



## **Tribal Sovereignty and Treaty Making**

In this brief, NAPTAC explores what sovereignty is, how and why it applies to federally recognized tribes, what sovereignty means to Indian nations, and key points to remember.

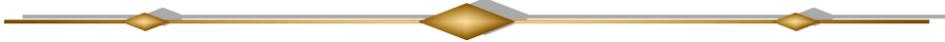
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### **Suggested citation**

Butterfield, R. (2016). *Tribal sovereignty and treaty making*. Albuquerque, NM: Education for Parents of Indian Children with Special Needs (EPICS).

# Tribal Sovereignty and Treaty Making



In this brief, NAPTAC explores what sovereignty is, how and why it applies to federally recognized tribes, what sovereignty means to Indian nations, and key points to remember. In a companion brief, we will discuss how outreach to Native tribes can be adjusted to remain in keeping and in accord with the reality of Native sovereignty.

## What is tribal sovereignty?

The Myriam-Webster Dictionary defines *sovereignty* as “a country’s independent authority and the right to govern itself.”<sup>1</sup> The term can be applied to a variety of entities such as states, federally recognized tribes, and nations.

A **federally recognized tribe** is an American Indian or Alaska Native tribe that is documented as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that status. Federally recognized tribes are also recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States.<sup>2</sup> At present, there are 567 federally recognized American Indian and Alaska Native tribes and villages.<sup>3</sup>

What is often not fully realized about Native sovereignty is that tribes have an ***inherent right*** to be recognized as individual sovereign nations. They were governing their lands and themselves before the United States was even founded. The U.S. Constitution clearly acknowledges this when it gives Congress the power to regulate commerce with foreign nations, among states, and with Indian tribes. Article I: Commerce Clause, Section 8 of the Constitution reads:

“The Congress shall have the power to lay and collect taxes, Duties, Imposts and Excises, to pay debts and to provide for the common defense and general Welfare of the Unites States; but all Duties, Imposts and Excises, shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations’ and among several states and with the Indian tribes...”<sup>4</sup>

Tribal sovereignty has been retained in treaties and re-affirmed multiple times by the U.S. Supreme Court and through Federal law and case law. For example, in 1832, Supreme Court Chief Justice John Marshall described the tribes’ unique status and special relationship to the U.S. government, ruling that Indian tribes were “distinct, independent political communities” that had the right to govern their own affairs.<sup>5</sup> Thus, “Indian tribes have all the powers of self-government of any sovereignty” except where those powers “have been modified or repealed by act of Congress or treaty.”<sup>6</sup>

### How did treaty making affirm tribal sovereignty?

In general, treaties are formal negotiated agreements between nations. Each party in a treaty takes on certain responsibilities and obligations in exchange for specific benefits. Treaties are legally binding on both parties. In the United States by the authority of the Constitution, treaties are considered the supreme law of the land.

American Indian tribes and the U.S. government negotiated and signed 371 treaties between 1778 and 1871. These treaties set forth how the relationship between tribes and the newly established United States would operate from that day forward. Included was “the right to continue governing themselves. This means that their sovereign rights are *retained*, not granted” (*emphasis added*).<sup>7</sup>

The U. S. government stopped making treaties with tribes in 1871. After 1871, negotiations with tribes continued as before but were labeled as “agreements,” not treaties. These agreements recognized rights as well as liabilities that were virtually identical to treaties.

#### Periods of Treaty Making

Treaty making fell into distinct periods that reflect, from the federal government’s perspective, the motivations for the treaties:

- Colonial treaties | 1600-1776
- Early treaties of alliance or peace | 1778-1810
- Beginning land cessions | 1784-1817
- Civil War treaties | 1861-1865
- The “Great Peace Commissions” | 1865-1868
- End of treaty making | 1871

### How did tribes benefit from treaties?

The treaties made between Indian tribes and the U.S. government were binding land contracts or grants of rights to the U.S. by tribes. Through treaty making, tribal rights were expressly retained, expressly relinquished, or expressly *not* relinquished. In exchange for the loss of vast lands and natural resources, **tribes were guaranteed certain protections and services**. Among these were health and social services, economic development, and education. Tribes reserved to themselves a place to live and hunt and gather certain foods, some in off-reservation lands “in their usual and accustomed places.”

Indian lands are sometimes called “restricted lands” because they cannot be sold or leased without the federal government’s approval. Tribes continue to receive select benefits from those treaties today.

### **How did the United States benefit from treaties?**

Since 1600, the U.S. has received benefits from those same treaties. The treaties gave to the federal government millions and millions of acres of land, water, timber, and minerals. These lands became the basis for economic development. Lands relinquished by tribes were sold to settlers, lumbermen, mining interests, speculators, and others. Vast tracts of these ceded lands are also in the public domain (e.g., national forests and parks). The money received by the federal government was used to pay off the national debt and to finance government operations.

### **What is the trust relationship?**

A contractual or “trust” relationship exists between Indian tribes and the U.S. government and began during the treaty-making period. The federal government became a manager, or trustee, over remaining Indian lands by holding unceded reservation areas in trust for tribal use and benefit.

Like sovereignty, the “trust relationship” was clarified by the Supreme Court in another Marshall decision. He ruled that the continuing relationship between the U.S. and Indian people resembled that of a guardian and ward.<sup>8</sup> The Court clarified that tribes were distinct from foreign nations in that they were “domestic dependent nations” that existed within the boundaries of the U.S., and that the federal government should assist them while still recognizing their sovereign rights.

### **Why is sovereignty important to understand when working with tribes and tribal members?**

An understanding of tribal sovereignty is key to understanding many issues involving tribes and individual American Indians. Sovereignty is a political, legal status. It sets Indians apart from all other ethnic and racial groups within the United States.

As sovereign nations, federally recognized Indian tribes have the lifelong right to govern themselves. Remember this fact when conducting outreach to Native American tribes and when providing Parent Center services to Native parents whose children have disabilities, whether they live on the reservation or in rural or urban areas.

Understanding the concept of sovereignty helps all who interact with tribes recognize that each tribal government is a distinct entity with unique authority. Because tribes have different languages and customs, they may have established **independent protocols** for determining many aspects of tribal members’ lives, including education. This means that, from tribe to tribe, the rules and customs of Indian society and government may vary.

## Key Points to Remember:

- Sovereignty is the right of an entity to govern itself.
- Sovereignty sets Indians apart from all other ethnic and racial groups within the United States.
- The U. S. Supreme Court has ruled that tribes are “distinct, independent, political communities.”
- Indians are entitled to the benefits of this special trust relationship with the federal government due to legal and political agreements known as treaties.
- Treaties are binding legal documents.
- Treaties did not give sovereignty and lands to Indians. Treaties only recognized these rights as pre-existing and inherent.
- Treaties often set aside off-reservation rights—in other words, Indian rights to hunt, fish, and gather foods in usual and accustomed places.
- Treaties protected the tribes’ rights to maintain their tribal ways and to manage their internal affairs.
- Dealings between the federal government and Indian tribes gave rise to a “trust” relationship between the two entities.
- Indian lands are sometimes called “restricted lands” because they cannot be sold or leased without the federal government’s approval.

## References

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<sup>1</sup> Merriam-Webster Dictionary. (2016). *Simple definition of sovereignty*. Online at: <http://www.merriam-webster.com/dictionary/sovereignty>

<sup>2</sup> U.S. Department of the Interior, Indian Affairs. (2016, November). *Frequently asked questions*. Washington, DC: Author. Online at: <http://www.bia.gov/FAQs/>

<sup>3</sup> National Conference of State Legislatures. (2016, October). *Federal and state recognized tribes*. Washington, DC: Author. Online at: <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx>

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<sup>4</sup> U.S. Constitution. (1787). *Article I: Commerce Clause, Section 8*. Online at: <http://www.annenbergclassroom.org/page/article-i-section-8>

<sup>5</sup> U.S. Supreme Court, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Online at: <https://supreme.justia.com/cases/federal/us/31/515/case.html>

<sup>6</sup> Cohen, F. (1941). The scope of tribal self-government. *The Handbook of Federal Indian Law* (Chapter 7, p. x). Washington, DC: U.S. Government Printing Office. Online at: <http://thorpe.ou.edu/cohen/cohenintro2.pdf>

<sup>7</sup> Native American Caucus of the California Democratic Party. (n.d.). *Tribal sovereignty: History and the law*. Sacramento, CA: Author. Online at: <http://www.nativeamericancaucus.org/content/tribal-sovereignty-history-and-law>

<sup>8</sup> *Cherokee Nation v. Georgia*, 30 U.S. 5 Pet. 1 1 (1831). Online at: <https://supreme.justia.com/cases/federal/us/30/1/case.html>



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