PART V.

INDIAN TREATIES CONSTRUED BY SUPREME COURT OF THE UNITED STATES.

Treaty with Delawares, September 17, 1778 (7 Stat. 13, vol. 2, 3), 5 Pet. 1; 6 Pet. 515.
Treaty with Wyandottes, Delawares, Chippewas, and Ottawas, January 21, 1785 (7 Stat. 16, vol. 2, 6), 175 U. S. 1.
Treaty with Cherokees at Hopewell, November 28, 1785 (7 Stat. 18, vol. 2, 8), 2 Pet. 216; 5 Pet. 1; 6 Pet. 515; 14 Pet. 4; 2 How. 76; 109 U. S. 556; 117 U. S. 288; 135 U. S. 641; 148 U. S. 427; 175 U. S. 1; 224 U. S. 413.
Treaty with Choctaws, January 3, 1786 (7 Stat. 21, vol. 2, 11), 2 How. 76; 224 U. S. 448.
Treaty with Chickasaws, January 10, 1786 (7 Stat. 24, vol. 2, 14), 2 How. 76.
Treaty with Wyandottes, Delawares, Ottawas, Chippewas, and Pottawatomies, January 9, 1789 (7 Stat. 28, vol. 2, 18), 175 U. S. 1.
Treaty with Creeks, August 7, 1790 (7 Stat. 35, vol. 2, 25), 2 Pet. 216.
Treaty with Cherokees, July 2, 1791 (7 Stat. 39, vol. 2, 29), 1 Wheat. 115; 5 Pet. 1; 6 Pet. 515; 14 Pet. 4; 117 U. S. 288; 202 U. S. 101; 224 U. S. 413.
Treaty with Cherokees, February 17, 1792 (7 Stat. 42, vol. 2, 32), 5 Pet 1; 14 Pet. 4; 117 U. S. 288.
Treaty with Cherokees, June 26, 1794 (7 Stat. 43, vol. 2, 33), 5 Pet. 1; 6 Pet. 515.
Treaty with the Six Nations, November 11, 1794 (7 Stat. 44, vol. 2, 34), 19 How. 366; 5 Wall. 761; 162 U. S. 283; 271 U. S. 65.

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Indian Treaties as Sovereign Contracts

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PROFESSOR

The United States government, from its very inception, continued the English and colonial strategy of dealing with the Indian tribal nations on a government-to-government basis through treaty-making. The federal government entered more than 400 treaties with various Indian tribes from 1778 to 1871. In these treaties, the United States negotiated cessions of land, recognized other areas of land called "reservations" which the tribes reserved to themselves, and respected the self-governing powers of tribes. Even though Congress ended treaty-making with tribes in 1871, the preexisting treaties are still in effect and contain promises which bind the United States today. In fact, under our Constitution, treaties are "the supreme Law of the Land." In addition, the United States continues to deal with the tribal nations on a political basis up to the modern day.

The Indian nations negotiated treaties from a position of strength until the early 1800s. The newly formed United States faced internal problems and external conflicts with European countries and could not afford war with Indian tribes. Hence, early treaty-making between the United States and tribes was often favorable to the tribes. After the War of 1812, though, and the relaxing of the European threat against the United States, the weakening position of tribes led to more one-sided treaty negotiations in favor of the United States.

Many people misunderstand the nature of treaties and the reservations that were

formed by treaties and the promises that were given therein. Native governments and peoples were not given rights or land by the United States but instead, through political and contract-like negotiations, tribes arranged a trade of rights with the United States. The United States Supreme Court has referred to Indian treaties as contracts between sovereign nations, and in one case, the Court referred to "the contracting Indians." Furthermore, in 1905, the Court stated that treaties were not a grant of rights to Indians but were instead a reservation by the tribes of rights that they already owned. Thus, through treaty-making, tribes gave up certain rights to land and assets in exchange for payments, promises, and protection from the United States. These treaties, then, were not gifts from the United States to Indians but were a trade of certain rights from tribes to the United States to preserve other rights the tribes already possessed and wanted to retain.

Treaty rights are often hotly contested issues because they are sometimes perceived as "special rights" for Indians. These rights have been vigorously opposed by state officials and issues about tribal treaties are often in the news. The property rights that a specific treaty protected, however, are not for all Indians in general but are rights specific to the tribe that signed the treaty in question and its citizens. A good example of specific treaty rights are the Pacific Northwest treaties that preserved salmon, ocean, and shellfish fishing rights for the tribes that entered treaties with the United States. These treaty rights do not apply to Indians in general.

Furthermore, the United States treaties with many Pacific Northwest tribes are good examples of the operation of treaties as contracts and of the analysis that the Supreme Court applies to interpreting Indian treaties. The treaties that affect salmon and Columbia River fishing rights were negotiated in the mid-1850s. At that time, neither Oregon nor Washington was a state; instead, they were United States territories. The tribal populations in this region, however, outnumbered white trappers and settlers by more than 4 to 1 and the tribes possessed aboriginal title to the area. These tribal nations had not been defeated in war by the U.S. nor had they ceded their lands to the federal government. The tribes were independent sovereigns controlling, ruling, and living on their own lands.

The United States directed Governor Isaac Stevens of the Washington Territory to negotiate treaties with the Northwest tribes to secure land concessions to allow further American settlement in this area. Governor Stevens negotiated treaties with the Puget Sound tribes, and with the Makah on the northwestern tip of Washington. Stevens also negotiated treaties regarding the Columbia River watershed with tribes at Walla Walla, Washington, in June 1855. The four tribes that possess these particular treaty rights today are the Confederated Tribes of the Warm Springs, the Confederated Tribes of Umatilla Indians, the Confederated Tribes and Bands of the Yakama Indian Nation, and the Nez Perce Tribe. These tribes traded their ownership of 64 million acres of land in Oregon and Washington for the right to retain reserved areas of land (reservations) for their exclusive use, and to reserve the right to fish on and off their reservations at their "usual and accustomed stations in common with citizens of the United States." When the Senate ratified these treaties in 1859, they became the supreme law of the land, and the tribes had thus reserved their property rights to salmon and other fish and shellfish and a property right to use their usual and accustomed fishing sites to carry out these treaty protected rights.

Treaties have many similarities to contracts and have often been so treated by the courts. As in contract law, courts try to interpret treaties to achieve the intent of the parties. The unique aspect of interpreting Indian treaties, however, arises from the recognition of the disadvantaged bargaining position that Indians often occupied during treaty negotiations. Hence, courts narrowly interpret treaty provisions that injure tribal interests. This analysis is similar to the judicial treatment of "adhesion contracts." An adhesion contract is one that was not fairly bargained for by the parties and in which one party was operating from a much weaker position than the other party. In such instances, courts will not interpret the contract, or a treaty, against the interests of the weaker party.

The suspect manner in which most Indian treaties were negotiated has led the United States Supreme Court to develop special rules of ''construction" or interpretation that favor tribes in interpreting treaties. Indian treaties receive a broad construction or reading in favor of the signatory tribe by mixing principles of international treaty construction with contract principles. For example, courts resolve ambiguous expressions in a treaty in favor of the tribe, since the United States drafted the treaties, and they were written in English which very few tribes spoke and none could read; courts interpret treaties as the tribes themselves would have understood the terms used in the treaty and during the negotiations to determine the intent of the parties; and courts factor in the history and circumstances behind a treaty and its negotiations in interpreting a treaty's express provisions. The Supreme Court has stated that the language used in treaties should never be interpreted to a tribe's prejudice.

There is good reason for judicial deference to the Indian side of treaty making and to closely scrutinize the negotiations of many Indian treaties. The United States and its negotiators often selected who was to be the "chief" of the tribe they would negotiate with; often the United States negotiators bribed and unduly influenced tribal negotiators with gifts and/or alcohol; the United States often was represented by attorneys while the tribes were obviously not so represented, and, of course, the treaties were written in English. Governor Stevens engaged in this very conduct in negotiating the Oregon and Washington Indian treaties. He had his Harvard trained lawyer, Lieutenant George Gibbs, but the tribes had no legal representation. Also, Stevens was known for avoiding the actual leaders of a tribe and instead choosing the tribal representatives he wanted to negotiate treaties. Stevens offered bribes or "gifts" to Indian negotiators who signed treaties and refused to give gifts to Indians who did not sign his treaties, and he was accused by his own men of badgering, coercing, and hurrying tribes to sign treaties. Under contract theory, contracts or treaties negotiated and agreed to in this manner would not be enforceable due to undue influence, unequal bargaining position, and the absence of arms-length bargaining.

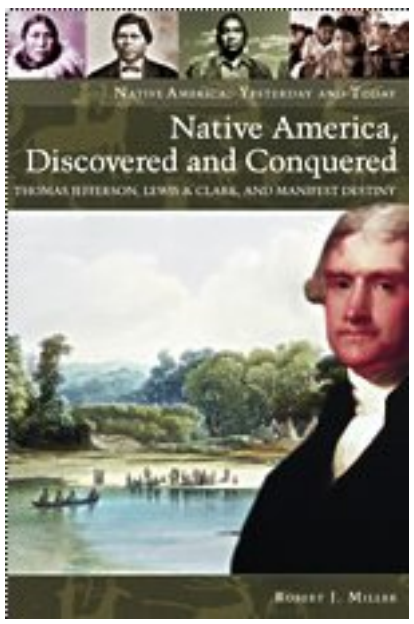
In addition, the treaties negotiated by Governor Stevens with Puget Sound and Columbia River tribes were written in English, which of course the Indians did not speak or read. Stevens used an interpreter who spoke the Chinook Jargon that some of the Indians spoke, but it was a language that was totally inadequate for negotiating the technical and legal terms and provisions of treaties. The Chinook Jargon contained no more than 300-500 words, was a slang mixture of English, French, and Indian words, and could not possibly have conveyed the technical meaning and intent of the United States and the tribes regarding the provisions and

property rights covered by the Columbia River and Puget Sound treaties.

The Supreme Court has directly addressed the Stevens treaties in at least seven different cases since 1905 and has consistently upheld the treaties and interpreted their provisions in favor of the signatory tribes. Consequently, these treaties contain the contractual and still binding promises of the United States to recognize the tribal right to live undisturbed on their own reservations and to avail themselves of the rights guaranteed in the treaties. In these treaties, the tribes reserved to themselves many right, including fishing for salmon, and the United States promised to provide certain benefits such as health care, education, and financial payments to pay for the lands the tribes sold to the United States. The promises contained in these treaties are still the supreme law of the land, and along with the hundreds of other Indian treaties signed by the United States, they are guarantees the federal government must keep to fulfill its promises to Indian people.

As with any contract, both parties must fulfill the promised terms or suffer the legal consequences. The United States, then, must fulfill the treaty promises it made to Indian tribes. As one Supreme Court Justice stated in regard Indian treaties: "Great Nations, like great men, should keep their word."

For further information, see Robert J. Miller, Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling, 25 Amer. Indian L. Rev. 165 (2001); Robert J. Miller, Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act, 70 Ore. L. Rev. 543 (1991); Fay Cohen, Treaties on Trial (1986); Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"–How Long a Time is That?, 63 Calif. L. Rev. 601 (1975).



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Further details about the book and other writings on the impact of Manifest Destiny on Native America can be found on Professor Miller's blog at
http://lawlib.lclark.edu/blog/native_america/

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