HISTORICAL REVIEW OF FEDERAL INDIAN POLICY

The Falmouth Institute
3918 Prosperity Avenue, Suite 302
Fairfax, VA 22031
(703) 641-9100

to many, particularly if the language, dress, religion and culture of the inhabitants were significantly different from those of European society.

Although many Europeans felt that aboriginal people were not civilized, perhaps not even human, and certainly without rights, there were those who were more enlightened. Franciscus de Vitoria was one of them.

Vitoria was a Spaniard during the Age of the Conquistadors. In 1532, he argued that "aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners." [De Indis Et De Iure Belli Relectiones 128 (E. Nys ed., J. Bate trans. 1917)]

Vitoria said that European nations could exercise power over the Indians or acquire their property only because of conquest in a "just" war or through a voluntary cession and agreement by the Indians. Vitoria's views became accepted by writers on international law of the 16th, 17th, and 18th centuries. The thin pretext for many "just" wars and the coerced "voluntary cessions" are infamous, dark moments in Western history.

Although some land in America was claimed by Spain, (e.g., California, Arizona, New Mexico, Florida and Texas), and some by France (the Louisiana Purchase) the land which the United States occupied at the time of its creation had been claimed by England. Therefore, English law applied, but the policies (originally offered by Vitoria) were the same.

Under English law, Indians had a right of occupancy--sometimes called Original Indian Title. Only a sovereign nation could treat with Indian Tribes. In the colonies as early as 1651, individual colonists were prohibited from purchasing land from Indian

Tribes unless the purchase was authorized by the Crown or colonial government. English law also required just compensation for the taking of land. This applied to treaties with Indians as well as purchases.

Sovereign Nations--Government to government relationships

During the colonization of America, the British Crown dealt with Indian Tribes formally as sovereign nations through treaties. As the colonies grew, the colonists encroached on Indian land and otherwise treated Indians poorly.

In response, the Crown assumed the role of protector. In 1763 it forbade cessions of Indian land west of the crest of the Appalachians. It also centralized the process of licensing and approving all Indian land cessions east of the Appalachians.

The following year, the Crown proposed a plan to control all other regulation of Indian Affairs through the Indian agents. The plan was only partially implemented and never formally approved. It was abandoned in 1768. In 1775, however, the Crown revived the concept of centralized management of Indian affairs and appointed Indian agents who were directly responsible to London. The following year, the colonists declared independence.

INDIAN RELATIONS WITH THE NEW NATION

With independence, the new nation found itself facing the same issues concerning Indian rights. It also wanted to avoid Indian wars, which were a drain on the treasury and a potential tool for foreign powers. The Government realized that if Indian affairs were left to the individual States, the greed for land certainly would cause more Indian unrest.

Therefore, the authors of the Constitution gave the power to treat with Tribes to the Federal Government rather than to the States. Only the President could make treaties and only with the consent of the Senate. The Federal government also was given the power to regulate interstate commerce and trade, including that with Indians.

In 1778, the first treaty was signed between a Tribe (The Delaware) and the new government. By signing this treaty, the government affirmed the British and European tradition of dealing with Tribes as political entities.

Trade and Intercourse Acts (1790-1834)

The Trade and Intercourse Acts were a series of laws passed to protect Indians. The laws distinguished between Indians and non-Indians and made all trade with Indians subject to Federal regulation.

The laws also changed the Federal-Tribal relationship. Tribes lost a measure of internal sovereignty. A Tribe's right to enforce its laws was not only restricted to its territory, it further was generally restricted to its own people.

The Trade and Intercourse Acts did the following:

- Prohibited non-Indians from acquiring Indian land by treaty or purchase;
- Prohibited non-Indian settlement on Indian lands;
- Prohibited non-Indians from hunting or grazing animals on Indian lands;
- Made trade with Indians subject to Federal regulation and license;

- Made crimes against Indians committed by non-Indians a Federal crime and provided for compensation to Indians;

- Government provided for compensation of no -Indians who prevailed in damage cases involving Indians;

- Authorized the War Department to appoint Indian agents; but

- Did not regulate the conduct among Indians (e.g., trade between Indian individuals or Indian nations).

Supreme Court Shapes The Federal Relationship

Johnson v McIntosh (1823) -- The First Supreme Court Case Dealing with Indian Affairs

Before the Non-Intercourse Acts clearly outlawed the purchase of Indian lands by individuals, the sale of Indian land to individuals was not uncommon. In 1823, the Court was asked to review one such transaction.

The Court ruled that the transaction was not valid. Only the Federal Government had that right. Prior to the founding of the new government, only England had the right to treat with Indian Tribes. With the Declaration of Independence, that right transferred to the new nation. Speaking for the majority of the Court, Chief Justice Marshall stated that "The Indians retained the right of occupancy which only the discovering sovereign could extinguish, either by purchase or by conquest."

Cherokee Nation v Georgia (1831) -- The First of the Cherokee Cases

In the early 1800's, Georgia enacted laws that divided the Cherokee territory among counties. Georgia extended State law to these counties, thereby invalidating Cherokee law. Moreover, the State made it illegal for the Cherokee government to pass or enforce laws. The Cherokees sued.

The case is a landmark because the Court had to decide whether the Cherokees had the right to sue a State in Federal court. Central to that issue was whether the Cherokee Tribe was a "foreign state" within the meaning of the Constitution at provision giving the Court jurisdiction over suit between foreign nations and ones of the United States.

Writing for the majority of the Court, Chief Justice Marshall concluded:

The Tribe succeeded in demonstrating it is a state, a "distinct political society separated from others and capable of managing its own affairs and governing itself."

Yet, the Court held that the Tribe was not a foreign nation for its lands were within the boundaries of the United States. Marshall concluded:

> They [Indian Tribes] may, more correctly, perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the U.S. resembles that of a ward to his guardian."

Indian Tribes were "dependent nations." Unlike other nations, Indian nations had fewer rights. For example, the land of foreign nations, such as France or Spain could not be claimed by the United States, but the United States could claim ownership of the land occupied by the Tribes. This meant, among other things, that the United States would not recognize a treaty between a Tribe and another nation--something Tribes had done during the Revolutionary War and the War of 1812.

As a dependent nation, a Tribe was something between a State and a foreign government. (The Constitution clearly did not recognize Indian Tribes as States.) This placed Indian Tribes in a unique position that required the special protection of the Federal government. They were the wards of the United States; and in the eyes of the Court, that made the Government a trustee.

In law, a trust responsibility is one that must meet exacting standards of ethical conduct--such as in trust established Last Wills and Testaments. In recognizing the Government as a trustee, the Court has required that the United States follow high standards when dealing with or representing the interests of American Indians.

The Government still has that trust responsibility today. It is a tough role in which the Government must defend and protect American Indian interests while encouraging Indians to become more independent. At the same time the government is responsible for all the other interests for which it has responsibilities. Unfortunately, the Government's stewardship as a trustee over the past 150 years often has fallen below the high standards envisioned in law.

Worcester v Georgia (1832) -- The Second Cherokee Case

A year after the Court handed down its famous "dependent nation" rule, it heard another case concerning Cherokees in Georgia. Georgia authorities had arrested several

missionaries for violating a State law that required non-Indians residing in Cherokee territory to be licensed by the State. Two of the missionaries appealed to the Supreme Court.

Chief Marshall concluded that Georgia had no jurisdiction. The Tribe had "exclusive jurisdiction" within the boundaries of the reservation. This case formed the basis for Indian jurisdictional law.

THE GOVERNMENT AS A TRUSTEE

Although the Court was favorable to Indians, Congress and the Executive Branch often were not. In the 19th century, it was the "Manifest Destiny" of the United States to expand and "civilize" the frontier. Indian Tribes were impediments to that goal. Repeatedly, they were forced to move farther west to new reservations--to land that the white-man did not want--until later.

Movement to Reservations (1830-1887)

1830 -- Indian Removal Act

This legislation authorized the forced removal of Indians to reservations. The Trail of Tears and other removal efforts resulted from this legislation.

1871 -- Congress passed a law stopping the making of treaties with Indians.

Reservations established after 1871 were authorized by statute or executive order. This removed Tribes from the category as quasi-foreign political entities and weakened their political status.

Congress's intent was to distance Indians and Non-Indians. It also wanted to civilize the Indians and assimilate them into American culture. The law did not change, however, the requirement for mutual agreement. Tribal consent was still a necessary part of Federal actions.

1883 -- Courts of Indian offenses were established--fashioned after Federal/State model.

1883 -- Crow Dog Case: The murder of an Indian by an Indian.

The Court ruled the murder was a Tribal matter and that Tribal laws applied. In response to the ruling, Congress passed the Major Crimes Act declaring murder and other serious crimes on Indian lands to be Federal offenses that could be heard only in Federal court. This law severely eroded Tribal sovereignty and traditional roles.

Allotment Period (1887-1928)

The Allotment Act of 1887: In the late 18th and early 20th centuries, the Government decided that Tribal governments were really unnecessary and that Indians should be given the same rights and privileges as other citizens. One major way to accomplish this was to give Indian land to Indian individuals. Congress believed that the Indians would farm the land, become typical landowners, and assimilate into American society.

It was a noble concept, supported in Congress by those who were sympathetic to and generally in support of American Indians. Thus, in 1887 Congress passed the Allotment Act (Dawes Act 24 Stat. 388).

The Act gave 160 acres to the head of the family and 80 acres to others in the family. Twice that amount was allotted if the land was suitable for grazing. Later, the amounts were reduced.

The land was held in trust for 25 years, while the Indians learned to manage their affairs. After that time, the land conveyed to the allottee in fee, free of encumbrances and subject to taxes.

Indians who received allotments became citizens of the United States, subject to State and local criminal and civil laws, but enjoying the protection of these laws as well. (Thirty-seven years later, the Indian Citizenship Act of 1924 made all Indians citizens of the United States.)

The Act also authorized the Secretary to negotiate with the Tribes for disposition of all "excess" lands remaining after allotments. This land was used for the settlement of non-Indians.

Results of allotment period: The effect was devastating to Indian Tribes and culture. Tribal governments were severely undermined, if not eliminated. Without a land base, these governments had no authority separate from the States; and as Indians became citizens of the United States, the Tribal governments lost their authority over their membership. In the Government's eye, Tribes became little more than clubs or associations.

The amount of land over which Indian Tribes lost control was staggering: from 138 million acres in 1887 to 48 million acres in 1934. Of this remaining land, over one acre in 10 was desert or semi-desert land, scarcely capable of supporting any type of agriculture.

Indian Reorganization and Preservation of Tribes (1928-1953)

The allotment period did not bring the changes and prosperity Congress expected. Instead, it brought greater poverty and hardship to many Indians. Thousands of Indians never had a chance to farm their land--they lost it instead to the white-man. Indian Tribal governments, although greatly weakened, did not disappear. Both Congress and the President recognized the need for a major change in public policy.

1928 -- Merriam Report

In 1928, the Secretary of Interior commissioned an independent study of Indian affairs in the United States and the role and effectiveness of the BIA. Conducted by the Institute of Government Research, and funded by John D. Rockefeller, Jr., the Merriam Report, as it was later called, recognized the disaster created during the allotment period, and recommended that the Government reaffirm and strengthen its trust responsibility to Indian people and Tribes. Recommendations of the Merriam report were incorporated in the Indian Reorganization Act.

1934 -- Indian Reorganization Act

This law was passed in response to the Merriam report and in reaction to the disaster of the allotment period. The Act only applied to Tribes who by majority vote asked that it apply. As a result, some Tribes are not under the Indian Reorganization Act (IRA) and are referred to as "Treaty Tribes" or "Traditional Tribes." The IRA--

- Recognized and Strengthened Tribal governments.

- Extended indefinitely the period of land held in trust.

- Indian Preference in Indian Service.
- Restored to Tribal ownership the "surplus" lands acquired from Tribes under the Allotment Act.

- Gave Tribes the right to employ legal counsel, with Secretarial approval.

- Secretary could issue charter of incorporation.

Termination and Relocation (1953-1968)

Twenty years later, the pendulum was moving in the opposite direction again. Congress wanted out of the Indian trustee business. It wanted "as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States." H. Con.Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

Over 100 Tribes were terminated during this period. Nearly all were small Tribes or bands, with the exceptions of the Menominee of Wisconsin and the Klamath of Oregon.

With termination, the special relationship with the Federal government ended. Tribes were subject to State laws. Lands were converted into private ownership and generally sold.

During this period, the BIA established the Relocation Program, which encouraged Indians to leave the reservation and seek jobs in urban areas. Although thousands of Indians relocated to major cities across the country, many American Indians did not give up their culture nor did Tribal governments disintegrate. Total assimilation did not occur.

Public Law 83-280: A Blow to Tribal Sovereignty

In the 1950's, Congress dealt the final blow to Tribal sovereignty in several states with the passage of P.L. 83-280. This law gave the following states civil and criminal jurisdiction over Indian communities:

California	Minnesota (except Red Lake)
Nebraska	Oregon (except Warm Springs)
Wisconsin	

The law allowed other states to assume jurisdiction by statute or by a State constitutional amendment. Several states assumed partial or total jurisdiction under this authority. They were:

Arizona	Iowa	North Dakota
Florida	Montana	Utah
Idaho	Nevada	Washington

Consent of the affected Tribes was not required and usually not sought. Later, the law was amended to require Tribal consent.

The law did not, however, give states general regulatory power. Nor did it give them the right to tax Indian property held in trust or to interfere with hunting and fishing rights.

Tribal Self-Determination (1968-1982)

In sharp contrast to the 1950's, the 1970's was a decade in which the Government reorganized and supported Tribal governments. Just as had happened in the 1930's, Congress, the Administration, and the Courts recognized the dislocation, poverty, and many other problems caused by termination policies. The Government reacted strongly and enacted a series of measures designed to support Tribal governments.

1968 - Indian Civil Rights Act (ICRA)

This law imposed on Tribes most of the requirements of the Bill of Rights

- Protection of free speech
- Free exercise of religion
- Due process
- Equal protection of laws

There was some disagreement over whether a Tribe could define "due process" and "equal protection." There also was disagreement about whether the ICRA gave Federal courts the power to hear cases that arose within the Tribe.

ICRA also amended P.L. 83-280 to require Indian in the future consent for sStates to assume jurisdiction.

1970 -- Nixon's Indian Policy

President Nixon stressed the continuing importance of the trust relationship. He urged the development of programs to allow Tribes to manage their own affairs with the maximum amount of autonomy. He also recognized that Tribal governments were permanent fixtures of Indian society and culture, and he supported strengthening these governments.

1974 -- Indian Financing Act

This law provides for a revolving loan fund to aid in the development of Indian resources.

1975 -- Indian Self-Determination Act (P.L. 93-638)

This law reflects President Nixon's policy to strengthen Tribal governments and to allow Tribes to have more control over their affairs. Under this law, a Tribe can contract with the BIA and IHS to operate any program or portion of a program that those agencies provide to the Tribe. This law has recently been amended to include other programs within the Department of Interior.

1978 -- The Martinez Decision

This case resolved some issues created by the ICRA. The Supreme Court ruled that Congress and not intended Federal courts to hear cases arising from the ICRA, except in special circumstances involving Indian people who were in jail. The Court held that Tribal courts had jurisdiction for other cases.

1978 -- The Oliphant Decision

In this case, the Supreme Court ruled that Indian Tribal courts do not have criminal jurisdiction over non-Indians on the reservation.

Self-Governance (1982-Present)

Today, Indian affairs appear to have evolved to a new period--the period of self-governance. American Indians have moved beyond the right to have their own governments and courts. More and more Tribes are successfully operating their own programs and exerting a wide range of governmental powers. There appears to be a growing acceptance among the Federal, State, and local governments of the right of Tribal governments to exercise authority over its members.

1982 -- Indian Tribal Government Tax Status Act

Allowed Tribes to qualify for Federal tax advantages, including the ability to issue tax-exempt bonds to finance government projects.

1983 -- President Reagan reaffirmed the earlier Nixon policy.

1983 -- Bingo halls opened on Tribal lands.

1987 -- The Cabazon Decision

The Supreme Court ruled that Tribes have the right to have bingo on Tribal land and are not subject to State regulation.

1988 -- Indian Gaming Regulatory Act

Authorized Tribes to have Bingo and some other games, but said that slot machines and some other forms of gambling required a compact with the State in which the Tribe was located. A Gaming Commission was established to regulate Indian gaming not covered by a compact.

1988 -- Tribal Self-Governance Demonstration Project

This experimental project allows Tribes to negotiate a compact with the BIA for programs they want to operate. Tribes have greater flexibility in the operation of these programs and how they use the money than they had under the P.L. 93-638 procedures. Tribal leaders are involved with the compacts, much like they were with treaties.

Some Tribal leaders oppose self-governance projects. They view the policy as another move toward termination.

1990 -- The Duro v Reina Decision

The Supreme Court said that Tribal courts did not have jurisdiction over Indian non-Tribal members.

1991 -- Public Law 102-137

Congress provided Tribal courts authority over Indian non-Tribal members for acts committed on Tribal land. This effectively renders moot the *Duro* decision.

1991 -- President Bush reaffirmed the government-to-government policy.

1991 and 1992 - The Yakima Cases

In two different cases, the Supreme Court has ruled that fee land on the reservation is under the jurisdiction of the State. In at least many situations, the State can zone and tax fee land on reservations.

PRESIDENT BUSH'S AMERICAN INDIAN POLICY STATEMENT

On June 14, 1991, President George Bush issued an American Indian policy statement which reaffirmed the government-to-government relationship between Indian tribes and the Federal Government.

The President's policy builds upon the policy of self-determination first announced in 1970, and reaffirmed and expanded upon by the Reagan-Bush Administration in 1983. President Bush's policy moves toward a permanent relationship of understanding and trust, and designates a senior staff member as personal liaison with all Indian tribes. President Bush's policy statement follows:

Reaffirming the Government-to-Government Relationship Between the Federal Government and Tribal Governments

On January 24, 1983, the Reagan-Bush Administration issued a statement on Indian policy recognizing and reaffirming a government-to-government relationship between Indian tribes and the Federal Government. This relationship is the cornerstone of the Bush-Quayle Administration's policy of fostering tribal self-government and self-determination.

Quasi-Sovereign Domestic Dependent Nations

This government-to-government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our Nation, of Indian tribes becoming what our courts have come to refer to as quasi-sovereign domestic dependent nations. Over the years the relationship has flourished, grown, and evolved into a vibrant partnership in which over 500 tribal governments stand shoulder to shoulder with the other governmental units that form our Republic.

This is now a relationship in which tribal governments may choose to assume the administration of numerous Federal programs pursuant to the 1975 Indian Self-Determination and Education Assistance Act.

This is a partnership in which an Office of Self-Governance has been established in the Department of the Interior and given the responsibility of working with tribes to craft creative ways of transferring decision-making powers over tribal government functions from the Department to tribal governments.

Office of American Indian Trust

An Office of American Indian Trust will be established in the Department of the Interior and given the responsibility of overseeing the trust responsibility of the Department and of insuring that no Departmental action will be taken that will adversely affect or destroy those physical assets that the Federal Government holds in trust for the tribes.

I take pride in acknowledging and reaffirming the existence and durability of our unique government-to-government relationship.

Personal Liaison

Within the White House I have designated a senior staff member, my Director of Intergovernmental Affairs, as my personal liaison with all Indian tribes. While it is not possible for a President or his small staff to deal directly with the multiplicity of issues and problems presented by each of the 510 tribal entities in the Nation now recognized by and dealing with the Department of the Interior, the White House will continue to interact with Indian tribes on an intergovernmental basis.

Permanent Relationship

The concepts of forced termination and excessive dependency on the Federal Government must now be relegated, once and for all, to the history books. Today we move forward toward a permanent relationship of understanding and trust, a relationship in which the tribes of the nation sit in positions of dependent sovereignty along with the other governments that compose the family that is America.

Publication services were provided by the Office of Administrative Services, Branch of Visual Communication Services (Office of the Secretary).

DEPARTMENTAL REGULATION	NUMBER: 1020-6
SUBJECT: POLICIES ON AMERICAN INDIANS AND ALASKA NATIVES	DATE: October 22, 1992 OPI: OFFICE OF ADVOCACY AND ENTERPRISE or OFFICE OF PUBLIC AFFAIRS

1 PURPOSE

The purpose of this document is to outline the policies of the United States Department of Agriculture (USDA) in its interactions with Indians, Alaska Natives, tribal governments, and Alaska Native Corporations (ANC). USDA policies are based on and are coextensive with Federal treaties and law. These policies pertain to Federally recognized Tribes and ANCs, as appropriate, and provide guidance to USDA personnel for actions affecting Indians and Alaska Natives. These policies do not involve USDA interactions with State-recognized Tribes, Indians, or Alaska Natives who are not members of Tribes with respect to matters provided for by statute or regulation.

2 DEFINITIONS

a Indian tribe (or tribe). Any Indian tribe, band, nation, Pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

b. Alaska Native Corporation. Any Alaska native village or regional corporation established pursuant to the Alaska Native Claims Settlement Act, Pub. L. No. 93-638 (ANCSA).

c Indian. A member of an Indian tribe.

d. Alaska Native. As defined by section 3(b) of ANCSA, a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakla Indian Community) Eskimo, or Aleut blood, or a combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum of blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or native group of which he claims to be a member of whose father or mother is (or, if deceased, was) regarded as Native by any village or group.

e Tribal government. The governing body of an Indian tribe that has been officially recognized as such by the Federal Government.

DISTRIBUTION