

**Indian Tribes,
Their Rights
And
Responsibilities**

Indian Tribes, Their Rights and Responsibilities

Prepared by The Honorable Elizabeth Furse

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This book has been written to fill the gap in the curriculum of educational institutions.

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INDIAN TRIBES, THEIR RIGHTS AND RESPONSIBILITIES

Great nations, like great men, keep their word.”

Justice Black

WHAT IS A TRIBE?

A tribe is a government with rights and responsibilities toward its citizens. Tribal citizens may live on or off reservation (the geographic area of tribal jurisdiction). In order to benefit from tribal benefits, treaty rights and government services, an individual must be an enrolled member of the tribe. Tribes have the exclusive right to determine eligibility for enrollment of their members.

WHAT IS A TREATY?

A treaty is a contract between sovereign nations. The United States Constitution states that treaties are the supreme law of the land and all judges are to be bound by them, state law notwithstanding.¹ In other words, states cannot make laws that contradict a treaty and states cannot make treaties. Britain and Spain signed treaties with Indian Tribes and the United States followed suit in order to obtain legal title to land held by the various Indian nations.

Most treaties between tribes and the United States are a cession of land from the tribe to the United States and a reservation by the tribe of certain rights – rights that they already have. These could include a portion of land for a homeland and hunting, fishing and gathering rights, both on and off reservation. In exchange for the vast holdings ceded to it, the United States promised to provide certain services in perpetuity. These include health, education, economic assistance and protection against crimes and infringements by United States citizens.

Like all other contracts, treaties cannot be changed without the agreement of both parties. Under the plenary power doctrine, the U.S. Congress can abrogate or alter treaties with Indian Tribes, but it must be done specifically and not by implication.

After 1871, the United States ceased to sign treaties with Indian Tribes. Instead, it entered into agreements that did not require ratification by the U. S. Senate.

WHAT DOES THE U. S. SUPREME COURT SAY ABOUT TREATIES?

Over time, the United States Supreme Court has established basic elements of Indian law and treaty interpretation. These include the following components:

1. The trust relationship: Tribes are not foreign nations but are “denominated domestic, dependent nations.” In *Cherokee v. Georgia* (1831),² the Court developed the doctrine of federal trusteeship over Indian affairs.
2. Government status: Indian tribes are sovereigns and state law does not apply on reservations without express consent of Congress.
3. Reserved rights doctrine: In signing the treaties, the Tribes reserved many of their aboriginal rights. These include land, hunting and fishing rights and the right to self-government.
4. Canons of construction: Ambiguities in the treaties are to be interpreted as the Indians would have understood them at the time of signing. Treaties are to be broadly construed in determining Indian rights but narrowly when considering elimination or abrogation of those rights.
5. Congress’s plenary power: Congress can abrogate rights established by treaty or by other documents; such abrogation must be specific.

AREN'T TREATIES OLD AND OUT OF DATE?

No, a contract does not “go out of date” just because it becomes inconvenient to certain interests. Even older than Indian Treaties, the US Constitution remains relevant and binding on its citizens. The Constitution guarantees treaties as “the supreme law of the land.” If age could render a contract obsolete, then tribes would be able to demand that lands transferred by their ancestors to the United States be returned to the tribe’s descendants.

CAN EVERY INDIAN EXERCISE ALL TREATY RIGHTS?

No, a tribal member can only exercise those rights guaranteed in a specific treaty signed by the tribe to which an individual is an enrolled member. For example, a Navajo has treaty rights under Navajo treaties, but has no treaty rights under the Warm Springs Treaty, unless the Navajo member is married to a member of the Warm Springs Tribe or has been adopted into the Tribe.

ARE INDIANS U. S. CITIZENS?

Yes, Indians are dual citizens in this country. In 1924, Congress conferred U.S. citizenship to tribal members in gratitude for their military service in W. W. I.³ The Act specifically states that U. S. citizenship does not affect tribal citizenship and rights secured under treaty.

WHY DON'T INDIANS PAY TAXES?

Individual Indians pay all the taxes that other citizens do, except for earnings from their own allotments or from income earned on reservation. Tribal income is exempt from federal tax. In general, the courts have ruled against the imposition by states of taxes in Indian country. Tribes may impose taxes on tribal and non-tribal residents on reservations.

WHY ARE SO MANY TRIBES OPENING CASINOS?

In 1988, Congress enacted the Indian Gaming Act.⁴ This act sets out the rules for the establishment of Indian gaming. Unlike other casino operations, there is no individual gain from an Indian casino. All revenues must be directed to governmental services, such as health, education and economic development. Tribes must enter into compacts with state governments. In many cases, gaming is the last resort for many tribes. As non-Indian activities degraded natural resources on which tribes depended, the tribes were forced to look for other sources of revenue to assist their citizens. Tribes do not see gaming as an ultimate revenue source, but it is one that has been helpful in an otherwise bleak economic situation. Indian gaming is highly regulated, both by the tribes and by federal law. It should also be remembered that gambling games have been part of the Indian culture for some tribes for centuries.

WHY CAN'T NON-INDIANS ADOPT INDIAN CHILDREN?

They can. Since the 1878 passage of the Indian Child Welfare Act (ICWA),⁵ Indian children who are put up for adoption are under protection of the tribal court of their tribe. This protection allows the child to know its Indian heritage and participate in any benefits accruing to it as a tribal citizen. The ICWA was a result of the wholesale adoption of Indian children and the loss of all their tribal rights. Adoptions also often meant that tribes lost touch with their citizens and many adopted children searched to no avail when they sought their roots. Under the ICWA, the tribal court is involved in all adoptions whether in tribal court or in state court. Preference is given to Indian adoptees but non-Indian adoptees are allowed.

REFERENCES

1. U. S. Constitution, Article VI.
2. Cherokee Nation v. Georgia, 30 U. S. (5 Pet.) 1 (1931)
3. Indian Citizenship Act, 18 U.S.C.(*) 1401(b) (1924).
4. Indian Gaming Regulatory Act 25 U.S.C. (**) 2701 (1988).
5. Indian Child Welfare Act, 25 U. S. C. (**) 1901-1963 (1978).

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