

The Issue of Tribal Sovereignty

By Robert L. Bennett

I would like to give a short history of the concept of tribal sovereignty, how it came about, how some tribes are exercising their sovereignty, and how some tribes might benefit if they would exercise more of it.

Under the European "law of discovery," the so-called civilized nations respected each other's lands, and those who discovered those lands took legal title under the *law of discovery* which was recognized by the community of nations.

The consequence of this taking of titles was to practically eliminate all the external powers of the native tribes, because now the European countries claimed their lands.

Thus, the external powers of the tribes were fairly well eliminated through the recognition that the legal titles to lands were taken either by the discovering nations, or by chartered companies.

However, it was recognized, that since there were native peoples occupying those lands, they had a possessory interest in their land. So there has always been a recognition, from earliest history, that the tribes in possession of the lands had a possessory interest in the land.

Power is Delegated to the Federal

Mr. Robert L. Bennett is a former Commissioner of Indian Affairs. He has been associated with the University of New Mexico Indian Law Center since his retirement from the Bureau of Indian Affairs, and remains a distinguished leader in Indian affairs.

The following is a condensation of a presentation made by Mr. Bennett in May, 1977, at Albuquerque, N.M. on the subject of tribal sovereignty.

In 1880, the U.S. Congress delegated the responsibility for Indian tribes to the executive branch of the government. When this delegation of authority was made, President Jefferson in 1803 announced a policy which continued for more than 130 years, a policy of integration and assimilation. Thus was formed the basis for all that the federal government did in its relationship with Indian tribes.

In 1832, the Supreme Court of the U.S. made an interpretation of what the Constitution actually means in terms of the federal-tribal relationships; these interpretations are known as the Cherokee cases.

In these cases, Chief Justice Marshall held that the external powers of the tribes had been extinguished by conquest and by the law of discovery, but that the tribes were independent political communities or sovereign nations who had all of the internal powers of sovereignty.



Robert Bennett, who served as Commissioner of Indian Affairs in the early 1970s, now with the School of Indian Law at University of New Mexico, Albuquerque.

of sovereignty therefore Crow Dog was subject to the jurisdiction of the tribe.

The only way in which these internal tribal powers of sovereignty could be limited was by specific acts of Congress, the Supreme Court decided.

The Major Crimes

Further, and even more devastating, was the fact that with the passage of the Allotment Act, it became possible for the balance of reservation land to be opened for settlement and for homesteading. The Allotment Act, it must be said, was adopted not merely to accelerate the process of integration, but also to make more land available to the white settlers. This Allotment Act is the basic rea-

When the U.S. was founded, the authority to deal with the Indian tribes and nations who were recognized as sovereign nations was delegated by the colonies to the U.S. Government, under the Constitution of the United States. The United States succeeded to the legal title, and under the Constitution were delegated to deal with several foreign nations *and with the Indian tribes.*

Clearly, the U.S. dealt with the tribes as sovereign nations, and made treaties with them, even prior to the adoption of the Constitution in 1778.

The first treaty was with the Delaware Tribe. It was a treaty of military alliance, the same kind of treaty being made with foreign nations. Partly, the reasons for the treaty-making process, was because the western boundary of the U.S. was extremely insecure, and the treaties were made for the protection of these western boundaries.

The first act of the Federal Government, as the governmental structure having power and jurisdiction in Indian affairs, was the passage of the Northwest Ordinance of 1789.

The Ordinance recognized that legal title to the lands was with the U.S., but the possessory title was in the tribes. They could not be disturbed in the possession of these lands except with their consent, the payment of adequate compensation, or in the case of just wars.

Subsequently, there followed the first Trade and Intercourse Act of 1790. It is this Act which is the basis upon which the Passamaquoddy and Penobscot, as well as some tribes in New York, are bringing suit against those states, because agreements between the states and the tribes, by which lands were given up to the states, were never approved by the Congress, as required by the Act of 1790.

within the U.S., they were also subject to the laws of the U.S.

However, because the U.S. was the supreme law of the land, it could by special acts of Congress diminish the internal powers of sovereignty. Fundamentally, that's the constitutional basis upon which the relationship between the federal government and the Indian tribes rests.

In 1871, Congress ended treaty-making with the Indian tribes, through an Amendment to the Appropriation Act of 1871. However, the federal-tribal relationship continued through Agreements and Executive Orders. It is also in 1871 that Congress authorized the appropriation and expenditure of funds, with which the Indians could be educated and trained, the federal government thereby assuming more direct responsibility for the Indian people. Previously, various missionary groups had this task.

At the same time, the educational responsibility of the federal government assumed the role of founding non-reservation boarding schools. The boarding school system was predicated again, on the policy of integration and assimilation, as well as the separation of the young people from their families and tribal environment.

The Case of Ex-Parte Crow Dog, Sioux

A major event influencing federal-tribal relationship was the trial of one Crow Dog in 1885, following a murder on the Rosebud Sioux Reservation in South Dakota. Crow Dog was to be prosecuted by the federal court, but he challenged the jurisdiction of this court. In 1883 the Supreme Court went back to the Cherokee cases of 1832 and declared that the tribe had *internal powers*

of jurisdiction.

As a result, Congress passed what is known as the Major Crimes Act, comprising 14 crimes in which the federal government has jurisdiction. A legal issue then arose: It was assumed that when the U.S. took jurisdiction, the tribes automatically lost tribal jurisdiction over those crimes. But this assumption has been rebutted, the claim being that when the U.S. extended its jurisdiction, it did not in the same act, eliminate the jurisdiction of the tribes. Essentially what you have is *concurrent jurisdiction.*

This is the most recent interpretation given by attorneys who are knowledgeable in the field of Indian law.

After the passage of the Major Crimes Act, most tribal justice systems went into oblivion. Therefore, the Secretary of the Interior set up a system of tribal courts which we know as the 25 CFR, or Secretary's Courts, or Courts of Indian Offenses, as they are variously called.

The next major effect upon federal-Indian relations was the so-called Allotment Act, which had devastating results. Firstly, it became very difficult for the tribes to exercise their powers, because the land was no longer under the control and ownership (possessory ownership) of the tribes. The land now came under the ownership of individual Indians, thus removing the basis for tribal governments, also effectively destroying many tribal cultures. This is because the concept of an individual owning any part of the land was foreign to the culture of the people.

The Allotment Act flew directly in the face of Indian tradition, which was general among most tribes at the time. The Act, moreover, was a continuation of the policy of integration and assimilation.

sons between the progress of one tribe or another, because different things happened to different tribes, based on governmental action. Consequently, you have a situation in which, for example in the Southwest, the tribes there retain their land in tribal ownership. They were never allotted, because they were not considered to be "suitable for agriculture." In many

Allotment Act Opens Tribal Land to Homesteading

other reservations, those that were allotted, the concept of tribal sovereignty was practically destroyed as well as the cultures and traditions of those tribes.

The U.S. was still bent upon "opening up" Indian land to nonIndian settlers. So, in 1906, they passed an act entitled the Competency Act, which created commissions determining whether or not an individual land owner was "competent" to own his allotment.

Two other related events took place now. One was an act affecting the Five Civilized Tribes. It was a Termination Act, which held that no Indian person of less than one-half degree Indian blood would be considered restricted insofar as receiving a fee title. Those of more than one-half degree of Indian blood would be considered a "restricted" Indian.

When the Five Tribes received their allotments, they also received a fee title, but that title was subject to restrictions against incumbrances on the title without the approval of the Interior Secretary. And so the restrictions were automatically removed from every member of the Five Tribes who was less than one-half degree Indian blood.

Continued on Page 22

Of course, this accounted for a great deal of land lost to tribes in Oklahoma. It further provided that the probate of these allotments would be under the jurisdiction of the state courts; any heir found to be less than one-half by operation of the law, the restrictions on that person's interest became lifted.

The Special Case of the Osage Nation

In this Act, the Osage Tribe was constrained by another regulation: The Act provided that the President of the U.S., and later the Secretary of the Interior, would appoint the governing bodies for these tribes if in case there was any business left between the federal government and these tribes that needed to be completed for purposes of termination of those tribes.

When termination occurred, it would be through the tribal officers appointed by the federal government. This Act, however, was amended a few years ago. Now the people of those tribes may elect their officers and their own government. It's a recent development.

An interesting feature is the situation of the Osage Tribe. This tribe had considerable mineral wealth which was held in the name of the tribe. Following the policy of integration, the U.S. now passed a special Act relating to the Osage, wherein the federal estate of the Osage Tribe was divided up among all of the then living members of the tribe,

One of the provisions of the Wheeler-Howard bill originally, was to re-establish the tribes within the political structure of the U.S., under Sections 16 and 17, and reinstitute (when they were able to do this), their tribal governments, operating on the basis of a representative form of government in which the tribal members delegated power under a constitution to a tribal government.

It is most important to recognize that sovereignty of the tribes resides in its membership. The tribal membership can, therefore, if it wishes, adopt the constitution which delegates some of their powers to a government.

The tribal sovereignty is not in the tribal government. Tribal sovereignty is in the tribal membership.

Powers of Tribes

All those powers which were not delegated to the tribal government, are still retained by the tribe. These are called reserved powers. Thus, the government acts on the basis of authority delegated to it under a constitution, so you have a representative constitution in which the tribal government is elected, a representative plus a traditional form, in which the provision is still made for the traditional leadership to participate in council meetings.

There are general councils such as the Crow Tribe of Montana has, in which the tribal government itself, which is set up under their bylaws, has no authority other than that given to them at meetings of the general council, where resolutions are passed. You also have the traditional governments such as some of the Pueblos of the South-

Slave Labor Conditions on Mink Farm

Rochester, New York

By Tom W. Harris

If blacks, poor whites and Latinos come to mind when you think of migrant farmworkers, you missed somebody.

Our old friends the American Indians also have a slice of the American pie and are allowed to provide cheap labor to the wealth machine just like any other exploited group.

Which brings us to the story of Lester Bennet and his fur farm, just 45 minutes from downtown Rochester.

... and John Salter, Jr., a Penobscot of the Wabanaki Confederacy, who recently pitched his tent here to work for a church group.

... and numerous other interesting people and events.

Like many another boy lucky enough to grow up near fields and forests not yet "developed," John Salter Jr. ran a trapline in his youth.

When he was hired a few months ago as director of the Office of Human Development, an arm of the Catholic Diocese (the first Indian to hold that office), he began to build a trap for Lester Bennet.

people willing to work for him, and I can easily see why."

Salter McGowan and Ricehill made clandestine visits to the Algonquins at Bennett's camp, traveling back roads at night. The two Indians on the team gained the trust of the Algonquins, although "there's an atmosphere of fear there," in Salter's words.

"What we learned and observed was shocking. The camp was the nearest thing to degradation I've ever seen."

The team accumulated an impressive list of Algonquin grievances, say Salter and McGowan.

Overcrowding in "chicken coop" shacks with fire hazards, malfunctioning stoves, and inoperative toilets. The Indians were required to cut their wood on Sundays; a violation of laws, requiring that heating be supplied. Bennett did not regularly dispose of stacked garbage. Winter wind blew through crannies.

Mink killing, skinning and pelting is messy work, but only two showers were available.

Wages of \$2 an hour were below the legal minimum of \$2.20 for farm labor (lower than the legal minimum for other types of work). This pay was also lower

interest in the total mineral estate. The Act authorized the setting up of a tribal council whose function was to administer the tribal estate.

The Osage Tribal Council, thus, does not represent the people of the Osage Tribe. It only represents those people who own interests in the mineral estate of the tribe through the head rights, or their inheritance.

Inheritance of head rights was subject to claim by anyone, but because of the corruption which developed in connection with these estates, Congress limited the inheritance of Osage head rights to members of the Osage Tribe, except where they may be devised, or to others by will, but these two significant acts of Congress relating to the policy of integration are significant in the light of current affairs.

Following a survey and an investigation by a Brookings Institute task force, a report was issued in 1928 called the Meriam Report, exposing Indian conditions in every phase of life.

This report was the background for what eventually became the Indian Reorganization Act of June 18, 1934. Tribes were given two years to decide if they wished a general referendum to vote themselves out from under the Act. Many tribes did that.

The Indian Reorganization Act, promoted by Indian Commissioner John Collier, was based upon the Wheeler-Howard Bill. When this bill went to Congress, it was substantially changed and came out as an Indian Reorganization Act, which varied in many ways from the original bill. Many tribes felt betrayed, because Collier's meetings with them explained some of the provisions in the original bill, which were not put into effect with the passage of the Indian Reorganization Act.

which the traditional or religious people have certain obligations, and the modern or constitutional governing body regularly elects officers, and does all those things exercised by such types of governments.

Jurisdiction

The tribes are becoming quite sophisticated in the conduct of their governments, but many serious and even severe problems remain.

There are such problems as jurisdiction: does the state have jurisdiction in such areas as criminal justice, taxation, and water rights? This has been declared to be invalid, as a result of many Supreme Court decisions. However, the issue remains, and the states continue to attempt to exert jurisdiction over the tribes within their borders.

There are problems such as water rights, which have been adjudicated time and again in favor of the tribes, so that the tribes have prior rights to the waters on, beneath and surrounding their reservations.

And there is still a problem with tribal sovereignty. Many states are raising this question, and some are attempting to disqualify and discredit the whole philosophy and policy. The tribes and their governments, however, are insisting that they are indeed sovereign internally, that they have a right to determine their own destiny, a right to govern themselves with all that such rights imply, including taxation.

(Mr. Bennett's comments on other aspects of tribal sovereignty, such as the Self-Determination Act and more recent developments, is not dealt with here, due to space requirements.)

shopped, revolted, and a lot of other things happened.

It took more work and craft than trapping a mink or fisher or martin, those most elusive furbearers. It was also perhaps more gratifying.

The blowup at the fur farm resulted from teamwork among white and Indian, layman and clergyman, and state and federal agents.

The primary team was a trio: Elliott Ricehill, a Winnebago Indian, who works in Rochester as an alcoholism counselor; Tim McGowan, a community organizer and coordinator of political affairs for the Office of Human Development; and John Salter.

There had been unsettling reports about Bennett's camp for years, says Salter.

The Bennett Fur Farm, also known as L.W. Bennet and Son, is a family enterprise located some 4 miles outside East Bloomfield in Ontario County.

Lester Bennett, who helped start the operation some 45 years ago, doesn't like to publicize the size and success of the enterprise.

"It only encourages stealing," he said. "People got jealous."

But the project is one of the nation's three largest mink ranches, and has about 60,000 mink.

The animals are raised in pens and slaughtered for their pelts. Indians are imported annually for the killing and skinning. Buses pick them up at three Algonquin reservations in Quebec and return them at the end of the eight to ten week season.

Says Salter: "His recruiters have had to go further and further north to find

"The findings confirmed what we had already heard from people on our rural staff," says McGowan.

The Algonquins were in a position resembling captives, says Salter.

Instead of paying them periodically in cash as required by law, Bennett provided transportation to local grocery stores. Their grocery debts were deducted from their pay at the end of the season.

The Algonquin workers, many of whom don't speak English, have some uncertainties about the accounting system. Dependent upon their employer for both funds and transportation, they fear they could be stranded without funds or transportation home.

And in McGowan's words, they are "politically unsophisticated."

Indians on remote reserves may be unsophisticated but others aren't.

Even before the recent investigation, a Mohawk traveled to the Algonquin reserves and spread the word about Bennett. This reduced his labor supply, Salter says, made him more dependent upon those who came to work for him, and hence gave them more clout.

Martha Terrance, a Mohawk, spearheaded a food drive at St. Michael's for the mink skinners.

Martha Fahrer, head of the Native American Cultural Center, who has long been concerned about Indian migrant labor, coordinated a substantial clothing drive and gave other assistance.

(NOTE: The above article is reprinted from the *Rochester Patriot* with permission. It's an unusual story, not yet ended. We hope to bring the readers up to date as the story unfolds.)

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March 6, 1978

Mr. Robert L. Bennett
604 Wagon Train Drive, S. E.
Albuquerque, New Mexico 87123

Dear Bob:

Thanks for your letter of February 5th and the very helpful enclosures. Your paper on tribal government is excellent. Has it been formally published, I hope?

Sincerely,



Philip S. Jessup
Program Director

PSJ: aer



STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION — EDUCATION BUILDING
SANTA FE — 87503

LEONARD J. DE LAYO
SUPERINTENDENT OF PUBLIC INSTRUCTION

March 21, 1978

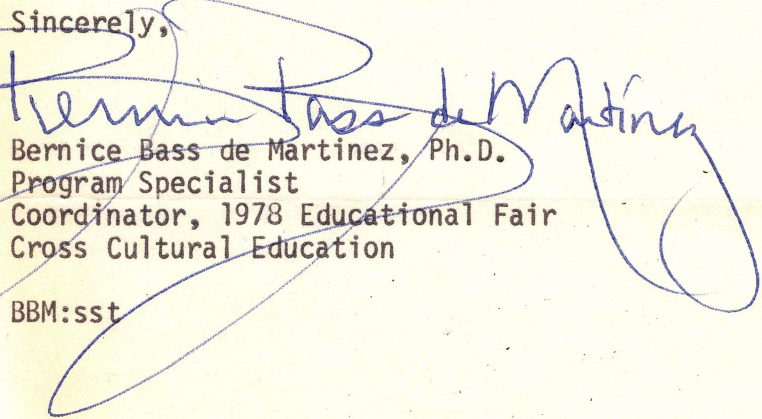
Dr. Robert Bennett
604 Wagon Trail Drive SE
Albuquerque, NM 87123

Dear Dr. Bennett:

Thank you for your contribution to the 1978 Educational Fair. Your assistance along with the kindness of each and every participant and consultant helped to make this year's fair one of the most outstanding.

Your particular efforts were so greatly appreciated that I wanted to let you know personally. Again thank you.

Sincerely,


Bernice Bass de Martinez, Ph.D.
Program Specialist
Coordinator, 1978 Educational Fair
Cross Cultural Education

BBM:ssst

St. John's College SANTA FE, NEW MEXICO 87501

April 13, 1978

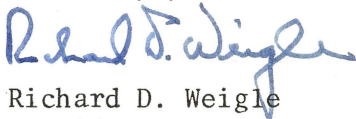
Dear Mr. Commissioner:

On behalf of all of us who heard you on Tuesday evening, I want to send warmest thanks. You made an excellent presentation which informed us about our Government's policy toward the Indians. It really seems incredible that we were so shortsighted over the years. You made us understand the Indian point of view in a wonderful way, and we are grateful.

I hope you will return to St. John's when you can. I hope, too, that you will encourage able, young people who might benefit from this education to consider St. John's in the years to come.

With high regard and warm good wishes,

Sincerely yours,



Richard D. Weigle
President

Mr. Robert L. Bennett
604 Wagon Train Drive, S.E.
Albuquerque, New Mexico 87123

RDW:gm

PETE V. DOMENICI
NEW MEXICO

United States Senate

WASHINGTON, D.C. 20510

June 6, 1978

Mr. and Mrs. Robert L. Bennett
604 Wagon Train, SE
Albuquerque, New Mexico 87123

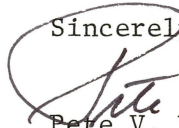
Dear Bob and Cleota:

Thanks so very much for your recent contribution to my Senate campaign.

In addition, I appreciate your expressing your comments on the current issues facing New Mexico today. You can be assured of my continuing efforts to make our government responsive.

I sincerely appreciate all your help. It's friends like you that make my work so satisfying.

Sincerely,



Pete V. Domenici
United States Senator

P. S. I've enclosed a "People for Pete" pin as another way of saying thanks for your support. I hope you'll wear it as a symbol of our friendship.

Special Acknowledgements

MEMBERSHIP Romana Ayer
PUBLICITY AND TYPING Beulah D. Paisano
Myrtle Dushane
PHOTOGRAPHER Geronimo Alexander
SOCIAL Bill Williams
WAYS AND MEANS Howard Dushane
DECORATIONS Beulah Paisano
REUNION Joe Cata
HISTORIAN Beth Cata
SUNSHINE COMMITTEE Louis Weller
Mamie Weller
Roland Miller
Irene Miller

Direction

I was directed by my grandfather
To the East,
so I might have the power of the bear;
To the South,
so I might have the courage of the eagle;
To the West,
so I might have the wisdom of the owl;
To the North,
so I might have the craftiness of the fox;
To the Earth,
so I might receive her fruit;
To the Sky,
so I might lead a life of innocence.

Alonzo Lopez, Papago

Haskell Club of Albuquerque

Reunion



June 9-10, 1978

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P R O G R A M

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No Host Cocktail Party and Get-Together
7:00 p.m. - Large Room - Shalako Inn

SATURDAY - JUNE 10

Coffee at George and Gwen Roberts' residence
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Master of Ceremonies	Joseph Cata
Invocation	John P. Williams
In Memoriam	John P. Williams
Welcome	Charles Bradley President

DINNER

Entertainment	Cheryl Jean Paisano
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HONOREE

Stan Gertie	
"This is Your Life"	Robert Bennett

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9:00 p.m.	to	1:00 a.m.
Music		The Melotones



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IN REPLY REFER TO:

P. L. 93-638

JUL 31 1978

Mr. Robert L. Bennett
Consultant on American Indians
604 Wagon Train Drive, S.E.
Albuquerque, NM 87123

Dear Mr. Bennett:

This is to extend our appreciation to you for your excellent presentations on Federal Trust Responsibility, Tribal Sovereignty and Tribal Jurisdiction at our conference, June 26 - 27, 1978.

We have received many favorable comments about your presentations from the staff and tribal leaders. We are planning to use the video tape of your presentations in our leadership training efforts.

Thank you for your assistance.

Sincerely yours,

Area Director