

Appendix O: Tribal Relations

Native American Intergovernmental Affairs: Modoc National Forest, Tribal Relations Program

Origins of Native American Intergovernmental Affairs

The United States and the 562 federally recognized tribes share a unique relationship whose foundation lies in the earliest history of this country.⁷ The settlement of the New World began with Native American tribes possessing a clear strategic advantage over the 13 colonies, both militarily and economically; consequently, early American treaties with Indian tribes emphasized both tribal sovereignty and property rights.⁸ Also, treaties were intended to deter foreign powers from forging alliances with Native Americans on U.S. promises of protection and trade.⁹ Good relations with Indian tribes were paramount to American foreign policy since tribes protected U.S. western and southern borders from European aggressors similar to what the Warsaw Pact did for the U.S.S.R. in the 20th century.¹⁰ The practice of treaty making continued as the country reconstituted itself under the United States Constitution in 1787.¹¹ Over 371 treaties were negotiated with Native American tribes by special commissioners acting on behalf of the President and under oversight by the War Department until 1849; subsequently, oversight was transferred to the newly established Department of the Interior.¹² The U.S. Senate continued to ratify Indian treaties between 1787 and 1871, which “under the Authority of the United States shall be the supreme Law of the Land.”¹³ Treaties are superior to state constitutions and state laws.¹⁴ The U.S. House of Representatives protested their exclusion over the Indian treaty-making process by passing the Indian Appropriations Act of 1871. The action prevented Congress from entering into any treaties with Indian tribes (25 U.S.C. § 71).¹⁵

⁷ Federal Register, Department of the Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs (Washington, D.C.: U.S. Government Printing Office, Volume 73, No. 66, 2008), 18553.

⁸ Charles Wilkinson, *Indian Tribes as Sovereign Governments*, 2nd ed. (Oakland: American Indian Lawyer Training Program, 2004), 93.

⁹ *Ibid.*, 93-96; *Johnson v. M'Intosh*, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823).

¹⁰ Wilkinson, *Indian Tribes as Sovereign Governments*, 93-94.

¹¹ Yale Law School, “The Avalon Project—Documents in Law, History and Diplomacy,” under “Report of Proceedings in Congress; February 21, 1787,” http://avalon.law.yale.edu/18th_century/const04.asp (accessed October 14, 2008).

¹² The National Archives, “Records of the Committee on Indian Affairs, 1820-1946,” under “Chapter 12. Records of the Committee on Interior and Insular Affairs and Predecessor Committees, 1816-1968,” <http://www.archives.gov/legislative/guide/senate/chapter-12-indian-affairs.html#1-41> (accessed October 14, 2008).

¹³ U.S. Constitution, in article 2, section 2, President “shall have the power, by and with the advice and consent of the Senate to make Treaties, provided two thirds of the Senators present concur,” and article 6.

¹⁴ *Worcester v. State of Georgia*, 31 U.S. 515 (1832).

¹⁵ Wilkinson, *Indian Tribes as Sovereign Governments*, 97.

The Source of Federal Trust Responsibilities

As non-Indian populations dramatically increased coupled with industrial revolutionary technological advances and the War of 1812, Indian tribes suffered a shift in the balance of power that favored the United States; consequently, Congress increased their use of treaties as instruments for massive land concessions from American Indians.¹⁶ Land concessions obligated the nation to tribes when aboriginal territories were exchanged for U.S. promises set forth in treaties.¹⁷ The obligation is known as, “the doctrine of trust responsibility,” was first articulated in a U.S. Supreme Court opinion of Chief Justice John Marshall.¹⁸ The Honorable John Marshall created two distinctions. Firstly, Chief Justice Marshall limited the sovereign status of Indian tribes by designating all tribes as “domestic dependent nation.”¹⁹ Lastly, federal trust responsibility is drawn from the reference, “Their (Indian tribes) relation to the United States resembles that of a ward to his guardian.”²⁰ The Honorable Frank Murphy, Justice on the U.S. Supreme Court, further distinguished trust responsibility in his opinion to the Court in 1941:

In carrying out its treaty obligation with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with Indians, should therefore be judged by the most exacting fiduciary standards.²¹

Again, fiduciary responsibilities are based upon treaties, which are, “not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted.”²²

Forest Service Trust Responsibilities

The USDA Forest Service, Southwest Pacific Region (Region 5), Modoc National Forest, is an agency of the federal government, whose obligation toward Native American tribes is governed by trust responsibility and where, “any Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes.”²³ The scope of these trust responsibilities are defined by the Constitution, Congress, courts, the executive branch, and statutes to protect and maintain the lands, resources and traditional use areas of Indians.²⁴ Presently, the Modoc National Forest consists of 1,979,407 acres of which 1,654,392 acres are administered by the Modoc National Forest, which includes portions of the aboriginal homelands for six federally recognized tribes, which are as follows:

Alturas Indian Rancheria, California; and

¹⁶ Wilkinson, *Indian Tribes as Sovereign Governments*, 93-96.

¹⁷ *Ibid*, 53.

¹⁸ *Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831).

¹⁹ Mary Christina Wood, “Origins and Development of the Trust Responsibility: Paternalism or Protection?” [paper presented at the Federal Bar Association-28th Annual Indian Law Conference, Albuquerque, NM, April 10, 2003]

²⁰ *Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831)..

²¹ *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1941).

²² *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

²³ *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981).

²⁴ *U.S. v. Mitchell*, 463 U.S. 206 (1983); U.S. Department of Agriculture. 2008. Prepared by the Office of the General Council. Departmental Regulation: *Policies on American Indians and Alaska Natives [March 14, 2008]* No. 1340-007.

Cedarville Rancheria, California; and
 Fort Bidwell Indian Community of the Fort Bidwell Reservation of California; and
 Klamath Tribes, Oregon (formerly the Klamath Indian Tribe of Oregon); and
 Modoc Tribe of Oklahoma; and
 Pit River Tribe, California (includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek and Roaring Creek Rancherias); and
 Susanville Indian Rancheria, California.²⁵

Also, the Modoc National Forest includes the indigenous territories of two federally unrecognized tribes, which are as follows:

The Shasta Tribe, Inc.; and

The Shasta Nation, Inc. (Confederated Bands of the Shasta and Upper Klamath River Indians).²⁶

Brief on Selected Tribes of the Modoc National Forest

Modoc Tribe of Oklahoma

The Modoc Tribe of Oklahoma were followers of Keintpoos ‘having the water-brash’ who is commonly known as Captain Jack.²⁷ The nation belonged to the amalgamation of tribes that signed the 1864 Treaty of Klamath Lake, Oregon with the Klamath, Modoc, and Yahooskin Band of Snake Indians.²⁸ The refusal of Captain Jack to remain on the Klamath reservation led to the Modoc War of 1872-73, which ended in the execution of Keintpoos on October 2, 1873, and the relocation of 153 Modoc men, women, and children to the Quapaw Agency in Oklahoma.²⁹ The Eastern Shawnee purchased 4,000 acres of trust land for the Modoc in 1874; however, Modoc populations dwindled to 99 natives by 1879 and only 68 Modoc were eligible to receive allotments following the passage of the General Allotment Act of 1887.³⁰ The U.S. Congress authorized the remaining Modoc survivors to return to the Klamath Tribes, Oregon, on March 3, 1909, but many remained or returned to Oklahoma.³¹ Upheavals in national Indian policy prevailed following the Hoover Commission, Indian Reorganization Act of 1934, and World War

²⁵ Federal Register, Department of the Interior, Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs (Washington, D.C.: U.S. Government Printing Office, Volume 73, No. 66, 2008), 18553; Modoc National Forest, “About Us: Forest Facts,”

<http://www.fs.fed.us/r5/modoc/about/index.shtml> [accessed October 29, 2008].

²⁶ Dan Meza, “Tribal Contact Information of the Modoc National Forest,” Modoc National Forest [March 30, 2008].

²⁷ Keith A. Murray, *The Modocs and Their War* [Norman: University of Oklahoma Press, 1959], 35. “The leader of the Modoc group who adjusted best to the new ways in Yreka was *Keintpoos*, dubbed, for a joke, by Judge Steele as ‘Captain Jack’ because of an alleged resemblance to one of the miners of that community.”; Access Genealogy-Indian Tribal Records, “Modoc Indian Chiefs and Leaders,”

<http://www.accessgenealogy.com/native/tribes/modoc/modocindianchiefs.htm> [accessed October 29, 2008].

²⁸ “Treaty with the Klamath, etc., 1864,” October 14, 1864, 16 Stats., 707., Ratified, July 2, 1866, Proclaimed February 17, 1870, *Indian Affairs: Laws and Treaties. Vol. II (Treaties)*. Compiled and edited by Charles J. Kappler. Washington: Government Printing Office, 1904, http://www.fws.gov/Pacific/ea/tribal/treaties/Klamath_1864.pdf [accessed October 29, 2008].

²⁹ Murray, *The Modocs and Their War*, 304, 318.

³⁰ Patricia Shruggs Trolinger, “The History of the Modoc Tribe of Oklahoma,” Modoctribe.net. <http://www.modoctribe.net/history.html> [accessed October 29, 2008].

³¹ Chapter 253, Mar. 3, 1909. [H. R. 16743.] [Public, No. 306.] 35 Stat., 751. Section 5; Trolinger.

II with federal trust responsibility being utilized as an instrument against tribes. The enactment of Public Law 83-280 on August 15, 1953, facilitated the termination of both the Klamath and Modoc Tribes.³² Again, Federal Indian policy revolved when President Richard Milhous Nixon repudiated the former Indian policy of termination with his address to Congress on July 8, 1970.³³ President Nixon introduced a new Indian policy of Self-Determination, which continues to be followed today. The Modoc Tribe of Oklahoma acted on this new policy and was recognized as a tribe on May 15, 1978.³⁴ The Modoc tribe remains the only federally recognized entity with traditional cultural properties in the national forest that is without the jurisdictional concerns of Public Law 83-280.

Pit River Tribe, California (Includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek and Roaring Creek Rancherias)

The Modoc National Forest encompasses portions of the Pit River Tribe, which is one of five California tribes and one Oregon tribe of the national forest whose tribal jurisdictions are subject to Public Law (P.L.) 83-280.³⁵ The passage of P.L. 83-280 authorized state criminal jurisdiction over Indians and non-Indians in the mandatory states of California, Minnesota, Nebraska, Oregon and Wisconsin with Alaska as the 6th state; moreover, P.L. 83-280 transferred criminal jurisdiction to those mandatory states without tribal consent between 1953 and 1968.³⁶ Non-mandatory states or optional states could enact P.L. 83-280 by legislative action; however, the law was amended in 1968 to where tribes must provide consent.³⁷

The switch to state jurisdiction also meant a decline in potential tribal control over law enforcement because tribes under Public Law 280 could not take advantage of the 1975 Indian Self-Determination Act to contract with the BIA [Bureau of Indian Affairs] for the administration of their own law enforcement services.³⁸

The Pit River Tribe, California, and 106 tribes of California have not requested the state to retrocede their jurisdiction back to the United States; furthermore, all California tribes are subject to P.L. 83-280.³⁹ Public Law 83-280 is an example of Congress utilizing federal trust responsibility as an instrument to assimilate tribes, which convolutes issues of tribal, federal and state jurisdiction within the Modoc National Forest. The late President Richard M. Nixon redirected American Indian policy to Self-Determination, which Congress enacted as Public Law (P.L.) 93-638, the Indian Self-Determination and Education Assistance Act of 1975.⁴⁰ P.L. 93-638 provides federal government-to-government authorities for agencies to contract with tribes;

³² Public Law **83-280**, August 15, 1953, codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. § 1321–1326; 25 U.S.C. 564.

³³ Environmental Protection Agency. Presidential Documents, “President Nixon, Special Message on Indian Affairs,” [July 8, 1970] <http://www.epa.gov/tribalportal/pdf/president-nixon70.pdf> [accessed on October 29, 2008].

³⁴ 25 U.S.C. 861a; U.S. Government Accountability Office, Report: “Indian Issues: BLM’s Program for Issuing Individual Indian Allotments on Public Lands Is No Longer Viable,” GAO-07-23R BLM Indian Allotments, [October 20, 2006] 16.

³⁵ Wilkinson, *Indian Tribes as Sovereign Governments*, 126; Public Law (P.L.) 83-280, August 15, 1953, codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. § 1321-1326.

³⁶ Garole Goldberg, J.D., Duane champagne, Ph.D., “Final Report: Law Enforcement and Criminal Jurisdiction Under Public Law 280,” [November 1, 2007], vi, 3.

³⁷ *Ibid.*, vi.

³⁸ *Ibid.*, 6.

³⁹ Garole Goldberg, J.D., Duane champagne, Ph.D., “Final Report: Law Enforcement and Criminal Jurisdiction Under Public Law 280,” [November 1, 2007], 9.

⁴⁰ P.L. 93-638, Approved January 4, 1975 (88 Stat. 2203).

however, those authorities are limited by statute to the Department of the Interior and Department of Health and Human Services.

The Pit River Tribe, California, was federally recognized by the Secretary of the Interior through an Act of Congress on August 13, 1946.⁴¹ The tribe is a confederation of eleven bands as follows, under a constitution adopted in 1964:

- | | | |
|-------------|--------------|----------------|
| 1. Ajumawi | 5. Atwamsini | 9. Kosealekte |
| 2. Astariwi | 6. Hammawi | 10. Madesi |
| 3. Aporige | 7. Illmawi | 11. Hewisedawi |
| 4. Atsugewi | 8. Itsatawi | |

The traditional cultural properties of the tribe are described as the 100-mile square by the Pit River Tribe, which were based upon natural boundaries of mountains and watersheds; however, exact boundaries that was offered as evidence to the Indian Claims Commission was not specific, according to the commission.⁴³ Nevertheless, tribal trust land and fee patent land of the Pit River Tribe, California, lies within or abuts the boundaries of the Modoc National Forest; therefore and pursuant to Executive Order 13175, the national forest maintains a government-to-government consultation agreement with the tribe to assist the agency’s execution of its’ federal trust responsibility.⁴⁴ The Pit River Tribal Council was advised by the Modoc National Forest to close roads under the agency’s Travel Management Guidelines during a scheduled consultation held on Wednesday, 3 September 2008.⁴⁵ Irvin Brown, Tribal Councilman-Kosealekte Alternate, stated during the meeting that the plan was acceptable provided that road closures not impede tribal members from accessing sacred sites or traditional cultural properties.⁴⁶

Klamath Tribes, Oregon

The Klamath Tribes, Oregon, is subject to state jurisdiction under Public Law 83-280, where, “state or county law enforcement replaced the Bureau of Indian Affairs police, and state criminal trials largely replaced those carried out by the federal government.”⁴⁷

⁴¹ Indian Claims Commission, No. 347, *The Pit River Indians of California, Petitioners v. The United States of America*, Defendant, Smithsonian Institution [August 11, 1951], 1.

⁴² Pit River Tribe, Tribal Contact List, [January 22, 2008]; Native American Rights Fund, “National Indian Law Library,” [1964] <http://doc.narf.org/nill/Constitutions/pitconst/pitriverconst.htm>. [accessed October 29, 2008].

⁴³ Indian Claims Commission, No. 347, [August 11, 1951], 21-22.

⁴⁴ Memorandum of Understanding Regarding a Communication and Consultation Protocol between USDA Forest Service, Modoc National Forest, Lassen Shasta-Trinity National Forest, and Lassen National Forest and the Pit River Tribe [May 4, 2007].

⁴⁵ Modoc National Forest, Tribal Relations Program, “Government-to-Government Consultation Standard Form” [Wednesday, 3 September 2008].

⁴⁶ Ibid.

⁴⁷ Garole Goldberg, J.D., Duane champagne, Ph.D., “Final Report: Law Enforcement and Criminal Jurisdiction Under Public Law 280,” [November 1, 2007], 3,9.

Federal Statutes Relevant to American Indian Tribes

Table 3.11-14. Federal Laws Relevant to Native American Concerns on National Forest Management

Law	Purpose
National Environmental Policy Act of 1969	Requires consideration of effects on cultural values and diversity.
American Indian Religious Freedom Act of 1978, as amended in 1994	Protects Indian religious practices and access to sacred sites.
Federal Land Policy and Management Act of 1976	Coordinates with Indian tribes to inventory, plan, and manage resources of value to tribes.
National Historic Preservation Act of 1976	Accounts for impacts of management on prehistoric and historic sites.
Archeological Resources Protection Act of 1979, as amended in 1992	Protects archeological resources and requires that affected tribes be notified if archeological studies might harm or destroy culturally or spiritually important sites.
Native American Graves Protection and Repatriation Act of 1990	Requires consultation with tribes about disposition of Native American remains, funerary objects, and other cultural relics.