implied Divestiture of Sovereign to Jurisdiction over Land

**“The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe” in the absence of express congressional delegation except in two (2) circumstances:**

**(1) “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members”.**

**(2) “A tribe may also retain inherent power to exercise civil regulatory authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct affect on the political integrity, the economic security, or the health or welfare of the tribe.”**

# Brendale v. Confederated Tribes of the Yakima Nation

- ▶ **"*Montana* suggests that in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health and welfare of the tribe ... The impact must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe."**
- ▶ **Opinion by Justice White (Joined by Chief Justice Rehnquist and Justices Scalia and Kennedy)**
- ▶ **Upheld zoning jurisdiction over non-Indian owned fee land in area of reservation that court said "retained its 'Indian Character'". Impacts on these sorts of values imperil the political integrity or welfare of the tribe.**

# Strate v A-1 Contractors

- ▶ Facts: Case involved whether the Tribal Court had jurisdiction over a non-Indian company whose employee injured the non-member spouse of a Tribal member in an auto accident on a state highway running through the Reservation. The A-1 Contractors was on the Reservation doing work for the Tribe. The Tribe/BIA had granted the state a highway right-of-way (easement) across trust lands.
- ▶ Holding: No Tribal Court jurisdiction. Contract for landscaping work was not related to worker driving on highway and terms of contract did not constitute “consent” over negligence actions. Tribal Court jurisdiction over motor vehicle traffic on state highway was not needed to preserve “the right of reservation Indians to make their own laws and be ruled by them.”
- ▶ Distinguished in *Ford Motor Company v Todecheene* (2007): Tribal Court did not plainly lack jurisdiction over product liability case against Ford Motor Company – accident occurred on trust land.
- ▶ North Dakota Supreme Court reached the same result in a similar case involving trust land.

## Atkinson Trading Company v Shirley, 532 U.S. 645 (2001)

- ▶ Facts: Retail/hotel business located on Navajo Reservation on an isolated fee parcel. Received numerous services (police/fire) from the Tribe and was a licensed "Indian Trader". Challenged the Navajo Nation's hotel occupancy tax.
- ▶ Holding: Atkinson's acceptance of Tribal services did not constitute "consent" to Tribal jurisdiction. Receipt of "Indian Trader" license authorizing the company to transact business on the Reservation was not related to business between Atkinson and non-member guests who accessed hotel via public highway. Consent to jurisdiction in one area does not imply consent to jurisdiction in other areas. The Navajo Nation had not demonstrated that its inability to collect taxes from Atkinson would drain Tribal resources so severely that it imperiled the integrity of the Tribe. Noted that the Tribe could charge fees for services.

# United States v. Lara

- ▶ Affirms Congress' ability to re-affirm aspects of inherent sovereignty Tribes, which the Supreme Court has held are inconsistent with Tribes' "dependent status".
- ▶ A number of Justices raised Constitutional due process concerns with Tribal exercise of authority (criminal/civil) over non-Indians

# City of Sherrill v Oneida Nation, 544 U.S. 197 (2005)

- ▶ Held that Tribe did not “revive their sovereign control” over lands re-acquired by the Tribe within the Reservation.
- ▶ “We now reject the unification theory of OIN and the United States and hold that ‘standards of federal Indian law and federal equity practice’ preclude the Tribe from rekindling embers of sovereignty that long ago grew cold”
- ▶ “This Court has observed in the different, but related context of the diminishment of an Indian reservation that ‘[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use’, may create ‘justifiable expectations’”
- ▶ “When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations.”
- ▶ **KEY LESSON:** Need to re-define and change “expectations” and “assumptions as to jurisdiction by the State”.

# Jurisdiction Principles

- ▶ Critical Factors to Look At/For:
  1. Will this activity involve non-members?
  2. Will this activity take place on Tribal trust lands, Tribal fee lands, member-owned land or non-member owned land?
  3. Are there clearly defined (in ordinances; regulations; adopted plans) Tribal interests that will be impacted?

# LTTB's Unique Situation

- ▶ Sherrill is a case arising in equity –
- ▶ “This Court has observed in the different, but related context of the diminishment of an Indian reservation that ‘[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use’, may create ‘justifiable expectations’”
- ▶ LTBB has an Act of Congress which says that any expectations are not justified – they are the result of the federal government’s failure to implement and enforce treaty protections. Congress restored and reaffirmed all rights the LTBB had and implemented a process that contemplated the Band’s re-acquisition of lands and sovereignty within its Reservation.
- ▶ Law always trumps equity.

# Jurisdiction - Outside Reservation or if there are No Boundaries

	Trust Land	Tribal Fee Land	Tribal Member Fee Land	Non-Indian Fee Land
Land Use	Tribal	State/ Local	State/ Local	State/ Local
Environmental	Tribal/Federal	State/ Local	State/ Local	State /Local
Criminal	Tribal/Federal	State/ Local	State/ Local	State /Local
Taxation	Tribal	State/ Local	State/ Local	State/ Local

“Outside of”  
or  
“No  
Boundaries”

# Jurisdiction - Within a Reservation with Recognized Boundaries

	Trust Land	Tribal Fee Land	Tribal Member Fee Land	Non-Indian Fee Land
Land Use	Tribal	Tribal	Tribal	Limited Tribal
Environmental	Tribal/ Federal	Tribal	Tribal	Tribal or Federal
Criminal (over Indians)	Tribal/ Federal	Tribal	Tribal	Tribal/ Federal
Taxation	Tribal	Tribal	Tribal	Limited Tribal

**Within  
Boundaries**

# LESSONS/PRINCIPLES

- ▶ Tribes have lost nearly every case involving jurisdiction over non-Indians in recent years.
- ▶ Those cases Tribes have won have depended on 2 critical factors: Trust Land and identifiable (at least to the Supreme Court) Tribal interests that had a cultural dimension.
- ▶ Must be able to articulate a very critical Tribal interest that is at stake.
- ▶ Definition of Tribal-specific interest and relationship to both governmental and cultural component of self-government may be key.

# The Role of Tribal Government/Citizens

## ▶ Education & Communication

- ▶ Develop an understanding the history of the Reservation and evolution of the law
- ▶ Learn/understand the specific factors that have resulted in affirmation of Tribal jurisdiction over citizens and territory.
- ▶ Think critically, creatively – what could happen, how that this be managed
- ▶ Proactively identify activities that present opportunities (legislative/program gaps; cooperative agreements; education of non-Tribal public) and risks (disputes that could lead to litigation)
- ▶ Be patient – don't try to do too much – a lot of little pieces
- ▶ Recognize that the Tribe needs to protect 2 legal principals – Reservation boundaries and Tribal jurisdiction
- ▶ Communicate: define expectations of neighbors (private and governmental)

# Role of Tribal Government/Citizens

- ▶ Use your knowledge of the history of the Reservation and the legal principles to drive strategic development of Tribal laws, programs and re-acquisition of Tribal lands.
- ▶ Develop broader knowledge base of history and legal principles within broader segment of Tribal population
- ▶ Re-educate of the Department of Interior.
- ▶ Re-educate the surrounding non-Tribal public and state/local governments – there is enough knowledge of facts to reinforce with more information.
- ▶ Make it easy (less frightening) & give them practical/moral reasons to not oppose the Tribe.

# Role of Tribal Government/Citizens

- ▶ Strengthen Jurisdiction – laws/programs.
  - Develop a clear identification of Tribal community values and interests
  - Identify current jurisdictional gaps: government/citizen cooperative effort to address issues that affect citizens.
  - Position activities within defined Tribal values and interests
  - Can position Tribal activities to assure jurisdiction over non-members to protect Tribal interests and values.
  - Don't be afraid of cooperative agreements – educate Tribal citizens about the role of cooperative agreements.
  - Aggressive/creative land acquisition strategy can leverage all of these efforts.

# Pursue Cooperative Agreements

- ▶ Use Standards/Processes incorporated into Tribal laws/plans to engage other jurisdictions – force consultation - to ensure review addresses impacts of concern to the Tribe. Can threaten legal action, if necessary to protect Tribal interests.
- ▶ Education the non-Indian public of the nature and basis for unique Tribal interest – gives them a practical reason to accommodate the Tribe's policy positions; puts agencies on notice of potentially impacted interests.
- ▶ Avoids litigation but positions Tribe to utilize more direct/aggressive course of action, if all else fails.

# Land Acquisition Strategies

- ▶ Land is the Key Ingredient to exercising sovereignty.
- ▶ Pursue alternative/creative strategies for future land acquisition.
- ▶ Goals of Land Acquisition Strategies:
  - Change demographics - % of land and population that is Tribal.
  - Strategic decisions to change perceptions about Tribal presence.
  - Strategic decision to acquire lands for Tribal purposes (economic development; cultural; environmental; community facilities) to increase leverage over surrounding lands.
  - Where possible – acquire lands and use lands in a way that emphasizes values unique to Tribal culture.
  - Take advantage of tax agreement to position Tribal economy & infrastructure.

# Conclusions

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