

EUROPEAN DOCTRINES

Doctrine of Discovery

With the arrival of Europeans in the Americas, European powers involved in exploration of the “New World” (e.g., Spain, France, England) searched for a means of avoiding conflict among themselves. They agreed that discovery alone was insufficient for the assertion of title or sovereignty. Discovery would give the discovering nation the right to obtain title from the indigenous people (with compensation). Thus, the “Doctrine of Discovery” developed as a tool for regulating competition among European powers engaged in exploration.

Uninhabited lands: a discovering nation could assert sovereignty and take title.

Inhabited lands: the discoverer had the exclusive right to obtain title from the native nations. Indigenous nations were not “recognized” sovereigns (i.e., European) and although the people were deeply spiritual, they were not Christian. Their cultures, languages and governance were very different. There was no individual ownership of land, in contrast with the European legalities of property ownership. Indian nations along the east coast were primarily hunters rather than farmers, like the Europeans.

Doctrine of Conquest

Justifications for conquest included the following:

To convert nonbelievers to Christianity: the Roman Catholic Church taught that the only means of salvation was through belief in Christian principles. Conversion to Christianity was widely presumed to be sufficient justification for conquest of “pagan” nations which did not have the right to equal recognition under a European-defined law of nations. European nations were superior, rational, correct, civilized and law-abiding (i.e., abiding by God’s law) and all other nations were inferior, irrational, incorrect, uncivilized and pagan (i.e., not following the European world view).

To “civilize” (e.g., turn nomads into farmers)

To defend against attack and interference with trade and commerce

Doctrine of Preemption

This doctrine gave the European governments the exclusive right to negotiate treaties with Native Nations and to issue title to individual citizens (see, e.g., the 1763 Proclamation by King George III). Only representatives of the King could enter into treaties with Native Nations. This was deemed necessary to avoid military friction caused by individual land transactions with Indians. The United States adopted this doctrine immediately after the formation of the new government. The federal government preempted states and individuals from entering into treaties with Native Nations without obtaining federal approval. This was done through a series of Indian Trade and Intercourse Acts, beginning in 1790.

UNITED STATES: Powers and Doctrines

U.S. Constitution (1790)

The U.S. Constitution vested power to deal with Indian Tribes in Congress and limited that power to commerce (see the Indian Commerce Clause, Article I, Section 8, Clause 3).

- Congress enacts federal laws.
- Courts interpret the laws.
- The Executive Branch carries out the law (including the development of rules and regulations). Currently, the Bureau of Indian Affairs (in the Department of the Interior) has primary responsibility for overseeing federal responsibilities in Indian Country. Indian Health Service is located in the Department of Health and Human Resources. Indian housing is in the Department of Housing and Urban Development.

The U.S. Constitution established two types of sovereigns: federal and state. The federal government and states were created and defined by the Constitution. Native Nations are separate sovereigns that pre-existed the Constitution. They were not included in the governmental structure created by the Constitution.

Doctrine of Plenary Power

This doctrine grew out of the Indian Commerce Clause in the U.S. Constitution. It was the federal government that was responsible for the protection of tribal rights and the enforcement of treaty promises against violations by states and individual non-Indians. It began as a peace-keeping doctrine during the formative years when alliances with Native Nations were critical to the survival of the fledgling nation. It has grown through the years, especially in U.S. Supreme Court decisions.

Doctrine of Federal Trust Responsibility

The U.S. has a protectorate relationship with Native Nations based primarily on treaty promises. U.S. treaties (government-to-government agreements) began in 1778 and ended in 1871. They were written in English and often misunderstood by Indians. Federal guardianship (“trustee”) over tribal rights and resources requires a higher standard of care. Tribal lands are held in trust by the federal government (on behalf of both tribes and individual Indians). These lands cannot be taxed by states.

When Native Nations ceded lands to the U.S. through treaties and other formal agreements, they reserved homelands as well as hunting, fishing and gathering rights which often extended beyond reservation boundaries. In exchange, the U.S. promised education, health care and a viable homeland. Tribes retained aboriginal sovereign rights to govern their lands and people.