

Indian Treaties as Contracts

By Robert J. Miller



The United States government, from its very inception, continued the English and colonial strategy of dealing with the Indian tribal nations on a government-to-government basis through treaty making. The federal government entered into more than 400 treaties with various Indian tribes from 1778 to 1871. In these treaties the United States negotiated cessions of land, recognized other areas of land called “reservations,” which the tribes reserved to themselves, and respected the self-governing powers of tribes. Even though Congress ended treaty making with tribes in 1871, the preexisting treaties are still in effect and contain promises that bind the United States today. In fact, under our Constitution, treaties are “the supreme Law of the Land.” The United States has continued to deal with the tribal nations on a political basis up through modern times.

The Indian nations negotiated treaties from a position of strength until the early 1800s. The newly formed United States faced internal problems and external conflicts with European countries and could not afford war with Indian tribes. Hence, early treaty making between the United States and tribes was often favorable to the tribes. After the War of 1812,

The Medicine Creek Treaty was signed at this spot on December 26, 1854. The site lies in Thurston County, along McAllister Creek—known to the Indians as Medicine Creek.



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though, and the relaxing of the European threat against the United States, the weakening position of tribes led to more one-sided treaty negotiations in favor of the United States.

People often misunderstand the nature of treaties and the reservations that were formed by many treaties and the promises made therein. Native governments and peoples were not given rights or land by the United States but instead, through political and contract-like negotiations, tribes arranged a trade of rights with the United States. The United States Supreme Court has referred to Indian treaties as contracts between sovereign nations, and in one case, the Court referred to “the contracting Indians.” In 1905, the United States Supreme Court stated that treaties were not

a grant of rights to Indians but were a reservation by the tribes of rights that they already owned. Thus, through treaty making, tribes gave up certain rights to land and assets in exchange for payments, promises, and protection from the United States.

Treaty rights are often hotly contested issues because they are sometimes perceived as “special rights” for Indians. Treaty

rights, however, are not for Indians in general but are tribe-specific and apply only to the citizens of the signatory tribe to the specific treaty in question. A good example of specific treaty rights can be found in the Pacific Northwest treaties that preserved salmon, ocean, and shellfish fishing rights for the tribes that entered into the treaties with the United States. These treaty rights do not apply to Indians in general, yet they have been vigorously opposed by state officials, and the issue of tribal treaty rights is constantly in the news. The treaties of the Pacific Northwest tribes are also a good example of the operation of treaties as contracts and the analysis that the Supreme

Court applies to interpreting treaties.

The treaties that affect salmon and Columbia River fishing rights were negotiated in the mid-1850s. At that time neither Oregon nor Washington was a state; instead, they were United States territories. The tribal population in this region outnumbered white trappers and settlers by more than four to one. The tribes possessed aboriginal title to the area. These tribal nations had not been defeated in war nor had they ceded their lands to the United States. The tribes were independent sovereigns controlling, ruling, and living on their own land. Nonetheless, the United States directed Governor Isaac Stevens of Washington Territory to negotiate treaties with the Northwest tribes in order to secure land concessions that would allow further American settlement in this area. Stevens negotiated treaties with the Puget Sound tribes and

Close. See KLOSE.

Cly. v. English. *To cry.*

Cole, adj. English, COLD. Cole illahie, *winter*; icht cole, *a year*; cole sick waum sick, *the fever and ague.*

Comb, n. English. *A comb.* Mamook comb, *to comb*; mamook comb illahie, *to harrow.*

Cooley, v. French, COUREZ, imp. of COURIR. *To run.* Cooley kiuatan, *a race-horse*; yahka hyas kumtuks cooley, *he can*, i. e., *knows how to run well.*

Coop-coop, n. Chinook, idem. *The smaller sized dentarium or shell money.* See HYKWA.

Co'sho, n. French, COCHON. *A hog; pork.* Siwash cosho, *a seal*; literally, *Indian pig.*

Cul'tus, adj. Chinook, KALTAS. *Worthless; good for nothing; without purpose.* Ex. Cultus man, *a worthless fellow*; cultus pot-latch, *a present or free gift*; cultus hechee, *a jest*; merely laughing; cultus namitsh, *to look around*; cultus mitlite, *to sit idle*; *to do nothing*; cultus klatawa, *to stroll.* *Ques.* What do you want? *Ans.* Cultus, i. e., *nothing.*

D.

De-lâte, or **De-létt,** adj., adv. French, DROITE. *Straight; direct; without equivocation.* Ex. Klatawa delett, *go straight*; delett wauwau, *tell the truth.*

Di-áub, or **Yaub,** n. French, DIABLE. *The devil.* Sometimes used combined with the article, as LEJAUB.

D'ly, or **De-ly,** adj. English, DRY. Chahko dely, *to become dry*; mamook dely, *to dry*, v. a.

Doc'tin, n. English. *A doctor.*

Dol'la, or **Táh-la,** n. English. *A dollar; money.* Chikamin dolla, *silver*; pil dolla, *gold*; dolla siághost, *spectacles.*

E.

Eh-káh-nam, n. Chinook, EKANAM. *A tale or story.* Used only on the Columbia river. Often erroneously pronounced Ay-keh-nam.

Eh-ko-li, n. Chinook, ÉKOLI. *A whale.*

Ee'na, n. Chinook, IINA. *A beaver.* Eena stick (literally, *beaver wood*), *the willow.*

This page from an early Chinook-English dictionary demonstrates the limited vocabulary of the Chinook jargon and its inadequacy as a language used to conduct treaty negotiations.

court decision interpreting these treaties followed Supreme Court precedent from 1905 and allowed members of tribes that signed these treaties to cross private property to harvest shellfish as their treaty guaranteed.

Stevens also negotiated treaties regarding the Columbia River watershed with tribes at present-day Walla Walla, Washington, in June 1855. The four tribes that possess these treaty rights today are the Confederated Tribes of the Warm Springs, the Confederated Tribes of Umatilla Indians, the Confederated Tribes and Bands of the Yakama Indian Nation, and the Nez Perce Tribe. These tribes traded their ownership of 64 million inland acres for the right to retain reserved areas (reservations) for their exclusive use and to reserve the right to fish on and off their reservations at their "usual and accustomed stations in common with citizens of the United States." When the United States Senate ratified these treaties in 1859, they became the supreme law of the land, and the tribes had thus reserved their property rights to salmon in the Columbia River watershed and a property right to use their usual and accustomed fishing sites to carry out this treaty-protected right.

Treaties have many similarities to contracts and have often been treated as such by the courts. As in contract law, courts try to interpret treaties to achieve the intent of the parties. The unique aspect of interpreting Indian treaties, however, arises from the recognition of the disadvantaged bargaining position that Indians often occupied during treaty negotiations. One such disadvantage was that treaty negotiations were not conducted in their own language. Hence, courts narrowly interpret treaty provisions that injure tribal interests. This analysis is similar to the judicial treatment of "adhesion contracts." An adhesion contract is one that was not fairly bargained for by the parties and in which one party was operating from a much weaker position than the other party. In such instances, courts will not interpret the contract or treaty against the interests of the weaker party.

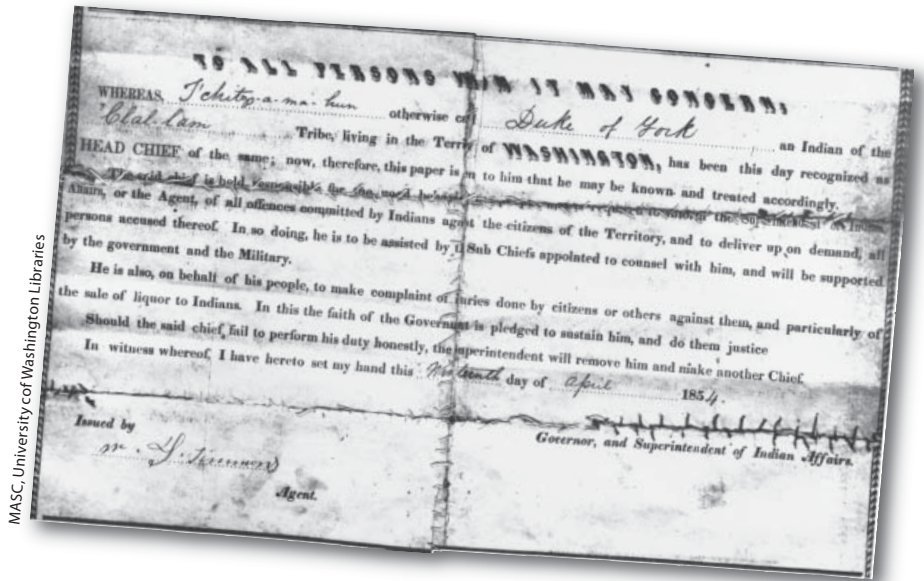
The suspect manner in which many Indian treaties were negotiated has led the Supreme Court to develop special rules of "construction" or interpretation that favor tribes in interpreting treaties. Indian treaties receive a broad construction or reading in favor of the signatory tribe by mixing principles of international treaty construction with contract principles. Courts resolve ambiguous expressions in a treaty in favor of the tribe since the United States drafted the treaties and they were in English, which very few tribes spoke or read; courts interpret treaties as the tribes themselves would have understood the terms used in the treaty and during the negotiations. Courts also factor in the history and circumstances behind a treaty and its negotiations in interpreting the treaty's express provisions. The language used in treaties should never be construed to a tribe's prejudice.

There is good reason for judicial deference to the Indian side of treaties and close scrutiny of the negotiations of many Indian treaties. The United States and its negotiators themselves often selected who was to be the "chief" of the tribe they would negotiate with; often United States negotiators bribed and unduly influenced tribal negotiators with gifts and/or alcohol; the United States often was represented by attorneys while the tribes were obviously not so represented; and, of course, the treaties were written in English. Governor Stevens engaged in this very conduct in negotiating the Pacific Northwest Indian treaties with the help of his Harvard-trained lawyer, Lieutenant George Gibbs. The tribes had no legal representation. Also, Stevens was known to avoid the actual leaders of a tribe and instead would himself choose tribal representatives for the negotiations. Stevens offered bribes or "gifts" to Indian negotiators who signed treaties and refused to give gifts to Indians who did not sign the treaties. He was accused by his own men of badgering, coercing, and hurrying tribes to sign treaties. Under contract theory, contracts or treaties negotiated and agreed to in this manner would not be enforceable due to undue influence, unequal bargaining position, and the absence of arms-length bargaining.

In addition, the treaties negotiated by Stevens with Puget Sound and Columbia River tribes were written in English, which of course the Indians did not speak or read. In some instances Stevens used an interpreter who spoke the Chinook jargon. Some of the Indians spoke Chinook jargon, but it was a language totally inadequate for negotiating the technical and legal terms and provisions of treaties. The Chinook jargon contained no more than 300 to 500 words and was a slang mixture of English, French, and Indian words. It could not possibly have conveyed the full meaning and intent of the United States and the tribes

The United States government attempted to control which Native American leaders would participate in the treaty negotiations. Hereditary leaders deemed more receptive to United States policy were given certificates such as this one, which formally named them as head chief.

The certificate indicates, "Should the said chief fail to perform his duty honestly, the superintendent [of the office of Indian Affairs] will remove him and make another Chief."



regarding the provisions of the Columbia River and Puget Sound treaties.

The Supreme Court has directly addressed the Stevens treaties in at least seven different cases since 1905—including *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977)—and has consistently upheld the treaties and interpreted their provisions in favor of the signatory tribes. Consequently, these treaties contain the binding, contractual, and still effective promises of the United States to recognize the tribes' right to live undisturbed on their own reservations and to avail themselves of the rights guaranteed in the treaties. In these treaties, the tribes reserved to themselves the right to fish for salmon, and the United States promised to provide certain benefits such as health care, education, and financial payments to pay for the lands the tribes ceded to the United States. The promises contained in these treaties are still the supreme law of the land and, along with the hundreds of other Indian treaties signed by the United States, are guarantees the federal government must keep to fulfill its promises to Indian people.

As with any contract, both parties must fulfill the promised terms or suffer the legal consequences. The United States, then, must fulfill the treaty promises it made to Indian tribes. As one Supreme Court justice stated in regard to Indian treaties: "Great nations, like great men, should keep their word."

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