



Denis Binder is entering his 50th year of Teaching. His first article, published in the California Law Review in 1971, was “Sex Discrimination in the Airline Industry: Title VII Flying High.” He has published three indices of Environmental Justice Cases, and in 2017 “Some Rough Historical Parallels Between South Africa and the United States.” He consulted with Cesar Chavez and the United Farm Workers in 1991.

Professor Denis Binder is not a Native American, but through an unique sequence of events was the first chair, 1977-78, of the Section of Native American Rights of the Association of American Law Schools

The Treatment of the Native Americans

by Professor Denis Binder

We celebrate Thanksgiving with an image of kumbaya between the Pilgrims and the Mashpee Wampanoag Native Americans. The Pilgrims celebrated their harvest with the Natives. The Native Americans looked upon the settlers with wary eyes. Armed conflicts quickly ensued between the Powhatan Confederacy and Virginia colonists in 1610 and the Pequots and the Massachusetts Bay colonists in 1636. Chief Opechancanough led the Powhatan Confederacy against the British settlements in Virginia from 1622-1646, when he was captured and then murdered by a guard.

The Thanksgiving festival followed the earlier harvest during a failed experiment in socialism by the Pilgrims. They established collective ownership of the land with communal farmland and harvest sharing. The hard workers lost their enthusiasm when they realized their efforts would be shared with “slackers.” The land was then divided into individual portions for the colonists. The next harvest was successful.

The history of America is one of friendship, hostility, treachery, and blind neglect to the Native Americans. The American settlers from the East Coast to the West Coast displaced the Native Americans, who fought with and against the Americans in several wars, including the French and Indian War, the Revolutionary War, the War of 1812, the Civil War, Red Cloud’s War and the Great Sioux War. The Indian conflicts lasted four centuries from 1609-1924 with atrocities, brutalities, depravity and massacres on both sides. Whether friend or foe, the Native Americans almost always ended up on reservations, often with limited natural resources, an imposed cultural and lifestyle change, and a corrupt Indian agent. The ending of armed hostilities did not resolve America’s Indian problem.

The early settlers faced a forbidding wilderness on the east coast. They worked their way through the forests and over the Appalachian Mountains to spy the vast Ohio Territory and the Northwest Territory.

Under the Royal Declaration of 1763, the British forbade settlement in the Ohio Territory, a lesser cause of the Revolutionary War, to minimize friction with the Native Americans west of the mountains.

Independence opened the West to settlement. Even George Washington became a speculator in Ohio lands. A series of treaties with England, France, Mexico, Russia and Spain granted Florida, the Great Plains, the West, and Alaska to the United States. The cry soon became Manifest Destiny. Neither harsh environments nor Native Americans could stop the inexorable westward expansion to the Pacific Ocean, Hawaii, and the Philippines.

The American People, an amalgam of immigrants from throughout the Old World, flooded into America. Nothing would stand in the way of Manifest Destiny - not the wilderness, the British, the mountains, burning deserts, frozen plains, or the Native Americans. The American people mastered the landscape and conquered the Native Americans.

Rivers were bridged, dammed, diverted, and tunneled. Mountains were cut, blasted, and tunneled. Wetlands were drained, filled, and dredged. Fossil fuels and minerals were mined, drilled, and pumped. America was spanned by wagon trails, canals, steel rails, and asphalt. Environmental protection was not a consideration.

The Far West was initially settled for its resources, especially mineral resources, of which the 49ers and the California Gold Rush are best known in American history. Every western state had a mineral, and thus mining, boom. Native Americans were displaced from their lands.

Chief Red Cloud was a great chief of the Lakota Sioux. He successfully fought the U.S. Army—including the 1866 “Fetterman Massacre” in which an 81-man detachment of soldiers was wiped out compared to only 14 casualties of the combined Northern Cheyenne, Lakota and Arapahoe Native Americans—a precursor a decade later to the Battle of

the Little Bighorn.

The United States then entered into The Fort Laramie Treaty on April 29, 1868 with the Arapahoe, Lakota, Northern Cheyenne and other bands. The Treaty granted the tribes the Black Hills and other lands for their “undisturbed use and occupation” as the Great Sioux Reservation. The United States “solemnly[agreed]that no unauthorized persons shall ever be permitted to pass over, settle upon, or reside in[the]territory.”[1] The Treaty further provided that the treaty could not be abrogated, or the reservation reduced, without being “executed and signed by three quarters of the adult male Indians.”[2] The Black Hills are sacred lands to the Sioux.

The June 25, 1876 Battle of the Little Bighorn was a consequence of discovering gold in the Black Hills.

General George Armstrong Custer led an expedition into the Black Hills in 1874, six years after the Treaty of Fort Laramie, where gold was found. A wave of miners and settlers poured into the Black Hills. The United States revoked and breached the Fort Laramie Treaty; the reservation was no more.

A commission offered the Sioux \$6 million or \$400,000 annually in exchange for the mineral rights.

The Sioux asked for \$70 million and got zero. Indeed, the federal government stripped the Sioux of their treaty and granted off-reservation hunting rights.

Congress on August 15, 1876, passed the “Sell or Starve” Act, which stated that all aid was to be cut off to the Sioux until they relinquished the Black Hills and hunting rights.[3] A new agreement was reached with 10% of the males. Congress in 1877 enacted the 1876 agreement into law. The Indian Claims Commission held the “Sell or Starve” Act was an uncompensated exercise of eminent domain. The Indian Claims Commission awarded damages of \$17.1 million plus 5% interest retroactive to 1877.

The Court of Claims affirmed the Commission’s decision. The Supreme court quoted the Court of Claims conclusion: “A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe.”[4]

The Lakota Sioux, Northern Cheyenne, and Arapahos united. They won the Battle of the Little Bighorn but lost the war. George Armstrong Custer was revered as a martyr for over a century for his bravery in Custer’s Last Stand. Anheuser Busch distributed 150,000 heroic posters of Custer’s Last Stand to bars. The lithograph was a nonfactual depiction of the battle, cementing the image of a heroic Custer.

Not so today. Custer is remembered for an earlier massacre at Washita River on November 27, 1868, where his 7th cavalry killed women and children of a peaceful Cheyenne winter encampment. Custer’s Last Stand is now officially the Little Bighorn Battlefield National Monument.

The public image of America’s Native Americans through the 1960’s

was essentially negative as Hollywood usually portrayed Indians as villains in scores of movies and TV shows. America’s youths often played Cowboys and Indians. As a side note, the villains in Hollywood westerns were usually attired in black while the good guys wore white.

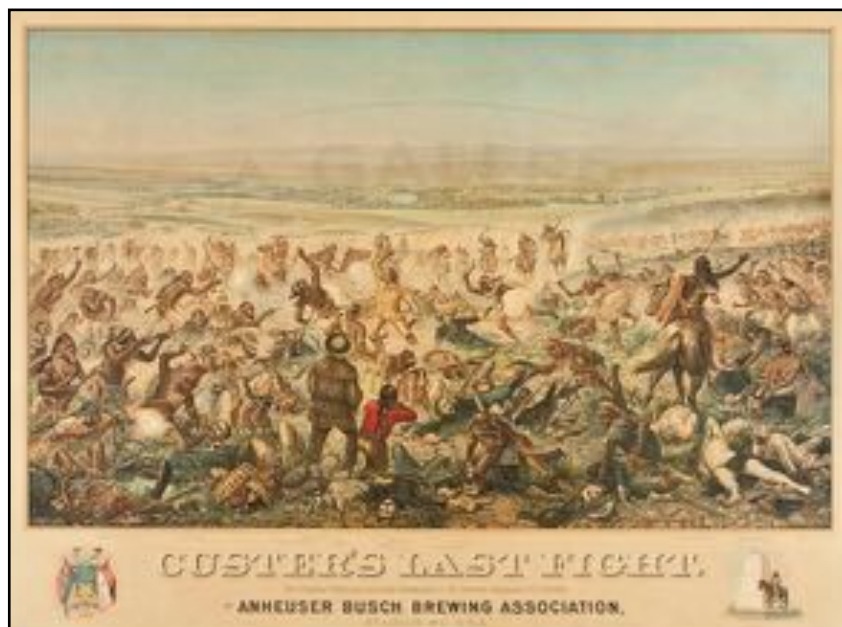
President Andrew Jackson signed and implemented the Indian Removal Act of 1830, fulfilling a

12-year desire to forcibly remove the tribes of the Southeast, the Creeks, Choctaws, Seminoles, Chickasaws, and Cherokees to Indian Territory, now known as the state of Oklahoma. Thousands died in the forced marches on what became known as the Trail of Tears.

Forced resettlement was a consistent theme with the Native Americans through the 20th Century, usually to reservations and often away from their home ranges and the settlers. The reservations could be created through treaties or by executive order.[5]

A split in America existed over the fate of the Native Americans. Many in the West thought, “The only good Indian is a dead Indian.” An example is the 1864 proclamation by Colorado’s Territorial Governor, John Evans. He called for citizens to kill Indians and seize their property.

The East respected the Indians as “Noble Savages” defending their lands. The compromise was to throw them onto reservations, out of sight – out of mind,



while forcing them to change their culture and lifestyle. Ironically the “Cowboy West” after the Civil War treated Black cowboys fairer than other occupations.

A scorched earth policy accelerated the demise of the Plains Indians with the near extermination of the buffalo, a critical food source whose hides were used as clothing and tenting. 31 million buffalo were slaughtered in a two-year period. The bison were shot for sport by passengers on the transcontinental trains, by buffalo hunters, fur traders, and as a matter of military policy. The Army correctly believed that killing the buffalo would deprive the Plains Indians of food, forcing them onto reservations.

The Comanches fell to superior firepower in the U.S. Army and state forces, especially the Colt Revolver and the Spencer Repeating Rifle. The Natives suffered from another handicap from having their tribes scattered initially. Tribes had traditionally fought each other, and thus unifying them as one to fight the White Man was difficult. The few times with Pontiac and Tecumseh in the East and Sitting Bull, Crazy Horse, and Red Cloud in the West were anomalies. The scattered tribes faced unified armies of soldiers.

Red Cloud is quoted late in life as saying, “They made us many promises, more than I can remember. But they kept but one... They promised to take our land... and they took it.”[6]

First General William Sherman and then General Phil Sheridan commanded the Army in the Indian Wars in the West after the Civil War. General Sheridan wrote about the fate of the Indians in his 1878 Annual Report of the General of the U.S. Army. They sent the Indians to reservations with promises of religious instructions and supplies of food and clothing. He remarked these promises were not kept. He continued:

“We took away their country and their means of support, broke up their mode of living, their habits of life, introduced disease and decay among them, and it was for this and against this that they made war. Could anyone expect less? Then, why wonder at Indian difficulties?”[7]

The Europeans and Natives exchanged diseases. Lord General Jeffrey Amherst is widely believed to have authorized British soldiers to give smallpox-contaminated blankets to the Indians. The historical record to date is inconclusive. However, the North American Indians had no resistance to many European diseases, especially cholera and smallpox which decimated the Native Americans throughout North America and the Caribbean.

Alcohol, “Firewater,” was also devastating to the Native Americans. An example is Ira Hayes, a Pima Indian, one of the six Marines and sailors who raised

the flag on Iwo Jima in the famous second staged photo. Ira became a hero. Yet he suffered from post-traumatic stress disorder and turned to alcohol. He died on January 24, 1955, from exposure and alcohol poisoning.

The District Counsel of the Seattle District of the Army Corps of Engineers hired me in 1976 to prepare a legal memo on the rights of the Colville and Spokane Indians caused by the construction of Grand Coulee Dam on the Columbia River. The Colville Reservation is on the western side of the Columbia River. The Spokane Reservation lies on the confluence of the Columbia and Spokane Rivers. The Colvilles are not a traditional tribe, but 12 bands thrown together on one reservation.



Chief Joseph

One of the bands is Chief Joseph’s Nez Perce Indians. Chief Joseph is a legend in Native American history. His band fled the Nez Perce Reservation in Idaho, seeking refuge in Canada. The military chased Chief Joseph and his band over 1,000 miles, finally forcing them to surrender in Montana 40 miles from the Canadian border. They were not returned to their reservation but exiled to the Colville Reservation.

Chief Joseph said:

“We gave up some of our country to the white men, thinking that we could have peace. We were mistaken. The white man would not let us alone.”[8]

Another Chief Joseph quote, which I have on a poster, says:

“Let me be a free man, free to travel, free to stop, free to work, free to trade where I choose, free to choose my own teachers, free to follow the religion of my fathers, free to talk, think and act for myself...”[9]

Grand Coulee Dam was damaging to both

reservations, taking some of their lands and destroying their fishery resource. The dam was considered too high, with 350 feet of head to build a successful fish ladder. Its reservoirs flooded the then traditional fishery of Kettle Falls just as The Dallas Dam on the Lower Columbia flooded Celilo Falls.



Celilo Falls



Kettle Falls

The Corps of Engineers constructed the large Chief Joseph Dam 51 miles below Grand Coulee Dam. The Chief Joseph Dam's purposes were to generate electricity and re-regulate (modulate) the large discharges from Grand Coulee. It cut off another salmon stream.

The federal government is legally a trustee for the Indian Reservations. Thus, the government acting through the Department of the Interior and Bureau of Indian Affairs is charged with protecting the best interests of the beneficiaries. The Bureau of Reclamation, which was building Grand Coulee, is also in the Department of the Interior. The Department had a substantial conflict of interest. It subordinated the rights of the Indians to whom it

owed a trustee's duty, to its power-generating Bureau. Based on a reading of the agency correspondence, it appears that the same government attorney may have been on both sides of the conflict. The federal agencies simply tried to figure out how many trees would be cut, acres taken for the reservoir and a loss of fishery resources to which figures were attached. The calculated amount was in the low 5 figures. The tribes were neither asked to consent nor able to contest the project.

The Colvilles and Spokanes ultimately received compensation from the government. Congress in 1940 granted the needed lands on the Colville and Spokane Reservations to the federal government. It authorized the Secretary of the Interior to determine the "just and equitable compensation for the tribal lands taken." [10] The Secretary awarded \$63,000 to the Colvilles and \$4,700 to the Spokanes. [11] Congress appropriated an additional \$3,300,000 in 1978 to compensate the Colvilles for the loss of their fisheries. Congress ratified in 1978 an agreement between the federal government and the Colvilles under the Indian Claims Commission Act to pay them a lump sum of \$53 million and \$15,250,000 annually from the sale of power from Grand Coulee.

A subsequent settlement with the Spokanes provided \$17,800,000 and \$12,800,000 for the next four years. Additional payments of \$6 million annually for 10 years and then \$8 million annually thereafter.

Clair Evans, Chairwoman of the Spokane Tribe, aptly said "Financial compensation is a semblance of justice, but we will never be as we were in the past." [12]

The Grand Coulee saga is not an isolated instance of ignoring tribal rights. The Mandan, Hidatsa and Arikara were forced in 1870 onto the Fort Berthold Reservation, a small part of their original lands. The government completed the Garrison Dam in 1953, flooding over a quarter of their remaining lands, leaving many members dislocated.

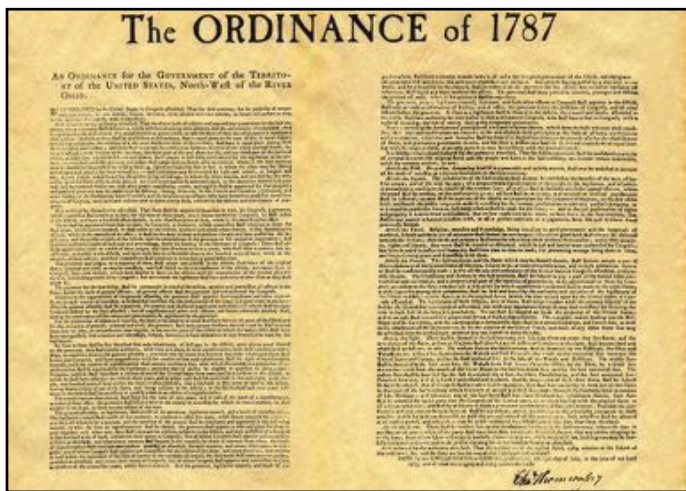
Another example is President Theodore Roosevelt's creation in 1908 of the 18,000-acre Bison Reserve—part of the effort to bring back the buffalo. It was carved out of the 1.25 square mile Flathead Indian Reservation of the Confederate Salish and Kootenai Tribes. Congress restored the Bison Range to the tribe on December 27, 2020.

These examples of the federal government's treatment of Indian lands are illustrative. It held legal title to the lands and ignored its trust relationship to the tribes. The government did as it wished with the lands: dams and reservoirs, railroads, highways, reserves, and divestitures without meaningful Indian consent. It adjusted reservation boundaries as it wished.

The settlers/homesteaders through the Great Plains and West were attracted by cheap land, either homesteading directly from the federal government or through intermediate owners, such as the transcontinental railroads with federal land grants. The federal government obtained dominion over the western lands through treaties with England, France, Mexico, Russia, and Spain. The question arose over the aboriginal rights of the Native Americans.

The United States then obtained legal “title” to the lands through treaties with the individual tribes and bands who under British law had “aboriginal rights.” The United States assiduously acquired tribal lands by force, peaceful treaties, or Congressional edict, but did not feel bound by the terms and conditions of the treaties. The ink was barely dry on some treaties before the United States breached them. Some tribes were simply displaced from their lands absent treaties.

The Native Americans did not own land in the Anglo-American sense. Land was communal, but with shifting boundaries depending on the vicissitudes of the tribes. For example, the tribes of the Pacific Northwest entered into a series of treaties with Territorial Governor Isaac Stevens in the 1850’s. They deeded hundreds of thousands of acres, retaining their traditional hunting and fishing rights. The Northwest tribes needed a series of judicial decisions over a century later to enforce their treaty rights.



The Northwest Ordinance of 1787 laid out a promise of fair treatment of the Indians:

“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress”[13]

Congress in 1789 reaffirmed the 1787 Ordinance. It followed up in 1790 with the first of six Indian Non-Intercourse Acts. The statute forbids the conveyance of tribal lands without the approval of the federal government.

These provisions were repeatedly violated over the next 180 years. Native American property rights were frequently ignored and treaties were broken. The roughly 11 million acres that were given to the land grant colleges came from 250 tribal lands on a formula of 30,000 acres per representative in Congress. The states had discretion in determining the lands set aside for the new public universities. These had been Native American lands.

The federal government vacillated between assimilation/termination and self-determination/reservation policies with the Indians.

President Washington said in his first term: “The Government of the United States are determined that their Administration of Indian Affairs shall be directed entirely by the great principles of Justice and humanity.”

Such was not to be! The onslaught of settlers into Ohio Territory resulted in armed resistance by the Indians. President Washington dispatched General “Mad” Anthony Wayne to fight the Indian forces which had defeated two earlier armies. General Wayne ultimately prevailed at the Battle of Fallen Timbers on August 20, 1794, in Maumee, Ohio, near Toledo. The Northwest Territory was opened to settlement.

Some reservations were blessed with natural resources, such as the Navajos with coal, ten reservations with oil and gas, the Colvilles with timber, and the Aqua Calientes in Palm Springs with land and water. Most reservations were resource-poor.

The states in much of the Twentieth Century treated Indian fishing and hunting rights, at best, on the same basis as non-Indians. They often discriminated against the Native Americans

Indian policy underwent a 180-degree change over the past six decades. The President, Congress, and federal courts, including the Supreme Court, recognized the rights of Native Americans and prioritized tribal hunting[14]and fishing rights over state regulation and non-Indian fishermen and hunters. The hunting rights extend to off-reservation sites as long as the treaty creating the reservation included off-reservation traditional hunting and fishing rights.[15]Fishing disputes were rare for several decades until the salmon runs drastically decreased due to a combination of habitat loss and a series of dams that disrupted migration through the dams. The joke was that during the peak salmon runs in the past one could walk across the Columbia River on the backs of the salmon.

I taught at the University of Puget Sound from 1975-78. Federal judges, especially Judge George Boldt in Seattle, issued a series of decisions recognizing the fishing rights of the tribes.[16]The Indian treaty rights

were subsequently affirmed by the Supreme Court.[17]

I remember two bumper stickers from the time:
 "1776 King George III; 1976 Judge George Boldt"
 "Save the Salmon; Can Judge Boldt"

The Supreme Court recognized Indian water rights in the 1908 case of *Winters v. United States*. [18] The Court held that when the federal government created the Indian reservations, the intent was that the reservations could become self-sufficient and self-reliant, which necessitated water rights with a priority date of the creation of the reservation. Indian tribes also still retain a degree of quasi-sovereignty.

The treaties were one-sided and often breached by the United States. The Native American signatories were usually illiterate. Private bills were introduced in Congress to rectify the wrongs. Congress enacted the Indian Claims Commission Act of 1946 to resolve the land claims. The tribes were to be compensated with money—not land. The Commission settled 342 claims for \$848,172,606.62 by 1978 when outstanding claims were transferred to the Court of Claims. [19] Not all claims were settled under the compensatory statute.

As we mentioned earlier, the Sioux received a \$17.5 million judgment in 1979 with 5% interest over the years, amounting to \$105 million. The Sioux rejected the award, seeking return of their lands. The award continues to draw interest, up to about \$1 billion today.

Other tribes received specific Congressional legislation. For example, the Puyallup Tribe of Indians Settlement Act of 1989 awarded the tribe \$162 million in land, money, economic development, and fishery enhancement. Congress in 1971 enacted the Alaska Native Claims Settlement Act. The various Native organizations received 44 million acres of land and \$963 million to settle the Alaskan claims in exchange for which aboriginal land claims were extinguished.

The reservation system was a "short-term" fix to end the armed conflicts between the Native Americans and the United States. It did not resolve issues of tribal and individual Native American rights, jurisdiction, sovereignty, cultural and religious rights, voting rights, and economic self-sufficiency. The Native Americans on the reservations were deprived of their traditional lifestyle, sovereignty, lands, culture, and religion. The Ghost Dance was banned. Their children were often taken away from their parents and sent to Indian Boarding Schools, where they were "Americanized." The schools had high disease and mortality rates. The students were barred from speaking their native languages. The native Americans in the early years on the reservations needed a pass to go off the reservation,

Furthermore, they were not citizens of the United

States.

Assimilation seemed the seductive answer. The Indians would become full citizens with all the rights and responsibilities of citizens of the United States. The government would free itself from the responsibility and burdens of managing the reservations.

The great commentator and humanist H. L. Mencken wrote, "For every complex problem there is an answer that is clear, simple and wrong." Forced assimilation was a clear and simple solution that was grievously wrong.

Congress struggled since the late 1880's to establish Native Americans Rights in the background of the reservations. Reconciling assimilation and reservations is as challenging as squaring a circle. Many of the attempts have been disastrous.

Location	Acres	Original Price per Acre	Location	Acres	Original Price per Acre
Colorado	5,211.21	\$7.27	Oklahoma	34,664.00	\$19.34
Idaho	17,023.00	24.83	Oregon	3,820.00	15.43
Kansas	1,684.50	33.43	South Dakota	120,443.00	16.53
Montana	11,034.00	9.86	Washington	4,879.00	41.37
Nebraska	5,641.00	36.63	Wisconsin	2,069.00	17.80
North Dakota	21,600.70	9.91	Wyoming	881.00	20.64

Congress enacted the Dawes Act (the General Allotment Act) in 1887, assimilating the Native Americans into western society. The statute provided that communally held tribal lands would be allotted to individual tribal members. The presumption being that allottees would learn western farming techniques. The statute also prohibited the retention of traditional Native culture. The United States sold surplus lands.

The Dawes Act was a disaster. It provided for the patent of allotments in fee simple in 1906 to non-tribal members; i.e. Whites. The intent was assimilation. Native Americans lost 90 million acres of land, from 138 million acres in 1887 to 48 million acres in 1934 being impoverished.

Congress halted allotments in 1934 in the Indian

Reorganization Act. The statute granted some self-determination powers to the Native Americans and tribes. It provided for tribal constitutions and by-laws.

Congress enacted House Concurrent Resolution 108 and Public Law 250(P.L. 250)in 1953. The House Bill initiated a formal policy of termination. Tribal autonomy would be abolished. Indians would now be subject to the same laws as non-Indians. Native Americans were to become full citizens of the United States on an equal basis with non-Indians. The act further provided for the additional sale of tribal lands to non-Indians.

P.L. 250 two weeks later extended state jurisdiction over several reservations, stripping both the federal government and tribes of criminal jurisdiction. Traditional tribal systems of criminal justice would be ended. Jurisdiction today is a crazy-quilt pattern, depending on the state and the reservation.

The result was that over 100 tribes and bands were terminated. 13,263 tribal members lost their tribal affiliations. Over 2.5 million acres of trust lands were devised.

Congress passed the Indian Relocation Act in 1956, another attempt at assimilating Native Americans into the greater American society. It offered jobs and housing for tribal members who left their reservations for urban centers. The results were disappointing. Both employment possibilities and housing were poor.

A major segment of the Civil Rights Act of 1968 is The Indian Civil Rights Act of 1968, which extended most of the Bill of Rights to Native Americans in Indian Country.

Congress enacted the American Indian Religious Freedom Act of 1978, which restored freedom of religion to the Native Americans.

The rights of Native Americans greatly changed in the late 1960's. The African American Civil Rights Movement started in the 1950's. The Native American Civil Rights Movement began in the late 1960's. The American Indian Movement (AIM) was founded in 1968 by activists who sought to improve the plight of urban Indians and then expanded nationally with an activist civil rights agenda.

NARF, the Native American Rights Fund, was founded in Boulder, Colorado two years later. NARF adopted a litigation route for Native American rights, highlighted by its eastern land claims cases. Several eastern tribes had entered into treaties with Connecticut, Maine, Massachusetts, and Rhode Island in violation of the Non-Intercourse Act. The Maine

and Rhode Island claims were ultimately settled with the extinguishment of aboriginal land claims.

President Johnson in 1968 signed the Indian Civil Rights Act, which extended the Bill of Rights to the Indians.

Alcatraz was a federal prison island in San Francisco Bay. The government closed the prison and then announced Alcatraz was surplus property. IOAT, "Indians of All Tribes" occupied Alcatraz on November 20, 1969, claiming a legal right under the Treaty of Fort Laramie to "all retired, abandoned, or out-of-use" federal property for the Indians who previously occupied it. They occupied the island for 19 months ending on June 11, 1971. President Nixon was unwilling to forcefully remove the Native Americans. He increased the budget of the Bureau of Indian Affairs by 225%, doubled funds for Indian Healthcare (still a major problem today), and established the Office of Indian Water Rights.

The President recognized the existing situation was intolerable and had to end. He sent the "Message from the President of the United States Transmitting Recommendations for Indian Policy." on July 8, 1970: "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." [20]

He called for the end of the termination policy:

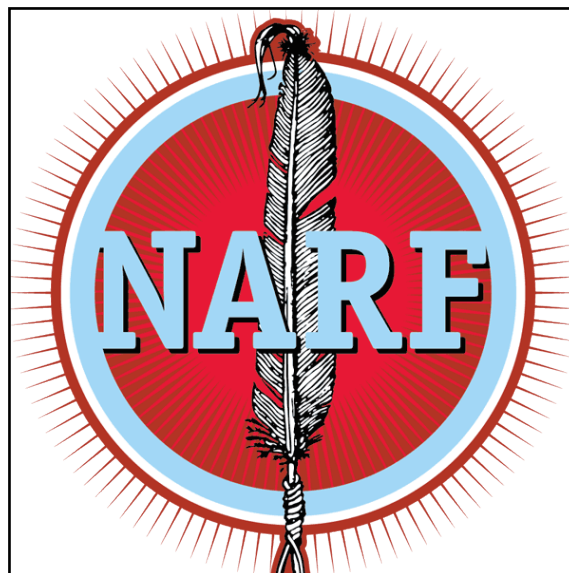
"This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that

the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit." [21]

He explained the "special relationship between Indians and the federal government is the result instead of solemn obligations which have been entered into by the United States Government." [22]

The 1971 Senate Concurrent Resolution 26 formally terminated the termination policy. Many terminated tribes regained tribal status. Tribes have also been able to reacquire some of their former lands.

Congress increasingly recognized the rights of Native Americans and the tribes. The Clean Air Act of 1990 recognized the rights of tribes. EPA was to treat



tribes the same as states.

Many reservations opened untaxed “smoke shops” selling alcohol and tobacco at a significant cost advantage. They have since moved into Indian casinos, some of which were highly successful, at least prior to Covid-19. The Indian Gaming Regulatory Act[23]was enacted in 1988,fostering Indian casinos.

A country cannot be a true democracy until the vote is extended to all citizens, regardless of race, sex, religion, or ethnicity. The Native Americans had difficulty acquiring voting rights.[24]States usually denied them the right to vote because they were non-citizens of the United States. Individual tribes were granted the right to vote, but no general franchise existed.

Congress in the 1924 Indian Citizenship Act attempted to resolve the issue. The statute provided: “All non-citizen Indians born within the territorial limits of the United States, be, and they are hereby declared to be citizens of the United States.”[25]

However, several states demurred and continued to deny Indians their voting rights. Congress finally resolved the issue in the Voting Rights Act of 1965.[26]

“No voting qualification or prerequisite to voting, or standard, practice, or procedure, shall be imposed or applied by a State, or political subdivision in a manner which results in a denial or abridgment of the right...to...vote on account of race, color, or language minority status.”[27]

The statute was prompted by the Southern discrimination against African Americans. However, Congress broadly defined “language minority status” to include American Indians, Asian Americans, Alaskan Natives and those of Spanish Heritage.[28]



The Superintendent of Indian Affairs in the Department of the Interior for decades has been a Native American, as are most of the employees. Congress supports the Indian Health Service with a current budget of \$6 billion. The Indian Health Services, like the Veteran Affairs Health Service, unfortunately has suffered in recent years from poor

quality in the delivery of health services to Native Americans.[29]

Congress has increasingly recognized tribal sovereignty. The 1990 Amendments to the Clean Air allowed tribes to develop air quality management plans and implement and enforce their rules in Indian Country.[30]

The Archeological Resources Protection Act of 1979 protected federal archeological sites and objects, many of which were Native American. Congress followed in 1990 with The Native American Graves Protection and Repatriation Act to require the repatriation of human remains and cultural items held by the federal government and museums receiving federal funds to the tribes and Native Hawaiian organizations. Many museums have repatriated cultural items to tribes, albeit slowly.[31]

Section 106 of the National Historic Preservation Act of 1966 requires federal agencies to consider the effects of undertakings they propose to carry out, license, permit, or fund on historic properties,[32] which can include properties of religious and cultural significance to Indian Tribes and Native Hawaiian organizations.

Congress took 150 years of struggle and conflicting legislation, alternating between periods of termination and self-determination. The current status allows Native Americans to retain their tribal rights on recognized reservations as well as possess the full rights of American citizens. The reservations are neither as desolate as a century ago nor an oasis today.

Severe poverty still exists as does federal underfunding of the reservations’ needs. Proper sanitation is missing on reservations. The latest attempt to do right is the \$1.2 trillion infrastructure bill signed by President Biden on November 15, 2021. It provides \$11 billion in benefits for Indian Country, including \$3.5 billion for the Indian Health Service and additional funds for water projects. About \$2.6 billion is for water and sanitation projects.

The Supreme Court on July 9, 2020, issued the opinion of *McGirt v. Oklahoma*. Justice Gorsuch, writing for the majority, held the state of Oklahoma lacked criminal jurisdiction over *McGirt* on reservation land. The 1830 removal of the Southeast tribes on the Trail of Tears pursuant to treaties declared the Creek Nation would be self-governing.[33]Congress never formally “disestablished” the reservation territory. The lands should therefore be treated as Indian lands for criminal jurisdiction. Perhaps as much as half of Oklahoma might thereby remain Indian Territory.

[1] *United States v. Sioux Nation of Indians*, 448 U.S. 371, 375 (1980).

[2]*Id.* at 376.

[3]The rider to the Indian Appropriations Act of 1876 provided: "[T]here will be no appropriation for the subsidence of the Sioux" unless they relinquish their hunting rights outside the reservation, and relinquish their claims to the Black Hills to the United States. Act of Aug. 15, 1876, 19 Stat. 176, 192, discussed at *United States v. Sioux Tribe of Indians*, 448 U.S. 356, 381 (1980). The provision is known as the "Sell or Starve." The provision is known as the "Sell or Starve" Act. See Allen Pusey, ABA Journal, Aug. 1, 2021, <https://www.abajournal.com/magazine/article/congress-passes-the-sell-or-starve-act>.

[4]*Id.* at 388, quoting *United States v. Sioux Nation*, 518 F.2d 1298 (Ct. Claims 1975).

[5]Congress in 1871 barred the creation of new reservations. 25 U.S.C. §71.

[6]Kaleena Fraga, *How Chief Red Cloud Waged War With The U.S. Army Over His People's Land And Won*, Nov. 22, 2021, <https://allthatsinteresting.com/red-cloud>.

[7]Gilbert King, *Where the Buffalo No Longer Roamed*, *Smithsonian*, July 17, 2012, <https://www.smithsonianmag.com/history/where-the-buffalo-no-longer-roamed-3067904/>.

[8]Chief Joseph, *An Indian's View of Indian Affairs*, 128 North American Review 412, 418 (April 1979), <https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Reading%20the%20Region/Texts%20by%20and%20about%20Natives/Texts/9.html>.

[9]The AmericanYawpReader,*Chief Joseph on Indian Affairs* (1877, 1879), <https://www.americanyawp.com/reader/17-conquering-the-west/chief-joseph-on-indian-affairs-1877-1879/>. Chief Joseph may be like Winston Churchill in that several quotes may be attributed to him because they sound Churchillian or Chief Josephian.

[10]Act of June 29, 1940, Pub. L. No. 76-690, 16 U.S.C. §§d-835h.

[11]*Id.* at 6.

[12]Evan Bush, *Congress votes to compensate Spokane Tribe millions for lands flooded by Grand Coulee Dam*, SEATTLE TIMES, (Dec. 17, 2019, 8:05 a.m.) <https://www.seattletimes.com/seattle-news/congress-votes-to-compensate-spokane-tribe-millions-for-lands-flooded-by-grand-coulee-dam/>.

[13]1787 Articles of Confederation, Art. 3.

[14]*Antoine v. Washington*, 420 U.S. 194 (1975). The Court held treaties were to be construed in favor of the Indians. *Id.* at 199.

[15]*Herrera v. Wyoming*, 139 S. Ct. 1686 (2019)

[16]*United States v. Washington*, 384 F. Supp.312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976).

[17]*Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979).

[18]207 U.S. 564 (1908). See also *United States v. Winans*, 198 U.S. 371 (1905) preserving Indian hunting and fishing rights.

[19]United States Indian Claims Commission, August 13, 1946–September 30, 1978: Final Report at 125 (1979).

[20]President Nixon, Special Message on Indian Affairs 1, July 8, 1970, Public Papers of the Presidents of the United States: Richard Nixon, 1970. https://www.ncai.org/attachments/Consultation_IJaOfGZqlYSuxpPUqoSSWiaNTkEJEPXxKLzLcaOiki fwWhGOLSA_12%20Nixon%20Self%20Determination%20Policy.pdf

[21]*Id.*

[22]*Id.*

[23]25 U.S.C. §2701 et seq.

[24]See generally Jean Reith Schroedel and Robert Saporito, *Voting Rights in Indian County*, 2 CHAPMAN DIVERSITY & SOC. JUST. F. 5 (2017); https://www.chapman.edu/law/_files/publications/2017-dsj/schroedel-saporito.pdf; Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269 (2004).

[25]*Id.* at 7.

[26]52 U.S.C. §10101 et seq.

[27]52 U.S.C. §10301.

[28]52 U.S.C. §10310 (c)(3).

[29]Mark Walker, Pandemic Highlights Deep Rooted Problems in Indian Health Service, New York Times, Sept. 9, 2021, updated Oct. 8, 2021, <https://www.nytimes.com/2020/09/29/us/politics/coronavirus-indian-health-service.html?referringSource=articleShare>.

[30]The Clean Air Amendments authorize the EPA to "treat tribes as states." 42 U.S.C. §7601(d)(2)(B).

[31]See Zachery Small, Push to Return 116,000 Native American Remains is Long-Awaited, N. Y. Times, Aug. 6, 2021, <https://www.nytimes.com/2021/08/06/arts/design/native-american-remains-museums-nagpra.html>

[32]16 U.S.C. §470f.

[33]The affected tribes are the Cherokee, Chickasaw, Choctaw, Creek (Miscogee) and Seminole.