

**Native Diplomacy: Treaties and Federal Indian Law
(LDST 390-03 and PLSC 379)**

Instructor: David E. Wilkins
Class Time: Tuesdays 3:00-5:40
Location: Jepson 107
Email: dwilkins@richmond.edu
Office Hours: Tuesdays 10-12
Phone: 804-287-6494

Description:

Indigenous Nations have long engaged in diplomatic arrangements with one another, foreign nations, colonial/state governments, and the United States. Such political engagements affirm the inherent political sovereignty of Native nations and provide them with distinctive rights and powers unique to these peoples. Of course, these diplomatic accords were also the means used to forge friendships, end wars, cede vast amounts of lands, create reservations, address other rights and resources, etc.

This course will cover the following: 1) the history of Native nation treaty-making; 2) the legal and political status of these treaties, accords, agreements, and negotiated settlements; 3) doctrines of interpretations of diplomatic arrangements; and 4) problem areas in Indigenous/state diplomacy and ambiguous areas in treaty litigation that serve to distort the development of a cohesive body of law in this critical area.

Required Readings:

You may purchase the following two books at the bookstore (or elsewhere, if you desire):

Martin Case, *The Relentless Business of Treaties: How Indigenous Land Became U.S. Property*

Francis P. Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley, CA: University of California Press, 1994).

The following books will be on reserve (but if your budget allows and you plan to continue work in this field you can find them online through various sources)

Vine Deloria, Jr. and Raymond DeMallie, ed's & comp., *Documents of American Indian Diplomacy*, 2 vol's (Norman: University of Oklahoma Press, 1999).

Charles Kappler, comp. *Indian Treaties: 1778-1883* (Mattituck, NY: Amereon House, 1972).

Additional Readings are also required. These will be available through Blackboard

Course Requirements:

[Note: There are two websites where you can quickly access ratified Indian treaties if you cannot get to the hard copy of Kappler. Check <http://www.narf.org> - This is the official site of the Native American Rights Fund) and see <http://thorpe.ou.edu> (University of Oklahoma). At the Oklahoma website go to “treaties” to find a digital version of Kappler’s treaty collection. View www.digitreaties.org and www.treaties.okstate.edu/treaties/ for more data.

U.S. Supreme Court opinions can be accessed at <http://www.law.cornell.edu/supct/index.html> or the official government site at <https://www.supremecourt.gov>. The library also has Lexis/Nexis where you can also find the court cases and other legal materials. The Law School is another possible option.

The following two websites contain useful Native legal and statutory materials <https://indianlaw.org/> (This is the official site of the Indian Law Resource Center. It is a good source for international political and legal materials related to indigenous peoples, both domestic and abroad); and see <https://www.loc.gov/collections/> (This is a good cite for early U.S. legal materials and other useful data. See, in particular, law library, federal courts web archive, and indigenous law web archive).

Expectations of all students: Active qualitative and quantitative participation, weekly questions, short comparative paper, and a major research paper.

Participation: As a seminar your active participation is welcomed and expected. Three unexcused absences and you will be administratively dropped from the course. Active participation constitutes **20%** of your final grade.

Weekly Questions: Each week in advance of class every student will submit two essay length questions based on the readings for that week. **These will be due no later than Monday 9:00am.** This assignment will indicate to me and your colleagues that you have done the required reading and will let us all know that you have thought critically and analytically about the materials. Typically, we will read a few of these at the beginning of each class as a way to generate discussion. Pitch these questions as if you were the instructor looking to gauge my knowledge of the materials read. Each question should address key issues raised in the week’s readings, but please incorporate other ideas or information you’ve gleaned from other sources or classes. The first question should use a **comparative perspective** when the readings allow for that. In other words, I want to see that you are capable of analyzing the various diplomatic accords, court cases, and arguments and methods laid out in these complex political, historical, and legal documents. The second question may be about anything you find important or curious in the works read in a given week. These questions constitute an important part of your final

grade (20%). Remember: format these questions as if **you** were the instructor quizzing **me** on the readings for that week.

This exercise will help you focus on the readings and sharpens critical thinking. Because you will have already analyzed the materials, you will be better prepared for class and more confident about engaging in substantive discussions.

Note: *I will generally not make extensive comments on these each week, other than to indicate that I have received them.* They are primarily a means for me to see that you're fully engaged with all the readings and for you to exercise your critical writing skills. I want you to express your ideas confidently, but your comments must be based in knowledge, not raw opinion.

Always bring a hard copy of your questions to class. Please feel free to contact me at any time about this aspect of the course.

Briefings: Each student will have multiple opportunities to lead the discussion of various materials read during the semester. This will be your opportunity to instruct me and your colleagues as to what you consider to be the most important elements in a given reading. Feel free to utilize whatever approach you feel is most germane to guiding the discussion on your particular assignment. This task will constitute **20%** of your final grade.

Research Paper: You will write a major (20 page) research paper relating to one of the seminar's themes, concepts, or aspects as it affects a specific Indigenous nation's diplomatic history or some other aspect of the political and legal status of treaties. I must approve your paper topic. The paper must present an original perspective on a particular diplomatic accord. It must reflect high standards of scholarly writing in terms of substance and style. The thrust of your paper should meet two major goals: 1st) provide a good historical analysis of the Native nation(s) involved in the treaty, as well as a description of who was doing the negotiating for the other party (another tribe, a European power, colony/state, federal officials) and 2nd) describe what motivated each of the parties to join the accord, what was the compensation or other concessions (if any), who were the major players in the treaty. Depending on the accord chosen, it is possible to do what lawyers refer to as a Sheppard's analysis of the treaty (if you are doing a tribal/U.S. treaty or agreement) to determine the legal validity of the treaty's provisions today.

You must turn in a 1-page description of your proposed topic to me no later than **September 13th**. I will review your proposal to ensure that your topic is appropriate, manageable, and that there are sufficient available resources to carry it through. Your paper must be typed, double-spaced, and copiously documented using legitimate published sources. By published sources I mean books, government documents, court cases, refereed journal articles, etc. Your paper must also include a lengthy bibliography of works cited. **Any paper not meeting these basic standards will be given a failing grade.** Online materials such as professional news sites, interviews, journals, and podcasts are acceptable as long as they are properly sourced and cited. A paper lacking a sufficient amount of quality sources will be returned unread.

Use either Kate Turabian's *A Manual for Writers of Term Papers, Theses, and Dissertations*, 7th ed; the *Chicago Manual of Style*, or Gibaldi's *MLA Handbook for Writers of Research Papers*, and rely exclusively on one of these to properly format your paper. Regardless of which guide book you use, use **footnotes, not endnotes** to document your work.

Your paper is due in class on **November 29th** [Note: I do not accept abbreviated - less than 20 pages - or late papers unless an act of God is involved. Computer failure the night before the due date does not constitute an act of God! Incomplete grades are rarely granted.] This paper constitutes **40%** of your final grade.

I am available to read completed drafts of your paper provided I receive it **two weeks** before it is due.

The scale of grades is the typical, albeit imperfect, 10-point system: 97-100 = A+; 94-96 = A; 90-93 = A-; 87-89 = B+; 84-86 = B; 80-83 = B-, etc.

Honor System: One of your most important jobs as a research writer is to document your use of source material carefully and clearly. Failure to do so will create confusion, reduce the effectiveness of your paper, and perhaps make you vulnerable to a charge of plagiarism. Plagiarism is the use of someone else's words or ideas without proper credit. It includes quoting directly without acknowledging the source; paraphrasing without acknowledging the source; and constructing a paraphrase that closely resembles the original language and syntax (Scott and Garrison, 1995: 85). The Jepson School upholds the provisions of the Honor System. Violations of this system is serious and egregious and the perpetrator will be subject to any one or combination of the following sanctions: Report to the Honor Council, loss of credit for the work involved, reduction in grade, or a failing grade for the course.

<http://studentdevelopment.richmond.edu/honor/>

Computers and Cell Phones: These devices **may not** be used during class unless you have a documented academic accommodation that requires computer usage. If that is the case, please contact me so that we can properly address your situation.

Disability Accommodations: Students with a Disability Accommodation Notice should let me know as soon as possible so that we may discuss arrangements for assignments and participation. Additional information may be found at <http://disability.richmond.edu>

Class Protocols, Respect and Civility: I have a somewhat formal approach to teaching based in respect for the way I was raised, learning, and the privacy of students. Therefore, I will address you by your last name and ask that you let me know your preferred honorific, such as Ms., Mr., or Mx. Like most people of my generation, I am still learning and getting accustomed to more inclusive identifications and will do my best to address everyone appropriately.

Other Expectations: Besides the above requirements, the only other expectation I have is that you be punctual and regularly attend class. If you have three (3) unexcused absences you will be

administratively dropped from the course.

As you can see, I expect a high level of intellectual discussion each time we meet. It also behooves you to take copious notes of the readings. A **hi-liter** does only that, it **hi-lites**. Retention of the material usually requires pages of detailed notes which should be made for every treaty, book, article, or case you read.

Finally, I reserve the right to add or delete readings from those listed below since new scholarship is always coming out. Also, I do not assign extra-credit projects, I do not loan my notes, and I do not use a curved grading system.

COURSE OUTLINE & READINGS

A. Introduction

B. Theoretical, Political/Legal, & Historical Perspectives on Indigenous Diplomacy

READ:

Vine Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," *Arizona Law Review*, vol. 31, no. 2 (1989): pgs. 202-223.

Vine Deloria, Jr. and Raymond DeMallie, *Documents of American Indian Diplomacy*, vol. 1 (Norman, OK: Univ. of Oklahoma Press, 1999): Introduction, pgs. 3-5.

Felix S. Cohen, *Handbook of Federal Indian Law*, reprint ed. (Albuquerque, NM: Univ. of New Mexico Press, 1972): Chapter 3, pgs. 33-46.

Francis P. Prucha, *American Indian Treaties* (Berkeley, CA: Univ. of California Press, 1994): Preface and Introduction, pgs. 1-19.

Vine Deloria, Jr. "Treaties," in Mary B. Davis, ed. *Native Americans in the Twentieth Century: An Encyclopedia* (NY: Garland Publishing, Inc., 1996): pgs. 646-649.

Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law & Peace, 1600-1800* (NY: Oxford University Press, 1997): Introduction and Chapters 1 & 2, pgs. 3-61.

Martin Case, *The Relentless Business of Treaties: How Indigenous Land Became U.S. Property* (St. Paul, MN: Minnesota Historical Society, 2018): Introduction, pgs. 3-12.

C. History of Indigenous Diplomacy

a. Diplomacy between Native nations

READ:

Black Elk (edited by Joseph Epes Brown), *The Sacred Pipe* (Norman, OK: Univ. of Oklahoma Press, 1953 [1989]): Read Chapter 6 “Hunkapi: The Making of Relatives,” pgs. 101-115.

Vine Deloria and Ray DeMallie, *American Indian Diplomacy*, vol. 1 (1999): Chapters 1 and 12.

b. Colonial, Foreign and Early U.S. Treaties with First Nations

READ:

Vine Deloria and Ray DeMallie, *American Indian Diplomacy*, vol. 1 (1999): Chapter 2, read pgs. 12-15 and read at least 5 treaties; Chapter 3, read pgs. 103-110 and read several treaties between tribal nations and Great Britain, Spain, and Mexico.

Felix S. Cohen, *Handbook of Federal Indian Law* (1972): Chapter 3, pgs. 46-48.

Dorothy Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago, IL: Univ. of Chicago Press, 1982): Chapters 1 & 2.

Francis P. Prucha, *American Indian Treaties* (1994): Chapters 1 & 2.

c. Constitutional Era First Nation Diplomacy

READ:

Vine Deloria and Ray DeMallie, *American Indian Diplomacy* (1999): Chapter 4 (in vol. 1) and read Chapter 15 (in vol. 2), pgs. 1084-1085, and several selected treaties involving the Iroquois and other First Nations.

Francis P. Prucha, *American Indian Treaties* (1994): Chapters 3-6.

Felix S. Cohen, *Handbook of Federal Indian Law* (1972): Chapter 3, pgs. 48-53.

Treaty with the Delaware, Sept. 17, 1778, 2 Kapp. 3.

Treaty with the Cherokee, Nov. 28, 1785, 2 Kapp. 8.

Treaty with the Six Nations, Jan. 9, 1789, 2 Kapp. 23.

Treaty with the Seven Nations of Canada, May 31, 1796, 2 Kapp. 45.

Martin Case, *The Relentless Business of Treaties* (2018): Chapters 1-3.

d. Removal Era Treaties

READ:

Francis P. Prucha, *American Indian Treaties* (1994): Chapters 7 & 8.

Felix S. Cohen, *Handbook of Federal Indian Law* (1972): Chapter 3, pgs. 53-62.

Martin Case, *The Relentless Business of Treaties* (2018): Chapter 4.

(Southeastern Nations):

Treaty with the Cherokee, July 8, 1817, 2 Kapp. 140.

Treaty with the Choctaw, Sept. 27, 1830, 2 Kapp. 310.

Treaty with the Creek, March 24, 1832, 2 Kapp. 341.

Treaty with the Cherokee, Dec. 29, 1835, 2 Kapp. 439.

Treaty with the Choctaw and Chickasaw, Jan. 17, 1837, 2 Kapp. 486.

(Northern Nations):

Treaty with the Seneca, Feb. 28, 1831, 2 Kapp. 325.

Treaty with the Kickapoo, Oct. 24, 1832, 2 Kapp. 365.

Treaty with the Shawnee, Oct. 26, 1832, 2 Kapp. 370.

Treaty with the Chippewa, etc., Jan. 14, 1837, 2 Kapp. 482.

e. Western Treaties

READ:

Francis P. Prucha, *American Indian Treaties* (1994): Chapters 9 & 10.

Felix S. Cohen, *Handbook of Federal Indian Law* (1972): Chapter 3, pgs. 62-64.

Martin Case, *The Relentless Business of Treaties* (2018): Chapter 5 & 6.

Treaty with the Navajo, Sept. 9, 1849, 2 Kapp. 583.

Treaty of Ft. Laramie with Sioux, etc., Sept. 17, 1851, 2 Kapp. 594.

Treaty with the Comanche, Kiowa, and Apache, July 27, 1853, 2 Kapp. 600.

Treaty with the Nisqualli, Puyallup, etc., Dec. 26, 1854, 2 Kapp. 661.

Treaty with the Wyandot, Jan. 31, 1855, 2 Kapp. 677.

Treaty with the Makah, Jan. 31, 1855, 2 Kapp. 682.

f. Civil War and Post-War Treaties, 1861-1871.

READ:

Vine Deloria and Ray DeMallie, *American Indian Diplomacy* (1999): Chapter 11 (read p. 587 and at least four treaties) and Chapter 6 (in vol. 1).

Francis P. Prucha, *American Indian Treaties* (1994): Chapters 11-13.

Felix S. Cohen, *Handbook of Federal Indian Law* (1972): Chapter 3, pgs. 64-67.

Treaty with the Choctaw and Chickasaw with the *Confederate States of America*, 1861.

Treaty with the Chippewa, Mississippi, etc., May 7, 1864, 2 Kapp. 862.

Treaty with the Klamath, Oct. 14, 1864, 2 Kapp. 865.

Treaty with the Sioux, Lower Brule= Band, Oct. 14, 1865, 2 Kapp. 885.

Treaty with the Choctaw and Chickasaw, April 28, 1866, 2 Kapp. 918.

Treaty with the Sioux, Brule, Oglala, etc., April 29, 1868, 2 Kapp. 998.

Treaty with the Navajo, June 1, 1868, 2 Kapp. 1015.

D: Distinctive Aspects of Indigenous Diplomacy - The Good, the Bad, and the Bizarre

READ:

Vine Deloria and Ray DeMallie, *American Indian Diplomacy*, vol. 1 (1999): Chapter 5 “Valid Treaties,” pgs. 181-182, skim pgs. 183-201, read pgs. 202-end of chapter.

_____, *American Indian Diplomacy*, vol. 2 (1999): Chapter 14, “Treaties and Agreements Rejected by Indian Nations” (Select several; skim the rest).

_____, *American Indian Diplomacy*, vol. 2 (1999): Chapter 13, “Treaties and Agreements Rejected by Congress” (read pgs. 745-746 and select several from specific tribes).

_____, *American Indian Diplomacy*, vol. 1 (1999): Chapter 8, “Railroad Agreements” (read pgs. 514-517 and selected agreements).

_____, *American Indian Diplomacy*, vol. 2 (1999): Chapter 18, “Miscellaneous Treaties,” (read all).

_____, *American Indian Diplomacy*, vol. 1 (1999): Chapter 9, “Settlement Acts” (read all).

E: Doctrines of Interpretation: General Treaty Concepts (nature and grounds of obligations, power to make, negotiation and ratification, modification or abrogation, construction of language, time of taking effect, conflict between treaties and other organic laws)

[Note: The Supreme Court decisions can be found at one of the sites mentioned earlier. The other federal cases have been placed on reserve at the library, though you may also be able to find these via Lexis/Nexis or at the Law School]

READ:

Missouri v. Holland, 252 U.S. 416 (1920).

U.S. ex rel. Goodwin v. Karnuth, 74 F. Supp. 660 (1947).

In re Nepogodin’s Estate, 285 P.2d 672 (1955).

F: Doctrines of Interpretation: Status of Treaties

READ:

Turner v. American Baptist Missionary Union, 24 Fed. Cas. 344 (1852).

Holden v. Joy, 84 U.S. (1872).

U.S. v. Winans, 198 U.S. 371 (1905).

Roy v. United States, 45 Ct. Cls. 177 (1910).

Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449 (1998).

McGirt v. Oklahoma, 591 U.S. ____ (2020)

G: Doctrines of Interpretation: Construction & Interpretation of Indian Treaty Language

READ:

Heidi K. Stark, “Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty-Making with the U.S. and Canada,” *American Indian Quarterly*, vol. 36, no. 2 (Spring 2012): pgs. 119-149.

The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).

Jones v. Meehan, 175 U.S. 1 (1899).

Seufert Brothers Co. v. U.S., 249 U.S. 194 (1919).

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

Washington State Department of Licensing v. Cougar Den, 586 U.S. ____ (2019).

H: Doctrines of Interpretation - Abrogation (Explicit & Implicit)

READ:

David E. Wilkins, “The Reinvigoration of the Doctrine of ‘Implied Repeals:’ A Requiem for Indigenous Treaty Rights,” *The American Journal of Legal History*, vol. XLIII, no. 1 (Jan. 1999): 1-26.

Cherokee Tobacco Case, 78 U.S. (11 Wall.) 616 (1871).

Ward v. Race Horse, 163 U.S. 504 (1896).

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

Menominee Tribe v. U.S., 391 U.S. 404 (1968).

Montana v. United States, 450 U.S. 544 (1981).

I: Wrapping Up - Treaties: Today and Tomorrow

READ:

Francis P. Prucha, *American Indian Treaties* (1994): Chapter 17 “Treaty Rights Activism.”

Vine Deloria, Jr., *Behind the Trail of Broken Treaties* (Texas Press, 1974, 1985): Chapter 12 “Reinstituting the Treaty Process” and “Afterword.”

Colin G. Calloway, *Pen & Ink Witchcraft: Treaties and Treaty Making in American Indian History* (NY: Oxford University Press, 2013): Conclusion: The Death and Rebirth of Indian Treaties, pgs. 226-244.

Larry Nesper, “Twenty-five Years of Ojibwe Treaty Rights in Wisconsin, Michigan, and Minnesota,” *American Indian Culture and Research Journal* 36, 1 (2012): 47-77.

David E. Wilkins, “International Indigenous Diplomacy in the 21st Century,” (a chapter in my forthcoming book, *Indigenous Governance: Clans, Constitutions, & Consent*).