2006

A Brief History of the U.S.-American Indian Nations Relationship

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By Richard B. Collins

Associated Press, AP

Chief Raymond Yowell of the Western Shoshone Nation, left, confers with trial attorney Robert Hager about the tribe's lawsuit to prevent a federal government–approved nuclear dump from being built on their land.

The European nations that colonized the Americas sought to achieve empire as well as acquire mineral wealth and land for their settlers. Each nation aimed to wrest land from the Indian nations, fend off European competitors, and in time control its own settlers. Indian land was obtained by the British government for its American colonies under the policies of purchase, coercion, and conquest. Another policy was to treat the Indian nations as separate but subject societies. The Crown made treaties with the tribes that ceded part of a tribe's domain and set aside retained lands for the Indians' exclusive use.

American Rule

After winning independence from British rule, the United States and its state governments followed the same dominant policy, acquiring Indian land for settlers and miners, from the founding until the 1920s. In pursuit of this aim, they adopted most of the British rules and policies, notably dealing with tribes by treaty.

At first, the respective powers of federal and state governments were ambiguous. The Articles of Confederation gave Congress "sole and exclusive" power over tribes but also guaranteed states' legislative powers within their borders. In 1787 the Constitution instead gave Congress, in the Commerce Clause, power to regulate commerce "with the Indian tribes." This was understood and has been interpreted to give Congress paramount power over tribes. Congress then passed the 1790 Trade and Intercourse Act, which forbade acquisition of Indian land without federal authority. For purchases from tribes, an amended version of this statute continues in force. The statute also defined Indian Country as a place apart, where citizens needed a federal license to trade. A less strict version of this provision continues in force; retailers to Indians in Indian Country still need a federal license.

The Cherokee Decisions

Eastern state governments, however, continued to exercise authority over Indians within their borders, purchasing land in violation of the federal statute and regulating Indian affairs generally. Georgia passed laws claiming power to govern Cherokee lands, and a Cherokee was convicted of murder by a Georgia court and hanged.

The Cherokee Nation resisted. Represented by former Attorney General William Wirt, the Cherokees challenged Georgia in the federal courts. However, the only path to federal court at that time was diversity jurisdiction, available only to American citizens and foreign citizens and nations. The Cherokees were not American citizens, so Wirt decided to file an original bill in the U.S. Supreme Court claiming to be a foreign nation and seeking judicial enforcement of the Cherokees' treaties with the United States.

In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Supreme Court famously held that the Cherokee Nation was not a "foreign state" as defined in the Constitution. Chief Justice Marshall's opinion said that the Cherokees constituted a distinct political body, which he characterized as a "domestic dependent nation," but the federal courts had no jurisdiction to hear cases brought by tribes. (In 1875, Congress gave litigants access to federal courts based on

federal issues; a tribe today can readily sue to enforce its treaty rights.)

The Cherokee challenge to Georgia reached the Supreme Court the very next year by a different route. Georgia required whites to obtain a state license in order to live among the Cherokees. Failure to comply was a felony. Two Christian missionaries who did not comply were prosecuted and convicted in a state court, which rejected their defense based on the Cherokee treaties. Upon review, the U.S. Supreme Court overturned their convictions. Chief Justice Marshall's opinion in *Worcester v. Georgia*, 31 U.S. 515 (1832), interpreted the Constitution to confer paramount authority over Indian affairs on the federal government and held that its treaties gave the Cherokee Nation an enforceable right to self-government within tribal territory, "in which the laws of Georgia can have no force."

For the Cherokees, this was a paper victory. Georgia refused to obey the Court's mandate, and President Jackson declined to enforce it. Three years later, he made a removal treaty with selected Cherokee leaders, and most of the Cherokees suffered the infamous Trail of Tears to Oklahoma, then called Indian Territory. But *Worcester v. Georgia* was not overturned and continues to be a defining precedent on tribal sovereignty.

Allotment and Assimilation

During the 1850s, the Cherokees and other major tribes in Indian Territory enjoyed relative prosperity. Elsewhere, settlers filled in the nation, and tribes that resisted were defeated in war. Greatly reduced Indian lands came to be known as reservations, where government authority was imposed by agents of the Bureau of Indian Affairs (BIA). The government adopted new policies toward tribes based on assimilation. It promised schools and instruction in farming, but the central feature was allotment. This referred to division of tribal common land into separate parcels deeded to Indian families as homesteads. From 1854, most Indian treaties included a provision in nearly identical terms in which the tribes purportedly consented to patent allotments to tribal members who requested them.

The Civil War accelerated the changes. Factions in the major Indian Territory tribes sided with the South. After the South was defeated, the government imposed new treaties in which these tribes also consented to allotment. However, few Indians sought allotments voluntarily, and in time Congress decided that reservations must be allotted compulsorily and comprehensively. The General Allotment Act of 1887 adopted this policy, and over the next forty years, allotment was imposed on more than half of the reservations, including all Indian Territory tribes. Tribal governments became moribund. Indian agents ran the reservations, establishing police and courts set up by the government. Congress subjected Indians to federal prosecution for reservation felonies. Land sold under the allotment act reduced tribal holdings by a whopping two-thirds.

The Kiowa and Comanche Tribes in Oklahoma Territory challenged compulsory allotment in the courts. By statute Congress imposed allotment on these tribes and overrode contrary provisions of their 1867 treaty with the United States. Tribal leaders sued to overturn the statutes, but in *Lone Wolf v. Hitchcock* (1903), the Supreme Court rejected their claim. It applied precedents holding that Congress could override treaties. More questionably, it held that Congress had plenary power over tribes and could compel allotment of tribal common land. In a number of decisions since *Lone Wolf*, the Court has continued to recite the ruling that Congress has plenary power over tribes and can abolish tribal governments or restrict their powers at will.

Another aspect of the allotment era was making Indians American citizens. For many years, federal officials deemed status as a tribal Indian to be incompatible with American citizenship. But in 1890, Congress broke with that policy and allowed residents of Indian and Oklahoma Territories to become citizens without renouncing tribal ties. A 1924 statute made citizens of all other Native Americans, again without relinquishing tribal relations.

The New Deal and After

By the 1920s, many tribal communities were places of demoralized poverty, and tribal governments had few means to serve their people. A proposal by President Harding to abolish tribes and reservations might have succeeded but for his scandals and death. More responsible officials then began to reexamine Indian policy, publishing in 1928 recommendations in what became known as the Meriam Report. The Roosevelt Administration broke with the past. The Indian Reorganization Act of 1934 renounced allotment, sought to strengthen tribal governments, and restored some common land to tribes. Interior Solicitor Felix Cohen and his staff compiled the 1941 *Handbook of Federal Indian Law*, the first systematic organization of the subject, which articulated tribal treaty and sovereignty rights.

The policy pendulum then swung back. Congressional committees published reports and studies favoring rapid assimilation of Native Americans and an end to the reservation system. Policy officially changed in 1953 with adoption of House Concurrent Resolution 108, calling for termination of tribal governments and removal of the federal restriction on sale of tribal land. The same Congress passed a statute known as Public Law 280, subjecting reservation Indians in many states to jurisdiction of state courts. Numerous tribal reservations were terminated, notably those of the Menominees in Wisconsin and the Klamath and Modoc Tribes in Oregon.

Indian Renaissance

The threat of termination, coupled with the civil rights movement, galvanized Native Americans into activism in the 1950s and 1960s. National Indian

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organizations began to lobby Congress. Both major political parties endorsed tribal self-determination in their 1960 platforms, as they have in every presidential year since. President Nixon formally renounced termination in 1970. Nixon also proposed that tribes be authorized to operate federal programs serving reservations. Congress responded by passing the Indian Self-Determination Act. Under it, many tribal governments now administer programs funded through the BIA and the Indian Health Service. Tribal police and courts enforce minor crimes, and tribal governments have departments that address many problems of modern resource and environmental law.

The other major development of the modern era is involvement of the courts. Except for claims cases against the government for damages, tribal rights were rarely litigated before 1959. The right of tribal sovereignty recognized in *Worcester v. Georgia* had lain dormant for a century. During that time, there was one judicial development of note. *Worcester v. Georgia* opined that treaties between the United States and Indian nations must be interpreted as the Indians would have understood them. This was a rule of obvious fairness for treaties written only in English and explained to tribal parties by interpreters, and between parties of grossly unequal powers. The rule was extended to other agreements with tribes in *Winters v. United States* (1908). Later, the Court held that ambiguities in statutes imposed on Native Americans should be resolved in their favor. *Alaska Pacific Fisheries v. United States* (1918). In *Lone Wolf*, the Court held that Congress, not beholden to Indian votes, had plenary power to impose its will on them. This most undemocratic relation was ameliorated by giving Indians the benefit of doubts in interpretation.

Tribes have become sophisticated players on the national political scene.

The Supreme Court's modern decisions began with its 1959 decision holding that Navajo Indians could not be sued by a white creditor in state court to collect a reservation debt. *Williams v. Lee* (1959). The Court expressly revived *Worcester v. Georgia*. Decisions since *Williams* confirmed the Indian Nations' reservation sovereignty over their members free of state jurisdiction, except when Congress clearly provides otherwise. In *California v. Cabazon Band of Mission Indians* (1987), the Court held that states lack regulatory authority over tribal gaming enterprises. Congress reacted by passing the Indian Gaming Regulatory Act of 1988, the federal statute that is the basis for tribal gaming businesses that have enabled some tribes to improve their economies significantly.

However, in 1978 the Supreme Court held that tribes have no authority to punish non-Indians who offend against tribal law, *Oliphant v. Suquamish Tribe* (1978), and several decisions since have denied tribal civil authority over non-Indians unless based on consent or federal statute. Tribal authority to tax lessees of tribal land was upheld, *Merrion v. Jicarilla Apache Tribe* (1982), but power to tax non-Indians lacking any contractual dealings with tribes was denied. *Atkinson Trading Co. v. Shirley* (2001).

Indian nations in 2006 are distinct sovereigns within our complex constitutional system. Within tribal territory, their authority over tribal members is comparable to that of state governments, which it displaces. They lack jurisdiction over non-Indians in tribal territory, a source of dissatisfaction that tribes seek to change. Whether or not they succeed, they have survived numerous attempts to force them to disband. Tribes have become sophisticated players on the national political scene. Their struggles of the last 500 years are simply a prologue to the next.

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Separating Fact from Fiction

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and Congress but Indian Country itself. The department is spending upward of $65 million per year for accounting work, litigation, and discovery costs that could be redirected into other Indian programs. The BIA is operating in an environment where the requirements of the district court—such as the lack of Internet access and hampered communications with beneficiaries—cause undue, expensive delays and deficiencies in providing trust services. The BIA needs to return to its core mission of serving Indian communities instead of dedicating limited resources to responding to litigation demands. Interior has a fiduciary responsibility to American Indian trust beneficiaries and should be able to focus on the business of carrying it out.

Ross O. Swimmer is special trustee for American Indians at the U.S. Department of the Interior. He was elected to three terms as principal chief of the Cherokee Nation and served one term as assistant secretary of Indian Affairs at the Interior.