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**Federal-Trust
Relationship**
*History and Context for
Nation-to-Nation
Consultations*

John S. McCain III
National Center for
Environmental Conflict Resolution

Udall Foundation



INTRODUCTIONS



- Stephanie Lucero, Senior Program Manager for Native American Alaska Native (NAAN) Service Area
- Lauren Nutter, Project Manager and Udall Scholar Alum (08)



Introduction to the Udall Foundation

- An independent executive branch agency
- Established by Congress to honor Morris K. Udall
- Mission to strengthen Federal Agencies and Native Nations
- Programs
 - Education
 - Scholarship
 - Native American Congressional Internship
 - Parks in Focus
 - Udall Center for Studies in Public Policy & Native Nations Institute
 - National Center for Environmental Conflict Resolution



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NATIONAL
CENTER FOR
ENVIRONMENTAL
CONFLICT
RESOLUTION

MISSION

Help federal agencies and other affected stakeholders address environmental disputes, conflicts, and challenges, including helping agencies build internal capacity to address those challenges

NATIONAL CENTER FOR ECR

SERVICES

Help resolve environmental conflicts involving federal agencies

Case Services



- Consultations
- Assessments
- Process Design
- Convening
- Mediations / Facilitations
- Project Management

Training and Program Support



- ECCR Training
 - Open Sessions
 - Customized
- ECCR System Design
- ECCR Program Support
- Tribal Consultation Training

ECCR Leadership



- Assist the federal government implement NEPA Section 101
- Help implement 2012 joint OMB/ CEQ ECCR Policy Memorandum
- Support National ECCR Conferences

What Is Tribal Sovereignty?



Federal Trust Responsibility

- Cornerstone of the government-to-government relationship
- Origin in treaties but now encompasses federal statutes, executive orders and caselaw.
- Fiduciary obligations on the part of federal agencies including protecting treaty rights, tribal self-governance, and managing natural resources for the benefit of tribes, and individual Indian landowners.
- Described by the Supreme Court as a “moral obligation of the highest responsibility and trust.”*

**Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

Indian Tribe

“Any tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation ... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”

-Indian Self Determination and Education Assistance Act, 43 U.S.C. 450b(e)).

Honoring Native Identity and the Federal Terms

- “American Indian or Alaska Native”
- “Indigenous People”
- “Native American”
- “Indian Tribe”

Common Terms

- Sovereignty
- Tribe
 - Federally Recognized
 - Non-Federally Recognized
 - State Recognized Tribe
- Indian country (18 USC § 1151)
- Tribal Lands
 - Indian Country
 - Fee lands
 - Traditional Homelands
- Government-to-Government
- Tribal Consultation

Effective Tribal Engagement Begins with Understanding History

“There is a serious information gap about Native Americans in the United States. Most Americans have never met or talked to an Indian, have never been on an Indian reservation, and know very little about Native Americans in general. Public schools teach us almost nothing about Native history and culture...The aspects and aspirations of contemporary Native American communities can only be understood by a study of their history in the United States.” – Walter R. Echo-Hawk (Pawnee)*

“When asked by an anthropologist what the Indians called America before the white men came, an Indian said simply, ‘Ours.’” – Vine Deloria Jr. (Lakota)**

“There are a whole lot of historical factors that have played a part in our being where we are today, and I think that to even to begin to understand our contemporary issues and contemporary problems, you have to understand a little bit about that history.” – Wilma Mankiller (Cherokee)***

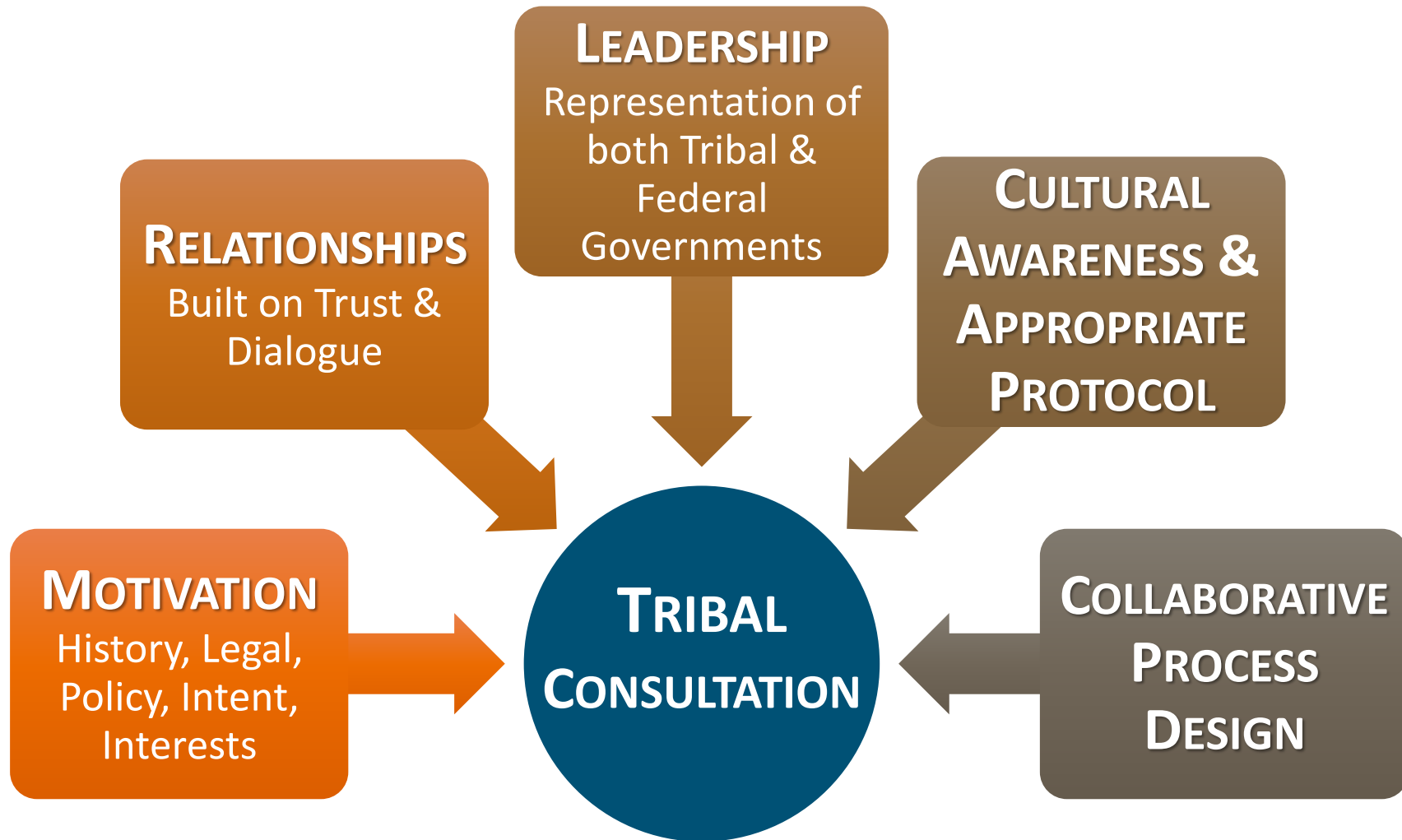
“If you don’t understand sovereignty, you don’t understand Indians.” – John Echohawk (Pawnee), Founder, Native American Rights Fund

*Echo-Hawk, Walter R., *In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided* 14 (2010)

** Lorenz, Melissa. *Vine Deloria, Jr., EMuseum @ Minnesota State University, Mankato*. 2008 (Archived copy retrieved April 19, 2015)

*** Marsico, K. *The Trail of Tears: The Tragedy of American Indians* 88 (2010)

Pillars of Effective Tribal Consultation



Federal-Indian Law Policy Eras



Federal Indian Policy Eras

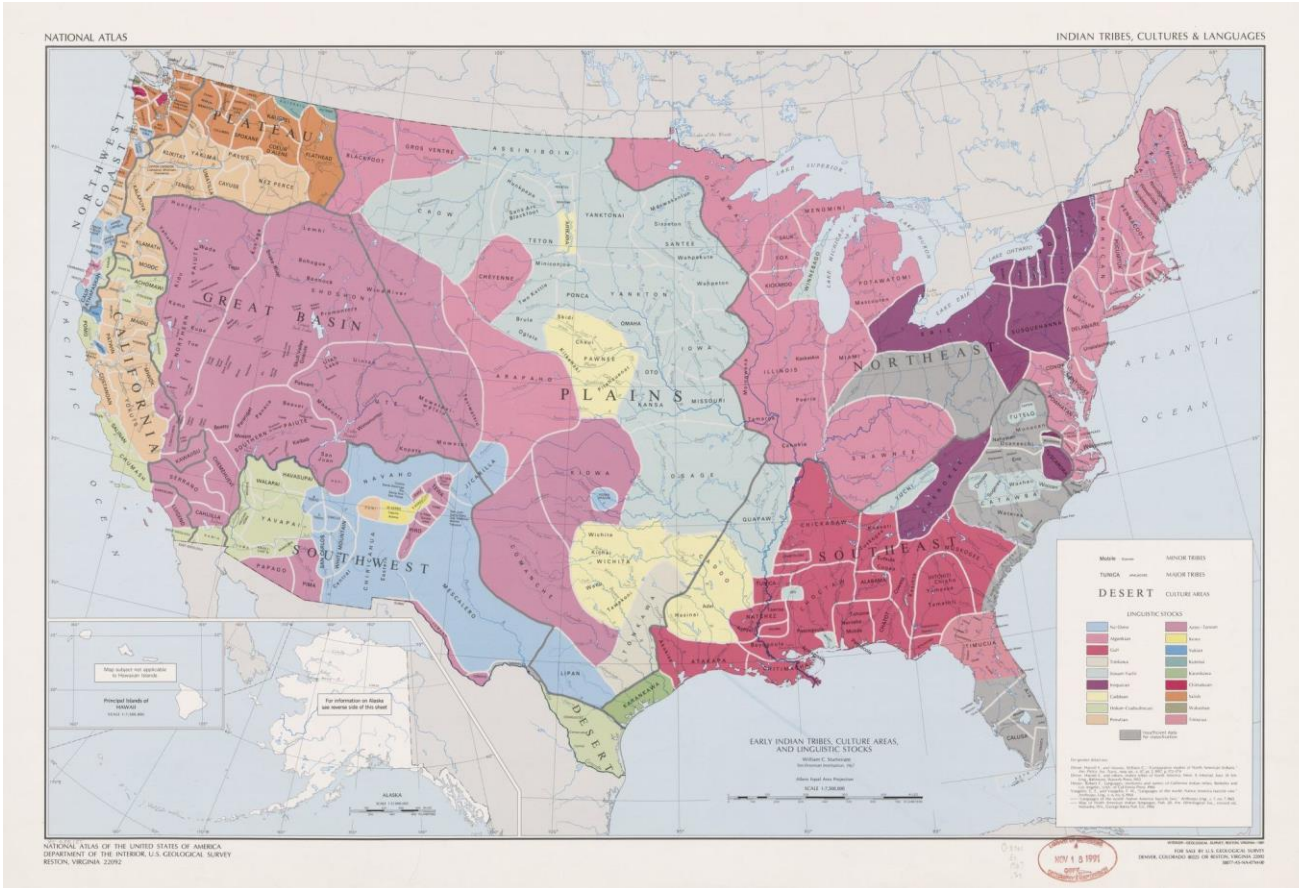
- Pre-Contact to Pre-Constitutional Development (~1492-1789)
- The Treaty Making Era (1778-1871)
- Removal and Reservations (1815-1846)
- US Consolidation of Territory in West (1846-1853)
- Reservations and Allotment (1853-1861)
- Allotment and Assimilation (1871-1928)
- Indian Reorganization (1928-1942)
- Termination (1943-1961)
- Self-Determination and Self-Governance (1961-~Present)
- Native Nations Today (~Present)

DEFINITION OF TRAUMA:

Emotional and psychological trauma is the result of extraordinarily stressful events that shatter your sense of security, making you feel helpless in a dangerous world. Psychological trauma can leave you struggling with upsetting emotions, memories, and anxiety that won't go away. It can also leave you feeling numb, disconnected, and unable to trust other people.

Traumatic experiences often involve a threat to life or safety, but any situation that leaves you feeling overwhelmed and isolated can result in trauma, even if it doesn't involve physical harm. It's not the objective circumstances that determine whether an event is traumatic, but your subjective emotional experience of the event.

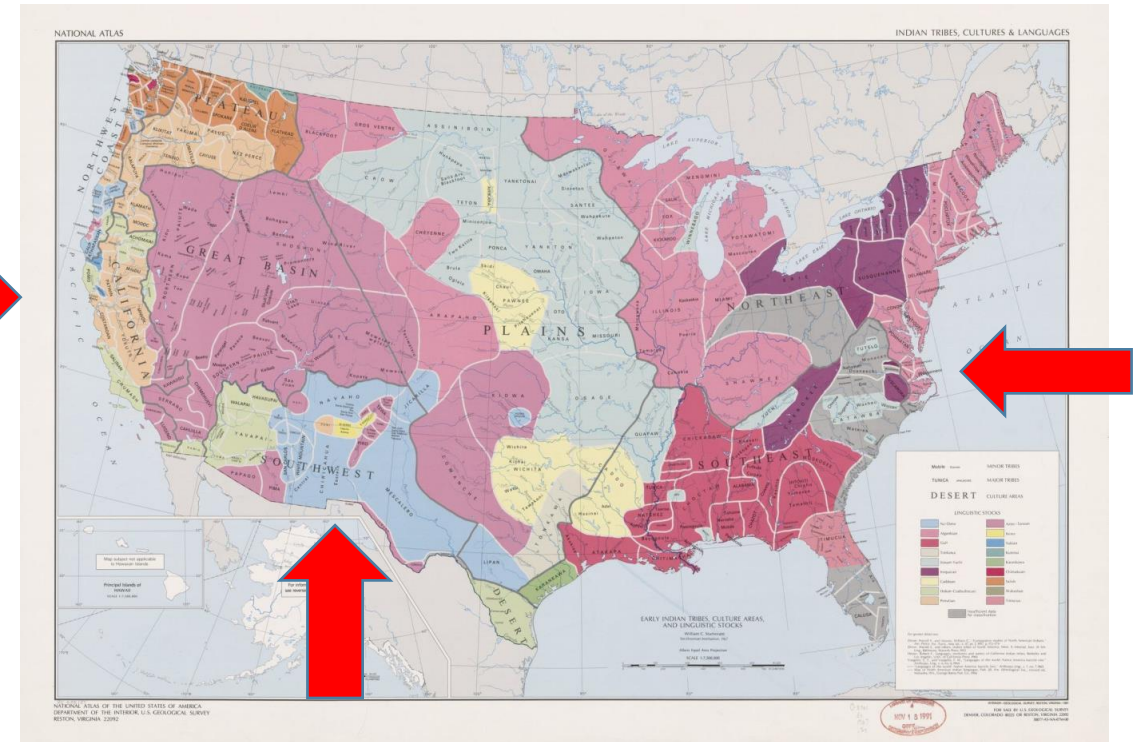
Americas: Pre-Columbian Contact



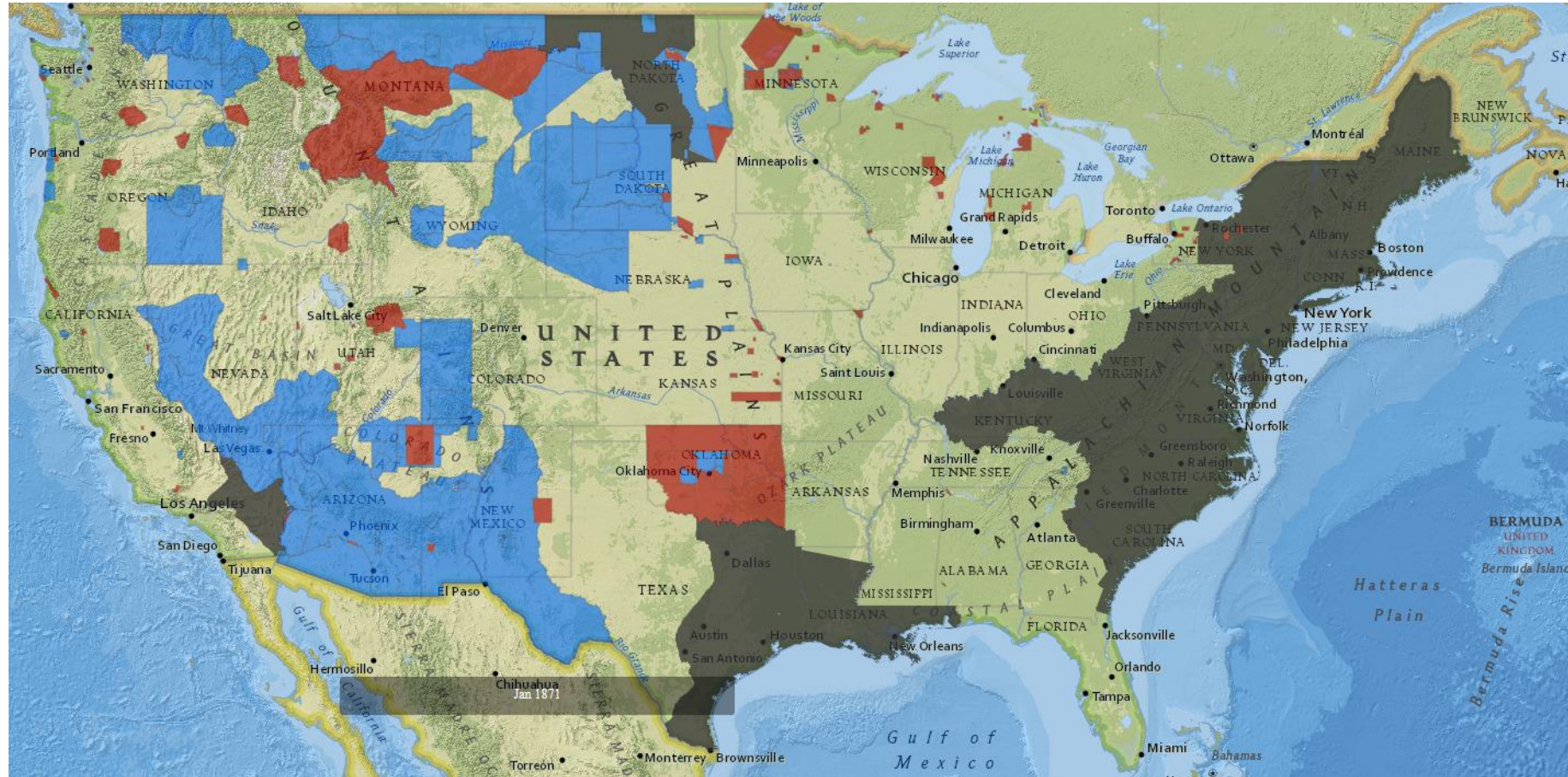
- 1.5 to 20 million Indigenous peoples
- Hundreds of independent nations governed by complex and distinct societies long before contact with Europeans.
- Each nation possessed its own government, culture, and language.

Pre-Constitutional Precedent (~1492-1789)

- Early recognition of Indigenous inherent sovereignty and occupancy of U.S. lands.
- Indian policy of the U.S. developed from European legal precedent and intent
- Treaties between Tribes and European nations were adopted by the U.S. Colonial Congress



Treaty Making: 1778-1871



Treaties and Tribes

Treaties for Tribes

Method of making alliances. Sacred texts that established connections to maintain survival (food, trade, common defense). Treaty partners are bound to protect each other's interests.

Treaties for Founding Fathers

Expediency and economy in warfare. Treaties were a method of drawing boundaries to erect fences. Treaties intended to create walls and divides. Treaties were the tool of peace by segregation.

Treaties

- 370 treaties were negotiated and signed by U.S. Commissioners and Tribal leaders (and ratified by the U.S. Senate) from 1778 to 1871.*
- Treaties typically provide for land cessions in exchange for a permanent homeland, peace and friendship, reserved fishing, hunting, gathering, and pasturing rights, alliance, health, agriculture, education and other services, goods, annuities.

• *National Congress of American Indians, Tribal Nations and the United States: An Introduction 16 (2015)

Indian Canons of Construction

Indian Canons of Treaty Construction

- Treaties to be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor.

Reserved Rights Doctrine

- [A] Treaty between the United States and the Indians... is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those **not** granted.*

Native Nations are Referenced in the U.S. Constitution

- **Article I, section 8, clause 3** reserves exclusively to Congress the power to *“regulate commerce with foreign nations, among the several states, and with the Indian tribes.”*
- **Article I, section 2, clause 3** excludes *“Indians not taxed”* from count of State residents for apportionment of representatives.
- **Article VI, clause 2** provides that *“all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”*

Early U.S. and Native Relations

- Concerns about competing deeds of purchase from Indians prompted colonial governments to assume exclusive authority to purchase Indian lands
- In 1787, Congress passed the **Northwest Ordinance**: “*The utmost good faith shall always be observed towards the Indians*”.
- 1788, U.S. Constitution is ratified.
- In 1790, Congress passed the **Trade and Intercourse Acts**
 - Prohibits Native Nations from selling land unless under the authority of the U.S.
 - Established laws for prosecuting non-Indians committing crimes in Indian country.

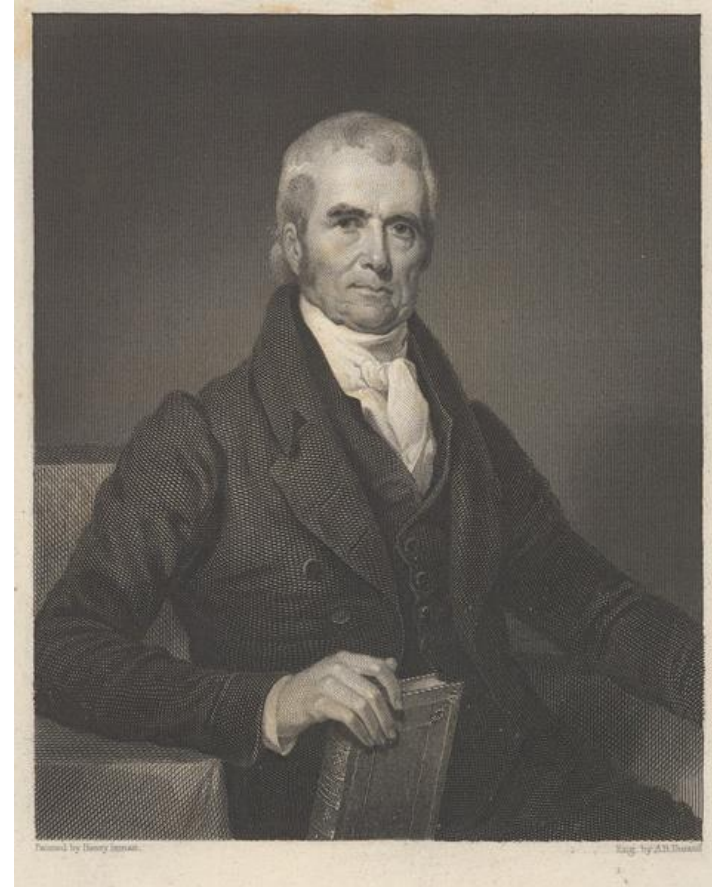
Removal and Reservation Era (1815-1846)



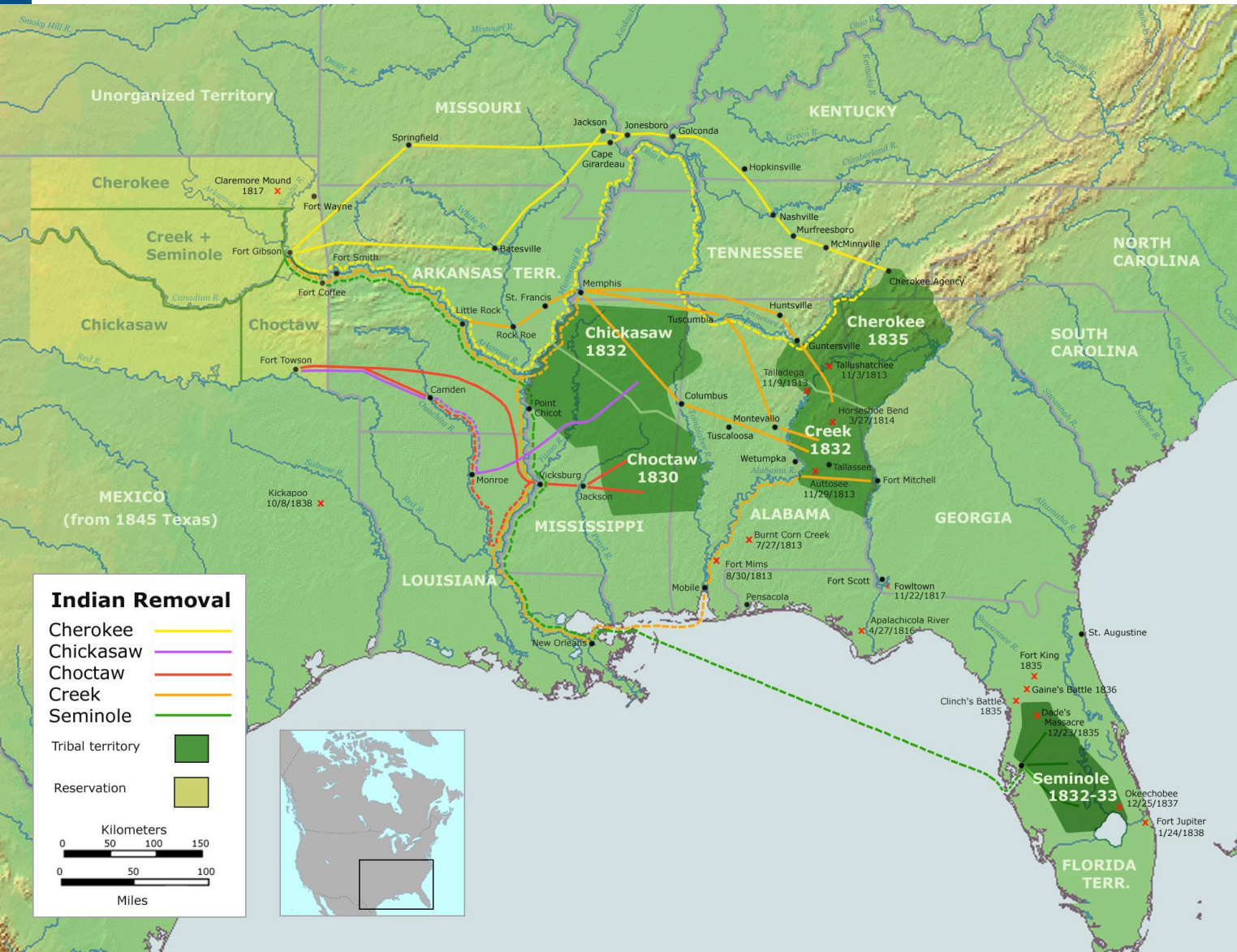
Marshall Trilogy

Chief Justice John Marshall laid the foundations of federal Indian law in three cases:

- *Johnson v. M'Intosh* (1823)
- *Cherokee Nation v. Georgia* (1831)
- *Worcester v. Georgia* (1832)



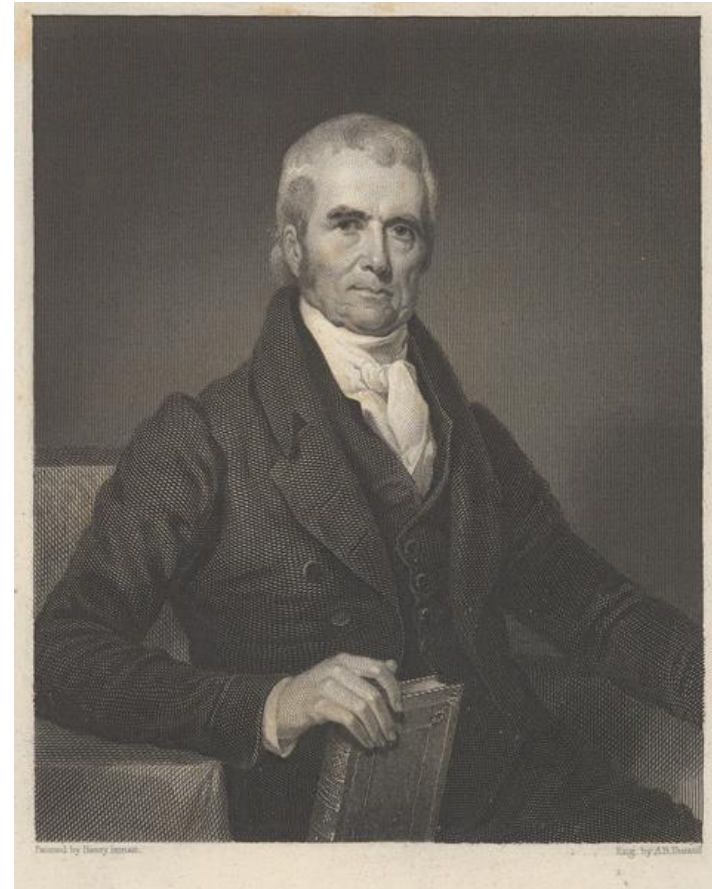
Indian Removal Act (1830)



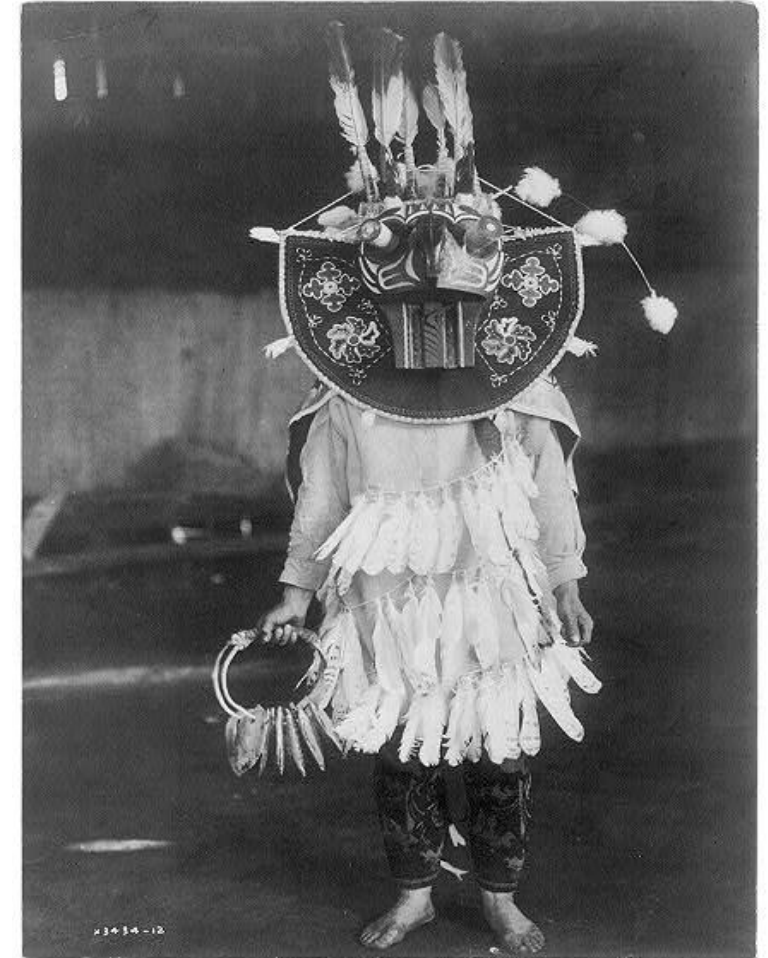
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Allotment and Assimilation Era (1871-1928)



Dawes Act Legacy

- Reduced Indian land from 138 million acres in 1887 to 48 million acres in 1934
- Devastating social, cultural and economic impacts to Tribal communities
- Resulted in “checkerboard” reservations of Indian and non-Indian land ownership that create property and governance issues to this day



Assimilative education policies

- Education as defined by the government, was viewed as the single most important tool in 19th century to implement assimilation policy.
- Indian children were shipped away from the reservation or brought together at reservation schools.



Reorganization Era (1928-1942)



Secretary of the Interior Harold L. Ickes hands the first constitution issued under the Indian Reorganization Act to delegates of the Confederated Tribes of the Flathead Indian Reservation (Montana), 1935. (LIBRARY OF CONGRESS, PRINTS AND PHOTOGRAPHS DIVISION)
MendotaDakota.com

- Indian Reorganization Act (1934) was enacted to end allotment and improve the political and economic status of Indians
- Goal to support development of Tribal governance structures like the U.S.
- IRA constitutions often varied from culturally consistent governance styles and systems

Termination & Relocation Era: 1943-1961



Self-Determination & Self-Governance Era (1961 - present)



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Self-Determination & Self-Governance

- Repudiation of termination policies and return to support of Tribal sovereignty in response to demands of Indian people and with official support of most presidential administrations since 1960.
- Indian Civil Rights Act
- Numerous Federal statutes signifying change in Federal Indian policy toward promoting Tribal sovereignty

Alaska Native Claims Settlement Act (1971)

- ANCSA created a legal framework for settling Alaska Native land claims, fishing and hunting rights, and provided for economic development.
- Signed into law by President Nixon in 1971
- Alaska was divided into 13 geographic regions, each with its own regional corporation, and 220 village corporations.



UN Declaration on the Rights of Indigenous Peoples

- Adopted by the UN General Assembly in 2007, and by the U.S. in 2010
- The Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues.



Tribal Consultation Policy Timeline



1968

1970

1983

2000

2004

2009

2017

2021

Special Message to Congress on the Problems of the American Indian: "The Forgotten American."

Special Message to Congress on Indian Affairs

Added the concept of "government-to-government" relationship between the tribes and the United States.

Executive Order 13175: Establishes regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications.

Memorandum recognizes E.O. 13175 and commits to working with tribes on a government-to-government basis.

Memorandum directs agencies to develop plan to implement E.O. 13175 and to report annually on progress.

No official policies or executive orders on Consultation

Memorandum reaffirming Tribal Sovereignty through consultation

Presidential Memorandum on Uniform Standards for Tribal Consultation

John S. McCain III

National Center for Environmental Conflict Resolution
Udall Foundation

President Biden's Memorandums

January 26, 2021, Presidential Memorandum

....History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.

November 30, 2022, Uniform Standards of Tribal Consultation

...charges all executive departments and agencies (agencies) with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications.

Federal Statutory Consultation Responsibilities

- National Environmental Policy Act of 1969 (42 U.S.C. 4321)
- National Historic Preservation Act (Public Law 89-665; 16 U.S.C. 470, as amended)
- Archaeological Resources Protection Act (16 U.S.C. 470aa-mm)
- American Indian Religious Freedom Act (16 U.S.C. 1996)
- Native American Graves Protection and Repatriation Act (25 U.S.C. 3001)

Executive Order Consultation Requirements

- Executive Order 12898 (1994) *Environmental Justice*
- Executive Order 13007 (1996) *Sacred Sites*

Native Nations Today

- Part of the unique family of governments – “nations within a nation.”
- 574 sovereign Tribal Nations (Tribes, nations, bands, pueblos, communities and Native villages) have a formal nation-to-nation relationship with the U.S. government.



Native Nations Today, continued

Indian country comprises 100 million acres

- American Indian reservations and trust land comprise 56 million acres
- Alaska Native corporations and villages control 44 million acres



Thanks for Participating

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