

# Tribal Nations – United States Relations: Policy Eras and Future Developments



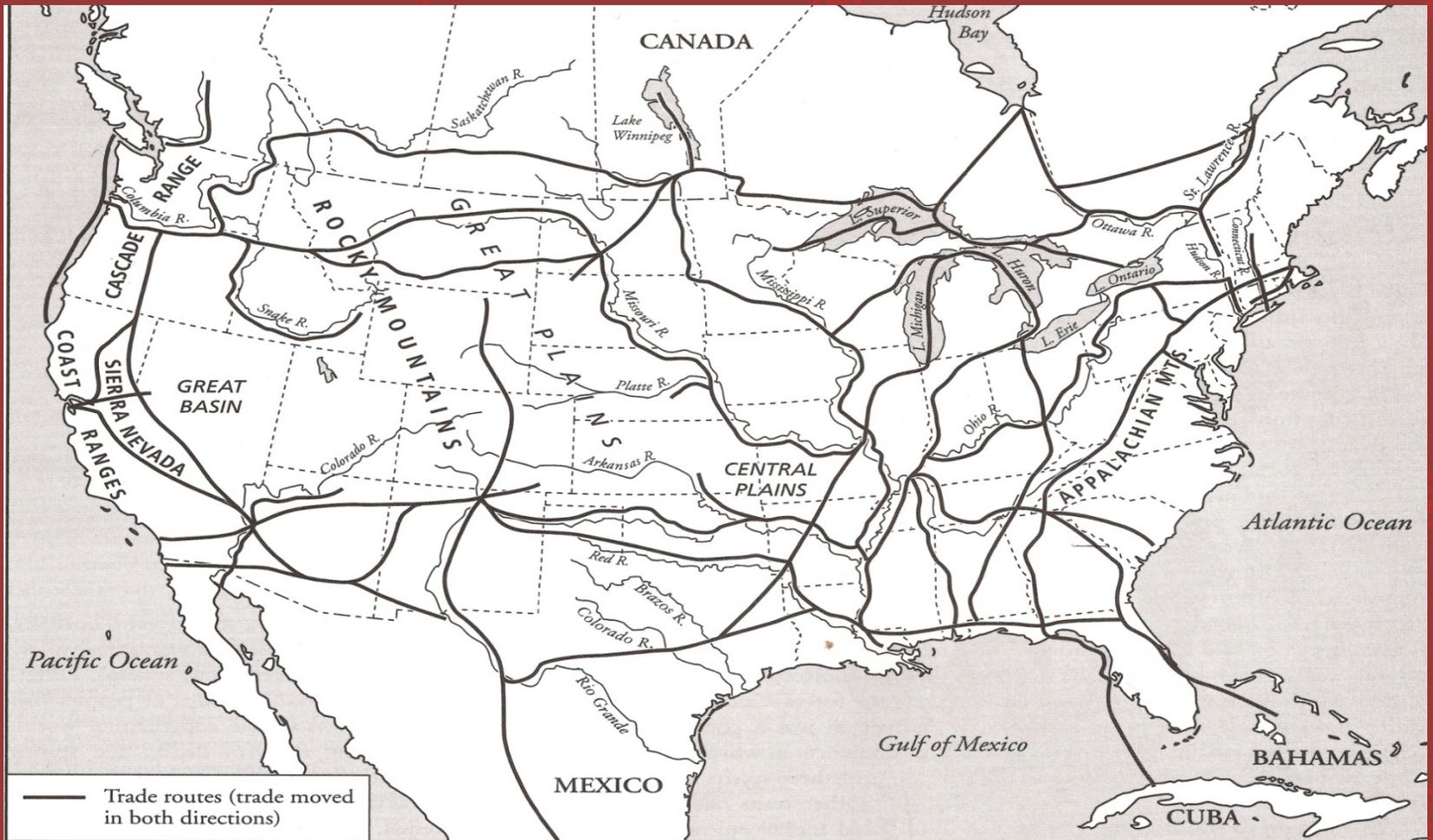
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# Tribal Nation Commerce Historically Estimated Trade Routes, Carl Waldman, *Atlas of the North American Indian*, rev. ed. Pg. 67



# Indian Country Defined in U.S. Law

- 18 U.S.C. § 1151 (Criminal Statute part of Major Crimes Act): Except as otherwise provided in sections 1152 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
- Indian Country = three categories
- 1) Reservations,
- 2) Trust/restricted lands/allotments, and
- 3) Dependent Indian communities (under federal supervision, similar to the Pueblos)

# Native American Law

- Tribal Nation Law
  - Tribal Legislation forming Tribal Legal Codes
  - Tribal regulations
  - Tribal Judicial Opinions
  - Tribal Customs, Norms, and Traditional Practices
  - Evolving International Indigenous Law
- U.S. Federal Indian Law
  - U.S. Congress legislation forming 25 U.S.C.
  - U.S. federal and state judicial opinions
  - U.S. federal agency, Bureau of Indian Affairs, policies and regulations
  - U.S. executive orders from the U.S. President

# Eras of U.S. Indian Policy

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- Sovereign-to-sovereign (1778 to 1871)
- Removal (1830 -1887)
- Reservation (1830-1887)
- Assimilation (1887-1934)
- Indian Self-Government (1934 - late 1940s)
- Termination (1950 – late 1960s)
- Indian Self-determination (1970s to present)

# Tribal Relations and the U.S. Constitution

- Article I & II: granted the U.S. President and Congress authority to declare war and make treaties. Supremacy clause states that treaties are part of the supreme law of the land. Art. VI clause 2
- Article I section 8 clause 3 gave Congress sole authority "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."
- Original Art. I section 2 clause 3 provided a formula for taxation and contained the language: "excluding Indians not taxed."
- Recognition that Tribal Nations were separate entities with their own governance engaging in commerce with the United States.

# Early U.S. Indian/Tribal Policy

- Non-Intercourse Acts periodically renewed, prevent land sales to private individuals or states, licensed Indian traders, traveling through tribal territory required a passport
- Sovereign-to-sovereign era involved diplomatic relations with Tribal Nations identified as most important
- Two contradictory policies: 1) enter into treaty relations with Tribal Nations owning their lands (International approach to create alliances) and 2) federal gov't should assimilate tribal members into mainstream citizen farmers (Roman Empire idea of "conquest")

# History in Oregon/Washington/Idaho Territory for current Idaho area Tribes Removal/Reservation Eras 1830-1887

- “Stevens Treaties” with Nez Perce Tribe in 1855 and with Salish & Kootenai in Montana in 1855 impacting Kootenai Tribe of Idaho. Series of Treaties with Shoshone, Bannocks, and Lemhi - Fort Bridger Treaties ratified in 1863 and 1868.
- Executive Orders post-1871 House Rider led to establishment of Coeur d’Alene Reservation and the Shoshone-Paiute Tribes’ Duck Valley Reservation.
- Northwestern Band of the Shoshone Nation federally recognized April 29, 1987 with tribal offices. Land base and trust status impacted by 2009 U.S. Supreme Court decision in Carcieri v. Salazar.

# The Marshall Trilogy: U.S. Supreme Court Decisions

- Johnson v. McIntosh (1823)= Tribes have the right only to occupancy of their lands because of the doctrine of discovery through which the U.S. gained the exclusive right to purchase title or acquire by conquest from the Tribes as successor to Britain
- Cherokee Nation cases: 1) Cherokee Nation v. Georgia (1831)= "domestic dependent nations"/ward-guardian language, not foreign nation, Federal trust responsibility origins, 2) Worcester v. Georgia (1832) = Georgia laws illegal in Cherokee territory, federal pre-emption in Indian affairs, states are component of federal government

# Tribal Nation general view on relations with the U.S.

- Treaty-based or agreement based relationship between sovereigns
- Encroachment of the states comprising the U.S.
- Owed just compensation for lands and resources taken, ceded, or negotiated over and owed treaty/agreement compensation for services promised (health, education, schools, roads, etc.)
- Must deal with slow moving federal bureaucracy due to federal laws and policies
- Interests not represented within the U.S. government and rarely portrayed accurately in U.S. media
- Refusal to assimilate and deny identity or nationhood

# Allotment, Assimilation and Abrogation of Treaties : 1887-1934

- General Allotment Act of 1887 (Dawes Act)
- Abrogated unilaterally reserved land provisions in treaties
- Other provisions of the treaties continue to remain in force
- Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)– political question doctrine for U.S. Congress' actions
- Social experiment stated as policy underpinning – “Kill the Indian, save the man.”
- Government and religious mandatory Boarding Schools for Native children, forced to speak English

# General Allotment Act of 1887

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- Dividing up tribal lands into 160 acre or less allotments for each Indian head of household
- Remaining lands declared surplus by U.S., which then set the price to pay the Tribe for these lands and sold the lands to settlers
- Settlers gained lands side by side with tribal members, creating checkerboard pattern
- Destroyed tribal economies
- Start of generational impoverishment

# Trust relationship and BIA

- As part of allotment, tribal lands are held in trust: the deed is held by the U.S. for the benefit of the allottee or Tribe, tribal members described as 'incompetent'
- Trust deeds are managed by the BIA, the BIA has a responsibility to account for use of the land – BIA leases land to non-Indian rancher and collects rents, puts rents in account (Individual Indian Money or IIM)
- Almost all tribal government lands are held in trust
- Trust status for resources on land – not to be depleted by BIA or contractors/lessors with accounting to Tribes
- U.S. trust responsibility often conflicts with U.S. interest

# Indian Reorganization Act of 1934

- Halted the policy of allotment
- Provided structure for reorganized tribal government into a corporate structure
- Provided for Tribes to create federally chartered corporations
- Had to vote NOT to accept
- BIA handed out boilerplate constitutions – did not accurately reflect the U.S. model, created central body with ultimate authority, great change from former model of gov't

# Termination of Federal Recognition of Tribes: 1950- late 1960s

- House Resolution No. 108 (1953) – to make Indians subject to the same laws as all other citizens and to terminate the federal trust relationship
- Passage of Public Law 280 delegating federal criminal authority to states listed in the act (6 mandatory states: AK, CA, MN, NE, OR and WI)
- Idaho and Washington “optional states”
- Indian Civil Rights Act 1968 amendment requiring tribal consent for PL 280 delegation.

# Termination of Federal Recognition by the U.S.

- End the federal recognition of a Tribe and all tribal citizens – no American Indian legal status
- Sell off or divide all tribal assets
- 1950s-60s approx. 110 Tribal Nations were terminated by Congress
- Policy finally abandoned due to overwhelming protest of tribal leaders, rise of national tribal orgs
- Minimal restoration has occurred – Klamath Tribe of Oregon and Menominee Tribe in Wisconsin restored

# Indian Self-Determination: present policy

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- Indian Self Determination and Education Assistance Act of 1975
- Government-to-government relationship
- Tribal governments taking over implementation of BIA services in tribal communities (known as 638 contracts)
- Self-governance – assuming full responsibility for federally funded programs
- Tribally chartered head start centers, elementary through high school, and 32 Tribal Colleges
- Re-establishment of tribal economies

# Tribes and State Governments

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- Many opportunities for joint projects, for increasing the economic prosperity of all residents
- Working relationships are the most beneficial for all involved; protracted litigation is costly and rarely ends in full resolution of dispute
- Working agreements guided by best business and relation standards provide stability and success
- Identifying common goals of governments and working in cooperation enables greater returns to all in the region

# Development of International Indigenous Principles: Full Circle

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- United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007)
- “Free, prior and informed consent”
- Land ownership for Indigenous peoples and protection of homelands
- Cultural and Economic Self-Determination
- Recognition of protection for sacred sites and preservation of spiritual practices
- Bringing the Declaration to life!