Looking Back to See the Future

Lorinda Riley, SJD
Value of Knowing Where We Came From

• Controversy of placing a new telescope (TMT) on Mauna Kea was met with significant resistance from Native Hawaiians

• Many people oversimplify this controversy: Native Hawaiians protecting a sacred mountain vs. scientific progress

• But in reality the controversy is due to a lack of understanding of state constitution and its relationship with Native Hawaiians
  • Native Hawaiians are guaranteed one third of public land revenues, but the state consistently provide gratis leases to pet projects and refuses to provide for the distribution of the revenues
  • It’s less about not wanting new telescopes and more that the state has not honored its agreements with the first thirteen telescopes

• This lack of true understanding creates trust issues and hostility
  • Later manifests itself as an unwillingness to negotiate even when the government later acts in good faith
Quick Quiz

1. What is the legal term used to define the status of federally recognized Indian tribes?
   a) Nation states  
   b) Sovereign nations  
   c) Domestic dependent nations

2. True or False: When determining the status of tribes the Supreme Court looked to the Commerce Clause in the US Constitution for guidance.

3. True or False: Tribal laws that contradict state laws are per se invalid.

4. The basis of federal Indian law is a legal doctrine called the __________?
   a) Plenary power doctrine  
   b) Doctrine of discovery  
   c) Magna carta

5. True or False: Tribal nations sold their fee simple interest in land when they signed treaties giving up land in exchange for peace and/or food and services.
## Answers

1. What is the legal term used to define the status of federally recognized Indian tribes?
   - a) Nation states
   - b) Sovereign nations
   - c) Domestic dependent nations

2. **True:** When determining the status of tribes the Supreme Court looked to the Commerce Clause in the US Constitution for guidance.

3. **False:** Tribal laws that contradict state laws are per se invalid.

4. The basis of federal Indian law is a legal doctrine called the __________?
   - a) Plenary power doctrine
   - b) Doctrine of discovery
   - c) Magna carta

5. **False:** Tribal nations sold their fee simple interest in land when they signed treaties giving up land in exchange for peace and/or food and services.
Linking Arms Together

- Treaties were entered into between Indian tribes and Colonies/US government
  - Highlight that tribes are pre-existing sovereigns
  - Early treaties were very egalitarian
  - As power shifted the treaties became more one sided

- Disparate views of treaties
  - Tribes viewed treaties as a binding of their peoples in perpetuity
  - European settlers viewed treaties as temporary agreements to be renegotiated as needed

Marshall Trilogy

- Three Supreme Court cases make up the foundation of Federal Indian law
    - Tribes have a right of occupancy to land only
      - Discovery gave title to the government that found it
      - By mere fact of discovery necessarily diminished Indian sovereignty
    - The “discoverer” has a right to “extinguish Indian right of occupancy either by purchase or conquest”
    - Commerce Clause: Congress can regulation commerce “with foreign nations, and among the several states, and with Indian tribes.”
    - Tribes are domestic dependent nations
      - In a “state of pupilage” as a “ward to his guardian”
    - The laws of the state can have no force in Cherokee Territory.
    - When a weaker nation puts itself under the protection of a stronger one it does not imply the destruction of the protected

- These cases are still good law and frequently cited.
Trust Responsibility (and Plenary Power)

• The Marshall Trilogy cases along with the various treaties signed with Indian tribes created a trust responsibility towards Indian tribes
  • This trust responsibility attaches to the federal government
  • Must make decisions in best interest of tribe

• Congress has plenary power over Indian issues
  • Congress can and has unilaterally abrogated treaties, but the SCOTUS has since said that the abrogation must be explicit and cannot be implied by passing a law that contradicts the treaty language
  • Furthermore, some scholars argue that this plenary power is also subject to trust responsibility (meaning that it must be in the tribes’ best interest)
Tribal Consultation

• Executive Order 13175
  • Requires Executive federal agencies to consult with federally recognized tribes on issues that have a “tribal implication”
  • Agencies have the option to expand beyond federally recognized tribes
    • DOD, DOE, USACE

• Statutory consultation requirements
  • National Environmental Protection Act
  • National Historic Preservation Act

• Meaningful consultation
  • Consultation must occur before decision is made
  • There should be engagement in all stages including development
    • Generally, agencies start consultation when it is already too late
Recommendations for Better Collaboration

• Most federal employees understand that there is a special relationship and that consultation must occur
  • However, they lack an understanding as to “why” this special relationship exists

• Understanding that tribal-federal and tribal-state relationships are diplomatic
  • Relationships between two political entities
  • Relationships that started much earlier than any of the parties involved

• This shared understanding and focus on diplomacy along with a desire to link arms can build trust and create better collaborations

• Recommendations
  • 1. Mandate training that includes the historical context in addition to merely teaching the legal requirements
  • 2. Support creation of indigenous courses and modules in Public Administration and Political Science programs
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