

**Seminar on Cultural Sovereignty
September 18, 2022 (1:00 p.m.)
Twin Lakes School House**

This seminar will focus on the wisdom of indigenous custom, tradition and dispute resolution (and the resilience of Native people). We'll also look at how federal law and U.S. Supreme Court decisions have impacted the cultural sovereignty of Native Nations. We'll discuss how contemporary Tribal courts have adopted traditional justice systems and how they've applied customary law.

Indigenous self-determination

- Utilizing internal norms and values (indigenous spirituality)
- Protecting inherent sovereignty (pre-Constitutional cultures, languages and customs)
- Teaching tribal wisdom about traditional homelands, culture, language and community (e.g., relationships are fundamental) ("He acts as if he has no relatives.") (e.g., songs, stories, ceremonies)
- Ensuring that actions are for the benefit of the 7th generation (Iroquois)
- Prioritizing customary law (unwritten tribal constitution)
- Strengthening institutions of indigenous self-governance
- Reclaiming indigenous history
- Protecting sacred relationship between Native people and the land (1980 U.S. Supreme Court ruled that the U.S. illegally appropriated the Black Hills and awarded the Lakota people \$100 million -- now worth more than a billion. The Sioux people want the land returned.)
- Building tribal educational systems that are responsive to traditional values
- Overcoming difficulties of codifying customary law, including for multiple, diverse indigenous nations placed on one reservation by the U.S.
- Developing "syncretism" (blending elements from different cultures to develop something new) (e.g., providing for grandparent custody and visitation rights in Tribal court) (integrating indigenous history/culture in public schools)
- Healing the harm done by destructive U.S. policies, colonialism and oppression based on attitudes of "superiority" and forced assimilation of Euro-American values (e.g., removal, boarding schools, allotment of land, reservations, religion)

Indigenous justice systems (Tribes may require that attorneys/tribal court advocates be licensed by the tribe/Tribal bar exam based on Federal Indian law, Tribal law, custom and tradition) (depending on jurisdiction issues, cases may be concurrent with non-Native courts or may be under federal/state jurisdiction)

- Peacemaker systems (dispute resolution based on traditional justice principles) (consensus, "talking out" process includes all interested persons)
 - Council of elders, family councils, community councils, peacemakers (e.g., Navajo Nation has certified peacemakers in 110 chapters)
 - Specialty systems (Pacific NW traditional courts that only handle disputes related to rivers) (Some pueblos have a contemporary secular court and a traditional religious court) (Hopi has a children's court, Navajo has several family courts)

- Restorative justice circles (flexible peacemaking councils)
- Healing to wellness courts (team approach to achieve the physical/ spiritual healing of participants + restore community well-being)
- Tribal court (similar to U.S./state trial courts)
- Appellate court/supreme court (may be an intertribal appellate court) (e.g., Northwest Intertribal Court Systems, a consortium of 15 Tribes in western Washington)

Some differences in justice paradigms

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| • Holistic (circle of justice) | Vertical hierarchy (church and state) |
| • Peacekeepers | Judges, formal court procedures |
| • Elders as tradition keepers | Formal education, training, licensing |
| • Fluid communications | Structured communications |
| • Oral customary law | Written statutory law, recordkeeping |
| • Justice/spirituality combined | Separation of church and state |
| • Talking out process | Argumentative |
| • Consensual (win-win) | Adversarial (win-lose) |
| • Comprehensive | Fragmented, compartmentalized |
| • No time limits on process | Time oriented, restrictive process |
| • Inclusive, egalitarian | Limited participation |
| • Represented by extended family | Represented by strangers, attorneys |
| • Focus on victim, community | Focus on individual rights, privileges |
| • Customary sanctions, ceremonies* | Prescribed penalties by the state |
| • Traditional "probation officers" | Officers of the state |
| • Reparations, restoration | Vindication |
| • Traditional dispute resolution | Alternative dispute resolution |
| • Confession, accountability | Innocent until proven guilty |
| • Healing, restoring harmony | Punishment, incarceration |
| • Respect for nature | Conquest of nature |
| • Mutual respect, community focus | Focus on individual accomplishments |
| • Giving, sharing, generosity | Taking, saving ("Greed is good.") |
| • Usage rights | Exclusive land ownership |

*Traditional ceremonies include honoring, purification, sustaining connections with family, community and culture. They may include prayer, talking circles, drumming, sweat lodge and other healing practices (e.g., burial of a spirit when a family member is missing in action and usage of Navajo sand paintings in ceremonies -- "places where the gods come and go" in the Navajo language)

Examples of Navajo traditional ceremonies (spiritual, healing, cleansing):

- Warrior Ceremony -- to provide protection when going to combat
- Enemy Way Ceremony -- to deal with combat-related stress when warriors return ("We're here to bring you home.")

- Blessing Way Ceremony -- to heal the individual and restore equilibrium with the cosmos and community.

Example of how indigenous traditions were used in a 2019 ceremony:

A Canadian museum entered into a legally binding contract for the use and protection of over 800 items collected from survivors and sites of Indian boarding schools across Canada ("The Witness Blanket"). The parties stated their purpose and intentions for the stewardship of these articles during a ceremony that included song, dance and an ancestor's mask. Respected witnesses from the Native community reflected on their responsibilities as *story keepers* and *memory holders*. Everyone celebrated with a feast in the Pacific Northwest *potlatch* tradition. Potlatch means "to give." [Native traditions define a rich person as someone who gives the most away. "When one's heart is glad, he gives away gifts."]

Examples of rights under Tribal governance:

- Use rights in land and resources (e.g., customary use areas and grazing permits in Navajo Nation) (fishing rights in Pacific NW).
- Family/clan/band territorial usage with hunting/gathering rights.
- Usage/protection of sacred sites.
- Customary family trusts (e.g., "most logical heir") to avoid fragmentation of land usage (state intestate succession laws lead to fractionated heirship).
- Recognition of oral wills in inheritance disputes. [e.g., Hopi disputants agree: (1) on the clan relative who'll resolve the dispute, (2) to accept the final decision and (3) to be bound by the decision.]
- Recognition of traditional marriages . (Traditional divorces are no longer recognized.)
- Ostracism, banishment and exclusion (Disciplinary kachinas -- ogres who frighten children into good behavior)

Tribal court decisions using customary law: Judicial notice of customary law ("where no question arises regarding custom or usage....if a custom is generally known within the community"))("What every damn fool knows.") (In cases where custom is disputed, the tribal court may seek tribal experts in tribal common law.)

- 1982 Apache v. Republic Life Insurance Co. (Window Rock District Court)
 - Insurance policy designated decedent's ex-wife as beneficiary.
 - Under Navajo customary law, divorce/leaving a spouse results in relinquishment of all rights in the life of that spouse. Insurance co. must pay the estate of deceased.
- 1996 Hopi Indian Credit Association v. Thomas (Hopi appellate court)
 - Hopi tribal member defaulted on loan made in 1974. Tribal court dismissed complaint based on 6-yr. *federal* statute of limitations.
 - Hopi appellate court reversed and remanded for fact-finding on *Hopi* custom and tradition.
- 1999 Means v. Chinle District Court (Navajo Supreme Court)
 - Russell Means (Oglalla Lakota) was charged with threatening + battery on his father-in-law (Leon Grant, an Omaha Indian) + battery on his nephew, a Navajo tribal member. He challenged Navajo jurisdiction to prosecute him because he was a non-member

Indian. (His argument was based on Duro v. Reina (1990). He also challenged Congressional authority to reverse a Supreme Court decision (1991 "Duro-fix."). [Later, in U.S. v. Lara (2002) the Supreme Court affirmed Congressional authority to reverse the Duro decision.]

--Defendant consented to criminal jurisdiction in the Navajo Nation based on the treaty of 1868, his marriage to a Navajo tribal member, residency in the Navajo Nation and the Navajo common law of "hadaane" (in-laws have certain duties and responsibilities).

Here are a few U.S. Supreme court decisions impacting Tribal jurisdiction:

- Ex Parte Crow Dog (1883)

--One Lakota (Crow Dog) killed another (Spotted Tail) on the Brule reservation. The dispute was resolved by Lakota custom and tradition. Crow Dog was tried in the Dakota territorial court, convicted of murder and sentenced to death.

--Supreme Court: Based on U.S. treaties, there's no federal court jurisdiction over major crimes on reservation involving only tribal members. [In 1885, Congress authorized federal jurisdiction over similar crimes.]

- Santa Clara Pueblo v. Martinez (1979)

--Julia Martinez claimed that her children were denied equal protection by Santa Clara Pueblo under Indian Civil Rights Act (1968).

--Supreme Court: The only remedy in federal court under ICRA is habeas corpus. There is no right to appeal a tribal court decision.

- Oliphant v. Suquamish (1979)

--Non-Indians challenged tribal jurisdiction over crimes they committed on the Suquamish Reservation.

--Supreme Court: Tribes have no criminal jurisdiction over non-Indians because it's "inconsistent with their dependent status" and the "overriding sovereignty" of the U.S. ("*implicit divestiture*").

- U.S. v. Montana (1981)

--Supreme Court: Tribes have no jurisdiction to regulate hunting/fishing by non-Indians on non-Indian fee land within the reservation, with two exceptions: (1) consent to jurisdiction and (2) regulation of conduct which threatens or has a direct effect on the Tribe's political integrity, economic security, health or welfare.

- Mississippi Choctaw v. Holyfield (1989)

--Tribal members tried to avoid tribal jurisdiction by leaving the reservation so their twins would be born in Mississippi and consenting to a non-Indian adoption.

--Supreme Court: Children of tribal members (who live on reservation) are also domiciled on the reservation, so tribal court has jurisdiction under Indian Child Welfare Act (1978).

Indian Child Welfare Act adoption placement preferences:

1. Member of child's extended family
2. Other members of Indian child's Tribe
3. Other Indian families

- Duro v. Reina (1990)

--Non-member Indian challenged Tribal jurisdiction over a crime committed on the Pima-Maricopa land.

--Supreme Court: Tribes lost their inherent criminal jurisdiction over non-member Indians because of their "dependent status," using the same reasoning as Oliphant. [Congress recognized inherent Tribal jurisdiction over *all* Indians in 1991 ("Duro fix").]

- McGirt v. Oklahoma (2020)

--Enrolled member of Seminole Nation committed crimes on treaty-based Creek lands in eastern Oklahoma (including most of Tulsa) and was convicted in state court. McGirt challenged state jurisdiction.

--Supreme Court: Creek lands protected by treaties are Indian Country. The *state has no jurisdiction* over crimes committed by Indians in Indian Country.

- Oklahoma v. Castro-Huerta (2022)

--Citizen of Mexico was convicted by the state of crimes against a Cherokee citizen in Indian Country. Appeal challenged state jurisdiction and claimed **exclusive** federal jurisdiction over major crimes in Indian Country.

--Supreme Court: Federal and state governments have **concurrent** criminal jurisdiction over non-Indians who commit major crimes against Indians in Indian Country by declaring **implicit** Congressional delegation of state jurisdiction. [Note: The court reverses long-established jurisprudence which held that there is no state jurisdiction in Indian Country unless **expressly** delegated by Congress.]

U.S. agencies with designated responsibility for Native Nations:

- Dept. of Housing and Urban Development (housing on Tribal lands)
 - Dept. of Health and Human Services (IHS) (health care/water and sewer on Tribal lands))
 - Dept. of the Interior (BIA) (land/governance/gaming/Tribal-state compacts)
 - Dept. of Agriculture (food/commodities)
 - Dept. of Education (BIE) (schools)
 - Dept. of Treasury (IRS) (taxes/audits under the Bank Security Act)
 - Dept. of Justice (U.S. attorneys/FBI) (federal Indian law/fingerprinting of gaming personnel)
- [Note: All U.S. agencies have a *trust responsibility* under U.S. treaties and case law to protect Native Nations' treaty-based rights and land.]