



American Indian Powers of Governance: The Intersection of Federal, Tribal, and State Authority

FEDERAL SUPREMACY

American Indian tribes have the inherent power of self-governance, called sovereignty. However, federal law determines the degree to which tribes may exercise sovereignty. The federal government may regulate Indian tribes, tribal members, and tribal lands, or may grant states authority to regulate matters affecting Indians. The tribes retain only those powers of governance that the federal government has not assumed directly or granted to states. Along with the authority to govern Indians, the federal government has a trust responsibility to Indians to protect Indian lands and resources.

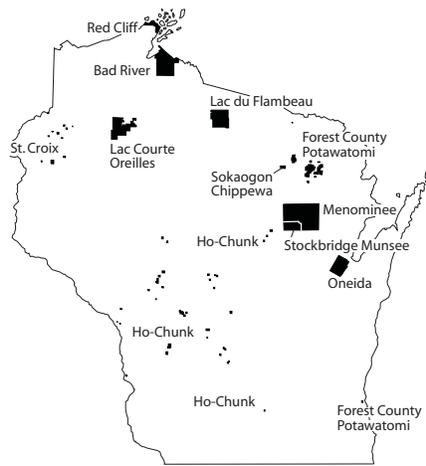
During the first century of U.S. nationhood, the federal government entered into treaties with tribes—to some extent treating the tribes like foreign nations—and enacted statutes to govern Indian affairs. In 1871, Congress effectively ended the president's power to enter into treaties with tribes, but provided that existing treaties remain valid unless specifically abrogated by federal statute.

TRIBES AND TRIBAL MEMBERSHIP

To exercise governing authority under federal law, a tribe must be recognized by the federal government. There are 11 federally recognized American Indian tribes in Wisconsin. Each tribe determines its own membership criteria. Common factors for determining membership include measurement of "Indian blood" (some tribes weigh maternal versus paternal links to the tribe differently) and whether a person's ancestors are on a specific membership or census list.

STATUS OF INDIAN LAND

Knowledge of the status of land is critical to understanding whether the federal government, a tribe, or the state has authority over matters affecting Indians on that land. Indian lands consist of reservations and off-reservation trust lands. Reservations are areas of land set aside by the federal government for specific tribes. The current mix of ownership of reservation land reflects the history of federal policy toward Indians.



Indian Reservations and Off-Reservation Trust Land, 2005

When reservations were first established, generally by treaty, the federal government usually prohibited alienation of reservation land. But in a major shift in policy, the federal government subsequently allotted pieces of reservation land to individual tribal members and transferred "surplus" reservation land to non-Indians. The intent of the allotment policy was to facilitate Indian self-sufficiency by

providing Indians individual ownership of land and to promote assimilation of Indians with non-Indians. However, the primary effect of the allotment policy was the transfer of large amounts of reservation land to non-Indians. In 1887, before the allotment policy was enacted, there were 138 million acres of reservation land. The federal government allotted about 40 million acres to individual Indians, and sold about 60 million acres as "surplus" land. Many individual Indians transferred their allotments, often because they could not pay property taxes. By the end of the allotment period in 1934, individual Indians owned a total of only 17.6 million acres of reservation land.

In 1934, the federal government passed the Indian Reorganization Act, ending the allotment policy and shifting federal policy toward protecting Indian lands. The federal government and tribes then began reacquiring reservation land. If certain requirements are met, the federal government now places land acquired by tribes, and sometimes by individual Indians, in trust for the tribe or individual. Reservation land therefore currently consists of land held in trust for the tribe, land held in trust for an individual tribal member, land owned by the tribe, land owned by a tribal member, and land owned by a non-tribal member. Tribes may also acquire off-reservation land and request that the federal government place it in trust. Trust land is generally tax exempt.

In Wisconsin, the status of reservation land varies greatly among the tribes. Much of the Menominee reservation is

tribal trust land, whereas much of the Oneida reservation is owned by non-Indians. The Ho-Chunk Nation does not have a consolidated reservation; instead the tribe has parcels of trust land in 14 counties at this writing.

RIGHTS AND PRIVILEGES OF INDIANS

As citizens of the United States and of the state in which they reside, Indians have the same rights and privileges under federal and state law as non-Indian citizens and are entitled to the same state and federal benefits.

Indians may vote in federal and state elections. Indian children are entitled to attend public schools, and all reservation land is within a public school district. (Several tribes also operate tribal schools that Indian children may attend.) Indians are entitled to receive public assistance benefits. Tribes administer some federal and state public assistance programs for their members; for example, some tribes administer the Wisconsin Works, or "W-2," program. If a tribe does not administer a program, tribal members participate through a county department.

Indians are protected by the U.S. Constitution in dealings with federal, state, and local governments, but the U.S. Constitution does not apply to tribal government actions relating to tribal members. To provide basic individual rights to Indians, Congress passed the Indian Civil Rights Act of 1968, which applies most of the protections afforded under the Bill of Rights to tribal actions relating to tribal members.

Federal treaties and laws also provide some benefits to Indians that are not afforded to non-Indians. For example, under treaties signed in the 1800s, the Chippewa retained the right to hunt, fish, and gather on land that is now roughly the northern third of Wisconsin. (Although that right was not widely exercised until a federal court affirmed the treaty rights in 1983.)

STRUCTURE OF TRIBAL GOVERNMENTS

Each tribe establishes the structure of its government. All the tribes in Wisconsin have adopted constitutions. Each tribe has a legislative body. Some tribes have at-large legislative districts and some have geographic districts or specify that a certain number of legislative seats are for tribal members who live on the reservation. All of the tribes have an executive, such as a president or council chair, either chosen by the electorate or the legislative body. Some tribal constitutions provide that certain matters must be voted on by the tribal membership as a whole. Tribes often establish administrative departments, such as social services, health, child welfare, education, personnel, and gaming. Each tribe has its own court system, including trial courts and some form of appellate review. The type of cases heard by tribal courts varies by tribe.

TRIBAL GOVERNING AUTHORITY

Tribes may regulate relations between tribal members and matters concerning land owned by a tribe or held in trust for a tribe or an Indian. Tribes establish and enforce laws affecting health and welfare, inheritance, family law, child welfare, tribal elections, conservation and hunting, gaming, and, to a limited extent, criminal law. Tribes may operate law enforcement agencies. Tribes have the authority to tax their members. And tribes may enter into agreements with the federal, state, or local government, and with other tribes.

STATE REGULATORY AND ADJUDICATORY AUTHORITY

The state may regulate activities of Indians who are outside the boundaries of a reservation or off-reservation trust land just as it regulates the activities of non-Indians. However, on a reservation or on off-reservation trust land, the state may act only to the extent the federal government has granted the state authority. The existence of state regulatory authority frequently de-

pends on whether the subject of regulation is an Indian or non-Indian, the status of the land on which the activity takes place, and the relative weight of federal, state, and tribal interests at stake.

The federal government in 1953 granted the state of Wisconsin adjudicatory authority over both civil and criminal matters involving Indians that occur on all Indian lands, except on the Menominee reservation. On the Menominee reservation, criminal jurisdiction is divided among the federal government, the tribe, and the state, depending on whether the alleged perpetrator is an Indian, whether the victim is an Indian, and the nature of the crime. Even though the state adjudicatory authority is settled with respect to ten of the eleven tribes, jurisdictional disputes may still occur because a tribal court may have concurrent jurisdiction with the state. In one recent case that was ultimately heard by the Wisconsin Supreme Court, twice, a non-tribal member filed an action against his former employer, the Bad River Band of the Lake Superior Tribe of Chippewa, in state court, and the tribe filed an action in tribal court. The courts made conflicting rulings. Some tribal and state courts have since adopted procedures to avoid conflict when civil suits are filed in both state and tribal court.

SUMMARY

American Indian tribes have sovereignty, but the extent of their sovereignty is limited by federal law. Federal law also limits the state's power to regulate tribes and activities on reservations and on off-reservation trust land.

Governing Wisconsin: "American Indian Powers"

Study Questions

1	List the 11 federally recognized American Indian tribes in Wisconsin.	
2	(1) Explain the allotment policy. (2) What happened as a result of the Indian Reorganization Act of 1934?	
3	Would the Oneida tribe be allowed to increase the voting age, from 18 to 21, for its people? Explain.	
4	The state fish of Wisconsin is the muskie. If the state legislature decided to protect the muskie from being caught, would the Chippewa have to abide by this law? Why or why not?	
5	List some ways in which the federal government limits the sovereignty of American Indians in Wisconsin.	
6	How should the federal government deal with Indian sovereignty? Identify five factors that the federal government should consider in crafting policy with respect to Indians.	

Governing Wisconsin: “American Indian Powers”

Study Questions in the Cognitive Domain

1	List the 11 federally recognized American Indian tribes in Wisconsin.	Ho-Chunk, Forest County Potawatomi, Oneida, Stockbridge Munsee, Menominee, Sokaogon Chippewa, Lac du Flambeau, Lac Courte Oreilles, Bad River, Red Cliff, and St. Croix.	Cognition
2	(1) Explain the allotment policy. (2) What happened as a result of the Indian Reorganization Act of 1934?	Under the allotment policy, the federal government could sell off “surplus” reservation land to non-Indians. In 1934, the federal government passed the Indian Reorganization Act which stopped this policy and began helping tribes to reacquire lost land.	Comprehension
3	Would the Oneida tribe be allowed to increase the voting age, from 18 to 21, for its people? Explain.	The members of the Oneida tribe have the same rights as non-Oneida citizens of the United States, so the tribe could not change the voting age for local, state, and federal elections. The tribe may, however, set a different voting age for its tribal elections.	Application
4	The state fish of Wisconsin is the muskie. If the state legislature decided to protect the muskie from being caught, would the Chippewa have to abide by this law? Why or why not?	No. In 1983, after years of dispute, a federal court ruled that an 1837 treaty signed by the Chippewa and the federal government gave the Chippewa the right to hunt and fish on their original tribal lands (22,400 square miles of northeastern Wisconsin) regardless of state and local regulations.	Analysis
5	List some ways in which the federal government limits the sovereignty of American Indians in Wisconsin.	(1) The federal government must recognize the tribe for it to receive sovereignty, and the federal government can revoke this status. (2) Tribal land has been trusted to the tribe by the federal government, and the tribe must get federal approval to acquire more land in trust. (3) Federal courts have jurisdiction in some criminal and civil cases.	Synthesis
6	How should the federal government deal with Indian sovereignty? Identify five factors that the federal government should consider in crafting policy with respect to Indians.	A list of factors may include tribal independence and self-sufficiency; integration of Indians and non-Indians; historic claims to land; preservation of Indian identity; honoring treaties; government’s trust responsibility to Indians; clarity as to who has governing authority and judicial power; impact of policies on non-Indians.	Evaluation