



American Revolution/Founding

 United States Constitution (1789):

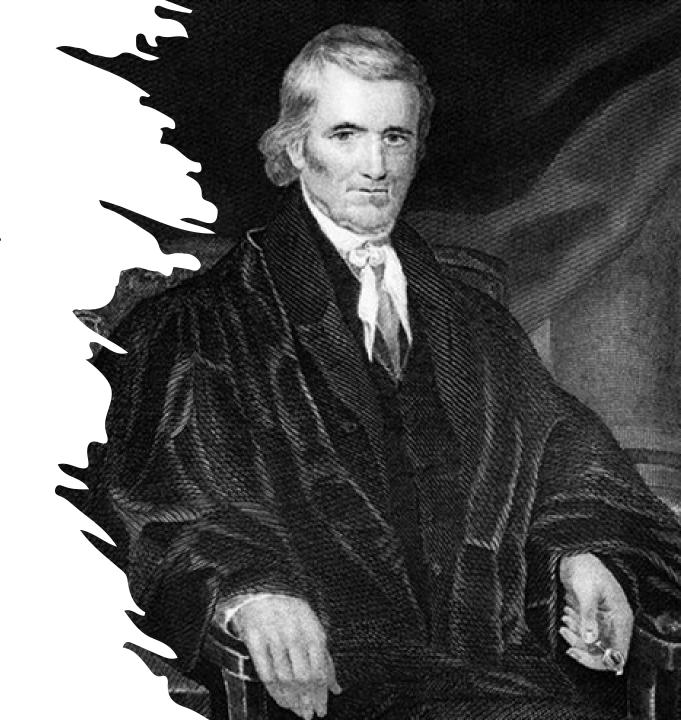
United States Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

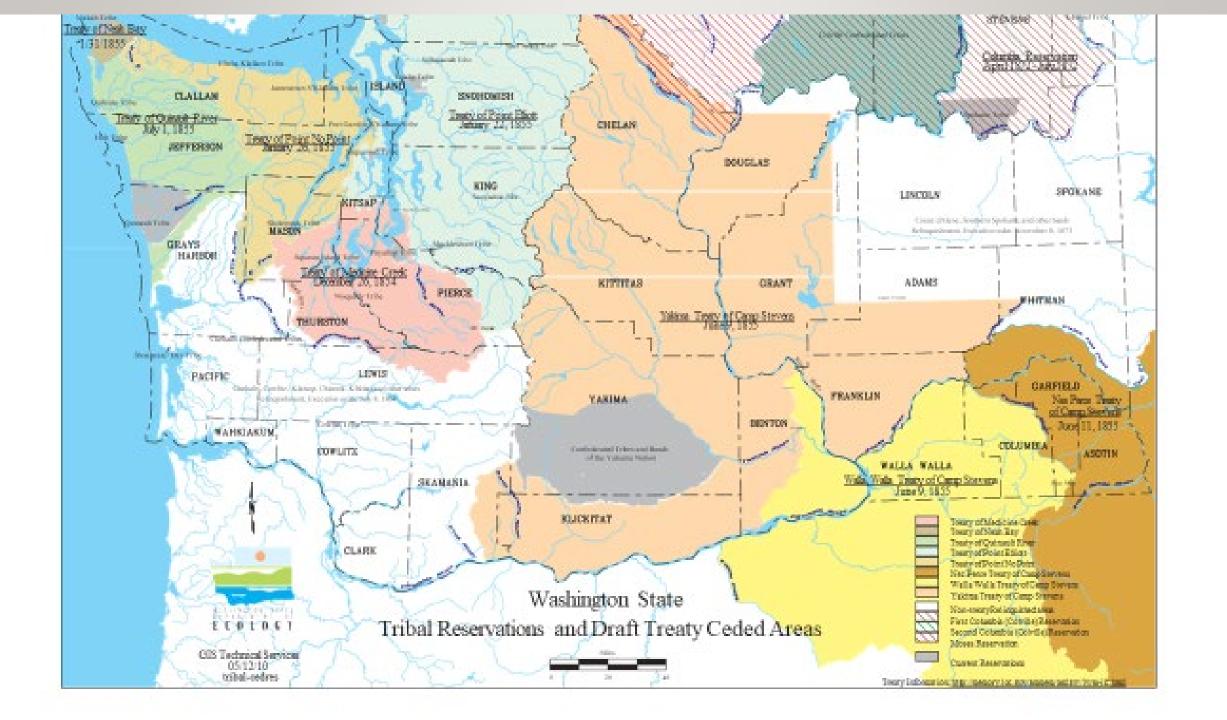
This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;

Foundations of Federal Indian Law

"From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate."

Worcester v. Georgia, 31 U.S.
515, 556, 57 (1832)





Treatymaking

- Formal treatymaking continued until 1871, thereafter, treaty substitutes were enacted by Congress
- Though treaty terms varied, all included mutual promises of relationship and were largely defined by cession of tribal lands in exchange for provision of services, support, etc.
- Reservations established in conjunction with cession of lands
- Rights reserved by Tribes (hunt, fish, gather, etc.) – continuing access to, use of, property rights in ceded territories



Treaties in the 20th Century



Plenary Power and Treaties

- Lone Wolf v. Hitchcock (1903):
 - Can US (Congress) unilaterally abrogate treaties?
 - Allotment according to treaty, required consent from 3/4 adult males
 - Congress authorized allotment anyway
 - Court: "power exists to abrogate [a] treaty, though presumably such power will be exercised only when circumstances arise which will not only justify [it] but may demand, in the interest of the country and the Indians themselves, that [Congress] should do so."



TREATY RESERVED FISHING RIGHTS: UNITED STATES V. WINANS, 198 U.S. 371 (1905) Article III of the Treaty with the Yakama:

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

United States v. Winans (1905)

- Issues in Winans:
 - What do treaty-reserved rights mean?
 - Promise more than just the rights enjoyed by other (non-Indian) citizens
 - Treaty is "not a grant of rights to the Indians, but a grant of right from them a reservation of those not granted."
 - Continuing right to cross land to access usual and accustomed places, rights that would run against the United States, the State of Washington, and future grantees
 - What about Washington's rights as a state?
 - Treaty rights not defeated by statehood or equal footing doctrine
 - BUT, Washington would not be restrained "unreasonably, if at all, in the regulation" of the exercise of treaty rights

Winans – rules for treaty interpretation

- Indian Canons of Construction:
- Treaties are not grants to the Indians but reservations of rights not surrendered.
- Treaties should be interpreted as the Indians would have understood them.
- Ambiguities should be interpreted in the Indians' favor
- Treaties should be liberally construed in Indians' favor



More recent treaty cases

- United States v. Washington, 384 F. Supp. 312 (1974) (Boldt)
- Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)
- United States v. Washington, 157 F.3d 630 (1998), cert. denied, 526 U.S. 1060 (1999) (Shellfish)
- Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (Continued existence of treaty rights, explanation/application of canons of construction)



Culverts Case

United States v. Washington, 864 F.3d 1017 (2017), aff'd, Washington v. United States, 138 S. Ct. 1832 (2018):

The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them. They reasonably understood that they would have, in Stevens' words, 'food and drink ... forever.' ...

Even if Governor Stevens had not explicitly promised that 'this paper secures your fish,' and that there would be food 'forever,' we would infer such a promise....

That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes.



Recently before SCOTUS:

- Washington State Department of Licensing v. Cougar Den, Inc., 139 S.
 Ct. 1000 (2019) (Treaty right to travel)
- Herrera v. Wyoming,139 S. Ct. 1686 (2019) (Hunting off-reservation open & unoccupied lands)
- McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (Reservation diminishment & disestablishment)



Review/Basic Legal Principles

RESTATEMENT OF THE LAW,

The Law of American Indians

This Restatement cements the foundational principles of American Indian law. Topics include federaltribal relations, tribal authority, state-tribal relations, tribal economic development, Indian Country criminal jurisdiction, and natural resources.

NATURAL RESOURCES

• Introductory Note:

The initial legal relationship between Indian tribes and the United States typically began with a land-cession treaty, in which the federal government acknowledged the power of Indian tribes to enter into treaties, acknowledged the expansive scope of tribal traditional territories, and purchased those land holdings from the tribes. In exchange, the tribes usually received cash or the promise of future annuities, vested title to reserved lands set aside for Indian and tribal ownership and use, and the promise of the United States to accept a duty of protection over Indian tribes, individual Indians, and their lands.



AMERICAN INDIAN TREATY LAW

- Treaties with Indian Tribes
 - a) Indian treaties made under the authority of the United States are part of the supreme law of the land.
 - b) Indian treaties constitute reservations of rights by Indian tribes, not a grant of rights to Indian Tribes.
 - c) Indian treaty rights and related federal obligations continue in force until and unless federal legislation abrogates the rights and obligations (see § 15) or the treaty signatories agree to amend the treaty.
 - d) State laws and regulations conflicting with Indian treaty provisions are invalid, unless authorized by federal legislation.
 - e) Indian treaties with states made after 1790 are invalid, unless authorized by federal legislation.



CANONS OF CONSTRUCTION OF INDIAN TREATIES

- A treaty must be liberally interpreted in favor of the relevant Indian tribes to give effect to the purpose of the treaty. Ordinary rules of construction do not apply. Courts apply the following canons of construction:
 - a) Doubtful or ambiguous expressions in a treaty must be resolved in favor of the relevant Indian tribes.
 - b) An Indian treaty must be construed as the Indians understood it at the time of the treaty negotiation.
 - c) An Indian treaty must be construed by reference to surrounding circumstances and history.



THANK YOU!

QUESTIONS/COMMENTS?

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