

University of Montana

## ScholarWorks at University of Montana

---

Faculty Books & Book Chapters

Faculty Publications

---

9-2017

### Why Indian Country? An Introduction to the Indian Law Landscape (chapter one in Indian Law and Natural Resources: The Basics and Beyond)

Monte T. Mills

*Alexander Blewett III School of Law at the University of Montana*, [monte.mills@umontana.edu](mailto:monte.mills@umontana.edu)

Follow this and additional works at: [https://scholarworks.umt.edu/faculty\\_books](https://scholarworks.umt.edu/faculty_books)



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

### Let us know how access to this document benefits you.

---

#### Recommended Citation

Mills, Monte T., "Why Indian Country? An Introduction to the Indian Law Landscape (chapter one in Indian Law and Natural Resources: The Basics and Beyond)" (2017). *Faculty Books & Book Chapters*. 5.  
[https://scholarworks.umt.edu/faculty\\_books/5](https://scholarworks.umt.edu/faculty_books/5)

This Book is brought to you for free and open access by the Faculty Publications at ScholarWorks at University of Montana. It has been accepted for inclusion in Faculty Books & Book Chapters by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

Why Indian Country? An Introduction to the Indian Law Landscape  
Monte Mills\*

I. Introduction.

If you understand Indian law,<sup>1</sup> you can understand anything. Over 500 years since their first contact with non-Indians and nearly 250 since America’s founding, Indian tribes and their members continue to build, enhance, and sustain their governments, cultures, and societies.<sup>2</sup> In doing so, tribes are engaged in the diverse array of activities demanded of modern governments, from criminal law and child protection to environmental law, contracts, business transactions, torts, and, perhaps most importantly for the readers of this paper, both protection and development of a variety of natural resources. The range of issues facing a single Indian tribe requires familiarity with a broad range of substantive areas of the law, any one of which could otherwise occupy an entire legal career.

Beyond the variety of subjects relevant to tribal law, however, understanding Indian law requires a deeper knowledge of the history, structure, and core of American law and government. As the leading treatise on Federal Indian Law notes, “Native American legislative policy and historic case law derives from more than five centuries of varied elements of international jurisprudence, constitutional principles, federal jurisdiction, conflicts of law, corporations, torts, domestic relations, procedure, trust law, intergovernmental immunity, and taxation.”<sup>3</sup> Indeed, scholars steeped in the formation and development of Federal Indian Law raise fascinating questions about the nature of the United States Constitution,<sup>4</sup> the role of racism in Supreme Court jurisprudence,<sup>5</sup> and the shortcomings of legal education and the profession itself in addressing these challenging issues.<sup>6</sup> Felix Cohen, creator of the field of Federal Indian Law,<sup>7</sup> famously compared the rights of Indians to a miner’s canary, suggesting that America’s “treatment of Indians . . . reflects the rise and fall in our

---

\* This paper was originally published by the Rocky Mountain Mineral Law Foundation in the Manual of the Special Institute on Advanced Indian Law and Natural Resources: The Basics and Beyond (2017) and should be cited as Monte Mills, "Why Indian Country? An Introduction to the Indian Law Landscape," *Indian Law and Natural Resources: The Basics and Beyond* 1-1 (Rocky Mt. Min. L. Fdn. 2017).

<sup>1</sup> An important first step in understanding “Indian law” is understanding what to call it. My use of “Indian law” broadly includes both “Federal Indian Law,” the body of federal laws, regulations, and court decisions that define the boundaries of tribal, federal, and state authorities, as well as “Tribal Law,” the incredibly diverse body of laws, rules, regulations, policies, and court decisions of the 567 distinct federally-recognized Indian tribes within the present-day boundaries of the United States. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017) (listing all 567 federally recognized Indian tribes); *See also* Bureau of Indian Affairs, Tribal Leaders Directory, [https://www.bia.gov/tribalmap/DataDotGovSamples/tld\\_map.html](https://www.bia.gov/tribalmap/DataDotGovSamples/tld_map.html) (last visited June 13, 2017).

<sup>2</sup> To be consistent with the field of law, i.e., Federal Indian Law, and minimize confusion, I refer generally to tribes and their individual members as “Indians,” but recognize that “Native Americans,” “Indigenous,” or other more accurate terms may be preferable.

<sup>3</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.01, at 6 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK]. Cohen’s Handbook is the gold standard for those seeking a deeper dive into Federal Indian Law, but there is also a nutshell, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (6th ed. 2015), and a hornbook, MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW (2016).

<sup>4</sup> E.g., Gregory Ablavsky, *Savage Constitution*, 63 DUKE L.J. 999 (2014).

<sup>5</sup> E.g., ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

<sup>6</sup> E.g., Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 91-92 (2002).

<sup>7</sup> COHEN’S HANDBOOK, *supra* note 3, at vii.

democratic faith.”<sup>8</sup> To understand Federal Indian Law is, therefore, to better understand the past, present, and future of the American legal system.<sup>9</sup>

In an effort to help promote such understanding, this paper provides a foundation of Indian law principles for the deeper treatments of more nuanced topics that follow. To do so, the paper is divided into four sections, each taking on a core aspect of the field: history, tribal sovereignty, the federal-tribal relationship, and the role, meaning, and power of treaties.

Importantly, while this paper surveys the basics of Indian law, the field’s diversity and complexities prohibit a detailed examination of every minute detail; therefore, more specific research and analysis would be necessary before tackling a particular legal issue. Nonetheless, by providing both basic principles and some broader context, readers of this work will hopefully have the conceptual framework within which to successfully take on such challenges.

## II. History.

One cannot begin to understand Indian law without acknowledging history and the role it continues to play in shaping the body of both Federal Indian and Tribal Law. History is important on two levels: first, as a general matter, the weight of history and the passage of time since many of the events that remain relevant to the development of modern Indian law necessarily affects the field itself. Second, at a more discrete level, specific historical events, policy eras, and tribal events can drastically affect the way in which Federal Indian Law applies in a particular instance. In addition, for almost every tribe, the past and its lessons remain closely tied to the day-to-day decision-making and determinations that drive the development of Tribal Law.

### A. Balancing the weight of history.

At the broadest level, the effect of history remains a driving force in Federal Indian Law. Professor Charles Wilkinson captured this effect in his recognition of Federal Indian Law as a “time-warped field”<sup>10</sup> in which “results repeatedly turn on the tension between maintaining integrity and stability in the law and affording the flexibility that law must maintain in order to meet the demands of changing circumstances.”<sup>11</sup> While perhaps comparable in some ways to questions of constitutional law, this tension is particularly acute regarding questions of Indian law, which are necessarily tied to centuries-old tribal status and historical developments that may pre-date the United States constitution.<sup>12</sup> But those historical events are often reviewed in the harsh light of a more modern era, where judges, legislators, and policy-makers may be unable or unwilling to recognize the role and importance of history.

Cases involving questions regarding the present-day boundaries of Indian reservations demonstrate the dangers of this lack of recognition. Such cases arise as a result of Congressional acts during the

---

<sup>8</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

<sup>9</sup> See Angela Riley, *Native Nations and the Constitution: An Inquiry into ‘Extra-Constitutionality’*, 130 HARV. L. REV. FORUM 173, 199 (2017) (“America is simply not America without an understanding and accommodation of the place of the more than five hundred Native Nations within it.”).

<sup>10</sup> CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 13 (1987).

<sup>11</sup> *Id.* at 23.

<sup>12</sup> See, e.g., *Talton v. Mayes*, 163 U.S. 376, 381-84 (1896) (recognizing that the sovereignty of the Cherokee Nation existed before the United States Constitution and is, therefore, not limited by the Constitution).

Allotment era of the late 1800s and early 1900s,<sup>13</sup> which opened reservations to non-Indian settlement. A century or so later, uncertainty arises over the status of the lands in those areas that were opened by Congress – did Congress mean to diminish the reservation by moving its boundaries or does the reservation remain, albeit with non-Indians owning land within it?

In developing its “fairly clean analytical structure”<sup>14</sup> for answering such questions, the United States Supreme Court described precisely the tension that Professor Wilkinson captured as emblematic of this time-warped field. The Court begins its analysis by probing the language Congress used to open a reservation to non-Indian settlement, and, where such language expresses a Congressional decision to terminate or where such a decision is “clear from the surrounding circumstances and legislative history” the Court can safely rely on such Congressional direction.<sup>15</sup> But where such clear, express evidence is lacking, the Court can also see how history played out on those lands: “Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.”<sup>16</sup> In some cases, these “changing circumstances” can drive the Court’s review of the original Congressional act, which potentially undermines the “integrity and stability in the law.”<sup>17</sup> Most recently, the Court downplayed subsequent demographics and “justifiable expectations” to confirm the boundaries of a challenged reservation based on Congressional language.<sup>18</sup> Even then, however, the Court suggested that the passage of time could be relevant to related questions regarding the tribe’s authority over the disputed lands.<sup>19</sup> Thus, the passage of time and the movement of history – separate and apart from specific relevant historical facts – can influence the development of Indian law and, to be effective, practitioners must recognize the role of history and its weight upon the field.

## B. Understanding the history of Federal Indian law.

Beyond recognizing the weight of history and its effect on the field, successful Indian law practitioners must also understand particular aspects of the field’s history and the ways in which that history shaped the contours of present-day doctrine. While the unique histories, traditions, legal structures, and other aspects of each individual Indian tribe make generalizing from the broader history of Federal Indian Law and policy treacherous,<sup>20</sup> one must understand the history of federal

---

<sup>13</sup> See *infra* notes 65-70 and accompanying text.

<sup>14</sup> *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

<sup>15</sup> *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

<sup>16</sup> *Solem*, 465 U.S. at 471 (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977) (non-Indian settlement of and state jurisdiction over an area “not only demonstrates the parties’ understanding of the meaning of the Act, but has created justifiable expectations which should not be upset” by other interpretations of that prior Congressional act)).

<sup>17</sup> WILKINSON, *supra* note 10, at 23; see also *Rosebud Sioux Tribe*, 430 U.S. at 604-05; *Solem*, 465 U.S. at 472, n.13 (“Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient.”) (citation omitted).

<sup>18</sup> *Nebraska v. Parker*, 136 S.Ct. 1072, 1082 (2016).

<sup>19</sup> *Id.* (“[W]e express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe’s power to tax the retailers of Pender in light of the Tribe’s century-long absence from the disputed lands.”) See also *Wyoming v. U.S. Env’tl. Prot. Agency*, 849 F.3d 861, 880 (10th Cir. 2017) (recent decision regarding reservation diminishment, in which the court briefly considered subsequent demographics).

<sup>20</sup> See, e.g., WILKINSON, *supra* note 10, at 7-8 (describing these differences, among other issues, as “scattering forces” and “barriers to a unitary doctrine” within the field); Phillip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 434-36 (2005) (describing the incoherence of Indian law, and the uneasiness it causes for some Supreme Court Justices).

policies toward Indian tribes in order to grasp the complexities of each individual challenge facing the field in the present day. Although it is impossible to organize over 250 years of history into neat and discrete categories,<sup>21</sup> the following presents a brief overview of the general eras of Federal Indian Law and policy.

### 1. Laying the Foundations (Pre-Colonial times–Early 1830s).<sup>22</sup>

The roots of European colonial presence in America are interlaced with tribal relations and the rights of North America’s indigenous peoples to the lands of the “New World.”<sup>23</sup> Because European colonizers imported their own legal traditions that were subsequently incorporated into American legal doctrine, the foundations of Federal Indian Law can be traced all the way back to the medieval crusades, through Papal doctrines, Spanish conquest, and British Imperial policies up until the Revolutionary War and the founding of America.<sup>24</sup> Importantly, though Federal Indian Law set its own course in an attempt to find a “new and better rule, better adapted to the actual state of things” in the so-called New World,<sup>25</sup> the fundamental conflicts imbedded deep within these European legal concepts set forth challenges for the field that remain to this day.

First, the colonial approach to dealing with the tribes of North America largely imported the practice of treaty-making, an approach that necessarily “implied recognition of tribes as self-governing peoples.”<sup>26</sup> Though each treaty could vary depending upon the terms negotiated by and between the colonial and tribal representatives, those agreements served to define the geographical, military, and trade boundaries between the two sovereign entities, to the exclusion of other colonial powers.<sup>27</sup> These agreements also allowed for the purchase and settlement of indigenous lands by European colonists with the consent of the Indians and also provided the tribes an opportunity to protect and reserve important rights.<sup>28</sup>

Contrarily, however, European colonists also imported the notion of conquest and its accordant legal rights, including the idea that conquest of inferior indigenous peoples grants the conqueror superior rights of title and ownership.<sup>29</sup> This colonialist and racist notion underpinned and promoted the conception of Indians as savage or “Wild Beasts of the Forest” who would “retire” to the wilderness as European or American settlers advanced and purchased their territories from them.<sup>30</sup>

---

<sup>21</sup> COHEN’S HANDBOOK, *supra* note 3, § 1.02, at 8. (“[D]espite the appealing tidiness of this [chronological] analysis, there never has been a single, clearly articulated American Indian policy at any given time.”) For a far more detailed description of these eras, *see id.* §§ 1.02-.07, at 8-108. *See also*, FLETCHER, *supra* note 3, § 1.3, at 7-15; CANBY, *supra* note 3, at 12-34.

<sup>22</sup> Given the breadth and complexity of Federal Indian Law and policy, it does not fit neatly into specific timeframes, so these years are rough estimates.

<sup>23</sup> *See* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 47 (West Academic 7th ed. 2017).

<sup>24</sup> *See id.* at 47-71.

<sup>25</sup> *Johnson v. M’Intosh*, 21 U.S. 543, 591 (1823).

<sup>26</sup> GETCHES ET AL., *supra* note 23, at 85.

<sup>27</sup> *Id.*

<sup>28</sup> *See* COHEN’S HANDBOOK *supra* note 3, § 1.02, at 12-14.

<sup>29</sup> *See, e.g., Johnson*, 21 U.S. at 571-81 (describing the theory and history of European conquest in America).

<sup>30</sup> Letter from George Washington, Commander-in-Chief, to James Duane, Head of the Committee of Indian Aff. of the Continental Congress, (Sept. 7, 1783), *reprinted in* GETCHES, ET AL. *supra* note 22, at 99-100.

The conflict between the sovereign status of tribes through treaties and the superior rights of European “conquerors” dictated by their own legal tradition muddied the status of land claims and property rights across the original colonies and, later, the new United States. Similarly, the inconsistency between entering treaties to guarantee a sovereign-to-sovereign relationship in perpetuity and the idea that Indians, as a savage and inferior people, would ultimately disappear before the advancement of non-Indian settlers also played a significant role in shaping both Federal Indian Law and policy as well as the United States Constitution.<sup>31</sup>

A second conflict, related to but distinct from the question of tribal status and land ownership, revolved around who had authority to deal with tribal relations and Indian affairs. While the sovereign-to-sovereign nature of treaty-making suggested a primary role for centralized government, the practicalities of colonial rule presented significant challenges. For example, the Royal Proclamation of 1763, which sought to exert King George III’s authority to prevent land speculation by the British colonists with tribes on the western frontier, largely motivated the colonial resistance to ongoing British authority.<sup>32</sup>

The Continental Congress also struggled with the “divided legacy” on Indian affairs left by British imperial rule.<sup>33</sup> The division arose over the authority of individual colonies to enter into treaties and other arrangements with local tribes and the desire of British officials to ensure a more coordinated and consolidated approach to tribal relations.<sup>34</sup> Unable to clearly resolve that divide, the Articles of Confederation instead ended up reserving to Congress the “sole and exclusive right and power” over Indian affairs but only so long as such power did not infringe or violate “the legislative right of any State within its own limits.”<sup>35</sup> Thereafter, representatives of the Continental Congress negotiated treaties with tribes across the new nation, including the 1785 Treaty of Hopewell with the Cherokee Nation, which guaranteed peace to the Cherokee and protection by the United States.<sup>36</sup> But many states, including the State of Georgia in which the Cherokee resided, rejected this perceived Congressional interference in what the states viewed as local matters and issues of state authority.<sup>37</sup>

These conflicts, rooted in Indian affairs, posed existential threats to the young republic and largely drove the framing of the U.S. Constitution, which, according to one leading scholar, was ratified by Georgia on the belief that, as an implicit reward for ratification, the federal government would provide military support to “eradicate the Indian threat.”<sup>38</sup> Thus, while the Constitution only expressly reserved to the Congress the exclusive authority to regulate “commerce . . . with the Indians” and confirmed the supremacy of treaties made by and between the United States and the tribes, the underlying conflict between federal and state authority over Indian affairs continued to bubble.<sup>39</sup>

---

<sup>31</sup> See generally, Ablavsky *supra* note 4 (describing the conflicts to Constitutional ratification posed by Georgia and other states, who demanded federal assistance to remove tribes from within their boundaries).

<sup>32</sup> GETCHES, ET AL., *supra* note 22, at 67-69.

<sup>33</sup> Ablavsky *supra* note 4, at 1011.

<sup>34</sup> *Id.*

<sup>35</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

<sup>36</sup> COHEN’S HANDBOOK, *supra* note 3, § 1.02[3], at 20-21; Treaty with the Cherokees, 1785, pmbl., 7 Stat. 18.

<sup>37</sup> See, e.g., Ablavsky *supra* note 4, at 1029-30 (describing Georgia’s reaction to the treaty negotiations at Hopewell).

<sup>38</sup> *Id.* at 1072.

<sup>39</sup> U.S. CONST. art. I, § 8, cl. 3.

The resolution of these fundamental conflicts, between tribes as sovereigns and European legal doctrines of conquest and discovery and between the federal and state governments over the role and place of Indian tribes in the federal system, began in earnest with the Supreme Court's 1823 decision in *Johnson v. M'Intosh*.<sup>40</sup> That decision, the first of the so-called Marshall Trilogy that form the basis of Federal Indian Law,<sup>41</sup> defined the property rights of tribes in light of the colonial doctrines of discovery and conquest, ultimately determining that though the tribes retained the right of possession and use of the land, the United States, as successors in interest to Britain's colonial rule and by virtue of the European legal doctrines described above, acquired the "absolute ultimate title . . . , subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."<sup>42</sup> The *Johnson* decision cemented the doctrine of discovery into the foundations of Indian law and hinted at the forthcoming decisions regarding the status of tribes vis-à-vis the constitution, federal, and state governments.

Those subsequent decisions, issued in 1831 and 1832, stemmed from the ongoing conflict between Georgia and the federal government over the presence of the Cherokee Nation within the boundaries of the State of Georgia. Unable to overcome the federal government's treaties with the Cherokee, Georgia simply ignored the rights and protections guaranteed therein and sought to take over Cherokee territory.<sup>43</sup> In answering the question of whether the Supreme Court could exercise jurisdiction over the original action brought by the Cherokee Nation to stop Georgia's efforts, Chief Justice Marshall defined the Cherokee Nation as a "domestic, dependent nation,"<sup>44</sup> a description of tribal status that remains relevant to present.<sup>45</sup> Marshall also noted that, by virtue of the language of treaties like the Treaty of Hopewell, the Cherokee were under the protection of the United States and were therefore "in a state of pupilage" and like a "ward to [the United States as] guardian."<sup>46</sup> While rooted in treaty language of protection, Marshall's conception of tribes also carried the specter of inferiority and savagery inherent in the "Savage as the Wolf" approach of early federal policy.<sup>47</sup> Notwithstanding its colonial roots, however, the conception of tribes as wards to the federal guardian formed the basis of the federal governments trust relationship with and responsibility to Indian tribes ever since Marshall's opinion.<sup>48</sup>

In the term immediately following the *Cherokee Nation* decision, the Court again considered the Nation's conflict with the State of Georgia, this time getting to the merits of whether Georgia could apply its laws within Cherokee territory. In *Worcester v. Georgia*,<sup>49</sup> Chief Justice Marshall again relied upon the treaties by and between the federal government and the Cherokee Nation to determine that the "whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States."<sup>50</sup> Thus, Georgia law could have no effect

---

<sup>40</sup> 21 U.S. 543 (1823).

<sup>41</sup> See also *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>42</sup> *Johnson*, 21 U.S. at 592.

<sup>43</sup> *Cherokee Nation*, 30 U.S. at 11.

<sup>44</sup> *Id.* at 13.

<sup>45</sup> See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citations omitted) ("Indian tribes are 'domestic dependent nations.'").

<sup>46</sup> *Cherokee Nation*, 30 U.S. at 13.

<sup>47</sup> See *supra* notes 28-29 and accompanying text.

<sup>48</sup> See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 192 (2011) (Sotomayor, J., dissenting).

<sup>49</sup> 31 U.S. 515 (1832).

<sup>50</sup> 31 U.S. at 561.

within the Cherokee's territory because it would interfere with the terms of those treaties, which were recognized by the constitution as the supreme law of the land.<sup>51</sup>

Marshall's insulation of the Cherokee Nation from the reach of Georgia's authority protected the tribe's "distinct community,"<sup>52</sup> preserved the sanctity of treaties between tribes and the federal government, and, along with his prior decisions in *Johnson* and *Cherokee Nation*, set the course for Federal Indian Law to develop. These decisions announced the fundamental tenets of the field – tribal sovereignty, the federal-tribal trust relationship, and the importance of treaties. But, while this first era of Federal Indian Law had important ramifications for the future of the doctrine, it did not prevent the federal government from drastically shifting its approach to Indian policy over the succeeding two centuries.

## 2. Removal & Reservations (1830s-1870s).

It is rumored that President Andrew Jackson, a staunch supporter of Georgia during its conflicts with the Cherokee Nation, said of Chief Justice Marshall's decision in *Worcester*, "John Marshall has made his decision; now let him enforce it."<sup>53</sup> Notwithstanding the victory for Cherokee interests in that decision and the Court's reliance on treaty guarantees of protection by the federal government, the federal government soon focused its efforts on removing tribes from their territories, particularly those east of the Mississippi River. In 1830, for example, Congress, with the urging of President Jackson, passed the Indian Removal Act, authorizing the President to negotiate new treaties demanding the cession of then-existing Indian lands in exchange for lands west of the Mississippi, to which the Indians would relocate.<sup>54</sup> Relying on this authority, the United States pressed tribes to renegotiate their earlier treaties and, though many opposed both removal and renegotiation of those sacred texts, a "combination [ ] of resignation, military coercion, and fraud" resulted in the federal government securing agreement from at least factions of a number of tribes to remove westward.<sup>55</sup> When many tribal members, like the Cherokee, remained on their lands, the United States military then forcibly removed them.<sup>56</sup> Though some eastern tribes clung tenaciously to their lands and remain on their homelands east of the Mississippi,<sup>57</sup> the federal government largely succeeded in carrying out George Washington's half-century-old prescription for acquiring additional territory for non-Indian settlement.<sup>58</sup>

As non-Indian settlement proceeded westward, tribes and their territories continued to be invaded and inundated by squatters, prospectors, military expeditions, and others in search of Manifest Destiny. Like the colonial era approach, the federal government sought treaties with tribes across the West in an attempt to limit conflicts and contain tribal communities within particular areas.<sup>59</sup> But

---

<sup>51</sup> *Id.* at 559-60.

<sup>52</sup> *Id.* at 561.

<sup>53</sup> See GETCHES, ET AL. *supra* note 23, at 147 (citation omitted).

<sup>54</sup> An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi, 4 Stat. 411, 412 (May 28, 1830).

<sup>55</sup> COHEN'S HANDBOOK, *supra* note 3, § 1.03[4][a], at 50.

<sup>56</sup> See generally GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1932); JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (1988).

<sup>57</sup> See, e.g., GETCHES, ET AL. *supra* note 23, at 153 (noting the continuing presence of the Seminole in southern Florida, the North Carolina Cherokee, and the Choctaw of Mississippi).

<sup>58</sup> See *supra* note 30 and accompanying text.

<sup>59</sup> See, e.g., Treaty of Fort Laramie, 1851, 11 Stat. 749 (including promises of peace and establishing territories for various tribes); Treaty with the Blackfeet, 1855, 11 Stat. 657 (promising "perpetual" peace between the United States and the

conflicts, particularly with the ever-expanding on-rush of non-Indian settlers, remained. As the tide of non-Indians continued to roll over tribal lands, the federal government demanded tribal concessions in subsequent treaties, many of which resulted in smaller and smaller tribal reservations.<sup>60</sup>

Thus, by 1871, when Congress forbade additional treaty-making,<sup>61</sup> many tribes had already entered into a series of treaties, each of which represented a separate basis for a sovereign-to-sovereign relationship with the federal government. Through the Removal and Reservation period, these terms became less and less favorable, and resulted in the removal of many tribes from their ancestral homelands and the significant reduction of traditional tribal territories. While the end of treaty-making in 1871 did not significantly change the way in which the federal government made agreements with tribes or set aside tribal reservations,<sup>62</sup> the next era of federal Indian policy would have significant and lasting impact on tribes and tribal lands.

### 3. Allotment and Assimilation (1870s-1930s).

Spurred by the end of the Civil War, technological advances, and military prowess, the federal government magnified its westward focus through the last half of the 19<sup>th</sup> Century.<sup>63</sup> When combined with the lingering notion of Indian “savagery” and inferiority, the lack of any additional lands on which to remove Indians from the “progress” of non-Indians, and a more comprehensive approach to making Indian policy, this American hubris resulted in a broad, multi-faceted, and aggressive assault on Indian lands, cultures, and survival.<sup>64</sup> Cloaked in efforts to “civilize” Indians, the federal government allotted reservation lands,<sup>65</sup> supported the removal of Indian children to boarding schools, and prohibited cultural and spiritual practices while promoting conversion to Christianity.<sup>66</sup> While the assimilative onslaught against Indianness was extensive and its effects long-lasting, the allotment of Indian lands constituted perhaps the single-most drastic and reverberating impact on tribes and tribal communities.<sup>67</sup>

---

Blackfeet Tribe, including a covenant to be peaceful with other tribes, and setting aside a territory on which the Blackfeet could reside).

<sup>60</sup> See, e.g., Treaty with the Sioux, 1868, 15 Stat. 635 (reducing the territory reserved by the Great Sioux Nation in the 1851 Treaty and requiring that the Nation relinquish the “right to occupy permanently the territory outside their [new] reservation,” although the Nation also reserved hunting rights in certain off-reservation lands as well as some “unceded Indian territory” elsewhere).

<sup>61</sup> Act of March 3, 1871, § 1, 16 Stat. 544, 566.

<sup>62</sup> See COHEN’S HANDBOOK, supra note 3, § 1.03[9] at 70-71 (explaining that, after 1871, agreements with tribes were still negotiated but then approved by both the House and Senate and additional lands were reserved by Executive Order of the President, which had been used since 1855).

<sup>63</sup> See, e.g., *id.* § 1.04, at 71 (“Powered by more than the technological marvels such as the railroads, the steam engine, and the mechanical harvester, the new expansionist policy was also propelled by the ‘go-getter’ spirit that infused the nation after the war.”).

<sup>64</sup> See, e.g., *id.* (“There was no place left to remove the Indian, and there was little sympathy for the preservation of a way of life that left farmlands unturned, coal unmined, and timber uncut.”)

<sup>65</sup> Act of Feb. 8, 1887, 24 Stat. 388 (the “General Allotment Act” or the “Dawes Act”).

<sup>66</sup> See Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 776-805 (1997).

<sup>67</sup> See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (analyzing in detail the effects of allotment on Indian law).

The allotment policy was carried out through a variety of enactments over many years, but the 1887 General Allotment Act (or the Dawes Act) entrenched allotment as an official federal policy.<sup>68</sup> The Act did not effectuate any specific allotments but, instead, authorized Congress or the President to survey particular reservations and then allot portions of 80 acres, for agricultural purposes, or 160 acres, for grazing purposes, to individual Indians.<sup>69</sup> By the terms of the General Allotment Act, these allotments were to be held in trust by the federal government for the benefit of those Indians for 25 years following their issuance, during which time the allotments would be free from state or county taxation.<sup>70</sup> Upon the conclusion of that 25-year period, the General Allotment Act authorized the issuance of a fee patent to the individual Indian, who would also then be a United States citizen (along with any other Indians who moved away from their tribe and “adopted the habits of civilized life.”)<sup>71</sup> Congress later amended the Act to allow the Secretary of Interior to determine whether an allottee is “competent and capable of managing his or her affairs,” at which time the Secretary could, regardless of the 25-year trust period, end the allotment and “cause to be issued to such allottee a patent in fee simple.”<sup>72</sup> Once allotments passed to fee-simple ownership, any number of devices and schemes, including imposition of local taxes and foreclosure, fraudulent purchases, or outright theft, were then employed to strip the Indian owner of rightful title.<sup>73</sup>

In addition to the loss of land through allotment and the subsequent loss of fee title, the General Allotment Act also authorized the purchase of so-called “surplus lands” – the unallotted reservation land left over after allotments were parceled out to individual Indians – by the Secretary of the Interior.<sup>74</sup> These “purchases” were conducted pursuant to Congressional acts allotting individual reservations, opening the surplus lands to homesteading by non-Indian settlers, and providing for, at least in theory, the collection of proceeds from sales to such homesteaders by the Secretary of the Interior for the benefit of the tribe.<sup>75</sup> The settlement of non-Indian homesteaders on such surplus lands, in addition to the loss of allotted lands to non-Indians, resulted in a checkerboard pattern of land ownership *within* the boundaries of allotted reservations, creating significantly more complicated questions of ownership and tribal authority.<sup>76</sup> Ultimately, the toll of allotment on tribal land ownership was severe, with over 90 million acres – one-third of the total tribal land base – passing out of tribal hands from 1887 until 1934.<sup>77</sup>

---

<sup>68</sup> Act of Feb. 8, 1887, 24 Stat. 388.

<sup>69</sup> 25 U.S.C. § 331, *repealed by* the Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 2007.

<sup>70</sup> Act of Feb. 8, 1887, §§ 5, 6, 24 Stat. 389-90, (codified as amended at 25 U.S.C. § 348, 349 (2012)). While the General Allotment Act prescribed these general terms, reservation-specific allotment acts authorized by the General Allotment Act could vary from reservation to reservation. *See, e.g.*, Act of May 30, 1908, Pub. L. No. 177, 35 Stat. 558 (providing for the survey and allotment of the Fort Peck Indian Reservation of up to 320 acres of grazing land and up to 20 acres of timber lands in addition to 40 acres of irrigable lands, if available).

<sup>71</sup> Act of Feb. 8, 1887, at § 5.

<sup>72</sup> Act of May 8, 1906, Pub. L. No. 49-149, 34 Stat. 183.

<sup>73</sup> FLETCHER, *supra* note 3, § 1.3, at 10.

<sup>74</sup> Act of Feb. 8, 1887, at § 5.

<sup>75</sup> *See, e.g.*, Act of May 30, 1908, *supra* note 70, at §§ 4-9, 15.

<sup>76</sup> In addition to checkerboard surface ownership, the withdrawal of some sub-surface mineral estates from homesteading further complicated ownership, creating a three-dimensional checkerboard of surface and sub-surface ownership. *See, e.g.*, *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 867-72 (1999) (describing the history and effect of the federal reservation of coal from homesteaders in the 1909 and 1910 Coal Lands Acts on the Tribe’s ownership of aspects of the subsurface estate).

<sup>77</sup> COHEN’S HANDBOOK, *supra* note 3, § 1.04, at 74.

Beyond federal policies aimed at diminishing tribal status and dispersing tribal lands, the extension of the federal government's legal authority over tribes also reached a peak during the allotment era. Though Chief Justice Marshall's trilogy of decisions in the early 1800s established the exclusivity of federal authority over tribal relations and the supremacy of federal authority,<sup>78</sup> Supreme Court decisions of the allotment era broadly interpreted federal authority in a new way. When the federal government allotted the Kiowa, Comanche, and Apache reservation, for example, it failed to secure consent from two-thirds of the adult males of the reservation as was required by a prior treaty.<sup>79</sup> Upon a challenge from a tribal leader urging the Supreme Court to uphold the promises of the earlier treaty, the Court refused, holding that "it was never doubted that the power to abrogate existed in Congress, and that, in a contingency, such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."<sup>80</sup> Rather than consider the tribal allegations of fraud and coercion related to efforts to secure the requisite consent for allotment, the Court instead presumed that Congress had acted in good faith and termed the allotment of the reservation "a mere change in the form of Indian tribal property."<sup>81</sup> To support its endorsement of federal plenary power over Indian affairs, the Court expanded upon Marshall's original concept of tribes as "wards" to the federal government to imply tribal dependence and incompetence, which necessitated the overriding federal authority to protect them.<sup>82</sup> By reifying and reinforcing plenary federal authority, the Court wrote Congress a blank check to expand policies designed to break up tribal lands and existence, even where such efforts ran contrary to treaty promises or tribal interests. The shadow of these legal and policy initiatives still lingers over present-day Indian Country.<sup>83</sup>

#### 4. Reorganization (1934-1950s).

The drastic effects of the allotment era eventually prompted reconsideration of the federal government's approach to Indian policy. Far from "civilizing" tribes and promoting economic progress, federal efforts to assimilate Indians failed miserably, leaving most reservations far worse off. Recognizing that conditions in Indian Country were not improving in the late 1920s, the Secretary of the Interior commissioned a study of the social and economic conditions of American Indians. The result, which came to be known as the Meriam Report because of its author, Lewis Meriam, was issued in 1928 and opened with a blunt statement of its findings: "[A]n overwhelming majority of the Indians are poor, even extremely poor, and they are not adjusted to the economic

---

<sup>78</sup> See *supra* notes 40-52 and accompanying text.

<sup>79</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 563-64 (1903).

<sup>80</sup> *Id.* at 566.

<sup>81</sup> *Id.* at 568.

<sup>82</sup> See *id.* (recognizing Congress' "full administrative power ... over tribal property ... the property of those who ... were in substantial effect, wards of the government."); see also *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (upholding Congress' extension of federal criminal jurisdiction over Indian Country because Congress' "power ... over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell [and such power] must exist in th[e federal] Government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.").

<sup>83</sup> Like Federal Indian Law, Indian Country is a term of art developed through case law and subsequently adopted by Congress to include "(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." 18 U.S.C. § 1151 (2012).

and social system of the dominant white civilization.”<sup>84</sup> The confirmation of the allotment era’s failures combined with the broader momentum of the New Deal promised a shift in federal Indian policy.

In an effort to move federal Indian policy away from the failures of allotment, promote tribal self-determination and economic development, and thereby reduce the federal role in Indian Country, Congress passed the Indian Reorganization Act (IRA) in 1934.<sup>85</sup> The IRA dramatically swung the pendulum of federal Indian policy away from the destruction of tribal cultures and governance and, instead, authorized the organization of tribal governments through the adoption of constitutions<sup>86</sup> and the creation of corporations through which tribes could engage in business ventures.<sup>87</sup> In a direct rebuke to the prior era of federal policy, the IRA also explicitly ended the allotment of tribal land<sup>88</sup> and, in language that has since become the source of repeated litigation in the modern era of tribal gaming, authorized the Secretary of the Interior to purchase and place into trust additional lands for the benefit of tribes.<sup>89</sup> By reversing the attack on tribal governments and land bases, the IRA laid “the foundation for a resurrection of tribal government and power,” but was not a total panacea for reinvigorating tribal sovereignty.<sup>90</sup>

While some tribes took advantage of the authority offered by the IRA to adopt constitutions and reshape their often dormant tribal government, other tribes refused, viewing the IRA as offering a restrictive and foreign way of managing tribal affairs.<sup>91</sup> The Act itself offered little additional authority to tribes beyond the inherent sovereign rights they had always enjoyed and as confirmed by Justice Marshall’s early trilogy of cases.<sup>92</sup> In addition, the federal presence on many reservations and within the text of the boiler-plate constitutions offered to tribes by the Bureau of Indian Affairs remained extensive, resulting in significant limitations on independent tribal authority.<sup>93</sup> Thus, although the IRA “remains the foundational federal legislation in modern Indian affairs,”<sup>94</sup> its promises of renewed exercise of tribal sovereignty and economic prosperity remained elusive for many tribes. In fact, some have argued that, despite its support for tribal governments and self-determination, the IRA was still an effort to promote assimilation of Indians by providing a longer transition phase for tribes to become independent from the federal trust relationship.<sup>95</sup> It was not long until the federal government once again sought to rapidly accelerate such assimilation.

---

<sup>84</sup> The Problem of Indian Administration, Inst. for Govt. Research (Feb. 21, 1928), <http://www.narf.org/nill/resources/meriam.html>.

<sup>85</sup> Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 461 et seq.

<sup>86</sup> 25 U.S.C. § 476 (2012).

<sup>87</sup> 25 U.S.C. § 477 (2012).

<sup>88</sup> 25 U.S.C. § 461 (2012).

<sup>89</sup> 25 U.S.C. § 465 (2012); *see also* *Carcieri v. Salazar*, 555 U.S. 379 (2009) (limiting Secretary’s authority to take lands into trust under § 465 to tribes that were “under federal jurisdiction” when the IRA was passed in 1934); *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016) (rejecting challenge to Secretary’s trust land acquisition on the basis of the Secretary’s interpretation of the terms “recognized” and “under federal jurisdiction” in § 465), *cert. denied*, 137 S.Ct. 1433 (2017).

<sup>90</sup> VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE*, 101 (1983).

<sup>91</sup> *See, e.g.*, GETCHES, ET AL. *supra* note 23, at 225-26 (describing challenges by traditional Hopi tribal members to the Tribe’s IRA government).

<sup>92</sup> WILKINSON, *supra* note 10, at 68.

<sup>93</sup> *See* DELORIA, JR. & LYTLE, *supra* note 90, at 102 (“Secretarial approval of constitutions, by-laws, selection of legal counsel, and most tribal resolutions proposing land use and civil and criminal codes was in effect a veto power on the activities of the new formed tribal governments.”)

<sup>94</sup> FLETCHER, *supra* note 3 § 1.3, at 12.

<sup>95</sup> Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139, 144 (1977).

## 5. Termination (1950s-1960s).

The federal government of the late 1940s and early 1950s still struggled with its approach to Indian policy, particularly in light of the acknowledged failure of allotment and the incremental progress of tribal government following the IRA. Whipped up in part by the anti-Communist fervor of the time, a new policy focused on ending the federal-tribal relationship and detribalizing Indian Country became the focus of federal Indian policy during this time period.

The centerpiece of the termination era was House Concurrent Resolution 108, which called for certain tribes as well as all tribes within certain states to “be freed from Federal supervision and control and from all disabilities and limitation specially applicable to Indians.”<sup>96</sup> Efforts to do so took the form of tribal-specific termination acts, taking effect from 1961 to 1966, that authorized the development of termination plans to end the federal-tribal relationship, remove the trust status of tribal lands, and, for purposes of the federal government, essentially end the tribe’s existence as an Indian tribe.<sup>97</sup> The result was the termination of “approximately 109 tribes and bands,” affecting three percent of all federally recognized Indians and reducing the total land base of tribal trust lands “by about 3.2 per cent.”<sup>98</sup>

Beyond explicit termination of certain tribes and tribes within particular states, Congress also transferred aspects of federal jurisdiction over certain reservations to states. Congress passed Public Law 83-280 in 1953, which mandated that certain states assume jurisdiction over Indian Country and authorized similar assumptions by additional states.<sup>99</sup> Although the Supreme Court later determined that Congress did not authorize states to exercise general civil regulatory authority,<sup>100</sup> the effect was to broaden state control over reservation affairs, replacing the federal trust relationship with what the Supreme Court had termed the tribes’ “deadliest enemy.”<sup>101</sup>

In conjunction with the termination acts and Public Law 280, the federal government drew back from tribes on many other fronts during this time period, including education, healthcare, and land management.<sup>102</sup> The federal government also promoted the relocation of Indians from reservations to urban centers by expanding assistance programs for moving and employment in those often far-from-home cities.<sup>103</sup> Like the allotment and assimilation era only a generations prior, the termination era represented another full-frontal federal assault on tribes and tribalism, which resulted in drastic changes for those tribes who were terminated or who remained in Public Law 280 states but even demanded that tribes not directly under threat of termination actively fight it off. From that fight grew tribal efforts to once again redefine federal Indian policy; efforts that resulted in the modern era of tribal sovereignty and self-determination.<sup>104</sup>

---

<sup>96</sup> H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (Aug. 1, 1953).

<sup>97</sup> Wilkinson & Biggs, *supra* note 95, at 151-52.

<sup>98</sup> *Id.* at 151.

<sup>99</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 588-89 (1953).

<sup>100</sup> Bryan v. Itasca Cty., 426 U.S. 373, 390 (1976).

<sup>101</sup> United States v. Kagama, 118 U.S. 375, 384 (1886).

<sup>102</sup> See Wilkinson & Biggs, *supra* note 95, at 160-62.

<sup>103</sup> *Id.* at 161-62.

<sup>104</sup> See, e.g., CHARLES F. WILKINSON, BLOOD STRUGGLE, 86 (2005) (“For as the shock waves of termination rolled through Indian country, Indian people realized that something had to be done and that they could count upon nobody [but] themselves. That realization became a major impetus for the gathering of the modern tribal sovereignty movement.”).

## 6. Self-Determination (1970s-Present).

Though the 1970 statement of President Nixon on recommendations for Indian Policy marked the true birth of the self-determination era, the seeds of that era, and many of the recommendations described by President Nixon, were planted by President Johnson's earlier statements and establishment of the National Council on Indian Opportunity.<sup>105</sup> Reacting to the continued failure of federal Indian policy, particularly during the termination era, both Presidents Johnson and Nixon proposed once again redefining the federal-tribal relationship but suggested that promoting tribal interests and tribal authority would be the better approach.<sup>106</sup> This shift in federal policy set the stage for a slew of initiatives aimed at promoting tribal sovereignty and self-determination.

Of the many federal laws focused on tribal interests passed since the self-determination era began in 1970, perhaps none have had as great an effect as the Indian Self-Determination and Education Assistance Act of 1975, or ISDEAA.<sup>107</sup> In furtherance of the federal policy of tribal self-determination, the ISDEAA directed the Secretary of the Interior to enter into contracts with Indian tribes to "plan, conduct, and administer" previously federal programs for the benefit of the tribe's members and community.<sup>108</sup> By doing so, Congress sought to "assur[e] maximum Indian participation in the direction of ... Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."<sup>109</sup> Though a number of factors impeded a universally successful implementation of such maximum participation and required numerous subsequent amendments to address,<sup>110</sup> the success of the ISDEAA in transferring federal funds, administrative and institutional support is undeniable.<sup>111</sup> By giving tribes the option to contract and assume responsibility for federal services, including law enforcement, tribal courts, natural resource management, healthcare, and social services, among others, the ISDEAA allows tribes to decide how best to carry out those functions. Beyond the obvious benefits to tribal members and local citizens, the effect has also been the continued building and expansion of tribal institutional and governmental capacity.

A number of other federal legislative initiatives, most driven by tribal leaders, have broadened the platform on which tribes can continue such efforts.<sup>112</sup> These laws include efforts to address the effects of the termination era by restoring terminated tribes and recognizing their land bases,

---

<sup>105</sup> See FLETCHER, *supra* note 3, § 1.3, at 13.

<sup>106</sup> See, e.g., The Forgotten American, President Lyndon B. Johnson's Message to the Congress on Goals and Programs for the American Indian, 4 WEEKLY COMP. PRES. DOC. 438, 440 (Mar. 6, 1968) ("I propose, in short, a policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, self-determination."); Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363, 91st Cong., 2d Sess. (July 8, 1970); 116 CONG. REC. 23,258 ("Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejected both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination.")

<sup>107</sup> Pub. L. No. 93-638, 88 Stat. 2203 (Jan. 4, 1975).

<sup>108</sup> *Id.* § 102.

<sup>109</sup> *Id.* § 3(a).

<sup>110</sup> See Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance under the Indian Self Determination and Education Assistance Act*, 39 AM. IND. L. REV. 1, 18-48 (2015).

<sup>111</sup> See *id.* at 48-49 (detailing the growth of tribal ISDEAA self-governance programs).

<sup>112</sup> See Wilkinson, *supra* note 104, at 261-65 (documenting the range of tribally-oriented federal laws enacted in the modern era).

protecting Indian children from removal in placement proceedings, promoting tribal control of natural resources development and environmental regulation, and ensuring greater protection for Indian religious practices, ancestral human remains and associated funerary objects.<sup>113</sup> Though real challenges to the ongoing evolution of the federal self-determination policy remain,<sup>114</sup> tribes have reshaped federal Indian policy in the modern era to more clearly and accurately reflect tribal priorities and interests.

Having persisted and survived through the history of divergent federal Indian policies, tribes continue to exercise their inherent sovereign authority, engage and relate with the federal government, and rely upon the rights they reserved centuries ago in treaties. While the history of federal Indian policy provides a broader context for understanding the development and current state of these three issues, they remain fundamental tenets of Federal Indian Law that define the legal status and authority of tribes. The remainder of this paper covers the essential legal aspects of tribal sovereignty, the federal-tribal relationship, and the ongoing vitality of treaties, with a particular focus on how those issues relate to natural resources issues.

### III. Tribal Sovereignty.

Indian tribes have exercised sovereign rights of governance and authority since time immemorial. Indeed, well before the founding of the United States, “the British Crown and several of its colonies dealt with the Indian tribes as wholly independent foreign nations.”<sup>115</sup> The nature of these dealings as sovereign-to-sovereign is reflected in the treaties made between those colonial powers and the tribes and the nature of tribal sovereignty was subsequently recognized and described by Chief Justice Marshall.<sup>116</sup> Importantly, however, Marshall also recognized limitations on tribal sovereign authority presented by “the actual state of things” – namely that “discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.”<sup>117</sup> Similarly, Marshall’s view of the “discovery” of an inhabited continent by European colonists also restricted tribal sovereign authority to engage in foreign relations independent from the United States.<sup>118</sup> Nonetheless, subject to an important caveat based on more recent Supreme Court decisions described in greater detail below, the Court has more recently recognized “that the Indian tribes have not given up their full sovereignty...tribes still possess those aspects of sovereignty not withdrawn by treaty or statute.”<sup>119</sup>

The pre-constitutional and inherent nature of tribal sovereignty has important implications for both Federal Indian Law and the exercise of tribal authority to Tribal Law. As Charles Wilkinson notes, “Tribal sovereignty forms the bedrock of the modern court decisions and statutes.”<sup>120</sup> Tribal

---

<sup>113</sup> See GETCHES ET AL., *supra* note 23, at 252-56 (cataloguing these and other federal laws).

<sup>114</sup> Strommer & Osborne, *supra* note 110, at 49-66.

<sup>115</sup> William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 2 (1987).

<sup>116</sup> See *supra* notes 40-53 and accompanying text.

<sup>117</sup> *Johnson v. M'Intosh*, 21 U.S. 543, 589 (1823).

<sup>118</sup> *Worcester v. Georgia*, 31 U.S. 515, 519 (1833) (“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.”)

<sup>119</sup> *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

<sup>120</sup> Wilkinson, *supra* note 104, at 248.

sovereignty played a central role, for example, in the Supreme Court's consideration of the scope of tribal authority to tax on-reservation transactions,<sup>121</sup> including the severance of oil and gas from tribal trust lands.<sup>122</sup> Lower courts have also considered the extent to which federal laws regulating labor and employment relationships impede upon tribal sovereign authority to determine whether such federal standards may restrict tribal labor practices, such as through tribal employment rights ordinances.<sup>123</sup> Thus, the extent to which tribes continue to retain and exercise the right to "make their own laws and be ruled by them,"<sup>124</sup> the true scope of tribal sovereignty, remains relevant to virtually the entire range of tribal activities.

Importantly, however, in recent decades, the Supreme Court has taken a much narrower view of the extent of tribal sovereignty, particularly as it relates to tribal authority over non-Indians. The Court, by recognizing what has come to be known as implicit divestiture, has interpreted new limitations upon tribal sovereign authority by determining that the exercise of such authority has been withdrawn "by implication as a necessary result of the[ tribe's] dependent status."<sup>125</sup> This implicit divestiture of tribal sovereignty, though inconsistent with the traditional notion that only Congress can act to strip tribes of authority and, even then, only explicitly,<sup>126</sup> has resulted in decisions stripping tribes of criminal jurisdiction over non-Indians<sup>127</sup> and substantially limiting the scope of tribal civil authority over non-tribal members on non-tribal lands within reservation boundaries.<sup>128</sup> The implicit nature of these determinations replaces the certainty of demanding a clear statement from Congress in order to diminish tribal authority with subjective judicial determinations of tribal status relative to the facts of a particular case.<sup>129</sup> These decisions have clouded the boundaries of tribal sovereign authority as it relates to tribal civil, criminal, and regulatory jurisdiction over non-members.<sup>130</sup>

Outside the walls of the Supreme Court, however, both Congress and the Executive Branch have engaged in numerous efforts to protect, restore, and enhance tribal sovereign authority. In response to the Supreme Court's 1990 decision in *Duro v. Reina*,<sup>131</sup> for example, in which the Court determined that, like with non-Indians, tribal sovereignty did not include criminal jurisdiction over non-tribal member Indians, Congress amended the Indian Civil Rights Act to expressly recognize inherent tribal authority over such Indians.<sup>132</sup> The Supreme Court subsequently upheld the

---

<sup>121</sup> See, e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

<sup>122</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.").

<sup>123</sup> See, e.g., *Soaring Eagle Casino & Resort v. Nat'l Labor Rel. Bd.*, 791 F.3d. 648, 661-70 (6th Cir. 2015); *Nat'l Labor Rel. Bd. v. Pueblo of San Juan*, 280 F.3d 1278, (10th Cir. 2000).

<sup>124</sup> *Williams v. Lee*, 358 U.S. 217, 220 (1959).

<sup>125</sup> *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

<sup>126</sup> See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2031-32 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

<sup>127</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>128</sup> *Montana v. United States*, 450 U.S. 544, 564 (1980) ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation.")

<sup>129</sup> See, e.g., David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1620 (1996) (arguing that these and other Supreme Court decisions since the early 1980s are a new era of judicial subjectivism, marked in part by the Court "assum[ing] the prerogative of balancing various non-Indian interests in order to prune tribal sovereignty to the Court's own notion of what it ought to look like.")

<sup>130</sup> See e.g., FLETCHER, *supra* note 3, § 8.3, at 376-77.

<sup>131</sup> 495 U.S. 676 (1990).

<sup>132</sup> Pub. L. No. 101-511, Title VIII, §§ 8077(b), (c), 104 Stat. 1892 (Nov. 5, 1990).

amendment as a reaffirmation of inherent authority instead of a delegation of federal authority.<sup>133</sup> A number of other Congressional acts seek to promote greater tribal control and self-determination by expanding tribal control over forest resources,<sup>134</sup> agricultural lands,<sup>135</sup> leasing of surface trust lands,<sup>136</sup> the development of energy resources,<sup>137</sup> and the management of other trust lands and resources.<sup>138</sup> The Executive Branch has taken Congress' lead and, particularly during President Obama's administration, implemented regulations and policies that defer to tribal decisions on rights-of-way and leasing as much as allowed under federal law.<sup>139</sup> These legislative and executive initiatives are consistent with the broader aims and policies of the self-determination era, in which tribal sovereignty plays a central role, even while the Supreme Court has chipped away at the foundations and extent of such sovereignty.

#### IV. The Federal-Tribal Relationship

The federal-tribal relationship and the federal government's trust responsibility to tribes is, at times, in tension with tribal sovereignty. As far back as *Johnson v. M'Intosh*, for example, Federal Indian Law limited tribal authority in relation to federal responsibility and oversight of tribal property.<sup>140</sup> Chief Justice Marshall's following decisions added further depth and context to the federal-tribal relationship and, in *Cherokee Nation v. Georgia*, Marshall gave birth to both the federal government's trust responsibilities, as "guardian" and the notion of tribes as dependent, as "wards."<sup>141</sup> Like the Supreme Court, early enactments of Congress also demonstrated a view of federal authority that limited and overrode independent tribal authority.<sup>142</sup> While the federal-tribal relationship has ebbed and flowed in conjunction with the eras of federal Indian policy described above, its contours remain relevant for understanding the role of the federal government in the management, protection, and development of tribal natural resources.

Fundamental to understanding the federal-tribal relationship is the basis for the federal government's broad power over Indian affairs. The constitution empowers Congress to "regulate commerce ... with the Indian tribes,"<sup>143</sup> but the nature and scope of the federal government's broader authority for Indian affairs has not always been as clearly stated. For example, it took Chief Justice Marshall's decision in *Worcester v. Georgia* to make clear that, based on both the language of the constitution's Commerce Clause and the Treaty Clause (combined with the treaty promises made in treaties with the Cherokee Nation), the federal government, not the governments of the states,

---

<sup>133</sup> *United States v. Lara*, 541 U.S. 193 (2004).

<sup>134</sup> National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (1990).

<sup>135</sup> American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3746 (1993).

<sup>136</sup> Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (codified as amended at 25 U.S.C. § 415(h)).

<sup>137</sup> Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3506.

<sup>138</sup> Indian Trust Reform Act, Pub. L. No. 114-178 (2016) (codified as amended at 25 U.S.C. §§ 5601-5636).

<sup>139</sup> *See, e.g.*, 25 C.F.R. pt. 162, regarding leases of Indian trust lands; 25 C.F.R. pt. 169, regarding rights-of-way across such lands.

<sup>140</sup> *Johnson v. M'Intosh*, 21 U.S. 543, 591 (1823). ("[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.")

<sup>141</sup> 30 U.S. 1, 13 (1831).

<sup>142</sup> *See, e.g.*, Act of July 22, 1790, Ch. 33, § 4, 1 Stat. 137, 138 (restricting land sales by Indians to those authorized by treaty with the federal government).

<sup>143</sup> U.S. CONST. art. I, § 8, cl. 3.

possessed exclusive authority over Indian affairs.<sup>144</sup> Subsequent decisions of the Supreme Court read these constitutional provisions to provide the basis for Congressional legislation across the entire swath of Indian affairs, whether or not such action is directly related to commerce. In fact, the Court has said that “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”<sup>145</sup> Thus, the commerce clause has “become the linchpin in the more general power over Indian affairs recognized by both Congress and the courts.”<sup>146</sup>

In addition to broadly interpreting the constitution to recognize the plenary power of Congress over Indian affairs, the Supreme Court has also interpreted the scope of such power to include virtually any action of Congress taken with respect to Indians. As described above, this has included Congressional acts to abrogate earlier treaty promises,<sup>147</sup> to impose federal criminal jurisdiction upon tribes and within reservations,<sup>148</sup> and to both terminate and restore tribes as tribes.<sup>149</sup> Congress also relied upon its plenary authority to enact laws protecting Indian children,<sup>150</sup> religious freedoms,<sup>151</sup> and ancestral human remains.<sup>152</sup> Though one Supreme Court justice recently raised questions about the nature and scope of plenary authority,<sup>153</sup> particularly in relation to tribal sovereignty,<sup>154</sup> the breadth of Congressional plenary power of Indian affairs is well established.

Both Congressional plenary power and the history of tribal property rights have contributed to the federal government’s authority over tribal lands and natural resources. As *Johnson v. M’Intosh* established, the federal government retained control over the alienability of tribal lands by virtue of the doctrine of discovery.<sup>155</sup> This vesting of control, deemed “ultimate title,” when combined with the notion of the federal government’s role as guardian to the tribes from *Cherokee Nation*,<sup>156</sup> “resembled the trust concept of private law in which the fee of trust property is held by a trustee for the use and benefit of a beneficiary.”<sup>157</sup> From those roots, Congress, in exercise of its plenary power, adopted the language of trust in the General Allotment Act, indicating that the United States would “hold ...in trust” each allotment for the benefit of the individual allottee.<sup>158</sup> Congress further confirmed the trust status of tribal and allotted lands in the Indian Reorganization Act, which extended the original periods of trust status indefinitely and authorized the Secretary of Interior to take additional lands into trust for the benefit of tribes.<sup>159</sup>

---

<sup>144</sup> 31 U.S. 515, 561 (1832).

<sup>145</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

<sup>146</sup> COHEN’S HANDBOOK, *supra* note 3, § 5.01[3], at 389.

<sup>147</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 563-64 (1903).

<sup>148</sup> *See, e.g., United States v. Kagama*, 118 U.S. 375, 376-78 (1886).

<sup>149</sup> *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); Menominee Restoration Act, Pub. L. No. 93-197 (Dec. 22, 1972).

<sup>150</sup> Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069.

<sup>151</sup> American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

<sup>152</sup> Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048.

<sup>153</sup> *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring).

<sup>154</sup> *United States v. Bryant*, 579 U.S. \_\_\_, 136 S.Ct. 1954, 1968-69 (Thomas J., concurring).

<sup>155</sup> 21 U.S. 543, 591 (1823).

<sup>156</sup> 30 U.S. 1, 13 (1831).

<sup>157</sup> COHEN’S HANDBOOK, *supra* note 3, § 15.03, at 998.

<sup>158</sup> Act of Feb. 18, 1887, 24 Stat 388, 389.

<sup>159</sup> 25 U.S.C. §§ 462, 465 (1934).

Consistent with the trust status of some tribal lands, Congressional acts define the boundaries of the federal-tribal relationship with regard to how tribal property may be leased and managed. As far back as 1891, for example, Congress authorized the leasing of tribal and allotted lands, subject to the approval of the Secretary of the Interior.<sup>160</sup> Since then, Congress created a variety of additional frameworks for leasing Indian lands for both surface and sub-surface leasing and development.<sup>161</sup> Importantly, however, with the exception of recent additions to these options,<sup>162</sup> Congress retained federal approval for all such transactions.<sup>163</sup>

While consistent with the restraints on alienability originally recognized in *Johnson v. McIntosh*, this ongoing federal role can have significant consequences for tribal natural resources management. At its most extreme, the federal role can be entirely exclusive of tribes, as evidenced by a 1919 statute authorizing the lease of tribal minerals without tribal consent.<sup>164</sup> But even as Congress recognized greater tribal authority and required tribal consent for both surface and mineral leases, the remaining federal role can frustrate tribal projects and priorities.<sup>165</sup> Confounding those frustrations is the Supreme Court's narrowing of the potential for tribes to seek damages from the federal government where it fails to carry out its role in a manner consistent with how tribes view the trust relationship.<sup>166</sup> Though the shift to supporting tribal self-determination continues to motivate the evolution of federal agency interpretations of trust responsibility and tribal sovereignty in favor of increased tribal control, tribes continue to search for additional tribal resource development options that avoid or minimize these potential challenges.

Beyond the development of tribal trust lands and resources, the federal trust relationship is the basis for efforts to ensure tribal interests are considered, if not protected, in any federal decision that may affect such interests, regardless of whether such decision is limited to Indian Country. While Congress mandated federal consultation with Indian tribes where a federal undertaking may impact tribal cultural properties,<sup>167</sup> a host of other federal actions may impact tribes, their members, and resources. Therefore, in recognition of the "unique legal relationship" between the federal government and Indian tribes, President William J. Clinton issued an Executive Order requiring all federal executive agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."<sup>168</sup> Both Presidents George W. Bush<sup>169</sup> and Barack H. Obama reaffirmed these commitments, with President Obama's 2009 Presidential Memorandum requiring of his Administration "regular and meaningful

---

<sup>160</sup> Act of Feb. 28, 1891, 26 Stat. 794.

<sup>161</sup> See, e.g., Indian Mineral Leasing Act, 25 U.S.C. § 396 (1938); 25 U.S.C. § 415 (1955); Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1982).

<sup>162</sup> See, e.g., 25 U.S.C. §§ 415(h), 3501-3506 (2012).

<sup>163</sup> 25 U.S.C. § 396; 25 U.S.C. §§ 2101-2108.

<sup>164</sup> 25 U.S.C. § 399.

<sup>165</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE: INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT, GAO-15-502 (June 2015), <http://www.gao.gov/assets/680/670701.pdf>.

<sup>166</sup> See, e.g., *United States v. Navajo Nation*, 537 U.S. 488 (2003).

<sup>167</sup> See, e.g., National Historic Preservation Act, Pub. L. No. 89-665 (1966), codified at 54 U.S.C. §§ 302706(b), 306108.

<sup>168</sup> Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

<sup>169</sup> Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004).

consultation and collaboration with tribal officials in policy decision that have tribal implications.”<sup>170</sup> In order to carry through on that mandate, the Memorandum also required each agency to develop “a detailed plan of actions” to implement President Clinton’s earlier Executive Order.<sup>171</sup> Thus, the federal government’s trust responsibilities to tribes encompass federal agency obligations to involve and consult with tribes in off-reservation development decisions, which could impact how those developments and decisions are ultimately carried out.

## V. Treaties

Treaties made by and between the United States and Indian tribes form the core of the unique federal-tribal relationship and have helped define that relationship since the earliest decisions of the U.S. Supreme Court. Although the Supremacy Clause establishes the primacy of treaties as a legal matter,<sup>172</sup> it was not until Chief Justice Marshall began interpreting and applying that clause in the context of treaties between the United States and the Cherokee Nation that the true import of Indian treaties became clear. The language of those solemn agreements helped define and invigorate the constitutional and federal structure of the republic.

Beyond looking to treaties for the core principles of the federal relationship with Indian tribes and insulation of their inherent rights from state intrusion,<sup>173</sup> courts require particular interpretation of treaty language to ensure these fundamental structures are maintained.<sup>174</sup> These rules of interpretation, the Indian canons of construction, require that treaty language be construed as the Indians would have understood it, and the rights reserved by such language remain intact unless Congress has expressed clear and unambiguous contrary intent.<sup>175</sup> These interpretive rules further recognize that a “treaty was not a grant of rights to the Indians, but a grant of right from them[—]a reservation of those not granted.”<sup>176</sup> Therefore, in the words of the leading Indian law treatise, the canons are not simply intended to address a perceived inequality in bargaining power between tribes and the United States, but “have quasi-constitutional status; they provide an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation.”<sup>177</sup>

The exercise by an individual Indian of rights reserved in a treaty can lead to conflict with state authority, particularly where the Indian exercises or seeks to exercise a reserved right to hunt or fish away from his tribe’s reservation. Because these conflicts cut to the core of its federal Indian law jurisprudence, the Supreme Court has resolved them through further defining and applying its Indian canons of construction to limit state authority. In *Winans*, for example, the Court began a long tradition of resolving conflicts related to the off-reservation exercise of rights by Indians in the

---

<sup>170</sup> Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, 74 Fed. Reg. 57,879 (Nov. 9, 2009).

<sup>171</sup> *Id.* at 57,881.

<sup>172</sup> U.S. CONST. art. VI, cl. 2.

<sup>173</sup> See *supra* notes 40-53 and accompanying text.

<sup>174</sup> See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 551-57 (1832). (interpreting the Treaty of Hopewell in view of congressional policy to “treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate”).

<sup>175</sup> See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (*Mille Lacs*) (“[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.”); *id.* at 202 (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.”).

<sup>176</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905).

<sup>177</sup> COHEN’S HANDBOOK, *supra* note 3, § 2.02[2], at 118-19.

Northwest. It did so by carefully considering the context in which the treaty was entered and construing the treaty at issue as the Indians would have understood it.<sup>178</sup> The Court recognized that the right to use traditional fishing locations was “part of larger rights possessed by the Indians,” and that the “form of the [treaty] and its language was adapted” to preserve the exercise of those rights, albeit “in common with the citizens of the territory.”<sup>179</sup> The Court rejected the argument that the reserved rights were abrogated by the admission of the State of Washington to the Union.<sup>180</sup> Central to the Court’s interpretation and protection of the reserved right was its recognition that the treaty “seemed to promise . . . and give the word of the nation for more” than just allowing Indians to exercise the same rights as other citizens of the state.<sup>181</sup> Consideration of the treaty in light of the canons of construction was crucial in that recognition.

The canons of construction played a central role in resolving subsequent cases arising from similar conflicts between the exercise of off-reservation treaty rights and the authority of the State of Washington. In *Tulee*, the Court considered Washington’s conviction of a member of the “Yakima tribe” for failure to obtain a state license to fish.<sup>182</sup> “[V]iewing the treaty in [ ] light” of the canons requiring liberal construction and an understanding of the language as the Indians would have understood it, the Court determined that the “state is without power to charge the Yakimas a fee for fishing” because the state’s fees could not “be reconciled with a fair construction of the treaty.”<sup>183</sup> Relying in part on *Winans*, however, the Court recognized a right of the state to “impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish.”<sup>184</sup>

The Court followed *Winans* and *Tulee* with a series of cases defining the balance between off-reservation treaty rights and state authority to regulate the exercise of those rights as necessary for the conservation of a species, but only in a manner that does not discriminate against Indians.<sup>185</sup> In each of these cases, the Court considered the relevant treaty or other agreement in accordance with the canons of construction.<sup>186</sup>

Most recently, the Court reiterated the importance of the canons of construction in *Mille Lacs*, where it recognized that a tribe’s off-reservation rights to hunt, fish, and gather secured in an 1837 treaty survived, despite (1) a subsequent Executive Order purporting to revoke those rights, (2) cessions by the tribe in a subsequent treaty, and (3) the Act of Congress admitting Minnesota to the Union.<sup>187</sup> Central to the Court’s treaty interpretation was the requirement that courts “look beyond the written words to the larger context that frames the Treaty,” which “sheds light on how the [Indian]

---

<sup>178</sup> *Winans*, 198 U.S. at 380-81.

<sup>179</sup> *Id.* at 381.

<sup>180</sup> *Id.* at 382-84.

<sup>181</sup> *Id.* at 380.

<sup>182</sup> *Tulee v. State of Washington*, 315 U.S. 681, 682 (1942).

<sup>183</sup> *Id.* at 684-85.

<sup>184</sup> *Id.* at 685 (citations omitted).

<sup>185</sup> See *Puyallup Tribe v. Dep’t of Game of Washington*, 391 U.S. 392 (1968) (*Puyallup I*); *Dep’t of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); *Antoine v. Washington*, 420 U.S. 194 (1975); *Puyallup Tribe, Inc. v. Dep’t of Game of Washington*, 433 U.S. 165 (1977) (*Puyallup III*); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675-76 (1979) (*Fishing Vessel*).

<sup>186</sup> See, e.g., *Puyallup I*, 391 U.S. at 397-98 (“It is in th[e] spirit [of liberal treaty construction] that we approach these cases.”); *Antoine*, 420 U.S. at 199-200 (applying canons to an 1891 agreement and its subsequent congressional ratification); *Fishing Vessel*, 443 U.S. at 675-76.

<sup>187</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

signatories to the Treaty understood the agreement.”<sup>188</sup> This contextual understanding must come from “an analysis of the history, purpose and negotiations of this Treaty,” and may not be drawn from analogies to or reliance upon judicial interpretation of other agreements with similar language.<sup>189</sup> Any argument that “similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of the basic principles of treaty construction.”<sup>190</sup>

Treaties are not simply important due to their constitutional status and the role they played in helping define both the federal-tribal and federal-tribal-state relationship. Treaties also remain relevant to a range of more common and ubiquitous natural resource issues. Beyond questions of off-reservation hunting, fishing, and gathering rights, which may, in some instances, impose significant burdens on states to protect and restore treaty resources,<sup>191</sup> treaty reserved rights can form the basis of tribal claims to water rights,<sup>192</sup> on-reservation jurisdictional and regulatory questions,<sup>193</sup> and the scope of federal environmental review and tribal consultation on off-reservation infrastructure and development projects.<sup>194</sup> Occasionally, the potential for such a project to impact treaty rights can lead to a federal agency denying permits necessary for the project to move forward.<sup>195</sup> Therefore, consideration of treaties within the context of tribal natural resources issues and, in particular, doing so in accordance with the canons of construction, is imperative to understanding the Indian law questions inherent in such issues.

## VI. Conclusion.

The Indian Law landscape is diverse, complex, and can be overwhelmingly confusing, particularly to attorneys and practitioners encountering the field for the first time. While each particular legal issue facing an Indian tribe, its members, or those seeking to do business with them presents its own unique and fact-specific set of challenges, understanding the basic tenets of Federal Indian Law – tribal sovereignty, the federal-tribal trust relationship, and the role of treaties – and recognizing the broader context of history and the development of those foundational doctrines are key to successfully navigating those challenges. This paper provides a foundation for building such an understanding while setting the stage for the more discrete and nuanced topics that follow.

---

<sup>188</sup> *Id.* at 196.

<sup>189</sup> *Id.* at 202 (emphasis in original).

<sup>190</sup> *Id.*

<sup>191</sup> *See* *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016), *amended and superseded by* *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).

<sup>192</sup> *See, e.g.,* *Winters v. United States*, 207 U.S. 564 (1908); Montana Reserved Water Rights Compact Commission, Report on the Proposed Water Rights Compact Between the State of Montana and The Confederated Salish & Kootenai Tribes of the Flathead Reservation (Jan. 2014), <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/watercompactreport.pdf>.

<sup>193</sup> *See, e.g.,* *Window Rock Unified School Dist. v. Reeves*, No. 13-16259, slip op. at 21-23 (9th Cir. June 28, 2017) (relying on Navajo Treaty of 1868 to confirm Navajo Nation’s sovereign rights to exclude non-members from tribal lands).

<sup>194</sup> *See, e.g.,* *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 16-1534, slip op. at 36-43 (filed June 14, 2017) (determining that environmental review of proposed pipeline permits failed to adequately consider impacts of a potential spill upon treaty-reserved tribal rights and resources).

<sup>195</sup> *See, e.g.,* Memorandum for Record: Gateway Pacific Terminal Project and Lummi Nation’s Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County, Pacific International Holdings, LLC, NWS-2008-260 (U.S. Army Corps of Eng’rs., May 9, 2016), <http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/160509MFRUADeMinimisDetermination.pdf> (denying permit for deepwater coal terminal based on the potential impact on treaty fishing rights).