



# 2022 NATIONAL TRANSPORTATION IN INDIAN COUNTRY CONFERENCE

August 22-26    Louisville, Kentucky

Tribal Regulation, Enforcement and Adjudication of  
Commercial Motor Vehicles in Indian Country

August 23, 2022

Presented by Hon. Jan Morris (Ret.)

Director, National Tribal Judicial Center



THE NATIONAL  JUDICIAL COLLEGE  
Est. 1963

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# Background

- Highways
  - More than 164,000 miles of mostly rural highways within Indian Country
- CMV Traffic
  - 300.1 billion vehicle miles traveled by large trucks and 18 billion vehicle miles by buses in 2019
- Public Safety
  - Majority of 4,500 fatal crashes annually involving trucks occur in rural areas
- Tribal Regulation and Adjudication
  - 574 federal recognized Indian tribes
  - Sovereign nations



# Indian Country

- What does “Indian Country” mean?
- United States Code, 18 U.S.C. §1151
- [T]he term “Indian country” . . . means
  - (a) ***all land*** within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, ***including rights-of-way running through the reservation,***
  - (b) all dependent Indian communities, and
  - (c) all ***Indian allotments*** . . . ***including rights-of-way*** running through the same.

# Indian Country

- What is the importance of the phrase “all land within the limits of any Indian reservation”?
- *McGirt v. Oklahoma*, 140 S. Ct. 2454 (2020)
  - If Congress wishes to disestablish reservation land and eliminate tribal authority over it, Congress must clearly express its intent to do so
  - In the case of the Muscogee (Creek) Nation’s original reservation in the west, Congress never disestablished reservation land so the original boundaries remain intact as Indian country

# Rights-of-Way

- Treaties
  - Often included provision for roads for commercial traffic
- Acts of Congress
  - After 1871 various acts provided for roads, railroads and utility lines
- Secretary of Interior (1901)
  - 25 U.S.C §311 authorized the Secretary of Interior to grant permission to establish public highways through Indian reservations
- 25 U.S.C. §§ 323, 324 (1948)
  - Authorized Secretary of Interior to grant rights-of-way over tribal lands with tribal consent

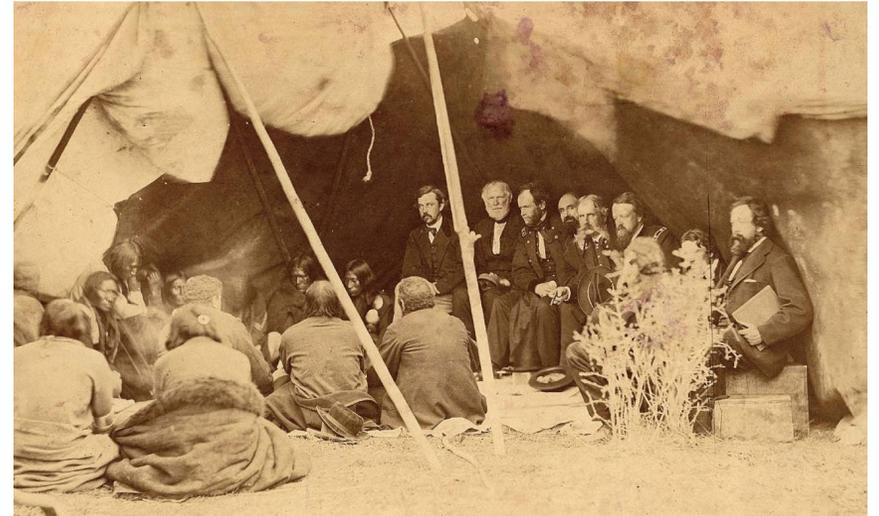


Image from Nat'l Museum of the American Indian P15390

# Tribal Sovereignty, Tribal Authority

- Inherent governmental powers
  - A hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982)
- Tribal Constitutions (IRA §16, 1934)
  - Typically included authority to promulgate ordinances to safeguard safety, public health and general welfare.
- Tribal Traffic Laws
  - Civil regulatory traffic laws promote public safety and welfare on public highways and are not limited to state jurisdiction where tribes have shown their own traffic safety laws are adequate. (*Colville v. WA*, 9<sup>th</sup> Cir. 1991)

# Tribal Civil Regulatory Jurisdiction

- Criminal jurisdiction vs. civil jurisdiction
  - criminal prohibitory (punitive)
  - civil regulatory (permissive)
- Criminal vs. non-Indians – prohibited (*Oliphant v. Suquamish*, 1978)
- Civil jurisdiction – civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in the tribal courts (*Iowa Mutual v. LaPlante*, 1987)

# U.S. Constitution

## The Supreme Law of the Land

- United States Constitution – Indian nations
  - Art. I, Section 8: The Congress shall have the power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes . . .
  - Art. II, Section 2: [The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties . . .

# U.S. Supreme Court Decisions



# U.S. Supreme Court

- *Worcester v. Georgia* (1832)
  - Congress has passed acts to regulate trade and intercourse with the Indians which treat them as nations.
  - All of these acts manifestly consider the several Indian nations as distinct political communities, having territorial boundaries within which their authority is exclusive.

# U.S. Supreme Court

- *Cherokee Nation v. Georgia* (1831)
  - It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can be denominated foreign nations.
  - They may, more correctly, perhaps, be denominated domestic **dependent nations**.

# U.S. Supreme Court

SALT RIVER PIMA-MARICOPA  
INDIAN COMMUNITY  
CODE OF ORDINANCES

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- *Williams v. Lee* (1959)
  - The question has always been whether a state action infringes on the right of reservation Indians to make their own laws and be ruled by them.
  - There can be no doubt that to allow the exercise of state jurisdiction would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation.

# U.S. Supreme Court

- *Iowa Mutual Ins. Co. v. LaPlante* (1987)
  - Congress has never expressed any intent to limit the civil jurisdiction of the tribal courts.
  - Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.
  - Civil jurisdiction over such activities presumptively lies in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute.

# U.S. Supreme Court

- *Montana v. U.S.* (1981) [The *Montana* Rule]
  - Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.
  - But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.

# U.S. Supreme Court

- *Montana v. U.S.* (1981) [The *Montana* Exceptions]
  - A tribe may **regulate**, through taxation, licensing, or **other means**, the activities of nonmembers who enter **consensual relationships** with the tribe through commercial dealing, contracts, leases, or **other arrangements**.

TITLE XIV  
CHOCTAW TAX CODE

§14-1-4 Permit to Engage in Business

**(1) Any person who engages in any business or activity on Choctaw Indian Reservation lands shall be required to first obtain a permit from the Commission to engage in such business or activity. The right to engage in such business or activity shall be conditioned upon the payment of taxes levied by the Mississippi Band of Choctaw Indians.**

- A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

# U.S. Supreme Court

- *Strate v. A-1 Contractors* (1997)
  - We align the grant of a right-of-way for a state highway under 25 U.S.C §323 with land **alienated** to non-Indians. *Montana* Rule, accordingly, governs this case.
  - The tribal court lacked civil adjudicatory authority over a tort action filed by a non-Indian against another non-Indian resulting from a car crash that occurred on a state highway running through the reservation.
  - As to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.

# U.S. Supreme Court

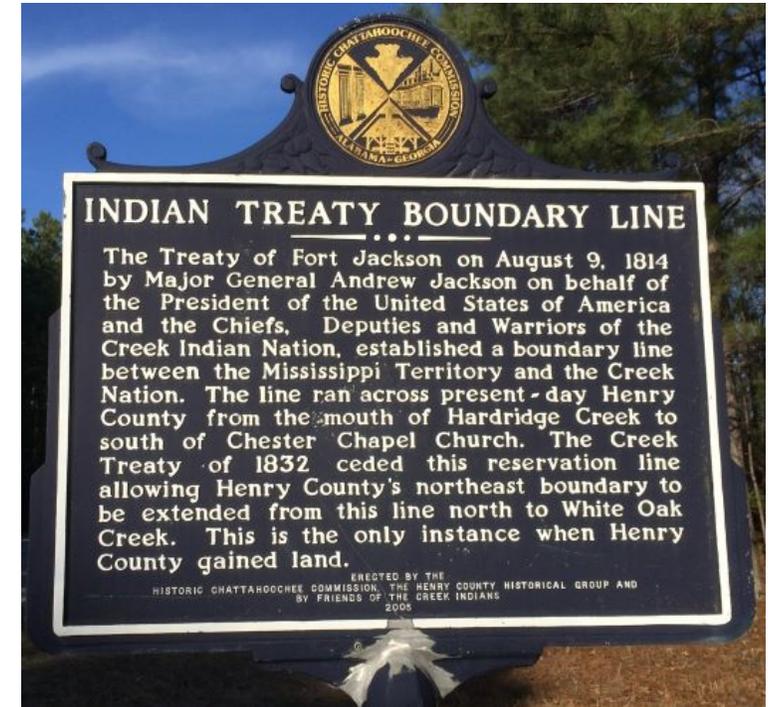
- *Strate v. A-1 Contractors* (1997)
  - 25 C.F.R. §169.10 – A granted right-of-way does not diminish:
    - tribal jurisdiction
    - tribe’s authority to enforce tribal law
    - tribe’s inherent sovereign power to exercise civil jurisdiction over non-members
    - the character of the land – non-possessory interest, **no alienation per 25 U.S.C §323**
  - A grant over land belonging to a tribe requires "consent of the proper tribal officials."
    - 25 U.S.C. §324 requires consent of the tribe – consensual under Montana exception 1

# U.S. Supreme Court

- *Solem v. Bartlett* (1984)
  - Once a block of land is set aside for an Indian reservation, and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.
  - “Diminishment” requires **explicit reference to cession** or other language evidencing the present **and total surrender of all tribal interests** strongly suggests that Congress meant to divest from the reservation all unallotted opened lands.

# U.S. Supreme Court

- *McGirt v. Oklahoma* (2020)
  - Despite allotment statutes and the Oklahoma Enabling Act, the original reservation boundaries established for the Muskogee (Creek) Nation in early 19<sup>th</sup> century treaties with the United States were never formally abolished or diminished and all lands within those original boundaries remain Indian country for purposes of the Major Crimes Act.
- If Congress wishes to diminish reservation land, and thus eliminate tribal authority over that land, Congress must clearly express its intent to do so.



# Federal Case Law Supportive of Tribal Enforcement

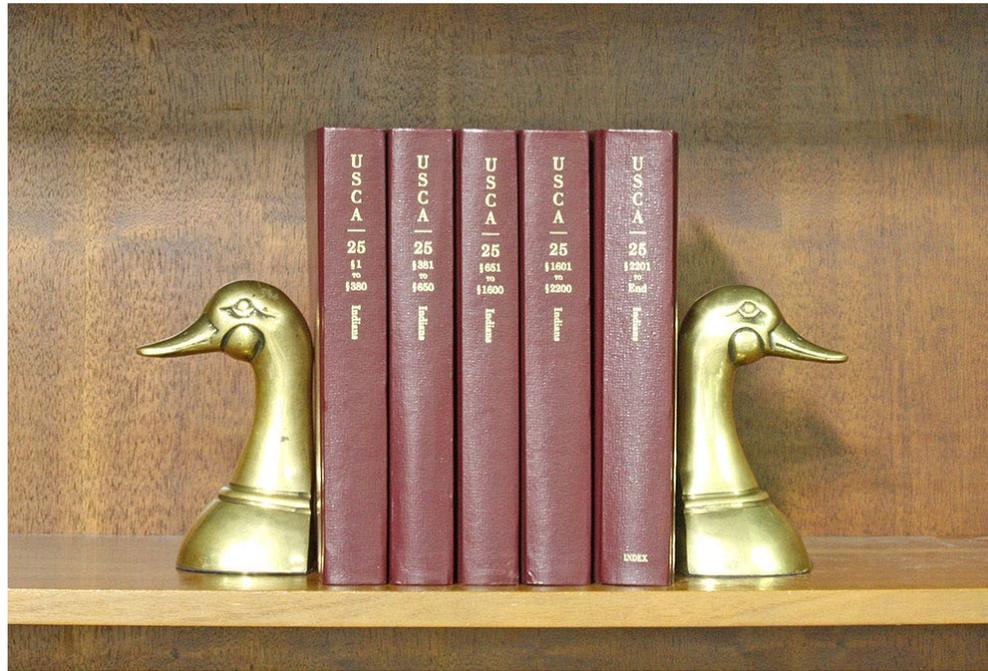
# Support for Tribal Enforcement

- *Confederated Tribes of the Colville Reservation v. Washington* (9<sup>th</sup> Cir. 1991)
  - Civil regulatory traffic laws promote public safety and welfare on public highways and are not limited to state jurisdiction where tribes have shown their own traffic safety laws are adequate.
- *Ortiz-Barraza v. U.S.* (9<sup>th</sup> Cir. 1975)
  - The power to regulate is only meaningful when combined with the power to enforce. Obviously, tribal police must have such power.

# Support for Tribal Enforcement

- *U.S. v. Cooley*, 141 S. Ct. 1638 (2021)
  - SCOTUS has preserved the possibility that certain forms of nonmember behavior may sufficiently affect the tribe as to justify oversight
  - The Court was presented with no statutory or regulatory provisions to show that Congress sought to deny tribes traffic enforcement authority
  - Existing legislation and executive action appear to operate on the presumption that tribes have retained this authority
  - No treaty or statute has explicitly divested tribes of the traffic regulation policing authority

# Federal Statutes and Agency Regulations



# United States Code - Rights-of-Way

- 25 U.S.C. §311 (1901) authorized Secretary of Interior to grant permission for the opening and establishment of public highways upon compliance with requirements “as he deems necessary”
- 25 U.S.C. §323 (1948) authorized Secretary of Interior to grant permission “for all purposes”
  - “subject to regulations **against alienation**”
- 25 U.S.C. §324 (1948) added a requirement for “the **consent** of the proper tribal officials”

# Code of Federal Regulations – Rights-of-Way

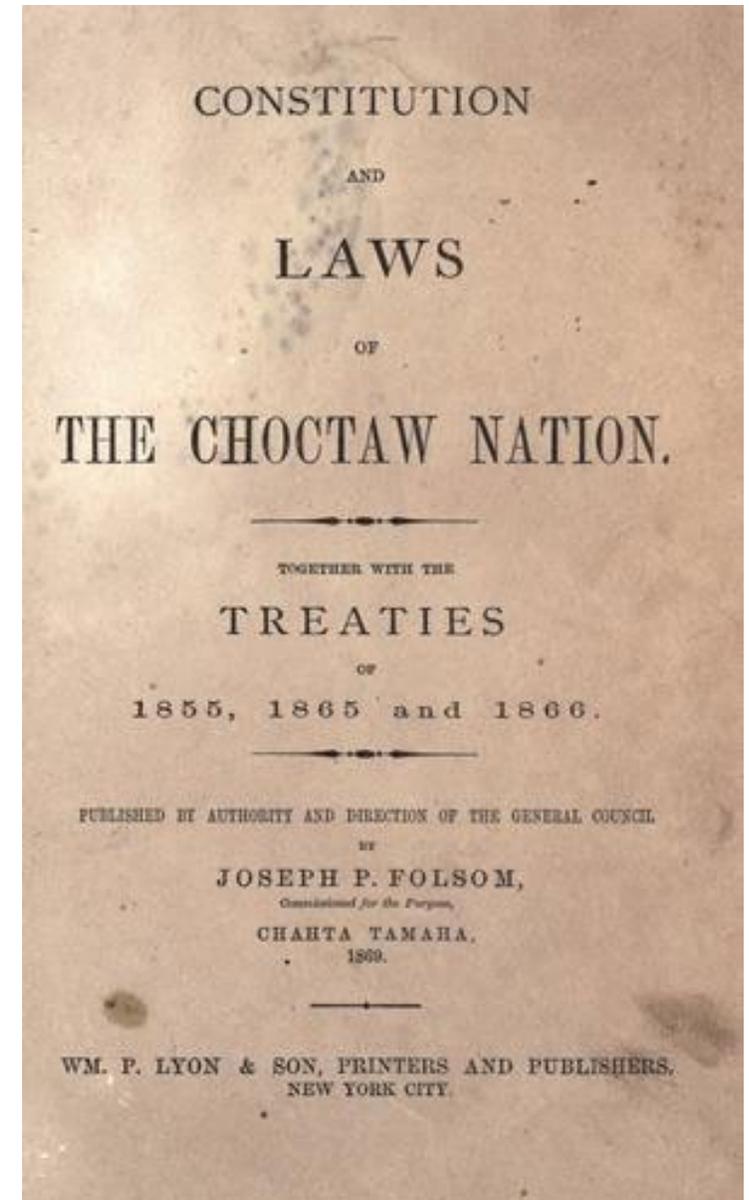
- 25 C.F.R. §169.10 - A right-of-way is a non-possessory interest in land. A grant of a right-of-way does not diminish to any extent:
  - (a) The Indian tribe's jurisdiction over the land and any person or activity within the right-of-way;
  - (c) The Indian tribe's authority to enforce tribal law of general or particular application on the land within the right-of-way;

# Continued

- A grant of a right-of-way does not diminish to any extent:
  - (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land; or
  - (e) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.
- *Chevron* deference doctrine: a legal test as to when a court should defer to an agency's interpretation so long as Congress has not spoken directly to the precise issue in question.

# Tribal Law

- Tribal Constitutions
  - Tribal jurisdiction “shall extend over all persons, property, lands, water, air space, resources and all activities occurring within the boundaries of the reservation notwithstanding the issuance of any right-of-way.”
- Tribal Ordinances or Codes
  - Tribal territory “shall be taken to include all territory within the reservation boundaries, including fee-patented lands, rights-of-way, roads, water, bridges and land used for schools, churches or agency purposes.”



# Federal Recognition of Tribal Regulatory Authority

- Tribes are recognized by the federal government as the regulatory authorities on tribal lands for:
- Food safety (retail food, safety in food service and manufacturing)
- Building safety (casinos, hotels, etc.)

# Federal Recognition of Tribal Regulatory Authority

- Environmental protection (treatment as states):
  - Clean Water Act
  - Safe Drinking Water Act
  - Clean Air Act
- Why not traffic safety? (remember *Colville v. WA*, *Strate*, *Ortiz-Barraza*, and *Cooley*)
  - The purpose of federal CMV/CDL regulations is “to help reduce or prevent truck and bus accidents, fatalities, and injuries.” Important to tribes, too!

# Treaty Rights and Inherent Authority to Exclude

- Inherent authority of a sovereign to preserve peace and safety
- Exclusion, enforcement and adjudication
- *McGirt*: this authority applies to **all lands within original boundaries** of reserved lands unless specified or expressly diminished by Congress

# Tribal and State Collaboration

- Enforcement – highways & tribal police
  - NTJC Model Tribal CMV Code
  - Cross deputation
  - Tribal LEO training and inspection certification
  - Round-the-clock law enforcement coverage in remote areas at no cost to states



# Tribal and State Collaboration

- Adjudication – tribal courts
  - NJC CMV courses for tribal judges
  - NTJC CMV Toolkit for Tribal Courts
  - NTJC Bench card
  - Masking issues
- Violation reporting – states and SDLAs
  - IGAs, may require state statute and administrative code changes

Thank you for your attention!

Questions?

# Resource Citations

# Statutes, Regulations, Federal Register and Case Citations

- 18 U.S.C. §1151
  - Indian country defined
- 25 U.S.C. §323
  - Authority for Sec'y of Interior to grant rights-of-way over tribal lands
- 25 C.F.R. Part 169
  - Rights-of-way over Indian land
  - §169.10 – rights-of-way do not diminish tribal authority over the land
- 80 Fed Reg 72491 (p. 72494) 11/19/2015
  - Final Rule updating the process for obtaining BIA grants of rights- of-way on Indian land, while supporting tribal self-determination and self-governance

# Statutes, Regulations, Federal Register and Case Citations

- *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)
- *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)
- *Williams v. Lee*, 358 U.S. 217 (1959)
- *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)
- *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)
- *Montana v. U.S.*, 450 U.S. 544 (1981)

# Continued

- *Strate v. A-1 Contactors*, 520 U.S. 438 (1997)
- *Ortiz-Barraza v. U.S.*, 512 F.2d 1176 (9<sup>th</sup> Cir. 1975)
- *Solem v. Bartlett*, 465 U.S. 463 (1984)
- *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)
- *Confederated Tribes of the Colville Indian Reservation v. Washington*, 938 F.2d 146 (9<sup>th</sup> Cir. 1991)
- *U.S. v. Cooley*, 141 S. Ct. 1638 (2021)