Indian Land Tenure FOUNDATION

NATIVE LAND LAW

Can Native American People Find Justice in the U.S. Legal System?

Since the first Europeans arrived in North America, Native American people have had to protect and defend their rights to their land and its natural resources. Early treaties provided an alternative to constant war over territorial boundaries, and they acknowledged the inherent sovereignty of Native nations and the European nations; similar treaty making continued with the newly formed United States. Yet, as the U.S. expanded into the continent and the new immigrants became increasingly hungry for land, many treaties with Indian nations were disregarded, illegally altered or came to be renegotiated under circumstances unfavorable to Native nations. As the U.S. courts gained power and influence, legal actions and Supreme Court decisions began to frame the legal and political relationship between the U.S and Native nations, often overriding the original treaty agreements both in practice and in spirit.

Historically, laws are shaped by the times and by the reigning ideologies of those in power. During the 19th century, when much of the federal law governing non-Native interactions with Native nations and concerning Native land and resources was established, the majority of Americans still believed that Indian people would eventually disappear and that those few who remained would gradually assimilate into American religious and social society. The "discovery doctrine" was used and often misconstrued in a number of early court cases to argue against the validity of Native American claims to the lands they had called home since time immemorial. These Christian-based and ethnocentric concepts, indicative of 19th century American political and popular thought, found their way into the nascent legal precedents being set during this period. As a result, many of the early court rulings that are still used in legal arguments today are heavily influenced by racist ideology and outmoded beliefs.

This begs the question: Can Native American people find justice in the U.S. legal system if the very laws used to determine their rights to control their own land and natural resources are fundamentally flawed and unfair? Recognizing that unjust laws present a serious barrier for Indian nations attempting to secure their land bases and strengthen their economies, in 2006, the Indian Land Tenure Foundation (ILTF) awarded a grant to the Indian Law Resource Center (ILRC) to review federal Indian law from its origins and focusing on the landmark cases that have had a direct impact on Native lands and resources. The ILRC review engaged lawyers, legal scholars and law professors to ascertain a wide variety of legal opinions and viewpoints. Based upon this review, the U.S. Constitution and international human rights doctrines, ILRC created a legal framework to guide the future development of federal law relating to Indian land and resources. The results of this work are captured in a document entitled, *Draft General Principles of Law Relating to Native Lands and Natural Resources.*

At the base of U.S. law concerning Native lands and resources are historical elements of fairness and justice. As the principles and case law have been applied in the U.S., however, they have evolved to become unfair and unjust.

The publication before you provides a very brief overview of each of the 17 draft Principles of law developed by ILRC. While the narrative has been edited by ILTF staff, it draws liberally from ILRC's *Draft General Principles*, often restating its language without identifying quotations. Our intent is to introduce the Principles in a brief fashion here and in language that is more accessible to the general public. However, the complete *Draft General Principles*, which includes extensive legal and historical analysis, should be reviewed to fully understand the positions of ILRC and legal scholars as well as the potential impact this reform strategy will have on Indian law.

It is important to note that we see the Principles as a work in progress. In order to move this valuable work forward, more input is needed from Native communities throughout the U.S. As a starting point, in July 2009, ILTF and ILRC hosted a small meeting of tribal leaders and their legal counsel to review and discuss these Principles. We have included some of the comments provided during this initial gathering in the articles that follow.

As we continue to present the Principles, we hope to gather further input from and have constructive discussions within the Native community. We plan to host additional meetings with Native leaders and community members in the months to come. If you would like to get updates on ILTF's legal reform strategy, hear about future meetings or receive a copy of the full *Draft General Principles*, please fill out the enclosed postage-paid card and drop it in the mail to us. You may also submit your comments regarding the Principles directly to us at info@indianlandtenure.org. We look forward to hearing from you and working with you to reform the unjust laws that prevent Indian people from asserting their rights to own, manage and control their Native homelands.

Cris Stainbrook, President
Indian Land Tenure Foundation

Draft General Principles of Law: Introduction

At the base of U.S. law concerning Native lands and resources are historical elements of fairness and justice. As the principles and case law have been applied in the U.S., however, they have evolved to become unfair and unjust. The Principles outlined in this publication state what we believe the federal law *actually is* and *ought to be* in light of the Constitution, relevant treaties and universal concepts of justice and human rights. (The full text of the Principles can be found on pages eight and nine of this publication.) These Principles are an effort to state the basic elements of a framework of law about Native lands that would be fair, workable and in keeping with American concepts of justice and the rule of law.

The Unfair and Unconscionable Nature of U.S. Indian Law

Basic unfairness is clearly seen in the discovery doctrine which has been misconstrued as giving ownership of all the land in this country, particularly all Native lands, to the European nation that "discovered" the area. This would mean that the Native people of this continent lost ownership of all their lands when Europeans landed on these shores. The unfairness of this concept is obvious, and this doctrine has never, in fact, been the law. Nevertheless, courts and government officials routinely apply this mistaken and discriminatory rule and believe it to be the law.

An Unworkable System Designed to Fail

The government manages or controls most Indian and Alaska Native land as trustee of those lands, frequently mismanaging the land and failing to properly account for the moneys owed to the Native nations and individuals that own the land and resources. This legal framework is designed to fail. A few of the gross problems that have been created include: the vast loss of lands through allotment; fractionation of Native allotments; widespread failure of the federal government to account for Native trust funds and trust resources; and the continuing erosion of Native powers to govern and manage their lands and resources.

The Basic Tenets of U.S. Indian Law Would Be Unconstitutional if Applied to Any Other Group

Major parts of the federal law dealing with Native lands and doctrines such as the "plenary power doctrine" are plainly in violation of the United States Constitution. Congress frequently deals with Native property by enacting legislation that would be forbidden by the Constitution if it affected anyone else's property. This legal framework is not only inconsistent with the Constitution and with human rights standards world-wide, but it has enormous adverse consequences for Indian and Alaska Native nations throughout the United States.

This framework of truly unjust and unworkable law has made it practically impossible for Native people of this country to correct the social and economic injustices that they suffer. This legal framework, more than any other factor, is responsible for the longstanding poverty, political marginalization and social ills that are so common in Indian Country. It is not likely that Indian and Alaska Native governments can solve these problems unless this body of law is thoroughly reformed.

Effective governance requires a framework of law that is reasonably fair, consistent and predictable. Changing, clarifying and improving the laws affecting Native lands and resources is necessary if Native nations are to gain effective control of their homelands and improve their economic and social well-being.

> ***"This framework of truly unjust and unworkable law has made it practically impossible for Native people of this country to correct the social and economic injustices that they suffer."***

The Process and Impact of Law Reform

If useful change in the law about Native lands is to be achieved, two things are necessary. First, we must identify what changes ought to be made, that is, what the new legal rules or principles should be in order to form a complete and workable framework of law about Native lands. Second, in order for change in the law to come about, we need wide agreement among tribal leaders and lawyers representing Native nations and individual landowners about what those changes ought to be.

These Principles are a first step in serious reform. If the federal courts and Congress did adopt these Principles, Native nations would be in a position much like we have today, except that many of the worst legal restrictions and uncertainties would be gone. These Principles:

- create a legal framework that ensures justice for Indian and Alaska Native nations in the United States;
- retain the general trust relationship, but reiterate that the general trust relationship requires the United States to act with the highest integrity when dealing with Native nations; and
- call for limiting the current plenary power doctrine by making that power subject to the Bill of Rights, other constitutional provisions and international human rights law. As such, Congress would no longer have the power to take aboriginal property without compensation or due process, or terminate the legal status of Indian nations. Congress would still be able to enact legislation relating to Native lands provided there is a constitutional provision authorizing such legislation.

With the adoption of these Principles by the United States, Native nations would gain much greater security in their lands and resources, greater freedom of action as governments, and freedom from the threat of adverse federal actions, including detrimental acts of Congress. Specifically, some of the changes that would result if these Principles were implemented include:

- broad freedom of Native nations to own, use and manage their lands and resources;
- freedom from the threat that the federal government can take their lands or resources, except where it is done by eminent domain, with just compensation, due process of law and for a public purpose;
- congress could no longer enact laws to terminate Native nations, abolish Native governments or abolish reservations;
- Native nations would be free from acts of Congress and court decisions that deny Native peoples the constitutional rights that other Americans have; and
- Native nations and individuals would have the opportunity, at their choosing, to hold and manage their own lands and resources free of federal control as trustee.

In summary, Native nations would continue to exist and operate within the present basic framework of treaties, reservations, shared jurisdiction and exclusive federal authority in the field of Indian affairs. But, they would be able to act with far greater freedom, with far less federal interference, with greater certainty about their ownership and control over their lands and resources, and with access to a fair and consistent system of federal law and legal remedies.

AMERICAN INDIAN HISTORY TIMELINE

1492
Columbus makes landfall in the western hemisphere.

1493
Pope Alexander VI issues the papal bull Inter Catera, the third in a series of papal bulls extending dominion over non-Christian nations of Europe and sanctifying the enslavement of native, non-Christian peoples. This papal bull also states that one Christian nation does not have the right to establish dominion over lands previously dominated by another Christian nation.

1537
Pope Paul III issues the papal bull Sublimis Deus, which attempts to settle a dispute within the Catholic Church about whether it is right to enslave Indians. This bull declares that Indians are human beings, and therefore endowed with human rights, contrary to the arguments of those who claimed that indigenous people were incapable of understanding Christianity, and therefore suitable for lives only as slaves. Together, these papal bulls come to serve as the basis and justification for the Discovery Doctrine.

1763
Royal Proclamation of 1763. English Crown begins to make official statements of policy that recognize the pre-existing, inherent sovereignty of Indian tribes on the North American continent. The Royal Proclamation acknowledges the rights of Indian nations to aboriginal title to land, which was not to be disturbed without tribes ceding or selling their lands to the Crown.

1775
American War of Independence (1775-1783). To finance the war, the American rebel government sells speculative land grants to areas still rightfully occupied by Indians.

1500 1760 1770

Native Land Ownership and the Doctrine of Discovery

The first three Principles deal with Indian and Alaska Native legal rights to their lands and the rights of the United States and the countries that "discovered" America. The first Principle describes the legal rights of Native nations. The second Principle describes the legal rights of the "discovering" countries, and later the United States. The third Principle states that certain legal concepts and doctrines are not to be applied in any way that diminishes or impairs the land rights of Native nations.

These three Principles, and in fact all of the Principles, are intended to apply to all kinds of Native rights involving land and resources, including shared rights to use land and rights to hunt, fish and gather on lands or waters.

Principle 1 – Native nations have complete ownership of their aboriginal lands – not some limited or partial right.

Lands owned by Indian and Alaska Native nations by reason of long use or possession are said to be held by *aboriginal title.* Clearly aboriginal title was established by Indian and Alaska Native nations long before Europeans arrived on this continent. Lands held under aboriginal title are just like any other property, complete in the sense that the Native nation is recognized as having the full rights of ownership without discrimination or diminishment.

"The doctrine of discovery did not give "discovering" nations or the United States ownership of Native lands and resources. It only gave the U.S. the exclusive right to purchase the land if the Native owners were willing to sell."

This is an important call for change from today's generally accepted reading of U.S. law that says that Indian title to their lands, aboriginal ownership, is a lesser form of title. The notion that aboriginal title is a lesser form of title and that the United States can take aboriginal title lands without compensation is found in Supreme Court rulings. But this rule is clearly in violation of the United States Constitution.

Tribal Leader Comments

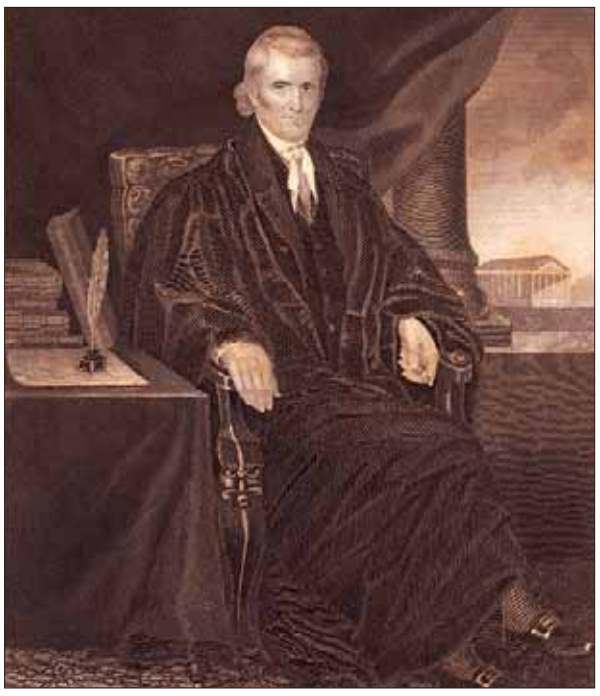
- Participants immediately saw the gap between Principle One and existing law and recognize that this is an important reform.
- The bulk of the comments focused on strategies for reform: education as a central part of the reform strategy and terminology such as "nation" rather than "tribe," and "citizen" rather than "member."
- There was support for a litigation and legal education strategy to rehabilitate aboriginal title. Participants explored a litigation strategy in California. Research by some attorneys concludes that there is no legal mechanism that has extinguished aboriginal title in California.

Principle 2 – "Discovery" did not give the "discovering" country any ownership of Native lands. It only gave the "discovering" country the exclusive right to buy the land from the Native owners.

The doctrine of discovery is a topic that generates a great deal of comment, but much of it is mistaken or confused. Many courts have mistakenly said that "discovering" countries gained legal rights to Native property under the doctrine of discovery. Some courts have even used this mistaken idea to justify actions that diminish the land rights of Indians and Alaska Natives. But such comments by courts are not supported by federal law nor the origins of the doctrine of discovery. The doctrine of discovery applies only to *uninhabited* lands. The doctrine did not take away or diminish the legal rights of Indians and Alaska Natives to land and resources and cannot be used to justify any such reduction in land rights today.

We are concerned about the doctrine of discovery in modern times, because discovery *supposedly* reduced the ownership rights of indigenous nations to the lands and resources that they have possessed since time immemorial.

Supreme Court cases addressing the doctrine of discovery and aboriginal title in the 1800s provide a clear view of federal law which is substantially the same as Principles One, Two and Three. Some of the most significant cases during this period were presided over by Chief Justice John Marshall, whose "Marshall Trilogy" had a major impact on Native land law.[1] The overall conclusion that emerges from *Fletcher v. Peck* (1810), *Johnson v. M'Intosh* (1823), *Worcester v. Georgia* (1832) and *Mitchel v. United States* (1835), all cases presided over by Marshall, is that the doctrine of discovery did not give "discovering" nations or the United States ownership of Native lands and resources. It only gave the U.S. the exclusive right to purchase the land if the Native owners were willing to sell.



Courtesy: Special Collections Research Center, University of Chicago Library

John Marshall, Chief Justice of the United States from 1801 to 1835. Many court decisions made during Marshall's tenure, especially those known as the Marshall Trilogy, continue to shape Native land law and policy today.

The general conclusion of Principle Two is that there is no sound legal authority either in international or federal law for the proposition that the doctrine of discovery took away or diminished the ownership rights of the Native landowners or that it gave to the U.S., as successor to the "discovering" nations, any actual ownership of Native lands. The doctrine of discovery under U.S. law merely gave the discovering nation an exclusive right to purchase Indian and Alaska Native lands; it did not give title to those lands.

Tribal Leader Comments

- Consensus that "discovery" must be understood for what it was or discredited altogether.
- Participants questioned whether the doctrine can still exist in the new scheme as it is largely responsible for non-Indian sense of entitlement to Indian resources.

Principle 3 – Legal rules that deny, take away, or reduce Native ownership of their lands and resources are invalid, because they violate the United States Constitution.

This Principle means that Native nations have complete ownership of their aboriginal title lands, not just permission of the federal government to occupy or use the land. This is important because if Native nations only have a right to use and occupy their lands with the permission of the U.S., they do not own their lands or have a legally protected right

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1778
Treaty-making period between the American government and Native North Americans begins. The first American treaty is with the Delawares.

1781
Articles of Confederation declare the federal government shall have authority over Indian affairs, "provided that the legislative right of any State within its own limits [sic] be not infringed or violated."

1787
U.S. Constitution adopted as the supreme law of the United States.

Northwest Ordinance states: "The utmost faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress."

1788
U.S. Constitution, Article 1, Section 8, Clause 3, asserts that Congress shall have the power "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." State power on Indian issues is thus subordinated to federal power.

1791
Bill of Rights, the name given to the first ten amendments to the U.S. Constitution, is ratified and becomes law. Of particular importance for Native nations and people are portions of the Fifth Amendment that state: "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation."

1803
Louisiana Territory is "purchased" from France for $15 million.

President Jefferson sends Meriwether Lewis and William Clark to chart the western part of the North American continent.

1780 1790 1800

Native Land Ownership continued from page 3

to them. In its early case law the Supreme Court clearly stated that Native nations have ownership rights to their lands rather than mere rights of permissive occupation.

When doctrines such as *terra nullius* (the land belongs to no one), the doctrine of discovery, or any legal rule are asserted as the basis or justification for the denial of or limitation on the land ownership rights of Indian and other indigenous peoples, then serious questions are raised whether such doctrines or rules are consistent with the Constitution, especially the constitutional prohibitions on discrimination and the Fifth Amendment protections against takings and denial of due process. These constitutional issues are dealt with more fully in other Principles, particularly Principles Four, Five and Ten.

The first three Principles and this section go only so far as to establish that federal law and international law recognize and protect the ownership rights of Native nations to their aboriginal lands and do not create any substantive right on the part of the United States in those lands.

Tribal Leader Comments

- Participants commented that states have benefitted and continue to benefit from the current system of federal ownership and control of Indian land and Indian sovereignty. States and federal entities are not going to give up these benefits without a fight.
- Education is critical. When elected tribal leaders build personal relationships and educate state and federal officials, it makes a difference.

[1] *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832) make up the three cases in the Marshall Trilogy.

Impact of Principles 1, 2 and 3 on Present Legal Framework

- U.S. law will no longer consider aboriginal ownership a lesser form of title. Native nations have complete ownership of aboriginal lands.
- U.S. law will recognize Native ownership of their land and resources and the limited impact of the discovery doctrine on these rights.
- Existing constitutional obligations to Native nations and people will be reinforced.

Takings of Aboriginal Title Property

Few legal rules have hurt Native nations as much as the unrestricted taking of Native lands. Native nations have lost millions of acres of land simply because the United States wanted it and took it. The law has greatly diminished tribal land bases and undermined tribal economic development.

"The legal rule created by the Tee-Hit-Ton case discriminates against Indian and Alaska Natives by treating their lands held by aboriginal title differently from any other land in the United States."

Principles Four and Five assert that the Fifth Amendment of the Constitution protects all property, including Native property, from taking by the federal government. Under current Supreme Court precedent, however, the U.S. can take Native lands held by aboriginal title without any compensation and without due process of law. Congress has already taken or extinguished nearly all aboriginal title to the lands of Alaska Native nations in the 1971 Alaska Native Claims Settlement Act, all without due process or fair market compensation. The courts today permit such takings and view them as not violating the Fifth Amendment.

Principle 4 – Native lands of all kinds are protected against taking and other harm by the government – just the same as all property is protected. And, in addition, some Native land is protected by other legal rules that have been created by specific treaties, acts of Congress, or common law. In other words, Native lands and resources have at least as much legal protection against taking or other harm as other lands, and sometimes will have additional legal protections as well.

Principle 5 – Congress cannot take any Native lands or resources, including aboriginal title lands, unless it is done with fair compensation, for a public purpose, and in accordance with law.

Up until the mid-twentieth century, courts recognized that Indian and Alaska Native property rights, including their aboriginal title lands, were squarely within the Constitution's provisions that protect property from governmental taking. The Constitution forbids Congress from taking any property without just compensation and due process. Furthermore, U.S. courts have stated that the Constitution protects all property in the United States, whether it is held by Native nations or anyone else.

In the 1950s, the Tee-Hit-Ton clan of Tlingit Indians made a claim against the U.S. seeking compensation for the taking of timber from 350,000 acres of land they held by aboriginal title in Alaska. In that case, *Tee-Hit-Ton v. United States* (1955), the Supreme Court created a new legal rule. The Court stated that the Constitution does not protect Native lands held by aboriginal title. Under this new rule, only Native lands held by *recognized title* are constitutionally protected from governmental taking. (Recognized title lands are Indian and Alaska Native lands recognized as Native lands by the United States in treaties, statutes or executive orders.)

The legal rule created by the *Tee-Hit-Ton* case discriminates against Indian and Alaska Natives by

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Courtesy: Indian Law Resource Center

The Kuskokwim River, near Aniak, Alaska. As a result of the 1955 Tee-Hit-Ton *ruling and the 1971 Alaska Native Claims Settlement Act, Congress has taken or extinguished nearly all aboriginal title to the lands of Alaska, all without due process or fair market compensation.*

1810
Fletcher v. Peck. Chief Justice Marshall uses the term "title" to refer to the Indian right of ownership of their lands and asserts that Indians have all the rights of ownership except for the right to dispose of the land to any other European country.

1823
Johnson v. M'Intosh, the first of the three Supreme Court cases referred to as the Marshall Trilogy. The Court, under Chief Justice John Marshall, rules that Indian tribes cannot convey land to private parties without the consent of the federal government. The Court reasons that European discovery and the establishment of the United States diminished the rights of the tribes to complete sovereignty and also diminished the tribes' power to dispose of their land.

1824
Office of Indian Affairs is established within the War Department.

1830
Indian Removal Act authorizes the president to negotiate with tribes to give up land in the East in exchange for land in the West. This results in the forced removal of most eastern tribes to the West by the U.S. Army. Only small remnants remain in their traditional lands in the East.

1831
Cherokee Nation v. Georgia, the second case in the Marshall Trilogy. The Court finds that the Cherokee Nation is not a "foreign state" but a "domestic dependent nation" and that "their relation to the United States resembles that of a ward to his guardian." Dictum in the case also affirms the validity of treaties with tribes.

1810 1820 1830

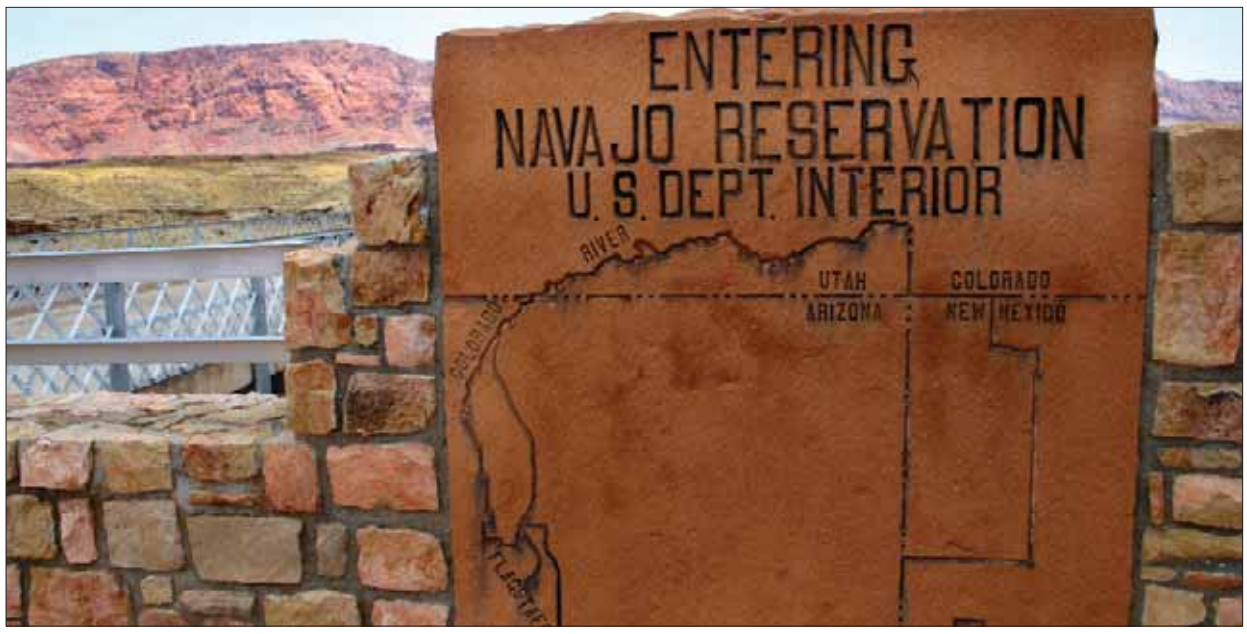
Trusteeship and Trust Title

Principles Six, Seven and Eight deal with the subject of trust title to Native lands and the role of the United States as trustee or supposed trustee. "Trust title" or "trust land" exists when one party (such as the United States) owns land for the use and benefit of another party (a Native nation or individual allotment holder). The United States is called the "trustee" and is said to hold "trust title." The U.S. owns the trust land but must assure that it is used exclusively for the benefit of the nation or individual, called the "beneficiary."

The purpose of these three Principles is to clarify the law about the trust status of Native lands and about the powers and responsibilities of the United States in regard to Native lands and resources held in trust. It is the intent of all three Principles, taken together, to preserve all rights and protections for Native land that now exist, regardless of whether the land is held in trust or not, without the federal controls that presently go along with trust status.

The United States claims to have trust title to 55.7 million acres of Indian land.[1] In our research to identify the origin of U.S. trust title, we have been able to establish an actual legal basis for the United States' claims of trust title to only about 22.4 million acres of the 55.7 million acres it claims to hold in trust. Thus, the trust status of some 33.3 million acres remains in doubt. This startling fact shows the enormous need for a reasonable and just rule for deciding what land is held in trust by the United States.

In our view, it is not legally necessary for land to be held in trust in order for it to be held under the jurisdiction of a Native nation and non-taxable by state and local governments. Treaties and statutes that recognize and guarantee Indian and Alaska Native self-government and self-determination do not depend on the land being in trust status. Tribally owned land on reservations continues to be protected against alienation by the Indian Trade and Intercourse Act whether or not it is held in trust.



Sign depicting the Navajo Nation boundaries. The Navajo Nation fought a 13 year legal battle against the U.S., arguing that the federal government had failed to fulfill its fiduciary duties as trustee of Navajo land. In 2009, the Supreme Court ruling dismissed the Navajo Nation's assertion, claiming the Nation could not "identify a specific, applicable, trust-creating statute or regulation that the Government violated."

Principle 6 – The United States holds trust title to Native land and resources only where the United States has gotten that trust title through some genuine legal process and only where the Native owner consents to the United States holding trust title. In other words, trust lands exist only where the United States has become trustee in a lawful way and only where the Native nation agrees to this.

Principle Six is intended to establish a clear legal rule for determining when the United States holds trust title to Indian or Alaska Native land and resources, and when it does not. This Principle states that Native owned land is not held in trust by the

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Takings of Aboriginal Title Property continued from page 4

treating their lands held by aboriginal title differently from any other land in the United States. Under this rule the U.S. government can take Native lands and resources held by aboriginal title whenever and however it wants. The U.S. government cannot do this to any other group or individual, only Indian and Alaska Native peoples.

The *Tee-Hit-Ton* case continues to influence courts' views of the legal protection of Native lands. Despite its unfairness and devastating consequences, the lower federal courts continue to regard it as good law and regularly apply the decision in new cases.

Tee-Hit-Ton is also out of keeping with the modern trend of the federal courts to expand the kinds of property that are protected by the Constitution against government taking. No matter how Native interests in land are classified—as aboriginal title, recognized title, executive order title or other title—there should be no doubt that under modern law, such interests are constitutionally protected against taking.

Principles Four and Five would change this rule for the future. They state that the United States cannot take Native land without due process and fair compensation. The U.S. must apply the same legal protections to Native lands, including aboriginal title lands, as it applies to property held by other Americans. It is important to note that these Principles would stop future takings without due process and just compensation, but would not change past takings.

Tribal Leader Comments

- Do Indian nations and individuals have rights under the Constitution? Some participants pointed out that Indian people, as a whole, were not made citizens until the 20th century, well after the Constitution and the Bill of Rights were written.
- It is important to highlight that the United States chose to negotiate and make treaties with Indian nations rather than to gain the lands by conquest.
- We must address the idea that Indian nations and peoples only occupied the land. "Occupation" suggests a limitation of power.

Impact of Principles 4 and 5 on Present Legal Framework

- The *Tee-Hit-Ton* rule will be replaced with legal rules that are consistent with federal law, principles of fairness and equality, and international human rights law.
- Court rulings will reflect U.S. laws which recognize Indian and Alaska Native land rights as property rights.
- Indian and Alaska Native property held by aboriginal title must receive at least the same constitutional protections as all other non-Indian owned property in the United States.

1832
Worcester v. Georgia, the third case in the Marshall Trilogy. The Supreme Court holds that state laws do not extend into Indian Country because they are incompatible with treaties, the Constitution and the laws "giving effect to the treaties."

1835
Mitchel v. United States. One of several 19th century court cases confirming that the doctrine of discovery did not give "discovering" nations, or the United States as a successor in interest, title to Native lands and resources.

1838
Trail of Tears takes place. Thousands of Indian people die of starvation, exposure and disease in a forced march from their homelands in the East to Indian Territory (what is now Oklahoma) in the West. Four thousand members of the Cherokee Nation, nearly a quarter of their membership, lose their lives.

1849
The Office of Indian Affairs is placed in the newly established Department of Interior.

Fighting between the Navajo and the U.S. Army result in the incarceration of Navajo on a reservation.

1854
Sioux Wars in the Great Plains begin.

1862
Homestead Act of 1862 is passed, turning over the American public domain to private U.S. citizens.

Congress passes the Pacific Railway Act authorizing the construction of a transcontinental railroad.

The largest mass execution in U.S. history occurs in Mankato, Minnesota. Thirty-eight Dakota are hanged for their participation in the U.S.-Dakota Conflict. Dakota nations are terminated and Dakota people are forcibly removed to reservations in the Dakotas and Nebraska.

1840 1850 1860

Trusteeship and Trust Title continued from page 5

United States unless two conditions are met: (1) The U.S. obtained trust title to the land by some valid legal means, and (2) the Native nation concerned has given its consent in some form. This rule is basically the same as the generally applicable legal rules that would apply to the creation of trust title and trust management of non-Native lands and resources.

Where the two requirements of this Principle are not met, then the United States does *not* have trust title to that Native land, even though it may be located on a recognized reservation. In that case, the land is owned by the Native nation by aboriginal right, or it may be held by recognized title when the Native nation's ownership has been recognized in a treaty or act of Congress.

Whether the land is held in trust or not does not (or should not) determine whether the land is subject to state and local taxation. (This point is covered in Principle Fourteen.) Likewise, there is no necessary connection between the trust status of the land and the governmental authority or jurisdiction of the Native government over that land.

Tribal Leader Comments

- There is broad consensus that "trust" is unacceptable as it currently exists.
- The federal government seems to view all non-fee land on reservations as trust land.
- Treaty relationships should have created something more meaningful; Native nations should reframe the trust relationship and trusteeship to fall under the treaty arena or under international law.

Principle 7 – Unless the United States has genuine trust title, the federal government has no authority as "trustee" to sell, lease, or do anything with Native lands without the consent and authorization of the Native owner.

Principle Seven deals with the powers of the federal government to control or dispose of Indian lands in its claimed or asserted role as holder of trust title *in situations where it does not actually have trust title.* Like Principle Six, this Principle states that the federal government has no power of control nor any power to sell or convey the land unless the tribal government or individual allotment owner genuinely wants the federal government to exercise such powers over their particular lands. Without such consent, the power does not exist and is without legal basis.

This Principle is intended to rule out the occasional practice of the federal government of taking, selling, leasing or otherwise disposing of Native land and resources under the pretext that it is acting as trustee in the best interest of the Native beneficiary. This problem is most severe where the U.S. is not actually or legally the trustee, but nevertheless asserts some role as a so-called trustee.

Accordingly, this Principle makes it unlawful for the United States to take any such action unless it is acting with the consent of the Native land owner. This is based upon ordinary principles of law and basic rules of constitutional law that would ordinarily prevent any such action by the federal government. But, as a practical matter, the operative rule in federal Indian law up to now has been that the United States does have such power; it can do as it wishes with Native land, though in some cases it may be required to pay compensation. This Principle would change that unfair rule.

> ***"The operative rule in federal Indian law up to now has been that the United States . . . can do as it wishes with Native land."***

Tribal Leader Comments

- There is a very real concern about the connection between trust status and tribal jurisdiction over that land. The jurisdiction and sovereignty of Indian nations is often thought to be dependent on the existence of that trust status. How do we hold onto our sovereignty without the trust status?
- A process needs to be defined that allows an Indian nation to reacquire lands that are part of their aboriginal territory, not put that land into trust, and keep those lands under Indian ownership and the jurisdiction of the Indian nation. There is no way to accomplish this under current law.

Principle 8 – Where the United States holds land or other property in trust for a Native nation, no matter how that came about, the United States has all the responsibilities and duties of a trustee that are required by law generally, without exceptions or limitations that reduce the government's responsibilities or duties.

Principle Eight strengthens and clarifies the legal duties that the United States has where it holds land or other property in trust for Native nations or individuals. The phrase, "holds property in trust," means that the United States holds validly created trust title to the property or otherwise controls the property pursuant to lawful authority.

This would include, among other things, lands held in trust pursuant to the Indian Reorganization Act, lands placed in trust by treaties, federal lands placed in trust for the benefit of tribes or individuals, and situations in which actual federal control or management makes the United States legally responsible for acting as a trustee. This Principle covers not only land but also all resources pertaining to the land, including water. Where statutes or treaties impose specific obligations on the United States, this rule is not intended to limit or change those duties.

Principle Eight simply states the government must not act in its role as trustee in a manner that would harm the interests of the Native beneficiary. The United States faces conflicts of interest in its role as a trustee for Indian nations and individuals, and it is not clear how all these potential conflicts should be resolved. It is clear, however, that they must not be resolved by the United States acting against the interests of the Native beneficiary.

Tribal Leader Comments

- There was some consensus to rewrite Principle Eight to more clearly and more strongly state that the U.S. has the full obligation that any trustee has to protect the trust assets against theft and to defend the trust assets when they are under attack.
- Participants argued that trust obligations are inherent federal functions and, as such, the obligations of the trustee cannot be waived or delegated to the tribe through self- governance contracts or other contracting processes. The federal government can't just pass the buck back to the tribe.

[1] This statistic comes from the Bureau of Indian Affairs (BIA) web site in 2007 and was cited by ILRC in the Draft General Principles. According to a 2009 BIA report, there are currently 55.5 million surface acres of land held in trust and an additional 12.3 million acres of subsurface-only. Taken together, the total reported trust lands are 67.8 million acres.

Impact of Principles 6, 7 and 8 on Present Legal Framework

- Some Native-owned reservation land that is now regarded by the federal government as held by trust title would be owned wholly by the Native nation, giving Native nations the option of either assuming full ownership of such lands or of taking steps to create a legal trust regarding such lands.
- If the trusteeship and the trust powers were not created with genuine consent of the Native owner, they could be open to legal challenge by the Native nation and perhaps in some cases by individual allottees.
- The United States would have all the fundamental obligations of a trustee wherever the federal government has actual possession or control of Indian or Alaska Native property.
- Present rules that permit outright conflicts of interest by the United States as trustee and that occasionally fail to impose trust duties on the United States would be eliminated.

1868
Various Sioux Tribes sign the Fort Laramie Treaty which concentrated the Sioux on the Great Sioux Reservation.

1871
Congress approves a rider to an Indian appropriations act which provides that the U.S. will no longer make treaties with Indian tribes, but that obligations under existing treaties are protected. The rider is introduced by Representative Henry Dawes.

1876
Battle of Little Bighorn occurs and Sioux warriors wipe out Custer and 250 U.S. soldiers. As a result, the U.S. government confiscates the Black Hills and much of the unceded territory set aside in the Fort Laramie Treaty.

1877
During the Nez Perce War, Chief Joseph, pursued by the U.S. Army, leads his people on a 1,800 mile flight from their homelands. Upon surrender, Chief Joseph delivers his famous quote: "I will fight no more forever."

1883
Ex Parte Crow Dog. The Supreme Court rules that the murder of one Indian by another within Indian Country is not a criminal offense punishable by the United States. Indian tribes in their territory are free of regulation by other sovereign governments absent explicit direction from Congress.

1885
In response to Crow Dog case, Congress passes the Major Crimes Act, extending federal criminal jurisdiction over major crimes to Indian Country.

1870 1880

Treaties with Indian Nations

The United States Constitution says that treaties, along with other federal laws, are "the Supreme Law of the Land." Even so, the United States does not fully honor its treaties with Indian nations, has often breached its treaty obligations, and has failed to provide adequate redress for its treaty violations.

This Principle addresses the problems Indian nations face in trying to enforce their treaties. It states that the federal government is bound by the Constitution to meet its treaty obligations to Indian nations and must provide a just remedy to the Indian nation when it fails to do so.

Principle 9 – The United States cannot freely violate treaties without providing full redress for the Indian parties, including compensation, restitution, or other appropriate, just remedy.

Long before adoption of the Constitution and the creation of the United States as an independent country, European nations and their American colonies entered into treaties with Indian nations. When the U.S. became an independent country, it continued this practice of recognizing Indian nations as separate sovereigns and establishing formal relationships with them through treaties.

> ***"Because treaties are agreements between two parties, the modification or cancellation of a treaty by one party alone does not affect the validity of the treaty."***

Treaty-making was the cornerstone of U.S. Indian policy until 1871 when Congress unilaterally ended the practice. Despite the formal end to treaty-making, previously made treaties remained legally valid and are the basis of the relationship between many tribes and the federal government today.

Federal courts have developed various rules for interpreting Indian treaties. For example, the reserved rights doctrine states that any rights not expressly granted to the federal government in a treaty or taken away by a valid act of Congress are considered to still be held by—or reserved to—the Native nation.

Another rule of treaty interpretation is that Indian treaties are to be interpreted as the Indians would have understood them. Any unclear treaty provision should be resolved in the Indians' favor. Similarly, the clear statement rule states that Congress may only modify or cancel a treaty when it acts clearly and unambiguously. This means that courts will make every effort to read legislation to comply with U.S. treaty obligations rather than to breach or modify those obligations.

Some legal rules tend to diminish treaty obligations. For example, the last in time rule states that treaties, like any other federal law, can be modified or cancelled by later acts of Congress. Principle Nine would clarify and somewhat alter this rule. Because treaties are agreements between two parties, the modification or cancellation of a treaty by one party alone does not affect the validity of the treaty.

Federal and state sovereign immunity are barriers that must be waived in order for Indian nations to bring suits against those governments to enforce treaty rights. Additionally, U.S. law requires that a person have a right of action in order to bring a lawsuit for violation of their rights. Indian treaties usually do not create a right of action, particularly when the suit is against a state, county or city.

Other barriers include equitable doctrines such as *laches* (used to prevent one party from waiting too long to bring its claim) and *acquiescence* (used to prevent a party from filing a suit about an action if the party knowingly went along with and allowed the action without protest when it occurred). These rules are used to prevent Indian nations from enforcing treaty rights in federal courts.

Principle Nine suggests that these obstacles to treaty enforcement should be reconsidered in light of federal and international law, which require the United States to fulfill its treaty obligations, interpret treaties in the light most favorable to Indian nations, and provide some sort of just remedy when treaty rights are violated. The failure of the U.S. to fulfill its treaty obligations does not diminish those obligations. Those obligations continue to exist and the United States must provide a just remedy when it violates treaty provisions.

Courtesy: National Archives and Records Administration

Treaty signing by William T. Sherman and the Sioux at Fort Laramie, Wyoming, 1868. The treaty guaranteed the Lakota ownership of the Black Hills and further land and hunting rights in South Dakota, Wyoming and Montana. In 1877, the U.S. government violated the treaty agreement and seized control of the Black Hills. In United States v. Sioux Nation of Indians *(1980), the Supreme Court upheld an award of $106 million to the Sioux Nation for the taken land. The Great Sioux Nation, which has never willingly relinquished title to the land, has refused a monetary settlement.*

Tribal Leader Comments

- Redress should not be limited to monetary damages; land isn't money.
- Recommendation to add a provision that requires the federal government to act on behalf of Native nations in order to overcome state sovereign immunity.

Impact of Principle 9 on Present Legal Framework

- Congress could only modify or cancel a treaty with the consent of the Native nation.
- Federal and state sovereign immunity would be waived in order for Indian nations to bring suits against those governments to enforce treaty rights.
- Equitable doctrines such as *laches* and *acquiescence* would be modified where they prevent Indian nations from enforcing treaty rights and seeking redress in federal courts.

1886
United States v. Kagama. The Supreme Court upholds Congress' authority to pass the Major Crimes Act, holding that the U.S. federal government has "plenary power" or supreme, absolute control over Indians.

1887
General Allotment Act (or Dawes Act), introduced by Senator Henry Dawes, is passed. The single most destructive piece of legislation aimed at Native land, the act and its subsequent amendments create the general framework for removing reservation land from communal tribal ownership and allotting parcels to individual members, which can eventually be alienated to non-Indians after expiration or termination of a 25 year period. Reservation land that exceeds the amount needed for individual allotment is considered surplus, taken out of tribal ownership and is opened to general homesteading by non-Natives. This forms the basis for modern land trust status, fractionated land title, checkerboard land ownership and ongoing land loss.

1890
U.S. Army kills nearly 300 Indian men, women and children at Wounded Knee.

1891
Congress permits the leasing of individual Indian allotments by non-Natives wherever the Secretary of the Interior finds that the allottee, "by reason of age or disability" cannot "personally and with benefit to himself occupy or improve his allotment or any part thereof."

1903
Lone Wolf v. Hitchcock. The "plenary power" of Congress over Indian people is further asserted. The Court rules that treaties may be unilaterally breached or modified by Congress. The Court also restricted its review of political acts of Congress affecting the federal trust responsibility to Indians.

1890 1900

Draft General Principles of Law

Relating to Native Lands and Natural Resources

These 17 Draft General Principles of Law were developed by the Indian Law Resource Center (ILRC) as a part of its Native Land Law Project, which received major support from the Indian Land Tenure Foundation (ILTF). Both ILRC and ILTF believe that the current federal law dealing with Native lands is unfair and unworkable, making it nearly impossible for Indian people to find justice in the present legal system in respect to their lands. These Principles are an effort to state the basic elements of a framework of law about Native lands that would be fair, workable and in keeping with American concepts of justice and the rule of law.

ILRC has worked with tribal leaders, legal experts and Indian law scholars representing many points of view in the development of these Principles. We hope that the Principles will, in their present form, provide a starting point for discussion and debate about making meaningful changes to the law. In order to encourage input from all key stakeholders, ILRC has created two separate versions of each Principle: one version, written with lawyers and legal scholars in mind, uses technical language specific to the legal field; the other version states the Principle in a non-technical language, making it more accessible to non-lawyers and a general audience. We have included both the non-technical and technical versions of each Principle below.

Principle 1

Non-Technical Version: Native nations have complete ownership of their aboriginal lands - not some limited or partial right.

Technical Version: The legal rights of Indian or Alaska Native nations to the lands and resources they own by reason of aboriginal ownership, use, and occupancy are the full rights of ownership, management, control, and disposition recognized in law without any diminishment or discrimination based on the aboriginal origin of these rights.

Principle 2

Non-Technical Version: "Discovery" did not give the discovering country any ownership of Native lands. It only gave the discovering country the exclusive right to buy the land from the Native owners.

Technical Version: The doctrine of discovery gave the "discovering" nation particular rights under international law as against other European or colonizing nations, namely the exclusive right to acquire land and resources from the Native or indigenous nations. The "doctrine of discovery" gave the "discovering" nation no legal right as against the Native nations or peoples.

Principle 3

Non-Technical Version: Legal rules that deny, take away, or reduce Native ownership of their lands and resources are invalid, because they violate the United States Constitution.

Technical Version: Legal doctrines such as *terra nullius*, the doctrine of discovery, and other such doctrines are inconsistent with the United States Constitution to the extent that they are mistakenly applied to diminish or impair the rights that Indian and Alaska Native nations hold with respect to their lands and resources.

Principle 4

Non-Technical Version: Native lands of all kinds are protected against taking and other harm by the government - just the same as all property is protected. And, in addition, some Native land is protected by other legal rules that have been created by specific treaties, acts of Congress, or common law. In other words, Native lands and resources have at least as much legal protection against taking or other harm as other lands, and sometimes will have additional legal protections as well.

Technical Version: The ownership of land and natural resources, including rights of use and occupancy, of Indian and Alaska Native nations and individuals, including interests in lands and resources held by aboriginal title, is entitled to the same constitutional protections as the ownership and other interests of others in their respective lands and resources, and in addition Indian and Alaska Native nations and individuals may have other rights and legal protections arising from treaties, statutes, and other sources of law.

Principle 5

Non-Technical Version: Congress cannot take any Native lands or resources, including aboriginal title lands, unless it is done with fair compensation, for a public purpose, and in accordance with law.

Technical Version: Congress, by reason of the Fifth Amendment to the Constitution, may not take the property of Indian or Alaska Native nations and individuals, including aboriginal property, except for a public purpose, with due process of law, and fair market compensation with interest.

Principle 6

Non-Technical Version: The United States holds trust title to Native land and resources only where the United States has gotten that trust title through some genuine legal process and only where the Native owner consents to the United States holding trust title. In other words, trust lands exist only where the United States has become trustee in a lawful way and only where the Native nation agrees to this.

Technical Version: The United States has trust title to land owned or beneficially owned by a Native nation or individual only if the United States has acquired that title through a valid legal process, such as a treaty, agreement, or statute, and only if that trust title had or has the consent of all the Native nations or individuals concerned.

Principle 7

Non-Technical Version: Unless the United States has genuine trust title, the federal government has no authority as "trustee" to sell, lease, or do anything with Native lands without the consent and authorization of the Native owner.

Technical Version: The federal government has no power as a putative or supposed trustee to control or dispose of lands owned by an Indian or Alaska Native nation, or individual unless the United States acts with the express, free, prior, and informed consent of the Indian or Alaska Native nation or individual concerned.

Principle 8

Non-Technical Version: Where the United States holds land or other property in trust for a Native nation, no matter how that came about, the United States has all the responsibilities and duties of a trustee that are required by law generally, without exceptions or limitations that reduce the government's responsibilities or duties.

Technical Version: Where the United States holds property in trust for an Indian or Alaska Native nation or individual, or where the United States has, by reason of events or circumstances of whatever nature, assumed control or possession of lands or resources belonging to or beneficially owned by an Indian or Alaska Native nation or individual, the United States has all the responsibilities of a trustee as prescribed by law generally applicable to trustees or constructive trustees: including but not limited to the obligation to conserve the trust assets, to manage the assets for the benefit of the beneficiary, the obligation to account to the beneficiary, the obligation to avoid every conflict of interest, and the obligation to end the trusteeship and return the trust asset to the beneficiary when so required by the beneficiary.

Principle 9

Non-Technical Version: The Unites States cannot freely violate treaties without providing full redress for the Indian parties, including compensation, restitution, or other appropriate, just remedy.

Technical Version: A treaty with an Indian nation is a treaty within the meaning of the United States Constitution, the violation of which gives rise to liability and the right to redress.

Principle 10

Non-Technical Version: The United States Congress does not have "plenary" or unlimited power to enact laws dealing with Native nations and their property. Instead, Congress has only those powers that are stated in the Constitution, and those powers must be used within the limits set out in the Constitution – especially those in the Bill of Rights.

Technical Version: Congress has only such powers in the field of Indian affairs – particularly with respect to Indian and Alaska Native lands and resources – as are conferred by the United States Constitution. The Constitution does not accord Congress "plenary power" – in the sense of additional or unlimited powers – over Indian and Alaska Native nations and their property.

Principle 11

Non-Technical Version: Native nations have the inherent or sovereign power to create their own governments and laws for all purposes, including for the purpose of using and controlling their lands and resources.

Technical Version: Indian and Alaska Native nations have the inherent right to form, maintain, and change their own governments and to create, maintain, and alter their own laws and legal institutions for the purpose, among others, of governing their own affairs and particularly for controlling, using, and managing their own lands and resources.

Principle 12

Non-Technical Version: Native nations have the right to use, control, and benefit from their lands and resources without interference by the federal government that is not authorized by the Constitution or by the Native government itself.

Technical Version: Native governments have the right to freely use, exploit, manage, and regulate lands and resources owned or beneficially owned by the nation, and they have governmental authority over allotted lands owned by Indian or Native persons within the reservation or subject to the jurisdiction of the Native government.

Principle 13

Non-Technical Version: Congress cannot terminate any Native nation.

Technical Version: Congress has no power under the Constitution or otherwise, with respect to any Indian or Alaska Native nation, to terminate its legal existence or to terminate its legal rights and status as a nation without the free, prior, and informed consent of that nation.

Principle 14

Non-Technical Version: Native lands and resources cannot be taxed by any government, no matter whether the land is held in trust or otherwise.

Technical Version: Land and other property owned by an Indian or Alaska Native nation in its sovereign capacity as a government is not taxable by any state or local government, whether or not that land is held in trust, in fee, or in any other form of tenure.

Principle 15

Non-Technical Version: The United States must respect and abide by international law, especially international human rights law concerning indigenous peoples.

Technical Version: The United States is bound by international law to respect the human rights and other rights of Indians and Alaska Natives both as individuals and peoples.

Principle 16

Non-Technical Version: The United States must make it possible for Native nations and individuals to go to court and get relief, or some kind of corrective action or compensation whenever they suffer harm concerning their lands and resources or any other violation of their rights. These court remedies must be fair and effective.

Technical Version: The United States must provide prompt and effective judicial remedies for the violation of the rights of Indian and Alaska Native nations, and individuals in relation to their lands and resources. Such remedies must be non-discriminatory and otherwise consistent with the United States Constitution, applicable treaties, and generally accepted principles of fairness and due process of law.

Principle 17

Non-Technical Version: The United States has the duty to protect Native lands and resources by preventing abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals.

Technical Version: The United States has a legal obligation to prevent abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals in relation to their lands and resources through the enactment and enforcement of reasonable legislation. This obligation of the federal government must be discharged in conformity with applicable treaties, the United States Constitution, international human rights principles, and these Principles.

Background image:

The background image is a parfleche, a painted, rawhide container or envelope used by Plains Indians to safely transport dried food, clothing, ceremonial items and important documents.

The Plenary Power Doctrine

Congressional power over Indian and Alaska Native nations and their property is often described as "plenary," meaning "full" or almost unlimited. Courts have used this idea of plenary congressional power over Indians and Alaska Natives and their property to approve a wide range of sweeping acts of Congress that affect Native nations and that control or take Native lands and resources.

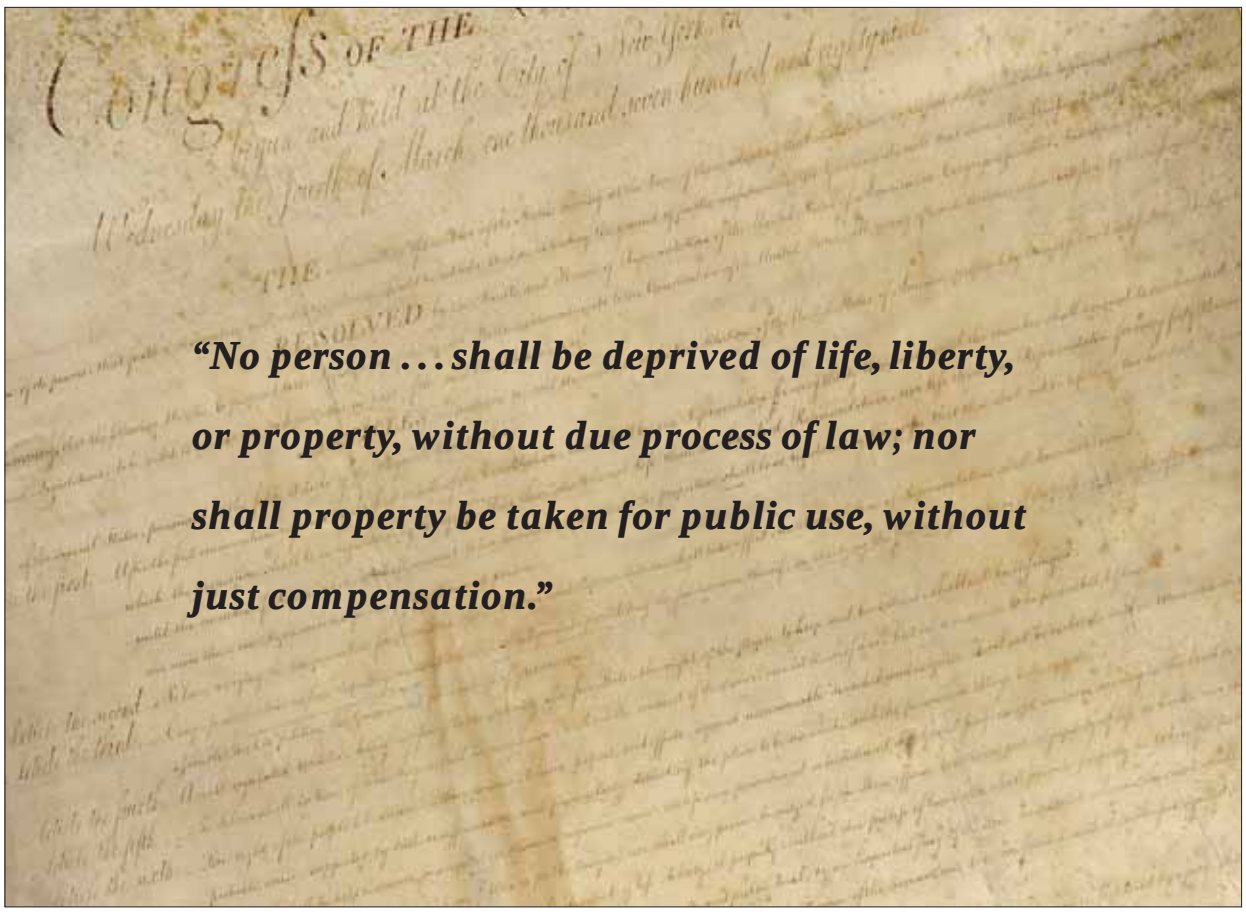
The Supreme Court's use of the plenary power doctrine to suggest that Congress has almost unlimited powers over Native nations is inconsistent with generally accepted constitutional principles, constitutional law, and early decisional law. Nevertheless, federal administrators and many courts act as if there were no actual or meaningful legal limits on congressional power over Native nations and their property.

Principle 10 – The United States Congress does not have "plenary" or unlimited power to enact laws dealing with Native nations and their property. Instead, Congress has only those powers that are stated in the Constitution, and those powers must be used within the limits set out in the Constitution – especially those in the Bill of Rights.

This Principle states that congressional power over Indian and Alaska Native nations, their lands, resources and other property is limited to those powers listed in the Constitution. The Constitution does not give Congress "plenary power" in the sense of unlimited authority over Native nations. Rather, the exercise of such power by any branch of the United States government violates fundamental principles of the Constitution.

> ***"Federal administrators and many courts act as if there were no actual or meaningful legal limits on congressional power over Native nations and their property."***

The Constitution establishes a government of limited authority. In its earliest decisions, the Supreme Court affirmed that the federal government's powers are limited to those listed in the Constitution. This rule remains the law today, but courts have ignored it when it comes to Indian people and Native nations.



An excerpt from The Fifth Amendment to the Constitution. The United States Bill of Rights, which includes the first ten amendments to the Constitution, was signed into law in 1791. The Fifth Amendment has particular importance for Indian nations.

Today, Congress exercises very broad but undefined powers over Native nations. The Supreme Court has used the plenary power doctrine to justify this congressional power. For example, it has upheld laws extending federal criminal jurisdiction over Indian lands, limiting Native nations' criminal and civil jurisdiction, permitting federal control of liquor on Indian lands, changing reservation boundaries without Indian consent or compensation, and abrogating treaties.

While the Supreme Court has approved of very broad congressional authority over Indian and Alaska Native nations, this power is not absolute. Constitutional limitations, including the Fifth Amendment takings clause, the due process clause, and the equal protection component of the Fifth Amendment, apply to congressional exercises of power over Native nations. Treaties, the trust doctrine and international law may also limit congressional power. Despite these limitations, the Supreme Court has sustained nearly every piece of federal legislation it has considered directly regulating Indian nations.

International law has evolved in recent years to embrace human rights principles for indigenous people that would rule out the sort of unlimited power asserted by Congress and the Supreme Court. The plenary power claimed by the U.S. over Native nations under federal law today is inconsistent with human rights law, particularly the U.N. Declaration on the Rights of Indigenous Peoples. For example, the Declaration states that Indian nations have "the right to autonomy or self-government in matters relating to their internal and local affairs."

The notion that Congress possesses unlimited power over Indian nations violates the Constitution, past Supreme Court decisions and international law. Courts should reject this unjustifiable assertion of congressional authority over Indian and Alaska Native nations.

Tribal Leader Comments

- The concept of plenary power is inconsistent with treaties and agreements Native nations have with the U.S. Native nations reserved the right to govern within their territories, to maintain customs/traditions and so forth.
- Participants expressed the need for more clarity on the relationship between the trust relationship and federal plenary power. If plenary power is removed, how does this affect the trust relationship?

Impact of Principle 10 on Present Legal Framework

- Congressional powers will be limited to those that are clearly stated in the Constitution.

1906
Burke Act is passed, which allows the Secretary of the Interior to administer Indian trust property. This also allows the Secretary to take this property out of trust for allottees who applied for fee patents and for those landowners deemed competent by the local Indian superintendent. Twenty-seven million acres of allotted land were lost to "sale" by 1934.

Goudy v. Meath. Upholds ad valorem taxes on Indian lands once the lands become alienable. (An "ad valorem" tax is a tax based on the value of real estate or personal property.)

1916
Policy of issuing fee patents to allottees without application begins. The Department of the Interior establishes "competency commissions" to visit reservations and issue fee patents to landowners without their knowledge or consent. Competency Commission members travel to settlements of allotted Indians making house to house visits to determine the competency of Indian householders. Determination of competency is based on an Indian person's ability to cope in a white man's world. Visits last less than 15 minutes.

1917
Commissioner of Indian Affairs issues a Declaration of Policy under which Indians determined to be "able-bodied, adult (and) of less than one-half Indian blood" are presumed competent. In 1919, the presumption of competence is expanded to include Indians "of one-half Indian blood."

1924
Indian Citizenship Act is passed, declaring all non-citizen Indians born within American territorial limits to be United States citizens.

1910 1920

Self-Determination

The purpose of Principles Eleven and Twelve is to clarify and improve the federal law concerning the rights of Indian and Alaska Native nations to form their own Native governments, laws and institutions for the purpose of using, managing and governing their lands and resources.

In order for Native nations to enjoy the rights and benefits of owning their lands and natural resources, federal law must assure that Native nations have the legal right to exist as self-governing entities, as well as the right to establish their own governments and laws and to be governed by them. Principle Eleven addresses this fundamental right of self-determination, a right that has always been recognized in federal law.

Native governments must also have the legal power and freedom to *exercise* or *use* their rights of ownership and governance in regard to their lands and resources. They must be able to use, control and govern their lands and resources without interference by others. Principle Twelve affirms that Native nations have the freedom to manage, use and benefit from their lands without many of the federal limitations and restrictions that now exist.

These Principles must be read together with Principle Ten concerning the so-called plenary power of Congress. The power of the federal government to limit or interfere with Native governments' ownership of their lands is limited by the Constitution to those powers listed in it. Even when exercising these constitutional powers, the federal government is restrained by the Fifth Amendment of the Constitution from undue interference with property rights.

Principle 11 – Native nations have the inherent or sovereign power to create their own governments and laws for all purposes, including for the purpose of using and controlling their lands and resources.

Indian and Alaska Native nations have an inherent right of self-government. This right is an essential part of the existence of a people; it is not created by or based on either federal law or international law. Indian nations have formed their own governments, followed their own legal traditions, and created their own dispute resolution systems for centuries. Indian nations were self-governing nations long before European contact and before formation of the United States.

Throughout U.S. history both federal law and international law have recognized that Native nations are sovereign peoples with the inherent right of self-government. Federal legal recognition of this sovereign status was shown in the many treaties entered into by the United States with Indian nations. Treaties governed the relations between Indian nations and the United States both before and for almost a hundred years after adoption of the Constitution.

These treaties were actually or at least in principle entered into with the approval and consent of the Indian nations that were parties to the treaties. The supposed rule that Congress has power to limit or eliminate the power of Native self-determination is contrary to the terms and spirit of most of these treaties. Treaties presuppose and affirm the right and authority of the Indian government to enter into nation-to-nation treaties and to make such agreements as are contained in each treaty.

International law today continues to be the most important and relevant body of legal rules concerning self-determination of distinct peoples such as indigenous peoples. Because the Constitution is silent on the matter of self-determination of indigenous peoples and because Native nations did not in general consent to nor play any role in the adoption of the Constitution, it is international law that can best provide a principled and independent source of law on this subject. Many articles of the U.N. Declaration on the Rights of Indigenous Peoples recognize rights closely related to self-determination and self-government including the right to "their own indigenous decision-making institutions; the obligation of states to consult and cooperate with indigenous peoples through their own representative institutions; the right of indigenous peoples to their political, economic and social institutions; and the right to institutional structures, customs and judicial systems," just to name a few.

Native nations have an inherent right of self-determination that has long been recognized by federal and international law. They have governmental authority over their citizens and lands, and should freely exercise this authority. U.S. courts have mistakenly asserted that Congress has unlimited power to restrict or eliminate Indian and Alaska Native nations' inherent right of self-determination. This assertion is contrary to the rule of law, the Constitution, international law and federal law generally and should be abandoned as a principle of law.

Tribal Leader Comments

- Both jurisdiction and title are important.
- Does self-governance affect a transfer of trust responsibility from the federal government to the tribe?
- Indian nations have an obligation to provide effective governance that serves their Native citizens.

Principle 12 – Native nations have the right to use, control, and benefit from their lands and resources without interference by the federal government that is not authorized by the Constitution or by the Native government itself.

The purpose of Principle Twelve is to increase and protect the freedom of Native governments to use and benefit from their lands and natural resources. This Principle states that Indian and Alaska Native nations have the right to use, manage and regulate land and resources owned by the nation and that they also have governmental authority, that is, law making authority, over Native owned allotted lands within their territory. The ability of Native nations to exercise their land rights and to use their lands effectively is essential to the well-being and development of Native communities.

> ***"Native nations have an inherent right of self-determination that has long been recognized by federal and international law."***

As a general rule, the U.S. government has always recognized the rights of Native governments to use, manage and regulate their lands. Specifically, Native governments have authority to enforce their ownership rights, to exclude people from their property, and to zone Native lands within their reservations. Native governments control the distribution of Native land, and have authority over individual use of the Native nation's property. Native nations also have authority over hunting, fishing and gathering on Native lands, and can regulate the exercise of those rights by members and non-members under federal law. Further, federal laws state that Indian nations are the primary environmental regulators on their lands.

However, many acts of Congress and federal regulations give federal officials extensive authority over the use and management of Native lands. Some of these statutes authorize the Secretary of the Interior to negotiate and approve leases of Native lands or grant rights of way over Indian lands. Others require secretarial approval for tribal land management plans and the implementation of these plans. The Secretary also has authority over individual Indian allotments held in trust or restricted status. Among other things, the Secretary of the Interior decides when to remove restrictions, approves all mortgages and deeds, regulates leasing and determines the legal heirs to individual allotments held in trust or restricted status. Some court decisions

Continued on page 12

1928
The Merriam Report is released. The report, which was funded by the federal government, details the destructiveness of federal Indian policy and spurs changes within the federal administration of Indian Affairs.

1934
Indian Reorganization Act is passed. This act repeals the General Allotment Act and enables tribes to voluntarily organize and adopt federally approved constitutions and bylaws.

1946
From 1946 to 1978, the Indian Claims Commission, using an adversarial court process, hears land claims brought by tribes for wrongful dispossession of their lands. Tribes press 484 claims and win 58 percent of them. The commission provides remedies of cash payment rather than land transfers.

1953
Public Law 280 is passed, transferring civil and criminal jurisdiction over Indian lands to state governments in six states.

The policy of tribal termination begins with the passage of House Concurrent Resolution 108, setting up the process whereby a tribe's political status can be dissolved, tribal lands can be taken out of trust and sold to non-natives, and state law is imposed on former tribal members. From 1953 to 1970, 13,263 Indians lost their tribal identity and 1,365,801 acres of land are lost.

1955
Tee-Hit-Ton v. United States. The Supreme Court holds that aboriginal title "is not a property right but amounts to a right of occupancy which the sovereign grants and … may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

Self-Determination continued from page 11

have even asserted that Congress can exercise unlimited authority or "plenary power" to limit the right of Native nations to their own lands.

This Principle is intended to respect Congress' limited authority under the Constitution, so long as it does not violate Indian treaties or human rights standards. The Constitution authorizes Congress only to regulate commerce with Indian nations. A statute restricting a Native nation's rights or powers to use, manage and control its own lands is constitutionally valid *only* if it is within Congress' powers—either the Indian commerce clause or its other enumerated powers.

Despite broad legal recognition of the right of Native nations to freely use, manage and regulate their lands, several barriers exist to the exercise of the right by Native nations. This Principle requires that these barriers be revisited and revised, because the Constitution and international law greatly limit the authority of the United States to interfere with these rights. To meet its constitutional and international legal obligations, the U.S. should take appropriate measures to respect, ensure and protect the right of Indian and Alaska Native governments to freely use, manage and regulate their lands and resources.

These two Principles are not intended to suggest that Native governments have rights of governance or ownership that are absolute or unlimited. Native governments, like all governments in the world, must respect the human rights of all persons and must exercise their rights with respect for the rights of others. Any limits on Native ownership rights must be consistent with treaty provisions, the Constitution, international human rights law and general principles of justice and fairness.

Tribal Leader Comments

- Need to clarify how this Principle and others focused on the self-determination of Indian nations may conflict with Principle Seventeen about U.S. duty to protect.
- Need to get the federal government removed from the approval process so individuals do not need to get BIA approval for every lease.

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Badlands National Park, South Dakota. Land within the Pine Ridge Reservation boundaries was taken by the U.S. government to establish a practice bombing range during WWII. That land was subsequently managed as part of the Badlands National Park. The Oglala Sioux Tribe, asserting its right to self-determination, is working with the National Park Service on a proposal to return control of the Park's South Unit to the Tribe.

Impact of Principles 11 and 12 on Present Legal Framework

- The assertion that Congress has unlimited power to restrict or eliminate Indian and Alaska Native nation's inherent right of self-determination is contrary to the rule of law, the Constitution, international law and federal law generally and should be abandoned as a principle of law.
- Limits on ownership rights for Native nations and individuals to freely use, manage and regulate their lands and resources must be made consistent with treaty provisions, the Constitution, international human rights law and general principles of justice and fairness.

Termination

Termination occurs when the federal government takes action to end the legal existence of an Indian or Alaska Native nation and to end the government-to-government relationship between a Native nation and the federal government. The United States adopted a formal policy of termination in 1953. Between 1954 and 1962, Congress terminated 109 Indian nations in eight states. The reasons for termination were varied, ranging from the desire to assimilate Indians into mainstream society to reducing federal spending on Indian nations.

Termination statutes typically abolished the legal relationship between Indian nations and the federal government. In most instances these acts caused the "terminated" tribes to actually cease to exist, resulting in the Indian nation no longer having a recognized land base over which to exercise governmental authority. It has been estimated that termination acts dispossessed Indian nations of nearly 1.4 million acres of land.

In 1988, Congress officially repudiated the termination policy and began enacting legislation to restore some but not all terminated tribes to federal status. Despite the restoring of federal recognition, these restoration acts did little if anything to correct the poverty, social problems and hardship that the original termination acts caused. For example, the repeal of the termination of the Wyandotte, Ottawa, and Peoria Indian Tribes of Oklahoma restored their status as Indian nations under federal law, but it did not re-establish their reservations or return any of the lands lost following termination.

Although termination is no longer the official policy of the federal government, many federal officials and judges still believe that Congress has the power to terminate Indian nations. Even today, termination bills are introduced in Congress, often following Indian successes in the courts. It is very likely that the threat of termination, under the mistaken view that Congress has such power, has a chilling effect on the exercise of Native rights.

Principle 13 – Congress cannot terminate any Native nation.

This Principle makes it clear that Congress does not have the power to terminate an Indian or Alaska Native nation without the free, prior and informed consent of the Native nation. According to this Principle, Congress cannot terminate the legal status of a tribe without its permission, because doing so would violate the Constitution and human rights recognized in international law.

Original principles of federal Indian law deny that Congress has any power to abolish Indian nations.

Continued on page 13

1956
Relocation Act is passed, encouraging Indians to move to urban areas.

1968
Indian Civil Rights Act is passed.

1969
Indian activists occupy Alcatraz Island. This event draws attention to radical Indian activism known as the Red Power Movement.

1970
The policy of termination of Indian tribes ends. President Nixon delivers a speech to Congress on Indian Affairs, indicating the importance of genuine Indian self-determination and empowerment. Congress does not officially repudiate the termination policy until 1988.

1971
Alaska Native Claims Settlement Act is passed, creating Alaskan tribal corporations who own and manage 44 million acres of land.

1973
Members of the American Indian Movement become involved in 10-week standoff with federal law enforcement agents on the Pine Ridge Reservation. This violent siege becomes known as "Wounded Knee II." Indian activists occupy the BIA building in Washington D.C.

1975
Indian Self-Determination and Education Act is passed. The act recognizes the right of Indian tribes to self-government, stating that "as domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory."

1960 1970

Termination continued from page 12

Indian nations existed as sovereign governments long before the creation of the United States. Further, as discussed in Principle Ten, Congress lacks unlimited "plenary power" to terminate tribes.

> ***"If Congress' power to recognize Indian tribes cannot be arbitrary, then by the same logic its power to terminate federal protections for Indian tribes must not be arbitrary."***

The right of Indian nations to exist finds substantial protection in federal common law, which is the law that develops out of court decisions. In general, Congress has the power to decide which Indian tribes will be "federally recognized." However, the Supreme Court has ruled that this power cannot be exercised in an arbitrary or random manner. It must be done only according to duly adopted laws or regulations. If Congress' power to recognize Indian tribes cannot be arbitrary, then by the same logic its power to terminate federal protections for Indian tribes must not be arbitrary.

A few lower federal courts have gone even further in recognizing the right of Indian nations to exist. For example, in the 1970s, a federal court stated that the Mashpee were a tribe unless they had intentionally and voluntarily ended their relationship with the federal government. This case suggests that tribal consent is required in order for courts to find that a tribe's federal status has been terminated.

The right of Indian nations to exist is a right that should receive constitutional protections, particularly for those Indian nations with treaty or statutory rights to self-government. The right of self-determination is almost always tied to Native rights to land and other resources. The right of Native nations to self-determination and to related property rights is so deeply a part of federal *statutory* law that these rights can plausibly be regarded as vested for purposes of constitutional protection. That is, they are rights that can no longer be taken away by the federal government except under very limited conditions.

To sum up, termination of Native nations is inconsistent with the Constitution and international human rights law. Yet many people mistakenly believe that Congress has the power to unilaterally terminate tribes. Under this Principle, Congress cannot terminate tribes without their free, prior, informed consent.

Tribal Leader Comments:

- There is fear in Indian Country about the federal government terminating Indian nations and a misguided belief that the trust relationship and trust status of Indian lands keeps that possibility of termination at bay.
- An opposing opinion is that when the federal government holds title to the lands, trust title, it is much easier to exercise plenary power, terminating the tribe and taking the lands or its resources. The trust situation is far from ideal for Indian nations.

Impact of Principle 13 on Present Legal Framework

- Congress cannot terminate tribes without their free, prior, informed consent.

State Taxation of Indian Lands

Current law allows the state to tax the land of Indian nations or individual Indians owned within reservation boundaries if that land is owned in fee simple title. This Principle calls for a change in the current law by declaring that state and local governments cannot tax tribally owned Indian or Alaska Native land, regardless of whether the land is held in trust or in fee. Although this would be a substantial change in the current law, it is consistent with early case law, congressional policy and general principles of fairness.

Principle 14 – Native lands and resources cannot be taxed by any government, no matter whether the land is held in trust or otherwise.

Historically, Indian nations were regarded as separate sovereign entities and not subject to state laws. The drafters of the Constitution limited state authority over Indian nations and their lands by giving all powers to deal with Indian nations exclusively to the federal government. Thus, states could not exercise any authority over Indian nations and their lands.

Early Supreme Court cases also stated that Indian nations were sovereign political entities that were not subject to state authority. The basic principle was that Indian nations are separate and politically distinct governments beyond the powers of a state, including the power to tax. The reference in Article 1 of the Constitution to "Indians not taxed" reflected the fact that neither Indians nor their lands were thought to be subject to state or federal taxes. Congress maintained the exclusion of "Indians not taxed" in Section 2 of the Fourteenth Amendment. This exclusion of Indians and their lands from taxation has slowly eroded.

> ***"Indian nations are treated unfairly in many contexts, and the area of taxation is one such context."***

The current rule comes from a decision in *Cass County v. Leech Lake Band of Chippewa Indians* (1998), where the Court stated that "when Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested.'" The Court in Cass County extended the reach of state taxation into Indian Country, building upon flawed analyses in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation* (1992) and *Goudy v. Meath* (1906).

The *Cass County* new rule has no sound legal basis. Justification for this rule came from the General Allotment Act of 1887 which sought to dissolve Indian nations and assimilate their citizens, open their lands, and eradicate their separate political identity. This policy has been firmly repudiated in the Indian Reorganization Act in favor of a policy of tribal self-determination.

Indian nations are treated unfairly in many contexts, and the area of taxation is one such context. The Supreme Court's assertion that taxation necessarily accompanies alienability is generally untrue for everyone other than Indians. First, government owned lands, whether local, state or federal lands, are generally not taxable even if they are alienable. Second, even some privately owned alienable lands are exempt from taxation. Tax exempt organizations, such as churches and charitable organizations, are

Continued on page 14

1978
U.S. v. Wheeler. The Supreme Court grants the existence of tribal sovereignty, but declares this sovereignty is subject to Congressional whim.

Oliphant v. Suquamish. The Supreme Court strikes down tribal jurisdiction over crimes committed by non-Indians on reservations.

American Indian Religious Freedom Act is passed, promising to "protect and preserve for American Indians their inherent right and freedom to believe, express, and exercise" traditional religions, "including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites."

Federal Acknowledgement Process established which sets forth the process by which unrecognized tribes gain federal recognition.

1979
U.S. v. Washington (the Boldt Decision). The Supreme Court upholds the 1974 Boldt Decision (named after Judge George Boldt), holding that treaties with Indian nations in the Northwest preserve the right to fish "at all usual and accustomed" places, and guarantees tribes the opportunity to take half of all harvestable fish.

1980
U.S. v. Sioux Nation. The Supreme Court rules that the Sioux must be awarded compensation with interest for the U.S. confiscation of the Black Hills. The Great Sioux Nation, which never willingly relinquished title to the land, refuses a monetry settlement.

1981
Montana v. United States. The Supreme Court rules that a tribe's regulation of non-Indian hunting on non-Indian land within a reservation is inconsistent with a tribe's status as a dependent domestic nation.

1982
Seminole Tribe v. Butterworth. The Supreme Court rules that tribes have a right to create gambling enterprises on their land.

The Application of International Law

Principle Fifteen is intended to make it clear that the United States must respect and protect the rights of indigenous peoples, including Indian and Alaska Native nations and individuals, as recognized in international law. The U.S. is not in compliance with its international legal obligations and instead continues to act as if it can selectively pick and choose which international obligations it will honor. The failure of the U.S. to fulfill all of its international legal obligations in regard to human rights does not mean these obligations do not exist. It just means the United States is in violation of its obligations under international law.

Principle 15 – The United States must respect and abide by international law, especially international human rights law concerning indigenous peoples.

Historically, international law governed the relations between the nations of the world. Since the late nineteenth century, the scope of international law has expanded to include human rights and the relationships between countries and their citizens. Recently, international law has begun to recognize the rights of peoples – the people of nations, tribes, and communities – in addition to the rights of individuals.

> ***"The internal laws of a country cannot be used as an excuse for failing to comply with international law."***

The U.N. Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in September 2007, declares the rights of indigenous individuals and peoples. It states the world community's views on indigenous peoples' rights and the responsibility of countries to protect these rights. Among other things, the Declaration states that "[i]ndigenous peoples have the right to self-determination" and "the right to autonomy or self-government in matters relating to their internal and local affairs." The Declaration expresses existing and emerging rules of customary international law that are binding on countries due to their ongoing practice and their belief that such practice is legally required.

Once a rule of international law has been established, countries are bound to comply with that rule.

Citizens of the Haudenosaunee, or Six Nations Confederacy, hold passports authorized by their government which they use for international travel. Along with the adoption of the U.N. Declaration on the Rights of Indigenous Peoples, the international community is increasingly recognizing the sovereignty and rights of Native nations. This passport is held by Oren Lyons, Haudenosaunee, Onondaga Nation.

This is true regardless of the country's domestic legal rules and constitutional limitations, and it means that countries are to pass laws consistent with the international rule or incorporate it into their domestic law. The internal laws of a country cannot be used as an excuse for failing to comply with international law.

There is a general presumption by courts that Congress intends to comply with international law. The Supreme Court frequently uses or applies international law and there are many examples of the Supreme Court taking into account international human rights law when ruling on major cases.

Nonetheless, the United States often fails to respect human rights and fails to incorporate its international legal obligations into its domestic law. In a recent case the Supreme Court ruled that "not all international law obligations automatically constitute binding federal law enforceable in the United States" and federal courts have often been unwilling to view developing customary international law as binding. Also, the last in time rule allows the U.S. to avoid its international legal responsibilities on the ground that international treaties and customary law obligations can be cancelled out by any later federal legislation.

Despite these limitations, the United States remains bound by international law. This includes existing and emerging law regarding indigenous rights. The U.S. has a duty under international law to pass laws to make sure it complies with international legal obligations. In many instances, the U.S. has failed to do so. Domestic laws need to be reformed to ensure that they conform to international law.

Tribal Leader Comments

- Some Native nations stressed the importance of involvement in international legal forums. Others voiced concern that participating in international forums may inhibit domestic redress.
- By using the term "bound" by international law, are we saying that U.S. courts need only "take into account" international law?

Impact of Principle 15 on Present Legal Framework

- The United States has a duty under international law to pass laws to ensure compliance with international legal obligations.
- Domestic laws need to be reformed to make sure that they conform to international law.

State Taxation continued from page 13

generally exempt from property taxes.

The Court's allowance of state taxation of Native nation lands is legally unsound, contradicts stated congressional policy, and unfairly disadvantages those Native nations as sovereign governments. Continued judicial approval of state taxation of Indian lands is a manifestation of dated U.S. Indian policy requiring assimilation by Indian and Alaska Native nations into the state polity and should be modified to reflect current congressional policies promoting the survival of Indian nations as sovereigns.

Tribal Leader Comments

- Expand definition so that within designated boundaries only the tribe can tax.
- Must recognize that different tribes have different issues—as sensitive as they are—and we need to discuss them to come up with a solution that will work for all.

Impact of Principle 14 on Present Legal Framework

- Current law will be changed to ensure that Indian nations are provided the same tax treatment as other governments (state and local) and be appropriately recognized and treated as sovereign governments regardless of whether the land is held in trust or fee status.

1983
Indian Land Consolidation Act is passed. This law and its 1984, 2000 and 2004 amendments promote consolidation of tribal land allotmentments and interests.

1987
California v. Cabazon Band of Mission Indians. The Supreme Court rules that the grant to civil jurisdiction under P.L. 280 does not include regulatory authority; therefore, the state laws relating to gaming cannot be enforced against Indians.

1988
Indian Gaming Regulatory Act is passed, acknowledging Indian nations' authority to establish and manage gaming businesses but requiring them to negotiate compacts with states to define the states' roles.

Tribally Controlled Schools Act is passed. Congress officially repudiates the termination policy "rejecting House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of Federal relations with any Indian Nation," and begins enacting legislation to restore some, but not all, terminated tribes to federal status.

1990
Native American Graves Protection and Repatriation Act is passed.

1992
County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation. The Supreme Court states that "a county can assess ad valorem taxes on reservation land owned in fee by individual Indians or the tribe and originally made alienable when patented in fee simple under the GAA [General Allotment Act]."

1996
Eloise Cobell, a member of the Blackfeet Tribe, files one of the largest class-action suits in U.S. history against the federal government. Her suit seeks redress of the gross mismanagement of 300,000 individual trust accounts.

Judicial Remedies and the Obligation to Protect Native Lands

These Principles recognize that a right to lands and resources is meaningless if that right cannot be affirmed and protected. This is a fundamental tenet of law and is critical to all of the Principles in this document. Principles Sixteen and Seventeen call for a fair and effective remedy when Indian nations or individuals suffer harm to their land and resources and calls on the United States to affirmatively protect both Indian nations and individuals from abuse, fraud and other wrongdoings to their land and resources.

The historical hostility of communities and local governments surrounding Indian reservations has not disappeared. Indian nations and individuals rarely receive an effective judicial remedy when making claims to protect their lands and resources in U.S. courts. These Principles, therefore, are an expansion of legal protections already provided under U.S. law and create affirmative obligations that are established in or implied by the other Principles.

Principle 16 – The United States must make it possible for Native nations and individuals to go to court and get relief, or some kind of corrective action or compensation whenever they suffer harm concerning their lands and resources or any other violation of their rights. These court remedies must be fair and effective.

Principle Sixteen states that the United States must provide an effective remedy to Indian and Alaska Native nations and individuals when they suffer any harm to their land and resource rights. In this Principle we are generally talking about judicial remedies—the remedies provided by a court. The right to an effective judicial remedy has two main elements: (1) the remedy must not be discriminatory or unfair, and (2) the remedy must meet the requirements of due process, meaning it must provide an opportunity to be heard in court and have the case decided according to the law.

The Constitution and many federal court decisions recognize the fundamental principle that the law must provide a remedy when a person's rights are violated. International law extends this requirement to violations of Native property rights. Present federal law, however, does not fully support the right to an effective judicial remedy for Native nations and individuals in relation to their lands.

The right to an effective judicial remedy is a cornerstone of federal law that is not always available when the U.S. has violated a person's or a Native nation's legal rights. The U.S. has sovereign immunity, and it is up to Congress whether it will waive this immunity and make it possible to sue the U.S. in any particular situation. The Supreme Court has said this means that the U.S. "is under no obligation to provide a remedy through the courts," and it is free to decide whether to lay aside its immunity.

The right to an effective remedy for Native peoples when their rights to property are violated is a basic part of effectively protecting these rights. To meet its obligations under international human rights law and the Constitution, the U.S. must provide an effective and fair judicial remedy when land rights are violated. The Principle calls upon Congress to provide such remedies statutorily, and it calls upon courts to construe existing waivers of sovereign immunity liberally to provide remedies wherever possible.

Tribal Leader Comments

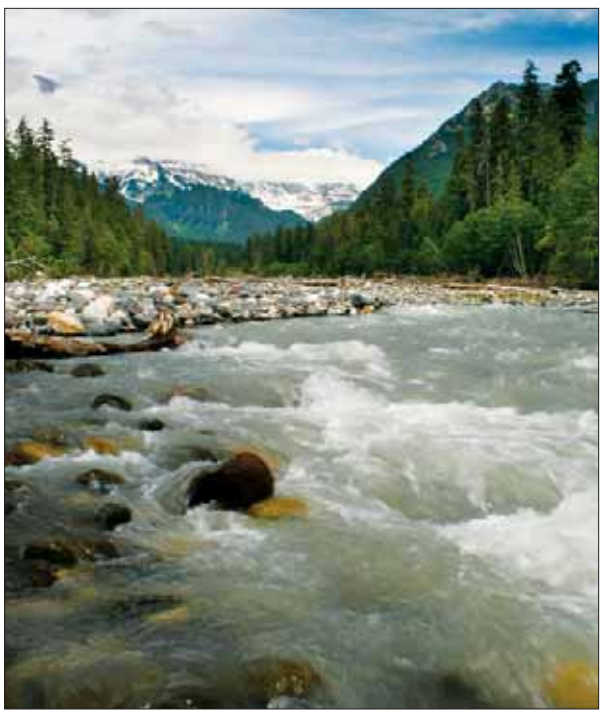
- There is broad reluctance to take legal action because of bad court decisions that affect many Native nations. A decision made in one case is applied to all future cases.
- Participants expressed a willingness to share resources with other tribes in big court cases.

Principle 17 – The United States has the duty to protect Native lands and resources by preventing abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals.

Principle Seventeen declares that the United States has a legal obligation to protect Indian and Alaska Native lands and resources from abuse, fraud and other wrongdoing against Native nations and individuals. The federal obligation to protect Native lands and resources includes preventing abuses by government officials as well as other people. The U.S., in cooperation and consultation with Indian and Alaska Natives, must take proactive steps to protect Native lands and resources.

> ***"Present federal law . . . does not fully support the right to an effective judicial remedy for Native nations and individuals in relation to their lands."***

Federal law provides limited protections for the lands, territories and resources of Native nations and individuals. The Constitution recognizes Indian treaties, many of which expressly protect or at least reserve Indian land rights, as "the Supreme Law of the Land." However, there are many obstacles facing



The Nisqually River, one of many traditional Native fishing areas in the Pacific Northwest. Throughout the early- and mid-twentieth century, overfishing by commercial fisheries severely threatened native salmon stocks. Northwest tribes fought a series of legal battles to protect the salmon and their treaty rights to fish at all "usual and accustomed places." A landmark victory for the tribes, United States v. Washington *(1974), better known as the* "Boldt Decision," *upheld the tribes' treaty rights and recognized the tribes' right to regulate their own fisheries.*

Indian nations when they attempt to get their treaties enforced. While some federal statutes protect Indian land rights, many of these statutes provide merely a "patchwork" of protections. Even where there are protective laws, Indian nations face significant barriers when trying to enforce these protections, barriers such as federal and state sovereign immunity.

As discussed in connection with Principle Eight, there are some statutes that clearly establish the U.S. as the trustee for certain Indian lands. These statutes create real duties on the part of the United States to protect such lands or property. But, where there is no actual trust created by statute or actual control of Native property, present federal law does not impose on the U.S. a clear, general responsibility to protect Indian lands. While the law does provide some protections for Native lands and resources, federal law offers little protection to Native lands that are neither protected by treaty nor held in trust by the United States.

In sum, the obligation of the United States to protect Native lands is supported by the Constitution and a patchwork of existing federal laws. It is clear, while some legal protections exist, there is not a comprehensive system of protection for Native lands.

This Principle requires that the United States do more to protect Native lands by not only enforcing existing federal law, but also by assuming the affirmative obligations established in the other Principles. These include:

- providing at least the same protections for Native

Continued on page 16

1998
Cass County v. Leech Lake Band of Chippewa Indians. The Supreme Court states that "when Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested'."

2003
United States v. Navajo Nation (Navajo I). The Supreme Court rules that the Indian Mineral Leasing Act of 1938 and its regulations do not constitute the substantive source of law necessary to establish specific trust duties which mandate compensation for breach of those duties by the federal government.

2004
American Indian Probate Reform Act is enacted, amending the 1983 Indian Land Consolidation Act.

2009
United States v. Navajo Nation (Navajo II). The Supreme Court ruling dismisses the Nation's assertion of a breach of fiduciary duty by the Secretary of the Interior, arising from his failure promptly to approve a royalty rate increase under a coal lease the Nation executed in 1964.

Carcieri v. Salazar. Limits the authority of the Secretary of Interior to take lands into trust under the provisions of the Indian Reorganization Act (IRA). The Court holds that the term "now" in the phrase "now under federal jurisdiction" limits the authority of the Secretary to only take land in trust for Indian tribes that were under federal jurisdiction in June 1934, the date the IRA was enacted.

Cobell v. Salazar. Settlement in the Cobell lawsuit is reached, totaling close to $4 billion. Under the agreement, $1.4 billion will be distributed to Indian plaintiffs involved in the case, and $2 billion dollars will be placed in a fund to buy back fractionated interests.

2000 2010

Judicial Remedies continued from page 15

lands, including lands held by aboriginal title, as for other types of property (Principles One and Four);

- requiring the United States to obtain the free, prior and informed consent of a Native nation before taking or approving any action regarding the nation's land (Principle Seven);
- requiring the United States to protect Native trust lands in the same way as any other trustee would be required to protect trust assets (Principle Eight);
- providing a remedy when Native land rights are violated (Principles Nine and Sixteen); and
- complying with international human rights law with respect to Native nations and their lands (Principle Fifteen).

To better comply with this Principle, Congress, in cooperation and consultation with Indian and Alaska Natives, should enact legislation that clarifies and strengthens protections for Indian lands and that allows for effective enforcement of these protections by Indian nations. In addition, the executive branch should shape its policies to ensure that such laws are properly enforced.

Tribal Leader Comments

- Several leaders expressed serious concerns about immediate neighbors—city or county governments. They worry about local entities more than federal ones.
- There is a breach of treaty rights by agencies within the [federal] government: Forest Services, BLM, DOI, Agriculture, Roads, and State Department.
- This Principle needs a stronger mandate that the U.S. has to act.

Impact of Principles 16 and 17 on Present Legal Framework

- Congress must enact legislation that provides an effective and fair judicial remedy when land rights are violated, and courts should construe existing waivers of sovereign immunity liberally to provide remedies wherever possible.
- Congress must enact legislation that clarifies and strengthens protections for Indian lands and that allows for effective enforcement of these protections by Native nations. This must be done in cooperation and consultation with Indian and Alaska Natives nations.
- The executive branch must shape its policies, including support for litigation by Indian and Alaska Native nations to ensure that such laws are properly enforced.

ILTF'S Legal Reform Strategy

One of Indian Land Tenure Foundation's primary strategies is to reform the legal and regulatory mechanisms related to recapturing physical, cultural and economic assets for Indian people and strengthening Indian sovereignty and self-government. Two projects described below demonstrate some of our current efforts in this area.

Proactive Agenda for Indian Land

ILTF is partnering with Native nations and individuals to develop a Proactive Agenda for Indian Land to address tribal and federal policy impacting Indian land ownership throughout Indian Country today. Proactive Agenda priorities will be based on the current attitudes and insights of Indian people about land issues.

To identify initial priorities for the Proactive Agenda, ILTF has collected input from over 1,500 Indian landowners, tribal leaders, scholars and individual Indian people—all stakeholders in Indian land tenure issues. Primary data came from a 16-week internet survey conducted over the course of three months (February - April 2007) and focused on topics of land ownership, land use and management, tribal jurisdiction and the federal trust relationship.

Survey findings indicated widespread dissatisfaction with the current land tenure situation and the desire that Native nations and individuals take the lead in redesigning Indian land tenure systems. Based on these results, ILTF has identified specific areas for additional research, policy reform and increased education with regard to Indian land. By developing and advancing this agenda for change, Indian people can direct the movement toward greater Indian control of Native lands today and in the future, and ILTF will be able to focus its resources toward support for their efforts.

Native Land Law Project

In addition to our work in the Proactive Agenda, ILTF has initiated the Native Land Law Project, a partnership between ILTF and the Indian Law Resource Center (ILRC) to review the existing body of case law related to Indian land and to create a set of related legal principles that will guide future law toward more just ends. These general principles of law relating to Indian lands and natural resources (found in this publication) represent reform objectives that will be presented to tribal leaders and their legal experts for their input, critique and support.

ILTF recognizes the need for increased public awareness of Indian land-related law. In order for members of Congress, state lawmakers and others to move toward respect for Indian nations and Indian lands, the public must be made aware of the laws governing Indian people and their land. We seek to educate broadly and reform legal mechanisms so that Indian nations can recapture assets for Indian people and strengthen the sovereignty of Indian nations.

To learn more about ILTF's strategies, programs and initiatives, visit our web site at: www.indianlandtenure.org.

Indian Law Resource Center: Justice for Indigenous Peoples

Founded in 1978, the Indian Law Resource Center (ILRC) is a nonprofit law and advocacy organization established and directed by American Indians. ILRC provides legal assistance to Indian and Alaska Native nations who are working to protect their lands, resources, human rights, environment and cultural heritage.

ILRC has advocated for the land rights of many Indian nations in the U.S. in the past three decades. In 2000, the Supreme Court upheld a ruling to protect the Cheyenne River Sioux Tribe's right to religious practices at Devil's Tower that ILRC had helped to defend. In 2003, ILRC helped the Independent Traditional Seminole Nation to purchase and protect 2,500 acres of undeveloped land for the benefit of the Nation. More recently, ILRC has been working with the Timbisha-Shoshone on a federal lawsuit to challenge Congress' power to take Indian property and funds without compensation.

ILRC was also instrumental in drafting and forwarding the Declaration on the Rights of Indigenous Peoples, which was adopted by the U.N. General Assembly in 2007 by a substantial majority of nation states. The United States, sadly, was one of only four nations to vote against adopting the Declaration. Though, ILRC, along with the Navajo Nation, the Citizen Potawatomi Nation, the Haudenosaunee (Six Nations) and others continue to fight for U.S. support.

To learn more about ILRC and their work, you can contact them at one of the following locations:

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