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Native American Rights

Bella Mae came face to face with a porcupine that crawled into her home...

What Child is This sung in Cherokee by Jana Mashonee

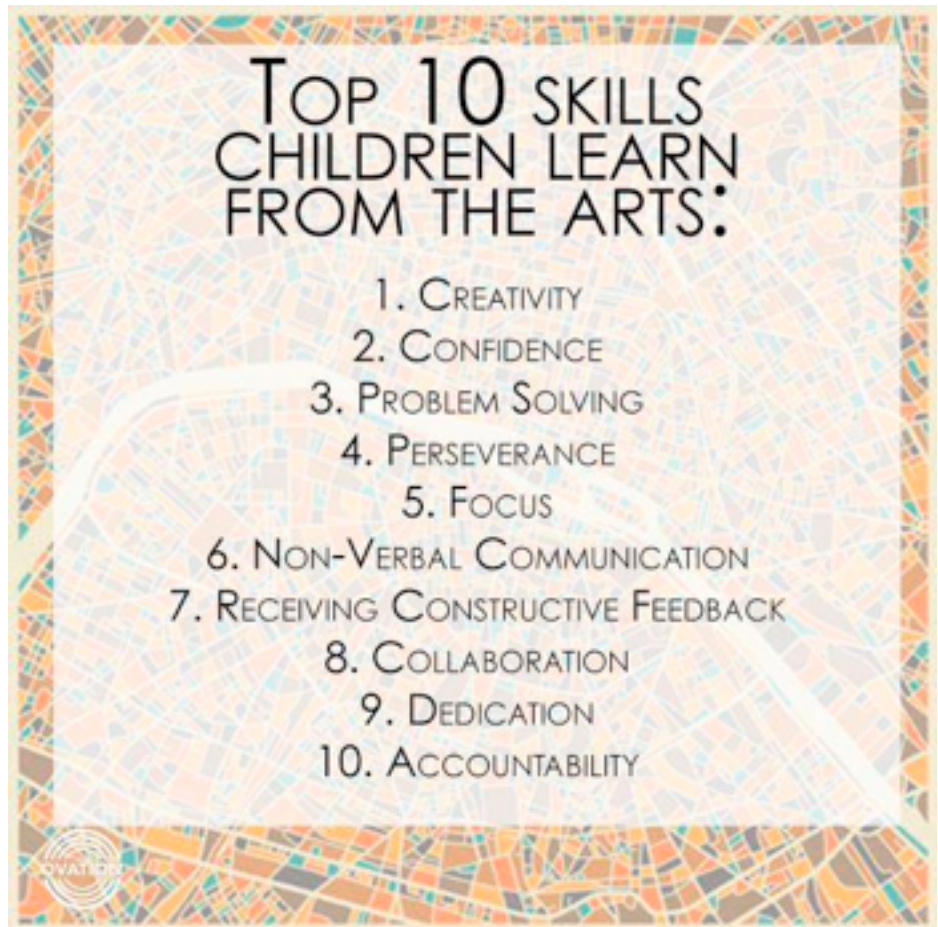
Opinion: Plenty to be proud of in Tahoe

Native American Rights <http://legal-dictionary.thefreedictionary.com/Native+American+Rights>

In the United States, persons of Native American descent occupy a unique legal position. On the one hand, they are U.S. citizens and are entitled to the same legal rights and protections under the Constitution that all other U.S. citizens enjoy. On the other hand, they are members of self-governing tribes whose existence far predates the arrival of Europeans on American shores. They are the descendants of peoples who had their own inherent rights—rights that required no validation or legitimation from the newcomers who found their way onto their soil.

These combined, and in many ways conflicting, legal positions have resulted in a complex relationship between Native American tribes and the federal government. Although the historic events and specific details of each tribe's situation vary considerably, the legal

rights and status maintained by Native Americans are the result of their shared history of wrestling with the U.S. government over such issues as tribal sovereignty, shifting government policies, treaties that were made and often broken, and conflicting latter-day interpretations of those treaties. The result today is that although Native Americans enjoy the same legal rights as every other U.S. citizen, they also retain unique rights in such areas as hunting and fishing, water use, and [Gaming](#) operations. In general, these rights are based on the legal foundations of tribal



sovereignty, treaty provisions, and the "reserved rights" doctrine, which holds that Native Americans retain all rights not explicitly abrogated in treaties or other legislation.

Tribal Sovereignty

Tribal sovereignty refers to the fact that each tribe has the inherent right to govern itself. Before Europeans came to North America, Native American tribes conducted their own affairs and needed no outside source to legitimate their powers or actions. When the various European powers did arrive, however, they claimed dominion over the lands that they found, thus violating the sovereignty of the tribes who already were living there.

The issue of the extent and limits of tribal sovereignty came before the U.S. Supreme Court in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823). Writing for the majority, Chief Justice [John Marshall](#) described the effects of European incursion on native tribes, writing that although the Indians were "admitted to be the rightful occupants of the soil ... their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." The European nations that had "discovered" North America, Marshall ruled, had "the sole right of acquiring the soil from the natives."

Having acknowledged this limitation to tribal sovereignty in *Johnson*, however, Marshall's opinions in subsequent cases reinforced the principle of tribal sovereignty. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), Marshall elaborated on the legal status of the Cherokees, describing the tribe as a "distinct political society that was separated from others, capable of managing its own affairs, and governing itself." In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832), Marshall returned to the issue, this time in an opinion denying the state of Georgia's right to impose its laws on a Cherokee reservation within the state's borders. He rejected the state's argument, writing "The Cherokee nation ... is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." Reviewing the history of relations between native tribes and the colonizing European powers, Marshall cited the Indians "original natural rights," which he said were limited only by "the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed."

The cumulative effect of Marshall's opinions was to position Native American tribes as nations whose independence had been limited in just two specific areas: the right to transfer land and the right to deal with foreign powers. In regard to their own internal functions, the tribes were considered to be sovereign and to be free from state intrusion on that sovereignty. This position formulated by Marshall has been modified over the years, but it continues to serve as the foundation for determining the extents and limits of Native American tribal sovereignty. Although Congress has the ultimate power to limit or abolish tribal governments, until it does so each tribe retains the right to self-government, and no state may impose its laws on the reservation. This position was reiterated in a 1978 U.S. Supreme Court case, *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303, in which Justice [Potter Stewart](#)

concluded that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

The ways that individual tribes exercise their sovereignty vary widely, but, in general, tribal authority is used in the following areas: to form tribal governments; to determine tribal membership; to regulate individual property; to levy and collect taxes; to maintain law and order; to exclude non-members from tribal territory; to regulate domestic relations; and to regulate commerce and trade.

Treaty Rights

From the time Europeans first arrived in North America, they needed goods and services from Native Americans in order to survive. Often, the terms of such exchanges were codified in treaties, which are contracts between sovereign nations. After the American Revolution, the federal government used treaties as its principal method for acquiring land from the Indians. From the first treaty with the Delawares in 1787 to the end of treaty making in 1871, the federal government signed more than 650 treaties with various Native American tribes. Although specific treaty elements varied, treaties commonly included such provisions as a guarantee of peace; a cession of certain delineated lands; a promise by the United States to create a reservation for the Indians under federal protection; a guarantee of Indian hunting and fishing rights; and a statement that the tribe recognized the authority or placed itself under the protection of the United States. Treaty making ended in 1871, when Congress passed a rider to an Indian appropriations act providing, "No Indian nation or tribe ... shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty ..." (25 U.S.C.A. § 71). This rider was passed largely in response to the House of Representatives' frustration that it was excluded from Indian affairs because the constitutional power to make treaties rests exclusively with the Senate. Since 1871, the federal government has regulated Native American affairs through legislation, which does not require the consent of the Indians involved, as treaties do.

Indian treaties may seem like historical documents, but the courts have consistently ruled that they retain the same legal force that they had when they were negotiated. Despite frequent challenges and intense opposition, courts have upheld guaranteed specific tribal rights, such as hunting and fishing rights. Often, disputes over treaty rights arise from conflicting interpretations of the specific language of treaty provisions. In general, there are three basic principles for interpreting treaty language. First, uncertainties in Indian treaties should be resolved in favor of the Indians. Second, Indian treaties should be interpreted as the Indians signing the treaty would have understood them. Third, Indian treaties are to be liberally construed in favor of the Indians involved. Courts have consistently upheld these principles of treaty interpretation, which clearly favor the Indians, on the basis that Indian tribes were the much weaker party in treaty negotiations, signing documents written in a foreign language and often with little choice. Liberal interpretation rules are designed to address the great inequality of the parties' original bargaining positions.

Reserved Rights Doctrine

Another crucial factor in the interpretation of Native American treaties is what is known as the reserved rights doctrine, which holds that any rights that are not specifically addressed in a treaty are reserved to the tribe. In other words, treaties outline the specific rights that the tribes gave up, not those that they retained. The courts have consistently interpreted treaties in this fashion, beginning with *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905), in which the U.S. Supreme Court ruled that a treaty is "not a grant of rights to the Indians, but a grant of rights from them." Any right not explicitly extinguished by a treaty or a federal statute is considered to be "reserved" to the tribe. Even when a tribe is officially "terminated" by Congress, it retains any and all rights that are not specifically mentioned in the termination statute.

Federal Power over Native American Rights

Although Native Americans have been held to have both inherent rights and rights guaranteed, either explicitly or implicitly, by treaties with the federal government, the government retains the ultimate power and authority to either abrogate or protect Native American rights. This power stems from several legal sources. One is the power that the Constitution gives to Congress to make regulations governing the territory belonging to the United States (Art. IV, Sec. 3, Cl. 2), and another is the president's constitutional power to make treaties (Art. II, Sec. 2, Cl. 2). A more commonly cited source of federal power over Native American affairs is the [Commerce Clause](#) of the U.S. Constitution, which provides that "Congress shall have the Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Art. I, Sec. 8, Cl. 3). This clause has resulted in what is known as Congress's "plenary power" over Indian affairs, which means that Congress has the ultimate right to pass legislation governing Native Americans, even when that legislation conflicts with or abrogates Indian treaties. The most well-known case supporting this congressional right is *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903), in which Congress broke a treaty provision that had guaranteed that no more cessions of land would be made without the consent of three-fourths of the adult males from the Kiowa and Comanche tribes. In justifying this abrogation, Justice Edward D. White declared that when "treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy."

Another source for the federal government's power over Native American affairs is what is called the "trust relationship" between the government and Native American tribes. This "trust relationship" or "trust responsibility" refers to the federal government's consistent promise, in the treaties that it signed, to protect the safety and well-being of the tribal members in return for their willingness to give up their lands. This notion of a trust relationship between Native Americans and the federal government was developed by U.S. Supreme Court Justice John Marshall in the opinions that he wrote for the three cases on tribal sovereignty described above, which became known as the Marshall Trilogy. In the second of these cases, *Cherokee Nation v. Georgia*, Marshall specifically described the tribes as "domestic dependant nations" whose relation to the United States was like "that of a ward to his guardian." Similarly, in *Worcester v. Georgia*, Marshall declared that the federal government had entered into a special relationship with the Cherokees through the treaties they had signed, a relationship involving certain moral obligations. "The Cherokees," he wrote, "acknowledge themselves to be under the protection of

the United States, and of no other power. Protection does not imply the destruction of the protected."

The federal government has often used this trust relationship to justify its actions on behalf of Native American tribes, such as its defense of Indian fishing and hunting rights and the establishment of the Bureau of Indian Affairs. Perhaps more often, however, the federal government has used the claim of a trust relationship to stretch its protective duty toward tribes into an almost unbridled power over them. The United States, for example, is the legal titleholder to most Indian lands, giving it the power to dispose of and manage those lands, as well as to derive income from them. The federal government has also used its powers in ways that seem inconsistent with a moral duty to protect Indian interests, such as terminating dozens of Indian tribes and consistently breaking treaty provisions. Because the trust responsibility is moral rather than legal, Native American tribes have had very little power or ability to enforce the promises and obligations of the federal government.

Several disputes have erupted over the relationship between the federal government and Native Americans. Beginning in 1998, beneficiaries of Individual Indian Money (IIM), which is held in trust by the federal government, brought a [Class Action](#) against the secretary of the interior and others, alleging mismanagement and breach of fiduciary duties against trustee-delegates of the funds. The case has spawned dozens of orders and rulings by the U.S. District Court for the District of Columbia.

In 1999, the district court in *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), found that the secretary of the interior and others had violated their fiduciary duties and ordered the secretary to file quarterly reports detailing progress in fulfilling these orders. The U.S. Court of Appeals for the District of Columbia Circuit affirmed this ruling in *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). Since the appeals court ruling, the district court has considered numerous motions and has issued several orders, including a holding that the secretary of the interior and the secretary of the Treasury were guilty of civil [Contempt](#) for refusing to comply with a court order to produce certain documents.

Other issues involving the federal government's power over Native Americans have likewise resulted in litigation. The struggle to define the jurisdictional boundaries between Native American tribal courts and state courts has occupied the federal courts for many years. Although Indian reservations are deemed sovereign states, both Congress and the U.S. Supreme Court have placed limitations on their sovereignty. Therefore, as specific issues arise about tribal court jurisdiction, the federal courts must intervene to decide these cases.

Such was the case in *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), in which the U.S. Supreme Court ruled that tribal courts do not have jurisdiction to hear federal [Civil Rights](#) lawsuits concerning allegedly unconstitutional actions by a state government officer on tribal land. The case arose when the home of a member of the Fallon Paiute-Shoshone Tribes of western Nevada was searched under suspicion that the tribe member had killed a bighorn sheep in violation of Nevada law. The tribe member brought a federal civil rights lawsuit against the game warden who had searched his house. The suit was brought in tribal court, which ruled that it had jurisdiction to hear the claim against the warden.

The district court and the U.S. Court of Appeals for the Ninth Circuit both found that the warden was required to exhaust his remedies in the tribal court before proceeding to federal court. The U.S. Supreme Court, per Justice [Antonin Scalia](#) disagreed, finding that Congress had not extended the jurisdiction of tribal court to hear federal civil rights claims. The case severely limits the scope of tribal jurisdiction.

Hunting and Fishing Rights

Hunting and fishing rights are some of the special rights that Native Americans enjoy as a result of the treaties signed between their tribes and the federal government. Historically, hunting and fishing were critically important to Native American tribes. Fish and wildlife were a primary source of food and trade goods, and tribes based their own seasonal movements on fish migrations. In addition, fish and wildlife played a central role in the spiritual and cultural framework of Native American life. As the Court noted, access to fish and wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed" (*United States v. Winans*, 198 U.S. 371, S. Ct. 662, 49 L. Ed. 2d 1089 [1905]).

When Native American tribes signed treaties consenting to give up their lands, the treaties often explicitly guaranteed hunting and fishing rights. When the treaties created reservations, they usually gave tribe members the right to hunt and fish on reservation lands. In many cases, treaties guaranteed Native Americans the continued freedom to hunt and fish in their traditional hunting and fishing locations, even if those areas were outside the reservations. Even when hunting and fishing rights were not specifically mentioned in treaties, the reserved-rights doctrine holds that tribes retain any rights, including the right to hunt and fish, that are not explicitly abrogated by treaty or statute.

Controversy and protest have surrounded Native American hunting and fishing rights, as state governments and non-Indian hunters and fishers have fought to make Native Americans subject to state hunting and fishing regulations. The rights of tribal members to hunt and fish on their own reservations have rarely been questioned, because states generally lack the power to regulate activities on Indian reservations. Tribes themselves have the right to regulate hunting and fishing on their reservations, whether or not they choose to do so. Protests have arisen, however, over the rights of Native Americans to hunt and fish off of their reservations. Such rights can be acquired in one of two ways. In some instances, Congress has reduced the size of a tribe's reservation, or terminated it completely, without removing the tribe's hunting and fishing rights on that land. In other cases, treaties have specifically guaranteed tribes the right to hunt and fish in locations off the reservations. In the Pacific Northwest, for example, treaty provisions commonly guaranteed the right of tribes to fish "at all usual and accustomed grounds and stations," both on and off their reservations. Tribes in the Great Lakes area also reserved their off-reservation fishing rights in the treaties they signed.

These off-reservation rights have led to intense opposition and protests from non-Indian hunters and fishermen and state wildlife agencies. Non-Indian hunters and fishermen resent the fact that Indians are not subject to the same state regulations and limits imposed on them. State agencies have protested the fact that legitimate conservation goals are compromised when Indians can hunt and fish without having to follow state wildlife regulations. The U.S. Supreme Court,

however, has consistently upheld the off-reservation hunting and fishing rights of Native Americans. In the 1905 case *United States v. Winans*, it ruled that treaty language guaranteeing a tribe the right to "tak[e] fish at all usual and accustomed places" indeed guaranteed access to those usual and accustomed places, even if they were on privately owned land.

The most intense opposition to Native American off-reservation hunting and fishing rights has occurred in the Pacific Northwest, where tribal members have fought to defend their right to fish in their traditional locations, unhindered by state regulations. In a series of cases involving the state of Washington and local Native American tribes, the federal courts ruled on aspects of the extent and limits of tribal fishing rights. In a 1942 case, *Tulee v. Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115, the Court ruled that tribal members could not be forced to purchase fishing licenses because the treaties that their ancestors had signed already reserved the right to fish in the "usual and accustomed places."

That case was followed by a series of cases involving the Puyallup Indian tribe that became known as *Puyallup I*, *Puyallup II*, and *Puyallup III*. In the first of those cases, the Court ruled that the state of Washington has the right, in the interest of conservation, to regulate tribal fishing activities, as long as "the regulation meets appropriate standards and does not discriminate against the Indians" (*Puyallup Tribe v. Department of Game*, 391 U.S. 392, 88 S. Ct. 1725, 20 L. Ed. 2d 689 [1968]). In the second case, the Court ruled that the state's prohibition on net fishing for steelhead trout was discriminatory because its effect was to reserve the entire harvestable run of steelhead to non-Indian sports fishermen (*Department of Game v. Puyallup Tribe*, 414 U.S. 44, 94 S. Ct. 330, 38 L. Ed. 2d 254 [1973]). In its ruling, the Court declared that the steelhead "must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing." Finally, in *Puyallup III*, the Court ruled that the fish caught by tribal members on their reservation could be counted against the Indian share of the fish (*Puyallup Tribe v. Department of Game*, 429 U.S. 976, 97 S. Ct. 483, 50 L. Ed. 2d 583 [1976]).

This notion of a fair [Apportionment](#) of fish was clarified by *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), in which the court determined that treaty language guaranteeing tribes the right to take fish "in common with all citizens of the Territory" guaranteed the Indians not just the right to fish but also the right to a certain percentage of the harvestable run, up to 50 percent. This decision set off a firestorm of controversy throughout the Pacific Northwest. Hundreds of legal disputes erupted over the allocation of individual runs of salmon and steelhead, and state and non-Indian fishing interests attacked the decision. The U.S. Supreme Court ultimately upheld the decision in a collateral case, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979). In that case, the Court upheld the district court's ruling and went on to clarify the details of the way the fish should be apportioned. Writing for the majority, Justice [John Paul Stevens](#) stated that the treaties guaranteed the tribes "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say a moderate living." A "fair apportionment," he said, would be 50 percent of the fish, emphasizing that 50 percent was the maximum, but not the minimum, amount of fish to which the Indians were entitled.

The Court resolved a decade-old legal dispute in 1999 involving Indian fishing and hunting rights with the decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119

S. Ct. 1187, 143 L. Ed. 2d 270 (1999). It ruled in favor of the Chippewa Indians' right to fish and hunt in northern Minnesota without state regulation. By a 5-4 vote, the Court upheld an appeals court decision finding that the tribe's rights under an 1837 treaty were still valid. The ruling marked a final victory for the tribe in its long fight to assert its treaty rights and to defend its cultural traditions.

Brought by the tribe in 1990, the lawsuit proved highly controversial in Minnesota, which regarded it as a threat to the \$54 million in tourism revenue generated by the Mille Lacs Lake resort industry. But two lower federal courts and the U.S. Supreme Court rejected the state's arguments that the 162-year old treaty had been invalidated by presidential order, later treaties, and even by Minnesota's gaining of statehood. The U.S. Supreme Court's majority opinion, written by Justice [Sandra Day O'Connor](#), detailed the history of the treaty and subsequent actions that the state, nine counties, and landowners claimed had rendered the treaty invalid. She found nothing in this historical information that had bearing on the continued validity of the treaty.

Water Rights

Access to water is another area in which Native Americans enjoy special rights. The issue of [Water Rights](#) has been most pertinent in the western part of the United States, where most Indian reservations are located and where water is the scarcest. In the West, rights to water are determined by the "appropriative" system, which holds that water rights are not connected to the land itself. Rather, the right to water belongs to the first user who appropriates it for a beneficial use. That appropriator is guaranteed the right to continue to take water from that source, unhindered by future appropriators, as long as the water continues to be put to a beneficial use. When the appropriator ceases to use the water, he or she loses the right to it. In contrast to this appropriative system, states in the East, where water is plentiful, follow the "riparian" system, which gives the owner of land bordering a body of water the right to the reasonable use of that water. All riparian owners are guaranteed the right to a continued flow of water, whether or not they use it continuously.

Native American water rights combine the features of the appropriative and riparian systems. The legal foundation for Indian water rights is the 1908 U.S. Supreme Court case *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340. That case involved a Montana Indian reservation that had a river as one of its borders. After the reservation was established, non-Indian settlers diverted the river's water, claiming that they had appropriated the water after the reservation was created but before the Indians had begun to use the water themselves. The U.S. Supreme Court ruled against the settlers, finding that when the reservation was created, reserved water rights for the Indians were necessarily implied. It was unreasonable, the Court argued, to assume that Indians would accept lands for farming and grazing purposes without also reserving the water that would make those activities possible.

A second important case involving Native American water rights is *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963). In that case, as in *Winters*, the U.S. Supreme Court held that the establishment of a reservation necessarily implied the rights to the water necessary to make the land habitable and productive. *Arizona* went beyond *Winters*, however, in also ruling on the quantity of water to which the reservation had a right. Although competing

water users argued that the amount of water reserved to the reservation should be limited to the amount that was likely to be needed by the relatively small Indian population, the Court ruled that the Indians were entitled to enough water "to irrigate all the practicably irrigable acreage on the reservation," a much more generous allotment.

Based on *Winters* and *Arizona*, Native American water rights today are determined by a set of principles called "*Winters* rights." First, Congress has the right to reserve water for federal lands, including Indian reservations. Second, when Congress establishes a reservation, it is implied that the reservation has the right to water sources within or bordering the reservation. Third, reservation water rights are reserved as of the date of the reservation's creation. Competing users with earlier appropriation dates take precedence, but those with later dates are subordinate. Fourth, the amount of water reserved for Indian use is the amount necessary to irrigate all of the practically irrigable land on the reservation. Finally, *Winters* rights to water are not lost through non-use of the water. All of these rights apply to both surface water and groundwater.

Even with the acknowledgement of Native Americans' *Winters* rights, water use in the West continues to be highly contested, as reservations fight to maintain their rights against the competing demands of state governments and non-Indian users. Several issues are yet to be resolved, such as the precise quantity of water that is needed to irrigate all "practically irrigable acreage" and the question of whether states can regulate non-Indian water users on Indian reservations. Because of the high costs and other difficulties involved in litigation, many tribes and states are choosing to try to negotiate water rights and then ask to Congress or the courts to approve their agreements.

Gaming Rights

In recent years, gaming has become one of the most important areas of economic development for Native American tribes. Since 1979, when the federal courts ruled that tribal-sponsored gaming activities were exempt from state regulatory law, the Indian gaming industry has grown tremendously, with more than 200 tribes operating gaming establishments. These operations have been extremely lucrative for the tribes running them; in 1993 the gross gambling revenues from class II and class III tribal gaming operations amounted to approximately \$2.6 billion. By comparison, Atlantic City had revenues of \$3.3 billion the same year. Tribe members benefit from the creation of jobs on the reservation and from the cash generated, which some tribal governments choose to distribute through direct payments to tribe members and others choose to reinvest in improving reservation infrastructure, educational facilities, and other programs and services designed to benefit tribe members. The impetus for the growth of Native American gaming began in the late 1970s, when the Oneida tribe in Wisconsin and the Seminole tribe in Florida sought to open high-stakes bingo operations on their reservations. The applicable laws in those states imposed limitations on the size of jackpots and the frequency of bingo games. The tribes asserted, however, that as sovereign nations, they were not bound by such limitations; they claimed that they could operate bingo games and regulate them under tribal law, deciding for themselves how large prizes could be and how often games could be played. Both suits ended up in federal court, and both tribes won (*Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310 [5th Cir. 1981]; *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 [W.D. Wis. 1981]). The rulings in both cases hinged on whether the states' laws concerning gaming were criminal laws

that prohibited gaming, or civil laws that regulated gaming. If the laws were criminal-prohibitory, they could be applied to activities on Indian reservations, but if they were civil-regulatory, they could not. The courts ruled that because the states allowed bingo games in some form, the laws were civil-regulatory and thus did not apply to gaming operations on Indian reservations.

Other tribes subsequently sued in federal court on the same issue and also won. The issue finally reached the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). In that case, the Court accepted the criminal-prohibitory/civil-regulatory distinction of the lower courts, ruling that the Cabazon Band of Mission Indians in California had the right to operate high-stakes bingo and poker games on its reservation because the state's gaming laws were civil-regulatory and thus could not be applied to on-reservation gaming activities.

Concern over Indian gaming had been building in Congress during the 1980s, and Congress responded to *California v. Cabazon* by passing the Indian Gaming Regulatory Act (IGRA), (25 U.S.C.A. §§ 2701 et seq.) in 1988. The IGRA specifically provides that Indian tribes "have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of [Criminal Law](#) and public policy, prohibit such gaming activity." The sponsors of the IGRA claimed that one of the bill's main goals was to use gaming as a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments." Nevertheless, many tribal leaders were opposed to the provisions of IGRA, regarding them as infringements on tribal sovereignty.

The IGRA provides the general framework for regulating Indian gaming. Its principal provision is the classification of Indian gaming, with each category of games being subject to the different regulatory powers of the tribes, the states, and federal agencies, including the National Indian Gaming Commission (NIGC), which was created by the IGRA. The IGRA classifies games into three types. Class I games are traditional Indian games, such as those played in connection with tribal ceremonies or celebrations; those games are regulated exclusively by the tribes. Class II games include bingo and related games; those games are regulated by the tribes, with oversight from the NIGC. Class III games include all games that do not fall into classes I and II, including casino-style games, parimutuel wagering, slots, and dog and horse racing. Class III games, according to the IGRA, may be conducted if three conditions are met: if the state in which the tribe is located permits any such games for any purposes; if the tribe and the state have negotiated a compact that has been approved by the secretary of the interior; and if the tribe has adopted an ordinance that has been approved by the chair of the NIGC.

Indian gaming and the IGRA continue to face opposition from various quarters. Tribal leaders view state regulation as a violation of their tribal sovereignty. The proprietors of non-Indian gaming establishments have attempted to slow or to stop the growth of Indian gaming, viewing it as a threat to their own enterprises. In some cases, tribal and state governments have had great difficulties negotiating the details of tribal-state compacts. These areas of difficulty and dissatisfaction suggest that Indian gaming may be subject to further legislation in the future.

Gaming has led to unprecedented growth for tribal economies, providing thousands of jobs for Indians and non-Indians and drastically improving the financial well-being of the tribes that have operated successful gaming establishments. Although some legislators have expressed concern over the expansion of gaming activities and the problems associated with increased gambling, Indian gaming generally enjoys broad public support. Native Americans have described it as "the return of the white buffalo," a traditional Native American symbol of good fortune.

The U.S. Supreme Court has stepped in to resolve several controversies regarding gaming rights. In *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001), the Court held that revenues from pull-tab games, similar to lottery tickets, at Chickasaw Nation gaming operations could be taxed under Chapter 35 of the [Internal Revenue Code](#). The ruling also applied to the Choctaw Nation, which offered a similar type of pull-tab game. The U.S. Court of Appeals for the Tenth Circuit, in reviewing the Chickasaw Nation's gaming activities, ruled that revenue from these games amounted to gambling revenues, rather than lottery revenues. The Federal Circuit, however, reached an opposite conclusion with respect to the Choctaw Nation in *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000).

The U.S. Supreme Court, per Justice Stephen Breyer, found that the [Internal Revenue Service](#) had properly levied a tax on these gaming activities. Although states are not required to pay these taxes, the applicable provisions in the tax laws applied specifically to the Indian tribes. Although Court precedent suggested that statutes regarding Indian tribes should be construed liberally in favor of the Indian tribes, Breyer found the statute to be unambiguous by its terms.

Further readings

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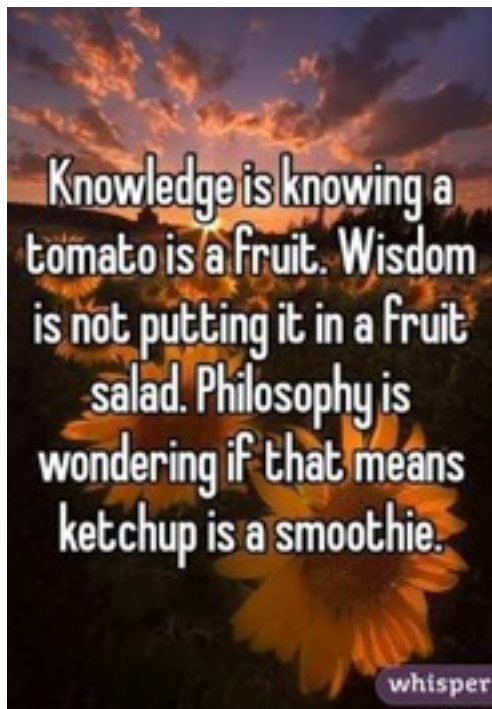
[Cherokee Cases](#); [Fish and Fishing](#); [Indian Child Welfare Act](#); [Interior Department](#). See also [primary documents in "Native American Rights" section of Appendix](#).

Native American Rights

- [Worcester v. The State of Georgia](#)
- [Surrender Speech](#)
- [Treaty with Sioux Nation](#)
- [My Son, Stop Your Ears](#)

When Europeans arrived in North America in the 1600s, they discovered that Native American tribes already occupied the land. Between the 1630s and the War of Independence, white settlers gradually pushed the Native Americans, whom they called "Indians," westward. The goals of the settlers, which included colonization, land exploitation, and religious conversion, led to cultural and social conflict that erupted in periodic "Indian wars."

After the formation of the United States, state and federal government leaders agreed that the nation needed to establish a national policy toward Native Americans. By the 1820s the government's policy was to remove Native Americans from their lands and resettle them in the "Great American Desert" to the west. In 1830 Congress passed the Indian Removal Act (4 Stat. 411) and appropriated \$500,000 for this purpose. During the presidency of Andrew Jackson (1829–1837), ninety-four removal treaties were negotiated. By 1840 most of the Native Americans in the more settled states and territories had been sent west.



The U.S. Supreme Court confronted the issue of Native American rights in the *Cherokee* cases, the collective name for two cases of the 1830s: *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831), and *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832). In *Cherokee Nation*, Chief Justice John Marshall ruled that the Cherokee Indians were not a sovereign nation. The following year Marshall issued an opinion that, while not overruling *Cherokee Nation*, held that the Cherokees were a nation with the right to retain

independent political communities. President Jackson refused to abide by this ruling and supported the removal of the Cherokees to Oklahoma, which took place in 1838–1839.

Few tribes willingly moved westward, resulting in more Indian wars. The Black Hawk War of 1832, fought in Illinois, illustrates the situation Native Americans faced. The Sauk and Fox tribes, who had been forced from their lands by white settlers, faced the prospect of famine but were reluctant to move west where they would have to confront the hostile Sioux nation. Accordingly, Chief Black Hawk led the Sauk and Fox in an unsuccessful campaign to reoccupy their former lands.

Throughout the nineteenth century, treaties were made in which tribes ceded areas of land to the federal government in return for compensation in the form of livestock, merchandise, and annuities. These agreements were often accompanied by the establishment of reservations. All treaties that the United States entered into prior to 1871 were written in the formal language of international covenants. The parties would sign the draft treaty, and the document would be submitted to the U.S. Senate for ratification. After 1871 formal treaty arrangements were abandoned in favor of simple agreements between the government and Native American tribes. These agreements required the approval of both houses of Congress and had the same authority as the previous treaty forms, but they effectively abandoned the idea that Native American tribes were independent. For their part, the tribes came to distrust the federal government for not honoring the treaties, confining them to reservations, and ending a way of life that had endured for centuries. Not until the twentieth century, after the continent had been settled and the tribes restricted to reservations, did the federal government attempt to seek a different policy.

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youtube.com

Opinion: Plenty to be proud of in Tahoe

Joanne Marchetta, Lake Tahoe News

People at Lake Tahoe are working together like never before to restore our environment, revitalize our economy, and improve our communities. We saw significant progress all around the lake this year. And our progress is sustainable with continued partnership and collaboration, so critical to tackle the many challenges and important decisions on our horizon.