

Indian Nations and Oregon Dept. Fish & Wildlife

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Outline

- Historical and legal foundations
- Indian Treaty Rights and Pacific NW fish
- Oregon and Tribal Nations
- Consultation

G. Washington to Congress, 9/7/1783

- “Indians ... retreat as our Settlements advance upon them and they will be as ready to sell, as we are to buy; . . .
- Settlement of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without . . . the other. . . . purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return . . . ;
- when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape. . . . nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence [sic]”

NW Ordinance of 1787

“THE UTMOST GOOD FAITH SHALL ALWAYS BE OBSERVED TOWARDS THE INDIANS; THEIR LANDS & PROPERTY SHALL NEVER BE TAKEN FROM THEM WITHOUT THEIR CONSENT; AND IN THEIR PROPERTY, RIGHTS & LIBERTY THEY NEVER SHALL BE INVADED OR DISTURBED, UNLESS IN JUST AND LAWFUL WARS”

(CONGRESS APPLIED THIS STATUTE TO THE OREGON COUNTRY IN 1848)

Commerce Clause

Art. I, Section 8

“The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes”

Congressional Representation

Article 1

“Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, . . . excluding Indians not taxed, three fifths of all other Persons.”

14th Amendment (1868)

“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”

Elk v. Wilkins, (1884) (Indians are not citizens).

All Indians made U.S. citizens eligible to vote in 1924 (but many states did not allow).

Treaty Clause

Article VI

“This Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made . . . shall be the supreme Law of the Land”

Cherokee Nation v. Ga. (1831)

- S. Ct. relied on the trust responsibility and the US duty to care for the best interests of Indians and held that the Nation was dependent on the United States for its “protection” and its “wants”.
- “They may, more correctly, perhaps, be nominated domestic dependent nations. ... Their relation to the United States resembles that of a ward to his guardian.”

Worcester v. Ga. (1832)

- “by various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts.”
- Coming under the protection of the United States “does not imply the destruction of the protected.”
- Repeated treaties - demonstrate tribes are nations.

PRINCIPLES OF FEDERAL INDIAN LAW

- Congressional Plenary Power.
- Diminished Tribal Sovereignty - Indian nations retain all aspects of sovereignty not abrogated by a statute (Congress took) – by a treaty the Tribe surrendered - or by implied divestiture (Oliphant (1978)).
- Trust Relationship - (U.S. fiduciary duty as trustee and guardian of Indian wards).

Seminole Nation v. U.S. (1942)

- USA had to pay treaty annuities twice.
- Second time to tribal citizens as the treaty stated.
- Government is more than “a mere contracting party”.
- US “fails to recognize the impact of certain equitable considerations and the effect of the fiduciary duty of the Government to its Indian wards.”
- “Under a humane and self imposed policy ... [the U.S.] has charged itself with moral obligations of the highest responsibility and trust. Its conduct ... in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”

The Status of Indian Treaties in United States Law

- 375 treaties with tribal nations 1778-1871
- Indian treaties are contracts between nations. Commercial Passenger Fishing Vessel (1979)
- U.S. v. Winans (1905) (Tribes reserved rights to salmon fishing – exclusive on rez & “in common” with “citizens” at “all U&As”)
- McGirt v. Oklahoma, (2020) (“On the far end of the Trail of Tears was a promise.”).

Fishing & Hunting Rights

- New Mexico v. Mescalero Apache Tribe (1983) (no state reg of hunt & fish on rez)
- NW Fishing cases: Winans (U.S. 1905) (access to fishing sites across private prop)
- Commercial Passenger Fishing Vessel (U.S. 1979) (up to 50% of the salmon harvest)
- U.S. v. Wash (W.D. Wa. 1974) (“Boldt”) and U.S. v. Oregon (1968) - continuing jurisdiction
- Stillaguamish Tribe v. Upper Skagit Tribe et al (9th Cir. September 3, 2025) (U & As).

Gov. Stevens Treaties 1853-55 & Pacific NW Fishing

- Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act (1992),
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1248282
- Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling (2002),
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161284

More articles of mine on treaties

- Treaties between the Eastern Shawnee Tribe and the United States: Contracts between Sovereign Governments (2017),
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875875
- Treaty Interpretation: Judicial Rules and Canons of Construction,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1355227

Oregon & Tribal Nations

- 9 federally recognized tribes; G-G Kitzhaber EO 96-30. (708 secs of ORS mention Indians)
- State Comm. on Indian Services (1975).
<https://www.oregonlegislature.gov/cis>
- ORS 97.740 - 97.760 (Protect Indian Graves)
- 182.162 - 182.168 (State/Tribes relations)
- 358.905 - 358.961 (Archaeological sites)
- 390.235 - 390.240 (Historical materials)

Return of consultation

- IRA (1934) tribal elections, constitutions
- Tribal settlement acts 1971-2024; water rights agreements 1982-2024
- ISDA & TSGA. NHPA, NAGPRA, and ARPA.
- Clinton EO 12875 (1993) & 13007 (1996) (sacred sites)
- EOs 13,084 (1998) & 13,175 (2000)
- GW Bush memorandum (2005) G-to-G
- Obama memorandum 2009 & Biden 2021

E.O. 14,112 (Dec. 11, 2023)

- “My Administration is committed to protecting and supporting Tribal sovereignty and self-determination, and to honoring our trust and treaty obligations to Tribal Nations.”
- “administer Federal funding and support programs for Tribal Nations, ... in a manner that better recognizes and supports Tribal sovereignty” Reduce administrative burdens and administrative funding to provide Tribes with autonomy.

Federal Policies & the Tribal Role

- Federal agency consultation policies
- “Best Practices” – Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37-98 (2015) <https://commons.und.edu/ndlr/vol91/iss1/2/>

Consultations

- Sovereignty - political power - jurisdiction
- Self-Determination Era of federal Indian policy
- U.S. consultation duties.
- Co-managers of rez and treaty resources
- Oregon law requires some consultations with CIS and with tribes; e.g., ORS 468A.199 (7/27/2023 - state to consult tribes re climate and Indigenous practices); ORS 270.030 (1/1/2024 - can sell or donate lands to tribes)

Working with Tribal Governments

- Consult, early and often, take the time.
Quechan Tribe v. U.S. Dep't Interior, 755 F.Supp.2d 1104 (S.D. Cal. 2010)
- Plan WITH - don't report what you've decided
- NHPA sec. 106 - Forest Service violated reasonable & good faith efforts to consult.
Pueblo of Sandia (10th Cir. 1995)
- Respect & Consideration
- Historical & Cultural Knowledge
- NPS National Register Bulletin 38 (1978?)

Indian nations & Oregon Economy

- Oregon State Legislature (.gov) - <https://olis.oregonlegislature.gov/liz/Downloads> PDF [reprint of] 2022 ECONorthwest report on tribal casinos and contributions to Oregon economy in 2018 & 2019.
- 2019 - 8 Tribes operated 10 gaming facilities in Oregon, including hotels, restaurants, RV parks, golf courses, shops, conference centers, movie theaters, etc. Employed 4,571 workers [75%?], paid \$238.3 million in wages and benefits. Earnings paid about a fourth of tribal government services = \$43.9 million for 635 employees. Employ almost exclusively Oregonians and mostly buy goods and services from Oregonians; major indirect impact on state economy.
- • Directly and indirectly supported 10,873 jobs statewide = \$556 million in wages, benefits & self-employed earnings.
- • Indirectly supported businesses and other governments in Oregon by \$784.9 million.
- • Over 6.6 million visits to Oregon casinos in 2019, including more than 1.2 million visitors from out of state.

Indian nations & Oregon Economy

Government revenues = \$34.9 million for Oregon, \$16.4 million local governments, \$108.5 million feds.

- Tribes paid \$1.6 million to the Oregon State Police and over \$300,000 to federal government for gaming regulators.
- Tribal gaming businesses provided \$182.9 million to Tribes; most paying for healthcare, social services & public works.
- • Tribes donated over \$8 million to local charities in 2019 and \$163.7 million since 1992.
- • Tribal casino hotels sold over 434,440 room nights to guests visiting rural Oregon communities.
- • Dominance/competitive advantages of the Oregon Lottery eroded the market share of tribal casinos from its peak of 35.5% in 2002 to 29.6% in 2019.