Overview of Federal Indian Policy

“They’re Still Here!”: Over Three Hundred Years of Shifting U.S. Federal Indian Policy

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Timeline of Federal Indian Policy

- **Doctrine Of Discovery**
  - 1492-1600’s

- **Treaty-Making Era**
  - 1800’s

- **Indian Removal Era**
  - 1830-1850
  - 1600’s - 1871

- **Reservation Era**
  - 1850-1880’s

- **Indian Reorganization Era**
  - 1930’s - 1945

- **Allotment & Assimilation**
  - 1887-1930’s

- **Indian Self-Determination Policy Era**
  - 1945-1961
  - 1970’s-Present

**Note:** The treaty-making era pre-dates the U.S. AND overlaps the removal and reservation policy eras.
The Roots of Federal Indian Law and Policy: Early International Law

The Doctrine of Discovery

• A series of Papal Bulls (laws) issued by the Pope.
• Divided the world into those who were civilized (Christian) and savages (non-Christian).
• Declared that the discovering Christian European power had dominion over the lands and the people discovered.
• Led to decimation of Indigenous populations due to disease, enslavement, and mass killings.
• Later became institutionalized in U.S. federal Indian law in the case Johnson v. McIntosh (1823).
Shifts In Indian Policy – Why So Many Contradictions?

Since the United States became a nation, federal Indian policy has seen many significant changes. Some of the shifts in policy may, at first glance, seem rather contradictory. However, when considering the underlying assumptions and when placed within the context of the broader context of U.S. history, the major shifts in policy can be construed as being quite logical.

The three primary underlying assumptions were:

1. Indians would assimilate
2. Indians would eventually disappear, as they “died off naturally” due to relocation and the subsequent loss of traditional subsistence and economic practices (loss of fishing rights, land for agriculture and reductions in wildlife, and other subsistence rights).
3. Indians would be exterminated.

These three assumptions were combined in one form or another as strategies for dealing with “the Indian problem”. In short, approaches to federal Indian policy were marked by short-term policy solutions, as the assumptions were that native peoples would not—for too long--survive in large numbers, or as distinct peoples. The expectation was not that in the 21st century, more than 560 American Indian tribal nations would still exist as political and culturally distinct peoples.

Therefore, at the end of each policy era, policy-makers were faced with having to deal with “the Indian problem” again, because, “Darn! They’re still here!” In other words, place the shifts in Indian policy within the overall context of the nation’s history, consider the assumptions identified above, and what might otherwise seem to be quite contradictory policy can be understood as logical approaches to an unresolved “problem.”
Brief Overview of Federal Indian Policy Eras

**Pre-U.S. – 1871**

The **treaty-making era**. This policy era overlaps others in that the U.S. continued to make treaties with tribal nations through the removal and reservation policy eras. Also, note that American Indian tribal nations had treaties with European powers which predated the U.S. Constitution or the nation itself.

*Treaties are documents of agreement between sovereigns.* It’s a practice of securing agreements between nations. The United States enters into treaties with other governments—not with ethnic minorities, not with interest groups, and not with individuals. The U.S. government continued to enter into treaties with tribal nations until 1871. The constitution declares that treaties, along with the constitution itself, are “the supreme law of the land.” That remains the status of treaties between the U.S. and American Indian nations today.
Removal Era

1830-1849  The Removal Era.
President Andrew Jackson urges Congress to act to remove Indians on the east coast, in the southeast, and northeast areas of the U.S. to lands west of the Mississippi. The rapidly growing non-Indian population, discovery of gold in Georgia, and the need for even more land for non-Indians results in the push to move Indians “out of the way.” Congress passes the Indian Removal Act, and the Cherokee try to defend their lands, sovereignty and political status in the courts. Chief Justice John Marshall writes the opinions in two landmark cases which lay the foundation of federal Indian law—Cherokee Nation v. Georgia, and Worcester v. Georgia.

Despite the Supreme Court’s ruling in Worcester v. Georgia, Indians are removed to Indian Territory--Oklahoma (Oklahoma is a Choctaw word). This policy era includes the famous Cherokee Trail of Tears, but other tribes, including the Choctaws, experienced their own trail of tears. Thousands of American Indians, including many elderly and children, died along the way to Oklahoma during removal.

Today, there are more than 40 tribal nations in Oklahoma due to Indian removal

Exercise: Visit at least one of the pairs of the home pages below, and read about tribal history and the Indian removal era as told by native peoples from tribes who were targets of removal policy:

http://www.nc-cherokee.com/cultural.htm
http://www.cherokee.org/
http://www.choctawnation.com/index.cfm?fuseaction=Home
Reservation Era
1850 – 1886
The Reservation Era.

By 1849, the non-Indian population has continued to increase rapidly, and many people go west seeking to make their fortunes in a variety of ways. In the late 1840’s gold is discovered in California, leading to the California Gold Rush.

Once again, Indians are “in the way”, and in possession of territory desired by non-Indians for a variety of reasons—gold, ranching, farming, and industry. The reservation system is created to further relocate Indians, and for some, it seemed a viable alternative to preventing further killing of Indians.

American Indians in California are targeted by miners, settlers, and others for extinction. View the web links on this section to see some of the specific actions taken against Indians in California, and how they led to the decimation of California’s indigenous population during the Gold Rush era.

During the Civil War era, the nation’s interest is diverted from attention to resolving the Indian problem to solving the crisis of the battle for states rights versus the power of the central government and slavery, but native peoples find themselves in the way of many non-Indian interests and “progress” not long after the war ends.
The nation’s non-Indian population has now extended from coast-to-coast, and yet Indians are still present as identifiably distinct peoples, who are once again in the way. Senator Henry Dawes, along with others propose breaking up tribal land-holdings as a way to assimilate and “civilize” the Indians.

Congress passes the Dawes Act and other legislation, which actively and aggressively pursues an agenda of ending tribal sovereignty, and trying to civilize individual Indians and make them assimilate into the dominate culture and society.
The Meriam Report, published in 1928, reports on the conditions of American Indians in more than 20 states. It finds conditions of abject poverty and extremely poor health conditions are common among American Indians.

In 1933, President Roosevelt appoints John Collier as Commissioner of Indian Affairs. He calls for an end to allotment policy, citing the failure of policy and that it was responsible for creation the horrible living conditions of American Indians. In 1934, Congress passes the Indian Reorganization Act, which allowed for, in part, allotted lands to be reconsolidated into reservations and tribal governments to be reinstated and reorganized.
1945 – 1961  The Termination and Relocation Era

The federal government begins terminating the special trust relationship -with various tribal nations and begins relocating American Indian individuals from reservations to urban relocation centers in San Francisco, Dallas, Chicago, Phoenix and other metropolitan areas. This policy urges wholesale break-up of communities and emphasizes assimilation of American Indians as individuals into “mainstream” society.

During this era, Congress passes Public Law 280, which requires state governments in certain states to assume criminal jurisdiction over tribal lands in their states. PL 280 was unpopular with American Indian tribes and with states. In later years, it was rescinded in part, leaving criminal jurisdiction in Indian country a complicated patchwork of law.

American Indian Self-Determination Policy Era

1960’s- Present  **American Indian Self-Determination Policy**

In the 1960’s sentiment towards American Indians begins to change. During the civil rights era, the American Indian Movement as well as other groups begin to draw the nation’s attention to the plight of American Indian people and federal policy affecting them. Both President Johnson and President Nixon were champions of a policy of self-determination for American Indian peoples. In 1970, President Richard Nixon addressed Congress on the subject. President Nixon reinstates the status of some tribal nations terminated during the termination era. By the mid 1970’s, Congress responds by passing two critical pieces of legislation: The Indian Self-Determination and Education Assistance Act and the Indian Child Welfare Act.

This policy officially ends termination and relocation policy, emphasizes the status of tribal nations as sovereign, domestic dependent nations with a status higher than states, re-affirms treaties as, along with the constitution, the supreme law of the land, and authorizes the Bureau of Indian Affairs to contract directly with tribal nations to run their own programs and services.
American Indian Self-Determination Policy

Tribes begin running their own programs in education, forestry, economic development, and other areas and employing their own qualified tribal members to administrate and operate them.

Indian preference in employment by tribes was challenged through the courts as being discriminatory against non-Indians in Morton v. Mancari. The Court noted, in this case, that the term “Indian” was not a racial term, but a political one and that the purpose of Indian preference in employment was part of the government’s interest in ensuring American Indian self-determination.

Other important legislation and Presidential Executive Orders that have affirmed self-determination and the unique legal and political status of tribal nations in the current policy era include:

1988—The Indian Gaming Regulatory Act

Executive Order 13007—Indian Sacred Sites (1996)

Executive Order 13175—Consultation and Coordination with American Indian Tribal Governments. (2000)
American Indian Self-Determination Policy

Current Status of Tribal Governments

- Treaties are still valid and, along with the constitution, the “supreme law of the land.”
- Tribes are distinct, self-governing political societies with a status higher than states, whose sovereignty is limited only by the federal government.
- The government-to-government relationship between tribes and the United States and the trust responsibility has been affirmed repeatedly in court cases, executive orders, and legislation (see, for example, EO 13175, “Consultation & Coordination with Indian Tribal Governments).

American Indian tribal nations status is unique, both the in the U.S. and in the world. Tribal governments are, for the most part, extra constitutional in that they pre-date the existence of the U.S. and are mentioned in the Constitution only twice.

Additionally, indigenous peoples in many other countries have no treaties to afford them established legal rights to land and other resources as do American Indian tribes.
Tribal Lands

• Trust lands
  – Held in trust by the federal govt. for Indian tribes

• Allotments
  – Restricted
  – Unrestricted

• Fee Lands (including lands purchased by a tribe)
Indian Country

• In addition to reservations, Indian Country Includes
• allotments
• dependent Indian communities
  – land set aside by the Federal govt. for Indian use and
  – under federal superintendence
• New Indian lands
  – 1934 Indian Reorganization Act provides the Secretary with overall authority to acquire new lands for American Indian tribes (which may or may not be taken into trust)
  – Some new lands are acquired under particular Congressional legislation (for example, N-H Land Dispute lands acquired in the settlement process includes both trust and fee lands)
Alaska Native Peoples & Lands

• Very different with respect to lands than trust lands of tribes in the lower 48.
• Why?

• 1906 Alaska Allotment Act (amended 1956)
  – Allotments were under BLM administration until approved > BIA
• 1971 ANCSA
• 1980 ANILCA
Alaska Native Claims Settlement Act

- 1971 - Enacted by Congress to settle Alaskan Native claims
  - Extinguished Aboriginal title in AK
  - Native Alaskan people received 44 million acres and $962 million
  - Established a corporate structure
    - 200+ village corporations
    - 12 regional corporations
ANILCA

• Alaska National Interest Claims Act
  – Alaskan Native subsistence issues (as rural residents)
  – Public land management activities affecting subsistence
  – Regulates subsistence on federal lands and reserved waters
  – Rural subsistence (customary and traditional use)

• Established a federal subsistence board (Alaskan regional directors of BLM, USDA FS, USFWS, NPS, BIA, and a Chairperson)

• State of Alaska manages on state and private lands (including Native corporation lands)—no preference for rural residents.
  – Exception: reserved navigable waters to fulfill public land withdrawal purposes (includes the North Slope)

• 1993 – Ten regional advisory councils established

• Result – tangled web of federal and state regulations and court decisions
Implications

- Environmental issues on Native lands are complicated in terms of regulatory jurisdiction and management actions.
- BIA often has contradictory roles in any given environmental case/issue:
  1. The role of guardian/trustee to act “in the best interest” of their Indian client (ward).
  2. A responsible party—in many cases, reluctance to assume any sort of liability or incur a cost.
Implications

• Particularly complex where allotments are involved, especially for tribes with both reservations and restricted allotments.

• Alaska – a special case, with numerous layers of jurisdictional complexity and unique environmental challenges.
Thank you