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From Clean Water to Casinos: Why Sovereignty is Important to Native Americans

by Lisa K. Neuman

On the surface, Native Americans appear to be just one of the many ethnic groups that make up the contemporary United States. In fact, this idea, while common today, is relatively new and is actually a misleading perception of Native Americans simply as individuals who embody racial, ethnic, and/or cultural difference in a modern multicultural American landscape. In spite of these common perceptions, it is important to understand that Native Americans are in a vastly different historical and legal position than any other American minority, ethnic, or racial group. This is because the identities of Native Americans have been defined historically primarily in relation to their membership in native tribes or nations. These native tribes or nations have had a highly specialized legal relationship to the U.S. government, one that has shifted over the years from one of shared sovereignty to one where the federal government and the states have jointly eroded tribal sovereignty and have left America's indigenous nations with shreds and patches of their original powers.

Prior to contact with Europeans, conservative estimates are that there were somewhere between five and 10 million Native Americans living in what is now

the United States (Sanger, personal communication; also see Sutton 2004: 8). The languages, cultures, religions, economies, types of social organization, and forms of governance differed dramatically from one group to the next, and these characteristics of America's indigenous population shifted over time as a result of complex interactions between groups. At the time of European contact, there existed in what would become the United States many hundreds (at the least) of well-organized native groups that were governing themselves in sophisticated—albeit different—ways.

After contact, the observation that Native Americans had complex trade networks and forms of self-government led some European observers to recognize in principle, if not in practice, the sovereignty of native groups and the rights of such groups to the lands they occupied. The concept of sovereignty—essentially meaning “autonomy” or “right of self-government”—would figure centrally in the relationship between native tribes and the Europeans who settled in their territories. Combined with the European concept of ownership of private property, the principle of native sovereignty was fundamental to a growing American nation's efforts to assert its own rights by recognizing the established rights of America's original inhabitants. The fledgling U.S. government would depend on international recognition of Native American sovereignty in order to bolster its own claims to independence from Great Britain. In the European tradition, treaties were made between sovereign nations. The fact that the United States of America entered into somewhere around 400 treaties with native tribes between 1778 and 1871 helped to solidify the new American nation's position as a sover-

eign government on par with the British, the French, the Spanish, or any other. It is in this historical context that native tribes are appropriately referred to today as native nations (for an interesting discussion, see Dorris 1981: 48-9).

From this perspective, to question the sovereignty of native nations is to question the legal foundations upon which the United States of America was built. The very existence of the United States (and hence both its federal and state governments) was based on the transfer of land through treaties signed with Indian nations. It is important to realize that not all tribes had treaties with the federal government and that many treaties were never ratified. However, the treaties that were made were essentially a transfer of rights (in many cases, the right to control land) from native nations to the United States. The tribes retained any rights not explicitly transferred in their treaties, for example, the rights to hunt, gather, and fish in tribal territory. In return for their lands, native nations were given promises by the U.S. government, which in many cases included promises to provide health care, education to Indian children, and protection for the group from intrusion by foreign nations and/or neighboring tribes. Many of these promises were necessary because, having relinquished a large portion of their land base, the tribes realized they would no longer be able to provide the same level of protection and care for their descendants as they had before.

Although the United States eventually would break a large number of its treaty promises, the very process of treaty-making itself created what is still known as a “trust responsibility” between the federal government and the tribes. This means that the federal government has a

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specific legal obligation to the tribes with which it contracted treaties in the past, and this is manifest today in the federal programs (often mistakenly referred to as “welfare benefits”) that provide educational scholarships and social services for members of many Indian tribes. Ironically, while such federal programs for Indians should serve to remind us of the historical sovereignty of native nations, today they often create misunderstandings among non-Indians, who tend to view them as indicators of the poverty and lack of independence of modern native communities.

In his article “Native American Sovereignty in Maine,” Stephen Brimley aptly demonstrates that today when three of Maine’s American Indian tribes—the Penobscot, the Passamaquoddy, and the Maliseet—attempt to behave as sovereign entities, they find themselves bound by the restrictive language of the 1980 Maine Indian Claims Settlement Act. The courts consistently have upheld the language of the settlement, which both defines the tribes as municipalities and excludes them (unless they are specifically named) from benefiting from any federal Indian legislation passed after 1980. As Brimley points out, this strict interpretation of the language of the settlement has been used to erode the sovereignty of the three tribes, particularly when they attempt to pursue economic enterprises. This is one reason why many people from native communities outside of Maine view the settlement as an example of the kind of thing they want to avoid in potential future negotiations between their tribes and state governments.

On this issue, Brimley does a very good job explaining to those who might assume that three of Maine’s Indian tribes unthinkingly signed away their sovereignty that this was not, in fact, the case.

The Maine tribes that signed the settlement believed that they were advancing their sovereign rights vis-à-vis both the federal government and the state of Maine. As Brimley explains, they had good reason to believe so. And, lest we also jump to the conclusion that Maine’s Indian nations were alone in confronting this issue, it is important to realize that since the United States became a nation, other native nations have had to struggle against the gradual erosion of their sovereignty by both the federal government and the states.

Two particular events—one a piece of legislation and the other a Supreme Court decision—formed the basis for this erosion of tribal sovereignty across the United States. Under the Constitution, the president, with the approval of two-thirds of the Senate, was given the power to contract treaties with native nations. However, in 1871, Congress passed a law prohibiting future treaty-making between the United States and native nations. This law was passed to allow the House of Representatives to have a stronger voice in the administration of Indian affairs (Pevar 2002: 49). Since treaties had served up to this point to affirm the sovereignty of both parties who signed them, this ban on treaty-making greatly affected native sovereignty. From this point on, federal legislation would replace treaty-making as the means of defining the relationship between the federal government and Native Americans. This effectively eliminated the need for the United States to obtain tribal consent to annex native lands. In addition, in 1903 the Supreme Court handed down a decision in a case known as *Lone Wolf v. Hitchcock*, in which it ruled that existing Indian treaties had the same status as, but no greater authority than, federal laws. Furthermore,

the High Court stated that a federal law could change or even repeal a treaty made with a native nation in the past (for a good discussion, see Pevar 2002: 49).

As a result, a significant proportion of federal legislation passed after 1871 has served overall both to reduce the powers of native nations and to enhance the powers of the states over them. The recent period (from the late 1970s onward) is often referred to by scholars as a period of great tribal “self-determination” (see Brimley, this issue). However, this characterization is certainly best understood as a contrast to the overwhelming number of official government policies following the treaty era that negatively affected tribal sovereignty. These detrimental policies included assimilation (for example, 19th century allotment and the break up of reservations; the forced schooling of Indian children; and the mid-20th century termination of tribes) and assaults on the civil rights of Indians (for example, the FBI’s attacks against the American Indian Movement of the 1960s and 1970s; the involuntary sterilization of large numbers of Indian women at Indian Health Service clinics during the middle part of the 20th century; and the placement of large numbers of native children in non-Indian foster and adoptive homes prior to the passage of the Indian Child Welfare Act of 1978).

In reality, as Brimley’s discussion of the case of Maine illustrates, full tribal self-determination has not been realized today. Moreover, I would argue that many of the positive (pro-sovereignty) pieces of legislation and court decisions in the past 25 years or so stem not from new attempts by the federal government to confer sovereignty to native nations, but from specific instances of native tribes (and sometimes Native American individ-

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uals) asserting their unique legal status as members of historically sovereign groups.

The case of a tiny tribe from California, the Cabazon, provides a good example. In the 1980s, the Cabazon asserted their sovereignty by setting up a high stakes bingo operation on their reservation near Palm Springs. In response, the state of California argued that the tribe was in violation of the state's anti-gambling laws, while the Cabazon argued that the state of California could not infringe on this aspect of their sovereignty. The U.S. Supreme Court ultimately ruled in 1987 for the Cabazon, claiming that the state of California did not have jurisdiction over gaming operations on reservation lands. As a direct result of this case (known as *California v. Cabazon Band*), Congress quickly passed the 1988 Indian Gaming Regulatory Act (IGRA), which today defines on a national scale how Indian gaming can be conducted and regulated by both the federal government and the states. In many respects, the IGRA was a reactive and preemptive piece of federal legislation, as the *Cabazon* decision forced Congress to legislate rules governing Indian gaming, lest it wanted the issue to replay itself again and again in state and federal courts. In this case, a modern native group had asserted a sovereign right, challenged a powerful state that historically had been given widespread jurisdiction over Indian affairs, and won. However, in acknowledging this victory for tribal sovereignty, it is important also to realize that the IGRA actually gave power to the states and allowed them more control over Indian gaming than the *Cabazon* decision would have indicated (for an in-depth discussion of laws affecting Indian gaming, see Pevar 2002: 319-32).

While the federal government has redefined its own relationship to Native Americans over time, native nations today maintain a view of their own sovereignty that preserves the core of their original relationship with the United States government. In spite of challenges to their sovereignty, native nations continue to assert their rights to be self-governing within a larger modern American society. When the Wabanaki fight to regulate water quality on their reservations or when they strive to operate a casino as an economic enterprise, Mainers would do well to understand that these efforts stem not from the tribes' attempts to assert unique rights as ethnic minorities but from a legitimate claim to sovereignty that is also the very foundation upon which the sovereignty of the United States was built. 🐾

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