IV

Indian Treaties

What is a Treaty?

"A treaty, including one between the United States and an Indian tribe," the U.S. Supreme Court has explained, "is essentially a contract between two sovereign nations."[1] Indian tribes were recognized as sovereign nations by the European countries that began settling in North America during the 1600s, and the Europeans entered into treaties with them to acquire land. Similarly, after the United States gained its independence from Great Britain, it relied on treaties to conduct its formal relations with Indian tribes. In fact, the first treaty signed by the United States following the adoption of the Constitution was with an Indian tribe, the Delaware.[2] Thus, as the Supreme Court noted in 1823, Indian tribes were regarded by the nations of Europe and by the United States "as distinct, independent political communities, retaining their original natural rights," and ranked "among those powers capable of making treaties."[3]

Who can Sign a Treaty on Behalf of the United States?

The U.S. Constitution authorizes the president, with the consent of two-thirds of the Senate, to enter into a treaty on behalf of the United States.[4] The Constitution declares that a federal treaty, just like a federal statute, is "the supreme law of the land."[5] Treaties therefore are superior to state constitutions and state laws. If a state law conflicts with the provisions of a treaty, the treaty prevails.[6]

A treaty can be made on any subject. However, a treaty may not deprive a citizen of a right guaranteed by the Constitution; the Constitution is always

superior to any law or treaty.[7] The United States has signed scores of treaties with foreign countries, covering such subjects as trade, fishing on the high seas, international travel, rules of war, and the use of nuclear energy.

How many Indian Tribes have Treaties with the United States?

Nearly four hundred treaties have been signed between Indian tribes and the United States. Most tribes in the lower forty-eight states, other than those in California, have at least one treaty with the federal government.[8]

Not a single California tribe has a treaty with the United States. Many California tribes signed treaties with the United States and, in compliance with them, gave up vast landholdings and moved to small reservations. However, the U.S. Senate subsequently refused to ratify these treaties, and thus they are legally unenforceable. The California tribes, as former Assistant Secretary of Indian Affairs Kevin Gover recently acknowledged, "never got the benefit of the bargain that they made with the United States."[9]

Until 1871, treaties were the accepted method by which the United States conducted its formal relations with the Indians. As explained below, Congress passed a law in 1871 that ended treaty making with Indian tribes.

What do the Indian Treaties Say?

The goal of the United States in nearly all of its treaties with Indian tribes, as discussed in the previous chapter, was to obtain Indian land through negotiation rather than warfare. In exchange, the United States typically gave the tribe a set of promises. While individual treaties varied from one tribe to another, nearly all of them "expressly recognized the sovereignty of the tribes" and many "contained express assurances that the federal government would 'protect' the tribes."[10] Most treaties also guaranteed the tribe such things as food, clothing, medical care, education, and other services. In exchange for peace and land, then, the United States promised to create a federally protected reservation for the tribe, to respect the tribe's sovereignty, and to provide for the well-being of tribal members.

These treaties usually assured the Indians that they would not be forced to move from their new reservation. In 1854, Senator Sam Houston described the perpetual nature of these land assignments in the following terms: "As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again be removed from your present habitations."[11]

Many of these promises, however, were soon broken. The 1858 treaty with the Yankton Sioux Tribe of South Dakota, for example, resulted in the United States receiving more than 11 million acres of land from the tribe. In exchange,

the Indians received a reservation of approximately 430,000 acres, along with a promise that the federal government would protect the tribe's "quiet and peaceful possession" of that land and that no white person would be permitted to live on the reservation without the tribe's consent.[12] Yet by 1934, the federal government had removed three-quarters of that territory and had allowed non-Indians to live on the reservation.[13] Similarly, the Shoshone Tribe signed a treaty with the United States in 1868 in which the tribe relinquished millions of acres of aboriginal lands and received, in exchange, a reservation in Wyoming, the Wind River Reservation, for their "absolute and undisturbed use."[14] Just ten years later, however, Congress passed a law giving the Arapaho Tribe, a traditional enemy of the Shoshone, common ownership of the Wind River Reservation, and the U.S. Cavalry forcibly moved the Arapaho to the reservation over strenuous protests by the Shoshone.[15]

Tribes that had particular needs were often provided guarantees in their treaties that addressed those needs. For instance, numerous tribes in the Northwest subsisted on fish they caught in rivers and in the ocean. The federal government appointed Issac Stevens in the mid-1850s to negotiate treaties with many of these tribes. Each "Stevens" treaty guaranteed the tribe a right to fish "at usual and accustomed grounds and stations . . . in common with all citizens of the United States," or words to that effect.[16] One of these tribes, the Makah, traditionally hunted whales. The Stevens treaty with the Makah Tribe, whose reservation is located on the tip of the Olympic Peninsula in Washington, guarantees the tribe a right "of whaling," the only tribe to secure such a right.[17] Similarly, treaties negotiated with tribes that lived along the Great Lakes usually provided, as did the treaty of 1836 with the Ottawa and Chippewa Nations, the right to fish in the Great Lakes and in connecting waters.[18] The Yakama Tribe in Washington had a long tradition of trading with other tribes. The treaty with the Yakamas assures them "the right, in common with citizens of the United States, to travel upon all public highways."[19] This provision has been interpreted to grant the Yakamas an exemption from various state taxes associated with the use of state highways, such as license and permit fees for the tribe's commercial vehicles.[20]

At least nine treaties with Indian tribes contain a "bad men" provision. This provision guarantees that if "bad men among the whites" commit a crime on the reservation, federal agents will arrest and prosecute these lawbreakers and will reimburse any Indian who sustained an injury or loss from that misconduct.[21]

Is an Indian Treaty a Grant of Rights to a Tribe?

The main purpose of an Indian treaty was to take land from the tribe. Although certain promises were given by the federal government in exchange, no effort

was made in any of these treaties to list the many rights that these sovereign tribal governments retained.

An Indian treaty therefore should be viewed, the Supreme Court has explained, "not [as] a grant of rights to the Indians, but a grant of rights from them."[22] These treaties were intended to list the rights that tribes were relinquishing, not those they were retaining. Thus, tribes have many rights in addition to those listed in treaties. In fact, any right that a sovereign nation would normally possess that is not expressly extinguished by a treaty (or by a subsequent federal statute) is presumptively reserved by the tribe.[23] This is a fundamental principle of Indian law known as the *reserved rights doctrine.* For example, a tribe retains the right to fish on its reservation even if that right is not conferred in its treaty; the treaty's silence on the subject means that this inherent right has not been lost.[24]

When a treaty recognizes a tribe's right to engage in an activity that the tribe historically engaged in, such as hunting or fishing, the treaty is not viewed as the source of those rights. Rather, the treaty merely recognizes rights that the tribe has always possessed.[25]

Did Indian Tribes Enter into Treaties Voluntarily?

When Europeans arrived on this continent in the 1600s, Indian tribes on the East Coast, as mentioned in Chapter I, generally welcomed them and allowed them to share their land. As time went on, however, the colonists wanted more and more land, and this often led to open warfare with the Indians. After the United States gained its independence from Great Britain, the desire for land—and friction with Indian tribes—increased. The War of 1812 between the Americans and the British removed the last major threat of European intervention in U.S. internal affairs. The federal government, which had grown much stronger over the years, could now focus its military power on the Indians, and Indian treaties became increasingly one-sided.[26]

The Creeks, Choctaws, Chickasaws, and Cherokees, located in the southeastern part of the country, suffered some of the first losses. In a series of treaties between 1816 and 1835, all four tribes were compelled to relinquish most of their ancestral homelands in exchange for land in the Indian Territory (now the state of Oklahoma), and were forcibly relocated there.

In the decades that followed, tens of thousands of white settlers and prospectors moved westward—often trespassing on land pledged in treaties to Indian tribes—and the U.S. Cavalry went along to protect them. One by one, tribes were forced to sign treaties and were placed on reservations, often hundreds of miles from their original homelands.[27] A number of tribes were forced to sign second and even third treaties that moved them further west, despite

language in their original treaties promising that they would never have to move again. The Ottawa Tribe signed five treaties that moved them from northern Ohio to Kansas, and finally to Oklahoma where the tribe currently resides, with each move relinquishing more land to the United States.[28]

Does the United States Still Enter into Treaties with Indian Tribes?

No. In 1871, Congress passed a law (Title 25, U.S.C., section 71) that prohibited the federal government from entering into additional treaties with Indian tribes. Since then, Congress has regulated Indian affairs through legislation.

Section 71 was passed largely because the House of Representatives disliked being excluded from Indian policy making. Under the Constitution, treaties are made by the president and the Senate, whereas a federal law must be passed by both houses of Congress: the Senate and the House of Representatives. Thus, the House is involved in passing a law but not in ratifying a treaty, and the House pressured the Senate into passing section 71 so that it could participate in formulating Indian policy.[29]

The passage of section 71 reflected a severe loss of legal and political status for Indian tribes. Until this time, Indian tribes had been viewed by the federal government as sovereign nations whose consent was required before the federal government could take any action affecting them, such as removing tribal land. Now, Congress could do anything it wanted merely by passing a law, regardless of a tribe's opposition. In fact, treaties in which Congress had promised a tribe to never take tribal land without the tribe's consent could now be abrogated (broken) merely by the passage of a statute. In this way, Congress could (and frequently did) confiscate land that had been promised to tribes in peace treaties.

For example, the Fort Laramie Treaty of 1868 with the Sioux guaranteed that certain lands, including the sacred Black Hills of South Dakota, would forever belong to the Sioux unless "at least three-fourths of all the adult male Indians" gave their written consent.[30] However, the U.S. Cavalry, led by Colonel George Armstrong Custer, allowed prospectors to search for gold on this land in violation of the treaty. When gold was discovered in the Black Hills in 1874, hundreds of prospectors swarmed to the territory. In 1877, in clear breach of the Fort Laramie Treaty, Congress passed a law that removed the Black Hills from the Sioux without the tribe's consent.[31]

Did Section 71 Repeal the Earlier Indian Treaties? If not, are all of these Treaties Valid Today?

Section 71 states that "no obligation of any treaty . . . shall be hereby invalidated or impaired." Thus, the passage of section 71 did not affect any existing

Indian treaty. But this does not mean that every Indian treaty is still valid today. In fact, most Indian treaties have been abrogated in whole or in part by Congress, such as the Yankton, Shoshone, and Sioux treaties mentioned above.[32]

In *Lone Wolf v. Hitchcock* (1903),[33] the Supreme Court upheld the authority of Congress to abrogate an Indian treaty. According to the Court, a federal treaty and a federal law have equal authority. In the same way that Congress may pass a federal law that amends or repeals an earlier law, Congress may also pass a law that amends or repeals an earlier treaty. Thus, the Court held, it is entirely in the discretion of Congress whether to honor or abrogate an Indian treaty. The Supreme Court has consistently upheld the principle that "Congress has the power to abrogate Indians' treaty rights."[34]

The *Lone Wolf* decision has been extensively criticized on the grounds that it dishonors the word of the United States and permits Congress to break promises made to people who have already fulfilled their end of the bargain.[35] Indians were told by the federal agents who negotiated these treaties that they could trust the United States to fulfill its commitments, and these assurances turned out to be hollow. Supreme Court Justice Hugo Black stated in a dissenting opinion, criticizing Indian treaty abrogation: "Great nations, like great men, should keep their word."[36]

An Indian legal scholar, Robert A. Williams, Jr., has explained that Indians place enormous significance in one's promise. To Indians, a treaty creates a solemn bond between the participants, and violating a treaty is unpardonable. Treaties are sacred covenants. The tribes that relinquished their lands in treaties fully expected the United States to honor its oath.[37]

Are Tribes Entitled to Compensation When their Treaty Rights are Abrogated?

The Fifth Amendment to the Constitution provides that Congress may not deprive anyone of "private property . . . without just compensation." Indian treaty rights are a form of private property protected by the Just Compensation Clause, the Supreme Court has held.[38] Therefore, when Congress abrogates an Indian treaty, it must adequately compensate a tribe for the value of any rights or property that is lost. However, money often provides little actual "compensation" to people who have lost their homes and sacred lands. For instance, the Sioux have been awarded more than $100 million in compensation for the loss of the Black Hills, which as just discussed had been set aside for the Sioux in the Fort Laramie Treaty of 1868 but was taken from them by a statute in 1877.[39] The Sioux, however, do not want the money; they want the Black Hills. Tribal members filed a lawsuit asking a federal court to order Congress to return the land. The court held that the judicial branch of government (the courts)

cannot prevent the legislative branch (Congress) from abrogating a treaty and taking Indian land.[40] To this day, most Sioux have refused to accept the compensation that was awarded, and their money sits unclaimed in a federal bank.

How are Indian Treaties Interpreted When a Dispute Arises as to their Meaning?

Many disputes have arisen over the language of Indian treaties, often involving valuable interests in land, water, minerals, and hunting and fishing rights.[41] The Supreme Court has developed three rules that govern the interpretation of Indian treaties, called the *canons of treaty construction*. First, ambiguities in treaties must be resolved in favor of the Indians.[42] Second, treaties must be interpreted as the Indians would have understood them at the time the treaty was signed.[43] Finally, treaties must be construed liberally in favor of the Indians.[44] As the Supreme Court noted in 1999, "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understand them," interpreting them "liberally in favor of the Indians."[45]

These canons of construction benefit the treaty tribe, as the Supreme Court intended they would, to help compensate for the fact that tribes were at a significant disadvantage in the treaty-making process. For one thing, Indian treaties were always written in English, and thus the Indians could not be certain what they were signing. Tribes were dependent on government interpreters to explain these treaties to them. Also, most treaties were signed under the threat of force and therefore were inherently unfair. Finally, as explained in Chapter III, a treaty creates a trust relationship between the tribe and the United States, a relationship that requires the federal government to enhance, not injure, tribal interests, and therefore it should be presumed that the treaty was intended to provide the tribe with what it needed to prosper.[46] Consequently, Indians should receive the benefit of the doubt when questions arise regarding how a treaty should be interpreted. As the Supreme Court explained in a 1989 case interpreting several Indian treaties:

> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, the Court has long given special meaning to this rule. It has held that the United States, as the party with presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[47]

These canons of construction have been extremely important to Indians, resulting in favorable court decisions in numerous cases. For example, the Supreme Court held in 1999 that certain language in an 1837 treaty between the United States and the Chippewa Tribe reserved to the Chippewa a right to hunt and fish *outside* the tribe's reservation because that is probably the way the tribe had interpreted that language at the time.[48] Similarly, courts have held that (1) a treaty that gave tribes a right to fish "in common with citizens of the territory" conferred not just an equal opportunity to catch fish but reserved to the tribes a right to capture up to 50 percent of the available resource;[49] (2) a treaty that created a reservation for a tribe to be held "as Indian lands are held" reserved to the tribe enough water to make the reservation productive, even though the treaty said nothing about water rights;[50] (3) a treaty that intended to change a nomadic tribe into an agrarian one entitled the tribe to a sufficient amount of water to raise cattle on the reservation, even though the treaty said nothing about such a right;[51] (4) a treaty that granted Indians the right to fish in a lake adjoining their reservation was interpreted to reserve to them the right to moor their boats on a shoreline now owned by a municipality, even though no language in the treaty expressly conferred that right;[52] and (5) a treaty that granted a tribe "the right, in common with citizens of the United States, to travel upon all public highways," conferred a right to haul tribal timber on state roads without payment of state licensing fees, even though the treaty did not expressly confer that tax immunity.[53]

These same canons also apply to the interpretation of federal *statutes* regarding Indians.[54] As the Supreme Court has stated, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[55]

What Standards are used to Determine Whether Congress has Abrogated a Treaty?

The Supreme Court held in *Lone Wolf v. Hitchcock*, as just mentioned, that Congress may abrogate an Indian treaty at any time, but other decisions of the Court have sought to limit the application of that decision. The Supreme Court has recognized that Indian treaty rights, although capable of being abrogated by Congress, "are too fundamental to be easily cast aside."[56] Thus, a court must not deem a treaty to have been abrogated unless Congress has made its intention to do so "clear and plain."[57] Treaty abrogation may not be inferred.[58]

However, the Supreme Court also held that a treaty can be deemed to have been abrogated by a federal law if that law's "surrounding circumstances and legislative history" indicate a congressional intent to abrogate the treaty, even if

the law contains no express statement of abrogation.[59] This is known as the *implied abrogation* standard,[60] but even here the evidence must show that Congress actually considered the effect the law would have on the treaty and decided to abrogate it.[61]

May a Federal Agency Abrogate an Indian Treaty?

No. A federal agency may not abrogate an Indian treaty without specific congressional authorization.[62] For example, although Congress has given the Army Corps of Engineers the general authority to build dams to prevent rivers from flooding, the Corps may not build a dam on land reserved to an Indian tribe without the *express* consent of Congress.[63]

May a State Abrogate an Indian Treaty?

No. A state may not take actions inconsistent with an Indian treaty.[64] Even if the treaty was made before the state entered the Union, the state must honor the treaty unless Congress decrees otherwise.[65]

How can Treaty Rights be Enforced?

Indians and tribes are entitled to enforce their treaty rights. A violation of an Indian treaty is a violation of federal law. No one may take any action inconsistent with an Indian treaty unless Congress has expressly authorized it.

If a violation of an Indian treaty is occurring, a lawsuit may be filed in federal court to halt the violation.[66] (There are some exceptions to this rule that are discussed in Chapter XVIII.) Treaty rights may also be raised as a defense to a state[67] or federal[68] criminal prosecution, and if the treaty protects the activity for which the defendant is being prosecuted, the charges must be dismissed. For example, if state officials arrest an Indian for hunting or fishing out of season, that person is not guilty of the charges if he or she was exercising a treaty right at the time in question.[69] Chapter XVIII explains how to file a lawsuit to protect treaty rights.

Indian treaties belong not just to Indians; they belong to everyone in the United States. Today, some of these treaties, especially those reserving water rights or hunting and fishing rights, or granting immunities from certain state taxes, may seem "unfair" to non-Indians, just as many of these treaties seemed unfair to Indians at the time they were signed. But regardless of how they seemed then or now, the citizens of this country have a legal, moral, and ethical duty to enforce these treaties. Indians paid dearly for their treaty rights, and the United States must keep its end of the bargain. Some people, calling these treaties "ancient documents," argue that they no longer need to be enforced. However, the Declaration of Independence and U.S. Constitution are "ancient"

documents as well. As one court observed in enforcing a century-old treaty, "the mere passage of time has not eroded, and cannot erode, the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold."[70] The extent to which the United States honors its treaty commitments to Indian tribes reflects the extent to which our society is committed to the rule of law and justice. The integrity of our country depends on it.