



# TRIBAL MANAGEMENT PROGRAM

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## “The Big Picture”: A Brief Review of Federal Indian Law for Alaska Tribes

Federal Indian Law is important because it “sets the stage” on how the Federal, State, and Tribal governments interact. It is also important because it outlines the basic rights of tribes, and you must know your rights in order to exercise them.

### I. International Period 1781-1871

- a. Rule of Discovery- a rule of international law that allowed European nations to lay “claim” to lands in the New World. Originally, only gave right to “exclusive trade” it was later interpreted by the US to mean the US holds title to the land, but the Native Americans have a right to continued use and occupancy (aboriginal title).
- b. Treaties- formal agreements that are the result of negotiations between nations. Considered to be the ultimate recognition of sovereignty.
- c. US Constitution- Article I section 8, the Commerce Clause. Main source of federal power over Indians.
- d. Non-Intercourse Act- Indian Trade and Intercourse Act of 1790
  - i. Regulated commerce with the tribes, non-natives must get a permit from the federal government to trade with Indians.
  - ii. Prevents the sale of tribal lands without federal consent.
- e. General Crimes Act- extended federal jurisdiction into Indian Country, except for cases only involving Indians. Major intrusion on Tribal Sovereignty.
- f. The Marshall Trilogy
  - i. Johnson v M'Intosh- US notion of Discovery: Indian rights were impaired, but not extinguished (continued right of occupancy and use). Also, upheld rule that non-natives must have the permission of the federal government to purchase Indian land
  - ii. Cherokee Nation v Georgia- Tribes are found to be “Domestic Dependant Nations”, but they retain their Inherent Sovereignty.
  - iii. Worcester v Georgia- Tribes have exclusive jurisdiction within Indian Country. States have no jurisdiction in Indian Country, unless clearly given by Congress.
  - iv. The Trust Responsibility that the US government has towards tribes was confirmed through these three cases, also the “Cannons of Construction” arose from these cases.
  - v. Cannons of Construction- basic rules that are to apply to all Indian Law cases.
    1. The terms of treaties and statutes should be liberally construed to the benefit of Indians.

*Naturally Inspiring.*

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2. Ambiguities in the law should be resolved in favor of Indians.
3. Tribal Sovereignty is a backdrop against which all statutes must be read.

II. Allotment and Assimilation Period 1871-1924

- a. Purchase of Alaska happened during this period that was a low point for Tribal Sovereignty.
- b. Major Crimes Act- gives the federal government jurisdiction over “major crimes” in Indian Country, even when only Indians are involved. Arose from the Crow Dog case.
- c. General Allotment Act- Each tribal members given an allotment of reservation land (never more than 160 acres). “Surplus” land is sold.
  - i. Very destructive, 2/3 of tribal lands lost during this period.
- d. Lone Wolf v Hitcock- ruled that Congress has “plenary power” over tribes, even the power to unilaterally break treaties.
- e. Talton v Mayes- ruled that since the sovereign powers of tribes predate the US constitution, rights provided by the Constitution do not apply to tribal governments.
- f. Alaska laws/cases during this period.
  - i. Berrigan- 1905 recognized Alaska tribes have an aboriginal land claim that the US has duty to protect
  - ii. Nelson Act- Established segregated schools in Alaska. Native education is provided by federal govt.
  - iii. Allotment and Townsite Acts- land to Alaska Natives. From 1906-1960 (54yrs) only 80 allotments approved.

III. The Indian New Deal 1924-1948

- a. Meriam Report- report on deplorable living conditions on reservations. Led to passage of IRA
- b. Indian Reorganization Act-turning point in how US treats tribes.
  - i. Ended Allotment period, furthered recognition of tribal governments.
  - ii. Extended to Alaska Tribes in 1936. Today 1/3 Alaska Tribes are IRA.

IV. Termination Period 1948-1968

- a. Termination of trust status and trust responsibility was the goal.
  - i. Short lived, but devastating
  - ii. Dillon Myers, former director of Japanese and Aleut Internment Camps is made Head of Indian Affairs.
- b. PL 280- extended state criminal and some civil law into Indian Country (only applies in Indian Country)
  - i. Alaska is a mandatory PL 280 state.
- c. Alaska Statehood (1959)- Did not clarify existence of aboriginal claims, ignored it. Allowed State to choose land for ownership, later frozen by ANCSA.

V. Self-Determination 1968-present

- a. Indian Civil Rights Act- US Bill of Rights does not apply to tribal governments due to inherent sovereignty. ICRA applied most of Bill of Rights to tribal governments.
  - i. Tribes must provide Due Process and fundamental fairness.

- ii. Limits punishment to 1 year in jail and \$5000 fines.
- b. Alaska Native Claims Settlement Act- largest settlement treaty in US history.
  - i. Conveyed 44 million acres of land and a settlement of apx. \$1Billion to newly formed native corporations.
  - ii. Unclear about Tribal Government status and Indian Country status- Venetie case later ruled that ANCSA land is not Indian Country, but tribes retain sovereignty (John v Baker).
- c. Indian Self-Determination and Education Act-
  - i. Goal is to promote transition from federal control to participation of tribes in programs that benefit Tribes. Led to tribal control/administration of tribal programs.
- d. Indian Child Welfare Act (1978)- combat widespread separation of Native children from their families and culture.
  - i. Requires state courts to notify tribal governments when children's cases are initiated in state court (does not apply to juvenile delinquency or divorce cases).
  - ii. Gives tribes the right to intervene, or request transfer to tribal court.
- e. Important Cases:
  - i. Oliphant- US Supreme Court says tribes do not have criminal jurisdiction over non-natives.
  - ii. Wheeler- Because tribal and federal courts derive their power from "separate sovereigns" No Double Jeopardy.
  - iii. Santa Clara Pueblo- ICRA does not give the federal court the power to decide civil rights cases in Indian Country
    - 1. only tribal courts can hear civil rights cases (except Habeas Corpus) otherwise it is an unnecessary intrusion on Tribal Sovereignty. Civil rights under ICRA are defined by tribe, not US Bill of Rights.
- f. 1980's
  - i. During this period, Alaska Tribes faced substantial opposition to self-determination from all Branches of the Alaska State government. Throughout the 80's the Alaska Supreme Court ruled several times that no tribes exist in Alaska outside of Metlakatla.
  - ii. ANILCA (Alaska National Interest Land Conservation Act)
    - 1. Federal Law that gives preference to rural residents for subsistence uses of resources.
    - 2. Faced much opposition by the State, arrest of Katie John
    - 3. Katie John- does ANILCA apply to waters (fish)? Yes
      - a. But ANILCA not clear pre-emption, rather a federal/state compromise
      - b. State Gov (Knowles) agreed not to appeal – although Parnell appealed anyway
- g. 1990-
  - i. Gov. Cowper- recognized that Tribes exist in Alaska, but recognized very limited powers. AO 186
  - ii. Gov. Hickler- no tribes exist.

- iii. Gov. Knowles- recognized tribal governments
  - 1. Millennium Agreement recognized some tribal powers and a government to government relationship.
- iv. 1993 Clinton Administration- DOI listed tribes in Alaska as “Tribes” with all the immunities and privileges of other tribes.
- v. 1994 Tribal List Act ratified by US Congress, recognizing Alaska Tribes.
- vi. Gov. Murkowski- opposed to tribes, making attempts to scale back tribal authority in Alaska.
- vii. Gov. Palin -No change
- viii. Gov. Parnell- No change

h. Important Cases:

- i. Venetie Adoption Case (9<sup>th</sup> Cir): Held PL 280 does not give Alaska exclusive jurisdiction, but rather concurrent with Alaska Tribes.
- ii. Tyonek: Tribal Status is retroactive. When Congress recognizes a tribe, they recognize the tribe always existed, not just from recognition on.
- iii. Venetie Tax Case 1988 (US Supreme Court): Since land went through ANCSA it is not Indian Country.
  - 1. “Dependant Indian Community” must be set aside for Indian use and under federal supervision.
    - i. Held: not set aside for Indian use because no restraints on alienation (non-natives can buy land)
    - ii. Not under federal supervision because :
      - 1. ANCSA land regulated by State, not federal law.
      - 2. government services are general federal aid, not indicative of federal control.
- iv. John v. Baker 1999 (Ak Supreme Court) Recognized existence of federally recognized tribes and their inherent powers of self-government.
  - a. State recognized jurisdiction of Alaska Tribes over tribal members in the area of domestic relations, even in the absence of Indian Country.
- v. In re CRH- prior Alaska Supreme Court cases say PL 280 terminated tribal jurisdiction.
  - 1. Held: jurisdiction is concurrent and that ICWA cases can be transferred to tribal courts.
- vi. Kaltag v US- “The Kaltag court’s adoption orders are entitled to full faith and credit and the Bureau shall grant said status to the adoption... by issuing a substitute birth certificate”
  - 1. 2010 The US Supreme Court declined to hear the case, leaving the decision intact.
- vii. Tanana v Alaska –“tribes retain concurrent jurisdiction to legislate, to initiate, and to adjudicate CINA cases in tribal courts. There is nothing in ICWA that prohibits or limits tribes from passing laws that would allow the tribe to initiate CINA cases in tribal court.”

*- Alwacak case a land into trust in Alaska*