

Tribal Treaty Rights

This short history will help understand that tribal treaties are a fundamental part of tribal constitutional democracy, and that by signing treaties, the United States affirmed the coexistence of separate cultures and government within a common land base.

- I. Pre-non-tribal contact
 - A. Tribal tenure in the Northwest
 1. Tribal people have been living in the Pacific Northwest since the beginning of time--at least 15,000 years.
 2. Tribal people had an established relationship with their homeland longer than any other culture of Europe or the Middle East.
 3. Over a hundred distinct aboriginal cultures existed in the Pacific Northwest lands.
 - B. Tribal ownership of land
 1. Because Yakama and other tribes are sometimes described as 'nomadic,' many people think the tribes had no fixed relation to the land base.
 2. While tribes did not share the European notion of individual land ownership, they had their own system of ownership and use.
 3. Each tribe occupied and used a particular territory.
 - a. Tribes moved with the seasons to make the best use of the natural environment.
 - b. Each tribe and family within a tribe had designated hunting, fishing, and gathering places.
 - C. Land and resources preservation
 1. Despite continuous use of 10,000 years or longer, the area's natural resources were preserved.
 2. Tribal cultures in the Pacific Northwest had many ways of protecting the land and its resources.
 - a. The profound respect the tribal people shared for land, water, animals, plants, and nature in general, was both pragmatic and spiritual.
 3. Tribes practiced conservation methods such as limiting the number of times a particular spot was used for camping, and specifying only certain times when fish could be caught.
 4. Legends and traditions taught by elders instructed that the land and all the things of nature must be respected and protected from overuse.
 5. The spiritual value of the land protected it from misuse. For the Yakama tribal people, all land was and is sacred--it sustained them and their culture, it was the link to the past of their ancestors.
 - a. Ceremonies such as the first-salmon, first-deer, and first-root observances paid respect to the spirits of nature.
 - E. Tribal Government

1. Each village and tribe developed its own complex political system.
2. Elements of leadership through inheritance and by condition of wealth, participatory democracy, and representation were part of the political system of the aboriginal people.
2. The basic unit of government was generally the village.
 - a. Leaders were drawn from a village's household group.
 - b. Leaders were also chosen for particular activities or functions.
3. The formation of alliances with other tribes and villages, seasonal movements, and settling disputes were among the decisions made by tribal leaders.
4. Established procedures were followed for decision-making and dispute resolution.
 - a. Decisions were usually made by consensus of the council of village leaders or sometimes consensus of all adults in a village or tribe.

II. Treaty beginnings

A. Arrival of Europeans on this continent

1. When European powers in the opening decades of the 16th century began staking claims to the lands of what would be called America, their purpose was to gain an economic and political foothold in the "new world," as means of shoring up the wealth and power of their respective monarchies.
2. As the following two centuries would show, the success of their enterprise depended upon extraction of local products and resources for European markets and transplanting of European life into America.
 - a. And, this in turn, required European settlement and acquisition of tribal lands.

B. Justifications for acquiring tribal lands

1. The Spanish Crown, being among the first European powers to gain a foothold in North America, requested that one of its leading intellectuals, Francisco de Victoria, advise on European rights in the western hemisphere.
 - a. His analysis set forth several lasting principles, among them, that Europeans could legally acquire tribal lands but because tribes had title to the land their consent was required before lands could be taken.
2. Victoria's principles of tribal aboriginal title and consent requirements were widely accepted by 16th, 17th and 18th century authorities on international law.
 - a. His legal principles became the cornerstone of tribal treaty law.
3. Other legal moral theories were used to legitimize the acquisition of tribal lands, principally, the "doctrine of discovery."
 - a. This notion held that the "discover" of "unoccupied lands" (unoccupied by Europeans) had the right to assume title to these lands in the face of competing claims of other European nations.
 - b. Over the centuries of early American history, the consent theory together with the doctrine of discovery shaped how the European

sovereigns, and then, the United States would deal with tribes and their land.

C. Tribal response

1. While tribes chose to greet the Europeans with friendship and assistance, they nonetheless desired to maintain a separate homeland and way of life.
 - a. In defining their relationship with the Europeans, the tribes also chose not to make treaties with individual settlers, who were given to reckless intrusions on tribal lands and rarely appreciated the fact of tribal governments and sovereignty.
 - b. Tribes were only willing to make agreements with representatives of the colonies or the "King."

D. Tribal treaties

1. The origins of treaties are found in Spanish jurisprudence and the evolution of international law. Tribes, and treaties in general, are procedures of international law, and as such, they are mutually agreeable contracts between sovereign nations.
2. Treaties, and not other forms of legal agreements, were made with tribal people because tribes were independent nations who possessed title to the land and who exercised all rights inherent in their sovereignty., "the treaty was not a grant of rights to the tribes, but a grant of rights from them--a reservation of those not granted." (*U.S. v. Winans*, 1905).
3. Treaties were also based on Victoria's principles that land should be acquired from the tribes only with their consent and that acquisition of tribal lands was solely a governmental matter, not to benefit to individual colonists or settlers.
 - a. These tenets were adhered to in the earliest dealings between Europeans and tribes.

E. Colonial Treaties

1. Getting tribal consent to acquire and settle lands was more than a legal requirement, it was a practical necessity when for many decades powerful tribal nations outnumbered settlers.
2. The colonies and the various European powers made treaties with tribes to secure land for settlement and to make alliances, sometimes military alliances with the tribes.
3. For their part, tribes made treaty agreements to establish containment lines beyond which no European settlements were to occur, to gain protection from settlers, and to generally secure the peace.

F. United States and tribal treaties

1. When the U.S. replaced the colonies and the European states, the new federal government gave itself, first in the Articles of Confederation and then in the Constitution, the exclusive power to make treaties and to manage tribal affairs.
2. The new government continued the treaty process with tribes until 1871.
3. Through treaties, the U.S. acquired both lands and legal responsibilities; and the Yakama Tribe ceded over 12 million acres of land in return for

homelands, protection, and for material and political assistance.

III. Treaty times--1850--1870

A. Westward expansion

1. Prior to the 1850s Northwest tribes were affected very little by Spanish settlements in California and by the activities and employees of the great fur companies.
2. Not until the 1850s, after the expansion of the U.S. territories and the discovery of gold in California, did white settlers begin to encroach upon tribal native population.

B. Settler's attitude

1. White settlers were imbued with the spirit of manifest destiny and, much like earlier colonists, regarded the tribal people as an obstacle to the country's progress. Tribes were neither Christians or farmers, they were 'savages' who weren't using--cultivating or mining--the land.
2. From the vantage point of both settlers and government, the only hope for tribes was to assimilate into American life by changing their customs, dress, religion, language, occupations, and philosophy.

C. Government politics

1. Beginning in the 1850s, the federal government embarked on aggressive policy of securing land for settlers through treaties with western tribes.
2. Between 1851 and 1868, over 60 treaties were negotiated with Pacific Northwest tribes--many were never ratified.
3. Prior to the mid-19th century, land reservations were not a primary ingredient of federal tribal policy--the government (had been able to move tribes westward into areas without settlement).
4. The expansionist period brought newcomers to all parts of the continent, and tribes were insisting on reserving a portion of their original homeland.

D. The tribes negotiate

1. Dramatic changes were taking place in tribal country:
 - a. Strangers were settling on tribal lands. Plowing was destroying root plants, and pigs and cattle were scaring off game. Missionaries were urging tribes to abandon their traditional religions.
 - b. Tribes saw treaty-making as a means to retain a homeland where their activities would not be disrupted and their culture could be kept separate from the growing numbers of immigrants.
2. The tribes three main goals in reserving a portion of their homeland was to:
 - a. preserve land and natural resources.
 - b. preserve culture and traditions
 - c. preserve tribal governments.
 - d. In addition to reserving their traditional economies and cultures by retaining rights to hunt, fish, gather roots and berries in their usual and accustomed places, including ceded lands outside of the reservation boundaries.

E. Consequences

1. While the U.S. got its land and the treaties themselves reflect the tribes purposes in treaty-making, what was not foreseen was the enormous displacement of tribal people that took place in the following two decades despite treaty promises.
2. Some tribes were divided among as many as four different reservations; on the Yakama reservation there were more than a dozen different tribes.
3. Others had their reservations holdings reduced from their original size.

IV. Treaties today

A. Sovereignty

1. *"Indian tribes are part of the constitutional structure of government. Tribal authority was not created by the Constitution--tribal sovereignty predated the formation of the United States and continued after it--but tribes were acknowledged by the Constitution in the reaffirmation of previously negotiated treaties (most of which were with Indian tribes), the two references to "Indian not taxed," and the Indian Commerce Clause."* Charles F. Wilkinson, 1987.
2. It is inherent; it cannot be given to one group by another.
3. Prior to making treaties, tribes were independent sovereign nations--they possessed all the power of government.
 - a. Today tribe are quasi-sovereign, that is, they retain domestically most powers of government.

B. Tribal jurisdiction

1. According to *Worcester v. Georgia* (1832), the single most important Supreme Court decision on treaty law, the Constitution rendered tribes subject to the legislative power of Congress and ended the external powers of sovereignty (such as power to make treaties with foreign nations and power to make war), but did not affect the domestic powers of self-government.
2. Over the years, Congressional acts have eroded some of the original scope of tribal jurisdiction.
 - a. For example, the Major Crimes Act of 1855 allows certain crimes committed within tribal jurisdiction (murder, rape, robbery) to be tried in federal courts. Nonetheless, tribal powers today include the power to enact and enforce laws, the power to tax, the power to regulate hunting, fishing, the power to zone and otherwise determine land use, and the power to determine the form of tribal government institutions.
 - b. Tribal governments also operate and regulate businesses and provide a full range of social services.

C. State jurisdiction

1. States do not have inherent power, that is, jurisdiction, within reservations.
2. This concept of state exclusion is based not the status of tribes and the constitutional fact that tribal relations are a matter of federal jurisdiction.
3. States and their non-tribal citizens have been viewed as representing interests that were in direct conflict with tribal survival

- a. the federal government was viewed as being responsible for protecting tribes from states.
 4. The original and total proscription against any state jurisdiction has been eroded over the past century and a half. The most pervasive transfer of jurisdiction to the states is Public Law 280.
 - a. Enacted by Congress in 1953 this law authorized certain states including Washington to assume civil and criminal jurisdiction over tribes within their boundaries.
 - b. Fortunately in 1968, legislation was passed that provided for reacquisition of tribal jurisdiction.
- D. Trust responsibility
 1. Tribes are governmental units that have a special political relationship with the federal government.
 2. That relationship, the trust relationship, derives from treaty provisions that call for, among other things, the federal government to protect tribal property.
 3. The federal government's trust responsibility to tribes has three components
 - a. It is obligated to safeguard and enhance tribal land and natural resources
 - b. tribal government
 - c. tribal social services
 - d. and, to provide funds, necessary to meet these obligations.
 4. The trust responsibility encompasses the entire federal government, including the executive branch and all its agencies, and Congress.
 - a. For Congress, the trust relationship is both a source of and a limit to its power.
- E. Supreme Court and federal case law
 1. Of the three branches of government, the judicial branch which comprises the federal court system, has been the most consistent in upholding and protecting treaty rights.
 - a. Furthermore, Supreme Court law forms the analytical framework for tribal law--it has defined and refined the above-described as a basic concept of tribal treaty law.
 2. The court has also adopted general rules of interpretation that apply to treaties.
 - a. Treaties must be interpreted as parties understood at the time of signing.
 - b. when a treaty provision is doubtful or unclear, the treaty must be interpreted so as to promote its central purpose.
 - c. in interpreting treaties, ambiguities are to be resolved in favor of the tribes. (Because tribes has an oral and not a written tradition and because treaties were written in English.).
 - d. terms of a treaty are to be construed, not according to technical meaning, but the way in which tribes would have understood them at the time of signing.

V. Tribes today

A. Land and natural resources: On-reservation

1. In treaties, Washington tribes intended that their governments would remain in control of their reservation lands as a means of maintaining their cultures and economies.
 - a. today, Washington tribes have maintained nearly exclusive jurisdiction over on-reservation lands and resources.
 - b. However, in 1887 Congress enacted legislation with lasting impact on tribes across the country.
2. The purpose of the General Allotment Act
 - a. It divided tribal lands among tribal people--was to assimilate tribes by breaking up the tribally based ownership of land.
 - b. Under the act, individual allotments usually did not amount to all the previously held tribal lands. As originally enacted, it provided for allotments of different quantities of land to various classes of tribal people, i.e., one-quarter section to heads of families, one-eighth section to single persons over the age of 18 years, one-eighth section to orphaned children under the age of 18, and one-sixteenth to all other single persons under the age of 18.
 - c. The remaining lands were declared surplus and opened to non-tribal settlement.
 - d. Additional lands were lost when tribal members sold their allotments.
 - e. Some 90 million acres of tribal lands went out of tribal lands because of this and other allotment acts.
3. The Indian Reorganization Act of 1934
 - a. prevented further allotments of tribal lands and made funds available for tribes to buy lands back.
 - b. However, for many Washington tribes, the General Allotment Act had the (intended) effect--a very important underpinning for tribal culture and cohesion, the tribal land base, was lost.
4. Land and water codes, hunting and fishing regulations (for both tribal and non-tribal people) and other resource protection measures have been established by Washington tribes.

B. Off-reservation natural resources: Fishing rights

1. Washington tribes reserved resources and lands at usual and accustomed places outside the reservation boundaries.
 - a. Traditional places where tribes hunted, fished, and gathered foods.
3. Columbia River Tribes, including the Yakama, have gone to considerable effort to protect their reserved fishing rights.
 - a. While of paramount importance to the tribes, salmon, including steelhead, play a vital role in their culture, religion, and economies of all Washington tribes.
4. The Supreme Court and federal courts have interpreted the treaty fishing

rights of Washington tribes in numerous cases as far back a 1905, and have in nearly every instance, re-affirmed tribal rights.

5. Principal features of these fishing rights include
 - a. entitlement of 50 percent of the harvestable fish passing by usual and accustomed fishing places;
 - b. state involvement in tribal fishing is limited to those regulations reasonable and necessary for conservation that do not discriminate against tribal people.
 - c. the right to hatchery fish and, to environmental protection of fish habitat, because treaty fishing rights are more than "the right to dip a tribal net into the water and bring it out empty."
 - d. These rights along with tribal jurisdiction and management can and do protect natural resources for the benefit of all people.

C. Economic development

1. Treaty-guaranteed natural resources together with tribal jurisdiction form the basis for economic development as well as for cultural and economic self-sufficiency.
2. Attacks on tribal rights have often thwarted economic development.
 - a. Tribal efforts are diverted to defending basic rights rather than focused on planning the wise use and development of tribal resources.
3. The questions and contours of economic development for tribes are in many respects different than for local and state governments or businesses.
 - a. For example, because tribal lands are held in trust by the federal government the land can't be mortgaged to raise investment capital.
 - b. The federal government also has broad control over tribal monies, a problem that is compounded by complex and confusing laws, regulations, and administrative directives.
4. Nonetheless, in recent years there has been a comparative flurry of tribal economic development across the country.

D. Restoration

1. In the 1950s political pressure was brought to bear on Congress to end the federal government's relationship with and the tribal status of tribes.
2. In the late 50s and early 60s, 64 tribes and bands were terminated. As a result, tribal lands were disposed of, the trust relationship was ended for most purposes, state judicial and legislative authority was imposed, and laws went into effect without the understanding of informed participation of the tribes involved.
 - a. Congress has the authority to re-establish federal tribal status for terminated tribes.
 - b. Other terminated tribes in Washington have managed tribal cultures and governments, and worked to regain their federal status.

VI. Treaties tomorrow

A. Old treaties

1. Some challenge the validity of treaties by saying that treaties are not real treaties, that they have become invalid with age and circumstance.
 - a. This notion has no basis in fact. Treaties with tribes are binding today, and like the Bill of Rights and Constitution, they don't expire with time.

B. Assimilation

1. Others argue that treaties should be abrogated for the benefit of tribal and non-tribal people alike.
2. This suggestion that tribal people should become like everyone else ignores over 500 years of history in which tribes have chosen over and over again to remain different.
 - a. Even after nearly a century of federal policies and program geared to assimilate tribes at any cost, tribes have maintained distinct and separate cultures.
3. Tribal people are not like other U.S. citizens because they are entitled to the treaty-guaranteed rights of their tribes and because they have a land base as well as distinct and definable culture.
 - a. As citizens of their tribes, tribal people are a legal or political entity, not an ethnic group.

C. Treaties are tools

1. Treaties are essentially a tool that can be used by tribes to protect property rights, cultural identity, and powers of government.
2. Treaty rights have their foremost importance as a method by which tribal governments can serve the needs of their people.
3. Tribal government, in turn, becomes a means that support the survival of the tribe.

Suggested Readings

Understanding Indian Treaties as Law, Washington State Superintendent of Public Instruction, 1978, Russell Barsh. (Grade lesson plans for 7-12. Teaching Indian treaties and Indian fishing rights in the Northwest).

Indian Tribes as Sovereign Governments--A Source book on Federal-Tribal History, Law and Policy, 1988, Charles Wilkinson, American Indian Lawyer Training Program, Inc.

Felix S. Cohen's Handbook of Federal Indian Law, 1982, Michie, Bobs-Merrill, Strickland, Rennard and Wilkinson. (A reference).

Tribal Sovereignty: Indian Tribes in U.S. History, 1979, Fay Cohen, Jeanne Hevuing, United Indians of All Tribes Foundation.

Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians, 1970, University of Washington Press. (A new edition from 1984 includes Columbia River Tribes).

Treaties on Trial: The continuing controversy over Northwest Indian Fishing Rights, 1986. Fay G. Cohen, a report prepared by the American Friends Service Committee.