

## **Rights of American Indians Are Protected**

When Indian nations first began to deal with the federal government they were considered sovereign (Getches ET AL., supra note 18, at 122-5). They exercised independent authority to govern themselves, and no other nation was depended upon to legitimate their acts of government. After colonization of the continent, Indian nations accepted certain limitations on such sovereignty and significant losses of land and resources in exchange for treaty agreements. These treaty agreements and subsequent legal decisions interpreting them protected the Indian rights of self-government and the understanding that the powers exercised by tribal governments were inherent to sovereigns, not something that had been granted to them by the Constitution.

In what is more commonly known as the “Marshall Trilogy”, the U.S. Supreme Court decided three cases in the early 1800’s establishing a number of statutes that remain the basis for the federal-tribal relationship. These principles are the following:

- (1) The Federal government has “plenary power” over Indian matters. This means that federal treaties and statutes prevail over state law (Getches et al., supra note 18, at 122-5)
- (2) The status of Indian nations was established as “dependent sovereign nations” to the federal government. Thus, Indian nations cannot enter into agreements with other countries, nor can they alienate their lands except to the federal government. (Canby, supra note 53, at 68).
- (3) Treaties between Indian nations and the federal government were interpreted to establish that Indian nations retained the right to self-government within the territories reserved to them, without constraint by any other entities, including state governments. (Id. At 109)
- (4) Certain “Canons of Construction “ were established for the interpretation of treaties with Indian nations. These Canons provided that when construing the treaties they were interpreted as understood by the Indians. Ambiguities within treaties or statutes were interpreted in the Indians’ favor. Treaties and

Federal Indian laws were interpreted liberally and they were to favor retained tribal self-government, rather than state or federal authority. (GETCHES ET AL., supra note 18, at 155-66.)

- (5) The protection of land, guaranteed in the treaties, was later extended to the right to use and develop the resources of the land for the economic self-interest of Indian nations. (U.S. v. Shoshone Tribe of Indians, 304 U.S. 111, 118 (1938), White Mountain Apache Tribe V. Bracker, 448 U.S. 136, 138 (1980).

During the early years of the twentieth century the Supreme Court began to allow more incursions of federal power into Indian country, thus endangering the internal sovereignty of Indian nations. (See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Sandoval, 231 U.S. 28 (1913); Sioux Tribe v. United States, 316 U.S. 317 (1942). Prior to a number of court decisions in the 1930's and 1940's, the Supreme Court had held to the concept that general federal laws, like state laws, were not applicable to Indians within Indian country. This changed significantly with the Supreme Court ruling in Federal Power Commission v. Tuscarora Indian Nation (362 U.S. 99, 120 (1960), the court held that absent a treaty of federal statute to the contrary, federal laws of general applicability apply also to Indians and tribal governments.

This assertion of the federal government's power has been moderated slightly since Tuscarora. The court should interpret the general applicable statutes, treaties and subsequent legislation so that the treaties are not changed or eliminated, unless a clear congressional intent is established. (Getches et al., supra note 18, at 346-48)

The law has been recently settled as to the sovereign status of Alaska Native villages. Unlike most federally recognized tribal governments in the United States, the Villages do not have territorial integrity as reservations (Id. At 911-18). they are instead owned by village corporations in fee simple. The Alaska Native Claims Settlement Act (ANASCA) (43 U.S.C 1601-1628

(1994), passed in 1971, settled aboriginal land claims and expressly revoked all reservations in Alaska, except the Metlakatla reservation, but did not resolve the legal disputes (Getches et al., supra note 18, at 346-48). The Alaskan Ninth Circuit District Court held, in *State of Alaska v. Native Village of Venetie Tribal Government* (101 F.3d 1286 (9<sup>th</sup> Cir. 1996) (rev'd, No. 96-1577, 1998 WL 75038) (U.S. Feb. 25, 1998), that the native villages possessed the same sovereign rights as other Indian nations, and were dependent Indian Communities (Id. At 1302). Congress has also taken this same position by including Alaska Natives in all major Indian legislation since the passage of the Alaska Native Claim Settlement Act. It has done so, however, by specifically including Alaska Natives.

In a pair of recent U.S. Supreme Court decisions issued from Indian country dramatically illustrates how few facts of American life haul more deeply contentious freight than Native American sovereignty. What is Indian sovereignty? Who dreamed it up? And why are the tribes winning all these cases? I will answer these questions, these laws and legal relationships. There is a perception afoot in the land that we are a nation defined by competing political agendas. In fact, politics is just so much like the weather. It comes and it goes and it comes and it goes. We are instead built as a nation of laws. The courts control the helm of the ship of state. Courts steer us toward reckonings with the goals of public opinion that few politicians have the courage or the vision to articulate, i.e., civil rights, reproductive freedom, sovereignty etc.

The 550 federally recognized tribes own the last great deposits of natural resources on the North American continent. Among the looming legal battles – as huge as they are inevitable – are resource allocation, water, timber, salmon, land, gold, copper, zinc, oil, gas, uranium, coal and aquatic management on the Columbia, Colorado, Missouri rivers and the disposition of the Snake River dams, as well as water quality, fish harvest and heavy metal poisoning on the Great Lakes.

As offer of sovereignty and peace. Between 1790 and 1871, the U.S. Senate ratified 380 treaties with Indian nations. Congress entered into treaties with the tribes to acquire land which it could sell to pay off its debts. It had to offer the tribes sovereignty and peace. When the legal concept of sovereignty was first challenged in the Supreme Court by the state of Georgia in the 1820's, Chief Justice John Marshall took pains to examine this legal apparatus and to explain how it functions. He knew battles with the tribes would only escalate over time.

This group of cases, known as the Marshall Trilogy, held that every treaty ratified by the U.S. Senate under Article VI, Clause 2 of the Constitution, was now the "supreme law of the land". Sovereignty, explained Marshall, exists as a pre-condition among self-governing entities and acts as a legal shield protecting all rights and privileges reserved and implied by nationhood. In fact, treaties were a granting of rights from the tribes, to the federal government.

President Andrew Jackson objected to Marshall's opinion and declared: "Let him enforce it!" then sent thousands of Cherokee to their deaths on the Trail of Tears (an act which today would get President Jackson indicted by The Hague as a war criminal). Then, the attitude of lawmakers was "not to worry" about the consequences of conducting long-term government-to-government relationships with 380 foreign Indian nations.

After, Wounded Knee, in 1890, the prevailing wisdom held that the American Indian would be a vanquished race by the turn of the Century – Wrong -- Fast forward 100 years. Recent legal opinions have signaled a return to the Marshall Trilogy and to what is known in the federal judiciary as the 'foundational principles of Indian law.' This swing has grown out of the fact that gambling proceeds and education (there are more than 2,000 Indian lawyers in the U.S.) have empowered once-passive tribes to acquire the cash and the legal fire power to strike decisively when states trespass on Indian sovereignty.

For 20 years, Chief Justice William Rehnquist has done his best to dismantle Marshall. Justice Antonin Scalia recently wrote that the interpretation of Indian law in the Rehnquist Court acts as a search for “what the current state of affairs ought to be.”

This is a startling confession from a judge who has consistently argued that the fundamental role of the court is: “...not to determine what seems like good policy at the present time, but to ascertain the meaning of the text.” Scalia could have added, “when your political agenda happens to agree with it.” In the end, we were a nation of laws that would not easily bend to the political judgments of high-court judges. The foundational law has held.

The 14<sup>th</sup> Amendment today translates into a vigorous defense by the federal government of its dominion over national waterways, air quality and public lands, through its “supreme law of the land” contracts with the tribes.

Government attorneys argued that the state of Washington was never party to the treaty with the tribes. Therefore, it had no standing to claim jurisdiction over federal waterways. The Supreme Court agreed. State officials and private landowners were thunderstruck, yet the arrogance was theirs to own, right from the start. They failed to recognize that this opinion was written and proclaimed to the world on a spring day in a farmhouse in Appomattox, Va. 134 years ago. The state of Washington championed politics and fell in a whimpering heap at the feet of the law. The feds and the tribes are partners who go way, way back. Without treaties and concessions from the tribes, states, beyond the original 13, would not exist.

The rest, as they say, is history, but the future is in the hands of the courts. Not, thankfully, in the hands of politicians. After if the states choose not to learn this lesson, if they choose to press on with their self-serving agendas at the expense of the tribes, hocking their consciences for political and economic gains, future relations with the tribes promise to be very bitter and very expensive, because “the supreme law of the land” will be the final word.

What Is Federal Indian Law? The term “federal Indian law” refers to the body of law that defines the legal relationship between the United States and the Indian tribes. As the name implies, it does not include either state law or the laws that tribes have developed to govern themselves, their members, and their territory. Federal Indian law originated in the dealings between the European colonial powers and the native nations of the Americas. The framers of the Constitution affirmed this relationship by delegating the power to regulate relations with Indian tribes to the Federal Congress. From two lines in the Constitution, federal Indian law has grown to encompass about 380 treaties, separate volumes of both the U.S. Code and Code of Federal Regulations, and thousands of court decisions.

Originally, Indian nations were not considered part of the United States. Article I of the Constitution, for example, disallows counting “Indians not taxed” toward apportionment of the House of Representatives. Since then the relationships between the United States, the tribes, and the states have continuously evolved. As the tribes became more integrated into the United States, they lost or gave up several attributes of Sovereignty, and their people became U.S. citizens-both taxed and apportioned representation in Congress. Today, Indian nations form an integral part of the national system, while retaining most of the attributes of their original status as self-governing sovereign nations.

That status as sovereign nations within the United States gives tribal governments a role unlike that of the other two types of U.S. sovereigns – the federal government and the states. Tribes may regulate a wider range of subjects than the federal government, but do not have the same extensive powers as the states. On the other hand, tribes, not having signed the Constitution, are not bound by its restrictions, unlike the federal government and state governments. Tribes are, however, subject to the supremacy of federal law.

Definition of Tribe, Indian and Indian Country: One of the most fundamental assumptions of Indian law is that the basic relationship between the United States and a tribe is one between the two nations through their respective governments. Federal Indian law primarily concerns tribal sovereignty, individual and tribal property rights, and the division of jurisdiction between the tribes and states; “Literally every piece of legislation dealing with Indian tribes...single(s) out for special treatment a constituency of tribal Indians... “To be found constitutional, however, “Federal racial classifications...must serve a compelling government interest, and must be narrowly tailored to further that interest.” The Supreme Court has very rarely found such a compelling justification.

At first glance, federal Indian statutes may appear to violate this prohibition. The Supreme Court has found, however, that the classification of Indians is not suspect so long as the classification depends upon the Indians’ membership in a tribe with governmental status, and not upon the perceived racial characteristics of the individuals. Thus, Indian and tribe, both of which are also ethnological terms, have taken on a different significance as legal terms. As such, the classification is political, not racial, because it depends on membership in the tribe. Interestingly, the determinations of what entities are tribes for these purposes are ultimately up to Congress.

Tribe: There is no definitive legal description of what constitutes a tribe that applies to all areas of this field of law. One of the most widely-used descriptions comes from the 1901 Supreme Court case, *Montoya v. United States*: a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” As far as the federal government is concerned, it only has a government-to-government relationship with those tribes that it has recognized. As a result, the typical definition of “tribe” is functional rather than descriptive: a tribe is an entity that appears on the list of federally-recognized tribes published annually by the Bureau of Indian Affairs (BIA), Department of the Interior (DOI). The federal government has

recognized 560 tribes by treaty, statute, executive order, the presence of a long-term historical relationship, or other means.

Since 1978, BIA has used powers delegated by Congress to extend recognition to tribes. The Bureau's regulations require that a tribe seeking recognition has maintained a distinct identity, has exercised political authority over its members through history to the present, has drawn that membership from a historical tribe (but not primarily from the membership of another recognized tribe), and currently has governing procedures and methods of determining membership. In addition, Congress must not have expressly terminated or forbidden a federal relationship with the tribe.

Tribes not on the list of federally-recognized tribes do exist independent of federal acknowledgement, however, as demonstrated by the fact that tribes gain recognition from time to time. This attests to the origins of tribes separate from the United States even where they have no governmental presence in federal law. However, the distinction is often academic. Many tribes without the protection of federal recognition have collapsed and disappeared because there was no way to assert themselves under state and federal regulation.

Indian: Just as tribes determine for themselves whether and in what form to persevere or cease to exist, they also determine their own membership. The significance of this in Federal Indian Law is that the definition of Indian also tends to be functional: a member of an Indian tribe. Therefore, the tribes determine who is an Indian. Of course, that means that the definition of Indian tends to incorporate the membership criteria of hundreds of federally-recognized tribes. In addition, the federal government has codified definitions of Indian for various purposes that impose so-called blood quantum requirements or eliminate the tribal membership requirement. It is important to note that Indians also constitute an ethnic minority in the United States protected by the civil rights guarantees of the Constitution and Civil Rights

Acts. As such, discrimination for or against Native Americans on the basis of race, color or national origin is as illegal as it is for other ethnic groups.

Indian Country: Federal Indian law and tribal laws generally only apply, and state laws generally have no effect, within the area known as Indian country. Historically, Indian country was the area beyond the frontier where Indian nations still held sway. Today, Indian country is that part of the United States set aside for Indian nations. While the legal definitions of tribe and Indian tend toward the circular, in 1948 Congress codified the definition of Indian country:

“Indian country”...means (a) all land within the limits of any Indian reservation under the jurisdiction of the United State government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

While the statutory definition only purports to define the limits of the applicability of a chapter of the U.S. criminal code, the Supreme Court has held that it also provides a generally appropriate definition of the frontiers of tribal and civil federal Indian law jurisdiction on one hand and state jurisdiction on the other. This is not as incongruous as it seems since Congress based the statutory language on Supreme Court precedents.

The different types of Indian country memorialize the sometimes radical shifts in Indian policy throughout U.S. History. To understand how tribes have managed to retain the territories and powers that they have today, one must look to sometimes quite ancient history.

Indian tribes have lived in the Americas since time immemorial. Anthropologists may define this as tens of thousands of years ago, but federal Indian law flattens out this immense time span into pre and post contact eras. Events in the Americas before European exploration have no legal significance in the field-although they may in tribal law. It should come as no surprise given tribal longevity that tribes now within the United States have had formal, government-to-government relations with a variety of European powers, their colonies, the original states, and finally with the United States.

European Colonization: Various legal theories on how to acquire Indian land properly prevailed during the period between the first contacts between Europeans and Native Americans and the ratification of the Constitution. These theories differed on such major points as whether the Indian nations held title to the land or if only so-called Christian nations could do so, and whether only the nations could buy and sell those lands, or if individuals could do so.

In 1532, Francisco de Victoria advised the Spanish Emperor that European rights to lands occupied by Indians were not superior to those of the Indians. Therefore, Spain would need the consent of the tribes to take dominion over land in the Americas or else conquer them in a just war. Spain, the Pope, and within 100 years, the other colonial powers adopted Victoria's reasoning as law with some significant variations. Despite doctrinal differences, Europeans generally purchased land from the Indian tribes through treaties negotiated between the political leaders of the colonies and the tribes as representatives of independent nations. That is not to say that the expansion of European settlement was generally fair, peaceful or lawful.

In order to maintain peace with the Indian tribes and discourage their alliance with France, King George III of England, in the Proclamation of 1763, forbade the encroachment of colonists into the Indian Territory West of the Appalachians, implicitly recognizing Indian ownership. This greatly

antagonized the colonists, many of whom continued to purchase land directly from the Indians.

Treaty making by the fledgling United States followed the government-to-government pattern set prior to the Revolution, however. The 1778 Treaty with the Delaware's, the first between the United States and an Indian tribe, pledged friendship and respect for the separate territory of the two nations. Before the adoption of the Constitution in 1789, the United States and the several states concluded many Indian treaties. They sought primarily to establish peace and territorial boundaries, and to regulate trade and the extradition of criminals, among other subjects.

#### Foundation of Federal Indian Law and Policy (1789-1871)

The Constitution, ratified in 1789, delegated all power over Indian affairs to the federal government. States negotiated treaties with and purchased land from tribes after that time, but the Constitution made those actions ineffective or illegal. Soon after the assembly of its first session, Congress passed the first Trade and Intercourse Act restricting all dealings with Indians to licensed traders, outlawing the purchase of lands directly from Indians and assigning punishments to crimes committed by colonists against Indians.

#### The Marshall Trilogy: The Bedrock of Federal Indian Law

In 1823, Chief Justice Marshall wrote the first of these cases, *Johnson v. McIntosh*, which addressed competing claims to the same lands acquired from the same Indian tribe by different means. The first claim was based on a purchase by a private consortium, while the second claim was based on a purchase by the United State through a treaty. The Supreme Court held that Indian nations could only convey complete ownership of their lands to the United States, not private individuals. Chief Justice Marshall based his opinion on the United States' adoption of the doctrine of discovery, which held that a title to Indian lands vested in the European power that claimed

them. “The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.” Chief Justice Marshall found that the Indian title was compatible with U.S. Property law and was defensible against all but the federal government. Since Indian tribes did not have full title, they could not convey it. Only the United States could do so, but it must first extinguish the Indian right of occupancy by purchase or by conquest. The claimants who had bought lands directly from a tribe could have received only the Indian title of occupancy that the treaty later extinguished.

Marshall noted and questioned the justification of this doctrine based as it was on the lesser value placed on Indian cultures by European powers. Marshall opined that it was not up to the “courts of the conqueror,” which owed their legitimacy to the doctrine of discovery to question that concept:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired unit it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

This approach legitimized U.S. expansion at will, legally confirmed ultimate federal control of Indian affairs, and restrained encroachment not authorized by the federal government into Indian territories. Most importantly, it confirmed the necessity of treaty making to a nation that sought to expand, but avoid war with the Indian tribes.

Although the Constitution, several acts of Congress, and the Supreme Court had resolved on paper which government would have responsibility for Indian affairs, they did not end the competition between the federal government and state governments for actual control of Indian affairs. In addition, they did not define the position that Indian tribes held in or out of the new republic.

The mounting three-way conflicts diffused for a time when Congress resolved in 1830 to remove the Indian tribes from the borders of the states then in existence to the newly-acquired lands west of the Mississippi-land occupied by other Indian tribes.

Of the tribal-state strife that motivated the removal policy, the conflict between the thriving Cherokee Nation and the rapidly growing State of Georgia may have been the most acrimonious. In any case, it was the most litigated, yielding the second two cases in the Trilogy. The State of Georgia, in an attempt to oust the Cherokee Nation from its lands in spite of its treaty with the United States, began a campaign of official harassment:

The acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

In *Cherokee Nation v. Georgia*, the Cherokee nation challenged the legality of these actions directly in the Supreme Court invoking the Court's original jurisdiction over suits between a state and a foreign state. The Court dismissed the case in 1831, ruling that it lacked jurisdiction to hear the case because "an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution." Marshall held that Cherokee had shown that it was indeed a state by virtue of its self-government and its treaty relationship with the United States, but he rejected the argument that the nation was foreign since it was wholly within the United States. Later cases have generally accepted Marshall's comment that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations" as the definition of tribal status in the federal system. Thus, for U.S. law, the independence of Indian tribes since time immemorial finally came to an end, but not their power to govern their territory.

A year later, in 1832, the Supreme Court ruled in a case arising from the enforcement of the same Georgian laws in *Worcester v. Georgia*. Missionaries to the Cherokee Nation appealed their conviction in Georgian courts for not having received a license from the Governor of Georgia to enter Cherokee country. Marshall, tracing the colonial history to which the United States was an heir and relying on principles of international law, held that the relationship between the United States and the Cherokee Nation resembled that of a guardian to its ward, and precluded relations with other colonial powers, but did not divest the tribe of its sovereignty: “the settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger and taking its protection.” Marshall concluded “the Cherokee nation then, is a distinct community, occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force.” Furthermore, “the whole intercourse between the United States and this nation is, by our constitution and laws, vested in the Government of the United States.” On the basis of the continued exclusive sovereignty of the Cherokee Nation and the delegation of the power to regulate Indian affairs exclusively to the Federal Government “the act of the state of Georgia...was consequently void.”

The Marshall Trilogy stands for the proposition that Indian tribes had lost the ability to transfer their lands or enter treaties with any entity except the United States, but were otherwise unchanged, distinct political entities that could continue to rule their own territories within the United States. Over the next century and a half, the courts and Congress eroded those clear rules, but they remain the starting points for any analysis of the powers of tribes.

**Removal:** The federal government never had to force the State of Georgia to comply with *Worcester* because the Governor pardoned the missionaries instead. During the litigation the removal of Indians throughout the east had begun. The 1835 treaty of New Echota purported to cede all Cherokee lands. Most Cherokee rejected the treaty, but in 1838 the United States forced the Cherokee to leave their ancestral lands, homes, and possessions at gunpoint.

The Trail of Tears refers to the forced march of nearly the entire 17,000 – member C Cherokee Nation from northern Georgia to present day Oklahoma that killed 4,000 Cherokees. The removal policy had reached its height. The United States eliminated nearly all Indians from the fertile eastern United States and placed most in the semiarid center of the country-known at the time as the Great American Desert. Even today, the conspicuous absence of any large Indian populations in the East or many tribal groups in an area that once had a dense Indian population testifies to the chilling results of this immense segregation policy. Despite that, a few remnant tribes do remain to assert their presence in the East. The removal policy gave way in the 1850's to an official policy of confining Indians to reservations rather than attempting to remove them beyond the quickly expanding frontier.

Treaties: Worcester confirmed that Indian treaties were the same dignity and weight as other treaties. The Constitution recognizes treaties as the supreme law of the land, on the same level as acts of Congress, which means that they preempt State law, but may be abrogated by a later act of Congress. Today, in many ways, the fight to have the terms of treaties fulfilled forms the centerpiece of the Indian tribe's quest to expand recognition of their rights. Ironically, treaties had the opposite effect when they were made. In making treaties, the United States clearly recognized tribal authority. Typically, however, treaties served as the instrument by which the tribes ceded to the United States portions of their land and other rights.

Furthermore,

The legal force of Indian treaties did not insure their actual enforcement. Some important treaties were negotiated but never ratified by the Senate, or ratified only after a long delay. Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of only a small part of the signatory tribes. The Federal Government failed to fulfill the terms of many treaties, and was sometimes unable or unwilling to prevent States, or white people, from violating treaty rights of Indians.

Over the course of United States-Indian treaty making, from 1778 to 1871, the United States ratified about 380 treaties. In the 1840's and 1850's, a flurry of treaty making occurred with Indian tribes in the Northern plains, the Northwest, the West, Southwest and Texas. These treaties did not generally seek the removal of tribes from contact with the few states in the area at that time, but rather confined the tribes to smaller reserved territories. Tribes would cede most of their lands, but reserve certain lands and other rights to themselves. These lands and other rights led to Indian rights to hunt, fish and gather, among other things, outside of the lands reserved by them. The United States negotiated few treaties between the outbreak of the Civil War and the end of treaty making in 1871. In 1871 rider on an appropriations bill ended treaty making with Indian tribes. At least part of the reason was because the House, which has primary authority over appropriations, had no say in the negotiation of treaties, but was responsible for dispensing the funds required by them. A practical reason for ending the treaty process was that there was no longer anywhere that Indians could live out of the paths that the United States had chosen for settlement. The rider (as codified) reads:

*No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.*

The effect of the provision was to replace treaties with agreements that the Executive Branch negotiated and both Houses of Congress enacted into law. Acts of Congress, of course, have the same legal effect as treaties. Congress and the Executive Branch continued to set aside land for Indians. Thus, the move was mostly symbolic, heralding the beginning of the assimilation era.

Attempted Assimilation (1871-1928): The focus of Federal Indian laws now shifted to the removal of more lands from Indian tribes to the United States

for settlement, the expansion of federal laws into internal tribal affairs, the widespread use of mandatory boarding school education far away from home to “take the Indian out of the child,” and, above all, the allotment of reserved tribal lands to individual Indian ownership.

Allotment: The General Allotment Act (Dawes Act) enabled the President to allot small parcels of tribal lands to individual Indians who selected them, to hold the land in trust for 25 years or longer to prevent the transfer of the land, to sell lands left after allotment to the United States, to subject allottees to State civil and criminal jurisdiction, and to extend U.S. citizenship to allottees. Under the original Act the heads of households and minors received 160 and 40 acres each. An amendment soon changed the amount to 80 acres of farming land or 160 acres of grazing land per Indian. Later amendments made it much easier to alienate these lands before the 25 years were up.

The allotment acts sought to break up tribes by breaking up ownership of the land. The various acts, however, did not purport to eliminate tribal governments. Policy makers generally hoped, however, that tribes would fade away once individual private property ownership made Indians independent of the tribe, and tribal members learned how to live in the larger society. As Theodore Roosevelt put it, “the General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and individual.” Of the 138 million acres in Indian or tribal hands in 1887, only 48 million remained in 1934. Most of the loss was due to the cession to the United States of the 60 million acres of tribal land that Congress declared “surplus” – no longer needed by Indians – after the allotments had been made. Of those, the United States paid for 40 million acres, and the rest were simply opened to homesteading by Congress. That would not have been nearly as traumatic had the allottees been able to hold onto their lands. As a rule they did not. The small size of the allotments often made them economically unsound as farms. Of 35 million acres allotted, 27 million were lost or sold, generally through tax sales or swindles.

Despite the massive dispossession caused by allotment, it was the official policy of the United States for nearly 50 years.

Case Law at the Turn of the Century: Major Supreme Court Indian jurisprudence at the end of the 19<sup>th</sup> century swung back and forth between the conceptions of tribes as self-governing sovereigns and mere federal subjects. In 1882, *McBratney v. United States* bucked the Worcester rule of exclusion of state law, and found state jurisdiction over the murder of a non Indian by a non-Indian in Indian Country. In 1883, *Ex Parte Crow Dog* reversed the federal court conviction of an Indian for the murder of another Indian, finding that federal laws not specifically directed at Indian country could not have any effect there. Congress immediately passed the Major Crimes Act, which applied federal law to seven crimes in Indian country. In 1886, *United States v. Kagama* upheld this new federal intrusion into internal tribal self-government. In 1896, *Talton v Mayes* held that the source of tribal powers predated, and was not modified by, the Constitution. Therefore, the restrictions of the 5<sup>th</sup> and 14<sup>th</sup> Amendments did not apply to tribes. In 1903, *Lone Wolf v. Hitchcock* upheld the unilateral sale of lands by the United States in direct contravention of a treaty requirement of the consent of three-fourths of adult males for the sale of tribal land. These cases seem to exemplify the confusion caused by the phrase “domestic dependent nations.” *Crow Dog* and *Talton* follow the Worcester conception of tribes as internally autonomous, but subject to express, overriding federal authority. On the other hand, *McBratney*, *Kagama* and *Lone Wolf* ignore the explanation of dependency found in Worcester and instead take it literally to mean complete dependence on the United States for government and support. This conformed completely with the allotment policy, which cast itself as a means to make a helpless people independent.

Reorganization (1928-1941): In 1928, the Meriam Report concluded that the allotment and assimilation policy had failed. This spurred a short period in which the federal government shifted away from a policy that encouraged the political and social dissolution of tribes to a policy of encouraging tribal

government along the lines recommended by the United States, and protecting tribal resources. The centerpiece of this era was the Indian Reorganization Act (IRA). IRA stopped further allotment, extended the federal trust status of allotments indefinitely, and authorized return to the tribes of surplus lands and the establishment of new reservations. In addition, IRA offered template governments (based on the federal government) to tribes that would accept federal oversight. Forty percent of tribes rejected the offer. Some tribes found IRA useful in the resuscitation of tribal government, but others found it unadaptable to the tribal context. Most tribal governments are organized under IRA.

Termination (1943-1968): After just 15 years, Congress again began to embrace the dissolution of tribal ties and tribes as U.S. policy. Many continued to believe that it was tribal existence that kept Indians from integrating into mainstream society. Congressional reports issued between 1943 and 1950 were extremely critical of reorganization and of BIA. Funding for BIA was greatly cut during this period. In 1952, the House passed a resolution calling for the formulation of proposals “designed to promote the earliest practicable termination of all federal supervision and control over Indians.” A year later, House Concurrent Resolution 108 passed, calling in ringing terms for the end of the special status of Indians, and the termination of federal supervision and control over all tribes in several states and several additional tribes. This resolution was not binding, but it did guide the course of termination policy. Congress terminated the federal relationship with more than 100 tribes in the next few years. Typically, the tribes lost their land, became subject to state authority, and found it impossible to exercise their governmental authority. In tandem with termination of tribes, BIA embarked on a very large relocation program that granted money to Indians to move to selected cities to find work. After cutting BIA’s budget for 10 years, Congress had to triple it to keep up with the costs of termination and relocation.

Public Law 83-280: Congress also enacted Public Law 83-280 (PL280) in 1953, delegating limited jurisdiction over Indian country to several states. PL 280 states are divided between six so-called mandatory states named in the Act, and nine optional states that assumed jurisdiction later by simply changing their own laws. No provision of PL280 required tribal assent to this process, although most of the optional states did seek it. The Mandatory states – Alaska (added in 1958), California, Minnesota, Nebraska, Oregon and Wisconsin – received the full extent of the jurisdiction delegated by the Act. The optional states – Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah and Washington – assumed all or part of the jurisdiction offered. Consequently, one must look to the state law of the optional states to know what jurisdiction the state assumed.

In PL280, Congress extended state criminal jurisdiction into Indian country, and repealed the federal criminal laws relevant to Indian country for selected states and Indian country. PL 280 probably did not repeal tribal criminal jurisdiction, but the criminal laws of affected tribes could not conflict with state law.

The Supreme Court rules that PL 280's grant of civil jurisdiction did not go as far based on differences between the statutory language in the criminal and civil grants of authority, and the presumption that the Court will not imply limitations on tribal authority. In *Bryan*, the Court found that the civil grant did not authorize state civil regulation in Indian country. A later case, *Cabazon*, clarified the distinctions between the civil and criminal sides, establishing the inapplicability of civil/regulatory state laws and the applicability of criminal/prohibitory state laws. This PL280 would not extend into Indian country state laws regulating pollution discharges, but would extend state laws prohibiting murder.

In addition to those judicial limitations, the statute accepts certain types of jurisdiction from both the civil and criminal grants of jurisdiction. States may not alienate tax or otherwise encumber assets held in trust or otherwise

restricted by the United States for the benefit of tribes or Indians. In addition, states may not regulate such assets in any way that conflicts with a treaty, statute or agreement. Most importantly, this prevents states from regulating hunting and fishing rights confirmed by treaty or statute. Furthermore, PL 280 bars the state courts from adjudicating ownership, possession, or other interests in trust property.

Self-determination (1968-Present): The self-determination era began with an act of Congress opposed by the majority of tribes, the Indian Civil Rights Act of 1968 (ICRA). The primary purpose of ICRA was to impose restraints very similar to the Bill of Rights on the tribes. Several provisions differed slightly, and others are missing altogether. For example, ICRA does not prohibit the establishment of religion as this would radically alter the character of some tribes, and does not guarantee counsel, civil juries, or large criminal juries in recognition of tribal property. Most radically, ICRA provided for the writ of habeas corpus in federal court, and limited criminal punishments to a maximum of \$500 and six months in prison extended to \$5,000 and a year in prison in 1986).

The imposition of certain civil rights restraints on tribal governments and other provisions, such as the direction to BIA to draft a model tribal court code, implied that Congress had decided that tribal governments had a future and was planning for it. One part of ICRA clearly indicated a break from termination policy. States could now give up their PL 280 jurisdiction over Indian Country, and could only assume jurisdiction with the consent of the tribal membership through a rigorous referral process. ICRA did not, however, revoke any of the earlier grants of PL280 jurisdiction to the states.

In 1970, President Richard Nixon made the break clear in a message to Congress. He declared termination a failure and asked Congress to repudiate it, reaffirmed the trust responsibility of the federal governments to the tribes, and called on Congress to legislate to enable an increase in tribal autonomy.

Presidents Ronald Reagan, George Bush and Bill Clinton have all reaffirmed the message.

Congress agreed. In 1973, Congress restored the federal relationship with Menominee, the largest terminated tribe. Several other restorations followed. In the next two decades Congress passed several significant measures that have eliminated many of the barriers to tribal self-government. For instance, in 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA). The Act recognizes the federal trust responsibility, acknowledges that federal domination of tribes stifled self-government and development, and that “Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.” The substance of the ISDA then directs BIA and the Indian Health Service (IHS) to contract out to tribes most of the services administered by these agencies. The Act also authorized grants to help strengthen tribal management of Indian community services. Of great importance is the Act’s explicit disclaimer that the law is in no way a termination of the federal government’s trust responsibility to Indian tribes. Congress renewed its commitment in 1988:

*In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable Tribal governments, capable of administering quality programs and developing the economies of their respective communities.*

Congress passed many other statutes to encourage the protection of tribal government and Native American culture and religion. In addition to acts designed specifically to promote tribal government, Congress has brought tribes into a number of national programs: ISTEA and environmental statutes, among others. Congress also has provided funding for tribal participation in those programs the way it does for states.

For the first time in history, the United States began to support tribal government actively as an end in and of itself, rather than a means to protect

Indians for the time being. It acknowledged, after nearly two centuries of assaults and insults to tribal self-government, that there was little use in attempting to eliminate tribes. It acknowledged that it should respect the will of its Indian citizens to maintain their tribal existence despite the odds. Over time this willingness to stop working against tribal government turned into active removal of barriers and then into devolution of tasks to tribes and support for taking on new areas of government. As the legislative and executive branches move down this path, however, the courts have had to address the states' challenges to tribal government in many areas, the limitations contrary to current policy placed on tribes in the past-sometimes the distant past-and, most of all, the undefined role of tribes in the federal system.

Tribal Sovereignty and Jurisdiction: Congress and the Executive Branch have reaffirmed their support for the independence of tribes through policy statements and removal of barriers to participation in the national system of governments. Although this does not add to or detract from tribal sovereignty per se, it does make it more practical-in some cases possible-for tribes to exercise the powers that have always existed, but may have been used much less since the last century.

In the face of changing federal policy, most tribes have maintained-though not always exercised-their self-governing, sovereign nature.

#### A. The Source and Scope of Tribal Powers

The government's attempts to eliminate barriers to tribal government, support Indian Tribal governments, and entrust them with more responsibility and encourage the resumption of governmental functions all depend on the tribes' independent ability to do so-tribal sovereignty. The term 'sovereignty' is often used to mean the act of governing. Describing governing as the exercise of sovereignty may be more accurate.

Sovereignty is the right or power that comes from itself and no other source that a government draws upon to govern. The European conception of sovereignty that the United States received held that a nation could have only one sovereign, the monarch. The Constitution splits sovereignty between the states and the United States. Both sovereigns derive their authority to govern from the people, and neither depends on the other for its authority. The tribes represent the third, independent sovereign within the United States. The courts have reasoned that the tribes by dint of their existence since time immemorial, prior to the inception of the other two U.S. sovereigns, must derive their authority to govern from their own sovereignty. This stems from the original acknowledgment of the legitimacy of tribal government outside the United States. When *Worcester* held that the United States had brought the tribes within the United States, it also held that that act had not extinguished the tribal existence. Therefore, the same tribal sovereignty continued although the new relationship with the United States limited the exercise of that sovereignty.

Limitations: When the Marshall Trilogy recognized tribal sovereignty, it also established the first recognized limitations on tribal authority. *Johnson v. McIntosh* found that tribes could not convert their aboriginal title into fee title. *Worcester v. Georgia* established that tribes within the territory of the United States could not make treaties with other powers. The 1978 case *Oliphant v. Suquamish Indian Tribe* introduced the implied limitation that tribes could not prosecute nonmembers for criminal actions in Indian country.

Holding that it was inconsistent with their dependent status. In 1981, the Supreme Court, in *Montana v. United States*, added another implied limitation. The Court held that tribes lacked the power to apply their civil regulatory authority to nonmember activities on nonmember fee lands in Indian country unless the nonmembers had a consensual relationship with the tribes, or those activities affected tribal interests. The courts have confirmed that tribes retain many more powers than they have lost, however; “In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty

or statue, or by implication as a necessary result of their dependent status.” Thus the inquiry, when looking at a disputed tribal power, begins not with a search for some grant of authority to the tribal government, but instead with an assumption that the tribe has that power. From there one must look to tribal and federal law to see if the tribe and federal government have imposed limitations on the exercise of that power. This status is in some ways similar to that of the states. The Tenth Amendment reserves to the states all powers not delegated to the federal government by the Constitution in a similar manner to the way that tribes gave up a few powers to the United States, but reserved the rest. In the case of tribes, however, the Constitution does not bar the federal government from changing the balance of power to the detriment of the tribe. Although listing the limitations on tribes is easier, and enumerating all of the powers tribes still possess is impossible, a description of some of those powers may be useful.

**Tribal Powers:** Tribes may choose whatever forms of government best suits their practical and cultural needs. For instance, tribes need not adopt forms of government patterned after the United States, including such elements as the separation of powers. Since the Constitution does not limit tribes, they do not have to separate their government from their religion. After Congress passed IRA, most tribes did, however, adopt constitutions developed by BIA and patterned loosely after the U.S. Constitution.

Some tribes have adopted constitutions that describe their traditional form of government such as Seneca in New York and Muskogee (Creek) and Choctaw in Oklahoma. The constitutions of some tribes remain unwritten. The Santo Domingo Pueblo government has operated under the same unwritten constitution for centuries. Many tribal governments have blended traditional and nontraditional elements into their governments. For example, these governments may appoint traditional headmen to the tribal council for life, or provide that secular decision making be approved by the religious leadership. Tribal courts have borrowed quite extensively from other U.S. court systems and have developed extensive rules of procedure and evidence.

However, tribal courts also rely on tribal tradition and often look for traditional or informal methods of dispute resolution.

Tribes can legislate generally, adopting all manner of civil and criminal laws. This authority includes, but is not limited to, determination of domestic rights and relations, regulation of commercial and business relations, chartering of business organizations, disposition of nontrust property and establishment of rules of inheritance, land use regulation, power to raise revenues for the operation of the government, and power to administer justice through law enforcement and judicial systems.

Tribal governments possess the attributes of sovereignty, including immunity from suit. No party but the United States may sue a tribe without a waiver of immunity from the tribe itself or from Congress. Tribal sovereign immunity does not extend to tribal officials acting outside of their official capacity.

Tribes have the power to determine tribal membership. Rights such as voting, holding office, receiving tribal resources such as grazing and residence privileges on tribal lands, and participating in per capita payments usually depend on tribal membership. The Indian Civil Rights Act of 1968 imposes restrictions similar to a number of those contained in the Bill of Rights on tribal governments in dealings with tribal citizens and others who come under lawful tribal jurisdiction.

**B. Tribal Jurisdiction:** Jurisdiction is the description of subject matters, acts, places and people over which a government may assert control. In the United States there are constant struggles among the various governments to determine which ones have jurisdiction to hear a case or regulate a particular area. The most familiar occur between the federal government and state governments, but the most complicated may be those that involve tribes because they often implicate the powers of the federal government and state governments as well. Federal Indian law divides jurisdiction more strongly

between civil and criminal halves than in other fields because of the different ways that they have developed.

1. Criminal Jurisdiction: Original tribal jurisdiction is inherent, complete and exclusive over tribal members and territory. That condition changed substantially in the late 19<sup>th</sup> century. McBratney brought crimes by non-Indians against non-Indians in Indian country under the sole jurisdiction of the states. The Major Crimes Act and the Federal Enclaves Act granted concurrent jurisdiction to the federal government for certain enumerated crimes. This did not eliminate tribal jurisdiction, but it did pressure tribes not to prosecute. ICRA (as amended in 1986) limits the criminal punishments that a tribe can assess pursuant to its self-government to no more than \$5,000 and a year imprisonment. This essentially limited tribal courts to jurisdiction over misdemeanor offenses. Oliphant announced the farthest reaching limitation on tribal criminal jurisdiction, holding that tribes have no inherent authority over crimes by non-Indians.

Tribes retain exclusive jurisdiction over crimes not enumerated in the Major Crimes Act, committed by Indians against Indians, or by Indians without victims. Tribes retain concurrent jurisdiction with the federal government for all other crimes committed by Indians. In either case, under ICRA they cannot assess the same punishment as other governments would for these sometimes very serious crimes.

2. Civil Jurisdiction: In the case of civil jurisdiction, the original conception of tribal jurisdiction essentially remains the same. In the seminal 1959 case, *Williams v. Lee*, the Supreme Court recognized that tribal courts have exclusive jurisdiction over claims arising in Indian country that implicate Indian interests. Two decades later, *Montana v. United States* held that the Crow Tribe could not prohibit nonmember fishing on nonmember lands within its reservation. However, the Court recognized that a “tribe may regulate...the activities of nonmembers who enter consensual relationships with the tribe or its members (or) 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.” This became known as the Montana test, and it is exceptionally important because a significant amount of the lands in Indian reservations has been alienated from Indian ownership. The Supreme Court found that tribal civil adjudicatory authority extends to the same limits in *Strate v. A-1 Contractors*. The Supreme Court applied the Montana test to a tort case that arose on a state highway on an Indian reservation and determined that the claim did not fall under the tribe’s jurisdiction because it did not sufficiently affect the tribe. For further discussion of tribal jurisdiction please see “Chapter Three: EPA’s Approach to Environmental Protection in Indian Country.”

3. Indian Country Jurisdiction: With some exceptions, the borders of Indian country determine the extent of tribal jurisdiction, the extent of certain types of federal jurisdiction, and the exclusion of state jurisdiction. There are several different types of Indian country, and they are often found mixed together. The definition of Indian country was developed by the Supreme Court in several cases, and then codified by Congress in 1948:

“Indian country”...means(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian country also includes, among other types of land, lands held in trust by the United States for tribes, Indian Pueblos, Indian colonies and Rancheria.

Reservations: The terms “Indian country” and “Indian reservation” are often used interchangeably, although reservations are a subset of Indian country. Originally, reservations were those contiguous, undivided lands that Indian tribes kept when they ceded the rest of their lands to the United States. Today, however, reservations tend not to be undivided and may have been set aside from the public domain by an act of Congress, executive order, or treaty. The exterior boundaries of reservations often enclose lands not owned by the Tribe, including, but not limited to, allotments and nonmember-owned fee lands. Both are considered part of the reservation, but the nonmember-owned fee lands may have implications for the exercise of tribal civil jurisdiction over nonmember activities there. The main, but not essential, factor is that either the tribe or the federal government has reserved the land, or the federal government has designated the lands as a reservation. Also, if Congress opened the reservation to non-Indian settlement it may have intended to diminish the size of the reservation, but must have made its intention explicit. Outside of exterior reservation borders, the Supreme Court has held that the “reservation” category of Indian country includes tribal trust lands even if such lands have not been formally declared a reservation.

Dependent Indian Communities: The Supreme Court in *Verette* interpreted the term “dependent Indian communities” for the first time SINCE PASSAGE OF THE Indian country statute. The Court held “that it refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.” In so doing, the Supreme Court relied on its prior cases on which Congress had based the statute. In one such case, *United States v. Sandoval*, the Supreme Court termed the Pueblo Indian tribal lands “dependent Indian communities” based on Congressional recognition of the tribes’ fee simple title and past federal guardianship.

In *Verette*, however, the Court decided there was no federal set-aside because Alaska Native Claims Settlement Act of 1971 (ANCSA) had revoked the

reservation and transferred unrestricted settlement lands in fee to private, for-profit Native Village corporations, with the legislative goal of promoting self-determination and avoiding “any permanent racially defined institutions, rights, privileges or obligations.” Furthermore, the Court found that several aspects of ANCSA were inconsistent with continued federal superintendence, and did not agree that the continued provision of federal health, social, welfare and economic programs supported a finding of federal superintendence.

Allotments: Allotments are lands held in trust for the benefit of individual Indians by the United States. Between 1887 and 1934, 35 million acres of reservation lands were allotted to tribal members, of which only about eight million remained in tribal hands at the end of the allotment period. Originally, the United States would hold allotments in trust for the allottee and protect them from loss for 25 years or until BIA determined that the allottee was legally competent, whichever came first. At that point the allotment would convert to fee simple title, and be subject to no more restrictions or protections. In 1934, the IRA allowed the Secretary of the Interior to extend indefinitely the length of the trust period for allotments.

#### 4. Other Jurisdiction

Ceded Territory: Aboriginal lands sold by treaty or agreement with the United States and reservation lands sold to or taken by the United States are both generally called ceded territories. Many tribes retained rights to hunt, fish and gather other resources in their former aboriginal territories. While these lands do not generally constitute Indian country, and a tribe cannot exercise exclusive jurisdiction over them, it may have regulatory authority over its members engaged in the reserved uses. On the other hand, the ceded reservation lands remain part of the reservation, and therefore Indian country, unless Congress explicitly diminished the reservation when it took title to the land.

Alaska Native Villages: Controversy continues to surround the status of Alaska Native villages, their authority and their lands. The relationship of the federal government with Alaska Natives has differed significantly from that with the Indians of the contiguous 48 states. The isolation of Native settlement explains in large part the fact that there were no treaties with Alaska tribes and only three reservations. Federal neglect of Alaska ended with the discovery of oil and the subsequent need to achieve finality regarding the ownership of the land and mineral rights. The Alaska Native Claims Settlement Act of 1971 (ANCSA) extinguished the aboriginal title to all lands within the state, eliminated two of three Indian reservations and provided funds and lands to corporations, the shareholders of which would be the Alaska Natives. The Act did not terminate the tribal governments, the federal relationship or the federal trust responsibility.

In February 1998, the Supreme Court, in *Venette*, answered one of the many questions not resolved by ANCSA – whether Alaska Native Villages could regulate nonmembers on ANCSA lands. The Court decided that the fee lands owned by the federally-recognized Native Village of Venette did not satisfy the test for dependent Indian community, and as such were not Indian country. Since they are not Indian country the Village cannot regulate the activities of nonmembers on these fee lands.

The status of Alaska Native governments as federally-recognized Indian tribes entitled to the powers, privileges, and immunities of other Indian tribes has been subject to conflicting views in the courts and Congress, as well as between the Alaska Natives and the State of Alaska. Alaska has broadly applied, “first territorial law and, later, state law,” to Alaska Natives. Until recently, the State of Alaska consistently refused to recognize Alaska Natives as having independent tribal governments. Of particular controversy has been whether Alaska Native governments enjoy sovereign immunity from suit in state court; the Alaska Supreme Court has ruled they generally do not. On the other hand, the federal government has recognized Alaska Native governments for purposes of Native programs and services since many years

before ANCSA. BIA has recognized 226 Alaska native entities as eligible for services and as having the powers and privileges of other tribes. Also, the Internal Revenue Service included those villages listed in ANCSA in the list of tribal governments eligible for benefits under the Tribal Tax Status Act of 1982.

There has sometimes been confusion as to which entity in a particular location is the federally-recognized tribal government because the same Alaska native village may have an ANCSA village corporation, a municipal government formed under state law, and a traditional or an IRA council. Of the 210 native villages recognized initially under ANCSA, 120 were organized as cities under state law, of which 71 have organized IRA councils, leaving at least 90 Alaska Native Villages governed solely by traditional village councils. In many villages, both the municipal government and the IRA or traditional councils provide services to residents under different federal and state authorities. EPA's policy is to regard only the governmental entity listed by BIA as the federally-recognized tribe under the EPA National Indian Policy and other federal laws and regulations applying to Indian tribes. As with other tribes, EPA determines the eligibility of Alaska Native tribes for EPA programs on a program-specific basis.

Oklahoma Tribes: The unique history of Oklahoma and the large number of tribes set Oklahoma Indian tribes apart. Indian country exists in Oklahoma, but its extent and character remain unsettled questions.

Because Oklahoma at one point made up part of the Indian Territory-an area set aside for the removed tribes from other parts of the country-it has a unique history of close Congressional supervision. This has resulted in the elimination of much of the reserved tribal lands, and made it impossible to generalize about the specific powers of tribes, particularly in eastern Oklahoma. Much of the land remains in allotment or trust status and all tribes have broad powers of self-government. The Supreme Court of Oklahoma has also recognized the existence of Indian country in Oklahoma. Although many

issues remain concerning how to effectively implement environmental programs for Indian lands in Oklahoma and disputes over the extent of tribal jurisdiction are still ongoing, Oklahoma tribes generally possess the same types of governmental authority as other federally-recognized Indian tribes. This authority extends to civil regulatory jurisdiction over Indian country in the same way as other tribes.

#### IV. The Federal-Indian Relationship

##### A. Federal Powers

The Congressional authority in Indian affairs is extremely broad. While the Constitution delegates the responsibility for regulating trade with the Indian tribes to the federal government, it does not describe the nature of the authority conveyed. Beginning with the Marshall Trilogy, the courts constructed a plenary power doctrine premised on the historical relationship between the federal government and the tribes that broadened the Congressional power to legislate as necessary beyond the specific delegations in the Constitution. As a result, the Supreme Court has upheld Congressional regulation of all aspects of Indian life, regardless of the consent or lack of consent by the tribes.

For some time the Supreme Court took the position that acts of Congress were presumptively in the best interest of Indians, and the Court would look no further. The Supreme Court formally ended that era in *Morton v. Mancari*, announcing that Congressional acts must be ‘tied rationally to the fulfillment of Congress’s unique obligation toward the Indians.’ In 1980, the Supreme Court held in *United States v. Sioux Nation* that Congress had violated that standard in confiscating the Black Hills from the Sioux Nation, and finally denounced the Court’s most famous approval of unfettered Congressional discretion, *Lone Wolf v Hitchcock*. It has been argued, but never held, that the 5<sup>th</sup> Amendment requirement of due process bars the

federal government from taking unjust actions toward Indians, such as extinguishing aboriginal title to moot a land claims case.

## B. Federal Trust Responsibility

The Federal government has a trust responsibility to federally-recognized Indian tribes that arises from Indian treaties, statutes, executive orders and the historical relations between the United States and Indian tribes. Like other federal agencies, EPA must act in accordance with the trust responsibility when taking actions that affect tribes. While the precise legal contours of the federal trust responsibility have not been fully defined, one may describe the trust responsibility in terms of its general and specific components (although the line between these two components is not always clear).

The general component of the trust responsibility relates to the United States' unique legal and political relationship with federally-recognized Indian tribes. It informs federal policy and provides that the federal government consult with and consider the interests of the tribes when taking actions that may affect tribes or their resources. Courts have not required particular procedures, but generally have looked to see whether federal agencies have sought the views of tribes and considered their interests. Nonetheless, President Clinton, in a 1994 memorandum, directed all federal agencies to assess the impacts of their plans, projects, programs and activities on tribal trust resources, assure that tribal rights and concerns are considered in decision making, and, to the extent practicable and permitted by law, consult with tribal governments before taking actions that affect them. The Supreme Court has noted that the federal government, as trustee, is charged with moral obligations of the highest responsibility and trust." The general trust provides one basis for the legal principle that ambiguities or doubts in statutes must be construed in favor of Indians. Citing the Indian Tribal Justice Act, the Department of Justice recently noted that the general trust responsibility "includes the protection of the sovereignty of each tribal government."

The specific component of the trust responsibility ordinarily arises only from some formal action of the United States such as a statute, treaty, or executive order. Congress plays the primary role in defining the trust responsibility. The federal courts often discuss the specific trust responsibility in terms of a fiduciary relationship that arises when the government assumes such elaborate control over Indian trust assets that the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (a tribe or an individual Indian), and a trust corpus (timber, lands, funds, etc.). It is easy to envision the trust corpus in situations where Congress has directed a federal agency to manage particular resources, such as timber or lands, for the benefit of tribes. Applying the trust corpus principle to a regulatory agency like EPA raises unique issues. Nonetheless, it is clear that EPA must ensure that its actions are consistent with the protection of tribal rights arising from treaties, statutes and executive orders. Further discussion of the specific trust with respect to EPA can be found in the tribal rights section below.

## V. Distinctive Tribal Rights

Indian tribes often have distinctive rights that arise from treaties, statutes, executive orders, agreements or as a result of aboriginal title, including rights in land and water, and the right to fish, hunt and gather. A number of these rights relate to or depend on environmental protection. Although the following discussion focuses on treaties and rights arising from treaties, tribal rights-including rights regarding land, water, fishing, hunting and gathering-also arise from other legal instruments such as statutes and executive orders. Much of the analysis below regarding treaties also applies to rights embodied in these other instruments.

### A. Treaties

Through treaties, Indian Nations ceded certain lands and rights to the United States and reserved certain lands (“reservations”) and rights for themselves. In many treaties (especially those negotiated during the 1850’s and 1860’s), tribal governments reserved hunting, fishing and gathering rights in territories beyond the land that they reserved for occupation. In the Northwest treaties, these were typically called “usual and accustomed” places. Generally, unless changed or abrogated by a subsequent treaty or statute, treaties are still the supreme law of the land. In 1832, Chief Justice John Marshall said:

The words ‘treaty’ and ‘nation’ are words of our language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are applied to all in the same sense.

#### 1. Canons of Treaty Construction

Courts follow certain canons of construction in interpreting treaties and other federal legal instruments regarding Indians. These principles of interpretation were developed largely to reflect the unequal bargaining position that Indians held in relation to the United States. Indians were often at a disadvantage because, for example, negotiations with Indians were generally conducted in foreign languages, such as English, and the cultural traditions were different, such as the concept of land ownership. Thus, as a general matter, the Supreme Court has held that ambiguities in treaties are to be construed liberally to favor Indians. In addition, in construing treaties, the courts have stated that several other canons of interpretation are to be followed, such as treaties that are to be construed as the Indians would have understood them at the time of the signing; treaty interpretation should rely on promotion of the treaty’s central purpose, not technical rules; and treaties should be read in light of the prevailing notions of the day and the assumptions of those who drafted them.

Several very important Indian law principles have resulted from these canons of construction. For example, the courts have held that a number of resource rights, such as water, hunting and fishing rights, may be implied from a treaty's purpose, even if the rights were not explicitly mentioned in the treaty. In addition, those canons have resulted in the principle that Congress must show a "clean and plain" intent in order to abrogate Indian treaty and other rights. The canons of construction have been extended to apply to the interpretation of statutes, executive orders and other instruments of federal law, as well as to the existence of aboriginal title.

## 2. Continued Validity and Significance of Treaties.

Some people unfamiliar with Indian history and Indian law do not acknowledge Indian treaty rights because they incorrectly believe that a breach or violation of any part of a treaty on the part of the United States has somehow nullified the treaties. As a general rule, Congress must specifically and directly repeal a treaty by legislation to invalidate it. Age alone has not invalidated treaties as the "supreme law of the land". In fact, unless abrogated, treaties remain valid documents that have the same force as federal statutes.

Treaties are very important in understanding the rights of Indian governments and Indian people today. In *Washington v. Passenger Fishing Vessel Association*, the United States Supreme Court rules on the validity of treaties signed in 1854 with Indians of the Pacific Northwest. In its 1979 decision, the Court stated: "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." The Court also affirmed general principles about treaties and recognized that, through treaties, Indian Nations granted certain rights to the United States and reserved land and rights for themselves.

Treaties are significant to all tribes, even to those tribes that did not enter into treaty relations with the federal government, for several reasons. First, treaties established a pattern of legal and political interaction based on negotiation between two sovereigns. Second, treaties form the foundation of federal Indian law affecting all tribal governments. Finally, even though some tribes did not formally enter into a treaty with the federal government, subsequent dealings through executive orders or legislation generally have been based on a series of consultations and negotiations between a tribe and the federal government, similar to the treaty process.

## B. Land Rights

Indian tribes and individual Indians have rights in land that were established and are held in varying ways. The term “Indian lands” generally refers to “those lands that are held by Indians or tribes under some restriction or with some attribute peculiar to the Indian status of its legal or beneficial owners.”

## C: Fishing, Hunting and Gathering Rights

In a number of Indian treaties, tribes explicitly reserved rights pertaining to the environment, including rights to fish, hunt and gather. Some treaties explicitly reserve such rights within Indian reservations. In several cases, particularly in the Pacific Northwest and the Great Lakes regions, tribes not only reserved such rights within reservation areas, but also retained rights in ceded territories that were their “usual and accustomed” hunting, fishing and gathering places.

Some treaties do not contain any explicit reservation of hunting, fishing or gathering rights. Nonetheless, courts have held that treaties carry those rights necessary to realize the primary purposes of the treaty. This principle is well-established in the context of reserving sufficient water rights to meet a tribe’s present and future irrigation needs. It may also encompass the purity

of the water supplied for irrigation. Courts have also found implicit rights in treaties and statutes pertaining to fisheries and subsistence hunting.

An important question is whether fishing and hunting rights include rights to a sustainable natural environment upon which fish and game depends. Since rights necessary to the primary purpose of a treaty may be implied, another important question is whether treaties generally reserve rights to environmental quality since almost all treaties were designed to reserve a permanent homeland for tribes. These questions are particularly relevant to EPA's programs.

Federal, state and local agencies need to refrain from taking actions that are not consistent with tribal rights whenever they exist, whether within Indian country or in ceded areas. A tribe's right to fish, hunt or gather, within or outside Indian country, is generally not subject to state regulation. However, a state may impose restrictions if they are reasonable and necessary conservation measures and the application of the restrictions to Indians is necessary in the interests of conservation.

### C. Water Quantity Rights

Indian tribes often have rights to a quantity of water under the Winters doctrine. In *Winters v. United States*, the Supreme Court held that the 1888 agreement establishing the Fort Belknap Reservation in Montana implicitly reserved the right to use the waters of the Milk River. While the agreement described one boundary of the reservation as being the middle of the Milk River, it made no mention of the rights to use the water. After the agreement was signed, non-Indian settlers upstream from the reservation built dams that diverted the flow of the river and interfered with agricultural uses by the Indians. The United States brought suit on behalf of itself and the affected Indians to enjoin the upstream users from diverting the water. Although the 1888 agreement made no mention of water rights, the Supreme Court found that the parties implied the right of a sufficient quantity of water to irrigate

the arid Reservation land, because without water, the purpose of the agreement would be frustrated. The tribes of the Fort Belknap reservation, by reserving lands for farming and pastoral purposes, had implicitly reserved waters necessary to make those uses possible in the 1888 agreement.

The Winters doctrine applies to Indian country areas whether created by treaty, agreement, executive order, statute or order of the Secretary of the Interior. The doctrine has been held to apply to ground water as well as surface water. In addition, the Winters doctrine may include the protection of a degree of water quality as well as water quantity.