NEWS, UPDATES AND VIEWS TO OUR ENROLLED TRIBAL MEMBERS OF AN INDIAN ORGANIZATION

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INTRODUCTION

As you read this today, I believe you already know that Indians and tribes are not bound to or by the U.S. Constitution, the supreme law of the land. Our inherent sovereignty and jurisdiction ("law expression") predates the U.S. Constitution. Our rights, privileges and immunities do not emanate from the U.S. Constitution or from Congress through laws, rules and regulations, but from our ancient Tribal Code which are often acknowledged by the federal government with a dash of seasoning.

You may ask: a) How then are we protected?; b) How do we exercise, invoke, or enforce our rights?; c) Who will protect us?; d) Should we protect ourselves with our own standing army?

To answer these obvious questions and concerns, we have to peek into the past to see where we stood then, and we stand today as Indians and tribes in the helter-skelter, hodge-podge, willy-nilly matrix of treaties, statutes, courts decisions, administrative rules, regulations, decisions, opinions, and Executive Orders which have developed into what we term as ***federal Indian law.***

The beginning of the awareness of American Indian rights dawned with Felix S Cohen's *Handbook of Federal Indian Law* which he wrote in 1942 after his appointment as Special Assistant to the Attorney General in 1939 to direct an "Indian Law Survey." Associate Justice Felix Frankfurter of the U.S. Supreme Court wrote in a Foreword to Cohen in *Dialogue on Private Property*, 9 RUTGERS L. REV. 355, 356 (1954) that:

"*Only a ripe and imaginative scholar with a synthesizing faculty would have brought luminous order out of such mishmash. He was enabled to do so because of his wide learning in the various fields of inquiry which are relevant to so-called technical legal questions. Learning would not have sufficed. It requires realization than any domain of law, but particularly the intricacies and peculiarities of* ***Indian law****, demanded an appreciation of*

history and understanding of the economic, social, political and moral problems in which the more immediate problems of that law are entwined."

Cohen's *Handbook* is an invaluable source for understanding the issues facing federal Indian policy. Senator Sam Ervin, recognizing the unevenness of the playing field, commented in 1968 while supporting the revision and updating of Cohen's *Handbook* that:

"*For most Americans claiming deprivation of some right afforded them under the laws and treaties of the United States, it is a simple matter to have an attorney look up the law and court interpretations thereof, and to bring suit based on the result of such legal research. For the* ***American Indian such a solution is difficult because of the inadequacy and sometimes even the total absence of legal documents***." (114 CONG. REC. 394 of 1968).

The Handbook of Federal Indian Law: The first edition of this great compendium was published in 1942 with periodical revisions over the years as federal Indian law developed and morphed to tackle the 21st century issues faced by Indians and tribes. This is the go-to book for reference, solutions and remedies because federal Indian law has been uncertain, inconsistent and flexible depending on the composition of the Executive, the Congress and the U.S. Supreme Court. Some administrations have been kind and favorable, others could not come to terms with inherent tribal sovereignty, while others simply miscast us "uncivilized savages." The fact that these "uncivilized savages" had tribal governments and constitutions is lost somewhere in the axiom that "*Government, to an American, is the science of his political safety.*" (George Clinton, "Letters to Cato,"(1787), Letter No.1, reprinted in Paul Leicester Ford, Essays on the Constitution of the United States (Brooklyn, N.Y.: 1892))

So, are we Indians considered Americans in the strict sense of the word? The text of the **1924 Indian Citizenship Act** (43 U.S. Stats. At Large, Ch. 233, p. 253 (1924) "Snyder Act")) reads as follows:

BE IT ENACTED by the Senate and house of Representatives of the United States of America in Congress assembled, That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

Nice, we are U.S. citizens. We did not demand it. What good is it to us because we are not represented in Congress. No seats are apportioned to us by legislative imperatives. The Constitution excluded us as did legislation. Why is the government so petrified in giving us representation in Congress as a distinct political community just like Whigs, Federalists, Republicans and Democrats are deemed eligible to sit in Congress after being voted in? We can get voted in, too. from our tribes, clans, bands and nations. We are almost 1.2 million strong now.

HISTORY

Recorded history is unequivocal that we were the original owners of the land and soil. We were here first. Thousands of years ago, some tribes were into agriculture; others were hunters, trappers, fishermen and gatherers; others simply made war with one another while engaging in the lucrative business of plunder whenever they found victims.

Then came the explorers, adventurers, pirates and looters in their fancy ships financed by some European kings, queens and popes. The arrival of these easterners changed the social, cultural, political and economic dynamics of Indians and tribes.

The foundation for federal Indian law was laid long before the formation of the Republic. Indian rights predate the U.S. Constitution. The basic concepts of original Indian title and tribal sovereign status originated as principles of **16th century international law** in the writings of scholars such as Francisco de Victoria. See F. Victoria, *De Indis et de Jure Belli Relectiones* 128 (J. Bate trans. 1917) (orig. ed. 1557). Hugo Grotius and Emmerich Vattel contributed vast and expansive scholarly works of the tribal political communities in the New World.

Suddenly, Indians and tribes found themselves governed by strange outlandish laws and customs through rules and regulations that had no relevance in wilderness societies. Adjustment, acculturation aimed at assimilation was difficult if not impossible. It can best be summed up in the words of Peter Graves of Red Lake testifying in "Hearings, Readjustment of Indian Affairs", 219, House Committee on Indian Affairs, 73rd Congress, 2nd Session (1934):

The older people . . . expect their young people to have a home. From which place they can go out into the world, and if the world is too fast for them they will have a place to return when they seek refuge. That was the intention of the old chiefs.

THE SITUATION TODAY

Long acquiescence in some practice by the government does not render it constitutional. Fairbank v. U.S., 181 U.S. 283, 307 (1901); Marshall Filed & Co. v. Clark, 143 U.S. 649, 691 (1892). However, some practices must be given great weight. Cohens v. Virginia, op. cit., at 418; The "Genessee Chief" v. Fitzhugh, 12 How.443, 458 (1852); Burrow Giles Litho. Co. v. Sarony, 111 .S. 53, 57 (1884).

The government has relied on long acquiescence as a tool and a veritable justification to say what an Indian or a tribe needs. Even unpersuasive dicta, is treasured and measured as a yardstick to make some point stick which slowly but surely evolves into federal Indian policy.

The first thing we need to understand is that the Commerce Clause of the U.S. Constitution grants (only) Congress the power to "regulate commerce with Indian nations" (Art. 1, sec.8, cl. 3). "Commerce" means the business of trade – buying, selling, bartering, lending, and borrowing. Commerce does not mean rearranging the Indians and their tribal affairs or intruding into tribal affairs, customs, mores, traditions and tribal law. That intrusion continues to this day.

SPECIAL NOTE: James Madison's *Federalist #42* laid the groundwork for the Commerce Clause when the U.S. Constitution was adopted, removing all references to ***state power*** originally contemplated in the Articles of Confederation with respect to **Indian affairs** (self-determination, inherent sovereignty, adoptions and tribal memberships, taxation, business corporations, domestic relations, driver licenses, trust relationship between federal and Indian tribes). The Commerce Clause of the U.S. Constitution, Article 1, section 8, clause 3, is cogent, unambiguous, and clear that *only* Congress shall the power to regulate commerce among the Indian tribes. It does not contemplate or imply state police power, or any state authority to preempt federal power granted by the U.S. Constitution to Congress. It would be tautological to say Congressional power is not state (police) power.

The second thing we need to understand is that Congress is given the power of "Exclusive legislation in all Cases whatsoever" (Art.1, sec. 8, cl. 17) within the federal district of Washington D.C. which has no legislature of its own, nor even exists as a territorial entity despite its ten mile square sphere of influence, power and authority. Why did the framers not grant Congress exclusive legislation over Indians and tribes instead of just regulating commerce? It is difficult to justify stretching this into a grant of virtually despotic power greater than "exclusive Legislation in all Cases whatsoever" with the concept of congressional "plenary power" which developed into the "trust relationship" over Indian country with "allotments" and "reservations" spawned by the Chief Justice Marshall's doctrine of "domestic, dependent nations" in *Cherokee v. Gerogia*.

The third thing to remember is that tribes are not even granted the status of States. We are not even represented in Congress. We should not be taxed. The American Revolution started on this premise. We should always invoke a tax *exception*. We don't want to ask for an *exemption*. They can say "no."

Interestingly, the Articles of Confederation referred to some Indians as "members" of states, an explicitly political test (Article IX, cl.4). Today, under 25 United States Code Section 450b[L] - **An "Indian organization" need not be a tribe or group of tribes, just a group of *tribal members.***

"*Indian tribes are not states. They have a status higher than that of states. They are . . . possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."* Native American Church v. Navajo Tribal Council, 272 F.2d 131, 133, 8th Cir. 1959. (The US Supreme Court avoided this case altogether).

The twisted logic in this case is evident. We enjoy a higher status than states, BUT, whatever inherent powers we have are dependent on that which we Indians and tribes have been forced to surrender to a stronger superior sovereign! This argument has no constitutional mooring. It is legislative bullying and judicial terrorism. This is simply judge-made law otherwise known as legislating from the bench by politicians attired in black robes.

What, if we had a standing army to face might with might? The Second Amendment does not stop us from forming one!

The mischief created by the "domestic, dependent ward" stamp of disapproval by the *Cherokee* court in 1831 is yet to be eradicated from our affairs. If we are NOT in Washington D.C. to come under the ambit and gambit of "exclusive Legislation in all Cases whatsoever, and if the U.S. Constitution is the supreme law of the land (Art.VI, sec.2), ***the federal government has no business regulating our affairs regardless of "plenary power," an un-enumerated power arrogated to itself by Congress.***

WHAT NEEDS TO BE DONE

1. A concerted effort to **increase tribal membership** must be an ongoing exercise because federal law leaves membership criteria almost entirely in tribal hands. See Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 [D.C.N.M. 1975]; 98 S. Ct. 1670 (1978). Although 25 U.S.C. 372a and 25 U.S.C. 476 limit our naturalization procedures for non-Indians because federal funding will have to be increased. We insist that we do **NOT** want federal funding as a tribal organization under 25 U.S.C. Section 450b[L]. **We want to be let alone. We need to be let alone**. **We have a right to be let alone**. That's federal common law first formulated by Judge Cooley (Cooley on Torts, 2d ed., p. 29. [p. 195 Note 4 in original].

2. Our credo and manifesto, that we want **no** federal or state or even municipality assistance must be made known to the President of the United States and to the Secretary of the Interior. The meddlesome attitudes by the Department of the Interior must stop. The Bureau of Indian Affairs should have no authority on us as a **tribal organization.** Treaty rights have been replaced by the suspect "federal recognition" political doctrine question even when treaties have not been abrogated or repealed. Treaty making with tribes ended in 1871, but that did not terminate our treaty rights.

3. We must invoke our tax exception rights, privileges and immunities since we want **no** federal or state or municipality assistance.

4. Since we have Tenth Amendment exceptions, exclusions, and exemptions, because we are not states, we should have the power to

tax commerce, sign treaties with other nation-states, grant letters of marque and reprisal, etc.

5. Use our ancestral lands as an asset base, and issue secondary native title to a financial institution with which a negotiable instrument could be obtained for continual funding and continuous financing of our very own economic development models. This asset base will not be collateralized because under the doctrine of ***usucapion***, we are the original land and soil owners. Our **e**nduring **n**ative **a**ncestral **c**ustomary **t**itle (**ENACT**) has not been extinguished unless by clear congressional enactments **(Title 18, U.S.C. Section 1151**). It is still Indian country, today, wherein reside States of the Union, counties and municipalities.

6. Our economic development models are not limited to schools, hospitals, department stores, grocery stores, a peacekeeping security unit, correctional facilities, banks, stock exchanges, executive, legislative and judicial organs of the Tribe. We have more than ample natural resources in our land and soil which only we should use while conserving the environment.

7. Peacekeeping security unit - So powerful were treaties that it recognized the capacity of Indian tribes to **make war** – see the Treaty with the Choctaws, 1830, art. 5, 7 Stat. 333 (Treaty of Dancing Rabbit Creek). This was discussed in Fleming v. McCurtain, 215 U.S. 56, 60 (1909).

8. TAXATION

Please review the following cases to see where we stand as Indians and tribes.

a) Immediate revenue can be extracted by imposing a tax on municipalities for property taxes, fuel taxes, mineral taxes, toll taxes and other taxes based on the undeniable fact that every municipality is in Indian country. As one court wrote in 1900, Indian tribes controlled entrance onto Indian lands, and therefore could "**impose conditions**." (Maxey v. Wright, 54 S.W. 807, 810-11 (Ind. Terr. App.), *aff'd*, 105 F. 1003 (8th Cir. 1900). Since all municipalities, counties and states of the Union are in Indian country, tribes have a right, duty and

obligation to issue travel permits/driver licenses, and impose taxes as well to no-Indians living and working within Indian country.

b) In Bryan v. Itasca County, 426 U.S. 373 (1976), in a matter involving Public Law 280, the United States Supreme Court struck down the imposition of a state tax levied on personal property located on a Public Law 280 reservation. In other words despite the language of Public Law 280, Congress did not give exclusive jurisdiction to the State.
Following the precedent set in *Bryan*, the **recovery of back taxes was upheld** in Topash v. Commissioner of Revenue, 291 N.W. 2d 679 (Minn. 1980).

c) The Staff of American Indian Policy Review Commission, Report on federal, State, and Tribal Jurisdictions 103-06 (1976) released details on many reservation Indians who paid taxes later found to be beyond the states' jurisdiction.

d) **United States Code Title 18, Part I, Chapter 53, § 1162**. State Jurisdiction***:*** **(**b) Nothing in this section shall authorize the alienation, encumbrance, or *taxation of any real or personal property,* including water rights, *belonging to any Indian or any Indian tribe, band, or community* that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. (emphasis added)

e) The United States Supreme Court declared in Elk v. Wilkins, 112 U.S. 94, 110 (1884):

"*The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their*

several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, *exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them*. Const. art. 1, §§ 2, 8; art. 2, § 2; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 515; U. S. v. Rogers, 4 How. 567; U. S. v. Holliday, 3 Wall. 407; Case of the Kansas Indians, 5 Wall. 737; Case of the New York Indians, Id. 761; Case of the Cherokee Tobacco, 11 Wall. 616; U. S. v. Whisky, 93 U. S. 188; Pennock v. Commissioners, 103 U. S. 44; Crow Dog's Case, 109 U. S. 556; S. C. 3 SUP. CT. REP. 396; Goodell v. Jackson, 20 Johns. 693; Hastings v. Farmer, 4 N. Y. 293. (emphasis added).

f) Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) – The U.S. Supreme Court declared that Indian nations have the *power to tax* non-Indians because of their power as a sovereign through dependent nation with treaty rights. The Court said that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."

g) In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115, decided March 27, 1973, the U.S. Supreme Court held that that the state could not tax personalty (personal movable property as opposed to realty) which has merged with realty exempt under 25 U.S.C. § 465.

h) The **Buck Act** (Act of 30 June 1947, 61 Stat. 644, 4 U.S.C. 104-10 as amended) authorizes state motor fuels taxes, sales taxes, use taxes, and income taxes in "Federal Areas" exempting only "federal instrumentalities" and "Indians not otherwise taxed." Every inch of land and soil in this continent was *Indian country* until treaty-making, land allotment and homesteading took effect. Our realties are in a federal area and a federal instrumentality under the Buck Act which preempts state taxation power.

i) Carpenter v. Shaw, 280 U.S. 363, 367 (1930) " doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." 25 USC 194 must have been intended to have this effect. "In all trials about the right of

property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person," etc. See 34 Op. A.G. 439 (1925) construing this provision, which has since become neglected.

j) Tribal corporations enjoy tax exemption according to Section 17 of the Indian Reorganization Act of 1934. See Revenue Ruling 94-16.

9. ***TRIBAL COURTS***

Tribal members are urged and encouraged to seek tribal court jurisdiction whether civil or criminal in nature. We are separate sovereigns just like the military, federal, or state governments with their own courts. Our judgments that award damages can be monetized especially if you a homeowner who has been foreclosed and evicted. You are one of the millions who signed away your rights when you inked the Sale & Purchase Agreement (SPA) without realizing that you also signed a Security Instrument. Check your SPA. For example, a **$700,000.00** home was securitized to **$1.75 billion** as evidenced in the Pooling & Servicing Agreement, a public document. You received no advantages, benefits or profits like the lenders, speculators, brokers and investors, and yet every month you are required to enslave yourselves to make that dastardly monthly mortgage payment that **YOU DO NOT OWE in the first place. Some call it mortgage cancellation.**

Tribal courts are established already to fight for your rights as a homeowner, and redeem what you lost.

Please review what federal Indian law has to say about tribal courts:

1. **United States Code Title 28, Part V, Chapter 115, § 1738**: State and Territorial statutes and judicial proceedings; full faith and credit:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

*The records and judicial proceedings of **any court** of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists,*

together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the ***same full faith and credit in every court*** *within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken*. (Emphasis added)

a) Tribal courts deserve full faith and credit since they are the court of an independent sovereign (Wis. Stat. § 806.245) ; in order to end confusion cases filed in state or tribal courts require mutual consultation. Teague v. Bad River Band, 236 Wis.2d384 (2000). According to the Restatement (Second) of Conflicts § 86, when courts of separate sovereigns both have jurisdiction over the same matter, the court ***first*** rendering judgment is commonly entitled to have its judgment receive full faith and credit by the other jurisdiction.

b) In Williams v. Lee, 358 U.S. 217 (1959), the United States Supreme Court upheld exclusive tribal judicial jurisdiction over actions involving contracts entered into on an Indian reservation between a non-Indian plaintiff and an Indian reservation in order to promote and protect tribal self-government.

c) In Kennerly v. District Court, 400 U.S. 423 (1971), The United States Supreme Court struck down asserted state judicial jurisdiction over civil contract actions brought by a non-Indian against an Indian concerning a transaction occurring on the reservation.

d) In denying the plaintiffs' argument that the Sioux tribal court was a recent creation, the district court judge portrayed a long, historic tradition of tribal self-rule that antedated contact with Europeans:

" *From time immemorial the members of the Ogallala Sioux tribe have exercised powers of local self-government, regulating domestic problems and conducting foreign affairs including in later years the negotiation of treaties and agreements with the United States*." Iron Crow v. Ogallala Sioux Tribe*, 231 F.2d 89, 99 (8th Cir. 1956*). Later, the 8th Circuit relied on the formulation of inherent tribal sovereignty and upheld a **tribal tax** on non-Indians. Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 556 (8th Cir. 1958*)

e) Tribal courts, which have repeatedly been recognized as appropriate forums for adjudicating disputes involving important interests of both Indians and non-Indians, are available to vindicate rights created by the Indian Civil Rights Act. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)

f) The U.S. Supreme Court held that the historical failure of the tribe to execute its powers did not bar a modern tribal assumption of jurisdiction in constituting a tribal court. It upheld exclusive jurisdiction of tribal courts and stating that such exclusive jurisdiction is justified because it is intended to benefit the Indians by furthering the congressional policy of Indian self-government. Fisher v. District Court, 424 U.S. 382 (1976).

g) As one court wrote in 1900, Indian tribes controlled entrance onto Indian lands, and therefore could "impose conditions." (Maxey v. Wright, 54 S.W. 807, 810-11 (Ind. Terr. App.), *aff'd*, 105 F. 1003 (8th Cir. 1900). Since all municipalities, counties and states of the Union are in Indian country, tribes have a right, duty and obligation to issue travel permits/driver licenses, and impose taxes as well to no-Indians living and working within Indian country.

Thus, the findings of a duly constituted tribal court that upholds federal Indian law and policy must be accorded judicial currency in our shifting and ambivalent jurisprudence germane to federal Indian law.

10. ***IMMIGRATION***

Article 1, section 8, clause 4 of the U.S. Constitution (the supreme law of the land,) mandates that Congress shall have the power "*To establish an uniform* ***Rule*** *of Naturalization, and uniform* ***Laws*** *on the subject for Bankruptcies throughout the United States."*

Did you catch that: The ***Rule*** for Naturalization and the ***Laws*** for Bankruptcies difference?

Why didn't the framers use the word "***Laws"*** for both Naturalization and Bankruptcies? Could it be because Columbus, the Spaniards, French and English, like the Pilgrim Fathers, who came here had no passports or visas? There are no immigration records. Are they here illegally"? Are they

undocumented aliens who left their descendants here who subsequently made rules and regulations that became laws for Immigration and Customs Enforcement (ICE) and the Border Patrol under the Department of Homeland Security?

The indisputable fact is that Indian tribes, as a separate dependent sovereign and a distinct political community, reserve the right to define **tribal membership**. There are more than a dozen U.S. Supreme Court cases to support this argument. That is all there is to it. Immigration is a catchphrase that has no meaning in Indian country.

CONCLUDING REMARKS

Indians and tribes must resist the autocratic federal, state and municipal governments who take advantage of us because we exhibit passive obedience. "*Tribes cannot lose their struggle for political identity because their objectives are un-American, but only because contemporary America has departed from its original ideals of political liberty*," to quote Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty*, p.287.

To quote again from Barsh and Henderson's *The Road,* above:

"*Congressional policy since the earliest days of the Republic has sought to answer the riddle of tribalism in a modern nation-state. It has refused to consider tribal statehood seriously. It has refused to afford tribal citizens the same liberties as the million os immigrants who came to populate their country. Every tribe has been subjected to inconsistent and often unique requirements without constitutional recourse. The closest we have come to a general Indian policy is the recurrent rhetoric of "assimilation," "integration into the mainstream," and "Americanization," which challenges the ethnicity and lifestyle of individual Indians without addressing their legal choice."* (ibid at p. 286)

May the great spirit of Tecumseh be emulated to unite our People to offer not just resistance like revolutionaries, but reform, restitution and redemption of that which we temporarily lost during the territorial expansion phase of early America.

God bless you.