

Federal Indian Law . . . and the Federal Treaty & Trust Responsibility

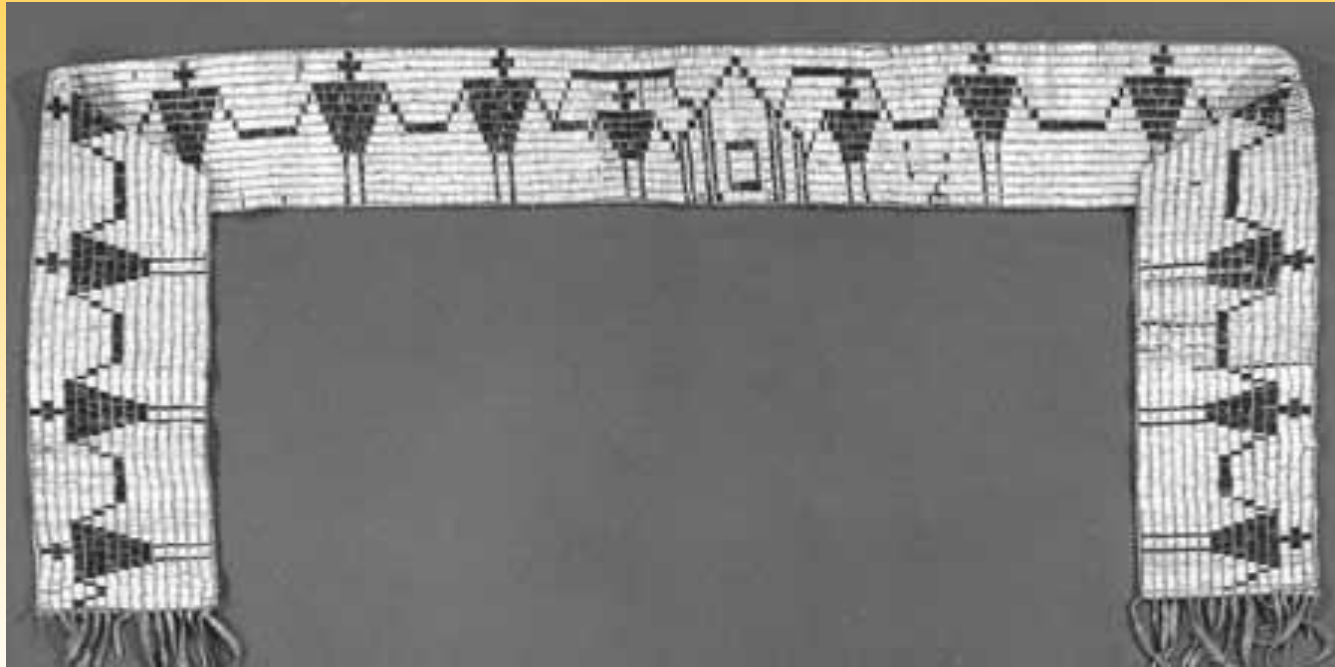


Photo – *Onondaga Nation, Canandaigua Treaty (1794)*

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Department of Defense
OFFICE OF PREPUBLICATION AND SECURITY REVIEW

The Biden-Harris Plan for Tribal Nations

ABOUT ▾ HOW TO VOTE **BIDEN HARRIS** DEMOCRATS VOLUNTEER ▾ SHOP

BIDEN-HARRIS PLAN FOR TRIBAL NATIONS

The United States of America was founded on the notion of equality for all. We've always strived to meet that ideal, but never fully lived up to it. Throughout our history, this promise has been denied to Native Americans who have lived on this land since time immemorial. And the pandemic highlighted this long history of inequity as it devastated tribal nations – Native Americans contracted the disease at 3.5 times the rate of white Americans, and in some states, they are dying at a rate five times their population share.

Joe Biden and Kamala Harris are committed to upholding the U.S.'s trust responsibility to tribal nations, strengthening the Nation-to-Nation relationship between the United States and Indian tribes, and working to empower tribal nations to govern their own communities and make their own decisions. With over 574 federally recognized Native American tribes in the United States, the Biden-Harris plan will:

“Joe Biden understands that tribal sovereignty and self-governance, as well as honoring the federal trust responsibility to Tribal Nations, should be the cornerstones of federal Indian policy.”

Photo – [JoeBiden.com/TribalNations/](https://www.joe Biden.com/TribalNations/)

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- Reinstatement of annual White House Tribal Nations conference
- Appointment of Native Americans to high-level government positions
- Nomination of judges who understand federal Indian law
- Ensuring fulfillment of federal trust and treaty obligations
- Promoting robust and meaningful consultation with Tribal Nations

Photo – [JoeBiden.com/TribalNations/](https://www.joe Biden.com/TribalNations/)

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The Federal Trust Responsibility

“Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.”

Justice Alito, U.S. v. Jicarilla Apache Nation (2011)



Photo – Outreach Magazine, Sept. 2, 2020

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The Federal Trust Responsibility

“It is generally believed, mistakenly, that the Federal Government owes the American Indian the obligation of trusteeship because of the Indians’ poverty, or because of the Government’s wrongdoing . . . But what is not generally known, nor understood, is that within the federal system the Government’s relationship with the Indian people and their sovereign rights are of the highest legal standing, established through solemn treaties, and by layers of judicial and legislative actions.”

American Indian Policy Review Commission, Final Report to Congress (May 17, 1977)

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Photo – HavasupaiLodge.com, May 31, 2022

The Land is What it's Always Been About

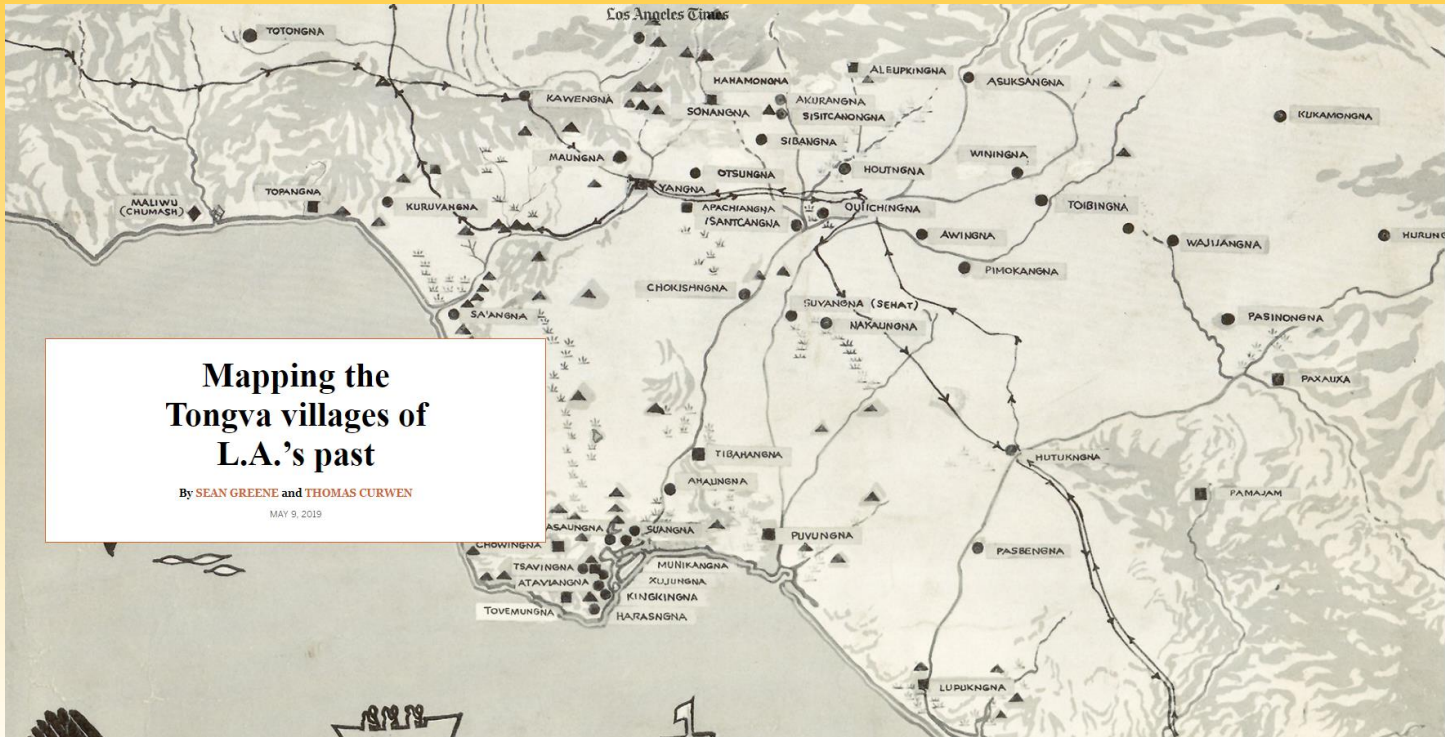


Photo - *Los Angeles Times*, May 9, 2019

“The control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian Affairs.”

Felix Cohen, 1941

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The Land is What it's Always Been About

“The United States should follow the British model of dealing with the tribes. Indians should be considered as foreign nations, not as subjects of the states; land transactions should be carried out by treaties; and treaties should be conducted, sanctioned, and honored by the federal government.”

Colin Calloway, *The Indian World of George Washington* (describing the shaping of the Washington-Knox Federal Indian Policy in 1789)

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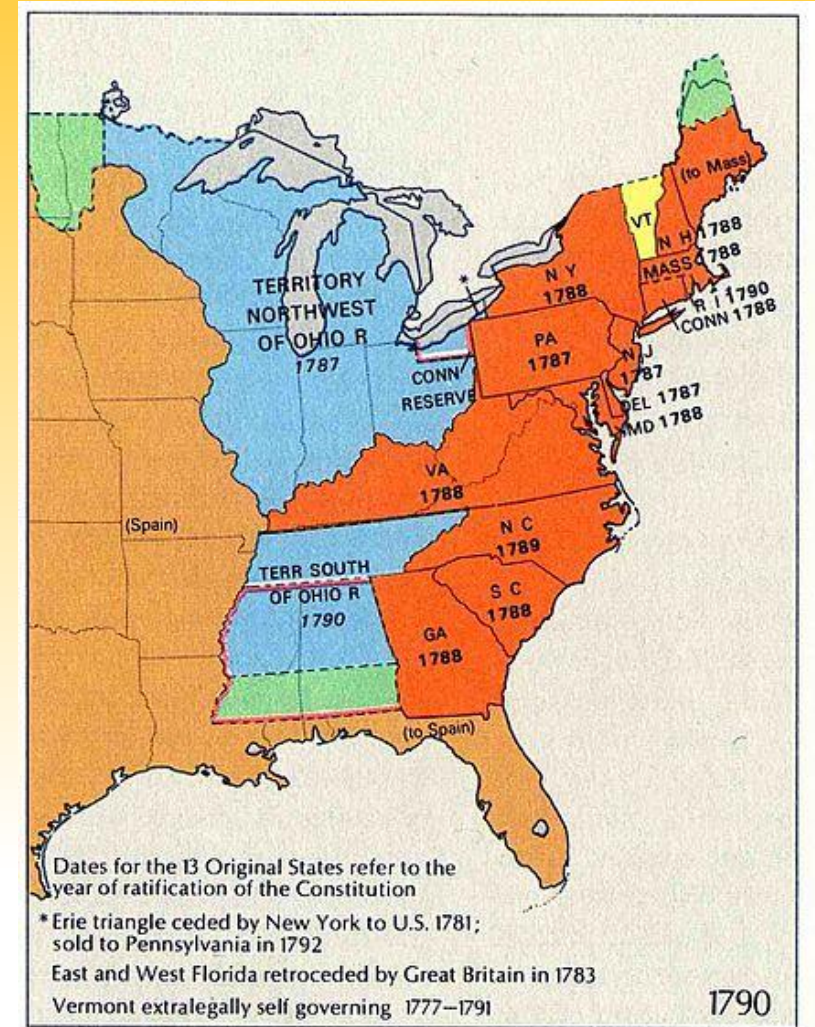


Photo – [Wikiwand.com](https://www.wikiwand.com), 2022

The Land is What it's Always Been About



Photo – *TeachingAmericanHistory.org*

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1. An “impartial dispensation of justice” toward Indians.
2. A “defined and regulated” method to acquire Indian land, since this was “the main source of discontent and war.”
3. A regulated and fair trade.
4. “Rational experiments . . . for imparting to them the blessings of civilization.”
5. The President should have authority to give gifts to Indians.
6. Adequate penalties should be imposed on those who infringed Indian rights, broke treaties, and endangered the peace of the nation.

George Washington, State of the Union 1791

'Bad Men' Clause – 1868 Treaty of Fort Laramie

ARTICLE I.

From this day forward all war between the parties to this agreement shall for ever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent, and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws, and, in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities, or other moneys due or to become due to them under this or other treaties made with the United States; and the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper, but no one sustaining loss while violating the provisions of this treaty, or the laws of the United States, shall be reimbursed therefor.

1. Pledges of peace & protection
2. If bad men among whites, or others subject to US authority, harm Indian interests:
 - Then, upon proof made, bad men would be arrested and punished under federal law
3. If bad men among the Indians harm US citizens:
 - Then upon proof made, tribe would extradite for punishment under US law

Photo – *Treaty of Ft. Laramie, 1868.*

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Indian Alliances & The Early U.S.

Indian alliances were critical:

- to the survival of early colonies
- in the French-Indian War
- during the American Revolution
- to westward expansion

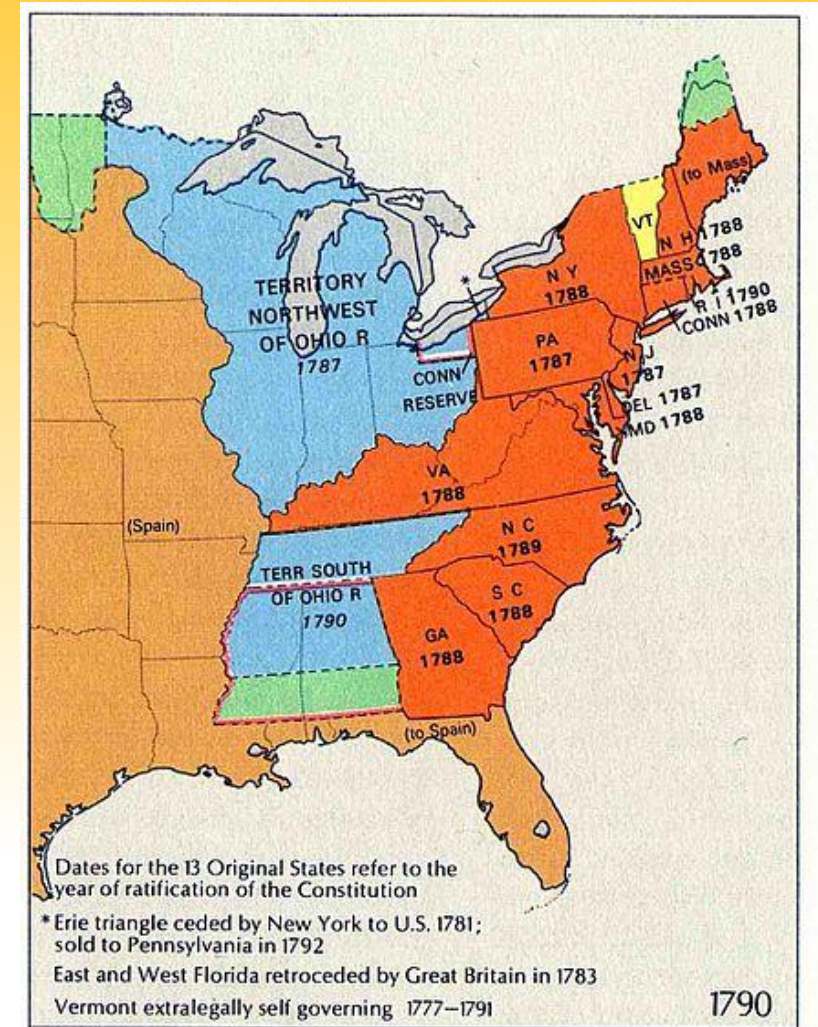


Photo – [Wikiwand.com](https://www.wikiwand.com), 2022

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The Evolution of “Indian Nations” under U.S. Law



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Art. 1, Sec. 8, Cl. 3

Congress has the exclusive authority “. . . to regulate Commerce with . . . The Indian Tribes”

Art 2., Sec. 2, Cl. 2

“[The President] shall have Power, by and with Advice and Consent of the Senate, to make Treaties. . .”

Art. 4, Sec. 3, Cl. 2

“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”

Art. 6, Cl. 2

“The Constitution, and the Laws of the United States . . . and all Treaties made, . . . shall be the supreme Law of the Land . . .”

The Evolution of U.S.'s Treaty Powers



Photo - Shutterstock

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- From first treaty with the Delaware in 1787 until 1871, the US entered into hundreds of agreements with various Indian tribes.
- Treaties included many items, such as, promises of peace & protection, land boundaries, hunting & fishing rights, education provisions, trade provisions, agricultural provisions, etc.
- A treaty “is not a grant of rights to the Indians, but a grant of rights from them.” – *United States v. Winans* (1905).

Tribal Land Loss via US Policies & Actions

Indian Lands were legislated away, bargained for in treaty agreements, outright stolen, & otherwise lost in a relatively short period of time.

Former Indian Territory provided for: a strong federal government, non-Indian settlement, & eventual admission of new states.

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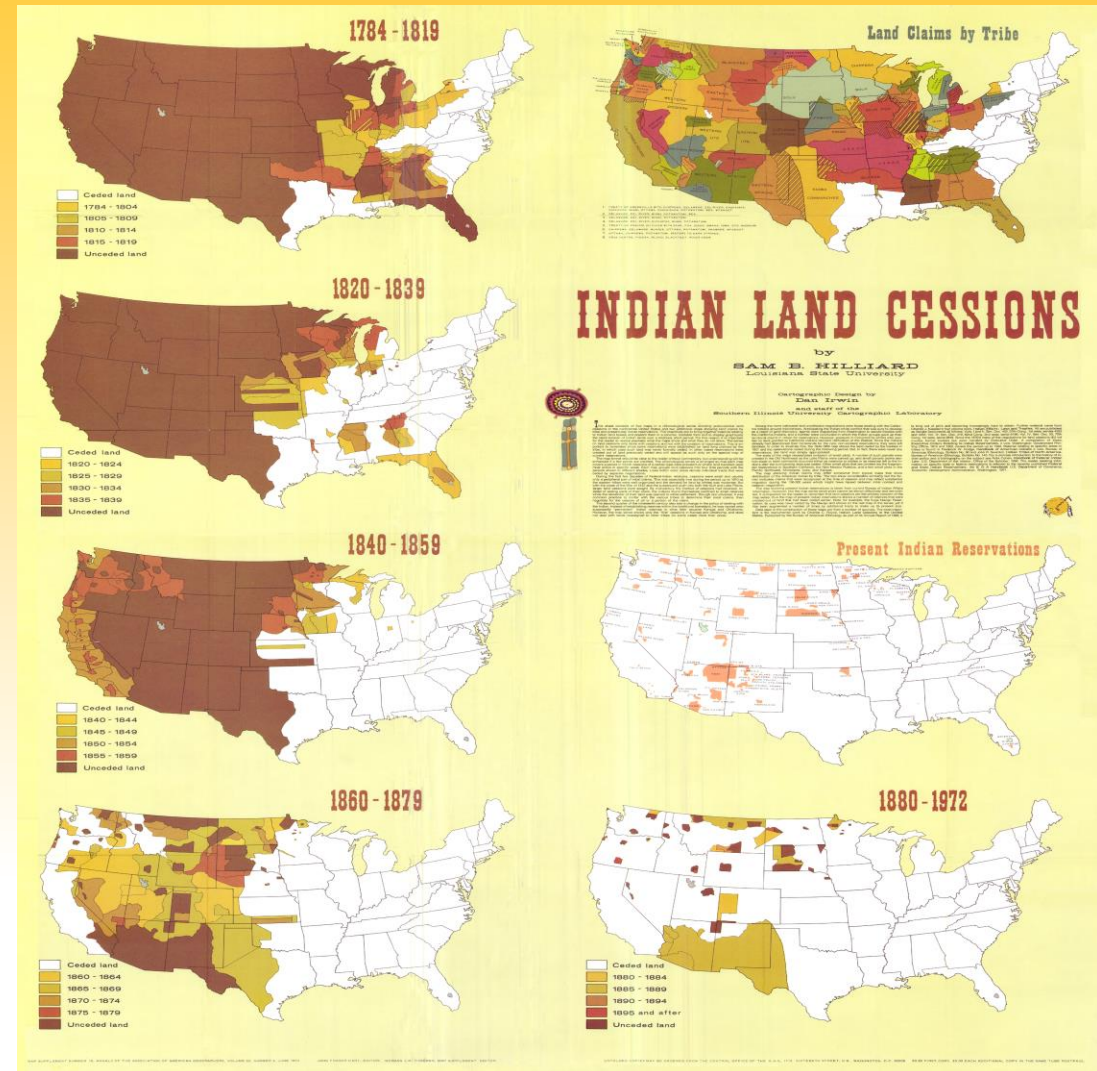


Photo – Vox, February 22, 2015

Federal Benefits of These Agreements

- The federal government owns approximately 640 million acres of land
- 28% of 2.2 billion acres of land in the U.S.
- 5 major land management agencies are:
 - The Bureau of Land Management (\$1.3 billion)
 - Fish and Wildlife Service (\$1.4 billion)
 - National Park Service (\$3.1 billion)
 - Department of Agriculture (\$146 billion)
 - Department of Defense (\$703 billion)

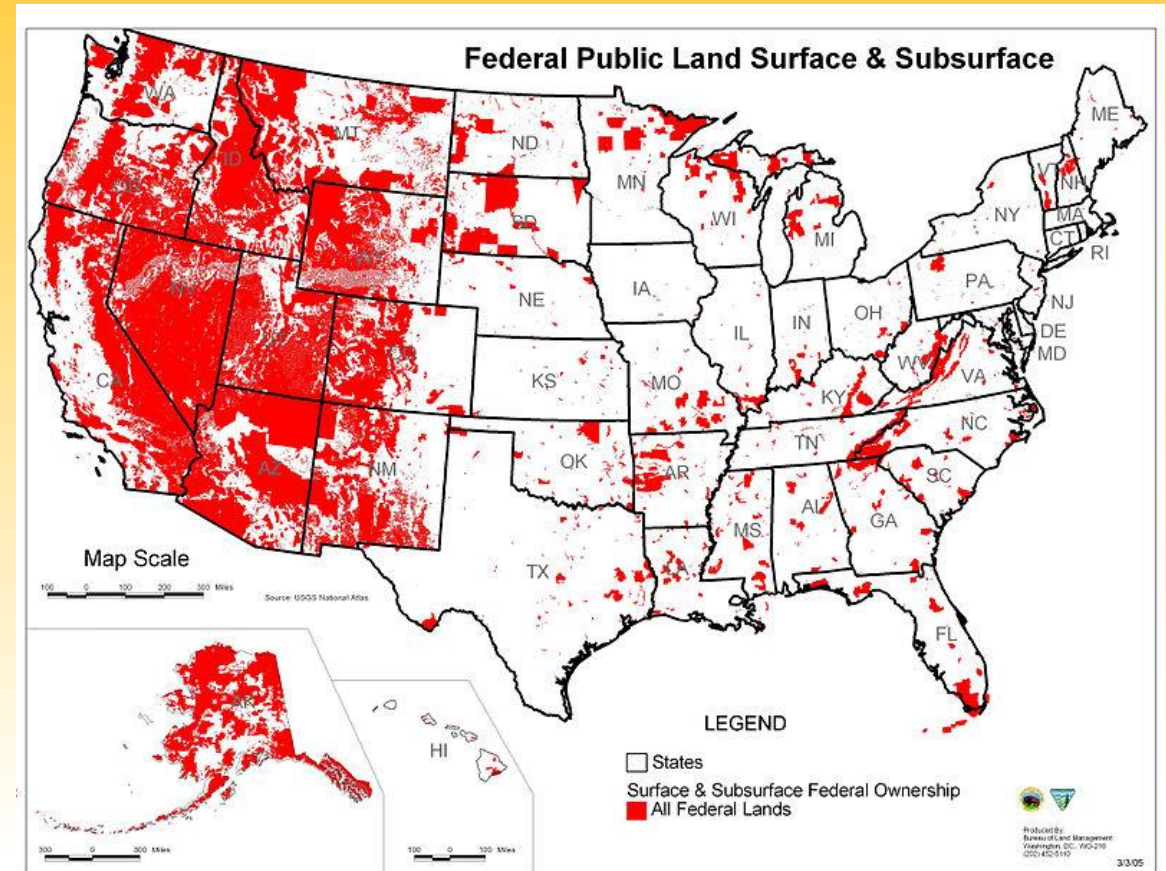


Photo – Wikipedia, 'Federal Lands,' 2022

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Federal Benefits of These Agreements

- The Bureau of Land Management (estimated 10,000 FTEs/245 million acres of public land)
- Fish and Wildlife Service (estimated 8,000 FTEs)
- National Park Service (estimated 20,000 FTEs/85 million acres of public land)
- Department of Agriculture (estimated 100,000 FTEs)
- Department of Defense (estimated 700,000 FTEs)

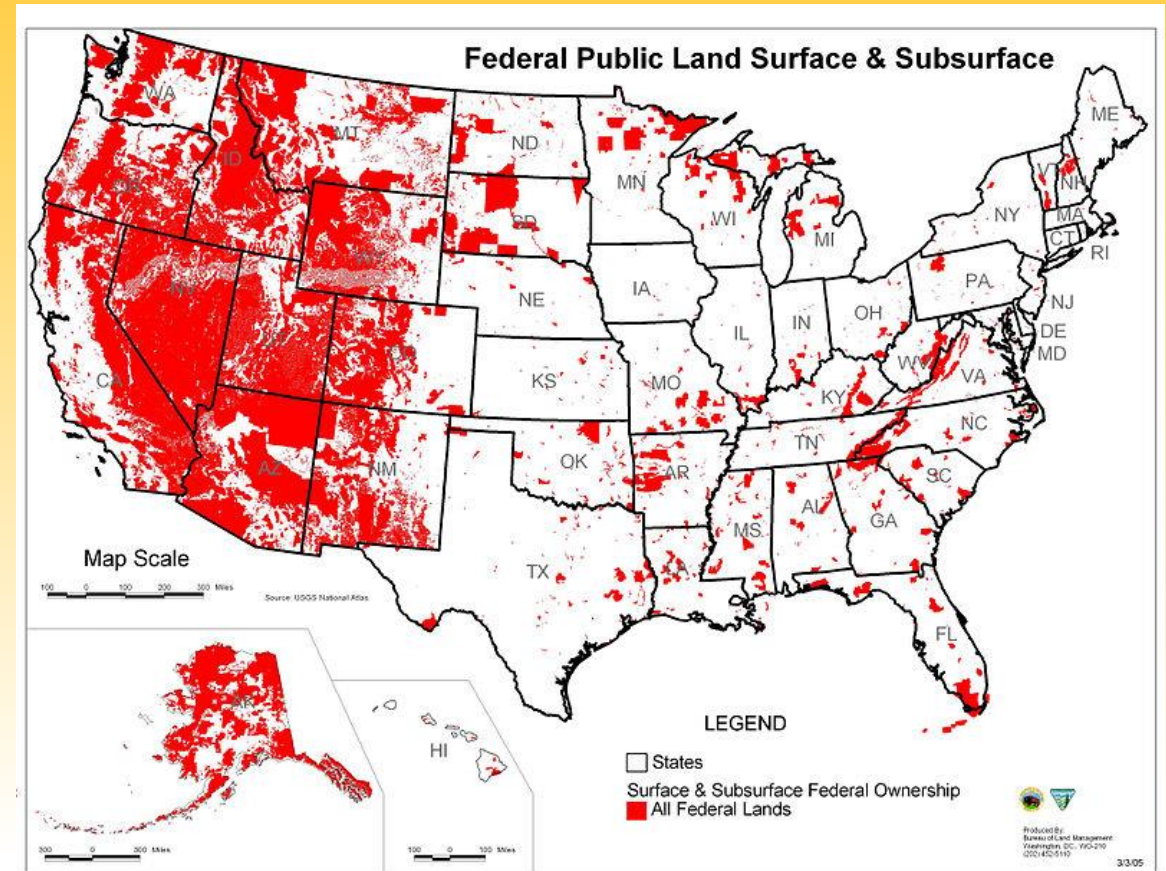


Photo – *Wikipedia*, ‘Federal Lands,’ 2022

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Early Supreme Court & Indian Treaties



Photo – *National Archives* (by Mathew Brady, 1869)

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US v. Winans (1905) – Yakima fishers retain traditional fishing rights, unregulated by State of Washington – *treaties are grants of rights from Indians, not to them.*

Tulee v. Washington (1942) – Treaties should be construed as they would have been understood by the tribal leaders that negotiated them.

Carpenter v. Shaw (1930) – Treaty language should be liberally construed, with ambiguities resolved in favor of the Tribes.

Minnesota v. Mille Lac Band of Chippewa Indians (1999) – confirming treaty rights on lands ceded in 1837 (usufructuary rights) . . . Such rights remain unless expressly abrogated by a treaty, statute, or executive order.

Indian tribes' Political Relationship with US

Morton v. Mancari (1974) – Bureau of Indian Affairs' American Indian/Alaska Native hiring preference passed by Congress does not violate the Due Process clause of the Fifth Amendment.

The preference was not racially motivated but rather it sought to give “*Indians greater participation in their own self-government; to further the Government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.*”



Photo – *Wenzel Fenton Cabassa P.A.*, Aug. 2013

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Contemporary Supreme Court Holdings



Photo – *New York Times*, 2021

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Washington State Dep't of Licensing v. Cougar Den, Inc. (2019) – the 1855 Treaty of the Yakama Nation preempts state tax law that attempted to tax fuel purchased by a tribal corporation for sale to tribal members.

Herrera v. Wyoming (2019) – Wyoming's statehood did not void the Crow Tribe's right to hunt on "unoccupied lands of the United States" under an 1868 treaty, and the Bighorn National Forest did not automatically deem the land "occupied" when the forest was created.

McGirt v. Oklahoma (2020) – For purposes of the Major Crimes Act, the Muscogee Creek Nation's reservation was never diminished by Congress and remains "Indian Country."

Washington on Treaties & Indian Affairs

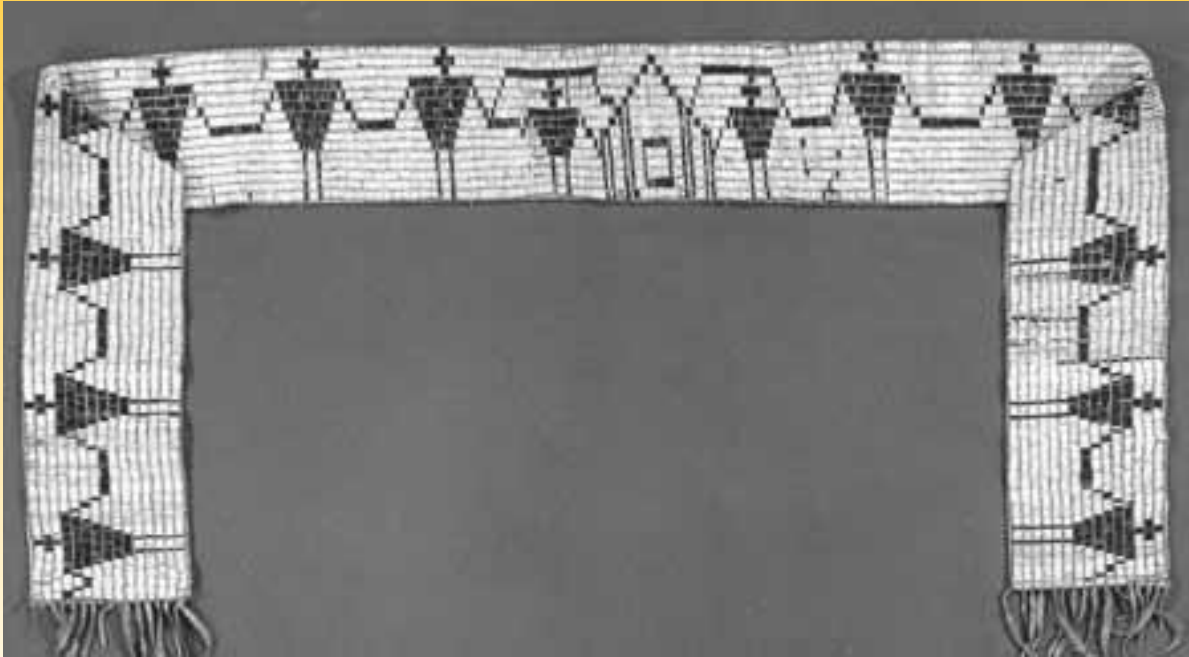


Photo – *Onondaga Nation, Canandaigua Treaty (1794)*

“Peace with the Indians required fair trade and fair treaties, and by ‘fair treaties’ he meant ‘that they shall perfectly understand every article and clause . . . That these treaties shall be held sacred, and the infractors on either side punished exemplarily.’”

Colin Calloway, *The Indian World of George Washington* (2018)

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Questions & Comments

**For more about the Indian Gaming & Tribal Self-Governance Programs,
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Or visit our website at: law.asu.edu/igg

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