

## **FEDERAL POLICY IN INDIAN COUNTRY (July 9, 2016)**

### **Pre-constitutional colonial period (1492-1776)**

- Native Nations predate the United States as separate sovereigns with unique cultures, languages and inherent powers of self-government.
- 1532 Francisco de Victoria established the foundation of modern international law – on which Indian law originated; he believed in a "republic of the whole world."
- In the 1530s, Bartolome de Las Casas successfully argued that Indians have souls. Because Indians were recognized as human beings, Native Nation consent was required before Europeans could legally acquire Indian lands.
- Treaties with Indian Tribes (nation to nation) were primarily for peace and military alliances as well as for land transactions.
- 1633 Massachusetts Bay Colony centralized land acquisition agreements with Native Nations (to avoid conflicts caused by unscrupulous individuals).
- 1744 treaty between the Six Nations/Iroquois Confederacy and Maryland/Virginia was to send Native boys to William and Mary College. See p. 57 Touch the Earth.
- King George III issued Royal Proclamation of 1763 which centralized Indian affairs, affirmed treaties with Native Nations, declared land west of Appalachian Mountains to Mississippi River "Indian Country," protected Indian Country from colonial settlement in an attempt to avoid wars caused by land-hungry individuals and colonies.
- Revolutionary War (1775-1783) between English colonists and England.

### **Confederation Period (1776-1789)**

- Articles of Confederation: 13 colonies (November 15, 1777)
- Conflict between federal and colonial/state management of Indian affairs.
- 1778 Treaty with Delaware Nation (guaranteed peace, thus allowing Washington to move his army through Delaware lands and promised statehood)
- 1784 Continental Congress appointed Commissioners to negotiate boundary lines and insure peace with Native Nations
- 1784 Treaty with Six Nations: U.S. received Six Nations "into their protection" (beginnings of a trust doctrine)

### **The formative years (1789-1870)**

- 1789 U.S. Constitution: established a division of powers for states and the federal government [Tribes *not* included] (Article I, section 8, clause 3: "The Congress

shall have Power .... to regulate Commerce with foreign Nations and among the several States and with the Indian Tribes.")

- 1789: the Bureau of Indian Affairs was located in the War Department until 1849 when it was moved to the newly created Department of the Interior.
- 1790-1835: the Trade and Intercourse Acts regulated trade + other dealings with Indian Tribes and established a requirement that all land transactions with Native Nations must be made or approved by the federal government.
- 1796 federal trading houses were established and run by agents of the U.S (trading houses closed in 1822, but federal licensing of Indian traders continued)
- Johnson v. M'Intosh (Sup. Ct. 1823): Doctrine of discovery + "Courts of the Conqueror" + Tribal "right of occupancy"
- 1830 Indian Removal Act: removal from aboriginal homelands to "Indian Territory."
- Cherokee Nation v. Georgia (Sup.Ct. 1831) U.S. Supreme Court has no jurisdiction to hear cases brought by "domestic dependent nations" + federal trust responsibility to protect Native Nations and their properties.
- Worcester v. Georgia (Sup.Ct. 1832) "Plenary" power of Congress + no state jurisdiction in Indian country. Response attributed to President Andrew Jackson: "John Marshall has made his law. Now let him enforce it."
- 1840s: Manifest destiny was the belief in a divine imperative that the U.S. take the continent, driving out the wilderness and establishing "civilization." This belief was based on a superior moral right because of religious, cultural and racial superiority. Natives were seen as heathens, inferior and uncivilized.
- 1849: California gold rush brought massive migrations of miners and settlers across the continent, causing major disruptions in Indian Country.
- 1864: Sand Creek Massacre (peaceful camp of Cheyenne and Arapaho, mostly women and children, attacked by Col. John Chivington -- a Methodist "fighting parson" whose stated mission in life was to kill Indians. He told his 700 soldiers to take no prisoners because "nits make lice.") More than 200 Indians died.
- 1864: U.S. Army (Kit Carson) forced "Long Walk" of the Navajo people from their homelands to Bosque Redondo, located in eastern New Mexico.

### **Reservations, allotment and forced assimilation (1870-1934)**

- Reservation policy: to contain, "civilize" and assimilate Indians [BIA controlled reservation food supply, health care, education, police, courts]
- 1870 U.S. began contracting with denominational schools to provide education for Indians ("Kill the Indian, save the man.")

- 1871: end of treaty-making with Native Nations – agreements, executive orders, statutes followed.
- 1874: Black Hills gold rush.
- 1876: Battle of the Little Big Horn (Sitting Bull and Crazy Horse defeated Custer). Congress added rider to Indian appropriations act which cut off all rations for the Sioux until hostilities were terminated and the Black Hills were ceded to the U.S. (legal challenge by the Sioux Nation still not resolved)
- 1877 Chief Joseph of the Nez Perce tried to lead his people to sanctuary with Sitting Bull in Canada rather than be forced onto a reservation.
- 1879 first off-reservation boarding school established (Carlisle Industrial School in Pennsylvania) with forced attendance to break family/cultural ties and “civilize” Indian children. Education for extinction: destruction of native language, customs and traditions, clan systems, tribal connections + militaristic training for assimilation, moving Indians from “savagery” to “civilization” (haircuts required, names changed, languages banned, children subjected to religious teachings, labor, abuse, disease and sometimes death)
- 1883 Courts of Indian Offenses established by BIA (known as “CFR” Courts). Local BIA superintendents governed reservations, teaching "civilization."
- Ex Parte Crow Dog (Sup.Ct. 1883): No federal jurisdiction to prosecute an Indian who killed another Indian in Indian Country.
- Major Crimes Act of 1885 established federal jurisdiction for five major crimes in Indian Country, later expanded to 15 offenses.
- 1885 Indian census rolls began: purpose was to count Indians in order to limit U.S. liability under treaties. Non-Indians decided who was an Indian.
- U.S. v. Kagama (Sup.Ct. 1886) Supreme Court says Congress has “plenary” power to enact Major Crimes Act as guardian of Native Nations.
- 1887 General Allotment Act (Dawes Act): attempt to transform Indians into "civilized" land-owning farmers (160 acres to head of household + 40 acres to minors, nothing to women) + open up "excess" tribal lands for homesteading by non-Indians + destroy tribal governments. Indian land held in trust by federal government for 25 years (later extended).
- 1891 amendment to Allotment Act: 80 acres of agricultural land **OR** 160 acres of grazing land to each Indian + Secretary of the Interior authorized to lease land for “incompetent” Indians.
- Allotment policy resulted in loss of 90 million acres of Tribal land and checkerboard pattern of land ownership which created jurisdiction/fractionated heirship/leasing issues.

- Talton v. Mayes (Sup.Ct. 1896): U.S. Constitution doesn't apply to Native Nations.
- Lone Wolf v. Hitchcock (Sup.Ct. 1903): Congress has authority to allot tribal lands in violation of treaty because Indians are dependent wards of the U.S.
- 1907 Indian Territory was opened up for non-Indian settlers and became the State of Oklahoma.
- U.S. v. Winters, (Sup.Ct. 1908): establishment of reservation created right of habitability, including water rights (federal law applied, not state law)
- 1924 Indian Citizenship Act (U.S. citizenship). State citizenship is governed by state law. (Arizona and New Mexico allowed Indians to vote in 1948 -- in response to a judicial decision.)

### **Tribal Reorganization (1934-1945)**

- 1934 Indian Reorganization Act: ended allotment + extended the trust provision for existing allotments + provided for the reestablishment of tribal governments + offered boilerplate constitutions modeled after U.S. government (a special tribal election + DOI Secretarial approval required) + encouraged tribes to establish enrollment qualifications (e.g., membership tied to a census roll, blood quantum, births to tribal members who reside on the reservation) + established employment preference for qualified Indians in the BIA.
- Tribes began the process of recovering from the devastating effects of allotment policy. 181 Tribes adopted the "model" IRA constitution; 77 rejected it.

### **Termination and Relocation Era (1945-1962)**

- 1946 Indian Claims Commission established a forum to settle Indian land claims based on treaties with U.S. (transferred to Court of Claims in 1978). Tribes were authorized to sue the federal government but were limited to *money damages* for loss of Tribal lands.
- BIA relocation program (after World War II) encouraged Indians to leave reservations and seek employment in urban centers with promises of training + jobs (one-way ticket).
- 1950 Dillon Myer became Commissioner of Indian Affairs (he ran detention camps for Japanese-Americans during WW II).
- 1953 House Concurrent Resolution 108 established U.S. termination policy.
- Termination Acts by Congress: ended federal government-to-government relationship (over 100 Tribes were terminated). Even though most Tribes have been restored to federal status, there were enormous land losses (over a million acres) + critical damage to sovereignty/jurisdiction/health care/education, etc.

- 1953 Public Law 83-280 gave jurisdiction to certain states and authorized other states to assume jurisdiction *without tribal consent*.
- Williams v. Lee (Sup.Ct. 1959): No state jurisdiction in civil collection case by non-Indian trader against Tribal members on reservation. State court jurisdiction in this case would “infringe on the right of Indians to govern themselves.”

### **Tribal Self-Determination Era (1962-Present)**

- 1968 Indian Civil Rights Act: amended P.L. 280 so states could no longer assume jurisdiction without tribal consent + authorized retrocession of P.L. 280 jurisdiction + established due process, equal protection for tribal members + applied many, but not all, provisions of the U.S. Bill of Rights to Native Nations + limited Tribal Court jurisdiction (6 mo/\$500 – later amended to 1 year/\$5,000) + limited federal court access to habeas corpus actions (Santa Clara Pueblo v. Martinez Sup.Ct. 1978). See also 2010 amendment to Tribal Law and Order Act.
- 1970 President Nixon declared termination a failed policy.
- Restoration Acts by Congress: 1973 Menominee Nation was first + many more.
- Morton v. Mancari (Sup.Ct. 1974) – no BIA employment discrimination because Indian preference isn’t based on race but on unique legal status.
- 1975 PL 93-638 Indian Self-Determination and Education Assistance Act (authorized Indian contracts to operate federal programs previously administered by BIA and IHS).
- 1978 Indian Child Welfare Act (See Mississippi Choctaw Indians v. Holyfield Sup.Ct. 1989, but also see Adoptive Couple v. Baby Girl, Sup.Ct. 2013). State courts required to notify child's Tribe during involuntary Indian child custody proceedings originating in state court. Tribe has right to intervene or transfer the proceeding to Tribal court. ICWA established preferences for foster care + adoptive placements (i.e., Indian child's extended family, child's Tribally authorized placement).
- 1978 American Indian Religious Freedom Act: established policy objectives concerning Indian religious practices. Executive orders have directed federal agencies in carrying out these policy objectives.
- U.S. v. Wheeler (Sup.Ct. 1978): Tribes and federal government are separate sovereigns; no double jeopardy for conviction of same defendant in both courts.
- Oliphant v. Suquamish (Sup.Ct. 1978): The Supreme Court decided that Tribal Court criminal jurisdiction over crimes committed by non-Indians on the reservation was “inconsistent with their status.”

- Santa Clara Pueblo v. Martinez (Sup.Ct. 1978): Indian Civil Rights Act doesn't grant jurisdiction to federal courts for a civil action concerning tribal membership by a Tribal member against a Tribe. Tribal courts have exclusive jurisdiction.
- Montana v. U.S. (Sup.Ct. 1981): Crow Tribe cannot regulate hunting/fishing by non-Indians on non-Indian fee land along Big Horn River within the reservation. Tribes have jurisdiction over "conduct which threatens or has some direct effect" on the Tribe's "political integrity, economic security and health or welfare."
- California v. Cabazon Band of Mission Indians (Sup. Ct. 1987): upheld tribal gaming.
- 1988 Indian Gaming Regulatory Act: responding to the Cabazon decision and citing fear of infiltration into Indian Country by organized crime, Congress passed this law to regulate Tribal gaming. National Indian Gaming Commission established. Compacts between Tribes and States required for high stakes gaming.
- 1988 Tribal Self-Governance Demonstration Project: Tribes could "compact" to administer most of the BIA and IHS programs through a single funding agreement (instead of separate contracts for each program).
- 1990 Native American Graves Protection and Repatriation Act: federal agencies and museums required to inventory Indian remains and cultural property + return them to Tribes.
- Duro v. Reina (Sup.Ct. 1990): No tribal court jurisdiction over crimes committed by *non-member* Indians on the reservation.
- 1990-91 Congressional rider to appropriations act amended ICRA definition of "powers of self-government" to include "the inherent power of Indian Tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." (This was called the "Duro fix" because it overruled Duro v. Reina.)
- U.S. v. Lara (Sup.Ct. 2004): Upheld Congressional authority to enact the "Duro fix" based on Tribal sovereignty. Therefore, there was no double jeopardy in Tribal and Federal prosecutions of the same case.
- 2009 Settlement Agreement of Cobell v. Salazar – class action lawsuit (filed in 1996): breach of trust responsibility (Individual Indian Money accounts)
- 2010 Tribal Law and Order Act: increased Tribal court sentencing limits to three years per offense, but added new requirements: legal counsel required for indigent defendant + tribal court judge must be licensed/law-trained + must publish criminal laws, rules of evidence and procedure + must maintain audio/video record of criminal trial.
- 2013 Violence Against Women Reauthorization Act (authorized some tribal court jurisdiction over *non-Indian* perpetrators of domestic violence and sexual assaults in Indian Country).