



Tribal Sovereignty



A GUIDE FOR MONTANA HIGH SCHOOL TEACHERS



Overview



- **Purpose**

Encourage Montana's high school social studies teachers to integrate information about tribal sovereignty throughout high school government and history courses

Individual slides contained in this power point will visually enhance lesson plans; however, this presentation is not intended to be used as a single lesson on tribal sovereignty

Introduction



- **Why do high school teachers need this information?**
 - Montana's Constitution, Article X, Section 1(2): "The State recognizes the distinct and unique cultural heritage of American Indians and is committed in its educational goals to the preservation of their cultural integrity."
 - MCA 20-1-501: schools should encourage students "to learn about the distinct and unique heritage of American Indians" and "all school personnel should have an understanding and awareness of Indian tribes"
 - To address four of the seven essential understandings developed by Indian educators



Essential Understandings



Indian educators from each tribe gathered to discuss topics for educators and students to learn about Indian people

These topics became the Seven Essential Understandings

This presentation addresses the first, fourth, fifth and seventh Essential Understandings



Essential Understanding 1



“There is great diversity among the 12 tribal Nations [located in] Montana in their . . . governments.”

Essential Understanding 4



“Reservations are lands that have been reserved by the tribes for their own use [or set aside for tribal use] through treaties, statutes, and executive orders”

“[Historically] land should be acquired from the Indians only through their consent with treaties [because] both parties to treaties were sovereign powers.”

Essential Understanding 5



“Federal Indian policies . . . have affected Indian people and still shape who they are today. Much of Indian history can be related through several major federal policy periods [including the] Treaty Period.”

[The major federal policy periods are Treaty, Removal and Relocation, Allotment and Assimilation, Reorganization, Termination, and Self-determination. See materials from the powerpoint presentation entitled Tribal Relations with the United States: History and Overview.]



Essential Understanding 7



“Under the American legal system, Indian tribes have sovereign powers, separate and independent from the federal and state governments. However the extent and breadth of tribal sovereignty is not the same for each tribe.”



Content



- Sovereignty defined
- A brief history of tribal sovereignty
- Sovereignty now
- Rights based on federal recognition
- An overview of contemporary issues

Learner Outcomes



- After this presentation, teachers should be able to integrate the following information into their curricula
 - Define sovereignty
 - Understand the history of tribal sovereignty in the U.S.
 - Explain how tribal status affects tribal sovereignty
 - Describe why Montana's treaty tribes have different rights based on the language of their treaties
 - Explain why Indians are politically, not racially, classified



General Principle of Sovereignty



Power and Control

The power of a governing body to exercise both legal and physical control over the people, land and resources found within a defined territory

What Are Sovereign Powers?



- Enter into treaties
- Make laws
- Enforce laws
- Determine criteria for citizenship or membership
- Exclude people from territory
- Promote and protect citizens/members and territory

Tribal Sovereignty: History



- Tribal nations of North America were sovereign before contact with Europeans
- After contact, European countries treated tribal nations individually as sovereign nations within North America
- After the U.S. was formed, U.S. government treated tribal nations as sovereign through treaties and trade

Pre-Contact with Europeans



- Tribal sovereign powers existed from time immemorial for North American tribes
- Tribes governed through tribal norms and varying government structures
- The Iroquois and Pueblos provide a sampling of tribal governance pre-contact

Tribal Governments Pre-Contact: Iroquois Confederacy

- Iroquois clan mothers appointed chiefs from each tribe to make up the Grand Council and represent their tribes' interests
- The Grand Council made decisions through consensus
- The Iroquois Grand Council and Constitution still govern the Iroquois Confederacy
- The U.S. Constitution is based in part on the Iroquois Constitution

Tribal Governments Pre-Contact: Pueblos



- Representative form of government
- Members of each of the two moieties (like clans or political parties) guaranteed each moiety's opinions are represented
- Governor and three other leaders oversaw day-to-day operations of the tribe

Sovereignty after Contact



- The countries of Europe entered into treaties with the inhabitants of North America because of recognized tribal sovereign powers

Sovereignty with the New U.S. Government



- Tribes treated as sovereign nations by U.S. government through treaties and trade
- Article VI of the U.S. Constitution: treaties are the Supreme Law of the Land
- Non-Intercourse Act (1790): Congress wanted to protect tribal sovereignty and land from state control; the Act declared invalid any “purchase, grant, lease, or other conveyance of lands” from tribes unless approved by U.S. government

QUIZ PREP



- **Define sovereignty and give examples of sovereign actions**
- **Describe how tribal sovereignty was established**
 - Pre-contact with Europeans
 - After contact with Europeans
 - By the U.S. government

The Marshall Trilogy



- The fourth Chief Justice of the U.S. Supreme Court, Justice Marshall, decided three Indian cases that framed Indian law in the U.S.
 - *Johnson v. McIntosh* (1823)
 - *Cherokee Nation v. Georgia* (1831)
 - *Worcester v. Georgia* (1832)

Johnson v. McIntosh



- Who has title to tribal land – citizens who purchase land from tribes, or citizens who receive land from the U.S. government?
- The “Discovery Doctrine”: U.S., the conquering nation, has title to land and tribes have right of occupancy
- U.S. government intervention is required to transfer title to tribal lands
- States and individuals cannot purchase tribal lands without U.S. government consent

Cherokee v. Georgia: Facts



- State of Georgia sought to void Cherokee Tribe's laws and government and extinguish their lands in Georgia
- Cherokees bypassed the lower Georgia courts, and sued in the Supreme Court
- The Court had to decide whether the Cherokee Tribe was a foreign nation, because only a foreign nation may sue first in the Supreme Court

Cherokee v. Georgia: Holdings



- Tribes are not foreign nations and cannot bring original actions in the U.S. Supreme Court
- Instead, tribes are Domestic Dependent Nations:
 - Tribes occupy U.S. territory, and the U.S. holds title to Cherokee land
 - The Cherokee Tribe could not form a relationship with a foreign nation without U.S. government involvement
 - U.S. and tribes have a guardian-ward relationship
 - The treaty between the U.S. and the Cherokee Tribe guaranteed the U.S. would protect the tribe from states and citizens

Cherokee v. Georgia: Legal Effects



- Trust relationship between U.S. government and tribes
 - U.S. holds title to tribal lands and has a duty to manage the land in tribes' best interests (protect land and tribes)
 - Tribes may use and reside on land, and cannot sell it unless given permission by U.S. government
- The U.S. legislative and executive branches have plenary power (authority to make decisions) over tribes

Worcester v. Georgia



- Georgia established a law requiring missionaries to be licensed to live in Cherokee territory
- Missionaries (including Mr. Worcester) did not obtain a state license, and moved to Cherokee territory under federal authority
- Georgia enforced its law within Cherokee territory
- Mr. Worcester sued, arguing Georgia had no authority within Cherokee territory

Worcester v. Georgia: Holding



- Supreme Court held states do not have authority or power over tribes
- Georgia could not enforce its state law in Cherokee territory

QUIZ PREP



- Explain “domestic dependent nation”
- Explain the relationship between states and tribes after the Marshall trilogy
- Explain the trust relationship between the federal government and tribes

Sovereignty Today



- The U.S. Constitution, federal statutes, and Supreme Court cases give the U.S. government and state government different levels of sovereign powers.
- When the U.S. was created, the Constitution and federal statutes maintained tribes' inherent sovereign powers. The Supreme Court has since further defined the scope and nature of tribal sovereignty.
- Currently, approximately 562 tribes have different sovereign powers than the U.S. government and state governments and from each other

Federal Sovereignty



- The U.S. government has complete sovereignty
- U.S. relates to other countries as one nation to other nations
- U.S., to some extent, relates to tribes as one nation to other nations
- U.S. has the ability to oversee and exercise some control over states and tribes



State Sovereignty



- States possess sovereign rights given or retained by U.S. Constitution to control state issues
- States do not have rights to control or interfere with tribes

Tribal Sovereignty



- U.S. government's relation with tribal governments reflects tribal sovereignty
 - Tribes control specific territories
 - Tribes control the people found in those territories
 - Tribes have rights on and off reservation land



Tribal Sovereignty Depends on Status



- **Federal Recognition**

- Recognized through treaty
- Recognized through Executive Order
- Recognized or restored by Congress

- **State recognition only**

- **Seeking federal recognition**

Federal Recognition



- Federal recognition is important
 - Government-to-government relationship between U.S. and tribe
 - Federally recognized tribes receive federal benefits
- Federally recognized tribes are listed in the Federal Register, available online and in libraries
- Federal recognition occurs through treaty, executive order, congressional recognition or restoration



Federal Recognition Criteria



- **A tribe MUST be federally recognized if**
 - Tribe has existed as a community and governed its members since historical times, and
 - Tribal members are descendents of the tribe, and
 - The tribe has not been terminated

Federal Recognition and Sovereign Rights



The type of federal recognition can impact the scope of recognized sovereign powers vested in each tribe, but this impact is not uniform

The remainder of this presentation discusses differing rights for tribes depending on how they are recognized

QUIZ PREP



- Which government or governments can oversee or control tribal land and the people on that land?
- What is federal recognition?
- What are some criteria for federal recognition?
- Why is federal recognition important for tribes?

Treaty Tribes: History



- Prior to 1778: hundreds of informal treaties between Europeans and tribes
- 1778: first written treaty between U.S. government and a tribe (Treaty with the Delaware Tribe of Indians)
- Early treaties with eastern tribes (e.g. Hopewell Treaty with the Cherokee) were negotiated and reflect U.S. desire to expand westward peacefully with tribes

Treaty Tribes: History



- Later treaties (e.g. the Stevens Treaty with the Blackfeet and the Fort Laramie Treaty with the Crow) were less negotiated and reflect U.S. desire to assimilate Indian people into U.S. culture
- 1871: Congress ended treaty-making with individual tribes
- Existing treaty tribes' rights were not impacted when Congress ended treaty-making; treaties still determine tribe's rights today



Treaty Tribes: Rights



- Treaties (and the rights within them) are the supreme law of the land
- Rights may be express or inherent
 - Express rights are expressly stated in the treaty
 - Inherent rights are not expressly stated in the treaty

Inherent Treaty Rights



- Tribal powers normally associated with a sovereign are inherent
- Inherent rights are retained by the tribe during treaty negotiations
- Examples include the right to govern, determine membership, and rights to hunt and fish

Losing Inherent Treaty Rights



- A tribe may expressly give up inherent rights in a treaty or another legally-recognized document
- The Constitution allows Congress to expressly divest tribes of treaty rights
- The Supreme Court has divested some tribes of certain treaty rights (called abrogating treaty rights)
- The Court has no constitutional authority to abrogate treaty rights

Interpreting Treaties



- Sometimes a court will determine a tribe's treaty rights by interpreting ambiguous treaty language
- Court interpretation rules (canons of construction)
 - Construe treaty language in favor of tribes
 - Interpret treaty language as tribes would have understood it
 - Interpret treaties to fulfill U.S. trust obligations (the duties of the U.S. government to protect tribal interests)

QUIZ PREP



- Name a common difference between early and late treaties between the U.S. and tribal governments
- True or false: when Congress ended treaty-making, all existing treaties became null and void
- Explain the difference between an express and inherent treaty right
- What branches of government have constitutional authority to divest tribes of inherent treaty rights?
- Name one or more canons of construction courts must follow in interpreting treaties



Treaty Tribes in Montana

- **Stevens Treaty Tribes:**
 - Blackfeet
 - Confederated Salish and Kootenai

- **Fort Laramie Treaty Tribes:**
 - Assiniboine and Gros Ventre (Fort Belknap Reservation tribes)
 - Assiniboine and Sioux (Fort Peck Reservation tribes)
 - Crow

Stevens Treaties



- Each tribe negotiated individually with territorial Governor Stevens (1854-1855)
- Goals
 - ✦ Establish tribal territory in order to open the remainder to non-Indian settlement
 - ✦ Establish transportation routes
 - ✦ Establish peaceful relationship with U.S. government
 - ✦ Abstain from hostilities and cultivate good-will and friendship
 - ✦ Protect traditional rights



Stevens Treaty Language

- “The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right . . . of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.” *Treaty with the Flatheads, etc. 1855*

Fort Laramie Treaties



- Each tribe negotiated individually with officers of the U.S. military (1851 and 1868)
- Goals
 - Establish land under tribal control and land under U.S. control, and assigned specific land to particular tribes
 - Compensate tribes for lost game
 - Create safe passage for non-Indians through erection of roads and forts, and identify Indians who harmed non-Indians

Fort Laramie Treaty Language



- Tribal members “shall have the right to hunt on unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.” *Treaty of Fort Laramie with the Crows, 1851*

Treaty Language Comparison



- “privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon **open and unclaimed land**”

Stevens Treaty with the Flatheads, etc., 1865

- “right to hunt on **unoccupied lands**”

Treaty of Fort Laramie with the Crows, 1868

QUIZ PREP



- Name two differences between Stevens and Fort Laramie treaties
- Name which tribes in Montana are federally recognized because of their treaties with Governor Stevens
- Name which tribes are federally recognized because of treaties signed at Fort Laramie

Executive Order Tribes



- Created by order of a U.S. President
- Last executive order establishing a reservation was in 1919

Sovereign Powers of Executive Order Tribes



- Executive order tribes generally have the same rights to water, hunting and fishing as treaty tribes; however, they rarely have off-reservation rights
- Some executive order tribes also have treaty rights
- The executive order may expressly limit tribal sovereign powers

Executive Order Tribes in Montana



- Northern Cheyenne
- Chippewa and Cree (Rocky Boy's Reservation tribes)

Northern Cheyenne



- The U.S. government forcibly removed the Northern Cheyenne to Oklahoma in 1877
- Many Northern Cheyenne escaped in 1878 and returned to their tribal homelands in and near Montana
- The Northern Cheyenne Reservation in Montana was created by executive order in 1884

Chippewa and Cree Tribes



- Requested by Chief Asiniweyin (correctly translated: “Stone Man”) in 1915 to establish a reservation in Montana for the landless tribes in Montana
- Chief Rocky Boy was joined by Cree leader Chief Little Bear
- Rocky Boy’s Reservation was established by executive order in 1916 for the Chippewa and Cree tribes

QUIZ PREP



- What is an executive order?
- What are the executive order tribes in Montana?

Statutorily Recognized Tribes



A tribe that has not been otherwise recognized (through treaty or executive order) can be recognized by a statute giving federal recognition

For example, the Mashantucket Pequot Tribe was recognized by Mashantucket Pequot Indian Land Claims Settlement Act in 1983

Restored Tribes



- Restored tribes are also statutorily recognized
- A restored tribe is one that loses its federal recognition through a congressional act, and then regains federal recognition through a subsequent congressional act
- The Siletz Tribe in Oregon is a restored tribe: it was terminated in 1956 and lost its land and federal recognition
- The Siletz Tribe was restored and federally recognized in 1977

Sovereign Powers of Restored Tribes



- Restored tribes' rights depend on the statutory language recognizing the tribe
 - Siletz Restoration Act provides the Siletz Tribe with a “Service Area” instead of a reservation; members receive federal benefits but have no hunting, fishing or gathering rights
 - Some tribes, like the Klamath Tribe, did not regain any of their land or hunting and fishing rights upon restoration

QUIZ PREP



- Name all the ways a tribe can be federally recognized
- What is statutory recognition?
- What is a restored tribe?

Tribes Recognized by States



- Rights of state-recognized tribes vary
- State-recognized tribes that are not federally recognized receive no federal benefits and can not engage in government-to-government relationships with the U.S. government
- The Little Shell Tribe of Chippewa Indians is not federally recognized, but is recognized by the State of Montana
- The approximately 4,300 Little Shell tribal members have no land base, but have an executive officer and tribal council

Tribes Seeking Federal Recognition



- Numerous tribes are currently seeking federal recognition
- The Little Shell Tribe of Chippewa Indians has been seeking federal recognition for over 100 years
- Congressman Denny Rehberg introduced a bill in July 2006, and promised to introduce another bill in January 2007 to recognize the Little Shell Tribe

Contemporary Issues Pertaining to Tribal Sovereignty



- Indians are part of a political class (not racial) based on tribes' sovereign powers
- Tribal sovereignty is of great importance to tribes today; issues range from hunting and fishing rights to determining criminal and civil jurisdiction on and off reservations
- *Tribal Sovereignty: Case Studies* examines cases that highlight current sovereignty issues, and show how a tribe's federal recognition can affect its sovereign rights