

Overview of Federal Indian Policy

"Great nations, like great men, keep their word."

*--Justice Hugo Black
commenting on Indian treaties*

Definitions:

Department of War: Federal agency under which Indian affairs were governed until 1824. This agency is now called The Department of Defense.

Department of the Interior: Federal agency under which Indian affairs are currently governed.

Bureau of Indian Affairs: Governmental agency under the Department of the Interior that manages all Federal Indian affairs.

Indian: Tribally speaking, "a person who has some Indian blood AND is regarded as an Indian by his or her community." (Canby, Jr. 8) The tribe determines the definition of 'some.' The Yakamas, for example, require that an Indian is eligible for enrollment when he or she possesses $\frac{1}{4}$ Yakama blood (i.e., has a parent who was at least $\frac{1}{2}$ Yakama). You will hear the term 'enrolled member' of a tribe. There are some Indians who do not have the blood quantum requirements to be a member of one particular tribe, but are still regarded as 'descendents' of the tribe. Federally speaking, the person in most cases must be a recognized member of a *federally recognized tribe*.

Indian Tribe: Ethnologically (culturally and ethnically), an Indian tribe is "a group of Indians who share a common heritage and speak a distinct language." (Stephen L. Pevar 14) Legally, a tribe is a "fundamental unit of Indian law" (Canby, Jr., William C, 3), but there is no catch-all definition of an Indian tribe. A group of Indians might qualify under one law or statute, but not in another. According to Canby, Jr., "at the most general level, a tribe is simply a group of Indians that is recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes." (4) And yet, there is still a problem with this definition. "Recognized" as a term is problematic. Ask yourself, "Recognized *by whom?*" Neighbors? The state? The Federal Government? And, recognized *for what purpose?*" If a tribe is federally recognized, an Indian tribe qualifies for protection under federal law under the Department of the Interior.

Federally Recognized Tribe: Over 500 distinct Indian nations in the U.S. are federally recognized. This means they entered into treaties with the United States and qualify for government assistance and other provisions guaranteed in treaties.

Non-Federally Recognized Tribe: These tribes either lost federal recognition through governmental Indian policy, or lacked the unifying political identity the federal government requires for recognition. (Pevar 14)

Indian Nation, Indian tribe, Indian band: These terms have been used interchangeably to describe a tribe of Indian people.

Indian Country: Land that has been reserved by the federal government for Indian primary use. Generally, state jurisdiction has no power in Indian country. (Pevar 16)

a. Outline of Indian Affairs

I. Tribal Independence (time immemorial¹ – 1787)

- a. European conceptions of sovereignty and how it ignored Indians' conceptions of sovereignty (Discovery Doctrine)
- b. Indian conceptions of sovereignty (make a part of Indian Affairs outline)
- c. The population of the Americas prior to contact is estimated 90 – 112 million. Historians estimate that when non-Indians calculated the population of indigenous people on this continent, that they did so after disease had decimated 95% of the indigenous population. (Mann 103)
 - i. The continent was mapped, complete with landmarks and boundaries
 - ii. The nations had distinct cultures, languages, and practices (to say a Seminole is the same as a Nisqually is like saying an Irish person is the same as a Portuguese person.
 - iii. The glossary term had organized governmental systems
 - iv. The nations had organized commerce and trade. Celilo Falls on the Columbia River was often regarded as the "Wall Street" of the Northwest.²
- d. Most tribes welcomed Europeans to settle on their land and entered into treaty agreements to determine boundaries and exchange European goods and friendship.
- e. Few Europeans could have survived without Indian assistance.
- f. Conflicts arose, usually between European nations who fought over control of the land. Each sought the help of neighboring tribes (e.g., the French and Indian War of 1763 where the English would not have won without their alliance with the powerful Iroquois Confederacy.)

II. Establishment of Federal Role and Trust Responsibility, Agreements Between Equals (1787 – 1828)

- a. Immediately following the Revolutionary War, the United States dealt with Indian tribes as sovereign nations. They were in no position to win any Indian wars over territory.
- b. The Northwest Ordinance of 1789 declared: "The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent." (Pevar 3)
- c. Policy was to continue to deal with Indian tribes by treaty by utilizing agents to negotiate treaties under the jurisdiction of the Department of War.
- d. Congress' position was to legally protect Indians from non-Indians, establishing its "trust responsibility" to the tribes.
 - i. Trade and Intercourse Act of 1790 required that non-Indians must obtain a federal license to trade with Indians under penalty of prosecution (this included non-Indian procurement of land);
 - ii. Trade and Intercourse Act of 1793 prohibited non-Indian settlement on Indian lands, federal employees from trading with Indians, and "exempted Indians from complying with state trade regulations." (Pevar 3)

¹ The once commonly believed theory that tribes migrated to North America via the Land Bridge has been challenged and arguably disproved on a number of occasions by fossil and other archeological evidence. See "1491" by Charles C Mann; *The Atlantic Monthly*; Mar 2002; Vol. 289, Iss. 3; pg. 41, 12 ", David Burton's "The Bering Land Bridge Theory Collapsing", Vine DeLoria, Jr.'s *Red Earth, White Lies: Native Americans And The Myth Of Scientific Fact*.

² See the video "Beneath Stilled Waters" interview of Ed Irby by Kirby Brumfield

- iii. Other Trade and Intercourse Acts provided federal compensation to injured Indians, but made no attempt to regulate conduct of Indians among themselves in Indian country.
- iv. These laws, like the negotiated treaties, were rarely enforced, however.

III. Indian Removal and Relocation to Reservations(1828 – 1887)

- a. Federal Indian policy changes dramatically with the inauguration of Andrew Jackson as president.
 - i. He undertook military campaigns against Indians
 - ii. An “unspoken” goal of removal of Eastern Indian tribes to the west (under Monroe and John Quincy Adams) became stated federal policy under Jackson.
 - iii. 1830 Indian Removal Act “authorized the president to ‘negotiate’ with eastern tribes for their relocation west of the Mississippi River.” By 1843 most tribes’ lands had been reduced to nearly nothing or they were coerced to move west.
 - 1. Tribes guaranteed permanent reservations in Kansas, Missouri, Wisconsin, were moved further west to Oklahoma Territory, often warring nations were placed next to each other.
- b. John Marshall, Supreme Court Justice, influenced Indian Policy and affirmed the United States’ trust responsibility to Indians for the next century and a half
 - i. Johnson v. McIntosh (1823, before the Trade and Intercourse Acts) established the “right of occupancy,” that is, Indian tribes, and their sole right to negotiate for lands with the European nation that ‘discovered’ the lands.
 - ii. Cherokee Nation v. Georgia (1831) determined that the Cherokee nation was a “state,” “a distinct political society separated from others, capable of managing its own affairs and governing itself), but that it could not be considered “a foreign state.” Marshall further characterized tribes as “domestic dependent nations,” a term utilized well into the 20th century. This decision reaffirmed the United States’ responsibility to protect Indian lands and interests, a “trust responsibility.” This set the tone for Indian protection, but clearly had its limits. (Canby, Jr. 16)
 - iii. Worcester v. Georgia (1832) reviewed the relations between tribes and the federal government and concluded that they “manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which under their authority is exclusive.” Further, “The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.” (Canby, Jr. 16)
- c. Removal occurred nonetheless.
 - i. “Trail of Tears” removal of Cherokee, Seminole, Choctaw, Chickasaw, Creek to Oklahoma Indian Territory.
 - ii. 1849, with nearly all Indians (and the Indian threat) removed from the east, the Bureau of Indian Affairs (BIA) moved from the Department of War to the Department of the Interior.
- d. 1848 Gold Rush brought thousands of settlers to the west who encroached upon Indian lands. These tribes suffered the same fate as the eastern tribes. Impoverished by disease, more than military campaigns, tribes were relatively powerless to negotiate fair treaties.
- e. Even so-called fairly negotiated treaties were broken by the U.S. government almost as soon as they were made, even before they were ratified.

- f. In 1871 Congress stopped the practice of making Indian treaties.
 - i. No longer considered tribes as independent nations
 - ii. Congress would "deal with Indians by passing statutes, which, unlike treaties, did not require tribal consent." (Pevar 5)
 - iii. Reservations created after 1871 to 1919 were by statute or executive order.
- g. Beginning 1865 reservations became instruments to "civilize" Indians through religious mission systems and boarding schools.
- h. In 1878 off-reservation boarding schools were established to remove children from their reservation environment. Some of these children were as young as five when they were forcibly taken from their families.
- i. In 1883 Courts of Indian Offenses were established to further civilize Indians. (United States v. Clapox, 1888)
 - i. Federal education and discipline instrument
 - ii. Many religious and customary practices were outlawed.
 - iii. In 1883 the Major Crimes Act was passed to declare major crimes, such as murder, committed in Indian Country were under federal, not tribal, jurisdiction.

IV. Allotment and Attempted Assimilation (1887 – 1934)

- a. 1887 Congress passed "The General Allotment Act," also known as the Dawes Act.
- b. Instead of a tribe owning and operating its reservation, the reserved land was carved up into "allotments" to be individually owned by tribal members who should then learn to farm their own land. These individual Indians became U.S. citizens. The remaining land would be opened to white settlement. This resulted in ...
 - i. The loss of millions of acres of Indian land
 - 1. 138 million acres of Indian land in 1887
 - 2. 48 million acres of Indian land in 1934, 20 million of which was desert or semi-desert land left for Indians to "farm."
 - ii. Rendering much of Indian land as unusable. Leased land and lost land often made a "checkerboard" reservation of Indian and non-Indian owned land, making large scale farming or grazing difficult, if not impossible. (Canby, Jr. 22 – 23)
 - iii. The break up tribal governments
 - iv. Forced assimilation into white culture, which failed miserably
 - v. The loss of traditional ways
 - a. Allotment was conducted without Indian consent.
 - b. Allotment's "official" intent was to end Indian poverty, but most Indians, who found themselves unable to pay state property taxes, lost both their land and a way to make a living.
 - c. The Indian Citizenship Act of 1924, making all Indians U.S. citizens, did little to improve an already failing "policy."
 - d. In 1928 the Meriam Report documented the failure of the Allotment Act and the need for policy reform
 - e. Government boarding schools continued throughout this period.

V. Indian Reorganization and Preservation (1934 – 1953)

- a. Indian Reorganization Act or Wheeler-Howard Act of 1934
 - i. Express purpose was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." (Pevar 6)
 - ii. Based on the assumption that Indians should be allowed to exist.
 - iii. Sought to protect remaining tribal lands

- iv. Permitted tribes to re-establish legal structures
- v. Established a \$10 million credit fund for loans to tribes
- vi. Established Indian preference in hiring employees within the Bureau of Indian Affairs
- vii. Established tribal self-government, but still subject to the approval of the Secretary of the Interior
 - 1. Unsuccessful, on the whole
 - 2. Required tribes to adopt a federalist system (executive, legislative, judicial)
 - 3. Unsited for most tribes
- viii. Ended Allotment
- ix. Restored tribal ownership of "surplus" lands not already owned by third parties (non-Indians)
- x. Obtained land and water rights for tribes
- xi. Created new reservations and increased existing reservations
- xii. Established federal funds for healthcare, irrigation, roads, homes, and community schools
- xiii. By 1953 Indian land had increased by two million acres

VI. Termination (1953 – 1968)

- a. House Concurrent Resolution 108 sought to end all federal aid to tribes "at the earliest possible time." (Pevar 7)
 - i. Terminated assistance to over 100 tribes
 - ii. Ordered their governments disbanded
 - iii. Tribes subject to state laws
 - iv. Ordered private ownership of tribal lands or sold
 - v. Done "to 'free' Indians from domination by the Bureau of Indian Affairs." (Canby, Jr. 26)
 - vi. The result was economic collapse.
 - vii. Two largest tribes that were "terminated" were the Oregon Klamaths and the Wisconsin Menominees.
- b. Congress' Indian "Relocation" program gave grants to some Indians who would leave the reservation and move to an urban center.
- c. Public Law 280 allowed for state jurisdiction over criminal and civil affairs on Indian reservations.
- d. All resolutions, acts, and laws were passed without tribal consent.

VII. Self-Determination (1968 – Present)

- a. Termination Policies regarded as a failure.
- b. Assimilation goals began to wane.
- c. President Lyndon B. Johnson stated, "We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their right to freedom of choice and self-determination." (Pevar 8)
- d. President Richard M. Nixon denounced termination and in 1970 stated, "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian sense of autonomy without threatening his sense of community." (Pevar 8)
- e. Indian Civil Rights Act of 1968
 - 1. Prohibited any states from acquiring any authority over Indian reservations without tribal consent
 - 2. Imposed upon tribes most of the U.S. Constitution's Bill of Rights (some tribes feel this is a limitation of rights they already had)
- f. The Indian Financing Act of 1974 provided revolving loans for Indians to develop their resources.

- g. 1974 United States v. Washington State, known as the Boldt Decision (after Judge George Boldt)
 - i. Attempt to end the Northwest “Fish Wars” of the 1970’s between Indian tribes and non-tribal sports and commercial fishers.
 - ii. Filed by the United States on behalf of the Puyallup, Nisqually, Muckleshoot, Skokomish, Makah, Quileute, and Hoh tribes, later joined by the Lummi, Quinault, Upper Skagit River, Sauk-Suiattle, Sqaxin Island, Stillaguamish, and Yakama Nation.
 - iii. Sportsmen organizations and state entities felt that they should have the power to regulate tribal fishing. The tribes maintained that the state had no regulatory power over them.
 - iv. Court ruled that treaty tribes had been “systematically denied their rights to fish off the reservation, that the tribes were entitled to the opportunity to catch half the harvestable salmon and steelhead returning to traditional off-reservation fishing grounds, that ceremonial and subsistence catches were not to count as part of the off-reservation share, and that by meeting specific conditions the tribes could regulate fishing by their members.” (“Indians of Washington State” 90)
 - v. Decision was ridiculed by non-Indian people and appealed.
 - vi. Decision unanimously upheld by the 9th District Court of Appeals.
 - vii. Hostility and resentment only intensified (see publications like, Indian Treaties: American Nightmare by C. Herb Williams and Walt Neubrech (Outdoor Empire Publishing, Inc, 1976)
 - viii. Three additional cases heard in 1978
 - ix. In 1979, the U.S. Supreme Court upheld almost all of the Boldt Decision.
 - x. Indians received very little in exchange for their lands.
 - xi. Indians had contractually reserved in the treaties what must be regarded as a property right—the taking of fish at their usual and accustomed fishing grounds and stations.
 - xii. These grounds might be far from reservations.
 - xiii. The ceremonial and subsistence catches would count as part of their 50 per cent allocation.
 - h. The Indian Self-Determination and Education Assistance Act of 1975 authorized tribes to assume responsibility for the administration of federal Indian programs.
 - i. The American Indian Policy Review Commission was established in 1975 to review federal Indian policy and find “alternative methods to strengthen tribal government.” Its 1977 report called for
 - 1. “a rejection of assimilationist policies
 - 2. “a reaffirmation of the status of tribes as permanent, self-governing institutions
 - 3. “increased financial aid to the tribes.” (Canby, Jr. 31)
 - i. The Indian Child Welfare Act of 1978 ended the practice of removal of Indian children to state welfare agencies

1. Nearly 1/3 of all Indian children were removed from their homes and families and placed in foster care, with adoptive families, or in institutions.
2. Most placements were with non-Indian agencies or families.
3. Nearly all were taken away from their homes because they were Indian and poor.
4. Entire tribes were being depleted of their youth.
5. In one state, the adoption rate of Indian children was eight times that of non-Indian children. (Pevar 296)
- j. The Indian Tribal Government Tax Status Act of 1982 gave the same federal tax advantages to tribes as states enjoyed
- k. In 1983 President Ronald Regan reaffirmed current policy and added an additional goal of ending federal dependency.
- l. In 1988 Congress declared their commitment to "the development of strong and stable tribal governments." (Canby, Jr. 31)
- m. In 1994 President William J. Clinton ordered federal agencies to operate "within a government-to-government relationship with federally recognized tribal governments." (Canby, Jr. 31 - 32)
- n. Tribes as a result have asserted their treaty and statutory rights, often opposed by certain non-Indian groups. Often these groups seek to abolish tribal rights altogether.
- o. A recent (ca. 1985) Senate commission stated that, "The long-term objective of Federal-Indian policy [should] be the development of tribal governments into fully operational governments exercising the same powers and shouldering the same responsibilities as other local governments. This objective should be pursued in a flexible manner which will respect and accommodate the unique cultural and social attributes of the individual Indian tribes." (Pevar 9)

Sources:

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