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1. Nobody I work for is responsible for what goes into this presentation. The opinions expressed here are mine alone. My Superiors did not approve the presentation and they probably did not read it.

THE CLASSICAL VIEW

2. "I Ain't Gonna Play Sun City!" --**the Doctrine of Retained Sovereignty**. Why is an apartheid-era "tribal homeland" any different than the Indian reservation?

3. Indians retain sovereignty unless diminished by federal (not state), government. Marshall trilogy starting in 1823-1832 *Johnson v. M'intosh,* (1823) (Private citizens cannot purchase lands from the tribes; tribes are domestic dependent sovereigns) *Cherokee Nation v. Georgia, (*1831) (Indians are as a ward to the U.S. which is a guardian) *Worcester v. Georgia* (Indian tribes are sovereign State had no right to enforce laws in territory) (1832).

4. Implied diminishment of tribal sovereignty not favored. Most recently and most emphatically though, in Merrion v. Jicarilla Apache Tribe, (1982) (tribe could impose oil and gas severance tax, even though it signed contract for limited royalty in 1953). Reason? Sovereign ability to impose taxes not impliedly (or explicitly) diminished.

5. Dual sovereignty status. Wheeler v. United States (1978) (Conviction in tribal court not double-jeopardy to criminal prosecution in Federal Court –Separate sovereigns).

6. Very few implied diminishments of authority. No army. No currency. No ability to enter into foreign treaties.

7. High Water Mark: Williams v. Lee, (1959) Trading post on reservation can't sue Indian customer for debt in state court. "Indians have the right to make their own laws and be ruled by them" Note: Williams v. Lee not cited with approval by the Supreme Court since 1982!

Other important holdings including tax cases.

Mescalero Apache v. Jones (1973) Sierra Blanca Ski resort improvements on the reservation not subject to property tax off-reservation activities subject to state corporate tax. Various extraneous theories of federal instrumentalities rejected—from now on it's a sovereign to sovereign dispute.

MClanahan v. Arizona State Tax Comm'n (1973) Navajo Indian living and working on the reservation not subject to state income tax . Indians win but takes a heavy "interest analysis" point of view rather than territorial approach. Little did anyone know that things were about to change. Indian lawyers start getting worried.

Ramah Navajo School Board v. Bureau of Revenue, of New Mexico (1982) GRT on contractor building school for Indian school board in Ramah prevented.

White Mountain Apache Tribe v. Bracker (1980) Pervasiveness of federal regulation of logging on Indian reservation prevents imposition of tax on the reservation.

Cotton Petroleum v. New Mexico (1988) State severance tax on oil and gas on the reservation permissible. (statutorily adjusted by New Mexico).

Eastern Navajo Industries v. Bureau of Revenue, 89 N.M. 369 (1976) State corporation majority owned by Indians an "Indian" for state tax purposes. A very simple case, but a helpful one that simplifies things for us.

The Backlash

"Interest Analysis" instead of Territorial Approach—much harder to deal with

Oliphant v. Suquamish Tribe (1978) (criminal prosecution of anglo in tribal court forbidden; criminal jurisdiction against non-Indians impliedly reserved from Indians). OK, a little strange, Pretty much anywhere can subject visitors to the criminal law. A seemingly minor thing, but in practice a real headache. Look at the fallout--- What about a non-member Indian? What happens when a non-Indian or non-member Indian engages in domestic violence on the reservation? Williams v. Lee says tribal court has jurisdiction for restraining order, but no jurisdiction on the criminal side to enforce the order? Congress has had to address these issues by legislation. Seemingly simple, yet non-territorial, decision creates great complexity.

Montana v. United States (1982) (Tribe may exercise civil authority over non-Indian where it has entered into consensual relationship with tribe---mineral development, for example, or where the non-Indian activity directly imperils the subsistence of the tribe)

Q. When does the the non-Indian activity directly imperil the subsistence of the tribe? A: Almost never. The civil jurisdiction over non-Indians is effectively limited to consensual relationships, or situations that can be tied to the power of the Indians to exclude. The Indians still have the power to exclude non-Indians from their reservation. Lots of opportunity for jurisdictional gaps between the states and the tribes.

Strate v. A-1 Contractors (1997) (granting of road right of way to state through the Indian reservation is an implied diminishment of the reservation, but not necessarily ownership of the underlying land). Wonder why the Indians are getting sticky about rights-of-way? Strate is a good reason.

NEW MEXICO SYNTHESIS

About 11% of New Mexico's population is Native American. We have 24 tribes counting the return of the Fort Sill Apaches, and the Ute Mountain Ute who, unique to New Mexico, have land in the state but apparently no tribal members.

Leave aside the political competition between the state and the tribes. 24 different physical jurisdictions creates a practical problem of law enforcement simply in terms of boundary lines. Overlay on top of that the kind of "interest analysis" type approach taken recently in the US Supreme Court, and you have a nightmare.

The three most pro-Indian courts in the nation are probably the New Mexico Court of Appeals, the New Mexico Supreme Court and the 10th Circuit Court of Appeals in that order. So, on top of these practical problems you have appellate courts not eager to hold the tribes to the US Supreme Court, federal law minimum. Things that apply elsewhere probably don't apply (yet) in New Mexico.

Hinkle v. Abeita, (2012) Strate v. A-1 rejected. Road-right-of-way still in tribal jurisdiction. Court of appeals for some reason, has zero interest in having an accident reconstructionist appear in court to testify whether the point of impact of a car crash was on or off the roadway every time there is a traffic accident.

State v. Romero, (2006) New Mexico Supreme Court declares a chunk of land in Taos just off the plaza in Pueblo of Taos jurisdiction. Got it completely wrong, Hydro Resources v. EPA, (10th Cir. 2010), but by then the congress had passed a law to allow the feds to take jurisdiction in criminal cases in that area----a legislative fix, and another complication to our jurisdiction we will have to deal with forever.

Fon du Lac v. Frans (8th Cir. 2011) Indians living on reservation collecting pension earned off reservation owe state income tax according to federal appellate court. Compare to the Native American Veterans settlement approach by the legislature where refunds were made to veterans earning money in the military service. My guess is the New Mexico appellate courts would not follow Frans until other courts did.

CURRENT TAX ISSUES

The Cotton Petroleum double taxation issue for severance tax has been resolved legislatively by the state, in favor of the tribes.

The division of GRT is handled by intergovernmental agreement, with the lion's share of all taxes collected on the reservation going to the tribes. All our agreements are available on our web site. These are very intricate documents. The problem isn't jurisdiction. The problem is we aren't collecting a lot of money. The last time I checked, about two years ago, we were collecting less than a million dollars state wide. So, things are going very well on the "peace and harmony" front, but not so well on the revenue front.

Territorial Disputes of the Future: P.L. 108-66, Generally, the US Supreme Court says that when a tribe reaquires fee lands that are outside of it's jurisdiction, i.e. an in-holding, the jurisdiction is not changed. Cass County v. Leech Band of Chippewa Indians (2007). That is, the land is not automatically restored to tribal jurisdiction. P.L. 108-66 provides that as to Santa Clara and San Ildefonso, reacquired lands within the boundary of the Pueblo Grant are subject to the Pueblo Lands Act of 1924, that is, not subject to alienation. Good case law, says that when tribal lands can't be alienated, they are reservation. Newer case law says otherwise. The statutory history says there was no local burden, so we for the time being have been taking the position that the taxability of such lands hasn't changed. This will be a fight some day.

Most tax laws dealing with Indian tribes give the tribes more authority than the federal government requires, so the state has flexibility in setting the parameters of the territorial boundary where it applies.

What did the legislature mean when it uses the term "pueblo grant" in this way? Arguably, it could mean the original Spanish land grant from the year one, even though the land in question might now be unquestionably be outside of Pueblo jurisdiction. i.e. the town of Bernalillo, the northern part of Taos, and Espanola. The AGO has told me that it has another interpretation, although it has not elaborated. This is important.

Please, please, pay special attention when you consider a bill with the words "pueblo grant" describing its jurisdiction. Do you mean lands where you would be prosecuted in federal court if you committed a crime against an Indian there? Do you mean the unique "Romero" lands that we have in New Mexico that are within the federal criminal jurisdiction although they are not in the tribal civil jurisdiction?

So what do we have as a potential border for each Indian tribe in New Mexico?

1. Tribal trust land.

2. Tribal trust lands including allotments not subject to alienation.

3. "Indian Country" under federal law, 18 U.S.C. 1151, traditionally, lands where, if an Indian commits an armed robbery he would be subject to federal and not state prosecution.

    A. "Indian Country" plus roadways and utility easements that are in the eyes of the federal government not now considered to be in tribal jurisdiction.

4. "The Pueblo Grant"—whatever that means.

5. "Romero Country" May be the same as "The Pueblo Grant" lands that are not normally Indian Country except by the aberrational decision of the Supreme Court with a subsequent legislative fix giving such jurisdiction to the federal courts.

6. Reacquired lands within the boundaries of Santa Clara and San Ildefonso pursuant to P.L. 108-66. Would possibly be included within "Pueblo Grant"

Please, please, be alert to the use of the phrase "Pueblo Grant" in a statute as it refers to the territorial jurisdiction of a tribe. For example, see this usage of the term "pueblo grant" creating a gas tax exemption:

"gasoline received in New Mexico and sold by a registered Indian tribal distributor from a nonmobile storage container located within that distributor's Indian reservation, pueblo grant or trust land for resale outside that distributor's Indian reservation, pueblo grant or trust land"

(N.M. Stat. Ann. § 7-13-4).

RECENT BIA REGS

November, 2012, BIA puts out a reg that purports to exempt activities on leased tribal lands from state taxation. Upheld in Florida District Court, but the main fight is going on in Palm Springs with the Desert Water Authority and the Agua Caliente Indians. A big chunk of Palm Springs is actually leased reservation land. So all these anglo-golf-playing leases are now claiming exemption from the California property tax. A pretty good fact pattern for the taxing authorities, but we'll see. My guess is the Palm Springs case will be the definitive case.

Pending regulation from BIA ousts state from regulatory and taxing authority from utility rights-of-way. The states were not caught flat-footed on this one and filed comments. New Mexico's comments complain about the the regulatory gap created where you have, say, a pipeline where the state is ousted from jurisdiction, but the Montana rule shields the lessee from regulation by the tribe.