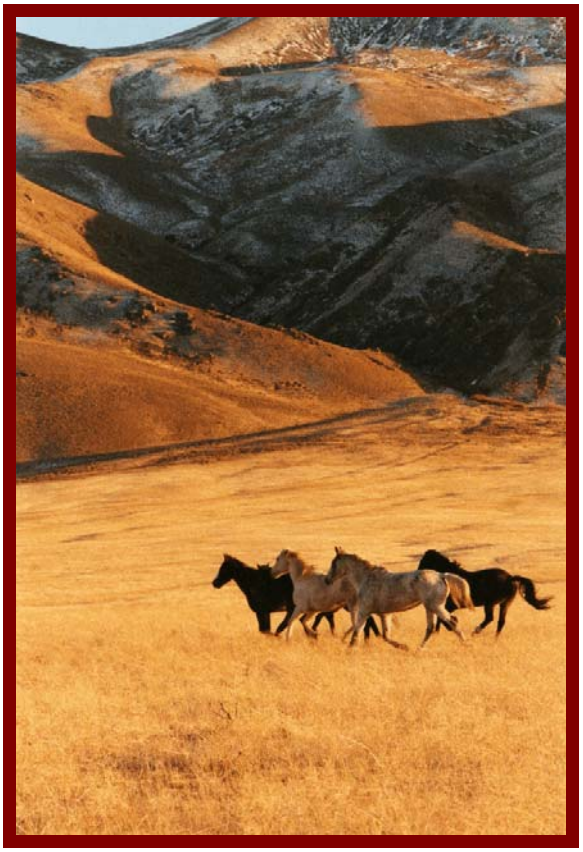
NATIVE LAND LAW PROJECT

Draft General Principles of Law Relating to Native Lands and Natural Resources

GENERAL EDITION



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INDIAN LAW
RESOURCE CENTER
JUSTICE FOR INDIGENOUS PEOPLES

Indian Land Tenure
FOUNDATION

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DRAFT GENERAL PRINCIPLES OF LAW
RELATING TO NATIVE LANDS AND NATURAL RESOURCES

GENERAL EDITION

Written and edited by the
Indian Law Resource Center

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Table of Contents

Acknowledgments

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Robert T. Coulter, Esq.
General Editor
February, 2010

Chapter I

Introduction: The Draft General Principles of Law

These draft General Principles of Law state what we believe the federal law *actually is* or what it *ought to be* concerning Indian and Alaska Native lands and resources.[1] Along with the Principles are brief Commentaries that discuss the Principles and existing federal law. In our view, present federal law is unfair, unworkable, and in many respects unconstitutional. These Principles are an effort to state the basic elements of a framework of law about Native lands that would be fair, workable, and in keeping with American concepts of justice and the rule of law.

We are seeking comments, suggestions, and advice from Native leaders, lawyers working in this field, and many others about these Principles. Efforts to change the law should involve the people who care about law reform the most – Indian and Alaska Native leaders and attorneys who daily face the discriminatory doctrines that deny Native nations basic security in their homelands and effective control over the use and development of their resources.

The federal law concerning Indian and Alaska Native lands has long been unworkable and extremely unfair by American standards of justice. For example, it is often incorrectly said that the "doctrine of discovery" gave ownership of all the land in this country, particularly all Native lands, to the European nation that "discovered" the area. This would mean, that the Native peoples of this continent lost ownership of all their lands when Europeans landed on these shores. The unfairness of this concept is obvious, and this "doctrine" has never in fact been the law. Nevertheless, courts and government officials routinely apply this mistaken and discriminatory rule and believe it to be the law.

[1] The Principles are set out below beginning on page 8.

Major parts of the federal law dealing with Native lands[2] are plainly in violation of the United States Constitution, doctrines such as the "plenary power doctrine" giving the federal government almost limitless power over Native nations. Another example is the Supreme Court's ruling that the federal government may take aboriginally held Native lands and resources without compensation or due process of law.

Congress frequently deals with Native property by enacting legislation that would be forbidden by the Constitution if it affected anyone else's property. The government also manages or controls most Native land, frequently mismanaging the land and resources, and fails to properly account for the resources and moneys owed to the Native nations and individuals that own the land and resources. This legal framework is not only inconsistent with our Constitution and with human rights standards world-wide, but it has enormous adverse consequences for Indian and Alaska Native nations throughout the United States.

Native leaders have for generations struggled to correct the enormous problems created by these unfair legal rules: the vast loss of lands through allotment and the fractionation of Native allotments, the widespread failure of the federal government to account for Native trust funds and trust resources, and the continuing erosion of Native powers to govern and manage their lands and resources, to name just a few of the gross problems that have been created.

This framework of truly unjust and unworkable law has made it practically impossible for Native peoples of this country to correct the social and economic injustices that they suffer. This legal framework, more than any other factor, is responsible for the longstanding poverty, political marginalization, and social ills that are so common in Indian country. It is not likely that Indian and Alaska Native governments can solve the deep social, economic, and governmental problems that afflict them unless this body of law is thoroughly reformed. Effective governance requires a framework of law that is reasonably fair, consistent, and predictable. Changing, clarifying, and improving the laws affecting Native lands and resources is necessary if Native nations are to gain effective control of their homelands and improve their economic and social well-being.

What parts of the law need to be changed? What would the new law be? There are many reasonable answers to these questions, and we do not pretend to have the *right* answer. But we are certain that the Native land owners themselves, the many nations and individuals with rights to lands and resources, must make the decisions about changing the law. For their rights, their lands,

[2] In this work, "Native lands" means lands of Indian and Alaska Native nations and Indian and Alaska Native individuals. We have not dealt here with the particular situation of Natives of Hawaii.

and their resources are at stake. Lawyers and legal scholars have a limited, but important role to play in providing the best possible legal analysis and the most thoughtful legal advice to Native land owners.

For Indian and Alaska Native nations and individuals to determine how they want to change the law, it must first be clear what the present law really is. Then it will be possible to consider what elements of the law ought to be changed or improved to make the law just, reasonable, and constitutional.

Some elements of the present law are widely misunderstood and mistakenly applied by courts and government officials. The *idea* that the doctrine of discovery took away Native land ownership is an example. Where mistakes have occurred, there is no need to change the law, but the law must be clarified so that it can be properly understood and correctly applied by courts and lawyers.

Many of the federal rules of law about Indian and Alaska Native lands have been created by decisions of the United States Supreme Court, and some of these rules are contrary to contemporary understandings of the Constitution. When court-made law is inconsistent with the Constitution, the best and perhaps the only course of action will be to persuade the Supreme Court to change its view and adopt a new and better rule. Congress may also be able to correct some of the mistakes of the Supreme Court.

Congress has also created some objectionable elements of the law through legislation. In these situations, only Congress can make the needed change through corrective legislation.

If useful change in the law about Native lands is to be achieved, two things are necessary. First, we must identify what changes ought to be made, that is, what the new legal rules ought to be in order to form a complete and workable framework of law about Native lands. Second, we believe that meaningful change in the law will not come unless there is wide agreement about what that change ought to be – wide agreement among leaders and lawyers representing Native nations and individual Native land owners.

The Native Land Law Project was created by the Indian Law Resource Center with major support from the Indian Land Tenure Foundation to work toward these two necessary objectives: identifying the changes needed to make a workable framework of law and building wide agreement about needed changes. We decided to draft a set of general legal principles that state what the federal law *really* is concerning Native lands and what the federal law *ought to be* in light of the Constitution, relevant treaties, and universal concepts of justice and human rights. To create this set of general principles, the Native Land Law

Project worked with Native leaders, legal experts, and Indian law scholars representing many points of view.

We have also written detailed Commentaries discussing the Principles and the legal authorities that support the Principles. The Commentaries help to clarify what the law is and to identify what changes are needed in present law to form a consistent, just, and reasonable new framework of law. By addressing all of the major elements of federal law bearing upon Native lands and land rights we hope to make it easier for Native leaders, lawyers, and others to consider how the law ought to be changed without undue fear of creating inconsistency with other legal rules and without undue concern about unintended consequences.

There is another more elementary reason for creating this framework of General Principles. Before we can ask anyone to consider serious changes in the law, we should state plainly and comprehensively what we think the changes could be. One cannot simply say that something is wrong. To be helpful, one must also say how to fix it or what would be right.

With this in mind, we have tried to set forth a consistent and reasonable set of principles, to identify what we believe ought to be changed, and to state what that change should be or could be. We have sought and received the advice and suggestions of dozens of lawyers, law professors, and Native leaders. In general, we have been pleased with the broad agreement that emerged on the major points. Nevertheless, we know that there will be many different views about what the law is, what needs to be changed, and what any changes should be.

We hope that this set of General Principles and Commentaries will provide a starting point for discussion and debate about changing the law. Perhaps it will encourage others to make proposals or draft alternate principles. It is important to have a productive debate and to move toward agreement or consensus about possible change. We do not believe that these Principles and Commentaries are the only possible right answer.

In drafting the General Principles, we applied a few basic ideas. First, the Principles had to be consistent with the United States Constitution, Indian treaties, and with general principles of justice and human rights. The Principles had to follow existing federal law to the extent it is consistent with these sources of law. The Principles had to be good enough that they could be asserted in a federal court as a fair statement of existing law or as a good faith argument for a change in the law. Finally, the Principles, taken together, had to form a consistent, reasonable, and workable framework of legal rules.

We have not attempted to draft an *ideal* version of the law. Nor have we tried to write a body of law fully based upon Native legal concepts. These would have been very interesting and useful projects, but we have not done that here.

The General Principles do not cover all of the details of the law affecting Native lands. The Principles are intended to be the primary rules or elements of the legal framework, from which courts, lawyers, and others can derive and work out the details and additional rules.

After drafting and redrafting an initial set of General Principles of Law with the consultation of a wide group of attorneys, law professors, and practitioners, we drafted Commentaries on the Principles over a period of more than two years. In the Commentaries, we assemble and discuss briefly the legal authorities and rules of law that justify and support each Principle. We also set forth the contrary rule or rules, where they exist, and the legal reasoning or authority behind them. Where the General Principle would change or replace the presently accepted rule or doctrine, the Commentary discusses the reasons that justify the change and the need for a new rule more in keeping with accepted legal principles. The legal authorities and the reasoning supporting the new rule are set forth in the Commentary following each Principle. The Commentaries do not attempt to include *all* legal authorities nor do they attempt to analyze or discuss every relevant issue. Rather they strive to incorporate the major authorities and most important reasoning supporting the Principle. The purpose of the Commentaries, beyond explaining the scope and nature of the Principles, is to be authoritative and useful for judges, government officials, legal advocates, Indian leaders, legislators, and others, not to be an exhaustive academic article.

We conducted three expert seminars to give detailed criticism and attention to the Principles and Commentaries. Each seminar lasted almost two full days and resulted in many suggested revisions and corrections. Each seminar was made up of a diverse group of 15-20 Native leaders, law professors, reservation-based lawyers, and other Indian law experts. Many other legal experts and leaders in the field of Indian law were also consulted individually. All of their views and suggestions have made important contributions to the present General Principles and Commentaries.

The General Principles and Commentaries which emerged from this process are fully set forth, with extensive legal references in detail in the Lawyer's Edition of the Principles and Commentaries.

However, there is a need for a version of the Principles and Commentaries written for a general audience rather than for lawyers. This General Edition for non-lawyers is a full and serious discussion of these legal Principles, but it is

written without unnecessary technical language, without detailed legal references, and without lengthy quotations from court opinions. Those readers, who wish to look more deeply at the legal analysis supporting the Principles, are, of course, welcome to read the Lawyer's Edition of the Commentaries.

* * *

If somehow the federal courts and Congress did adopt these Principles, what would the result be? What would the world look like for Indians and Alaska Natives? These are important questions. We can summarize the main points. These Principles do not call for the full independence of Indian and Alaska Native nations. Rather, they seek to create a legal framework that ensures justice for Native nations in the United States.

These Principles do not do away with the general trust relationship that is often considered to be of benefit to so many Native nations. In fact, these Principles reiterate that the general trust relationship requires the United States to act with the highest integrity when dealing with Native nations.

These Principles call for limiting the current plenary power doctrine, but they would not prevent Congress from enacting legislation relating to Native lands. They do however impose limitations on Congress' power over Native lands, making that power subject to the Bill of Rights, other constitutional provisions, and international human rights law. As such, Congress would no longer have the power to take aboriginal property without compensation or due process, or terminate the legal status of Indian nations. Congress would still be able to enact legislation relating to Native lands provided there is a constitutional provision authorizing such legislation.

Indian and Alaska Native nations would be in a position much like we have today, except that many of the worst legal restrictions and uncertainties would be gone. Major aspects of Native land ownership would remain the same:

1. Native nations and individuals would continue to hold all of the particular rights that they now have by reason of their unique status as Native nations and as members or citizens of these Native nations;
2. Native nations would continue to hold their lands in common as they see fit;
3. Native lands would remain untaxable;
4. Native lands would remain inalienable;
5. Native land would continue to be held in trust so long as the Native owner wished it to be in trust;

6. Native lands and resources would be protected by the federal government against fraudulent and abusive dealings;
7. Native allottees would continue to hold their allotments as they do today;
8. Indian and Alaska Native governments would remain sovereign and in control of their lands;
9. Native nations would remain part of the United States and subject to the power of Congress — but a power limited by the Constitution, human rights, and treaties;
10. Treaties made with Indian nations would remain the "supreme law of the land" along with the Constitution and acts of Congress; and
11. Indian reservations would continue as they are, and they would continue to be subject to the same rules of jurisdiction;.

But Native nations would gain much greater security in their lands and resources, greater freedom of action as governments, and freedom from the threat of adverse federal actions, including detrimental acts of Congress. Specifically, some of the changes that would result if these Principles were implemented would be:

1. Native nations would have broad freedom to own, use, and manage their lands and resources;
2. Native nations would be free from the threat that the federal government will take their lands or resources, except where it is done by eminent domain, with just compensation, with due process of law, and for a public purpose;
3. Native nations would no longer face the threat of future acts of Congress that terminate nations, control Native governments, or abolish reservations;
4. Native nations would be free from acts of Congress and court decisions that deny them the constitutional rights that other Americans have; and
5. Native nations would have the opportunity, at their choosing, to hold and manage their own lands and resources free of federal control as trustee.

In summary, Native nations would continue to exist and operate within the present basic framework of treaties, reservations, shared jurisdiction, and exclusive federal authority in the field of Indian affairs. But, they would be able to act with far greater freedom, with far less federal interference, with greater certainty about their ownership and control over their lands and resources, and with access to a fair and consistent system of federal law and legal remedies.

We believe that meaningful change in the law will not come unless we can come to wide agreement about what that change ought to be. For this reason, we need further input and participation by leaders of Native governments and legal experts. We hope that these General Principles and Commentaries can be used to discuss and debate the law that affects Native lands in this country. We hope that they will be an aid in considering what could be done to achieve change and what that change should be. We hope that lawyers and Native leaders will find these materials useful in defending and asserting Native land and resource rights in court, in Congress, and elsewhere. We hope also that they may prove useful in educating judges, law students, and others who work in the field of Indian affairs. But above all we hope that they will stimulate or provoke others to respond, to criticize the Principles, to offer suggestions or alternatives, and to work toward a shared vision of what should be changed in the law.

The Draft General Principles are set out here in their entirety. The Principles are also set out separately at the beginning of each chapter, before the relevant Commentaries.

DRAFT GENERAL PRINCIPLES OF LAW
Relating to Native Lands and Resources
With a Non-Technical Version

1. The legal rights of Indian or Alaska Native nations to the lands and resources they own by reason of aboriginal ownership, use and occupancy are the full rights of ownership, management, control, and disposition recognized in law without any diminishment or discrimination based on the aboriginal origin of these rights.

   Native nations have complete ownership of their aboriginal lands - not some limited or partial right.

2. The doctrine of discovery gave the "discovering" nation particular rights under international law as against other European or colonizing nations, namely the exclusive right to acquire land and resources from the Native or indigenous nations. The "doctrine of discovery" gave the "discovering" nation no legal right as against the Native nations or peoples.

   "Discovery" did not give the discovering country any ownership of Native lands. It only gave the discovering country the exclusive right to buy the land from the Native owners.

3. Legal doctrines such as *terra nullius*, the doctrine of discovery, and other such doctrines are inconsistent with the United States Constitution to the extent that they are mistakenly applied to diminish or impair the rights that Indian and Alaska Native nations hold with respect to their lands and resources.

Legal rules that deny, take away, or reduce Native ownership of their lands and resources are invalid, because they violate the United States Constitution.

4. The ownership of land and natural resources, including rights of use and occupancy, of Indian and Alaska Native nations and individuals, including interests in lands and resources held by aboriginal title, is entitled to the same constitutional protections as the ownership and other interests of others in their respective lands and resources, and in addition Indian and Alaska Native nations and individuals may have other rights and legal protections arising from treaties, statutes, and other sources of law.

Native lands of all kinds are protected against taking and other harm by the government - just the same as all property is protected. And, in addition, some Native land is protected by other legal rules that have been created by specific treaties, acts of Congress, or common law. In other words, Native lands and resources have at least as much legal protection against taking or other harm as other lands, and sometimes will have additional legal protections as well.

5. Congress, by reason of the Fifth Amendment to the Constitution, may not take the property of Indian or Alaska Native nations and individuals, including aboriginal property, except for a public purpose, with due process of law, and fair market compensation with interest.

Congress cannot take any Native lands or resources, including aboriginal title lands, unless it is done with fair compensation, for a public purpose, and in accordance with law.

6. The United States has trust title to land owned or beneficially owned by a Native nation or individual only if the United States has acquired that title through a valid legal process, such as a treaty, agreement, or statute, and only if that trust title had or has the consent of all the Native nations or individuals concerned.

The United States holds trust title to Native land and resources only where the United States has gotten that trust title through some genuine legal process and only where the Native owner consents to the United States holding trust title. In other words, trust lands exist only where the United States has become trustee in a lawful way and only where the Native nation agrees to this.

7. The federal government has no power as a putative or supposed trustee to control or dispose of lands owned by an Indian or Alaska Native nation or individual unless the United States acts with the express, free, prior, and informed consent of the Indian or Alaska Native nation or individual concerned.

Unless the United States has genuine trust title, the federal government has no authority as "trustee" to sell, lease, or do anything with Native lands without the consent and authorization of the Native owner.

8. Where the United States holds property in trust for an Indian or Alaska Native nation or individual, or where the United States has, by reason of events or circumstances of whatever nature, assumed control or possession of lands or resources belonging to or beneficially owned by an Indian or Alaska Native nation, or individual, the United States has all the responsibilities of a trustee as prescribed by law generally applicable to trustees or constructive trustees: including but not limited to the obligation to conserve the trust assets, to manage the assets for the benefit of the beneficiary, the obligation to account to the beneficiary, the obligation to avoid every conflict of interest, and the obligation to end the trusteeship and return the trust asset to the beneficiary when so required by the beneficiary.

Where the United States holds land or other property in trust for a Native nation, no matter how that came about, the United States has all the responsibilities and duties of a trustee that are required by law generally, without exceptions or limitations that reduce the government's responsibilities or duties.

9. A treaty with an Indian nation is a treaty within the meaning of the United States Constitution, the violation of which gives rise to liability and the right to redress.

The Unites States cannot freely violate treaties without providing full redress for the Indian parties, including compensation, restitution, or other appropriate, just remedy.

10. Congress has only such powers in the field of Indian affairs – particularly with respect to Indian and Alaska Native lands and resources – as are conferred by the United States Constitution. The Constitution does not accord Congress "plenary power" – in the sense of additional or unlimited powers – over Indian and Alaska Native nations and their property.

The United States Congress does not have "plenary" or unlimited power to enact laws dealing with Native nations and their property. Instead, Congress has only those powers that are stated in the Constitution, and those powers must be used within the limits set out in the Constitution – especially those in the Bill of Rights.

11. Indian and Alaska Native nations have the inherent right to form, maintain, and change their own governments and to create, maintain, and alter their own laws and legal institutions for the purpose, among others, of governing their own affairs and particularly for controlling, using, and managing their own lands and resources.

Native nations have the inherent or sovereign power to create their own governments and laws for all purposes, including for the purpose of using and controlling their lands and resources.

12. Native governments have the right to freely use, exploit, manage, and regulate lands and resources owned or beneficially owned by the nation, and they have governmental authority over allotted lands owned by Indian or Native persons within the reservation or subject to the jurisdiction of the Native government.

Native nations have the right to use, control, and benefit from their lands and resources without interference by the federal government that is not authorized by the Constitution or by the Native government itself.

13. Congress has no power under the Constitution or otherwise, with respect to any Indian or Alaska Native nation, to terminate its legal existence or to terminate its legal rights and status as a nation without the free, prior, and informed consent of that nation.

Congress cannot terminate any Native nation.

14. Land and other property owned by an Indian or Alaska Native nation in its sovereign capacity as a government is not taxable by any state or local government, whether or not that land is held in trust, in fee, or in any other form of tenure.

Native lands and resources cannot be taxed by any government, no matter whether the land is held in trust or otherwise.

15. The United States is bound by international law to respect the human rights and other rights of Indians and Alaska Natives both as individuals and peoples.

The United States must respect and abide by international law, especially international human rights law concerning indigenous peoples.

16. The United States must provide prompt and effective judicial remedies for the violation of the rights of Indian and Alaska Native nations and individuals in relation to their lands and resources. Such remedies must be non-discriminatory and otherwise consistent with the United States Constitution, applicable treaties, and generally accepted principles of fairness and due process of law.

The United States must make it possible for Native nations and individuals to go to court and get relief, or some kind of corrective action or compensation, whenever they suffer harm concerning their lands and resources or any other violation of their rights. These court remedies must be fair and effective.

17. The United States has a legal obligation to prevent abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals in relation to their lands and resources through the enactment and enforcement of reasonable legislation. This obligation of the federal government must be discharged in conformity with applicable treaties, the United States Constitution, international human rights principles, and these General Principles.

The United States has the duty to protect Native lands and resources by preventing abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals.

Chapter II

Native Land Ownership and the Doctrine of Discovery

General Principles One, Two, and Three

1. The legal rights of Indian or Alaska Native nations to the lands and resources they own by reason of aboriginal ownership, use, and occupancy are the full rights of ownership, management, control, and disposition recognized in law without any diminishment or discrimination based on the aboriginal origin of these rights.

2. The doctrine of discovery gave the "discovering" nation particular rights under international law as against other European or colonizing nations, namely the exclusive right to acquire land and resources from the Native or indigenous nations. The "doctrine of discovery" gave the "discovering" nation no legal right as against the Native nations or peoples.

3. Legal doctrines such as *terra nullius*, the doctrine of discovery, and other such doctrines are inconsistent with the United States Constitution to the extent that they are mistakenly applied to diminish or impair the rights that Indian and Alaska Native nations hold with respect to their lands and resources.

Commentary

I. Introduction

The first three Principles concern the legal nature of Indian and Alaska Native rights to their lands and the rights of the United States and the countries that supposedly discovered America. The first Principle describes the legal rights of Native nations. The second Principle describes the legal rights of the "discovering" countries, and later the United States. The third Principle states

that certain legal concepts and doctrines are not to be applied in any way that diminishes or impairs the land rights of Native nations. These three Principles, and in fact all of the Principles, are intended to apply to all kinds of Native rights involving land and resources, including shared rights to use land and rights to hunt, fish, and gather on land or on waters.

These Principles are an accurate statement of the present federal and international law, but this area of law is often badly misunderstood by lawyers, judges, government officials, and others. The "doctrine of discovery" is a topic that generates a great deal of comment, but much of it is mistaken or confused. Courts and judges are often some of the most confused. Many courts have mistakenly said that "discovering" countries gained legal rights to Native property under the doctrine of discovery. Some courts have even used this mistaken idea to justify actions that diminish the land rights of Indians and Alaska Natives. But such comments by courts are not supported by federal law. The doctrine of discovery applies only to *uninhabited* lands. The doctrine did not take away or diminish the legal rights of Indians and Alaska Natives to land and resources and cannot be used to justify any such reduction in land rights today.

Because uninhabited lands are rarely discovered in recent times, the doctrine of discovery would have little importance today, except for the fact that it is so frequently and mistakenly used to justify actions that diminish Native land and resource rights. The commonly held notion of the "doctrine of discovery" is a very discriminatory and oppressive idea that originated in the 15th century. The notion that Native peoples lost their land rights upon discovery by a European nation continues to have a damaging effect on Native peoples in this country and worldwide, even though it has never been a part of international or domestic law.

Our general conclusion, discussed further below, is that there is no sound legal authority either in international or domestic law for the proposition that the doctrine of discovery took away or diminished the ownership rights of the Native land owners or that it gave to the United States, as successor to the "discovering" nations, any actual ownership of Native lands. It gave the United States only the exclusive right to purchase the land if the Native owners chose to sell.

II. The Origin of the Doctrine of Discovery in International Law

The doctrine of discovery is a rule of international law, not a rule of domestic or national law. International law is simply the system of rules that apply to countries when they deal with one another. The doctrine of discovery as it applies to the United States can be summarized as follows:

The discovery of a previously unknown and *unoccupied land* gave the discovering country ownership of the land and sovereignty (governing authority) over the land – provided the discovering country actually occupied the newly discovered land.

The discovery of a land previously unknown to "civilized" nations but already *occupied or inhabited* by Native peoples gave the discovering country the exclusive right to purchase the land from the Native peoples, and if the discovering nation succeeded in occupying a part of the land (usually by agreement with the Native people) it would have sovereignty or governing authority over that land.

In no case did the doctrine of discovery give the discovering country any ownership of Native lands. Native ownership of their lands was not affected.

This summary of the doctrine of discovery is uniformly supported by the leading authorities on international law, including the International Court of Justice (often called the World Court) and the United States Supreme Court.[3]

III. United States Law on Aboriginal Title and the Doctrine of Discovery

No court has ever actually ruled as a matter of law that the United States validly acquired ownership of Native land under the doctrine of discovery. The cases that have suggested otherwise are inconsistent with United States law. United States law has always been in agreement with Principles One, Two, and Three. From its beginning, United States law has recognized the property rights of Indian and Alaska Native nations. The doctrine of discovery under United States law merely gave the discovering nation the exclusive right to purchase Indian and Alaska Native lands – it did not give ownership of those lands.

A. The Doctrine of Discovery and Pre-emptive Rights

Under the international doctrine of discovery, discovering countries did not gain ownership of inhabited land merely by right of discovery. Discovering countries developed their own internal legal rules governing the purchase of Indian land. The domestic law of England, France, the United States, and other countries included the government's "right of pre-emption", that is, the exclusive right of the government to acquire land from the Native owners. The right of

[3] Two leading authorities are Ian Brownlie, Principles of Public International Law 126-142 (6th ed. 2003) (discussing the various modes by which states acquire "title", that is, sovereignty over territory) and Oppenheim's International Law, Vol. I 678-679, 686-687 (Robert Jennings & Arthur Watts eds. 1992). The Supreme Court discussed the doctrine of discovery in the case of County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 233-234 (1985).

pre-emption flowed from the exclusive sovereign authority acquired pursuant to the doctrine of discovery under international law. In the British colonies in America, for example, the King had the pre-emption right and forbade all other purchases of Indian land without the King's permission. Later, the colonies, the states, the United States, and Canada all adopted the same rule.

B. Early Supreme Court Case Law on Aboriginal Title and the Doctrine of Discovery

We are concerned about the doctrine of discovery in modern times, because the doctrine *supposedly* reduced the ownership rights of indigenous nations to the lands and resources that they held by immemorial use and possession. Lands owned by Indian and Alaska Native nations by reason of long use or possession are said to be held by *aboriginal title*. But this supposed reduction of aboriginal title has never been a part of federal law. The federal law about aboriginal title and the doctrine of discovery is found mainly in four early Supreme Court cases, *Fletcher v. Peck*,[4] *Johnson v. M'Intosh*,[5] *Worcester v. Georgia*,[6] and *Mitchel v. United States*.[7] These cases, taken together, provide a clear view of federal law in the 1800s, and this view is substantially the same as Principles One, Two, and Three. The general conclusions that emerge from these cases show that the doctrine of discovery did not give "discovering" nations or the United States ownership of Native lands and resources. (A more detailed discussion of these four cases, with selected quotations from each decision, can be found in the Lawyers' Edition of the Draft General Principles of Law Relating to Native Lands and Natural Resources, Chapter II.)

1. British, French, and Spanish Laws Respected Native Property Rights

The first general conclusion that emerges in the early case law is that prior to the establishment of the United States, British, French, and Spanish laws and treaties repeatedly recognized and protected the ownership rights of Indian nations to their lands and resources. Early on, the United States Supreme Court adopted this respect for Native land rights into its own decisions.

[4] 10 U.S. 87 (1810).

[5] 21 U.S. 543 (1823).

[6] 31 US 515 (1832).

[7] 34 U.S. 711 (1835).

2. Federal Law Recognized Native Property Rights

Second, the early cases show that federal law recognized Native ownership of their land and resources. These rights were only limited by the exclusive right of the United States to purchase Native lands if and when Natives were willing to sell them. In recognizing Native property rights, these decisions rejected the idea that the doctrine of discovery gave colonizing states or the United States any actual title to Native lands and resources.

Chief Justice John Marshall (Chief Justice of the U.S. Supreme Court from 1801 to 1835) understood and repeatedly affirmed that Indian nations held all of the rights of ownership of their aboriginal lands, excepting only the right to sell the land to any European country other than the discovering country. Though Marshall sometimes referred to this Indian right of ownership as a mere "right of occupation," it is clear that in substance he recognized and affirmed that this included practically all the rights of ownership except for the right to dispose of the land to any other European country.

According to Marshall, the right of discovery was a right held by European nations *as against all other European nations* and did not affect the Indian nations' rights of ownership of their lands, except that it did deny their opportunity to sell their lands to any European country other than the discovering country. In the following passage from *Worcester v. Georgia*, Marshall explained the doctrine of discovery and its affect on Indian nations' rights of ownership of their aboriginal lands.

> To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, 'that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.' ... .
>
> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants,

> or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[8]

The Court in *Mitchel* later ruled that the rights of ownership of Indian nations to their lands are "as sacred as the fee simple of the whites." The Court ruled that the Indians' ownership rights included not just the right of occupation or possession but also the right to sell or dispose of the land.

3. Discovering Nations Did Not Acquire Ownership of Indian Lands

The third conclusion that emerges in the early cases is that discovering nations did not acquire ownership of Indian lands merely by "discovery". The right acquired by the discovering country was only the right of territorial sovereignty or governing authority (including the exclusive right to purchase Indian land), not the right of private ownership of the soil or resources held or occupied by the Native inhabitants.

While there were many views about the nature of the United States' and the individual states' rights to Indian lands, these early Supreme Court decisions crystallized a view that some prominent Americans shared even before the Supreme Court decisions. For example, Washington's Secretary of War, Henry Knox stated: "The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature and of that distributive justice which is the glory of a nation."[9] Thomas Jefferson was well versed in the law of discovery, and as Secretary of State, he explained that discovery gave the United States "a right against all other nations except the Natives,"[10] and not actual ownership of the land.

4. Marshall Intentionally Obscured the Meaning of "Title" in his Opinions

A close reading of the cases leads to a fourth conclusion, namely that Chief Justice Marshall had a personal interest in obscuring the meaning of the term "title" in his opinions. Marshall used the term in several different ways.

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[8] 31 U.S. at 543-544.

[9] Report of Secretary of War Henry Knox, "Relative to the Northwestern Indians" June 15, 1789, American State Papers, Indian Affairs: Vol. I, 12, 13 (1832).

[10] *See* Thomas Jefferson, Notes on the State of Virginia 96 (Univ. of North Carolina Press 1955) (1784).

Sometimes he used the term "title" to refer to the United States' general sovereignty over an area. At other times, he used the term to mean actual ownership of land. At still other times, he meant the exclusive right to purchase the land if the Indian owner were willing to sell. He also used the term "title" to refer to *contingent or future interests* in Indian lands that were still held and not ceded or sold by the Indian owners. Marshall wanted to make it clear in federal law that these new and unusual interests in land were real legal interests capable of being protected by federal law and being transferred by the government and among private parties. In Marshall's time, land speculators, including Marshall himself, bought and sold the future rights to Indian land, *rights that were meaningless unless and until the Indian owners ever should agree to sell or give up the land.*[11] This sort of land right is called a *contingent or future interest*, because it means nothing unless in the future the Indian owner agrees to sell or give up the land. Marshall wanted these new and complex future interests to be recognized and protected by the courts as <u>real</u> legal interests in land. For this reason, he used the well-established legal term *title* to make these contingent interests seem like sound legal interests.

5. The United States Did Not Acquire Native Title as a Successor State Under the Doctrine of Discovery

The final conclusion that emerges from the case law is that the United States did not acquire ownership of Native lands and resources as a successor state under the doctrine of discovery. The right of the United States, as successor to Great Britain, France, and Spain, was solely the right of sovereignty over the territory as against other European nations. It was not a right of ownership of the soil or resources, except where Great Britain had acquired ownership of the soil by purchase, agreement, or other lawful means. As successor, the United States could acquire no more right than was held by Great Britain.

C. The Supreme Court Has Repeatedly Confirmed the Law About the Doctrine of Discovery and Native Ownership of Their Lands and Resources up to Modern Times

The Supreme Court decisions that came after *Mitchel* reaffirmed the legal conclusions of the early cases we have discussed. For example, the Supreme Court in *Holden v. Joy* in 1872 restated the law, saying, "They [the Cherokee Nation] could sell to the government of the discoverer, but they could not sell to any other governments or their subjects, as the government of the discoverer acquired, by virtue of their discovery, the exclusive pre-emption right to

[11] *See generally* Lindsay G. Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands 177 (2005).

purchase, and the right to exclude the subjects of other governments, and even their own, from acquiring title to the lands."[12] The Court continued as follows:

> Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.[13]

This statement of the law remains substantially valid today and is consistent with the Principles.[14]

A very careful and accurate discussion of the law of discovery and Indian land ownership in the modern era is contained in the 1982 opinion of the Second Circuit Court of Appeals in *Oneida Indian Nation of New York v. State of New York*.[15] This decision confirms that "discovery" gave the discovering country nothing more than the exclusive right to purchase the land, if possible, from the Indian owners.

The Supreme Court's most recent decision expressing its understanding discovery and Indian land rights is the 1985 decision of *County of Oneida v. Oneida Indian Nation of New York.*[16] In this case, the Supreme Court agreed with the conclusions we have discussed above, and it referred with approval to this understanding in 2005 in *City of Sherrill v. Oneida Indian Nation of New York*.[17]

Thus, modern cases generally support Principles One, Two, and Three. They reaffirm that United States law recognizes Native ownership of their land and resources and the limited impact of the discovery doctrine on these rights.

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[12] 84 U.S. 21, 22 (1872).

[13] *Id.* at 23 (footnote omitted).

[14] *See also* Beecher v. Wetherby, 95 U.S. 517, 525 (1877).

[15] 691 F.2d 1070, 1075 (2d Cir. 1982).

[16] 470 U.S. 226, 233-34 (1985).

[17] 544 U.S. 197, 204 n. 1 (2005).

The assertion that the discovery doctrine gave the United States ownership of Native lands is clearly inconsistent with the Supreme Court's decisions.

D. Ownership of River Beds: An Inconsistent Rule

One modern Supreme Court decision is inconsistent with these longstanding legal rules and seemingly applies a contradictory rule to a small but significant area of Native property rights. In 1981, the Supreme Court in *Montana v. United States*[18] created and applied a special rule to the river beds of "navigable waterways" (most rivers in the United States). The Supreme Court ruled in *Montana* that the United States owns the beds of practically all rivers and other waterways, even those historically owned by Indian nations and even where the river bed is within a treaty guaranteed reservation. The *Montana* decision is mistaken on the issue of United States ownership of the river bed. It is also inconsistent with the Court's own prior decisions on Indian land ownership. Further, the *Montana* decision is inconsistent with the United States Constitution, because it is a taking of Native lands and resources without due process or compensation.

The *Montana* case concerned the bed of the Big Horn River within the Crow Nation reservation in Montana. The river bed and land around it had never been given up or sold by the Crow Nation, which had owned the land since time immemorial. The United States had not taken any action to extinguish Indian title or to take ownership of the land from the Crow Nation. These facts suggested that under United States law, the Crow Nation owns the Big Horn River bed. The Court, however, decided that the United States owns the Big Horn River bed.

The Court's holding in *Montana* lacks genuine legal support, and it is inconsistent with prior federal law and with other well-established rules of federal law concerning Indian lands. First, the cases relied on by the Court do not support its conclusion that the United States owns the Big Horn River bed. In the opinion, the Court never explained how the United States got title to the Big Horn River bed from the Crow Nation. Nor did it discuss any cases dealing with Indian land rights. The Court appears to have overlooked two centuries of federal court decisions recognizing Indian land rights, and it mistakenly concluded that the United States owns the bed of the Big Horn River.

The decision in *Montana* departs from well-established federal case law on Native land rights. Under federal law, the United States cannot own the Big Horn River bed, because it has not validly acquired this land from the Crow Nation. As previously discussed, United States law recognizes Native

[18] 450 U.S. 544 (1981).

ownership of lands, like the Big Horn River bed, which have never been given up by the Native owner nor purchased by the United States. While the United States has a pre-emptive right to buy the river bed under the doctrine of discovery (if the Crow Nation were willing to sell), it did not gain any other right to the land under that doctrine. The United States has never exercised its pre-emptive right and purchased the land. Nor has it exercised its power of eminent domain (condemnation) to purchase the land. The Crow Nation has never ceded the Big Horn River bed to the United States. Instead, the Crow Nation entered into treaties with the United States recognizing its ownership of the land.

The rule established by the Court in *Montana* is also inconsistent with the United States Constitution. The Fifth Amendment prohibits the taking of private property without due process and just compensation. The application of the *Montana* rule to river beds that are owned by Indian nations by aboriginal or treaty right actually constitutes a taking of the Indian land and deprives the Indian nation of its property without compensation or due process.

As a result, we conclude that the *Montana* decision is not good law today and ought to be abandoned by the Supreme Court and by Congress.

III. International Human Rights Law Recognizes Native Land Rights

International human rights law fully supports Principles One, Two, and Three. International human rights law states without exception or limitation that countries must recognize and protect the land and resource rights of indigenous peoples, including their ownership of the lands they have held since time immemorial. The Inter-American Court of Human Rights found that customary use and occupancy of land by indigenous peoples gives rise to legal rights the state has the obligation to recognize and protect.[19] The Inter-American Commission on Human Rights determined that Belize is obligated to recognize the land rights of the Maya people based upon their historic and customary possession of the land.[20]

In addition, the Inter-American Commission on Human Rights ruled that laws and policies of the United States that discriminate against Indian nations in regard to their land rights constitute a violation of the United States' legal obligations to protect human rights.[21] The Commission found that the United

[19] The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R.; Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, Inter-Am. Ct. H.R. (holding that the traditional possession of lands by indigenous peoples has the same legal effect as state-recognized title).

[20] Maya Indigenous Communities of the Toledo District, Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R. (2004).

[21] The Case of Mary & Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2002).

States' claim of ownership of the Western Shoshone lands that are used and occupied by the Dann family (the Indian petitioners), violated their right to property and their right to equal treatment under the law. The Commission particularly condemned the failure of federal law to provide the same level of legal protection to Indian lands as to the lands owned by others, which the Commission found to be a denial of equality before the law.

The legal recognition and protection of the land rights of Indians and other indigenous peoples by reason of aboriginal ownership has become a widely shared legal norm in the domestic law of countries in various parts of the world.[22]

IV. Related Issues Not Addressed Here

A few related and interesting issues are not addressed by Principles One, Two, and Three, and they are not discussed in this Commentary, either because they are considered elsewhere or because they do not appear to be important for present-day land issues.

We have not addressed the question whether it was legal or just for governments to grant or sell interests in lands that were still owned and held by the Indian owners, because this former practice does not appear to exist today.

Likewise, the rule that Native nations could cede or sell lands only to the "discovering" country appears to have little or no present-day importance. The limitation on the ability of Indian nations to sell to whomever was the result of the acquisition of sovereignty over the area by the country that "discovered" the territory and achieved effective occupation. The creation by European countries of a controlled market was unfair and unjust at the time, even though Indian nations were still free to transfer their lands rather freely to other Indian nations and to individuals and parties other than countries. The sovereignty of the United States and other countries over their recognized territories is no longer open to serious question in international or domestic law.

When the doctrine of discovery or any legal rule is asserted as the basis for the denial of or limitations on the land ownership rights of Indian and other indigenous peoples, then serious questions are raised about whether such rules are consistent with the United States Constitution, especially the constitutional

[22] *See, e.g.*, Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (articulating rules related to aboriginal title for purposes of Canadian law); Mabo v. Queensland (No. 2), [1992] 175 C.L.R. 1 (stating rules related to aboriginal title for purposes of Australian law); Alexkor (Pty) Ltd and Government of the Republic of South Africa v. Richtersveld Community and Others, 2003 (12) B.C.L.R. 1301 (finding under South African law that aboriginal title survived annexation of Native lands by the British). *See also* U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007) (recognizing full rights of ownership based on traditional use and possession).

prohibitions on discrimination and the Fifth Amendment protections against takings and denial of due process. These constitutional issues are dealt with fully in connection with other Principles, particularly Principles Four and Five (discussed in Chapter III) and Principle Ten (discussed in Chapter VI). These first three Principles and this Commentary go only so far as to establish that federal law and the law of nations recognize and protect the ownership rights of Indian and Alaska Native nations to their aboriginal lands and do not create any substantive right on the part of the United States in those lands.

V. Conclusion

These Principles correct the mistaken belief that Indian and Alaska Native nations do not have full legal ownership rights to their lands and resources. Under federal law, Indian and Alaska Native nations have full ownership rights to their lands and resources, including aboriginal title lands. The doctrine of discovery did not give "discovering" countries any legal rights to Native lands and resources. "Discovering" countries only gained a right to purchase Native lands under the doctrine of discovery.

Chapter III

The *Tee-Hit-Ton* Case and Takings of Aboriginal Title Property

General Principles Four and Five

4. The ownership of land and natural resources, including rights of use and occupancy, of Indian and Alaska Native nations and individuals, including interests in lands and resources held by aboriginal title, is entitled to the same constitutional protections as the ownership and other interests of others in their respective lands and resources, and in addition Indian and Alaska Native nations and individuals may have other rights and legal protections arising from treaties, statutes, and other sources of law.

5. Congress, by reason of the Fifth Amendment to the Constitution, may not take the property of Indian or Alaska Native nations and individuals, including aboriginal property, except for a public purpose, with due process of law, and fair market compensation with interest.

NON-TECHNICAL LANGUAGE

4. Native lands of all kinds are protected against taking and other harm by the government - just the same as all property is protected. And, in addition, some Native land is protected by other legal rules that have been created by specific treaties, acts of Congress, or common law. In other words, Native lands and resources have at least as much legal protection against taking or other harm as other lands, and sometimes will have additional legal protections as well.

5. Congress cannot take any Native lands or resources, including aboriginal title lands, unless it is done with fair compensation, for a public purpose, and in accordance with law.

Commentary

I. Introduction

The Fifth Amendment of the United States Constitution protects all property, including Native property, from taking by the federal government. Under current Supreme Court precedent, however, the United States can take Native lands held by aboriginal title without any compensation and without due process of law. Congress has already taken or extinguished nearly all aboriginal title to the lands of Alaska Native nations in the 1972 Alaska Native Claims Settlement Act, all without due process or fair market compensation. The courts today permit such takings and view them as not violating the Fifth Amendment.

Few legal rules have Native nation as much as the unrestricted taking of Native lands. Native nations have lost millions of acres of land simply because the United States wanted it and took it. The law has greatly diminished Native land bases and undermined Native economic development.

Principles Four and Five would change this rule for the future. They state that the United States cannot take Native land without due process and fair compensation. The United States must apply the same legal protections to Native lands, including aboriginal title lands, as it applies to other property. These Principles would stop *future* takings without due process and just compensation, but would not change past takings.

II. Aboriginal Ownership, Use, and Occupancy of Land is Fully Protected Under the Law

Lands owned by Indian and Alaska Native nations by reason of long use or possession are said to be held by *aboriginal title*. As discussed in the previous chapter, federal law states that lands held by aboriginal title are fully owned and controlled by Native nations. Aboriginal title includes a right to use land for subsistence activities such as hunting, fishing, trapping, and gathering. Aboriginal rights to hunt, fish, and gather on land may exist even where the Native nation does not have or claim full ownership of the land if the use is continuous and exclusive for a long period of time.

Principle Three means that Native nations have complete ownership of their aboriginal title lands, not just permission of the federal government to occupy or use the land. This is important because if Native nations only have a right to use and occupy their lands with the permission of the United States, they do not own their lands or have a legally protected right to them. In its early case law, the Supreme Court clearly stated that Native nations have ownership rights to their lands rather than mere rights of permissive occupation. The Supreme

Court described Native land as protected by a "sacred" right, and rejected any suggestion that the Indian nations' interest in their lands was diminished by the aboriginal origin of their ownership.[23]

III. Native Land, Regardless of the Title Under Which It is Held, is Entitled to Full Constitutional Protection

Up until the mid-twentieth century, courts recognized that Indian and Alaska Native property rights, including their aboriginal title lands, were squarely within the Constitution's provisions that protect property from governmental taking. The United States Constitution forbids Congress from taking any property without just compensation and due process. ("Due process" in this setting means that it must be done according to fair legal rules.)

Until 1955, United States courts stated that the Constitution protects all property in the United States, whether it is held by Native nations or anyone else. In the 1950s, the Tee-Hit-Ton clan of Tlingit Indians made a claim against the United States seeking compensation for the taking of timber from 350,000 acres of land they held by aboriginal title in Alaska. In that case, *Tee-Hit-Ton v. United States*, the Supreme Court created a new legal rule.[24] The Court stated that the Constitution does not protect Indian and Alaska Native lands held by aboriginal title. Under this new rule, only Native lands held by *recognized title* are constitutionally protected from governmental taking like all other property within the United States. Recognized title lands are Indian and Alaska Native lands recognized as Native lands by the United States in treaties, statutes, or executive orders.

The new legal rule created by the *Tee-Hit-Ton* case discriminates against Indian and Alaska Natives by treating their lands held by aboriginal title differently from any other land in the United States. Under the *Tee-Hit-Ton* rule, the United States government can take Indian and Alaska lands and resources held by aboriginal title whenever and however it wants. But the United States government cannot take other property without due process and fair compensation.

The *Tee-Hit-Ton* case continues to influence courts' views of the legal protection of Native lands. Despite its unfairness and devastating consequences, the lower federal courts continue to regard it as good law and regularly apply the decision in new cases. For example, in 2000, the Court of Appeals for the Federal Circuit in *Karuk Tribe of Ca. v. United States* used the *Tee-Hit-Ton* rule to

[23] Mitchel v. United States, 34 U.S. 711, 746 (1835).

[24] 358 U.S. 272 (1955).

deny the Yurok Tribe and Karuk Tribe's claim for compensation for the taking of more than 87,000 acres by Congress in 1988.[25] The court rejected the Tribes' claim because Congress did not recognize the Tribes' rights to their reservation as ownership. The *Karuk* decision is particularly disturbing because it applies the *Tee-Hit-Ton* rule to lands set aside by the government by an executive order. Prior to the *Karuk* decision, federal courts had stated that lands set aside by the President in executive orders is land that is entitled to constitutional protection. In contrast, the *Karuk* decision suggests that not all executive title lands are protected by the Fifth Amendment. Thus, the United States government may be able to take the approximately 23 million acres held under executive order title today without due process or just compensation.

Other courts have mistakenly relied on *Tee-Hit-Ton* as well. In 1992, the Supreme Court of Vermont used the *Tee-Hit-Ton* rule in deciding that the aboriginal title of the Western Abenaki Tribe had been extinguished by "the increasing weight of history," a conclusion that is not in keeping with federal law.[26] Native nations continue to assert many kinds of aboriginal title claims, including hunting, fishing, and use rights, and they face arguments that their property is entitled to fewer legal protections than other forms of property.

The *Tee-Hit-Ton* rule is inconsistent with well-established federal law. Federal law states that Native nations have more than mere permission to be on lands held by aboriginal title. Legally, Native nations fully own and control lands held by aboriginal title, as discussed in Chapter II.

Tee-Hit-Ton is also out of keeping with the modern trend of the federal courts to expand the kinds of property that are protected by the Constitution against government taking. No matter how Native interests in land are classified – as aboriginal title, recognized title, executive order title, or other title – there should be no doubt that under modern law, such interests are constitutionally protected against taking. Courts have recognized a wide variety of property interests as legally protected under the Fifth Amendment, including, for example, Social Security benefits. They have stated that "[t]he essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently grounded to support a claim of entitlement."[27] These understandings may arise from custom and usage.[28] It is indisputable that Indian and Alaska Native nations have well-founded understandings and expectations that they

[25] 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

[26] State v. Elliott, 159 Vt. 102, 115, 616 A.2d 210, 213 (Vt. 1992).

[27] Nixon v. United States, 987 F.2d 1269, 1275 (D.C. Cir. 1992) (President has property interest in presidential papers).

[28] *Id.* at n.18.

own the lands they have held since time immemorial. There can be no doubt that Indian and Alaska Native nations rely on their lands daily for food, spiritual meaning, and cultural significance. Indeed, the definition of aboriginal title incorporates these ideas. Lands held by aboriginal title are clearly property.

Further, the present-day validity of *Tee-Hit-Ton* has been diminished by more recent Supreme Court decisions. Recent Supreme Court decisions have restricted the scope of congressional power generally to those powers listed in the Constitution.[29] The Constitution greatly limits congressional power to take property and does not make an exception for Indian and Alaska Native property. These clearly stated constitutional limits on congressional power suggest that Congress cannot take Native lands whenever and however it wants.

IV. Conclusion

Today, justice and fairness are the touchstones for determining when property has been taken. Principles Four and Five would replace the discriminatory *Tee-Hit-Ton* rule with legal rules that are consistent with federal law, principles of fairness and equality, and international human rights law. Principle Four is consistent with existing United States laws, which recognize Indian and Alaska Native land rights as property rights. Principle Five states that Indian and Alaska Native property held by aboriginal title must receive at least the same constitutional protections as all other property in the United States. These Principles would prevent the United States government from taking Indian and Alaska Native property held by aboriginal title whenever and however it wants.

[29] For example, the Supreme Court recently said that Congress cannot enact a law based on its power over interstate commerce if the law does not have any impact on interstate commerce. In *United States v. Lopez*, the Court found that the possession of a concealed weapon within a local school zone did not impact interstate commerce. 514 U.S. 549, 564 (1995).

Chapter IV

Trusteeship and Trust Title

General Principles Six, Seven, and Eight

6. The United States has trust title to land owned or beneficially owned by a Native nation or individual only if the United States has acquired that title through a valid legal process, such as a treaty, agreement, or statute, and only if that trust title had or has the consent of all the Native nations or individuals concerned.

7. The federal government has no power as a putative or supposed trustee to control or dispose of lands owned by an Indian or Alaska Native nation or individual unless the United States acts with the express, free, prior and informed consent of the Indian or Alaska Native nation or individual concerned.

8. Where the United States holds property in trust for an Indian or Alaska Native nation or individual, or where the United States has, by reason of events or circumstances of whatever nature, assumed control or possession of lands or resources belonging to or beneficially owned by an Indian or Alaska Native nation or individual, the United States has all the responsibilities of a trustee as prescribed by law generally applicable to trustees or constructive trustees: including but not limited to the obligation to conserve the trust assets, to manage the assets for the benefit of the beneficiary, the obligation to account to the beneficiary, the obligation to avoid every conflict of interest, and the obligation to end the trusteeship and return the trust asset to the beneficiary when so required by the beneficiary.

NON-TECHNICAL LANGUAGE

6. The United States holds trust title to Native land and resources only where the United States has gotten that trust title through some genuine legal process and only where the Native owner consents to the United States holding trust title. In other words, trust lands exist only where the United States has become trustee in a lawful way and only where the Native nation agrees to this.

7. Unless the United States has genuine trust title, the federal government has no authority as "trustee" to sell, lease, or do anything with Native lands without the consent and authorization of the Native owner.

8. Where the United States holds land or other property in trust for a Native nation, no matter how that came about, the United States has all the responsibilities and duties of a trustee that are required by law generally, without exceptions or limitations that reduce the government's responsibilities or duties.

Commentary

Introduction and Overview

Principles Six, Seven, and Eight deal with the subject of trust title to Native lands and the role of the United States as trustee or supposed trustee. These Principles do not attempt to cover the entire field of the federal-Indian trust relationship. Rather, the Principles go only so far as to deal with trust title to land and trusteeship relating to Indian and Alaska Native lands and resources, including water.

In order to be clear, "trust title" or "trust land" exists when one party (such as the United States) owns land for the use and benefit of another party (an Indian nation or individual allotment holder). The United States is called the "trustee," and the United States is said to hold "trust title". The United States technically owns the trust land but must assure that it is used exclusively for the benefit of the Indian nation or individual, called the "beneficiary".

The purpose of these three Principles is to clarify the law about the trust status of Native lands and about the powers and responsibilities of the United States in regard to Native lands and resources held in trust. Federal law at present leaves uncertainty about the trust status of lands in many situations and

thus about the role of the United States in regard to those lands. In order to use and manage their lands effectively, Indian leaders need clarity and certainty about the status of all Indian nation lands and about their own powers and the powers of the United States over those lands.

These Principles do not change the general system of land holding and land management in any major way, though they would add clarity and would give Native nations greater freedom to hold and control their lands as they wish. These Principles would permit Native nations to continue having their lands and resources in trust without changing the status of the land as Indian Country for self-government purposes. The Principles would have the effect of sharply limiting the powers of the federal government, powers that have often been used to the detriment of Indian nations. These three Principles would also clarify and strengthen the obligations of the United States when it holds Native lands and resources in trust.

Principle Six is intended to establish a clear legal rule for determining when the United States holds trust title to Indian or Alaska Native land and resources, and when it does not. This Principle states that Native nation owned land is *not* held in trust by the United States unless two conditions are met: (1) The United States got trust title to the land by some valid legal means, and (2) the Native nation or nations concerned have given their consent in some form. This rule is basically the same as the generally applicable legal rules that would apply to the creation of trust title and trust management of non-Native lands and resources.

The Principle is intended to deal with the frequent claim by the United States that it holds trust title to millions of acres of Indian lands that have never been ceded or transferred in any manner to the United States. The United States usually makes this claim in order to justify controlling or disposing of Native lands or resources against the wishes of the Native nation or other Native owner. In such situations, there is no legal basis for the United States' assertion of trust title. This Principle is closely related to Principle Two, that the United States acquired no ownership right in Indian or Alaska Native land by right of discovery. In many cases, the land in question was reserved to the Indian nation or nations and recognized as Indian land in a ratified treaty. Nothing in these situations provides a legal basis for the United States' claim of trust title to the land. The United States *does* hold genuine trust title to much Native land and holds it in trust for particular Indian or Alaska Native nations and individuals. In many situations in modern times, Native nations have deliberately and voluntarily conveyed title in trust to the United States. In these situations the United States generally does have valid trust title.

For the United States to have trust title, this Principle requires consent by the Native nation or individual – the one that the United States hold trust title for. Sometimes the consent of the Native land holder to trust title can be fairly presumed – such as where the United States conveys to a Native nation or individual the beneficial interest in land that is legitimately owned by the United States and which did not previously belong to that nation or individual. This has occurred, for example, when the United States has set aside federally owned lands to create new reservations for displaced Indian nations.[30]

Where the two requirements of this Principle are not met, then the United States does not have trust title to that Native land, even though it may be located on a recognized reservation. In that case, the land is owned by the Indian nation by aboriginal right, or it may be held by recognized title when the nation's ownership has been recognized in a treaty or act of Congress. Many different situations exist, however, as regards how land is held by Indian nations. This Principle does not try to deal with all of the possible legal and historical situations. It goes only so far as to say that Indian nation owned land is not held in trust by the United States unless the two conditions are met.

Whether the land is held in trust or not does not (or should not) determine whether the land is subject to state and local taxation. This point is covered in Principle 14. Likewise, there is no necessary connection between the trust status of the land and the governmental authority or jurisdiction of the Indian or Alaska Native government over that land. This is so despite the fact that courts often mistakenly use the term "trust land" to refer to reservation land over which Indian governments have governmental authority.

Principle Seven deals with the powers of the federal government to control or dispose of Indian lands in its claimed or asserted role as holder of trust title *in situations where it does not actually have trust title*. Like Principle Six, this Principle states that the federal government has no power of control to sell or convey the land unless the Native governments or individual allotment owners genuinely want the federal government to exercise such powers over their particular lands. Without such consent, the power does not exist and is without legal basis. Principle Ten, which rejects the idea of congressional "plenary power" over Indian and Alaska Native lands, is a fuller expression of the lack of congressional power. Principle Seven goes somewhat farther by denying such power (absent consent) to the executive branch as well.

[30] *See, e.g.*, 39 Stat. 739 (Sept. 7, 1916) (setting aside public lands for Chief Rocky Boy's band of Chippewa and other displaced and homeless Indians in Montana).

Principle Eight is intended to make it clear that the federal government has specific duties regarding Indian and Alaska Native lands *where the land is held in trust*. These duties are created by treaty, agreement, statute, or common law.

Principle Eight states a general rule applicable to all trust situations, whether the trusteeship is created by statute, treaty, or agreement, or whether the trusteeship arises because of the fact of possession or control by the United States. When the United States is in actual possession or control of Native land or other property, there may be no formal trust, but in fairness the United States must be held to all the standards of a trustee so long as the possession or control continues. The Principle is intended to place on the United States approximately the same duties and responsibilities that a court would impose on any person in possession or control of property belonging to someone else. Naturally, where statutes or treaties impose additional obligations on the United States, this Principle is not intended to limit such duties.

It is the intent of all the Principles, taken together, to preserve all the rights and protections for Native land that now exist, regardless of whether the land is held in trust or not. This would permit Native nations to hold some or all of their lands without the federal controls that presently go along with trust status. In our view, it is not legally necessary for land to be held in trust in order for it to be non-taxable by state and local governments. Nor is it necessary for the land to be held in trust for it to be legally recognized nation land as part of a reservation. Treaties and statutes that recognize and guarantee Indian and Alaska Native self-government and self-determination do not depend on the land being in trust status. Nation owned land on reservations continues to be protected against alienation by the Indian Trade and Intercourse Act whether or not it is held in trust.

These three Principles would alter the present legal framework in important ways. First, some Indian nation owned reservation land that is now regarded by the federal government as held by trust title would be owned wholly by the Indian nation, but with the same legal character. It would continue to be free from taxation, protected against alienation, and subject to Indian nation jurisdiction. The Principles would give Indian nations the option of either assuming full ownership of such lands or of taking steps to create a legal trust regarding such lands. Second, the powers of the federal government over trust property would be limited by the requirement of Indian nation consent. If the trusteeship and the trust powers were not created with genuine nation consent, they could be open to legal challenge by the Indian nation and perhaps in some cases by individual allottees. Third, the United States would have all the fundamental obligations of a trustee wherever the federal government has actual possession or control of Indian or Alaska Native property. Finally, the Principles would do away with the present rules that

permit outright conflicts of interest by the United States as trustee and that occasionally fail to impose trust duties on the United States.

General Principle Six: Trust Title

6. The United States has trust title to land owned or beneficially owned by a Native nation or individual only if the United States has acquired that title through a valid legal process, such as a treaty, agreement, or statute, and only if that trust title had or has the consent of all the Native nations or individuals concerned.

NON-TECHNICAL LANGUAGE

6. The United States holds trust title to Native land and resources only where the United States has gotten that trust title through some genuine legal process and only where the Native owner consents to the United States holding trust title. In other words, trust lands exist only where the United States has become trustee in a lawful way and only where the Native nation agrees to this.

I. United States' Assertion of Trust Title: Scope and Origin

The United States claims to have trust title to 55.7 million acres of Indian land.[31] The United States claims to hold legal title to these Indian lands in trust for either an Indian nation or individual. Native nations and individuals have the right to use and occupy the property that is held in trust, but they cannot lease or sell it, because the powers of sale and lease are part of the trust title which belongs solely to the United States. The 55.7 million acres over which the United States claims trust title include lands on approximately 300 federally recognized Indian reservations, and both Indian nation trust land and individually owned trust lands.

However, we have been able to establish an actual legal basis for the United States' claims of trust title to only about 22.4 million acres of the 55.7 million acres it claims to hold in trust. Thus, the trust status of some 33.3 million

[31] Bureau of Indian Affairs, at [http://www.doi.gov/bureau-indian-affairs.html] (last visited Nov. 9, 2007) ("The Bureau of Indian Affairs (BIA) responsibility is the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives.").

acres remains in doubt. This startling fact shows the enormous need for a reasonable and just rule for deciding what land is held in trust by the United States.

A. Statutory Origins of Trust Title

The United States' trust title to *some* Indian lands comes from various federal statutes. Indeed, such acts of Congress are the *only* legal source for the United States claims of trust title. Actual trust title was created for Indian allotments by congressional allotment statutes, especially the General Allotment Act, passed during the late nineteenth and early twentieth centuries. During this period, Congress passed a series of acts to break up Indian nation land holdings by allotting nation lands in individual parcels and selling surplus nation lands. The General Allotment Act provided that the United States would hold individual allotments in trust for twenty-five years, and these trust periods were later extended indefinitely. Dozens of other allotment statutes created trust title in the same way.

Another act of Congress that authorized the creation of trust title is the Indian Reorganization Act (IRA), which repudiated the allotment policy and sought to revitalize Native governments. The Act authorized the Secretary of the Interior to acquire lands for Indian nations and directed that those lands be held in trust. Since passage of the IRA in 1934, the Secretary of the Interior has taken approximately 6.7 million acres of land into trust for Indian nations.

Finally, there are a number of statutes that set aside land in trust or provide that the United States will hold land in trust for a specific Indian nation or nations. Not many Indian nations have such statutes, but we have not been able to determine the number of acres held in trust pursuant to such specific statutes.

These statutory sources, however, do not appear to account for the federal government's assertion of trust title over much Indian land that is not affected by these statutes. Much Indian nation held land was not allotted or taken into trust under the Indian Reorganization Act, and only a few Indian nations have statutes specifically placing their land in trust. According to data collected by the Indian Land Tenure Foundation, an estimated 15.7 million acres of allotted land remained unalienated and in trust in 1934. Another 6.7 million have been taken into trust under the IRA. These numbers account for only about 22.4 out of the 55.7 million acres of Indian land over which the U.S. asserts trust title.

B. Possible Origins of Trust Title

Several other possible legal bases for the United States' claim of trust title over the remaining millions of acres of unallotted Indian land deserve mention. These possible bases are: (a) the doctrine of discovery; (b) the general trust relationship with Indian nations; (c) treaties; and (d) the general incapacity of Indian nations to manage their lands. Our conclusion is that none of these provides any actual legal support for trust title.

First, it is important to know that no decisions of the United States Supreme Court or any other authoritative court decisions have been found that establish any legal basis for the federal government's claim of trust title to unallotted Indian lands other than those lands taken in trust under the IRA or other statutes. Many opinions assume the existence of trust title without providing any legal authority or rationale for it. Unfortunately, court decisions provide practically no guidance on this issue, and the question of whether the federal government has trust title to Indian nation held reservation lands remains unresolved.

As we discussed in detail in Chapter II, the United States acquired no trust title and no ownership right of any kind to Native land by reason of the doctrine of discovery.

The general trust relationship that is said to exist between the United States and Indian and Alaska Native nations has never been understood to give the United States trust title to Native lands. Though the assertion of trust title on the part of the United States is frequently connected in some general way to the general trust relationship, no legal authority has been found for the theory that this relationship gives rise to trust title held by the United States.

Treaties are also commonly mentioned as a possible source of federal trust title to Indian lands. Indeed, a few treaties ceded land to the United States in trust so that it could be sold or allotted to specific families. In some cases, a part of that land was not sold and may continue to be held in trust. This could account for some additional trust land; how much is not certain.

Another theory is that the United States gained trust title over Indian lands through specific treaty language even though that language did not explicitly mention any kind of trust. We have not found any substantial legal authority that any treaties, other than those just mentioned, gave the United States trust title to any land.

Finally, in one 1902 case, *Cherokee Nation v. Hitchcock,*[32] the Supreme Court ruled that the United States could act as trustee over land owned outright by the Cherokee Nation, because the Nation had mismanaged the property. No matter what were the facts in that case, no court today would rule that all Indian nations today lack the capacity to manage their own property and affairs. This could not be the basis for federal trust title today.

Thus, none of the possible legal theories to support trust title provides adequate legal authority for the United States' trust title over all the Native lands for which it asserts trust title. Even taken together, these legal theories do not provide legal authority for the United States' assertion of trust title to as much as 30 million acres of Indian reservation lands.

II. Requirement of a Valid Legal Process

Principle Six states that the United States can only acquire trust title through a valid legal process. A valid legal process is one which is done according to law and which complies with the constitutional requirements of due process. Valid legal processes include: treaties, agreements, and statutes (provided they are within the power granted to Congress by the Constitution). For example, under the Indian Reorganization Act, the Secretary of the Interior can place Indian nation lands in trust at the Indian nation's request. Any lawful action could meet this requirement.

III. The Element of Consent

In order for the United States to have valid trust title to a given parcel of land, there must also be Indian nation or allottee consent. Where there has been consent, openly expressed or clearly implied by the Native owner, the issue of the validity of trust title usually does not arise, because the rights of the Native owner have not been disregarded or impaired. Whether such consent has been given is a question that can only be answered by looking at the facts in the particular situation. There can be no general answer, and there is a grave danger in any generalization. Every situation will have its particular facts and circumstances and its unique history that will bear on the issues of consent and trust title.

It is important to note, however, that any such consent must meet some basic requirements. First, consent must be free, prior, and informed. To be free, it must be given by the owner of the land without coercion, duress, fraud, bribery, threat, or external manipulation. For consent to be "prior," it must be given before any significant step in the process of creating trust title has been

[32] 187 U.S. 294 (1902).

completed and before each decision-making stage in the process. For consent to be "informed," it must be given only after the affected Native nation or person is provided with all relevant information in appropriate languages, including the likely and possible consequences of trust title, and alternatives to the creation of trust title. All information must be provided free from external manipulation and with sufficient time for review and decision-making in accordance with the laws and customs of the Native nation or people affected.

It is clear that Native nations and individuals have not always given prior, free, informed consent to United States trust title over their lands. In some situations, this may mean that trust title does not exist. In some cases, the lack of prior, free, informed consent in the past may be cured by free, informed consent at a later time. Further, under some special circumstances, consent may be implied by other actions and circumstances.

Many Indian nations appear to have consented to the United States' assumption of trust title over certain lands when those lands were taken into trust by the government at the request of Indian nations under the IRA. Whether this consent was actual and genuine is a matter that would have to be determined in each case.

Some Indian nations may also have consented to United States trust title over their lands in treaty provisions. The existence or authenticity of nation consent in any given treaty may depend on the specific circumstances in which the treaty was negotiated and signed, what the Indian nation thought it was agreeing to, and the language used in the treaty.

The genuineness of Indian nations' consent to trust title is undermined in many situations by the fact that for many years it has been mistakenly understood that having the land in trust status is necessary if the Native government is to have jurisdiction over the land and if the land is to be protected from state and local taxation. Courts have permitted state taxation and various elements of state jurisdiction over Indian lands that are not held in trust. If this were not the case, some Indian nations might wish to be free from the federal controls that come with trust lands.

Where there has been no consent on the part of the Indian nation owning the land, the assertion of trust title on the part of the federal government constitutes a substantial impairment or reduction of the property rights of the nation. The powers of the trustee to control, manage, and even sell or lease the land are a substantial reduction of the rights of ownership and control that the Indian nation would otherwise have. For this reason, it is entirely possible that Indian nations could challenge the federal government's assertion of trust title,

particularly in situations where the nation opposes the federal government's management and control decisions.

Where there has been no consent by the Native owner, there is no legal basis on which to sustain the federal claim of trust title. Absent consent, the assertion of trust title to Nation land, whether done by statute or by mere administrative action, is simply an unlawful act or an unconstitutional taking of Native land rights when done by an act of Congress.

What would happen when there is no consent as required by Principle Six? In situations where the consent of the Native nation was not given and was not fairly implied when federal trust title was first asserted or created, there are several possibilities:

1. Where the land in question is Indian nation held reservation land and the nation does not wish the land to be in trust, there is no legal basis for finding the existence of trust title.

2. Where no affirmative consent was given initially, but the Indian nation today desires that certain land be held in trust, then the nation's wish serves as a form of present consent. This consent would assure that the land continues to be treated as "trust land" despite the lack of any formal legal basis for that status.

3. In the case of allotments made without the consent of the Indian owner, the trust title to the allotments would, in most cases, not be open to present-day legal challenge because of the passage of time, statutes of limitation, because of acquiescence on the part of the Indian nation, or because of other such reasons. Despite the defective origins of the trust title to allotments made without the consent of the nation, challenges to those titles and allotments appear unlikely today. Whether any such challenge could succeed would depend on the particular legal facts concerning the allotments in question.

4. Where no consent to allotment was given by the Indian nation and the present allotment owner(s) do not wish the allotment to be held in trust, then the trust status of that allotment may be open to legal challenge. However, in such a situation the Interior Department might be expected to find a way to end the trust status by agreement.

Until the possible adverse legal consequences of taking land out of trust are corrected and clarified by the courts or by Congress by adopting some or all of these Principles, it is unlikely that many Indian nations or allottees will seek to alter the trust status of their land. This is so because Native government

jurisdiction and the taxability of the land are now mistakenly linked by the courts to the trust status of the land.[33]

Nevertheless, it would be helpful for the question of trust title to be governed by clear and reasonable legal rules that Indian nations and others can know and rely upon. At present, it is all but impossible to determine the actual legal title to much Indian land. Because of this, the legal rights of the Indian owners remain uncertain and the powers of the federal government over the land are uncertain and legally unregulated as well.

IV. Conclusion

The United States claims that it owns trust title to millions of acres of Native land, but it is not clear how the United States gained ownership of most of these lands. This makes it all but impossible to determine the actual legal title to much of these Native lands. Because of this, the legal rights of the Native owners remain unclear and the powers of the federal government over the land are uncertain and legally unregulated. Principle Six addresses this problem by establishing a clear legal rule for determining how the United States can gain trust title to Native lands. It states that the United States only holds trust title to Native lands if it gained trust title through a valid legal means and the Native land owner consented to it.

[33] For a further discussion of taxation of Indian owned lands, see the Commentary on Principle 14 (Chapter IX).

General Principle Seven

7. The federal government has no power as a putative or supposed trustee to control or dispose of lands owned by an Indian or Alaska Native nation or individual unless the United States acts with the express, free, prior and informed consent of the Indian or Alaska Native nation or individual concerned.

NON-TECHNICAL LANGUAGE

7. Unless the United States has genuine trust title, the federal government has no authority as "trustee" to sell, lease, or do anything with Native lands without the consent and authorization of the Native owner.

I. Introduction

This Principle is intended to rule out the occasional practice of the federal government of taking, selling, leasing, or otherwise disposing of Native land and resources under the pretext that it is acting as trustee in the best interest of the Native beneficiary. This problem is most severe where the United States is *not* actually or legally the trustee. Where the United States is actually acting as trustee pursuant to a legally created trust, then there are specific rules and limitations that apply to what the trustee can do. That situation is dealt with in Principle Eight. Principle Seven deals with situations where the federal government does *not* have actual or legal trust title to the Indian or Alaska Native land in question but nevertheless asserts some role as a so-called trustee.

Principle Seven makes it unlawful for the United States to take any such action, unless, of course, it is acting with the consent of the Native land owner. This Principle is based upon ordinary principles of law and basic rules of constitutional law that would ordinarily prevent any such action by the federal government. But, as a practical matter, the operative rule in federal Indian law up to now has been that the United States does have such power: it can do as it wishes with Native land, though it may be required to pay compensation in some cases. This Principle would change that unfair rule.

As we will discuss briefly, the Supreme Court has not made any ruling in the past 30 years or more that decides whether the United States does or does not have such power over Native lands. But the Supreme Court has announced a number of related rules that put significant legal limits on what the federal government can do concerning Native lands. Principle Seven is based upon these legal limits that we believe are already established in federal law. Some of these limits were discussed in *United States v. Sioux Nation*,[34] the famous case about the taking of the Black Hills.

II. Limits on Federal Power: The *Sioux Nation* Case

In the *Sioux Nation* case, the United States claimed the power to sell treaty-recognized Indian lands without the consent of the Native owners. The United States argued that it had the power to sell land that was guaranteed to the Sioux by treaty and was actually occupied by them, without the Native nations' consent and without just compensation, provided only that the action was "intended to promote the welfare of the tribe."

The Supreme Court did not actually decide whether the federal government had this power, but it made a number of important conclusions. It concluded that the land had been taken and that therefore the Constitution required that fair compensation be paid, with interest. In other words, Congress must abide by the Constitution when it deals with Indian land. The Supreme Court also rejected old rules that said Congress was presumed to be acting in good faith in dealing with Indian lands and that Congress' actions could not be challenged in the federal courts. Most important, the Court said that Congress' power over Indian lands "is not absolute" and is subject to "pertinent constitutional limitations." The Court did not say precisely what these limitations are, but it was an important step just the same.

The Supreme Court made some further conclusions that are connected to this Principle in the *Mitchell* cases[35] concerning federal trust powers and obligations regarding allotted lands. Even where a statute such as the General Allotment Act declares that allotted land will be held in trust, the Court found that the federal government lacked any legal power of control or management over the land by reason of that statute. This rule leads to the conclusion that the federal government has only such powers and such legal duties as are positively created by statute, treaty, or agreement or in like manner. Federal powers cannot be created solely out of the general trust relationship of the United States to all Indian and Alaska Native nations and individuals.

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[34] 448 U.S. 371 (1980).

[35] United States v. Mitchell, 445 U.S. 535 (1980); United States v. Mitchell, 463 U.S. 206 (1983).

Thus, Principle Seven is broadly supported by current federal legal rules even though the present federal law remains unclear on this point.

III. The Theory of Guardianship

The powers asserted by the federal government over Indian lands that are *not* held in trust are sometimes asserted on the basis of the supposed guardianship of the United States over its supposed Indian wards. Federal law is very clear, however, that the Constitution forbids the United States to take Native property and convey it to others despite the government's claim of guardianship. The Supreme Court adopted and reaffirmed this rule in the *Sioux Nation* case.

A guardianship is a legal relationship, created by a court pursuant to state law, in which one person (the guardian) makes personal and financial decisions for another person (the ward). Courts usually establish guardianships for the protection of minors and incapacitated persons, and guardians remain under the court's supervision. State laws create and regulate guardianships.

It is obvious that the relationship of the United States to Native nations is not a guardianship in any legal sense of the term. The law and principles of guardianship do not appear applicable in any way, and they do not support federal power over Indian land.

IV. Plenary Power

It is often argued or said that Congress may assume or assert the power to control or dispose of Native lands by reason of its so-called plenary power. However, as has been discussed in detail in the Commentary on Principle Ten (Chapter VI) on plenary power, Congress has no such unlimited authority.

It is apparent that, applying these Principles, numerous acts of Congress providing for federal control over Native lands and resources, including some statutes relating to the management of allotted lands, could be found to be unconstitutional in whole or in part. Depending on the will of affected Native governments and allotment owners, implementation of these Principles would require possibly extensive legislative action to eliminate unconstitutional statutes while preserving those elements of federal law that some or all Native land owners need or desire. The nature and extent of needed congressional legislation is not possible to determine at the present time but must await the emergence of a consensus on the changes required in federal Indian law relating to trusteeship and Native lands.

V. Conclusion

The United States has limited powers over Native lands that are not held in trust. Principle Seven states that the United States cannot dispose of, lease, sell, or do anything else to Native lands that are not validly held in trust without the consent of the Native owner.

General Principle Eight

8. Where the United States holds property in trust for an Indian or Alaska Native nation or individual, or where the United States has, by reason of events or circumstances of whatever nature, assumed control or possession of lands or resources belonging to or beneficially owned by an Indian or Alaska Native nation or individual, the United States has all the responsibilities of a trustee as prescribed by law generally applicable to trustees or constructive trustees: including but not limited to the obligation to conserve the trust assets, to manage the assets for the benefit of the beneficiary, the obligation to account to the beneficiary, the obligation to avoid every conflict of interest, and the obligation to end the trusteeship and return the trust asset to the beneficiary when so required by the beneficiary.

NON-TECHNICAL LANGUAGE

8. Where the United States holds land or other property in trust for a Native nation, no matter how that came about, the United States has all the responsibilities and duties of a trustee that are required by law generally, without exceptions or limitations that reduce the government's responsibilities or duties.

I. Introduction

This Principle strengthens and clarifies the legal duties that the United States has where it holds land or other property in trust for Indian nations or individuals. The phrase, "holds property in trust," means that the United States holds validly created trust title to the property or otherwise controls the property pursuant to lawful authority. This would include, among other things, lands

held in trust pursuant to the Indian Reorganization Act, lands placed in trust by treaties, federal lands placed in trust for the benefit of Indian nations or individuals, and situations in which actual federal control or management makes the United States legally responsible for acting as a trustee. This Principle covers not only land but also all resources pertaining to the land, including water.

This Principle describes the duties and obligations of the United States whenever the United States acts as a true trustee in relation to the lands and property of Indian and Alaska Native nations, regardless of whether the United States holds legal trust title to the land or resources. As we will discuss below, there are many situations where this occurs, and this is not the same as situations where the United States mistakenly or illegally claims to be trustee.

Where statutes or treaties impose specific obligations on the United States, this rule is not intended to limit or change those duties. This Principle does not impose the full array of trust duties and obligations where a statute or treaty creates only a "bare trust," that is, where the trustee does not control, manage, or occupy the trust property. But this rule would impose trust obligations wherever there is actual federal control or management, even where those obligations are not stated in any statute, treaty, or agreement.

Existing federal law supports this Principle in nearly all respects, but the Principle would add to existing law in a few ways. The current federal law is that where there is a trust relationship created by statute, treaty, agreement, or regulations, providing for control or management of Indian or Alaska Native lands, then the federal government as trustee has duties as stated in the relevant statute, treaty, agreement, or regulations *and* in the common law of trusts. Further, where there is in fact control or management of Native land by the United States, no matter how that came about, then the common law of trusts imposes trust obligations on the United States. At this time, there are no court decisions or other laws that specify what those obligations are.

By imposing specific obligations of a trustee on the United States where there is in fact control or management of Native lands by the United States, Principle Eight goes somewhat beyond what is established by the existing federal law. In these situations where the trusteeship is created by the fact of federal control over the land or property and this control does not have the consent of the Native owner, either a Native nation or individual allottee, this Principle would add to the existing law by requiring the United States to relinquish control of the property at the behest of the true owner.

This Principle spells out many of the duties and obligations of a trustee as established in the general common law of trusts, but it does not attempt to state

all such duties and obligations. The list of trust obligations in the Principle is not exclusive or comprehensive.

A brief discussion of the existing federal law concerning trusts and trusteeship over Native lands will help to explain Principle Eight. Following this brief discussion is a short summary of existing federal law, noting how Principle Eight would add to this body of law.

II. General Trust Relationship

The relationship between the United States government and American Indian nations has long been described as a "trust relationship." This general "trust relationship" has been a cornerstone of the federal common law for more than one hundred years.

This so-called "trust relationship," however, is not actually or legally a trust relationship, because there is no "trust" involved. A trust is a specific kind of relationship recognized in federal common law. A trust or trusteeship is composed of a *trustee*, who holds title for the benefit of another; a *beneficiary*, the person (or Native nation) for whose benefit the trust property is to be held or used by the trustee; and a *trust property*, which is the property held by the trustee for the benefit of the beneficiary.

While the United States has been likened to a trustee and the Native nations to beneficiaries, courts have not usually regarded this general trust relationship as the source of specific, enforceable obligations on the part of the United States as regards land, natural resources, and other property.

But the so-called general trust relationship is very important in one respect. The general trust relationship creates *a standard of conduct* for the United States in its dealings with Indian nations, whether or not any formal trust relationship exists. For more than 65 years, federal court decisions have repeatedly stated that the federal government's actions with respect to American Indian and Alaska Native nations must be "judged by the most exacting fiduciary standards." The Supreme Court's 1942 decision in *Seminole Nation v. United States*[36] declared that the United States, in all its dealings with Indian nations, has moral obligations of the highest responsibility and trust, and that the United States must act with the most exacting standards of honesty, loyalty, and scrupulousness.

The Principles would leave the law just as it is, in relation to the general trust relationship and in so far as it imposes the highest standards of conduct on

[36] 316 U.S. 286 (1942).

the United States in its dealings with Indian and Alaska Native nations and individuals.

III. Other, Legal Trust Relationships between the United States and Specific Native Nations and Individuals

In addition to the general trust relationship, federal court decisions have recognized the existence of true trust relationships between the United States and specific Indian nations and individuals. Courts have divided these trust relationships into two kinds: "bare or limited trusts" and other trust relationships. The obligations of the United States government depend on the treaty, statute, or agreement, and the common law giving rise to the trust. The extent of the obligations determines whether or not the trust is a "bare or limited trust."

A. Bare or Limited Trusts

In the 1980 case of *United States v. Mitchell*,[37] the Supreme Court decided that the General Allotment Act created only a limited trust between the federal government and individual allottees and thus imposed only very limited duties on the federal government as trustee. The General Allotment Act, the Court reasoned, did not give the federal government any power to control or manage trust allotments. The Court referred to this trust arrangement as a "bare or limited trust." The government does not carry *all* the obligations of a trust relationship when a bare trust is established, but only the particular, limited obligations created by the statute. Principle Eight is in accord with this aspect of exiting federal law.

In two more recent cases,[38] the Supreme Court decided that in the "bare trust" situation, where the United States holds trust title to individual allotments, the United States is obliged to abide by the limitations of the Constitution, particularly the Fifth Amendment, in its role as trustee. Thus, even in the case of a limited or bare trust, the United States has at least the negative obligation not to take the property in violation of the Constitution. This aspect of existing federal law is in keeping with Principle Five, discussed in Chapter III.

[37] 445 U.S. 535 (1980).

[38] Hodel v. Irving, 481 U.S. 704 (1987); and Babbitt v. Youpee, 519 U.S. 234 (1997).

B. Other Legal Trust Relationships

Existing federal law also recognizes that more extensive true trust relationships regarding Native lands can be created by statutes and regulations that authorize the United States to control, manage or possess Native property, even if the statute or regulations say nothing about "trust" obligations or a "trust relationship." Such trust relationships can also be created whenever the United States has actual control, management, or possession of Native property, even when it has not been authorized by a statute or regulation.

This was explained by the Supreme Court in the 1983 case of *United States v. Mitchell*,[39] where the Court wrote:

> Moreover, a fiduciary [trust] relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). . . . "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."[40]

Thus, the supervision and management of Indian property may create trust obligations even if the statutes authorizing such control do not use the word "trust."

In a more recent case,[41] the Supreme Court explained that where the trust relationship is established by the facts of occupation, control, or management of the property in question, the nature and extent of the federal government's trust obligations may be defined by the common law of trusts. A review of the general common law of trusts will help to clarify the duties of the United States as trustee in these situations.

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[39] 463 U.S. 206 (1983).

[40] *Id.* at 225 (citations and footnote omitted).

[41] United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).

IV. Common Law Trust Obligations

The United States Supreme Court has repeatedly stated that courts are to use the common law of trusts along with statutes and regulations to determine what obligations the United States has as trustee in any particular case. Federal common law does not include a complete listing of all these obligations, but it does impose certain fundamental duties on trustees. These fundamental duties of a trustee include:

- a duty of loyalty to the beneficiaries to administer the affairs of the trust solely in the beneficiaries' interests;
- a duty of reasonable skill and care, or "to display the skill and prudence which an ordinarily capable and careful man would use in the conduct of his own business of a like character and with objectives similar to those of the trust"; and
- a duty to account and furnish the beneficiary with information about the trust and its execution.

Under the duty of reasonable skill and care, the trustee must act with prudence to preserve the trust property, to protect it from loss or damage, and "to make such repairs, obtain such insurance, pay such obligations, and bring such actions as a prudent person would for the protection and preservation of the trust property." In addition, courts have found that the United States owed the following duties to Indian nations: to protect and preserve trust property; to inform the beneficiary about the condition of the resource; to act fairly, honestly, and with prudence; to protect and preserve Native water rights; to protect, manage, and operate Indian lands, including Indian timber; to seek profit while still protecting the asset; and to keep clear and accurate accounts of trust property.

The duty of loyalty owed by a trustee means that the trustee must not have any conflicting interests, that is, interests or duties that could cause the trustee to act against the interests of the beneficiary. Yet the United States often has many different duties that it is obligated carry out – some of them directly contrary to the interests of the beneficiary Indian nations.

The Supreme Court, in one case,[42] suggested that the duty of loyalty that applies to other trustees does not fully apply to the federal government. However, the Court did not make this a formal ruling, and it did not set out any sound legal basis for permitting the United States in the future to violate its

[42] Nevada v. United States, 463 U.S. 110, 142 (1983).

duties to one beneficiary (the Indian or Alaska Native beneficiary) whenever Congress has imposed a conflicting duty on the trustee.

Principle Eight simply states the government must not act in its role as trustee in a manner that would harm the interests of the Native beneficiary. The United States faces conflicts of interests in its role as a trustee for Indian nations and individuals, and it is not clear how all these potential conflicts should be resolved. But it is clear that they must not be resolved by the United States acting against the interests of the Native beneficiary.

Finally, federal common law recognizes, as we discussed above, that where the United States has actual control or possession of Native property, the United States has the duties of a trustee as provided by common law. This situation is called a *constructive trust*, because it is not, strictly speaking, a trust. Thus far, there are no court decisions that tell us what specific obligations the United States has when this situation exists and when there are no statutes that spell out the obligations. Principle Eight states that these obligations should include the obligation to return the property if the Native owner so requests. In this aspect, Principle Eight would add to the existing federal law.

V. General Summary of Obligations Relating to Trust Lands and Resources

Where there is only the general trust relationship, without actual control or management of the land or resources by the United States and without applicable statutes or treaties imposing duties of control or management, then there are no definite trust duties other than the general standard of fiduciary conduct in all dealings with an Indian nation or individual allottee. Even in this setting, the United States is bound by all pertinent constitutional requirements, such as those of the Fifth Amendment.

Where an applicable statute, treaty or agreement provides for only a limited trust, there is no duty or power of management. Even in a limited trust, the federal government has some duties. Presumably, these duties would be to avoid harm to the property, to assure that the property may be used or occupied for the benefit of the beneficiary, to assure that the land is not taxed or lost for non-payment of taxes, and other such general obligations. There is however no apparent decisional law on this point apart from the decisions prohibiting takings of allotment interests.

Where there is a trust relationship created by a statute, regulations, treaty, or agreement providing for control or management of Indian or Alaska Native land, then the federal government as trustee has duties as prescribed by the statute, regulations, treaty, or agreement *and* by the common law of trusts.

Where there is in fact control or management of Native land by the United States, no matter how created, the federal common law imposes the obligations of a constructive trustee upon the United States, particularly the obligation to return the property to its rightful owner. By imposing this obligation on the United States in this situation, Principle Eight goes somewhat beyond what is established by decided cases.

Chapter V

Treaties with Indian Nations

General Principle Nine

9. A treaty with an Indian nation is a treaty within the meaning of the United States Constitution, the violation of which gives rise to liability and the right to redress.

NON-TECHNICAL LANGUAGE

9. The Unites States cannot freely violate treaties without providing full redress for the Indian parties, including compensation, restitution, or other appropriate, just remedy.

Commentary

I. Introduction

The United States Constitution says that treaties, along with other federal laws, are "the supreme Law of the land." Even so, the United States does not fully honor its treaties with Indian nations, has often breached its treaty obligations, and has failed to provide adequate redress for its treaty violations.

This Principle addresses the problems Indian nations face in trying to enforce their treaties. It states that the federal government is bound by the United States Constitution to meet its treaty obligations to Indian nations and must provide a just remedy to the nations when it fails to do so.

II. Legal Status of Treaties with Indian Nations

Long before adoption of the Constitution and the creation of the United States as an independent country, European nations and their American colonies entered into treaties with Indian nations. When the United States became an independent country, it continued this practice of recognizing Indian nations as separate sovereigns and establishing formal, peaceful relationships with them through treaties. Treaty-making was the cornerstone of United States Indian policy until 1871. Congress unilaterally ended the practice of treaty-making with Indian nations in 1871. Despite the formal end to treaty-making, previously made treaties remained legally valid and are still the basis of the relationship between many Indian nations and the federal government today. Treaties between the United States and Indian nations continue to be legally recognized and applied under federal law.

Federal courts have developed various rules for interpreting Indian treaties. For example, the reserved rights doctrine states that any rights not expressly granted to the federal government in a treaty or taken away by a valid act of Congress are considered to still be held by – or reserved to – the Indian nation. This doctrine addresses those rights that were not specifically negotiated or addressed in a treaty. The reserved rights doctrine recognizes that Indian nations had pre-existing sovereignty and reserved certain rights in treaties. Under this doctrine, the Supreme Court has found that Indian nations may still have hunting and fishing rights on ceded lands and has upheld certain Indian government claims to water.

Another rule of treaty interpretation is that Indian treaties are to be interpreted as the Indians would have understood them. Any unclear treaty provision should be resolved in the Indians' favor. Courts look at the treaty's history and context to determine the understanding of the Indian parties to a treaty.

Some other rules tend to diminish treaty obligations. For example, the last in time rule states that treaties, like any other federal law, can be modified or cancelled by later acts of Congress. Principle Nine would clarify and somewhat alter this rule. Because treaties are agreements between two parties, the modification or cancellation of a treaty by one party alone does not affect the validity of the treaty. Even if a treaty is cancelled by a later act of Congress, the United States nevertheless remains bound by the terms of the treaty and is thus in default of its obligations.

Another rule, the clear statement rule, is that Congress may only modify or cancel a treaty when it acts clearly and unambiguously. This means that courts will make every effort to read legislation in such a way so as to comply

with the United States' treaty obligations rather than to breach or modify those obligations.

III. Obstacles to Treaty Enforcement in United States Courts

While United States law generally suggests that the United States must fulfill its treaty obligations, several barriers exist to the enforcement of Indian treaties. Over the years, federal court decisions have lessened the importance of the federal government's treaty obligations by allowing Congress to diminish or even outright ignore treaty obligations in certain instances. As mentioned above, the last in time rule permits federal legislation to trump treaty obligations in certain circumstances. Additionally, legal technicalities and court created rules often make it impossible for Indian nations to enforce their treaty rights in United States courts.

A. Sovereign Immunity of the United States

Governments have sovereign immunity – or immunity from lawsuits – due to their status as sovereign entities. It prevents any party from bringing a suit against the government unless the government allows it. Before any party can bring a lawsuit against the United States, the federal government must agree to it and clearly waive its sovereign immunity. Most Indian treaties do not contain clear waivers of the federal government's sovereign immunity, and thus courts have held that these treaties do not allow for suits against the United States.

For this reason, Indian nations seeking to enforce treaty rights against the United States in federal court must look to other federal statutes that contain a waiver of sovereign immunity. Two of the most commonly used statutory waivers are the ones in the Administrative Procedures Act (APA), and the Indian Tucker Act. Both of these acts limit the ability of Indian nations to make treaty claims. The APA allows parties that have been injured by actions of administrative agencies like the Bureau of Indian Affairs to sue the United States for relief other than money damages. The Indian Tucker Act only permits Indian nations to sue the United States if they are seeking money damages resulting from a treaty violation.

B. State Sovereign Immunity

States and state officials are among the most common violators of Indian treaty rights. But like the federal government, states also have sovereign immunity. States may waive their sovereign immunity, so long as they do so clearly, and the United States may also waive state sovereign immunity by

federal statute, as long as the United States does so expressly and with proper constitutional authority.

State sovereign immunity does not extend to suits by the United States. In other words, the federal government may sue a state at any time without regard to the state's sovereign immunity. Where an Indian nation has a claim identical to the federal government's claim against a state, the nation may litigate against the state in the same action. For this reason, in the absence of a state waiver or federal statute abrogating state sovereign immunity, Indian nations seeking to enforce treaty rights against states must typically get the United States to join their suit against the state.

C. Rights of Action

Under United States law, a person must have a right of action to bring a lawsuit for a violation of his rights. Indian treaties usually do not contain a right of action, that is, language that allows Indian nations to sue for a treaty violation. Indian nations seeking to enforce treaty rights must find another source, such as a statute, that gives it a right of action and/or argue that a right of action is implied by the treaty. This can be difficult when the suit is against a party other than the United States, such as a city or county. In some cases, federal courts have found that certain treaties may imply a right of action for equitable relief against a party other than the United States. Equitable relief is when the court orders a party to stop whatever it is doing that is causing harm or to take some other specific action. In contrast, courts are less willing to imply a right of action for money damages.

D. Equitable Doctrines

Equitable doctrines are court created rules that are supposed to ensure fairness. Examples include the doctrine of *laches*, which is supposed to prevent one party from waiting too long to bring its claim. Another equitable doctrine is *acquiescence*, which is supposed to prevent a party from filing a suit about an action if the party knowingly went along with and allowed the action without protest when it occurred. Although these doctrines are intended to ensure fairness, in recent years courts have used some of these "fairness doctrines" to prevent Indian nations from enforcing treaty rights in federal courts. In *City of Sherrill v. Oneida Indian Nation of N.Y.*,[43] the Oneida Indian Nation purchased some land within the boundaries of its historic, treaty-protected reservation. Based on its treaty, the Oneida Nation tried to remove the lands from local tax rolls. Although Congress had never diminished the Oneida Nation's reservation

[43] 544 U.S. 197 (2005).

boundaries or altered the jurisdictional status of lands within it, the Supreme Court held that the doctrines of laches, acquiescence, and other "fairness rules" barred the Nation from challenging local taxation of its supposedly treaty-protected lands. This ruling has been interpreted to bar other Indian nations from seeking relief for violations of treaty-protected rights to their ancestral homelands.[44] For the courts to use such equitable doctrines to prevent Indian nations from enforcing treaty obligations of the United States is inconsistent with long-established federal law, and it creates another severe impairment of Indian treaty rights.

IV. Treaties With Indians Should be Honored

The United States cannot fully honor its treaty obligations to Indian nations as long as its courts create barriers to the enforcement of these treaties. This Principle suggests that these obstacles to treaty enforcement should be reconsidered in light of federal and international law, which require the United States to fulfill its treaty obligations, interpret treaties in the light most favorable to Indian nations, and provide some sort of just remedy when treaty rights are violated.

The application of rules and doctrines, such as the last in time rule and sovereign immunity, that diminish or altogether prevent treaty claims negates the purpose of the rules of Indian treaty interpretation under federal law. These rules of Indian treaty interpretation recognize that Indian nations retained rights and sought to protect those rights. When courts create barriers to treaty enforcement, they undermine these important precedents.

International law also requires the United States to honor its treaty obligations and requires that the United States should reconsider the existing barriers to treaty enforcement. Under international law, treaties are binding upon the parties to them by virtue of the parties' good faith agreement to be bound. Countries' treaty obligations under international law thus arise independently of the status of those treaties in domestic law.

Developing customary international law requires countries to honor treaties with indigenous peoples. The UN Declaration on the Rights of Indigenous Peoples declares that "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other

[44] *See, e.g.*, Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2005) (holding under *Sherrill* that the Cayuga Indian Nation was barred by equitable doctrines from seeking any remedy for treaty-protected lands taken in violation of the federal Trade and Intercourse Act); Shinnecock Indian Nation v. New York, No. 05-CV-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006) (dismissing treaty-based land claim pursuant to *Sherrill*).

constructive arrangements concluded with states or their successors."[45] Under article 38 of the Declaration, countries are to "take the appropriate measures, including legislative measures" to ensure that this right and the others set forth in the Declaration are preserved.

V. Conclusion

Constitutional and international law obligate the United States to honor its treaties with Indian nations. The failure of the United States to fulfill its treaty obligations does not diminish those obligations. Those obligations continue to exist and the United States must provide a just remedy when it violates treaty provisions.

[45] U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 37(1) (2007).

Chapter VI

The Plenary Power Doctrine

General Principle Ten

10. Congress has only such powers in the field of Indian affairs – particularly with respect to Indian and Alaska Native lands and resources – as are conferred by the United States Constitution. The Constitution does not accord Congress "plenary power" – in the sense of additional or unlimited powers – over Indian and Alaska Native nations and their property.

NON-TECHNICAL LANGUAGE

10. The United States Congress does not have "plenary" or unlimited power to enact laws dealing with Native nations and their property. Instead Congress has only those powers that are stated in the Constitution, and those powers must be used within the limits set out in the Constitution – especially those in the Bill of Rights.

Commentary

I. Introduction

Congressional power over Indian and Alaska Native nations and their property is often described as unlimited or "plenary." Courts have used this idea of unlimited congressional power over Indians and Alaska Natives and their property to approve a wide range of sweeping acts of Congress that affect Native nations and that control or take Native lands and resources.

The idea that Congress has unlimited power over Indian nations and their property is not consistently supported by legal authority. Many Supreme Court decisions and other authorities oppose the broad congressional power often

claimed under the plenary power doctrine. Nevertheless, federal administrators and many courts act as if there were no actual or meaningful legal limits on congressional power over Indian and Alaska Native nations and their property.

This Principle states that congressional power over Indian and Alaska Native nations, their lands, resources, and other property is limited to those powers listed in the Constitution. The Constitution does not give Congress "plenary power" or unlimited authority over Indian and Alaska Native nations. Rather, the exercise of such power by any branch of the United States government violates fundamental principles of the Constitution and international human rights law.

This Principle would not prevent Congress from enacting legislation with respect to Indian lands and resources. Congress would continue to have considerable power within the Constitution to pass laws affecting Indian lands and resources. This Principle merely limits congressional powers to those that are clearly stated in the Constitution.

II. The Plenary Power Doctrine as Currently Interpreted by United States Courts

The plenary power doctrine describes congressional authority over American Indian and Alaska Native nations. Courts have described congressional authority over Indian affairs as plenary and exclusive. One prominent Indian law scholar has described it as "[w]hatever Congress wants, Congress gets."[46] As recently as 2004, the Supreme Court used the word "plenary" to suggest that Congress' power over Indians extends beyond those powers specifically granted to Congress in the Constitution.

Congress exercises very broad but undefined powers over Indian and Alaska Native nations. The Supreme Court has used the "plenary power" doctrine to justify this congressional power over Native nations. For example, it has upheld laws extending federal criminal jurisdiction over Indian lands, limiting the exercise of criminal and civil jurisdiction by Indian nations, permitting federal control of liquor on Indian lands, changing reservation boundaries without consent of or compensation to the Indian nation, and abrogating treaties.

While the Supreme Court has approved of very broad congressional authority over Indian and Alaska Native nations, this power is not absolute. Constitutional limitations, including the Fifth Amendment takings clause, the

[46] Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations,* 132 U. Pa. L. Rev. 195, 2855 (1984).

due process clause, and the equal protection clause, apply to congressional exercises of power over Indian and Alaska Native nations. Treaties, the trust doctrine, and international law may also limit congressional power. Despite these limitations, the "Supreme Court has sustained nearly every piece of federal legislation it has considered directly regulating Indian tribes, whether challenged as being beyond federal power or within that power but violating individual rights."[47]

III. Constitutional Limitations on the Plenary Power Doctrine

The Supreme Court's use of the plenary power doctrine to suggest that Congress has unlimited powers over Indian and Alaska Native nations is very out of keeping with generally accepted constitutional principles, constitutional law, and early decisional law.

The Constitution establishes a government of limited authority. In its earliest decisions, the Supreme Court affirmed that the federal government's powers are limited to those listed in the Constitution. This rule remains the law today but courts have ignored it when it comes to Indians.

The Constitution's text does not grant Congress unlimited power over Indian and Alaska Native nations. When the Constitution was drafted, Indian nations were distinct sovereign entities not subject to the ordinary laws of the states or the United States. Indian nations did not participate in the drafting or ratification of the Constitution. Thus, unlike the states, which did ratify the Constitution, they did not give any power to the United States or consent to the Constitution. The drafters of the Constitution recognized Indian nations as distinct political entities with their own powers, which predated the formation of the United States and the writing of the Constitution. They limited federal and state authority over Indian nations and their lands by specifically listing all powers to deal with Indian nations and giving them only to the federal government.

There are three provisions in the Constitution that deal with Indians or Indian nations: the Indian commerce clause and two apportionment clauses. None of these provisions expressly grants Congress "plenary" power over Indian or Alaska Native nations. The only specific grant of authority is in the commerce clause, but this is limited congressional power to regulate commercial dealings with Indian nations. The two apportionment clauses do not grant any authority to Congress whatsoever. They recognize Indian nations as distinct political entities by exempting "Indians not taxed" from the population count upon which

[47] *Id.* at 195.

congressional representation is based. None of these clauses gives any general or unlimited power to Congress with respect to Indians.

Despite the lack of explicit language granting Congress unlimited power over Indian and Alaska Native nations, recent Supreme Court decisions have identified the Constitution, and especially the Indian commerce clause, as a source of the "plenary power" held by Congress. The constitutional text does not support the Court's assertions, because the Constitution only gives to Congress the very limited power of regulating commerce with Indian nations.

The Supreme Court's first decisions on the relationship between the federal government and Indian nations expressed the view that Congress had limited rather than unlimited powers over Indians. In *Worcester v. Georgia*, the Court held that the states had no authority over Indian nations or their affairs, and explained that Congress could only exercise limited powers. It also set forth a strong vision of Indian sovereignty.

Congress sought to expand its power over Indian nations in the late nineteenth century, and the Supreme Court allowed it to do so. In *United States v. Kagama*,[48] the Court allowed Congress to exert power over the internal affairs of Indian nations by upholding the Major Crimes Act, which made crimes committed by Indians against Indians on Indian reservations federal offenses. The *Kagama* decision suggested that Congress had unlimited authority over Indian affairs. It also stated correctly that all authority over Indian affairs resided in the federal government and that no power had been left to the states.

The Court in *Kagama* rejected the argument that the Constitution gave Congress unlimited power to regulate the conduct of Indian members on their reservations. The Court based its expansion of congressional power not on the Constitution but on the purported dependence of Indian nations on the United States. The Court's language suggests that the federal government must exercise unlimited power over Indians because they are weak and in need of protection.

The expansion of congressional power in *Kagama* was contrary to past court decisions limiting congressional authority over Indians. It also violated the well-established constitutional principle that the United States government is one of limited powers. Yet the Court continues to uphold its reasoning in *Kagama* and has further extended congressional authority over Indian affairs.

The Court's recent broad interpretation of the Indian commerce clause as giving Congress unlimited power over Indians departs from earlier

[48] 118 U.S. 375 (1886).

interpretations of the clause as giving only limited federal authority over Indian affairs. The Court, however, has not explained how the Indian commerce clause now gives this unlimited power to Congress when it expressly stated in *Kagama* that it did not.

For the Indian commerce clause to include all the powers Congress currently claims under the plenary power doctrine, commerce would have to have an extremely broad meaning. Commerce would have to include not just trade with Indians but also the internal affairs of Indian nations. This reading of the Indian commerce clause is inconsistent with the limited language of the clause and normal definitions of commerce. It is also contrary to the views of the constitutional drafters, who rejected a proposed amendment that would have granted Congress the power to regulate the Indian nations. Finally, a broad reading of the Indian commerce clause is inconsistent with the Supreme Court's more narrow definition of commerce when considering the power granted to Congress over interstate and foreign commerce. While the Court has not interpreted the Indian commerce clause and the interstate and foreign commerce clauses the same way, it is not clear why the Indian commerce clause would give Congress more power than the interstate and foreign commerce clauses do.

Further, it is extremely unusual for any congressional power to be described as unlimited. Historically, very few claims have been made for extraconstitutional or non-enumerated congressional powers. In addition to its Indian affairs decisions, the Supreme Court has only recognized unlimited, extraconstitutional powers in cases dealing with the territories, the entry and expulsion of aliens, and foreign affairs. The Court's decisions in each of these areas have been seen as constitutionally problematic.

A more limited and constitutionally consistent reading of the Indian commerce clause does not prevent Congress from enacting legislation relating to Indian and Alaska Native lands and resources. While the Constitution limits congressional power to those powers it specifically lists, the Indian commerce clause grants considerable power to Congress. It is by no means evident that Congress needs unlimited power to enact legislation desired by Indian nations.

IV. Equal Protection of the Law

The idea that Congress has extensive powers going beyond those listed in the Constitution only applies to Indians and Alaska Natives. Congress has not claimed such vast and unlimited power over any other group, race, minority, category of citizens, or type of legal or political entity. The result is that Indians and Alaska Natives are subject to congressional legislation on almost every imaginable subject, without any defined limits except for the Bill of Rights.

Though the Supreme Court has not spoken on this point, it appears clear that the plenary power doctrine is inconsistent with the Constitution's equal protection requirements. In *Brown v. Board of Education*,[49] the Supreme Court suggested that groups or individuals cannot be denied basic constitutional rights based on their ancestry. Yet, just one year later, the Court ruled that the government can take the property of Indian nations without due process or compensation. Such governmental action would violate the Fifth Amendment if done to anyone else.

The basic rules of equal protection are straightforward. When courts review statutes or other governmental actions to see if they are consistent with the right of equal protection, they use one of three kinds of review. For discrimination based on race, ethnicity, national origin, or religion, courts ask whether the law is narrowly tailored to meet a compelling government interest. In cases based on gender discrimination, courts ask whether the law is substantially related to an important government purpose. In all other cases, courts ask whether the law is rationally related to a legitimate government purpose.

The classification of individuals or entities as Indians or Alaska Natives or by Indian nations is ancestry-based. Application of the usual rules and principles of equal protection to these discriminatory, ancestry-based exceptions to the usual rules would seem to condemn them. However, there are very few decisions on discrimination against Indian and Alaska Native nations in land-related cases. No case, for example, *rejects* an equal protection challenge to the exclusion of Indian and Alaska Native nations from the Fifth Amendment's protection against land takings. The plenary power doctrine may be contrary to the equal protection requirements of the Fifth Amendment, but this is an issue that has apparently not been addressed by the courts.

Courts often characterize discrimination in favor of Indian nations as "political" due to the government-to-government relationship between Indian nations and the United States. Favorable discrimination based on this "political" status is allowed if it is rationally related to a legitimate governmental purpose. This characterization and permissive review of legislation, however, should not be used when Congress discriminates *against* Indian nations. Beneficial legislation in favor of Indian nations is not a reason for denying them the regular constitutional rights that all others have. Just as the laws prohibiting discrimination against the disabled have never been watered down because they receive special accommodations, Indian nations should not have to give up their

[49] 347 U.S. 483 (1954).

constitutional rights just because the government provides them with some benefits.

V. International Human Rights Law

International law has evolved in recent years to embrace human rights principles for indigenous peoples that would rule out the sort of unlimited power asserted by Congress and the United States Supreme Court. The plenary power doctrine is inconsistent with both the spirit and the text of the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration states indigenous peoples' rights and the responsibility of states to protect those rights. The rights in the Declaration are fundamentally inconsistent with the plenary power claimed by the United States over Indian nations under federal law today. For example, the Declaration states that Indian nations have "the right to autonomy or self-government in matters relating to their internal and local affairs."[50] Further, the Declaration requires that "[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[51]

The plenary power doctrine also contradicts other international human rights instruments, which require states to protect indigenous rights to self-government and to lands and territories and to obtain indigenous peoples' consent before taking actions that affect them. For example, the American Declaration on the Rights and Duties of Man places restraints on state actions relating to indigenous peoples and their lands. In *The Case of Mary & Carrie Dann v. United States*, the Inter-American Commission on Human Rights found that the United States treated certain Western Shoshone people unlawfully by following a discriminatory procedure (the Indian Claims Commission Act) to review their property claims, which provided far fewer legal protections for Indian property than are provided for property owned by others.[52]

VI. Conclusion

The notion that Congress possesses unlimited power over Indian nations is inconsistent with the Constitution, past Supreme Court decisions, and

[50] U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, arts. 3 and 4 respectively (2007).

[51] *Id.* at art. 19.

[52] Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2002).

international law. Courts should reject this expansive and unjustifiable assertion of congressional authority over Indian and Alaska Native nations.

Chapter VII

Self-Determination

General Principles 11 and 12

11. Indian and Alaska Native nations have the inherent right to form, maintain, and change their own governments and to create, maintain, and alter their own laws and legal institutions for the purpose, among others, of governing their own affairs and particularly for controlling, using, and managing their own lands and resources.

12. Native governments have the right to freely use, exploit, manage and regulate lands and resources owned or beneficially owned by the nation, and they have governmental authority over allotted lands owned by Indian or Native persons within the reservation or subject to the jurisdiction of the Native government.

NON-TECHNICAL LANGUAGE

11. Native nations have the inherent or sovereign power to create their own governments and laws for all purposes, including for the purpose of using and controlling their lands and resources.

12. Native nations have the right to use, control, and benefit from their lands and resources without interference by the federal government that is not authorized by the Constitution or by the Native government itself.

Commentary

Introduction

The purpose of these two Principles is to clarify and improve the federal law concerning the rights of Indian and Alaska Native nations to form their own

Native governments, laws, and institutions for the purpose of using, managing, and governing their own lands and resources, especially those lands and resources that lie within their reservations or within Indian Country. Principle 12 affirms that Native nations have the freedom to manage, use, and benefit from their lands without many of the federal limitations and restrictions that now exist.

In order for Indian and Alaska Native nations to enjoy the rights and benefits of owning their lands and natural resources, federal law must assure that these nations have the legal right to exist as legal entities, as well as the right to establish their own governments and laws and to be governed by them. Principle 11 addresses this fundamental right of self-determination, a right that has always been recognized in federal law.

Indian and Alaska Native governments must also have the legal power and freedom to *exercise* or *use* their rights of ownership and governance in regard to their lands and resources. They must be able to use, control, and govern their lands and resources, generally speaking, without interference by others. Principle 12 deals with the activities of owning, controlling, and using lands and resources. As one expert asked, "What is the value of a tribe owning land if it cannot freely use and control the land?"

These two Principles do not attempt to fully define the law regarding self-determination of Indian and Alaska Native nations, but rather deal just with Native ownership, control, and management of their lands and resources. These Principles do not address the broader questions of civil and criminal jurisdiction on reservations or in Indian Country. Rather these Principles concern the rights and powers of Native governments with respect to lands and resources over which they do have jurisdiction, that is, governing power.

These Principles are intended to apply to the lands owned by Native nations and owned by Native individuals within their reservations or within Indian Country. They are not intended to apply to lands owned by an Indian nation outside a reservation unless those lands are held in trust or are legally subject to the jurisdiction of the nation (in which case, the land would probably be Indian Country). Nor are these Principles intended to apply to individually owned lands outside a reservation or Indian Country. This Principle is not intended to alter the rules of jurisdiction that divide governing authority among the Native, federal, and state governments.

It is essential to bear in mind that legal generalizations in this field are very treacherous, because many treaties contain relevant provisions applying only to the parties to that treaty, and Congress has enacted countless laws applying to one or more particular Indian nations. As a result, the federal law

concerning self-government varies considerably from Indian nation to Indian nation. These Principles provide only a clear starting point for determining Native nations' right of self-determination and for determining the validity or lawfulness of any limitations upon that right.

Though the right of Native peoples to form their own governments and to govern their own lands and affairs has always been given respect and protection in federal law, it has not been entirely free from doubt. Various forms of control by the federal government have come to intrude on this right. These Principles are intended to restate and clarify the long-standing federal law without great change. The most notable difference between these two Principles and present federal law is that the Principles limit federal governmental authority to control or interfere with Native land and resource rights. These Principles must be read together with Principle Ten concerning the so-called plenary power of Congress. The power of the federal government to limit or interfere with Native governments' ownership of their lands is limited by the United States Constitution to those powers listed in it. Even when exercising these constitutional powers, the federal government is restrained by the Fifth Amendment of the Constitution from undue interference with property rights.

These two Principles are not intended to suggest that Native governments have rights of governance or ownership that are absolute or unlimited. Native governments, like all governments in the world, must respect the human rights of all persons and must exercise their rights with respect for the rights of others. We leave for another day the question of what precisely those limits are or ought to be. Any such limits on Native ownership rights must be consistent with relevant treaty provisions, with the Constitution, with international human rights law, and with general principles of justice and fairness.

General Principle 11

11. Indian and Alaska Native nations have the inherent right to form, maintain, and change their own governments and to create, maintain, and alter their own laws and legal institutions for the purpose, among others, of governing their own affairs and particularly for controlling, using, and managing their own lands and resources.

NON-TECHNICAL LANGUAGE

11. Native nations have the inherent or sovereign power to create their own governments and laws for all purposes, including for the purpose of using and controlling their lands and resources.

I. The Inherent Right of Self-Determination or Self-Government

Indian and Alaska Native nations have an inherent right of self-government. The right of self-government is inherent, that is, it is an essential part of the existence of a people; it is not created by or based on either federal law or international law. Indian nations have formed their own governments, followed their own legal traditions, and created their own dispute resolution systems for centuries. Indian nations were self-governing nations long before European contact and before formation of the United States. For example, the Great Law of Peace has governed the Haudenosaunee for countless centuries.

Throughout the United States' history, both federal law and international law have recognized that Native nations are sovereign peoples with the inherent right of self-government. Federal legal recognition of this sovereign status was shown in the many treaties entered into by the United States with Indian nations. Treaties were made by the United States with Indian nations before the Constitution was adopted as well as later, and these treaties dealt with making peace, with boundaries of the Indian nations, extradition, and other topics. The Constitution made treaties, including treaties with Indian nations, "the supreme Law of the land", making no distinction between treaties with Indian nations and

other treaties. Entering into a treaty means that the parties to the treaty are nations or governments with the legal status and capacity to enter into binding legal agreements.

Chief Justice John Marshall stated the federal law concerning the status and self-determination of Native nations in two well-known cases, *Cherokee Nation v. Georgia*[53] and *Worcester v. Georgia*.[54] In *Cherokee Nation*, he described Indian nations as "states", that is, as distinct countries:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[55]

In *Worcester*, the Supreme Court spoke particularly of the right of self-government:

> The Indian Nations had always been considered as distinct, independent, political communities, ...
>
> ... and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government – by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without

[53] 31 U.S. 1 (1832).

[54] 31 U.S. 515 (1832).

[55] 31 U.S. 1, 12.

> stripping itself of the right of government, and ceasing to be a state.[56]

Felix S. Cohen, in his original 1941 treatise, Handbook of Federal Indian Law, wrote some of his most important and enduring conclusions on this point. He wrote:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. ...*
>
> From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty.[57]

II. The International Law Basis of the Right of Self-Determination

The inherent right of Native nations to form their own governments and to govern their own affairs was first recognized in international law, and federal law as well has consistently recognized and respected the right. Perhaps no other rule of international law is more important than the right of self-determination. In 2007, the General Assembly of the United Nations recognized the right of self-determination for indigenous peoples living within existing countries, including the United States, when it adopted the Declaration on the Rights of Indigenous Peoples. It is useful to understand the international law concerning self-determination, because international law has had an especially important bearing on the recognition of Indian self-determination in federal law, and because the term "self-determination" does not have the same meaning in international law as that given to it by Congress and the Department of the Interior.

The principle of self-determination has different meanings in different settings. For our purposes, the following are the most important elements:

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[56] 31 U.S. 515, 559-60.

[57] Felix S. Cohen, Cohen's Handbook of Federal Indian Law 122 (1941 ed. Reprint, 1971) (citation and footnote omitted) (emphasis in original).

- It is a general political principle that the people of every country should have the right to freely choose their rulers and their form of government.
- Where territorial changes are made among countries, it means that the population concerned should have a right to decide democratically which country to belong to.
- It is a principle calling for the independence of peoples and territories that were subject to colonial rule.

The present international law of self-determination includes components of both customary law[58] and treaty law.

The customary law of self-determination can be summarized as follows:

- Peoples in *colonial* territories are entitled to freely determine their political status, including complete independence, and to control their own lands and natural resources.
- This right does not include the right to change colonial boundaries.
- The whole people of a state or territory have the right to be free from foreign military occupation.
- A distinct people or racial group subjected to extreme forms of oppression or denial of effective political participation or access to government may be entitled to internal self-determination, that is, access to and participation in government.
- Except for peoples of colonial territories, the right of self-determination does not include a right to independence, that is, a right to separate statehood.
- Indigenous peoples located within recognized countries have a right of self-determination, including self-government, but without a right to independence except in cases of extreme oppression. This is an emerging right that is continuing to develop.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of self-determination primarily in Articles 3 and 4:

> *Article 3*
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[58] Customary international law is usually defined as the general practice of countries which they believe is obligatory or legally binding.

> *Article 4*
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

In addition, many other articles of the Declaration recognize rights closely related to self-determination and self-government. These include Article 18, the right to "their own indigenous decision-making institutions"; Article 19, the obligation of states to consult and cooperate with indigenous peoples through their own representative institutions; Article 20, the right of indigenous peoples to their political, economic, and social institutions; Article 33, the right to determine membership; Article 34, the right to institutional structures, customs, and juridical systems; and Article 35, the right to determine responsibilities of individuals to their communities.

There is an important limit on the right of self-determination in international law. The right of self-determination for all groups within countries is limited by the principle of territorial integrity. This principle is that, except in the most extreme circumstances, no group or people has a right to secede or break away from an existing country.

International treaty law also recognizes the right of self-determination. The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, two human rights treaties that have been ratified by nearly all the countries of the world, including the United States, declare the right of self-determination in their common Article 1.

The international law of self-determination has greatly influenced federal law on the right of self-determination. John Marshall relied heavily on international law in *Cherokee Nation* and *Worcester*.

International law today continues to be the most important and relevant body of legal rules concerning self-determination of distinct peoples such as indigenous peoples. Because the Constitution is silent on the matter of self-determination of indigenous peoples and because Native nations did not in general consent to nor play any role in the adoption of the Constitution, it is international law that can best provide a principled and independent source of law on this subject.

III. Current Federal Law on the Right of Self-Determination of Native Nations

The core principle of federal law that Native nations are independent sovereignties pre-dating the United States and have the inherent right of self-government remains valid law today. The Supreme Court in *United States v. Wheeler*[59] restated the federal common law concerning the status of Indian nations and governments. The opinion stated:

> [O]ur cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said that: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. ... [They] are a good deal more than 'private, voluntary organizations.'"[60]

The Court also affirmed the broad sovereign powers of Indian nations in other cases, such as *McClanahan v. Arizona State Tax Commission*.[61] The Supreme Court's opinion in *McClanahan* is helpful on this point, and it remains good law today. The Court wrote:

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. ... But it is nonetheless still true, as it was in the last century, that '(t)he relation of the Indian tribes living within the borders of the United States ... (is) an anomalous one and of a complex character. ... They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' [Quoting United States v. Kagama, 118 U.S. at 381-2.][62]

[59] 435 U.S. 313 (1978).

[60] *Id*. at 322-23.

[61] 411 U.S. 164 (1973).

[62] *Id*. at 172-73.

The inherent nature of Native governmental powers was again recognized and upheld by the Supreme Court in *United States v. Lara.*[63]

In 2008, the Supreme Court summarize its current views on the nature and extent of Indian governmental authority in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc*.[64] Chief Justice Roberts' opinion is significant for our purposes, because it affirms the inherent authority of Indian nations over the lands that they own and over many other important matters essential to such nations. The opinion in *Plains Commerce Bank* accepts without examination the supposed power of Congress to restrict the powers of Native self-government. The Supreme Court's assumption that Congress has such wide power is not well-grounded, and this Commentary will further address that issue later.[65]

However, it is clear that the Supreme Court continues to regard the powers of Native nations over their own lands as the very *core* of Native sovereignty and that the powers of Native governments in this area have not been eliminated by Congress. The Court's opinion in *Plains* summarizes the current state of federal law:

> For nearly two centuries now, we have recognized Indian tribes as "distinct, independent political communities," ... qualified to exercise many of the powers and prerogatives of self-government. ... We have frequently noted, however, that the "sovereignty that the Indian tribes retain is of a unique and limited character." ... It centers on the land held by the tribe and on tribal members within the reservation. ... ([T]ribes retain authority to govern "both their members and their territory," subject ultimately to Congress); ... ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe"). ...
>
> As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, ... to determine tribal membership, ... and to regulate domestic relations among members. ... They may also exclude outsiders from entering tribal land. ... But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: "[T]he inherent sovereign powers of an

[63] 541 U.S. 193 (2004).

[64] 128 S. Ct. 2709 (2008).

[65] For a further discussion on the limitations on Congress' supposed plenary power, see the Commentary on Principle 10 (Chapter VI).

> Indian tribe do not extend to the activities of nonmembers of the tribe." Montana, at 450 U.S., at 565, 101 S.Ct. 1245. As we explained in Oliphant v. Suquamish Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the tribes have, by virtue of their incorporation into the American republic, lost "the right of governing ... person[s] within their limits except themselves." *Id*., at 209, 98 S.Ct. 1011 (emphasis and internal quotation marks omitted).
>
> This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians – what we have called "non-Indian fee land. ... Thanks to the Indian General Allotment Act of 1887, ... there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes.[66]

While we do not accept the Supreme Court's view of the limits on Native sovereignty, the Supreme Court's statement of federal common law concerning the inherent right of Indian and Alaska Native nations to form their own governments and to manage their own lands is in keeping with Principle 11. It is important to observe that Congress has not enacted legislation that generally limits or takes away this right, though various statutes have an impact on the power of Indian nations to manage and use their lands. At least in principle, the power of Native governments over the lands they own is at the *core* of the sovereignty retained by Native nations.

Before turning to specific governmental powers of Indian governments, we should briefly take note of the Indian Reorganization Act of 1934 (IRA). Congress enacted the IRA in large part to reform its assimilationist policies and the allotment process. Among other things, the Act created a federal procedure that resulted in formal federal recognition of Indian governments. The Act provides that Indian nations may adopt constitutions or charters creating Indian governments, businesses, or organizations. The Act gave recognized Indian governments the option to organize under the Act or not. If a nation chose to organize under the Act, the Act guaranteed that the federal government would formally recognize and respect the Indian government or entity. The Act did not create or delegate the power to form Indian governments; rather it recognized that power as inherent.

[66] 128 S. Ct. at 2718 (citations omitted).

The IRA did not place any legal limits on the powers of Native governments, but rather gave the Secretary of the Interior the power to review and approve constitutions adopted under the Act. The Secretary was authorized to disapprove constitutions under the Act that were not consistent with "applicable laws."

Constitutions adopted under the IRA commonly required secretarial approval of council resolutions or other actions, but nothing in the Act required this and nothing requires it today. The IRA provides that constitutions adopted pursuant to the Act may be amended or revoked by a vote of the Indian government in compliance with the requirements of the Act. Though the IRA did not originally extend to Alaska Native nations or Indian nations in Oklahoma, the principal elements of the Act were extended with some modifications in 1936 to Alaska and to Oklahoma in the Oklahoma Indian Welfare Act.

Federal law recognizes many Native governmental powers relating to Native lands, and in this respect, federal law is generally supportive of or at least consistent with Principle 11. Native governmental powers are usually if not always defined by Indian constitutions or by traditional law, that is, by the law of each Indian nation. So far as federal law is concerned, Native governmental powers are extensive, especially in relation to Native lands. They include the power to determine membership or citizenship in the nation, the power to control marriage and other domestic relations of members, control over descent and distribution of property, the power to tax, control over the use of Native property, control over Native land and mineral development, the power to exclude persons from Native lands, the power to sue and make claims, the power to create courts for dispute resolution and to punish crimes, and many other powers as well.

Federal law concerning the existence of these Native powers or rights is generally consistent with Principle 11, differing only where federal statutes restrict or limit the exercise of these powers. These powers of indigenous peoples over their lands and resources are identified as human rights and protected by the UN Declaration on the Rights of Indigenous Peoples. The exercise of these powers by Native nations and the limitations placed upon them by the federal government are discussed in the following Commentary on Principle 12.

IV. Congressional Power to Restrict Native Self-Determination Is Limited

The Supreme Court and lower court decisions commonly include statements that the right of self-government is entirely subject to the will of

Congress.[67] But there is no substantial legal basis for this supposed limitation on Native self-determination, and the federal courts almost never provide any legal support for these statements.

So far as we have been able to determine, the question of Congress' power to limit Native governmental power over their own lands has not been actually decided by the Supreme Court. The issue of the power of Congress to change or enlarge Indian self-government was argued and decided to a very limited extent in *United States v. Lara.*[68] That decision was carefully limited to saying that Congress has power to *reaffirm or restore an element of inherent sovereignty that had been taken away by court-made law.* The Supreme Court did not decide how far Congress could legally go to *restrict* important powers of Native self-government.

Congress has rarely placed limits on the general authority of Indian and Alaska Native nations to control their lands. One of the only limitations that Congress has placed on the general authority of Indian and Alaska Native governments is the 1968 Indian Civil Rights Act. The Act requires Native governments to respect a list of civil rights and liberties that is similar to the Bill of Rights in the federal Constitution. As a practical matter, the Act has limited impact, because many Indian nations have incorporated the same or similar rights into their own law. The Act goes beyond Congress' constitutional power to legislate, and it is in all events ill-advised. Until it is repealed by Congress or found to be unconstitutional, it is a part of federal Indian law and could theoretically impose some limits on Native governmental actions regarding Native lands.

The rights of Native governments to use and manage their own property are not, in our view, subject to being taken away or restricted by the federal government, except for the power of eminent domain and certain generally applicable federal laws. Congress has the power to take anyone's land for a public purpose provided that it is done with due process of law and provided that fair compensation is paid. Certain general laws, such as environmental protection laws, also apply on Native lands. Otherwise, there is no constitutional authority for Congress to restrict Native nations in the use and control of their own lands and resources.

Quite apart from the lack of legal authority for Supreme Court statements about the unlimited power of Congress to diminish Indian self-determination,

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[67] *See, e.g., Plains Commerce Bank*, 128 S. Ct. at 2718-19 (quoted above); *Lara*, 541 U.S. at 201-02; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *Wheeler*, 435 U.S.at 323 (1978).

[68] 541 U.S. at 205.

there are many factual, historical, and legal considerations that call for a re-examination of this point and suggest that it should be rejected as a principle of federal law. First, the principle requiring the consent of the governed is central to our American political and legal systems, and it is central as well to international precepts of human rights. Our federal and state constitutions are all based upon the freely expressed democratic consent of the people and the states of the United States.[69] But this did not include any of the hundreds of Native nations. Most Indian and Alaska Native individuals were not citizens of the United States and were not eligible to vote until 1924. As a result, Native nations and, for the most part Native individuals, were never a part of the process of drafting and adopting the federal and state constitutions.

Second, treaties governed the relations between Indian nations and the United States both before and for almost a hundred years after adoption of the federal Constitution. These treaties were actually or at least in principle entered into with the approval and consent of the Indian nations that were parties to the treaties. The supposed rule that Congress has power to limit or eliminate the power of Native self-determination is contrary to the terms and spirit of most of these treaties. Treaties presuppose and affirm the right and authority of the Indian government to enter into the treaty and to make such agreements as are contained in the treaty. Though in some cases the treaty actually provided for limited federal governmental authority over the Indian party, a treaty applies only to the parties to that treaty, not to other Native nations.

The American notion of the *rule of law* is fundamental in the political life of the country as well as in our legal system. This widely shared ideal is that our country, our society, and our institutions will operate according to laws rather than according to the dictates of individuals or the arbitrary decisions of government. Our federal government is founded upon the idea that the government itself must act only according to laws, including the Constitution, duly adopted by the people. The concept of the *rule of law* includes the idea that laws will be enforced and violations will be remedied through courts or other government institutions, which themselves act according to established laws.

The old idea that Congress has unlimited power to limit or eliminate the powers of Native government and self-determination offends the American idea of the rule of law. This supposed power of Congress has no legal origin or basis and does not fall within the power given to Congress in the Constitution. There is no law or legal authority that creates or limits Congress' supposed power. It is entirely inconsistent with the principle of the rule of law. The fact that the

[69] Nell Jessup Newton, *Federal Power Over Indians: It Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 215 (1984).

supposed power has no legal limits is itself contrary to general constitutional legal principles, as we have discussed elsewhere.[70]

The role of the Supreme Court in repeating the idea that Congress has the power to limit or eliminate Native governments also raises concerns about the rule of law. Courts are essential to the rule of law, and it is the duty of judges to uphold the rule of law by using reasoned arguments to settle disputes. The Court appears to have abandoned its own institutional rules and commitment to reasoned argumentation in saying that Congress has unlimited authority over Native governments. The Court's assertions have no basis in law and are inconsistent with its prior decisions. The principle of the rule of law calls for great judicial restraint in creating rules that have no basis in the Constitution. At the very least, to uphold the rule of law, courts should provide reasoned analysis in creating a legal rule, and the Supreme Court has failed to do that.

Because the supposed rule about the power of Congress is based only on the Supreme Court's statements, it remains uncertain and unpredictable in its application. This undermines predictability, social harmony, and economic confidence, all goals of a sound legal system. Uncertainty is compounded because the present rule is said to apply to all Indian and Alaska Native nations without regard to the particular history, treaties, and circumstances of each Native nation. In fact there are hundreds of distinct Indian nations with widely varied histories, different wishes, and different treaty rights.

As a practical matter, the Supreme Court's presumption of congressional power has not worked very well and continues to cause disruption and uncertainty in the affairs of many Indian nations. In the opinion of many observers, Congress and the Supreme Court have exercised their assumed powers badly and have failed to achieve a reasonable degree of fairness, justice, or improvement in the economic and social conditions experienced by most Native nations. The present state of federal law has had the effect of diminishing or even destroying Native nations and their cultures, because, without a secure right of self-determination, Native peoples are not able to fully exercise their other human rights or to preserve and develop their cultures and societies.

V. Conclusion

Indian and Alaska Native nations have an inherent right of self-determination that has long been recognized by federal law and international law. They have significant governmental authority over their members and lands, and should be able to freely exercise this authority. United States courts

[70] *See* the Commentary on Principle Ten (Chapter VI) regarding the plenary power doctrine.

have mistakenly asserted that Congress has unlimited power to restrict or eliminate Indian and Alaska Native nation's inherent right of self-determination. This assertion is contrary to the rule of law, the Constitution, and federal law generally and should be abandoned as a principle of law.

General Principle 12

12. Native governments have the right to freely use, exploit, manage, and regulate lands and resources owned or beneficially owned by the nation, and they have governmental authority over allotted lands owned by Indian or Native persons within the reservation or subject to the jurisdiction of the Native government.

NON-TECHNICAL LANGUAGE

12. Native nations have the right to use, control, and benefit from their lands and resources without interference by the federal government that is not authorized by the Constitution or by the Native government itself.

I. Introduction

The purpose of Principle 12 is to increase and protect the freedom of Native governments to use and benefit from their lands and natural resources. This Principle states that Indian and Alaska Native nations have the right to use, manage, and regulate land and resources owned by the nation and that they also have governmental authority, that is, law making authority, over Native owned allotted lands within their territory. The ability of Native nations to exercise their land rights and to use their lands effectively is essential to the well-being and development of Native communities.

As a general rule, federal law has long recognized Native governmental authority over Native lands and the right of Native governments to use, manage, and regulate their lands. Congressional policy and international law also encourage the recognition and exercise of this right.

However, many acts of Congress and federal regulations give federal officials extensive authority over the use and management of Native lands. Some court decisions allow Congress to exercise unlimited authority or "plenary power" to limit the right of Native nations to use, manage, and control their lands. Native nations and their members, thus, face many obstacles in using their lands and resources. Many of these obstacles are inconsistent with United States constitutional law, international law, and current congressional policy.

II. The Right of Native Governments to Use, Manage, and Regulate their Lands

A. Indian Nations have an Inherent Right to Use, Manage, and Regulate their Lands

The right of Indian and Alaska Native governments to use, manage, and regulate their lands is an aspect of their inherent sovereignty. Native authority over their lands existed before the formation of the United States and the writing of the United States Constitution. Native nations have their own land holding systems, which recognize property rights in land and the authority of Native governments over Native lands. Unless a Native nation has specifically given this authority to the United States or it has been taken away by a valid act of Congress, the nation continues to have it.

Native nations exercise their inherent right to use, manage, and regulate their lands in different ways. Several nations have codes on land use and management, including laws governing hunting and fishing, land use and planning, zoning, and environmental quality. Native land management laws and policies differ from nation to nation. For example, one Alaska Native nation, Bill Moore's Slough, has a unique land policy written into its constitution, which does not allow for development inconsistent with traditional uses of the land and requires a 98 percent vote for approval of any land use.

B. United States Law Recognizes the Right of Native Governments to Use, Manage, and Regulate their Lands

The United States government has always recognized the right of Native governments to use, manage, and regulate their lands. Early Supreme Court decisions, including *Worcester v. Georgia*, stated that Indian nations have this right and excluded the states from exercising authority over Indian lands.[71] United States law continues to recognize the right of Native governments to manage, use, and regulate their lands. The United States Supreme Court has

[71] 30 U.S. 1 (1832).

stated that Native governments have authority over the use, management, and development of their lands and the lands of their members.

Specifically, Native nations have authority to enforce Native ownership rights, to exclude people from Native property, and to zone trust lands within their reservations. Native governments control the distribution of Native land, and have authority over individual use of Native property. Indian nations also have authority over hunting, fishing, and gathering on Indian lands, and can regulate the exercise of those rights by members and non-members under federal law. Further, federal laws state that Indian nations are the primary environmental regulators on their lands.

The federal government has recognized many specific activities undertaken by Indian nations as part of their right to use, manage, and regulate their lands. Although this list of activities is long, it is not complete. Under federal law, Native nations have any and all rights not expressly given to or taken away by Congress. Thus, the right of Native nations to use, manage, and regulate their lands may include other activities not yet specifically recognized by the United States government.

C. Obstacles to the Use, Management, and Regulation of Land by Native Governments

While United States law in general recognizes the right of Native governments to use, manage, and regulate their lands, Congress has created many obstacles to the exercise of this right by Native governments.

Federal statutes and regulations often limit the ability of Native governments to exercise their right to use, manage, and regulate their lands. Some laws indirectly interfere with Native nations' use of their lands.

Several federal statutes interfere with the authority of Native nations to use, regulate, and manage their lands by giving the Secretary of the Interior authority over nation owned lands and individually allotted Indian lands. Some of these statutes authorize the Secretary of the Interior to negotiate and approve leases of Native nation lands. For example, the Indian Long Term Leasing Act of 1955 authorizes the Secretary of the Interior to approve leases of any restricted Indian lands "for public, religious, educational, recreational, residential, or business purposes" after giving adequate consideration to environmental and land use factors.

Other statutes give the Secretary the power to grant rights of way over Indian lands.[72] Still others require secretarial approval for land management plans and the implementation of these plans.[73] Specific statutes also give the Secretary of the Interior significant additional authority over individual Indian allotments held in trust or restricted status. Among other things, the Secretary of the Interior decides when to remove restrictions, approves all mortgages and deeds, regulates leasing, and determines the legal heirs to individual allotments held in trust or restricted status.

Federal statutes also infringe on Native government rights to manage, use, and regulate their lands by giving the Secretary of the Interior management authority over natural resources and their development on Indian lands. For example, the Secretary regulates all grazing on Indian lands.[74] The National Indian Forest Resource Management Act of 1990 also gives the Secretary extensive control over forestry management on Native lands held in trust or restricted fee.

Native nations cannot fully and freely regulate, use, and manage their lands as long as federal officials have extensive power to intervene in and control the use and management of Native lands.

In addition, some recent Supreme Court decisions undermine or impair the right of Native nations to use, manage, and regulate their lands. For example, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, the Supreme Court stated that Indian nations could not zone certain lands owned by non-members within the reservation.[75] While the *Brendale* decision says that Indian nations may zone nation owned lands within the reservation, it undermines Indian authority to manage, use, and regulate these lands because it denies the nation the power to zone adjacent lands within the reservation. Further, the Court's decision in *Brendale* contradicts congressional policies that encourage Native government management and regulation of their lands.

Alaska Native nations, in particular, face tremendous obstacles in exercising governmental authority over the use and management of their lands. The Alaska Native Claims Settlement Act (ANCSA) extinguished nearly all Native land title and title claims in Alaska and created a land ownership system

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[72] *See, e.g.*, 25 U.S.C. §§ 319, 320, 321, 323-28.

[73] *See, e.g.*, American Indian Agricultural Resources Management Act of 1990; National Indian Forest Resource Management Act of 1990.

[74] *See, e.g.*, Indian Reorganization Act of 1934; American Indian Agricultural Resources Management Act of 1990.

[75] 492 U.S. 408 (1989).

that placed Alaska Native lands in the hands of Native corporations. As a result, most Alaska Native lands are owned by Native corporations rather than Native governments. Thus, even though Alaska Native governments have the right of self-determination, they have very limited authority over their traditional lands because they do not own them. Even where Alaska Native governments do own their own lands, the United States Supreme Court has denied them jurisdiction over these lands. Most Alaska Native governments can only exercise ownership rights, not governmental authority, over the lands that they own.

III. Some Statutes that Limit the Freedom of Native Nations to Use, Manage, and Regulate their Lands May be Inconsistent with Federal and International Law

Many of the statutes, regulations, and court decisions that infringe on the right of Native governments to use and manage their lands are inconsistent with general principles of constitutional, international, and federal law and well-established congressional policy.

A. Principle 12 Calls Into Question Federal Infringement on Native Freedom to Use, Manage, and Regulate their Lands

Principle 12 would give Native nations broad freedom to use and manage their own lands and resource. As a general matter, present federal law formally states that Native governments have the right to use, manage, and regulate their lands. Yet in practice, federal statutes and federal officials often prevent Native nations from using, managing, and regulating their own lands and resources.

Principle 12 is intended to respect Congress' limited authority under the Constitution – so long as it does not violate Indian treaties or human rights standards. But Principle 12 does not leave room for acts of Congress that go beyond its enumerated powers, and thus, the Principle calls into question at least some of the statutes that place restrictions on Native use of their own lands and resources.

It is beyond the scope of this Commentary to assess the constitutionality and desirability of all the federal statutes and regulations that limit Native nation use, management, and control of Native lands. The nations themselves are the proper parties to judge on the basis of experience which of these statutes are beneficial and which are not. Native nations may decide individually or collectively whether to seek to repeal, to amend, or to invalidate any statute by turning to Congress or to the federal courts. These Principles should be useful in seeking any such change, because they provide a set of rules for protecting Native land rights and for keeping federal control within reasonable and constitutional limits.

The United States government may not have the constitutional authority to create many of the current legal obstacles to the Indian nations' use, management, and regulation of their lands. The federal government is a government of limited powers, and in terms of Indian affairs, the Constitution authorizes Congress only to regulate commerce with Indian nations. A statute restricting a nation's rights or powers to use, manage, and control its own lands is constitutionally valid only if it is within Congress' powers – either the Indian commerce clause or another enumerated power.

Quite apart from the constitutional validity of these statutes, they are, at least in part, inconsistent with well-established doctrines of federal law. First, as discussed above, federal law holds that Native governments have the right to use, manage, and regulate their lands. Second, under the reserved rights doctrine, Native nations have the right to use, manage, and control their lands, unless they expressly ceded the right to the United States government or the right has been limited by a constitutionally valid act of Congress.

Further, present congressional policy promotes the right of Native governments to use, manage, and regulate their lands. Since the 1970s, Congress has adopted policies supporting the exercise of Native nations' rights to use, manage, and regulate their lands. Congress' stated commitment to enabling Indian nations to exercise their right to use, manage, and regulate their lands suggests that barriers to this right need to be re-examined and revised to be consistent with current congressional policy.

Statutes that limit Indian nations' use and control of their own lands must also be consistent with the obligations imposed by international law to respect indigenous lands and resources and the obligation to respect treaties made with Indian nations. This point has been discussed previously, especially in Chapter X.

B. International Law Protects the Right of Indigenous Peoples to Use, Manage, and Regulate their Lands

International law states that indigenous peoples have the right to freely use, manage, and regulate their lands, and the United States must respect that right. The United Nations Declaration on the Rights of Indigenous Peoples deals extensively with the land rights of indigenous peoples. Article 26(2) states,

> Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Articles 29 and 32 also declare that indigenous peoples have rights related to the regulation and management of their lands. Article 32 states that "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have also discussed the importance of the right of indigenous peoples to use, manage, and regulate their lands. In *The Case of Mary & Carrie Dann v. United States*, the Commission dealt with the United States' interference with two Western Shoshone Indians' right to use their land. The Commission emphasized the link between the survival of indigenous peoples and their ability to control their own lands.[76] Similarly, in *The Mayagna (Sumo) Community of Awas Tingni v. Nicaragua,* the Inter-American Court found that Nicaragua had violated the right of the Community to use and enjoy its property by granting forestry concessions to its lands.[77] Further, in *Saramaka People v. Suriname*, the Inter-American Court determined that Article 21 of the American Convention on Human Rights, which protects property rights, grants Native peoples the right to enjoy their property in accordance with their communal traditions.[78]

C. The United States Government Has Limited Legal Authority to Interfere with the Right of Native Nations to Use, Manage, and Regulate their Lands

While protected by federal and international law, the right of Native nations to use, manage, and regulate their lands is not absolute and may be subject to certain narrowly tailored legal limits. Actions by the United States government which infringe on this right must meet certain requirements to be valid.

The United States has more power to manage and control the use of Native lands when it validly holds trust title to those lands. Under federal law, the United States owes some fiduciary duties to Indian nations and allottees when it holds their lands and their resources in trust. Generally, as discussed in Principle Eight and the accompanying Commentary (Chapter IV), the United States, as trustee, will have all the same responsibilities as a private trustee, including those responsibilities to manage and protect Indian lands imposed on

[76] Case 11.140, Report No. 75/02, Inter-Am. C.H.R., para. 128 (2002).

[77] Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R., para. 153

[78] Judgment of Nov. 28, 2007, Inter-Am. Ct. H.R., para. 95.

it by the trust instrument. However, in cases of bare trusts, the United States' trust responsibility will be more limited.

When the United States does not validly hold trust title to Native lands, then the federal government has very limited authority to interfere with the right of Native governments to use, manage, and regulate their lands. Such federal actions must be in accordance with the Constitution and consistent with international law, or the Indian nation must have expressly given free, prior, and informed consent to the action.[79] For example, the Trade and Intercourse Act may be valid even though it interferes with the right of Indian nations to use, manage, and regulate their lands, because it appears to fall within Congress' power to regulate commerce with Indian nations.

IV. Conclusion

The United States has long recognized the inherent right of Indian and Alaska Native nations to freely use, manage, and regulate their lands. Despite broad legal recognition of this right, several barriers exist to the exercise of the right by Native nations. Principle 12 requires that these barriers be revisited and revised, because the United States Constitution and international law greatly limit the authority of the United States to interfere with the rights of Indian and Alaska Native governments to use, manage, and regulate their lands and resources. To meet its constitutional and international legal obligations, the United States should take appropriate measures to respect, ensure, and protect the right of Indian and Alaska Native governments to freely use, manage, and regulate their lands and resources.

[79] For more information on free, prior, informed consent, see the Commentary on Principle Six (Chapter IV).

Chapter VIII

Termination

General Principle 13

13. Congress has no power under the Constitution or otherwise, with respect to any Indian or Alaska Native nation, to terminate its legal existence or to terminate its legal rights and status as a nation without the free, prior, and informed consent of that nation.

NON-TECHNICAL LANGUAGE

13. Congress cannot terminate any Native nation.

Commentary

I. Introduction

This Principle addresses the problem of Congress practice of terminating Indian nations. This Principle makes it clear that Congress does not have the power to terminate an Indian or Alaska Native nation without the free, prior, and informed consent of the nation. According to this Principle, Congress cannot terminate the legal status of an Indian nation without its permission, because doing so would violate the United States Constitution and human rights recognized in international law.

II. History of Termination in the United States

Termination occurs when the federal government takes action to end the legal existence of an Indian or Alaska Native nation and to end the government-to-government relationship between a Native nation and the federal government.

Termination ends the self-determination of the Native nation and its legal character in federal law. This means that terminated Native nations cannot, for instance, enter into contracts, sue in United States courts, own land as a nation, or legally exercise jurisdiction over their land and resources.

The United States adopted a formal policy of termination in 1953. Between 1954 and 1962, Congress terminated 110 Indian nations in eight states, ending many of their federal legal protections. The reasons for termination were varied, ranging from the desire to assimilate Indians into mainstream society to reducing federal spending on Indian nations.

Termination statutes typically abolished the legal relationship between Indian nations and the federal government. The end of this relationship meant, among other things, that the nation and its members lost their eligibility for federal programs and services, and the Indian nation itself lost its status as a sovereign nation recognized and protected by federal law. The acts also subjected Indian nation lands to state and county taxation and required the Indian nations and their members to abide by state law. Federal statutes specifically protecting Indian land, such as the Trade and Intercourse Act, no longer applied. Termination statutes took many different forms. Some statutes directly and outright terminated Indian nations while others lured Indian individuals into giving up their rights under federal law by offering them large cash payments.

Termination did not necessarily remove all of the protections of federal law, nor did it deprive affected Native nations of all governmental powers. In theory, a "terminated" nation could continue to exist as a separate entity after termination. For example, the Menominee Termination Act only terminated the government-to-government relationship between the federal government and the Menominee Tribe. The Menominee Tribe itself did not go out of existence, and the Menominee Indians continued to maintain a tribal membership roll even after termination.

Nonetheless, in most instances these acts caused the "terminated" Native nation to actually cease to exist. In most cases termination resulted in the Indian nation no longer having a recognized land base over which to exercise governmental authority. It has been estimated that termination acts dispossessed Indian nations of more than 1.3 million acres of land. The Indian nation land that remained lost its status as "Indian country." This meant state taxes, state laws, and state court jurisdiction applied to the land and any activities on the land. Without the protections of federal law, neither the federal nor state governments had to respect Indian sovereignty. As a result, many Indian governments stopped functioning after termination.

In 1988, Congress officially repudiated the termination policy and began enacting legislation to restore some but not all terminated Indian nations to federal status. Despite the restoring of federal recognition, these restoration acts did little if anything to correct the poverty, social problems, and hardship that the original termination acts caused. For example, the repeal of the termination of the Wyandotte, Ottawa, and Peoria Indian tribes of Oklahoma restored their status as Indian nations under federal law, but it did not re-establish their reservations or return any of the lands lost following termination. Similarly, the Menominee Restoration Act reinstated the federal rights lost through termination, but it did not compensate the Tribe for their lands that were taken.

Although termination is no longer the official policy of the federal government, many federal officials and judges still believe that Congress has the power to terminate Indian nations. Even today, termination bills are introduced in Congress, often following Indian successes in the courts. It is very likely that the threat of termination, under the mistaken view that Congress has such power, may have a chilling effect on the exercise of Indian and Alaska Native rights.

III. Congress Does Not Have the Power to Terminate Indian Nations Under United States Law

Termination is closely linked to Congress' supposed plenary power over Indian affairs. "Plenary power" is often used to justify legislation that diminishes Indian sovereignty and extends federal authority over Indian and Alaska Native nations and their property.[80] Because Congress has mistakenly been thought to possess "plenary power" over Indian affairs generally, legal analysts often mistakenly assume that Congress' power can be stretched as far as possible – to terminating the legal existence of Native nations altogether.

Original principles of federal Indian law deny that Congress has any power to abolish Indian nations. Indian nations existed as sovereign governments long before the creation of the United States. Further, as discussed at length in Principle Ten and its accompanying Commentary, Congress lacks unlimited "plenary power," and the plenary power doctrine cannot be used as justification for any power to terminate Indian nations.

The right of Indian nations to exist is a right that should receive constitutional protections, particularly for those Indian nations with treaty or statutory rights to self-government. The right of self-determination is almost

[80] In Principle Ten and the accompanying Commentary (Chapter VI), we conclude that Congress does not have "plenary power" in the sense of unlimited authority over Indian and Alaska Native nations. Rather, Congress' power to legislate with regard to Indian and Alaska Native nations is limited to those powers listed in the Constitution.

always tied to Native rights to land and other resources. The right of Native nations to self-determination and to related property rights are so deeply a part of federal *statutory* law that these rights can plausibly be regarded as vested for purposes of constitutional protection. That is, they are rights that can no longer be taken away by the federal government except under very limited conditions. For example, in the Tribal Self-Governance Act of 1994, Congress recognized the "special government-to-government relationship with Indian tribes, including the right of tribes to self-governance, as reflected in the Constitution, treaties, federal statutes, and the course of dealings of the United States with Indian tribes."[81]

The right of Indian nations to exist also finds substantial protection in federal common law, which is the law that develops out of court decisions rather than statutory or constitutional provisions. In general, Congress has the power to decide which Indian nations will be "federally recognized." However, through federal common law, the Supreme Court has ruled that this power cannot be exercised in an arbitrary or random manner. It must be done only according to duly adopted laws or regulations. If Congress' power to recognize Indian nations cannot be arbitrary, then by the same logic its power to terminate federal protections for Indian nations must not be arbitrary. In light of the many court decisions acknowledging inherent Indian sovereignty and the numerous federal statutes guaranteeing the right to self-determination, Congress would have a hard time justifying the complete abolition of an Indian nation's existence under the arbitrariness standard.

Additional federal common law authority in support of this Principle may be found in the courts' decisions interpreting the termination of the Menominee Tribe and its subsequent restoration. The Seventh Circuit held that even though Congress terminated some aspects of the Tribe's sovereignty , the Menominee Termination Act did not affect "the fundamental existence of the tribe."[82] Further, the Supreme Court ruled that Menominee hunting and fishing rights, which were guaranteed by treaty, survived the Termination Act. These court decisions imply an unwillingness to terminate *all* Native rights.

A few lower federal courts have gone even further in recognizing the right of Indian nations to exist. For example, in the 1970s, defendants in the Mashpee Tribe's land claim case said that the Mashpee were not a tribe and had not been a tribe for over a century. The court stated that the Mashpee were a tribe unless they had intentionally and voluntarily ended their relationship with the federal

[81] 25 U.S.C. § 458aa et seq.

[82] United States v. Long, 324 F.3d 475 (7th Cir. 2003).

government. This case suggests that Native nation consent is required in order for courts to find that an Indian nation's federal status has been terminated.

IV. Termination Violates International Human Rights Law

Termination undermines the right of self-determination, the right to exist, and other fundamental rights of Indian and Alaska Native nations that are recognized in international law.

International human rights law has long recognized the right of self-determination. For example, two treaties – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights – declare that "All peoples have the right to self-determination." These treaties recognize the right of the people of a country, as a whole, to freely choose its form of government and its rulers.

The recently adopted United Nations Declaration on the Rights of Indigenous Peoples extends the right of self-determination to indigenous peoples. The Declaration is an important source of law, because it is the international community's most recent statement of the rights of indigenous peoples and the obligations of countries to protect these rights. Article 3 declares, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Articles 4, 5, and 20 further describe the right of self-determination. According to Article 4, "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." Article 5 declares the right of indigenous peoples "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social, and cultural life of the State." Additionally, Article 20(1) states, "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." The termination of Indian and Alaska Native nations undermines their ability to exercise their right of self-determination, because it prevents them from owning land and exercising jurisdiction over their territory and people.

The termination of Indian and Alaska Native nations also frustrates their right to exist. International law recognizes the rights of peoples to exist as peoples. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide prohibits the destruction in whole or in part of national,

ethnical, racial, or religious groups. The UN Declaration on the Rights of Indigenous Peoples declares that indigenous peoples, including Indian and Alaska Native nations, have the right to exist. Article 7(2) states, "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples." Termination threatens or denies the very existence of Indian and Alaska Native people by denying their legal status, and thus, violates their right to exist.

Further, Article 8 of the Declaration rejects the policy of assimilation that is an underlying justification for termination. Article 8(1) declares, "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." It obligates countries to provide effective means to prevent actions such as termination, which aim to assimilate Indian nations, deprive them of their integrity as distinct peoples, and take away their lands, territories, and resources. Under these principles of international law, the United States is prohibited from terminating the legal existence of Indian and Alaska Native nations.

V. Conclusion

Termination of Indian and Alaska Native nations is inconsistent with the Constitution and international human rights law. Yet many people mistakenly believe that Congress has the power to unilaterally terminate Indian nations. Under this Principle, Congress cannot terminate Indian nations without their free, prior, informed consent.

Chapter IX

State Taxation of Indian Lands

General Principle 14

14. Land and other property owned by an Indian or Alaska Native nation in its sovereign capacity as a government is not taxable by any state or local government, whether or not that land is held in trust, in fee, or in any other form of tenure.

NON-TECHNICAL LANGUAGE

14. Native lands and resources cannot be taxed by any government, no matter whether the land is held in trust or otherwise.

Commentary

I. Introduction

In general, states have broad authority to tax property within their borders. This broad authority is limited, and rightly so, in the context of Native owned lands. As early as the nineteenth century, the United States Supreme Court recognized the inherent sovereignty of Indian nations, stating that such nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive."[83] Thus, Indian nations were not subject to state laws.

Over the years, federal courts have moved away from this early recognition. In regard to state taxation, the general rule is that states cannot tax lands owned by Indian nations in Indian country unless Congress enacts

[83] Worcester v. Georgia, 31 U.S. 515, 557 (1832).

legislation clearly authorizing a state to tax such lands.[84] The Supreme Court has also said that land owned by Indian nations or individual Indians may be taxed if they are freely alienable – meaning they can be bought or sold without restriction.

This expansion of state tax authority over Native owned lands in Indian country has made it harder for Indian and Native Alaska governments to protect their lands and raise revenue to perform essential governmental functions.

Principle 14 calls for a change in these current rules by declaring that state and local governments cannot tax land owned by Indian or Alaska Native nations, regardless of whether the land is held in trust or in fee. Although this would be a substantial change in the current law, it is consistent with early case law, congressional policy, and general principles of fairness.

II. Current Case Law on State Taxation of Indian Lands

Lands located outside of Indian country and not held in trust, whether owned by an Indian nation or by an Indian individual, are subject to state taxation unless Congress has explicitly acted to exempt the Indian nation or the individual from the state tax. However lands outside of a reservation may be held in trust by the United States, and such lands are not subject to state taxation.

The current rule about state taxation in Indian country is that trust lands, including lands formally taken into trust under the Indian Reorganization Act, are generally not subject to state taxation. However, when an Indian nation reacquires land, that land remains subject to state taxation unless it is formally taken into trust.

III. Current Law on State Taxation of Native Lands in Alaska

The issue of taxation of Native lands in Alaska is governed primarily by the Alaska Native Claims Settlement Act of 1971 (ANSCA). ANSCA settled Alaska Native land claims by extinguishing nearly all aboriginal title in Alaska. ANSCA returned a small part of these Native lands to newly created Native corporations, not to the Alaska Native governments. ANCSA exempted these lands from state and local property taxes as long as they are not developed or leased to third parties or used solely for the purpose of exploration.

[84] Indian country has been broadly defined to include not only reservation lands, but also dependent Indian communities, and Indian allotments. *See* 18 U.S.C. § 1151.

ANSCA governs almost all Native lands in Alaska, except for the small parcels of trust lands that survived ANSCA and the one Indian reservation that still exists there – the Metlakatla Indian Community. The general rule regarding state taxation of Native trust lands – that they are exempt from state taxation without express congressional authorization – applies to trust lands in Alaska as well.

IV. All Lands Owned by Indian Nations and Indian Individuals within Indian Country should be Exempt from State Taxation

The current rules regarding state taxation of lands within Indian country are inconsistent with the historical treatment of Indians and Indian nations. Historically, Indian nations were regarded as separate sovereign entities and not subject to state laws.

The drafters of the United States Constitution limited state authority over Indian nations and their lands by giving all powers to deal with Indian nations exclusively to the federal government.[85] Thus, states could not exercise any authority over Indian nations and their lands.

Early Supreme Court cases also stated that Indian nations were sovereign political entities that were not subject to state authority.[86] The basic principle was that Indian nations are separate and politically distinct governments beyond the powers of a state, including the power to tax.

The reference in Article 1 of the United States Constitution to "Indians not taxed" reflected the fact that neither Indians nor their lands were thought to be subject to state or federal taxes. Congress maintained the exclusion of "Indians not taxed" in Section 2 of the Fourteenth Amendment. This exclusion of Indians and their lands from taxation has slowly eroded.

Early Supreme Court cases declared that states may only impose taxes on Indian lands if Congress has unmistakably and clearly authorized them to do so. Although Congress has never expressed such an intention, much less an "unmistakably clear" one, the U.S. Supreme Court recently declared a new rule authorizing state taxation of freely alienable lands owned by Indian nations.

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[85] U.S. Const. art. 1, § 8 (giving the federal government the power to regulate trade with Indian nations), art. 1, § 10 (prohibiting states from making treaties), art. 2 § 2 (authorizing the President to make treaties with the advice and consent of the Senate).

[86] *See, e.g.,* Worcester v. Georgia, 31 U.S. 515 (1832).

This new rule has no legal basis. Justification for this rule came from the General Allotment Act of 1887, which sought to dissolve Indian nations and assimilate their citizens, open their lands, and eradicate their separate political identity. Under the allotment policy, Indian members were assigned individual parcels of land, and the remaining Indian land was sold by the federal government.

In 1906, Congress amended the General Allotment Act to provide that a state did not gain jurisdiction, which includes taxation authority, over allotted lands until restrictions on the sale and purchase of the lands were lifted. Federal courts have viewed this Act as evidence of Congress' intent to make Indian lands that are freely alienable subject to state taxation. But this Act applied only to individually owned lands. There is no reason to extend this to lands owned by Indian nations. Nonetheless, the new rule is that if Indian owned lands become alienable, they become taxable. "[W]hen Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested.'"[87] Federal courts continue to follow this flawed reasoning, even though Congress has since repudiated the assimilation policy and explicitly adopted a policy of Indian self-determination through the Indian Reorganization Act.

Indian nations are treated unfairly in many contexts, and the area of taxation is no different. The Supreme Court's assertion that taxation necessarily accompanies alienability is untrue for everyone other than Indians. First, government owned lands, whether local, state, or federal lands, are generally not taxable even if they are alienable. This is not the case for lands owned by Indian nations. Second, even some privately owned alienable lands are exempt from taxation. Tax exempt organizations, such as churches and charitable organizations, are generally exempt from property taxes.

V. Conclusion

The Court's allowance of state taxation of Indian and Alaska Native nation lands is legally unsound, contradicts stated congressional policy, and unfairly disadvantages Indian and Alaska Native nations as sovereign governments. Continued judicial sanctioning of state taxation of Indian lands is a manifestation of dated United States Indian policy requiring assimilation by Indian and Alaska Native nations into the state polity and should be modified to reflect current congressional policies promoting the survival of Indian nations as

[87] Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 113 (1998).

sovereigns. The appropriate legal approach is embodied in the pre-allotment case law and tax status of Indian nations, which recognized the historical prohibition of state taxation of lands owned by Indian nations and individual Indians within Indian country. By returning to this analysis, Indian nations would be provided the same tax treatment as other governments and be appropriately recognized and treated as sovereign governments.

Chapter X

The Application of International Law

General Principle 15

15. The United States is bound by international law to respect the human rights and other rights of Indians and Alaska Natives both as individuals and peoples.

NON-TECHNICAL LANGUAGE

15. The United States must respect and abide by international law, especially international human rights law concerning indigenous peoples.

Commentary

I. Introduction

This Principle is intended to make it clear that the United States must respect and protect the rights of indigenous peoples, including Indian and Alaska Native nations and individuals, as recognized in international law. The United States is not is compliance with these international legal obligations. Instead the United States continues to act as if it can selectively pick and choose which international obligations it will honor. The failure of the United States to fulfill all of its international legal obligations in regard to human rights does not mean these obligations do not exist. It just means the United States is in violation of its obligations under international law.

II. The United States is Bound by International Law

International law generally refers to the law that governs the relations between the nations of the world. It places binding duties on countries, including the United States. The countries of the world – through the United

Nations, the Organization of American States,[88] other regional organizations, or through their own practice – create international law knowing that these rules will apply to them and that there will be some sanction if these rules are violated. In agreeing to these rules, countries acknowledge that they are bound to respect and follow them. Further, countries are responsible for ensuring that their actions and domestic laws conform to their international legal obligations.

International law comes from several sources, including international custom, international treaties, and international court decisions. Customary international law is law that is based on what governments actually do over a period of time – their practice – and that is accepted as legally binding by most if not all countries. In order to actually be considered law, countries must follow the practice out of a sense of legal obligation. Even if some countries have not already engaged in the general practice at issue, they may nonetheless be bound by it, so long as the practice is generally accepted as an actual legal obligation by most countries, and the countries at issue have not consistently objected to the practice.

An international treaty, sometimes called a convention, is a written agreement entered into between two or more countries. Human rights treaties usually recognize rights held by individuals, but they also create obligations on the countries to protect those rights. By entering into a treaty, a country agrees to be bound by the provisions of that treaty. Even when a country has not signed or ratified a treaty, the country is still bound by the principles expressed in the treaty to the extent that those principles exist in customary international law.

As members of the international community, countries know they are bound by the rules of international law, and they agree that the international community can enforce these rules. The United States has acknowledged these rules as binding by joining as a party to various international treaties. Further, the United States continues to comply with various reporting processes required under the international treaties it has ratified.

III. International Law Requires Respect for Indigenous Rights

Historically, international law governed the relations between the nations of the world. Since the late nineteenth century, however, the scope of international law has expanded to include human rights and the relationships between countries and their citizens. Recently, international law has begun to

[88] Whereas the United Nations is global in scope, the Organization of American States (OAS) is limited to the countries of the Americas. Similar to the United Nations, the OAS is made up of member countries that agree to abide by certain international laws, rules, and norms. The United States is a member of both the United Nations and the OAS.

recognize the rights of peoples – the people of nations and communities, – in addition to the rights of individuals.

The UN Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in September 2007, declares the rights of indigenous individuals and peoples. It states the world community's views on indigenous peoples' rights and the responsibility of countries to protect these rights. Among other things, the Declaration states that "[i]ndigenous peoples have the right of self-determination" and "the right to autonomy or self-government in matters relating to their internal and local affairs."[89] The Declaration expresses existing and emerging rules of customary international law that are binding on countries due to their ongoing practice and their belief that such practice is required.

There are a number of other international instruments, such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the American Declaration on the Rights and Duties of Man, that contain provisions requiring countries to protect indigenous peoples' rights to lands and territories. Although these international instruments do not specifically mention rights held by indigenous peoples and do not refer to indigenous peoples at all, various international bodies such as the UN Human Rights Committee and the OAS Inter-American Commission on Human Rights have used many of their provisions to address the specific issues faced by indigenous peoples.[90]

IV. The Domestic Application of International Law in the United States

Once a rule of international law has been established, countries are bound to comply with that rule. This is true regardless of the country's domestic legal rules and constitutional limitations, and it means that countries are to pass laws consistent with the international rule or incorporate it into their domestic law. The internal laws of a country cannot be used as an excuse for failing to comply with the international rule.

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[89] U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, arts. 3 and 4 respectively (2007).

[90] For example, the Covenant on Civil and Political Rights states that "ethnic, linguistic or religious minorities, in community with other members of their group, to enjoy their own culture" to practice their own religion and to use their own language. The Human Rights Committee interpreted this provision to require that countries protect indigenous culture, noting that protections for indigenous culture often includes protection for environmental and land rights. Further, the Inter-American Commission on Human Rights, in *The Case of Mary & Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2002), found that the United States had failed to protect the property rights of a traditional band of Western Shoshone Indians as required by the American Declaration on the Rights and Duties of Man.

In *Murray v. Schooner Charming Betsy*, the U.S. Supreme Court stated that the United States is bound by international law.[91] This is often called the *Charming Betsy* principle and it states that courts should make every attempt to read federal legislation in such a way as to comply with the United States' international legal obligations. There is a general presumption by courts that Congress intends to comply with international law.

The Supreme Court frequently uses or applies international law. In *Atkins v. Virginia,*[92] the Supreme Court looked to international standards and practices in deciding that mentally retarded persons should not be executed. In deciding a sex crime case,[93] the Supreme Court took into account an international human rights law decision by the European Court of Human Rights. International human rights law also played a role in a major case about discrimination in university admissions.[94] International human rights law was also used by the Supreme Court in outlawing the death penalty for persons under 18,[95] and in reviewing the case of a man held at the Guantanamo detention facility.[96] The Court also recently used international customary law to help decide a case about the immunity of a foreign country to a tax on property.[97]

Nonetheless, the United States often fails to respect human rights and fails to incorporate its international legal obligations into its domestic law and therefore does not meet its duties under international law. In contrast with early federal court decisions, such as the *Charming Betsy* case, one recent Supreme Court case ruled that "not all international law obligations automatically constitute binding federal law enforceable in the United States."[98] Some international treaties can only be enforced in domestic courts if Congress has passed some sort of federal legislation to implement the treaty. Further, federal courts have often been unwilling to view developing customary international law as binding under federal law. Finally, the "last in time" rule allows the

[91] 6 U.S. 64 (1804).

[92] 536 U.S. 304 (2002).

[93] Lawrence v. Texas, 539 U.S. 558 (2003).

[94] Grutter v. Bollinger, 539 U.S. 306 (2003).

[95] Roper v. Simmons, 543 U.S. 551 (2005).

[96] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2784 (2006).

[97] Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352 (2007).

[98] Medillin v. Texas, 128 S. Ct. 1346, 1356 (2008).

United States to avoid its international legal responsibilities by stating that international treaties and customary law obligations can be cancelled out by any later federal legislation.

Despite these limitations, the United States remains bound by international law. This is the case regardless of whether it has enacted domestic law for the purpose of implementing its international obligations. If the United States fails to pass such domestic laws, that simply means it is not in compliance with its international obligations. The unwillingness of the United States to apply international law in some domestic cases does not exempt it from its international obligations; rather the United States remains bound by the international law and remains accountable to the international community. To be sure, international institutions can and do hold the United States accountable. Treaty monitoring bodies, such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, review reports submitted by the United States and often find the United States to be in violation of various rights guaranteed in the treaties. Judicial bodies, including the International Court of Justice, have also issued decisions condemning the United States for its failure to comply with international law.[99] The Inter-American Commission on Human Rights has even held the United States accountable for violating the rights of the Western Shoshone people under the American Declaration on the Rights and Duties of Man.[100]

V. Conclusion

The United States is bound by international law. This includes existing and emerging law regarding indigenous rights. The United States has a duty under international law to pass laws to make sure it complies with these international legal obligations. In many instances, the United States has failed to do this. It should reform its domestic laws to ensure that they conform with international law.

[99] *See, for example*, Avena Case (Mexico v. United States), 2004 I.C.J. 128 (March 31, 2004) (reviewing conduct of the United States with regard to its domestic criminal justice system).

[100] The Case of Mary & Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R. (2002).

Chapter XI

Judicial Remedies and the Obligation to Protect Native Lands

General Principles 16 and 17

16 . The United States must provide prompt and effective judicial remedies for the violation of the rights of Indian and Alaska Native nations and individuals in relation to their lands and resources. Such remedies must be non-discriminatory and otherwise consistent with the United States Constitution, applicable treaties, and generally accepted principles of fairness and due process of law.

17. The United States has a legal obligation to prevent abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals in relation to their lands and resources through the enactment and enforcement of reasonable legislation. This obligation of the federal government must be discharged in conformity with applicable treaties, the United States Constitution, international human rights principles, and these General Principles.

NON-TECHNICAL LANGUAGE

16. The United States must make it possible for Native nations and individuals to go to court and get relief, or some kind of corrective action or compensation whenever they suffer harm concerning their lands and resources or any other violation of their rights. These court remedies must be fair and effective.

17. The United States has the duty to protect Native lands and resources by preventing abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals.

Commentary

I. Introduction: General Principle 16

This Principle states that the United States must provide an effective remedy to Indian and Alaska Native nations and individuals when they suffer any harm to their land and resource rights. A remedy in the legal sense refers to the opportunity to go to court and get a court order to stop and correct a violation of one's legal rights. A remedy can include getting money compensation, a return of property, a court order stopping harmful actions, and many other kinds of corrective action. In this Commentary, we are generally talking about judicial remedies—the remedies provided by a court. The right to an effective judicial remedy has two main elements: (1) the remedy must not be discriminatory or unfair, and (2) the remedy must meet the requirements of due process, meaning it must provide an opportunity to be heard in court and have the case decided according to law. Of course, the remedy must be "effective" by actually providing justice. It cannot be merely for show. Naturally a person or Indian nation is entitled to a remedy only in cases where actual legal harm or wrong has been proven.

The United States Constitution and many federal court decisions recognize the fundamental principle that the law must provide a remedy when a person's rights are violated. International law extends this requirement to violations of Indian and Alaska Native property rights. Present federal law, however, does not fully support the right to an effective judicial remedy for Indian and Alaska Native nations and individuals in relation to their lands.

II. Right to an Effective Judicial Remedy in United States Law

The right to an effective judicial remedy is based on the principle that when a person has a right that is recognized by law, and that right is violated, the law and the courts should provide a meaningful remedy to the person harmed. A meaningful remedy is one that "reasonably ensures" the protection of a right. This does not mean that every time a person believes his rights have been violated he is guaranteed some sort of remedy in court. The Constitution requires that a person at least have an opportunity to raise the issue in court, not necessarily that he always gets his requested remedy in court.

The right to an effective judicial remedy is a cornerstone of federal law. However, an effective remedy is not always available when the United States has violated a person's or Indian nation's rights under the law. The United States has sovereign immunity, and it is up to Congress whether it will waive this immunity and agree to be sued in any particular situation. The Supreme Court has said this means that the United States "is under no obligation to provide a

remedy through the courts,"[101] and it is free to decide whether to lay aside its immunity.

When it comes to violations of Indian land rights, compliance with the right to a fair and effective remedy is a particular problem. For example, the Indian Claims Commission, created by Congress in 1946 to resolve certain Indian land claims against the United States, did not use fair procedures and did not provide a just remedy in many cases.

III. International Law Requires the United States to Provide an Effective Judicial Remedy

International law recognizes the right to an effective judicial remedy. Many human rights treaties, conventions, declarations, and judicial decisions, recognize the right to an effective judicial remedy for human rights violations. For example, both the International Covenant on Civil and Political Rights and the International Convention of the Elimination of All Forms of Racial Discrimination include provisions obligating countries to provide effective judicial remedies for human rights violations. Because the United States has signed and ratified these treaties, it is bound by them to provide effective judicial remedies to Indian and Alaska Native nations and individuals.

Similarly, the American Declaration on the Rights and Duties of Man, which applies to all countries that are members of the Organization of American States, including the United States, also contains a provision on effective judicial remedies. In various cases, the Inter-American Court of Human Rights has stated that a judicial remedy must be effective, nondiscriminatory, and subject to prompt, final review by a competent court.

The right to an effective judicial remedy is not only present in international law generally, but it also applies specifically to indigenous peoples when their rights to their lands and resources have been violated. The UN Declaration on the Rights of Indigenous Peoples, which provides the most recent statement by the international community on the rights of indigenous peoples, includes a right to an effective judicial remedy in Article 40. Various international bodies, such as the UN Human Rights Committee, the Inter-American Court, and the Inter-American Commission, have also recognized the importance of providing an effective judicial remedy regarding indigenous peoples' rights to land and natural resources. For example, the Inter-American Commission on Human Rights condemned the United States for its failure to

[101] Lynch v. United States, 292 U.S. 571, 582 (1934).

provide an effective remedy to the Western Shoshone for violations of their land rights.[102]

IV. Conclusion

The right to an effective remedy for Indian and Alaska Native peoples when their right to property is violated is a basic part of effectively protecting these rights. These rights do not amount to much if the federal legal system does not provide an effective remedy when these rights are violated. Thus, to meet its obligations under international human rights law and under the Constitution, the United States must provide Indian and Alaska Native nations and individuals with an effective and fair judicial remedy when their land rights are violated. The Principle calls upon Congress to provide such remedies statutorily, and it calls upon courts to construe existing waivers of sovereign immunity liberally to provide remedies wherever possible.

[102] The Case of Mary & Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., para 142 (2002).

General Principle 17

17. The United States has a legal obligation to prevent abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals in relation to their lands and resources through the enactment and enforcement of reasonable legislation. This obligation of the federal government must be discharged in conformity with applicable treaties, the United States Constitution, international human rights principles, and these General Principles.

NON-TECHNICAL LANGUAGE

17. The United States has the duty to protect Native lands and resources by preventing abuses, fraud, and other wrongs against Indian and Alaska Native nations and individuals.

I. Introduction

Principle 17 declares that the United States has a legal obligation to protect Indian and Alaska Native lands and resources from abuse, fraud, and other wrong doing against Native nations and individuals. The kinds of wrongs this Principle is concerned with include stealing of Native resources, trespass on lands, environmental harm, deception, trickery, and corruption in dealing with Native lands, and other unfair or dishonest practices. The federal obligation to protect Native lands and resources includes preventing abuses by government officials as well as other people. The United States, in cooperation and consultation with Indian and Alaska Natives, must take proactive steps, such as enacting and implementing legislation, to protect Native lands and resources.

Federal law already provides some protections for Native lands and resources. There are however a number of gaps in these protections, leaving Indian and Alaska Native lands open to wrong doing in many circumstances. This Principle requires that the United States do more to protect Native lands by not only enforcing existing federal law, but also by assuming the affirmative obligations established in the other General Principles. These include:

- providing at least the same protections for Native lands, including lands held by aboriginal title, as for other types of property (Principles One and Four);
- requiring the United States to obtain the free, prior, and informed consent of a Native nation before taking or approving any action regarding the nation's land (Principle Seven);
- requiring the United States to protect Native trust lands in the same way as any other trustee would be required to protect trust assets (Principle Eight);
- providing a remedy when Native land rights are violated (Principles Nine and 16); and
- complying with international human rights law with respect to Indian and Alaska Native nations and their lands (Principle 15).

II. Domestic Law

Federal law provides limited protections for the lands, territories, and resources of Indian and Alaska Native nations and individuals. The Constitution recognizes Indian treaties, many of which expressly protect or at least reserve Indian land rights, as "the supreme Law of the land." However, there are many obstacles facing Indian nations when they attempt to get their treaties enforced.[103] There are also some federal statutes that protect Indian land rights, but these statutes provide merely a "patchwork" of protections.[104] Further, even where there are protective laws, Indian nations face significant barriers when trying to enforce these protections, barriers such as federal and state sovereign immunity. As discussed in the Commentary to Principle Eight, there are some statutes that clearly establish the United States as the trustee for certain Indian lands. These statutes create real duties on the part of the United States to protect such lands or property. But, where there is no actual trust created by statute or actual control of Native property, present federal law does not impose on the United States a general responsibility to protect Indian lands. While United States law does provide *some* protections for Native lands and resources, federal law offers little protection to Native lands that are neither protected by treaty nor held in trust by the United States.

In sum, it is doubtful that federal law adequately protects Native lands from abuse. While some legal protections exist, they are only a patchwork, not a

[103] For a more detailed discussion of these obstacles, see the Commentary on Principle 9 (Chapter V).

[104] *See, generally,* Cohen's Handbook of Federal Indian Law § 15.08[1] (Nell Jessup Newton ed. 2005) (listing federal laws protective of Indian property). *See also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law 306 (1941 ed. Reprint, 1971) for a thorough history of the "patchwork" federal legal protection of Indian lands.

comprehensive system of protection. Further, Native nations face significant barriers when they try to get these laws enforced.

III. International Law

Like the right to a judicial remedy, the obligation to protect human rights exists in many international human rights instruments. For example, the International Covenant on Civil and Political Rights requires all countries that have signed and ratified the treaty, including the United States, to "undertake the necessary steps, in accordance with [their] constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized" therein.[105]

In addition to such general international obligations, the United Nations Declaration on the Rights of Indigenous Peoples has identified obligations that are specific to indigenous lands and resources. Article 26(3) provides that "[s]tates shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." Article 27 further provides that "[s]tates shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources..." Finally, Article 38 provides that "states in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

The Inter-American Court of Human Rights has repeatedly said that countries have an affirmative legal responsibility to protect indigenous peoples' lands and resources. The Inter-American Court has further required the enactment of domestic legislation to fully protect these lands and has required that such legislation be created in consultation with the affected indigenous people.

IV. Conclusion

The obligation of the United States to protect Native lands, while not fully realized in federal law today, is supported by the Constitution and the patchwork of existing federal laws. This patchwork, however, is insufficient and does not comply with current international law requiring countries to take

[105] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, art. 2(2) (1966).

proactive steps to ensure that human rights, including indigenous peoples' rights to land, are not violated. To better comply with this Principle, Congress, in cooperation and consultation with Indian and Alaska Natives, should enact legislation that clarifies and strengthens protections for Indian lands and that allows for effective enforcement of these protections by Indian nations. In addition, the executive branch should shape its policies, including among others support for litigation by Indian and Alaska Native nations, to ensure that such laws are properly enforced.