

Trick or Treaty

A treaty is a contract between sovereign nations. The Constitution authorizes the President, with the consent of two-thirds of the Senate, to make a treaty on behalf of the United States.^[1]

- ^[1] U. S. Constitution, Article II, § 2, Cl. 2.



Supreme Law of the Land

Treaties are “the supreme law of the land.”^[2] This means they are superior to state laws and constitutions and are equal in rank to laws passed by Congress.^[3] A treaty can be made on any subject, except that it may not deprive a citizen of a right guaranteed by the Constitution.^[4]

- ^[2] U. S. Constitution, Article VI, § 2.
- ^[3] Ibid. See *Worcester v. Georgia*, 31 U. S. 515 (1832); *U. S. v. Forty-three Gallons of Whiskey*, 93 U. S. 188 (1876).
- ^[4] *Asakura v. Seattle*, 265 U. S. 332 (1924).



American Indians and Treaties

Until 1871, treaties were the accepted method by which the United States conducted its relations with Indian tribes. The U. S. has entered into more than 650 Indian treaties. Nearly every tribe has at least one treaty with the United States.



Grant of Rights to a Tribe?

- The Supreme Court has expressly held that an Indian treaty is "not a grant of rights to the Indians, but a grant of rights from them."^[1] The purpose of an Indian treaty was not to give rights to the Indians but to remove rights they already possessed, as sovereign nations.
- Consequently, Indians have great many rights in addition to those contained in treaties. In fact, any right that is not expressly extinguished by a treaty or federal statute is "reserved" to the tribe. This fundamental principle of Indian law is known as the "reserved rights" doctrine.
- ^[1] U. S. v. Winans, 198 U. S. 371 (1905).



So What are Treaty Rights?

In return for the vast Indian holdings and resources, the United States made certain promises:

- Protection for Indians from attacks upon their lands (this protection included legal assistance).
- Health care
- Education
- Some monies
- Sovereignty and religious freedom
- Confirmation and protection of certain rights: self-government, fishing and hunting rights, and jurisdiction over their own lands



Second Fort Laramie Treaty, 1868

"In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they, therefore, pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school, and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years."



Constitutional Protection

It is important to remember that these promises were made in honor. Also, they were, and still are, legally binding upon the U.S. by the 6th Article of the U.S. Constitution.

"Article. VI., Clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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."



WERE INDIAN TREATIES VOLUNTARY?

- Before the War of 1812, the United States and Indian nations negotiated as relative equals.^[1] The new nation, weakened by years of war with England, would have been no match for the Indians. Consequently, the early Indian treaties were voluntary and mutually advantageous: the U. S. obtained land and assurances of non-aggression from the Indians and the Indians received goods and services from the federal government.
- After the War of 1812, in which the threat of British intervention in U. S. internal affairs was finally ended, the federal government had less reason to maintain its friendship with the Indian tribes. What the U. S. wanted most was Indian land, which it systematically began to take by force. Indian treaties after 1812 were rarely voluntary.^[2]
- ^[1] Worcester, note 3 above, 31 U. S. at 548.
- ^[2] See *Antoine v. Washington*, 420 U. S. 194, 202 (1975).



Purposes of Indian Treaties

- 1/3rd were treaties of peace
- 2/3rd were treaties whereby 174,000,000 acres of Native lands were acquired by the Federal Government



WHAT IS CONTAINED IN INDIAN TREATIES?

Nearly every Indian treaty contains at least two provisions. First, the tribe agrees to relinquish land to the U. S. Second, the United States promises to create a reservation for the Indians under federal protection. Some treaties also promised to provide the Indians with specific services, such as medical care, food, and clothing, but many did not (it should be remembered that the purpose of an Indian treaty was to take rights away from Indians, thus treaties rarely listed the rights that were reserved to them).



Treaties Today

- In 1871, Congress passed a law (25 U. S. C. § 71) that abolished the practice of making treaties with Indian nations. This law declared that Indian tribes were not sovereign nations with whom the United States would make treaties. Since then, Congress has regulated Indian affairs through legislation, which is more convenient for Congress because laws, unlike Indian treaties, do not need the consent of Indians before they go into effect.
- Congress passed section 71 largely because the House of Representatives disliked its exclusion from Indian Policy-making. Under the Constitution, the President and the Senate make treaties. Consequently, the House took no part in formulating Indian policy. The House pressured the Senate into passing section 71 so that it would have a hand in regulating the government's interaction with Indians.^[1]

[1] 187 U. S. 553 (1903).



Section 71

- Section 71 contains a provision that states that "no obligation of any treaty...shall be hereby invalidated or impaired." Therefore, section 71 does not affect any Indian treaty made prior to 1871.
- This does not mean, though, that every Indian treaty is still valid today. To the contrary, most treaties have been "abrogated," that is, broken or breached by Congress. In 1903, the Supreme Court held in Lone Wolf v. Hitchcock that Indian treaties have the same dignity as federal statutes, but no greater dignity.^[1] Therefore, a federal law can amend or even repeal an Indian treaty in the same way that it can amend or repeal a law.^[2]

[1] Lone Wolf v. Hitchcock, 187 U. S. 553 (1903); Choate v. Trapp, 224 U. S. 665 (1912); Antonine, note 7 above.

[2] Carpenter v. Shaw, 280 U. S. 363, 367 (1930); DeCoteau v. District Court, 420 U. S. 425, 447 (1975); Bryan v. Itasca County, Minnesota, 426 U. S. 373, 392 (1976).



HOW ARE INDIAN TREATIES INTERPRETED?

- Many disputes have arisen over the terms and provisions of Indian treaties. These disputes often involve important and valuable interests in land, water, minerals and hunting and fishing rights.
- Because of the frequency of these disputes, the Supreme Court has developed a set of rules that govern the interpretation of Indian treaties. These rules are known as “canons of treaty construction.”



“Canons of Treaty Construction”

- First, uncertainties in treaties must be resolved in favor of the Indians.^[1]

• ^[1] Jones v. Meehan, 175 U. S. 1, 10 (1899); U. S. v. Shoshone Tribe, 304 U. S. 111, 116 (1938); Choctaw Nation v. Oklahoma, 397 U. S. 620, 631 (1970).



- Second, Indian treaties must be interpreted, as the Indians would have understood them.^[2]

• ^[2] Tulee v. Washington, 315 U. S. 681, 684-85 (1942); Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U. S. 658 (1979).



- Finally, Indian treaties must be liberally construed in favor of the Indians.^[3]

- ^[3] Fishing Vessel Association, note 12 above, 443 U. S. at 675-76, citing Jones v. Meehan, note 11 above, U. S. 175 U. S. at 10.



These canons obviously benefit the treaty tribe. The Supreme Court intended them to do so. Tribes were at a significant disadvantage in the treaty-making process. For example, treaties were always negotiated and written in English and the tribes could never be sure what they were signing. Besides, most treaties were forced upon the tribes and were unfair. For these reasons, Indians should receive the benefit of the doubt when questions arise, according to the Supreme Court.



Reservation System

- In 1848, gold was discovered on the South Fork of the American River at Sutter's Mill, near Coloma, bringing a rush of fortune seekers from around the world



Genocide of Native People

No group suffered as much from the Gold Rush as California's Native peoples. Estimates of the number of Native people in the area that is now California, before the arrival of Europeans, range from 310,000 to 705,000. Even before the Gold Rush the population of Native people in California had fallen to 150,000 due to the Mission system and diseases introduced by Spanish and Mexican settlers. The remaining Indian population was decimated during the Gold Rush. By 1870 the number of Native people had plummeted to 31,000 according to the California census.



In order to clear the way for white settlement, the U.S. Senate in 1853 authorized three commissioners to negotiate treaties with the Indian tribes in California. Eighteen treaties were negotiated. The Indian tribes agreed to give away millions of acres of land in exchange for the U.S. government's promise of protection and lands with adequate water and game to sustain them and their way of life. These lands would have contained about 7.5 million acres, or 7.5 percent of the land area of California. The Indians began moving to their new lands only to find out that the U.S. Senate had refused to ratify their treaties.

A System of Military Posts

- Instead of the treaties, the U.S. decided on "a *system of military posts*" on government-owned reservations. Each of these reservations would put into place a "*system of discipline and instruction.*" The cost of the troops would be "*borne by the surplus produce of Indian labor.*" No treaties were to be negotiated with the Indians; instead they would be "*invited to assemble within these reserves.*"
- Native people were rounded up at gunpoint and forced to march to the "reservations."
