

Tribal Sovereignty, by Jerilyn DeCoteau, Member of the Turtle Mountain Band of Chippewa, Indian Law Lawyer and Tribal Court Judge – July 20, 2020

I have been asked to share a piece on tribal sovereignty and to say what can be done to address the losses tribes have suffered since the arrival of Europeans and the establishment of the “New World.” Here is my too brief offering on such a complicated and important topic. I hope readers will find it informative, educational and that it inspires them to act. Please view it as a starting point.

Tribes as Sovereigns

Sovereignty is the inherent right of a group of people to govern themselves, to make the rules by which they will live. Sovereignty requires the agreement of a group of people and it requires a territory.

There are 574 federally recognized Tribes in the United States today, including 229 Alaska Native tribes and villages. Each of these exercises some degree of sovereignty over its territory and people.

Tribes’ sovereignty is inherent and pre-dates the United States. The colonies and later the United States recognized the tribes’ complete authority over their territory and their citizens. From the start, treaties were made with Indian Tribes, first by European Nations, then by the colonies and then the United States. This was a recognition that tribes were sovereigns, capable of entering into nation to nation treaties.

The United States entered into more than 500 treaties with tribes between 1778 to 1871, when Congress ended treaty making with tribes. Many more agreements were made after 1871, that recognized tribal sovereignty, such as the 1905 Agreement with the Turtle Mountain Band of Chippewa, which took 10 million acres of land for one million dollars. I have always known it as the “Ten Cent Treaty” so named because of the unconscionable undervaluing of the land.

Treaties are recognized in the United States Constitution as the “supreme law of the land.” Article VI, sec. 2 Supremacy Clause. The Constitution also gives Congress exclusive power to regulate commerce with foreign nations, the states, and with Indian Tribes. Article 1, sec. 8, clause 3. The United States broke every

treaty it entered into with tribes. For easy access, a substantial though incomplete list of treaties and agreements with Indian tribes can be found at:

https://en.wikipedia.org/wiki/List_of_United_States_treaties

Limitations on Tribal Sovereignty

In a series of early cases, the United States Supreme Court set down certain Indian law principles which began the process of limiting and defining tribal authority to govern their territory and those within it. For example: (1) under the Doctrine of Discovery, tribes have the right to use and occupy their lands, but the United States holds legal and beneficial title and the right to possession when the Indians give up their use and occupancy, *Johnson v. M'Intosh* (1823); (2) tribes are "domestic dependent nations... in a state of pupilage" and their "relation to the United States is that of a ward to his guardian," *Cherokee Nation v. Georgia* (1831); and (3) "Indian nations are distinct political communities, having territorial boundaries, within which their authority is exclusive...." *Worcester v. Georgia* (1832).

These principles stand to this day and established the basis of the relationship between the states, the tribes and the federal government: tribes have the full right to govern within their territory without state intrusion. But imposing a "dependent" status signaled a loss of some measure of sovereignty – the foundation of any government – and precipitated additional limitations in the future.

Tribal sovereignty has been severely limited by subsequent federal laws and court decisions. The Major Crimes Act of 1885 gave the United States criminal jurisdiction over certain crimes committed in Indian Country (the term includes reservations, allotments and other dependent Indian communities); the Allotment Act of 1887, divided up tribal land for individual ownership and sold off the lands not allotted, or "surplus" lands, (resulting in loss to tribes of 90 million acres or two thirds of reservation land); the Termination policy (Joint Congressional Resolution 53) resulted in termination of federal recognition of more than 100 tribes and liquidation of all their land and assets, and; "Public Law 280," a 1952 law, gave states criminal and civil jurisdiction over certain tribes.

Tribal authority has been limited in ways that are devastating to tribes' ability to govern their people, their territory, and all other assets. Federal laws and policies have caused loss of land, resources, people, children, culture, language, ceremony, and government and community institutions, and attempted to replace it all wholesale with dominant European rules, values, culture, religion, education and forms of government.

What sovereignty is left to tribes today?

Tribal sovereignty, as limited, or bolstered, by federal law, is practiced through *self-determination*, the longest-lived federal policy, adopted in the early 1970s and still in effect today. Legislation to implement self-determination has focused on furthering tribal control over government services to tribal people, increasing control over natural resources and economic development, and protecting tribal culture and community. The Indian Self-Determination and Educational Assistance Act of 1975 was the most far reaching legislation because it allowed tribes to directly contract with the federal government to administer Indian programs.

Tribes have lost ninety-eight percent, 1.5 billion acres of their land base. Land, territory, is a fundamental component of tribes' sovereignty. In addition, they have lost other assets of all kinds, including natural resources, language, culture, and even their children, all resulting from the series of wildly vacillating federal policies over the past two hundred and forty-four years. These losses cannot be undone easily, if at all, but tribes still have considerable assets, including significant amounts of land and other natural resources. Under the current policy of self-determination, tribes are exercising their sovereignty to reclaim their tribal institutions, recover land, regain control of their resources, exercise criminal and civil jurisdiction over their citizens, and revitalize their languages, culture, and ceremony.

Just this month tribes received some overdue support from the United States Supreme Court. In a surprising landmark ruling issued on July 9, 2020, the Supreme Court upheld the Muscogee Creek Nation's criminal jurisdiction within its reservation. *McGirt v. Oklahoma*, July 8, 2020. In order to uphold the Nation's authority, the Court had to determine whether the Muscogee Creek reservation

still exists. The State of Oklahoma had insisted the reservation was disestablished by a series of policies and occurrences, and that to find otherwise would disrupt long standing criminal law enforcement by the State. The Court found that the reservation, which was created by treaty and encompasses nearly all of eastern Oklahoma, still exists, despite intervening actions and expectations, because no law has disestablished the reservation. Applying the rule of law, the Court said it would “[hold] the United States to its word,” given in the treaty.

This decision has been hailed for its honoring of a treaty; however, its implications will be parsed for decades to come. While there has been an audible sigh of relief in this case, Indian country is used to holding its breath and will keep waiting to fully exhale; this is just one narrow victory for tribal sovereignty in the arduous task of reclaiming tribal assets and on the long road to rebuilding native nations.

A well-known Native author made this observation. “It may be that Americans will have to come face to face with the loathsome idea that their invasion of the New World was never a movement of moral courage at all; rather, it was a pseudo religious and corrupt socioeconomic movement for the possession of resources.” Elizabeth Cook-Lynn, from *Why I Can't Read Wallace Stegner and Other Essays. A Tribal Voice*.

Tribes still exist as nations, but because of the damage resulting from federal actions and policies, tribes will need strategies for political and cultural survival they may not have needed had tribes been allowed to co-exist with the United States and exercise their full sovereignty as they had always done. No sovereign can survive long in the world today without the recognition and respect of other, especially more powerful sovereigns. As Cook Lynn's words imply, the survival of tribal nations will require, from those who have benefitted from all that was taken, the “moral courage” to *act* in support of tribal sovereignty.

What can be done now?

To those non Native people who, after learning about tribal sovereignty, will ask, “what can we do,” I offer this: learn the true history of the United States, teach others, and support tribes in their efforts to rebuild, control, and maintain their communities. Be ready to give back land and other resources; they are not,

despite centuries of practice and expectations, rightfully yours. Your efforts and sacrifices will be a small price to pay for the last 500 years of Europeans living in Indian Country and enjoying the benefits of the land and resources that were taken from Native people.