

OVERVIEW OF FEDERAL INDIAN LAW

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SOVEREIGNTY:

“The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority ...the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation...” (Black’s Law Dictionary)

a: “supreme power, esp. over a body politic”

b: “freedom from external control...” (Webster’s)

DOCTRINE OF DISCOVERY and INDIAN RIGHTS

- English Colonial era influence (1763) on United States federal Indian law and policy
- United States colonizing legal theory
 - *Johnson v. McIntosh* (1823)

THE FEDERAL-TRIBAL RELATIONSHIP:

THE FORMATIVE YEARS – 1789 - 1871

- Colonial era origins
- “The Savage as the Wolf” ---
the Founders’ first Indian policy

THE CONSTITUTION
OF THE UNITED STATES AND THE
INDIAN NATIONS

COMMERCE

- Art. I, Section 8
 - “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”

CONGRESSIONAL REPRESENTATION:

Article 1- “Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . excluding Indians not taxed, three fifths of all other Persons.”
(See 14th Amendment)

AMENDMENT XIV

Section 2: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”
(1868)

TREATIES

Article VI: “This Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

COLONIAL PERIOD

1492-1774

- Struggles over land among European nations
- Peace making efforts with tribes

TREATY RELATIONSHIP

United States, England, France,
Holland, Russia, Spain, Mexico,
and Texas treated with tribes

1620-1871

CONFEDERATION PERIOD - 1774-1789

The Northwest Ordinance 1787

“The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars.”

Trade and Intercourse Act Era

1789-1825

Federal control, licenses, bonds,
passports

Legislative Enforcement of the Treaty Policy: Trade and Intercourse Acts

1790 Act: “No sale of lands made by an Indian, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the *right of pre-emption* to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.”

The Status of Indian Treaties in United States Law

- 390 treaties with tribes between 1778-1871
- Treaties are contracts b/t nations
- *United States v. Winans* (1905)
(reserved rights)

REMOVAL PERIOD

1825-1850s

- *Cherokee Nation v. Georgia* (1831)
- *Worcester v. Georgia* (1832)
- The Removal Act of 1830 (“consent”)
- Trail of Tears

RESERVATION ERA

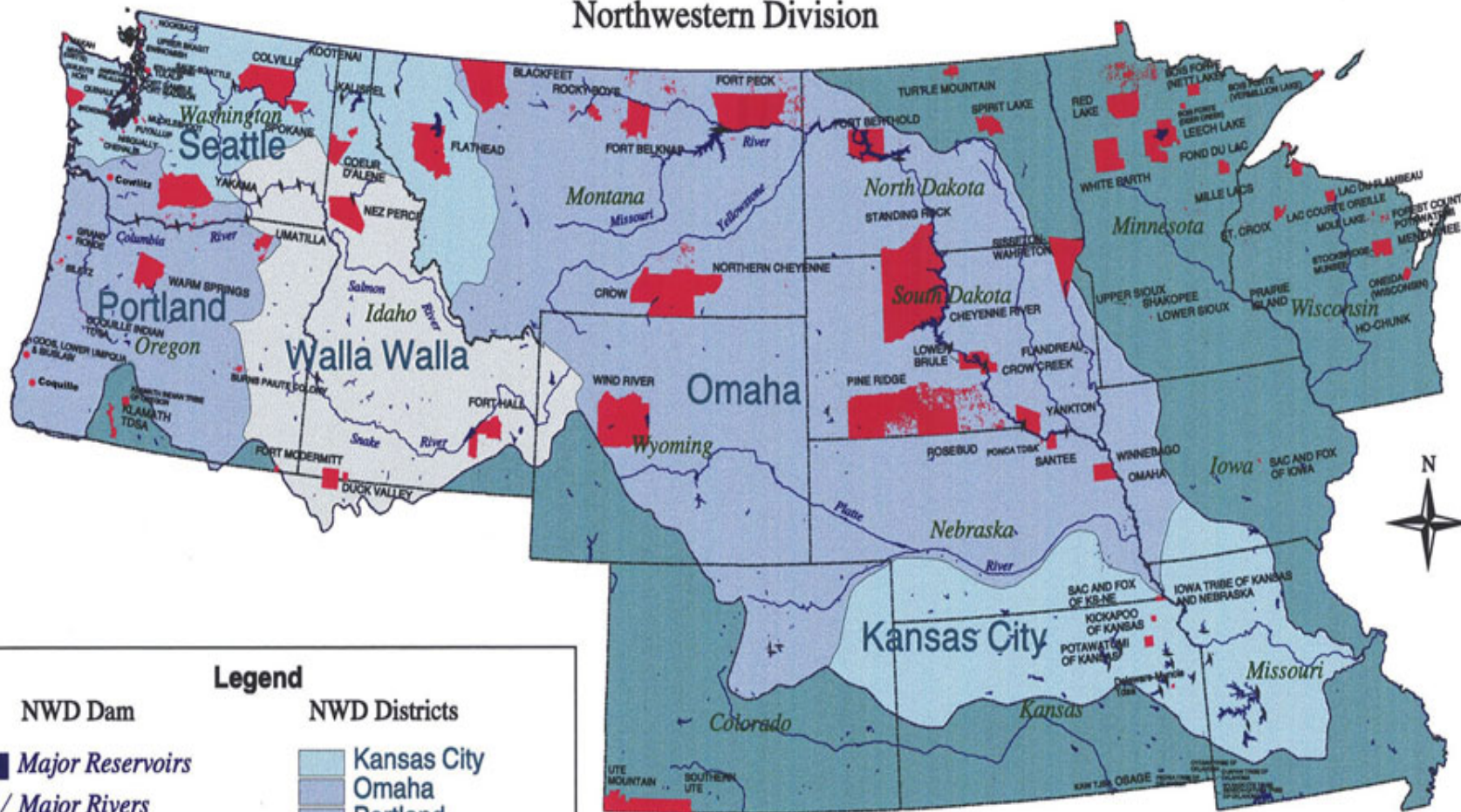
1850s - 1887

*Measured separatism

American Indian Reservations

US Army Corps of Engineers

Northwestern Division



Legend	
	NWD Dam
	Major Reservoirs
	Major Rivers
	Indian Reservations
	NWD Civil Boundary
	NWD Military Boundaries
	Kansas City
	Omaha
	Portland
	Seattle
	Walla Walla
	NWD Military

April 10, 1999



US Army Corps of Engineers
Northwestern Division

A CENTURY of SHIFTING POLICY

- Allotments and Assimilation 1887-1934:
 - *Lone Wolf v. Hitchcock*
- The General (Dawes) Allotment Act 1887
- The Period of Indian Reorganization 1928-1945
- The Termination Period 1945-1961:
 - *Menominee Tribe v. U.S.*
- The Era of Self-Determination 1961-present:
 - *Morton v. Mancari*

MODERN ERA

1887-1934

ALLOTMENT AND
ASSIMILATION

INDIAN REORGANIZATION ACT ERA

1934-40s

TERMINATION ERA

1940s -1962

HR Resolution 108 (1953)

61 Oregon Tribes & Bands

THE SELF-DETERMINATION ERA

1962 - PRESENT?

- * Indian Self-Determination and Education Asst Act

THEMES OF INDIAN LAW

- Congressional plenary power
- Diminished tribal sovereignty: Tribes retain all aspects of sovereignty not abrogated by statute (Congress takes) or by treaty (tribe surrendered)
- Trust relationship/fiduciary duty: U.S. trustee/guardian of Indian wards

THE FEDERAL-TRIBAL RELATIONSHIP

- Tribal property interests - ***Montana v. United States***
- The Federal-Tribal relationship as a source of federal power- ***United States v. Kagama - Lone Wolf***, duty to protect brings the power
- The Federal-Tribal relationship as a source of Indian rights: Executive accountability under the Trust Relationship - ***Seminole Nation v. United States***
- Congressional accountability under the Trust Relationship - ***United States v. Sioux Nation of Indians***

TRIBAL SOVEREIGNTY and the ADMINISTRATION OF JUSTICE

- Tribal Governments as Independent Sovereigns
 - *Talton v. Mayes*
 - *United States v. Wheeler*
- Tribal Justice Systems
 - *Santa Clara Pueblo v. Martinez* (Sovereign Immunity)
- Buffering State Incursions on Tribal Government
 - *Williams v. Lee*
 - *McClanahan v. Arizona State Tax Commission*

LIMITS OF TRIBAL JURISDICTION IN INDIAN COUNTRY

- 18 U.S.C. § 1151: “Indian country” . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States . . . whether within 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

Federal Environmental Regulation in Indian Country:

Treating Tribes as States

- *Montana v. EPA* (9th Circuit)
- *Albuquerque v. Browner*

Congressional Limits on Tribal Jurisdiction:

Federal Criminal Jurisdiction

- *Kagama* -- Major Crimes Act

“Public Law 280” – A Transfer of Jurisdiction
to Some States

- *Bryan v. Itasca County*

The Indian Civil Rights Act

- *Santa Clara Pueblo v. Martinez*

Federal Judicial Review of Tribal Court Jurisdiction

- *National Farmers Union Insurance Companies v. Crow Tribe* (1985)
- *Iowa Mutual v. LaPlante* (1987)

Qualified Tribal Control of Non-Indians (non-members)

- *Oliphant v. Suquamish Indian Tribe* (1978)
- *Montana v. United States* (1981)
- *Strate v. A-1 Contractors* (1997)
- *Nevada v. Hicks* (2001)

TRIBAL AND STATE CONFLICTS OVER CIVIL JURISDICTION

Taxation and Regulation

- *Washington v. Confederated Tribes of the Colville Indian Reservation*
- *White Mt. Apache Tribe v. Bracker (1980)*
- *Merrion v. Jicarilla Apache Tribe (1983)*
- *Yakima (1992) & Cass County (1998)*
- *Brendale v. Confederated Tribes of Yakima (1989)*

INDIAN RELIGION AND CULTURE

- American Indian Religious Freedom Act
(*Lyng and Smith*)
- *United States v. Dion* (1986) (ESA) & Secretarial Order No. 3206 (1997) Interior
- Protection of American Indian Cultural Resources (NHPA, NAGRPA, ARPA)
- Clinton EO 13007 (May 24, 1996)

WATER RIGHTS

- Water Law in the West
- Nature and Extent of Indian Reserved Water Rights
 - *Winters v. United States*
 - *Arizona v. California*

FISHING, HUNTING & GATHERING RIGHTS

- *New Mexico v. Mescalero Apache Tribe*
- NW Fishing cases:

Winans (U.S. 1905) access to fishing sites

Commercial Passenger Fishing Vessel
(U.S. 1979) *U.S. v. Washington* (“Boldt decision”)

U.S. v. Oregon (1968) (“Belloni decision”)
continuing jurisdiction today