

The absent American Indian treaties: 2013 update

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Abstract

In three earlier studies, those American Indian treaties that had not been cited before any federal court were identified. Over this sequence of evaluations, the number of these documents declined from 84 to 80. This brief note establishes five additional treaties that have appeared in presentations to these jurisdictions, thereby reducing the absent treaty number to 75, or 20% of the entire suite of 375 transactions recognized by the federal government.

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Article I, section 8, clause 3 of *The Constitution of the United States* (2004, p. 168) states that “[t]he Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Since the end of treaty making with the tribes on 3 March 1871 (16 *Stat.* 544, 566), the development of a fundamental judicial perspective that all rights were reserved by the tribes, except for those specifically granted through treaties, has led to abundant litigation.¹ Many such suits have taken place within a federal venue. Indeed, the sheer number of these appearances has been exacerbated by the perceived difficulties adhering to a collection spanning 375 recognized treaties (*Ratified Indian Treaties, 1722-1869*, 1966).

Three previous summaries have identified the instances of those compacts that have evaded legal discussion under the federal mantle. The initial list consisted of 84 entries, which was reduced to 81, and subsequently to 80 absent instruments (Bernholz, 2001; Bernholz, 2002; and Bernholz and Weiner, 2008, respectively). Investigations conducted in February 2013 – by submitting the appropriate *Statutes at Large* notation for each of these 80 remaining items to the legal search engines of the *Lexis-Nexis Academic* and the *Westlaw Campus Research* databases – unveiled an additional five acknowledged treaties mentioned in the proceedings of some federal arena.

The name of each of these interactions appears below, denoted by Kappler’s title for it (Kappler, 1904)² and linked to its full text found in the Oklahoma State University digital collection of [Kappler’s Indian Affairs: Laws and Treaties](#) (see Bernholz and Holcombe, 2005). These data are supplemented by the document’s *Statutes at Large* address and by the pertinent court case that engaged it. The two Court of Claims cases – *Labadi v. United States* and *Moore*

v. United States – went undetected in past pursuits because the current standard format of their *Statutes at Large* treaty references was not used in the original court reports. Thus, today’s 7 *Stat.* 255 and 12 *Stat.* 1163 were instead recorded in the nineteenth century *Labadi* and *Moore* opinions as “7 Stat. L., 255” and “12 Stat. L., 1163.” The two cases emerged because the *West* headnotes contained the modern *Statutes* renditions.

The referrals to these five recognized American Indian treaties reduce the number to 75 documents that remain absent from accounts of events before any federal court:

- [*Treaty with the Mohawk, 1797*](#) – 7 *Stat.* 61 – *Canadian St. Regis Band of Mohawk Indians v. New York* (2003);
- [*Treaty with the Ponca, 1825*](#) – 7 *Stat.* 247 – *Elk v. United States* (2009);
- [*Treaty with the Cheyenne Tribe, 1825*](#) – 7 *Stat.* 255 – *Labadi v. United States* (1896);
- [*Treaty with the Stockbridge and Munsee, 1839*](#) – 7 *Stat.* 580 – *Wisconsin v. Stockbridge-Munsee Community* (2004);³ and
- [*Treaty with the Arapaho and Cheyenne, 1861*](#) – 12 *Stat.* 1163 – *Moore v. United States* (1897).

References

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

Wisconsin v. Stockbridge-Munsee Community, 366 F. Supp. 2d 698 (2004).

¹ The Supreme Court stated in *United States v. Winans* (1905, p. 381; emphasis added) that the [*Treaty with the Yakima, 1855*](#) “was not a grant of rights to the Indians, but a grant of right *from* them – a reservation of those not granted.”

² These transactions appear in Kappler’s volume, beginning on page 50, 225, 232, 529, and 807, respectively.

³ This Stockbridge and Munsee instrument was published in the *Statutes at Large* a second time, at 11 *Stat.* 577, but the *Wisconsin v. Stockbridge-Munsee Community* case located through the use of 7 *Stat.* 580 as the search term was not returned by a similar application of the later citation.