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The Indigenous Peoples of the USA: Issues and Challenges of Native Americans

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Introduction

Vine Deloria, Jr., the most important Indian chronicler of indigenous political, legal, and religious experience in the U.S. in the last thirty years, noted recently that Indian life, particularly the experience of reservation-based tribal peoples, "has only the slightest resemblance to the conditions of three decades ago, and the current situation has elements of hope and portents of disaster."¹ This observation is even more realistic as we sit at the dawn of the new millennium. The 560 indigenous polities in the U.S.—374 Indian nations, tribes, bands, communities, and Pueblos in the lower 48 states; 226 are Alaska Native villages and corporations—cumulatively total a little more than two million individuals.

These distinctive and original peoples are, on the one hand, entering their most dynamic political, social, and economic period in over half a century because of changes in federal Indian policy, the revival or modification of traditions, customs, and languages, and as a result of lucrative gaming operations which are providing some tribes with previously unimagined riches and political clout.

Yet, paradoxically, indigenous groups are simultaneously facing a multi-pronged assault against their sovereign rights and economic resources. The assault force consists of anti-Indian state and federal lawmakers, conservative federal judges and justices, and an ambivalent public which at times seems supportive of tribal cultural and economic regenerative attempts, yet is willing to support or at least benignly accept efforts by their own lawmakers (state and federal) that are aimed at stripping tribal

nations of various sovereign powers, treaty-based rights, or other rights accorded to indigenous nations as separate sovereigns. In sum, while some tribes have become real players in the larger American economic and political systems, their rights still sit astride pillars made not of constitutional granite, but of treaty-soaked sand which can be washed away at the whim of particular lawmakers or judges.

Thus, trying to articulate the issues and challenges confronting indigenous nations in the U.S. is no small feat. One of the primary reasons it is not easy has to do with the reality broached above—that of indigenous diversity. Because of this diversity, and it is an increasing diversity because newly recognized tribes are coming into the political cognizance of the U.S. through the federal recognition process,² that extends political status to some tribal groups that have historically been denied recognition, there are 560+ distinctive sets of political, economic, cultural, and legal issues and concerns. These concerns range broadly from the unique water rights struggles of tribes in the southwest;³ to the fishing rights struggles of tribes in the pacific northwest and the great lakes;⁴ to the Indian gaming issue which has spread throughout Indian Country but which has had a variable impact;⁵ to the religious freedom problems Indians are experiencing which vary widely from tribe to tribe;⁶ to the increasing tension/cooperation between tribes and states with each sovereign seeking to expand its scope of governmental authority, although it is the states which, in many cases, seek to extend their jurisdiction inside Indian Country while tribes know it would be futile to try and extend their power into state territory;⁷ and to the issue of the corporate and governmental extraction of renewable and non-renewable natural resources which also vary from tribe to tribe depending on each nation's unique resource endowments.⁸

Besides tribal diversity and issue differentiation, there are the other political actors tribes must deal with on a regular basis: the intra and intertribal organizations that influence tribal governments and their policies, local (county and municipal)

governments, state governments, the federal government, and increasingly, the international community, which is slowly having its doors pried open by concerted action on the part of indigenous entities. Both individually, in ad hoc alliances, and sometimes collectively, these polities operate from their own sometimes convoluted and conflicting agendas, that are colored by their political ideology, cultural value orientations, and economic aspirations and constraints. Hence, any attempt to accurately describe the plethora of issues or foretell which direction Indian policy will go in the new millennium, is fraught with real difficulty.

Sovereign Contradictions

Without going into the details of each of these crucial and very different aspects--tribes, issues, and actors--let us step up to a higher level and say that it is possible to discern a set of problematic theoretical issues that appear to affect most indigenous peoples most of the time in their political, economic, and cultural relations with the federal and state governments. And until these are resolved or clarified indigenous peoples will continue to suffer from a lack of clarity in their political standing vis-a-vis the other governments in their midst.

We begin with the reality that tribal nations find that their rights, their lands, and their very sovereignty lack substantive protection from the very government--the U.S.--which is charged by treaty agreements (recognized in the Constitution as the "supreme law of the land"), by the trust doctrine (the federal government's moral and political obligation to protect and enhance remaining tribal lands, resources, and cultural existence), and by acknowledgement in the Commerce Clause--with protecting indigenous nations.

There is a real irony here: on the one hand the federal government recognizes and enforces the extra-constitutional standing of tribal nations, affirmed by the hundreds of treaties and agreements signed and ratified, yet it has empowered itself

by way of the plenary power doctrine with the right to thrust its laws and jurisdiction over tribes at any time. Tribal nations, since the 1880s, have had to cope with the reality that the federal government may act to unilaterally terminate its treaty or trust obligations to tribes, leaving them with little recourse.

The indeterminacy just described--with the U.S. sometimes supporting tribal sovereignty and sometimes acting to diminish or completely crush it--is, in fact, the hallmark of the tribal-federal relationship even today. And this indeterminacy is evidenced by a series of dichotomous legal/political constructs. These constructs are used by various branches of the federal government (and increasingly by state governments), which has empowered itself with the unconstrained right to define or dramatically redefine the actual contours of the tribal-federal relationship. However, the U.S. does not recognize in tribes a reciprocal right to do the same.

A few examples of these dualistic pairings, each rooted in law, politics, and public perception, will make clear why tribal nations and their citizens, who also happen to be American citizens, enjoy little political, legal, or economic stability in their internal or external sovereign lives.

First, tribes have been and are recognized as "distinct, independent, political communities" capable of exercising a significant measure of sovereign power. But tribes have also been treated as merely "domestic-dependent nations" limited to wielding a reduced degree of internal sovereignty.

Second, tribal sovereignty is sometimes viewed as an inherent and reserved power. But at other times federal courts have insisted that tribes may only exercise those governmental powers that have been delegated to them by federal authorities.

Third, the tribal-federal relationship is frequently described as that of a "trustee-beneficiary" relationship, with the U.S. being the trustee and the Indian tribes the beneficiary. On the other hand, some federal lawmakers and courts still maintain that the phrase "guardian-ward" is the most accurate description of the tribal-federal relationship.

Fourth, the power of the U.S. in relation to tribes is limited to that which is specifically enumerated in pertinent constitutional clauses (e.g., commerce, treaty, and property). On the other hand, some policymakers maintain that the federal government wields plenary (i.e. unlimited-absolute) authority over tribes and their property that is implied by constitutional clauses and their geographic location in the country.

As is evident from just these few examples, there remains a tremendous and fundamental ambivalence on the part of the federal government as to what the actual standing of tribal nations is vis-a-vis the U.S. and the states and so long as this ambivalence persists there can be no permanent resolution to many of the problems tribes confront both internally and externally.

This paradoxical standing of tribes in relation to the U.S. has contributed mightily to the nearly perpetual tension between tribes, states, and the federal government. And it has prompted some tribes to seek admittance into the United Nations in the hopes of securing some measure of protection and recognition of their rights of self-determination.

Notwithstanding their original and organic sovereignty, the hundreds of presidentially sponsored and Senate ratified treaties and House and Senate approved agreements confirming their separate political status, and federal policies historically and today based on the doctrine of tribal consent, tribes still have no real substantive protection of their basic political, cultural, or property rights, unless those rights have in some way been individualized.

And unless there is a positive move made by the U.S. to accept limitations on its self-created ability to exercise unbridled authority over tribes, Indian nations will remain without an enforceable status and will not be able to shield themselves from the very government charged with protecting their rights--the United States.

Challenges for the U.S. Government

Congress, in other words, must step forth and issue a number of clear cut directives to itself, the federal courts, and to the states.⁹ It must first disavow the use of the plenary power doctrine as being violative of the limitations imposed by the U.S. Constitution and the bilateral treaty relationship.

Second, it must remind the federal courts that it alone has the power to "regulate trade with Indian tribes," and that it is not the business of the courts to explicitly or implicitly override the U.S. treaty commitments to tribes.

Third, the Congress must remind the state governments that they are without constitutional authority to interfere in Indian affairs. This is a direct result of the doctrine of tribal sovereignty, the commerce clause, and the state disclaimer clauses where western states, in particular, were required to categorically declare that they would never attempt to interfere with Indian affairs on Indian lands and that they would never attempt to tax Indians earning income within reservation borders. States may become involved only with the express consent of the tribe, with the express consent of Congress, and only after having amended its constitution to allow it to engage in activities inside Indian Country. For those states lacking a constitutional disclaimer, they should be required to amend their constitution to insert such a disclaimer. This would bring real clarity to the current ambiguous state of tribal-state affairs since many eastern Indians inhabit states lacking such a clause.

The federal government must also facilitate immediate land returns to tribes based on historic and already proven claims, should make major expansions of reservation land bases for tribes that have them, and should create reservations for tribes lacking a land base. In addition, there still must be found a mechanism for the correction of the fractionated heirship lands that are the direct legacy of the General Allotment Act of 1887.¹⁰ Land is the basis of tribal sovereignty.

The U.S. should amend its constitution to expressly do three things: recognize tribal sovereignty, restart the treaty

process, and firm up the trust doctrine. A new wave of treaty making should be initiated with all those tribes that desire this form of political interaction and all non-ratified treaties must be promptly ratified.

The Bureau of Indian Affairs (BIA) must be virtually dismantled with most of its services being farmed out directly to tribes but without weakening the trust relationship. This process was begun in earnest through the Tribal Self-Governance Demonstration experiment initiated in 1988, but the self-governance process, made permanent in 1991, has recently been stymied by Republican lawmakers. Along with this dismantlement the current Indian trust fund crisis¹¹ must also be resolved to the satisfaction of the tribes. The trust fund accounts date back to the 1880s when the U.S. began to individualize tribal lands through the allotment process. Those allotted lands were to be protected, held in trust, by the federal government. As it was, they were often leased out to gas, oil or timber companies. The earned income from the leases were passed on to the descendants of the original allottees who for many years have been trying to "force the Government to set up a proper accounting system for the trust funds, and to repay beneficiaries who may have lost up to \$10 billion over the last century."¹²

The Congress should also act to expedite the federal recognition process for those groups who have petitioned the BIA for acknowledgement. At the current rate of settlement, the over one-hundred and forty petitioning groups will have to wait years before their individual petitions are resolved.

There is still a real need for an omnibus American Indian Religious Freedom law that once and for all brings clarity and protection to the distinctive religious expressions of indigenous nations. Since tribes are not protected by the constitutional First Amendment, the Congress must be the one to pass a comprehensive law guaranteeing Indian access to sacred sites, the unencumbered use of sacred animal parts, and supporting the religious needs of Indian inmates.

Congress should also work closely with other nation-states in the United Nations in an effort to recognize and incorporate the rights of indigenous peoples as cultural, political, and economic polities entitled to respect, autonomy, and self-governance.

Of course, some issues are outside the arms of the government. For example, what can be done to combat the negative and demeaning stereotypes and caricature images of Indians that persists in the mass media, the corporate world, and the military—Indians as "Noble Savages," as "Civilizable Savages," or as "Bloodthirsty Savages?" And importantly, what is the relationship between these false and often degrading images and the ongoing ambivalency and tenuousness of Indian rights.

Intratribal, and Intertribal Issues

Having described the external dimensions of intergovernmental relations, we now turn our attention to address some of the serious internal issues that continue to confront and bedevil many indigenous nations. First, there is the growing level of tribal fragmentation, segmentation, or factionalism, that is eroding the collective nature of a number of tribes. The concept of political secession is even being discussed and may soon be acted upon by segments of some tribes. The fragmentation is particularly evident among the Mohawk people of New York State, within Tohono O'odham territory in Arizona, among the Lumbee nation of North Carolina, and elsewhere.

But why is this political division occurring now? Does it have historical roots, or is it an outgrowth of contemporary phenomenon? The answer, of course, varies from tribe to tribe. In some cases the fragmentation has been exacerbated as a result of Indian gaming revenues which, in some cases, is creating a situation of Indian haves and have-nots. In other cases the fault line within the tribe has deepened as tribal members struggle with issues of assimilation into American society. Whatever its source, it is causing severe damage within tribal nations and in some cases, is increasing tensions between tribes as well. The fragmentation is also affecting some tribes efforts to establish or to

improve diplomatic relations with the states they reside in and it also impacts their federal relations as well.

There are many other issues of grave importance from an indigenous perspective. First, there continues to be a dramatic decline in the percentage of Indian people who speak an indigenous language as their first language. This language loss will potentially have severe consequences for tribal identity and cultural transmission.

Second, of all racial/ethnic groups in the U.S. American Indians have the highest intergroup marriage rate (marriage between persons of different races)—sixty percent of Indians marry someone from a different race—according to a recent study.¹³ By comparison, whites intermarry less than five percent of the time, while the figure for blacks is also less than ten percent. Such a high rate of intermarriage for Indians raises profound questions about the future meaning of tribal sovereignty, how tribes will define their citizenry, and will clearly impact the treaty and trust nature of intergovernmental relations.

Third, while crime rates are falling dramatically across much of America, in Indian Country the opposite is occurring. Alcoholism-related crimes, gang-activity, and ongoing interracial crimes are rampant and threaten to engulf tribal judicial systems already reeling from being understaffed and underfunded. In the most comprehensive report yet on crime in Indian Country, the Justice Department announced that their "findings reveal a disturbing picture of American Indian involvement in crime as both victims and offenders. The rate of violent victimization ... is well above that of other U.S. racial or ethnic subgroups and is more than twice as high as the national average. This disparity in the rates of violence affecting American Indians occurs across age groups, housing locations, income groups, and sexes."¹⁴

More distressingly, while violent crimes against white or black victims were primarily intraracial (black on black or white on white), the majority (60 percent) of violent crimes committed against Indians were perpetrated by whites.¹⁵ A stark reminder

that interracial tensions remain high between Indians and Euro-Americans.

Conclusion

The issues confronting indigenous peoples in the U.S. are myriad and the challenges are enormous. But larger problems--of forced removal, reservation confinement, cultural genocide, and termination--have been confronted and surmounted before and there is every indication that as difficult as conditions appear at the present, from both an external and internal perspective, that each tribal nation will find a way to make the necessary adjustments to keep their peoples, their lands, and their cultures moving forward though with an eye on past.

Evidence of this is found in the way tribal nations are appropriating and putting to use various technologies (computers, radio and television stations), in the way tribes are using gaming revenues to not only stabilize their cultures and expand their lands, but also to reach out to non-gaming tribes who are still mired in poverty, and in the way tribes are rekindling or recreating traditions, norms, values, and religious/cultural expressions that spiritually empower the community, helping them cope with the ever tenuous nature of their political and economic status in the eyes of the states and federal government.

Endnotes

¹ Vine Deloria, Jr., "The Reservation Conditions," *National Forum* lxxi, no. 2 (Spring 1991): 10.

² William Quinn, Jr. "Federal Acknowledgement of American Indian Tribes? The Historical Development of a Legal Concept," *The American Journal of Legal History* 34 (October 1990): 331-363.

³ See, e.g., Lloyd Burton, *American Indian Water Rights and the Limits of Law* (Lawrence, Kan.: University of Kansas Press, 1991); and Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water* (Tucson, Ariz.: University of Arizona, 1994).

⁴ See, e.g., Fay G. Cohen, *Treaties on Trial: The Continuing Controversy Over Northwest Fishing Rights* (Seattle, Wash.: University of Washington Press, 1986); Daniel L. Boxberger, *To Fish in Common: The Ethnohistory of Lummi Indian Salmon Fishing* (Lincoln, Neb.: University of Nebraska Press, 1989); and Rich Whaley and Walter Bresette, *Walleye Warriors: An Effective Alliance Against Racism and for the Earth* (Philadelphia, Penn.: New Society Publishers, 1994).

⁵ See, e.g., Ambrose I. Lane, Sr., *Return of the Buffalo: The Story Behind America's Indian Gaming Explosion* (Westport, Conn.: Bergin & Garvey, 1995).

⁶ See, e.g., Roger C. Echo-Hawk and Walter R. Echo-Hawk, *Battlegrounds and Burial Grounds: The Indian Struggle to Protect Ancestral Graves in the United States* (Minneapolis, Minn.: Lerner Publications, 1994).

⁷ James B. Reed and Judy A. Zelio, eds., *States and Tribes: Building New Traditions* (Denver, Colo.: National Conference of State Legislatures, 1995).

⁸ See, e.g., Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* (Lawrence, Kan.: University of Kansas Press, 1990); and Donald L. Fixico, *The Invasion of Indian Country in the Twentieth Century: American Capitalism and Tribal Natural Resources* (Niwot, Colo.: University Press of Colorado, 1998).

⁹ Many of the recommendations in this section of the article flow from ones made by Vine Deloria, Jr. See, e.g., *The Indian Affair* (New York: Friendship Press, 1974); *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (New York: Dell Publishing Company, 1974); and *The Nations Within: The Past and Future of American Indian Sovereignty* (co-authored with Clifford M. Lytle) (New York: Pantheon Books, 1984) reprint ed. (Austin, Tex.: University of Texas Press, 1998).

¹⁰ 24 St. 388.

¹¹ A class action lawsuit has been filed with the support of the Native American Rights Fund in an effort to get a proper accounting of the billions of dollars involved. On February 23, 1999 a federal judge held in contempt two Cabinet Secretaries, Secretary of Interior, Bruce Babbitt, and Secretary of Treasury, Robert E. Rubin, for deliberately delaying to turn over key documents and for lying about their actions.

¹² Timothy Egan, "Indians Win Round in Fight on Trust Funds," *New York Times*, 23 Feb. 1999, 1.

¹³ Council of Economic Advisers, *Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin* (Washington, D.C.: Government Printing Office, 1998).

¹⁴ U.S. Department of Justice, *American Indians and Crime* (Washington, D.C.: Bureau of Justice Statistics, 1999): iii.

¹⁵ *Ibid.*, p. 7.