

History of the Federal /Tribal Relationship

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Understanding how to establish effective relationships with American Indian Tribes in California requires us to know something about the history of these tribes' relationships with the early settlers who came from Europe and with the United States government which, once it was formed under the U.S. Constitution, assumed the authority to manage Indian affairs. These historical developments framed the relationship we have with the tribes today and have influenced the tribes' response to contemporary events and initiatives.

What is presented here is a thumbnail sketch, a very quick and modest summary, of a series of "stages" of the federal/tribal relationship that we think are important to be aware of. You will see that the relationship changed over the years. That is not surprising. Most relationships change over time. What may be less obvious is that each stage left its particular mark which we can often see today.

As a summary observation, the changes that occurred in the federal/tribal relationship can be seen to have been a function of: (1) the changing capacity of the federal government to "have its way", and (2) the ability of the non-Indian population to influence both state and federal policy as its appetites for Indian farm and range land and other natural resources (water, fish, wild life, gold, oil, uranium, etc.) increased.

Pre-1776 and 1787 – Before the Federal Government was Established.

Obviously, there was no federal/tribal relationship before we had a federal government in place. That was only established under the Articles of Confederation and a little later, the United States Constitution in 1787.

Prior to 1776 and 1787, in the early days of American settlement and expansion, the settlers were few, dispersed and unorganized. They found the new land inhabited by a significant indigenous population organized into tribes and confederations of tribes. Tribes had their own languages, religions, cultures, values, governments and economic systems. They had their own way of doing things that existed for thousands of years before contact.

Many of the newcomers were fascinated with what they learned about the indigenous people. A prominent example was Benjamin Franklin and other framers of the American Constitution who were said to model the federal system and representative government after the Iroquois Confederation made up of five independent tribes (Cayuga, Oneida, Onadoga, Seneca and Mohawk nations).

The early settlers needed safety and predictability in their relationships with the indigenous people. They often formed very cordial and mutually beneficial relationships. They traded with the Indians, they acquired land, learned about new crops, there was some intermarriage, they learned each other's languages. Good relations ensured the

survival of the colonists against the potential Indian military threat. The relationship that was forged reflected a respect for the balance of power that existed.

But it would not always be peaceful. As the presence of the Europeans increased, and it did dramatically, the settlers faced the military might of the tribes, which reacted to increasing encroachment of their homelands and hunting and fishing grounds. This occurred most notably during the French and Indian wars of 1754. A little later, during the American Revolution, Indian tribes were a very real military threat to the young nation. It was important for the American revolutionaries to know which tribes would be on their side or remain neutral, and which would be opposing them. They endeavored to memorialize agreements in the form of treaties.

Phase I. Conquest and Treaties (1789 – 1871)

(Parenthetically, treaty making officially ended in 1871 when Congress voted to end treaty making. After that, the President dealt with the tribes through Executive Orders and Congress continued to make laws that affected the tribes and the federal/tribal relationship)

You will remember that the U.S. Constitution was an effort to concentrate authority in one central location to: (1) regularize internal relationships with the distinct and independent minded colonies **and** with the sovereign tribes, (2) break down internal trade and other barriers and make one nation, and (3) to increase the country's capacity to protect and promote its interests outside its recognized borders.

With respect to the tribes, the framers of the Constitution in 1789 considered treaty making and the management of Indian affairs to be squarely within the authority of the federal government. This concept became embodied in the *Indian Commerce Clause of the U.S. Constitution*. It gave the President the authority to sign treaties. Treaties “negotiated” between the federal government and tribes were given the force of federal law. These were, like any federal law, supposed to be “supreme throughout the land.”

This *Indian Commerce Clause* had very important implications. First, it was a signal to other colonial powers that still had a strong presence on the North American continent (the British, Spanish and French) that *they were not to have formal relationships with the tribes*. Hands off, this is the exclusive domain of the U.S. government! Second, it was a signal to the colonies and later the states that managing and regulating Indian affairs was outside their purview as well.

Of course, we have to understand that this was easier said than done. During this historical period, the U.S. government was a fledgling operation -- weak, without resources, without a well funded central army, little ability to tax and spend revenues on behalf of the central government.

Meanwhile, many of the tribes were strong and independent. They could not be coerced to cooperate—but had to be reasoned with. Also, at this time, many tribes were allied

with other colonial powers – both during the Revolutionary War and afterwards. These colonial powers (British, French and Spanish) had ambitions to remain on the continent and had formed alliances with the Indians to resist westward expansion.

Conquest and Treaty Making can be divided into two major phases: 1789 – 1812 and 1812 – 1871

Prior to 1812, really 1815, which marked the end of the War of 1812 between the Americans and the British, the tribes enjoyed some leverage in their dealings with the federal government. They had alliances with the British or other colonial powers, or could use the threat of forming such alliances. Both commanded some respect. In effect, they could hold out for the “highest bidder” and each of the colonial powers were careful not to alienate their potential allies during a period when they tried to consolidate their power and secure their continued presence. Our fledgling nation was most concerned with survival and assurances against hostility at this time.

After 1815 and the withdrawal of the British from the Continent, the U.S. posture toward the Indians changed very dramatically. U.S. Indian policy became primarily responsive to the exigencies of western expansion. Treaties were used to remove Indians from the path of advancing white civilization.

One of the most notorious figures during this period was General Andrew Jackson. Prior to 1812 he had already begun to effectively undercut the federal government’s previous approach of a “government to government relationship” and converted it into a “guardian-ward relationship”. Briefly, Andrew Jackson over a period of 30 to 40 years as an “Indian fighter” in the south, acquired the authority of the governors in Georgia, Tennessee etc to organize local state militias to both wage war on and exterminate the Indians that resisted the huge numbers of settlers pushing westward.

He waged war on the Creeks, Cherokee, Choctow and Chikasaw, “negotiated” one-sided treaties, and ultimately forced them to cede millions of acres of choice land -- to be sold by the federal government to local settlers. Many saw this strategy as a way of filling the federal government’s empty coffers.

It is a long and brutal story how tribes were coerced, tricked, bribed into “negotiations” with their Great White Father represented by General Jackson. He and his local militias ultimately *punished* both those tribes and tribal elements who were resisting and those who were his allies in these Indian wars.

Treaties were broken soon after they were negotiated as the local people pushed for more of what the Indians had. On its part, the federal government did not live up to its treaty promises to provide minimal annual payments to the tribes. Often Indian agents used the reparations payments to pay off local creditors who claimed the tribes owed them the money. Treaties that were negotiated by government agents were taken for ratification to the Senate and were often altered unilaterally

In the course of this aggressive campaign Jackson defeated the British Army on our southern sea coast in the War of 1812. He sent them packing. Shortly thereafter he went further south after the Seminole Indians and drove the Spanish out of Florida.

Up until this point Jackson's justification for subduing and dispossessing the Indian tribes of their land and freedom of movement was **to remove the threat to national security posed by Indian alliances** with the British and Spanish who were still on the nation's borders.

Apparently, that was not enough. After defeating the British and the Spanish, he was determined to completely remove these and other tribes from the south-eastern part of the United States. He had a new rationale. As he said over and over again to the tribes, as he was "persuading" them to give up their land in exchange for land unseen west of the Mississippi River (present day Oklahoma), **he could no longer protect the tribes against the abuses of the white squatters who were moving onto their lands and taking their resources secured by previous treaties.**

General Jackson argued that if they remained on their vastly reduced homelands, they would lose their reservations and be forced to live as citizens of the states, under the jurisdiction of state laws and state courts. He urged that they would lose their separate identity and the rights and ability to be self-governing and preserve their traditions and culture. This persuaded many of the tribes to move west.

This is an important milestone in the nature of the tribes' relationships to the federal government. The state governments were in the driver's seat and the federal government did not have the muscle to oppose them even if it wanted to.

The power over Indian policy had shifted during this period importantly to the southern states which were doing the bidding for the white settlers screaming for the fertile land and resources. The states were jealous of tribes' apparent autonomy within their borders, and they claimed they had jurisdiction over the Indians and their reservations.

Supreme Court Justice John Marshall handed down his decision in *Cherokee Nation v. Georgia* on March 18, 1831. He rejected Georgia's argument that the Cherokees were a sovereign nation but he also **rejected the state's claim that they were subject to state law.** According to Justice Marshall, "the Indians were 'domestic dependent nations', subject to the United States as a ward to a guardian. **Indian territory was part of the United States but not subject to action by individual states.**"

Despite the fact that Judge Marshall and the Supreme Court maintained that states did not have jurisdiction over the tribes, **there was not army enough or will enough by the American people to protect the Indians and their lands from the squatters and thieves who continued to attack, invade and occupy the land they wanted from the tribes.** By and large these settlers would turn to state government for protection if they were attacked and the Indians invariably lost out.

Phase II. Extermination, Removal, and Resettlement (1830 – 1871)

The War of 1812 and the subsequent routing of the Spanish from Florida gave the U.S. government reason to believe that they were an indomitable world military force. This new found strength and confidence encouraged the federal union to institute the “removal policy.” The “consent” required previously for the acquisition of Indian lands was replaced by a new policy of forcing the tribes to exchange their homelands and give up their traditional way of life in exchange for inferior land in the “Indian territories.”

*Congress passed the **Indian Removal Act in 1832***, while Jackson was the United States President. Over 100,000 Indians were forced to give up their land east of the Mississippi River. This affected tribes not just in the southern states but throughout the mid west as well. Dozens of tribes were rounded up, put in stockades, shipped in cattle cars, forced to march 800 miles in the dead of winter and followed the “Trail of Tears”. Despite this obscene treatment, many of the removed tribes survived and escaped the fate of many extinct eastern tribes. They have retained their tribal identity and live on today.

Expansion Beyond the Mississippi River.

Up until this time, the west beyond the Mississippi River was not settled and the **tribes beyond the River were relatively free from the federal government’s interference.**

Two developments changed this significantly: (1) As a result of the Civil War in the 1860’s, the federal government had the technological and military means to expand its presence all the way to the west coast by **building a transcontinental railroad**. Ex-soldiers composed the workforce, ex-military Generals were their bosses, and the experience and expertise acquired in building roads and bridges and managing huge amounts of men and supplies during the Civil War were directly applied to defy all odds and build a railroad over the Rocky and Sierra Mountain ranges.

(2) **The demographics of the west transformed in a matter of years with droves of newcomers competing for land and other resources.** The completed transcontinental railroad greatly enhanced communication and transportation with the west and enabled the federal government to move troops and supplies more easily to any potential trouble spot in the western continent. This provided increased protection to travelers. It also facilitated travel for thousands of newcomers anxious to settle in the west.

During this period, until the early 1870’s, the tribes located in areas in the way of the railroad and wagon trains engaged in acts of resistance. But ultimately they were no match for the greatly fortified U.S Cavalry and system of forts strategically built along the way. Eventually, the remaining tribes were subdued and rounded up and placed on worthless lands in the most remote areas that were not coveted by the steady stream of western bound settlers, ranchers, farmers, traders, and gold hungry prospectors.

Parenthetically, the only tribes that seemed to escape the onslaught were tribes off the beaten track in the southwestern part of the country. To this day, the Pueblos, the

Navajos and other tribes were not on lands that were especially coveted and remain to this day largely intact.,

A new era began after the 1830's. Reservations were no longer seen as smaller land bases for tribes on their traditional homelands. The federal government established Indian reservations for the seclusion of Indian people who managed to survive the wars and the devastation of their communities. These reservations could be anywhere.

Phase III. Policy of Allotments and Assimilation (1871- 1928)

The decline in tribal life because of the cessation of prime land and the devastation that was wrought onto their communities became the new rationale for further interference with the Indians. But now the interference was internal.

Indian people were confined, impoverished, psychologically broken, sick and hungry, their political, social and economic systems destroyed by their conquerors. Instead of accepting responsibility for the deteriorated condition of the tribes, the reformers came up with a new rationale. They argued that their lack of self-sufficiency was due to the Indian's outdated and inappropriate traditions and values that were more suited to a nomadic way of life dependent on hunting and fishing. Now, locked away on reservations, their survival would depend on adopting the white man's way of life and becoming farmers and herders.

This was a definite departure from General Andrew Jackson's promise to the tribes that they would be able to retain their identity and pursue their unique way of life. Reservations were no longer seen as "sanctuaries" for Indians to pursue their own way of life. Non-intervention was no longer seen as the best way of "civilizing" the Indians. An aggressive new approach was adopted. They were to be "assimilated."

In 1879 the Dawes Allotment Act was passed by Congress. It divided Indian reservations into 160 acre parcels that were then assigned or allotted to individual members to farm. They acquired these lands in fee title. What was not needed for distribution was sold as "surplus land". As a result of the Allotment Act, **over two-thirds (2/3) of all Indian lands then in their possession were sold out from under the tribes.**

Shrinking the reservation in this way was motivated by two separate goals: (1) the West was filling up and this was a way to get more land for settlement (i.e., respond to local pressure from non-Indians), and (2) it was a way to end "tribalism" which was characterized by communal ownership of the tribal land and loyalties to family, clan and tribes instead of to the needs and aspirations of single individuals. Making everyone a farmer and type of independent entrepreneur was seen as a way of liberating Indians from the shackles of communal loyalties.

During this period the Federal Bureau of Indian Affairs became more and more intrusive and began to regulate every aspect of tribal life. Tribes became truly a dependent people looking almost exclusively to the federal government to take care of their needs.

BIA run Boarding Schools became a primary tool in “civilizing” the Indians and a deliberate attempt to tear them loose from their families and their traditional values, beliefs and behaviors. Children were taken from their homes and transported to far away locations up to twelve years. They were forced to cut their hair, wear the white man’s clothes, speak his language, eat his food, worship his religion, and adopt his belief systems. This proved to be an extremely effective strategy when trying to destroy a culture that is transmitted orally – just remove one generation and break the lines of communication.

Phase IV. The Period of Indian Reorganization (1928-1945)

In the 1930’s, with the election of President Franklin Delano Roosevelt, **the federal government reversed its former policy of assimilation and dissolution.** Under Department of Interior Secretary Harold Ickes and Assistant Secretary of Indian Affairs John Collier, New Deal reformers sought to revive tribal governments and tribes’ former ability to take care of themselves as a community.

With the passage of the Indian Reorganization Act (1934), the federal government came up with a template that standardized the structure and functions of tribal government. Whether or not tribes had a preexisting form of government, and most of them did, they were encouraged to adopt an IRA Constitution.

The reformers believed that the tribe itself, organized as a self-governing community, was better equipped to deal with the outside influences of the dominant society. A by-product of the IRA was better control and management of tribal property. Some IRA funds were used to reacquire much of the previously allotted lands. With a renewed land base some livestock cooperatives and tribal farming enterprises arose.

It is undeniable that the standard “one fits all” cookie cutter solution greatly simplified the federal government’s effort to relate to and manage hundreds of separate sovereign Indian nations. Now tribes would have an elected leadership that was recognizable and could legitimately speak for the tribe as a whole. They could be relied on to represent the tribes in their transactions with federal agencies

It is also undeniable that the federal government was trying to restore the integrity of their relationship with the tribes by creating an internal democratic process that would ensure some semblance of self-determination. It would have the familiar trappings, including: (1) regular elections of the tribes’ leaders every two years, (2) a representative form of government, (3) decisions by majority, (4) the principle of “one man, one vote”, (5) provisions for removing elected leaders, and (6) a centralized governing structure that concentrated full authority in the elected Tribal Council.

Nonetheless, it is also undeniable that the constitutions that were imposed embodied principles that were not always “culturally appropriate” and easily accepted by the leadership and membership. Traditionally, tribes did not elect leaders, they were chosen,

trained and replaced by elders according to their wisdom and long acquired expertise. Leaders earned their positions, they did not acquire them through popularity contests. Decisions were made by “consensus”. Instead of creating “winners” and “losers” through “majority rule”, decisions were designed to work for everyone. This was much less divisive. Instead of giving the power to single individuals to determine the fate of the tribe, traditional societies gave the power to families, clans and villages that were responsible for certain aspects of tribal life.

Today in Indian country, many tribal members still do not accept the legitimacy of their IRA governments. They still are foreign implants that the body politic wants to reject. Too often there is little agreement on a common vision, behavioral norms and values, and the right way of doing things. Many tribes are trying to reform their constitutions to more accurately fit their values and needs.

Phase V. The Termination Period (1945-1961)

A turnaround in congressional policy towards Indians began in the early 1940’s with a call to repeal the IRA and to move away from the encouragement of tribal self-government as the official federal policy. The Hoover Commission issued its Report on Indian Affairs, recommending “complete integration” of Indians so that they would move “into the mass of the population as full, taxpaying citizens.”

Some saw this as a form of emancipation. The status of Indians as wards of the Government would end and they would be granted all the rights and prerogatives pertaining to American citizenship.

This shift in policy was consistent with a policy to reduce the power of the federal government under the Eisenhower Administration that carried with it large Republican majorities in both the Senate and the House. Some people felt there was something “un-American about the idea of reservations. It was inconsistent with what people perceived as the successful integration of many other minority groups throughout the history of the United States.

Tribal land belonging to terminated tribes was taken out of trust and sold off to the highest bidder. Enrolled tribal members whose whereabouts were known were compensated. The federal government was taken out of the equation and states now had jurisdiction and the responsibility. State legislative and judicial authority was imposed. Tribal programs available only to federally recognized tribes were no longer available to terminated tribes and individuals.

The termination program was implemented in the 1950’s and proved to bring many things other than “freedom” to Indian country. Though now formally repudiated by the federal government, the memory of termination of over a hundred tribes (109) across the country by Congress and Washington bureaucrats lingers for Indian leaders today. **It stands “as a chilling reminder that Congress can unilaterally extinguish the special**

status and rights of tribes without Indian consent and without even hearing Indian views.”

“The best example of other assimilationist legislation during the termination era is Public Law 280, passed in 1953, in which Congress took the unprecedented step of passing general legislation extending states the opportunity to opt for civil and criminal jurisdiction in Indian country.

Phase VI. The Era of Self-Determination (1961--Present)

The crises in Indian country that resulted from the threat of termination ended up rallying the Indian leadership throughout the country and drove home the realization that tribes had to begin to act collectively to protect and promote their sovereignty. The National Congress of American Indians (NCAI) was organized in the mid-1940's. It convened an emergency conference in Washington in 1954 to protest Congress's move toward termination.

This was the beginning of Indian activism which began to break the pattern of psychological and physical dependence on the federal government. It received a tremendous impetus from the Civil Rights Movement and the growing awareness of the miserable plight of minority populations. Spirited by the African American community in the south, Indians were also the beneficiaries of some massive studies of poverty in America and new Congressional legislation designed to empower the disenfranchised.

The War on Poverty and the Great Society legislation initiated by President Kennedy and passed under the direction of President Johnson, provided tribes and other minority populations with millions of dollars of new funds to organize their communities, and provide health, human and educational services to their members under the direction of their own community organizations, leaders and members.

A new sensitivity to the conditions and rights of native people was orchestrated by Indian legal assistance programs that hired well-educated young lawyers who were able to provide free legal counsel and representation to tribes. For the next twenty years, the courts became the major battle grounds between the tribes and the federal government.

In 1968, President Johnson delivered a special message to Congress entitled: “the Forgotten Americans” —the first special message by any President to Congress solely on Indian affairs. In 1970, President Nixon issued a landmark statement calling for a new federal policy of “self-determination” for Indians. The “melting pot” philosophy so long popular in America, the land of the assimilated immigrants, was abandoned in favor of respecting the right of different peoples to be different—and to be self-determining.

The Indian Self-Determination Act (PL 94-638) left it up to an Indian tribe whether it was willing and able to assume administrative responsibility for a service program being administered by a federal agency. It had now the option to take over the control and

operation of federally funded schools, Indian Health clinics and hospitals, and all “bureau programs” real; estate, economic development, etc.

This was followed by an unprecedented volume of Indian legislation enacted at the behest of tribes or at least with their participation. This included the Indian Child Welfare Act (1978), the American Indian Religious Freedom Act of 1978, the Indian Land Consolidation Act of 1991, the National Indian Forest Resources Management Act, the Indian Mineral Development Act (1982), the Tribally-Controlled School Grants Act (1988) the Indian Education Act of 1988, the Tribally Controlled Community College Assistance Act, and the Native American Graves Protection and Repatriation Act (NAGPRA) etc.

In addition, since the 1970’s Indian tribal governments also have been more frequently incorporated with the general legislative and regulatory framework of the federal system. For example, Congress has treated tribes as states for purposes of several major federal environmental statutes. New laws gave the tribes primary authority to enforce the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, etc.

CONDITIONS IN CALIFORNIA

California was officially made the 31st state of the United States in 1850 after the Treaty of Guadalupe Hidalgo in 1848 was negotiated with Mexico and it relinquished its rights to the southwest. Before that Indians were under the jurisdiction and care of the Mexican government. It is commonly agreed that Mexico treated the Indian far better than the average American citizen or local and state government of the 1800’s and early 1900’s. In fact, it has been suggested that the Indians in California were mistreated worse than in any other area of the country. Given the dismal record elsewhere this should be “mind-boggling”.

The Mexican government exercised its authority over California at arms length. It lacked the resources and interest to exert much direct control. This left the Catholic Church during Mexican hegemony a relatively free rein “to win the hearts and minds of their local Indians” by building a string of Spanish Missions up and down the coast of California. These Missions were built by Indian slave labor and became the launching pads for the resident clergy to convert and “civilize” the indigenous Indian tribes. Today, we still have over thirty southern California tribes that call themselves a Band of Mission Indians, as the Pala Band of Mission Indians, the Morongo Band of Mission Indians, or the San Manuel Band of Mission Indians.

The new state of California became the primary destination spot for thousands of new farmers, ranchers, traders, prospectors, adventurers, misfits and malcontents who arrived daily to create a new life and carve out their fortunes. Lured by a mild climate, abundant water, fertile farm land and a rich resource base, the newcomers clearly believed that they would find the new land of “milk and honey”. The discovery of gold in the Sierra

Foothills in the 1840's just exacerbated the fierce and often chaotic competition for the land and resources.

Indian people in California were organized into hundreds of relatively small yet very independent tribes and bands. They each had their own language or dialect, and distinct culture. They had little tradition of warfare and were extremely vulnerable to foreign aggression. Their problems defending themselves were compounded by the fact that California was a new state that lacked the institutions and processes for self-government and law enforcement. It was truly the "wild west" where "might made right" and the most vulnerable had to pay the highest price.

Unfortunately, it was the Indian people who suffered unimaginable cruelty and injustice in this context of lawlessness. In 1850, a series of laws were passed in the state which reveals their plight. The *Act for the Government and Protection of Indians* (1850) passed by the first legislature "facilitated the removal of Indians from their traditional lands, separated at least a generation of children and adults from their families and cultures, enslaved Indian children to Whites, and punished "vagrant" Indians by "hiring them out to the highest bidder. There was one prominent Amendment to decrease the whipping punishment for Indians from 100 to 25 lashes. This legislation stayed on the books until 1937 when it was repealed in its entirety.

Article VII of the California Constitution gave the Governor the power "to call for the militia, to execute the laws of the state, to suppress insurrections, and repel invasions." These militias were formed primarily to send expeditions to exterminate the Indians. From 1851 to 1859 the state of California launched some 26 expeditions and incurred claims for more than \$1.3 million from private citizens who served on these expeditions. There were well documented massacres of entire villages during this period and bounty hunters were able to get cash reimbursement from the state government for every ear of a dead Indian they turned in.

Where was the federal government during this time? From 1851-1852 the U.S. Indian Commissioners, acting on behalf of the United States, negotiated 18 treaties with California Indian tribes. "The treaties negotiated by the Indian Commissioners reserved to the Indians approximately 7.5 million acres of land, representing about 7 ½ percent of the State of California. The land set aside was highly controversial. The Special Committee on the Disposal of Public Land formed by the state legislature opposed the ratification of these treaties, predicting that it would "be utterly impossible to prevent the continued collisions between the miners and the Indians" if the Indians enjoyed such "exclusive privileges".

In 1852, the California Senate and Assembly voted to notify the California Senators in Washington D.C. to oppose the ratification of the treaties and the "contemplated permanent disposal of a large portion of our mineral and arable land to the Indians." The treaties were rejected by the U.S. Senate in secret session and did not reappear in the public record until 1905 when an injunction of secrecy was removed.