



# LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT \_\_\_\_\_ DIRECT NO. \_\_\_\_\_

## ATNI TAX TASK FORCE- TAXATION AND TRIBAL INDIANS

CHAIRMAN HENRY CAGEY, LUMMI INDIAN NATION  
JEWELL JAMES, POLICY ANALYSIS (amended June 09)

**PURPOSE:** (1) GENERATE COMMITMENT FROM INDIAN COUNTRY TO JOINTLY SUPPORT INHERENT SOVEREIGNTY AND TAX EXEMPTIONS OF TRIBAL INDIANS; (2) SECURE CONGRESSIONAL OVERSIGHT HEARING ON IROQUOIS CONCURRENT RESOLUTIONS TO SECURE JOINT RESOLUTION ALIGNING PRESIDENTIAL & CONGRESSIONAL INDIAN POLICIES WITH THE U.S. CONSTITUTION; (3) SECURE CONGRESSIONAL HEARINGS TO AMEND THE INTERNAL REVENUE CODE TO PROTECT INDIAN COUNTRY AND ECONOMIC INTERESTS, AND ENHANCE TRIBAL CHARITY.

### GREETINGS TRIBAL LEADERS:

We appreciate the opportunity to work with you. Like you, we are concerned about federal taxation of Indian Country. Federal taxation impacts tribal government, all jobs and natural resources that generate income on-reservation. It impacts our tribal capacity to develop economically, to engage in trade and commerce as Indian nations, and to perform essential governmental functions and services. While Indian Gaming has stimulated aspects of economic growth, it has not alleviated the severe poverty that plagues most of Indian Country.

“Taxing” tribal Indians can be divided into three jurisdictional pieces- tribal, state, and federal. As tribes, we seek to exercise taxation within our jurisdiction, without the interference of the national and state governments. “*Taxation and representation go hand-in-hand*” was a battle statement of the colonial people that emerged from old Europe. It began nearly one thousand years ago. Eventually, the American Colonies declared that there would be no taxation without representation and local self-government. This stimulated the movement toward establishing constitutional popular sovereignty. Tribes demand no less.

The New England Confederation 1643, Franklin’s Albany Plan 1754, Franklin’s Draft 1775, and other documents had argued for the prevalent, pre-constitution idea that “representation and taxation out to be based on population.” Throughout this debate, up to the 1789 Constitutional ratification, the specific language to exclude the tribal Indians was maintained as part of the definition of who was not included under the constitution.

However, our concern is the denial of the unique, separate status of Indian Country from the United States and the individual states. We live, now, in a generation in which Self-determination and Self-Governance is the declared congressional Indian Policy, supported by several past presidents. Beginning in the late 1980’s, the 1975 Indian Self-Determination Act had been amended (adding Titles III, IV, V, and VI pending) to authorize, institutionalize, and implement tribal self-government in areas that had been exclusively controlled by the BIA/DOI. Before, Indians had, under U.S. law, been declared legally too incompetent to govern themselves. As we all know, tribes must legally battle to regulate tax authority in Indian Country (Merrion, 1982; Kerr-McGee

Corp., 1985; Atkinson Trading Co., 2001). Federally, most often, the IRS goes after individual tribal members, as citizens, and blocks the tribes' interventions. Most tribal members, as U.S. citizens, then become scared and settle the case. They fear the amount claimed against them, the possible fines, fees, and penalties that the IRS threatens to attach to the claim. Most cannot afford to hire an attorney to defend themselves.

### **THERE ARE NO MORE "EXCLUDING INDIANS NOT TAXED" – DOI SOLICITOR (1940)**

Over the time, from 1871 to the present, there has been an on-going debate and confusion over the valued status of being separate as enrolled "***Tribal Indians***" (see: Martinez, 1978). Tribal Indians live on the reservations, amongst their tribal community. They are a part of the tribal collective- even comingling through inter-tribally extended family systems. Tribal Indians preserve their traditions, culture, and society. They suffer together economically & socially as a reservation collective. In 1924, the U.S. Congress enacted the ***Indian Citizenship Act*** (43 Stat. 253, 1924). All tribal Indians were to become "citizens" of the United States, regardless of whether or not they were tribal (on-reservation) or individualized (i.e., living amongst the citizens of the state off-reservation, and having severed their allegiance to their tribal community). This act claimed to not impair or otherwise impact the rights and property of the tribal Indians.

The 1924 Act was intended to provide the Indians with ***national citizenship*** so that they could secure the "First Amendment Rights to Religious Freedom." The theory was that "citizenship" would stop the prosecution of the Indians that was taking place under the ***Religious Crimes Code*** (DOI Circular #1665). Fifty-four years after "citizenship" was imposed, tribal Indians did not have religious freedom, so the Congress enacted the ***1978 American Indian Religious Freedom Act*** (P.L. 93-341, 92 Stat. 469, 42 U.S.C. Sec. 1996). The act provided no legal power for the Indians but still the Supreme Court (1988) struck it down as bad law and bad policy (Lyng, Smith II). By the mid-1990's Indian Country began to recover pieces of their religious freedom (e.g., rights to ritual by federal prisoners, rights to eagle feathers, peyote back to the NAC, recovery of ancestral remains). Presently, we are fighting for access to and protection of off-reservation sacred sites (Congressional Hearings, 2008).

Reading this, you must wonder where does the authority for state and federal "taxation" of tribal Indians come from? First of all, we adamantly believe there is no constitutional authority for either one to tax tribal Indians. The 1924 Act did not give tribal Indians religious freedom but it did (indirectly) empower the Internal Revenue Service. The IRS began to argue that *All Indians are citizens, all citizens pay taxes, therefore Indians must pay taxes!* The Supreme Court, ruled in favor of the IRS in 1935 (Superintendent v. Commissioner, 295 U.S. 418)...finding that everybody paid taxes and Indians were included in the court's definition of "***every individual***." This was the generic language used in the tax acts and the full-blood Creek Indian could not point to language in the tax code that exempted his surplus trust income from taxation by the guardian.

By 1940, the DOI Solicitor agreed with the IRS and issued an opinion along those lines, (DOI, Opinions of the Solicitor, M-31039, Nov. 7, 1940). The Solicitor's research had shown that the Founding Fathers intended to assume jurisdiction over "***individual Indians***" that permanently *lived apart from their tribes*, in the states; but, the same Founding Fathers did not intend to claim jurisdiction over the separate tribal Indians

(See: As early as 1783, the Committee on Revenue recommended to Congress to “exclude” the Indians from taxation) that lived under the protection of their own native nations. Thus, they purposely chose the words “excluding Indians not taxed” to constitutionally describe those separate Indians...that lived as nations. This Solicitor chose to ignore the fact that these words, still retained in the constitution today, had valid meaning. But, he wrote his opinion with a lot of source information for us to track, although concluding the opposite of what the Founding Fathers intended. Since then the IRS has been attempting to tax everyone and anything that generates income in Indian Country (only narrowly limited by the ruling in Squire v. Capoeman, 1956).

In 1787, when the “Popular Sovereignty” Constitution was drafted into final form, there were two types of Indians- those that were tribal and dependent upon their separate tribal nations and those that were individuals and lived within the individual state (per earlier constitution- Article of Confederation), living like non-Indians, the same as any foreigner that migrated into the colonies/states. The draft Constitution proclaimed “excluding Indians not taxed” and this was descriptive of those tribal Indians that were not a part of the community known as “We the People of the United States.” Tribal Indians were neither national nor state citizens, and were not to be paying taxes to the national government or individual states, they were excluded (Constitutional Convention, Committee on Revenue, March 6, 1783, original draft language). Nor were they to be represented by the emerging United States. They owed their allegiance to their tribes first and foremost. Their Indian Nations were inherently sovereign and separate.

Now, since it’s 1789 ratification, the constitution empowered the United States to impose taxes, eventually challenged over the imposition of the federal income tax (See: Pollock v Farmer’s Loan & Trust Co., 157 U.S. 429 (1895); then the XVI Amendment, 1913). Originally, the US never included the tribal Indians in their taxation laws. This was why the Internal Revenue Code was so silent as to the tribal Indians. The constitutional language used to describe the tribal Indians was “excluding Indians not taxed” and these Indians were excluded from representation & taxation by the United States, and was more limiting upon the states power. The laws and constitutional amendment (14<sup>th</sup>) specifically excluded tribal Indians as U.S. or state citizens, as a matter of government-to-government relationship.

The Tax Courts and Supreme Court had decided that the general revenue laws should apply to everyone and that included the (tribal) Indians. A correct constitutional reading would be those Indians that live separate from their tribes, as members of the national or state civic communities, may qualify to be included in the population that is taxable- if the 1924 Citizenship Act is constitutional and the conditions of Elk (1884) are met. We would argue that this taxable-Indian-population would be composed of the “un-enrolled Indians” that are completely disconnected from their tribe. The Indians that were included in the early census counts were those Indians that lived separate from their tribal nations- on Indian Homesteads or in the cities. And, the Bureau of Census understood, as of 1930, that “Indians not taxed” meant “Indians not subject to taxation” and the Census did not count them as a part of the population of the United States.

Now, the 16<sup>th</sup> Amendment, we find, says “*The Congress shall have power to lay and collect taxes on incomes.*” The power to tax was given in 1787, and applied to the community known as the “We the People of the United States.” The taxation powers applied to what was constitutionally within the Congress’ reach. The power to tax

individual income was clarified by the 16<sup>th</sup> Amendment. This reach extended to the incomes of their citizens or aliens operating by their permission within their jurisdiction. It goes on to say “*from whatever source derived*” but the language is still limited to its constitutionally delegated jurisdiction. Then, it continues to say, “*without apportionment among the several States, and without regard to any census or enumeration.*” All this language applies to those within the delegated jurisdiction of the United States that could be counted and included. Tribal Indians were not counted in the census nor enumerated so the language still does not attach to them. The 16<sup>th</sup> Amendment did not include any language that would say or could be interpreted to mean “including Indians to be taxed” or “including Indians to be represented.”

In researching the question, we find that after the Civil War the 14<sup>th</sup> Amendment was ratified. After extensive debate by the 39<sup>th</sup> and 40<sup>th</sup> Congresses on Reconstruction, the amendment was reworded to assure that tribal Indians could not become national citizens (Section 1- “subject to the jurisdiction thereof”) nor state citizens (Section 2- “excluding Indians not taxed”). These were purposeful amendment words used with an intent to preserve the absolute no to tribal Indian citizenship (representation & taxation).

This separate status is why the United States continued to enter treaties with the Indian Nations- the representative political bodies for the tribal Indians! The US regulated commerce with the Indian Nations, as an act of supremacy over and above the powers of state governments. In reflection, we know that both the original constitution and the 14<sup>th</sup> Amendment prohibited the U.S. from representing and taxing the tribal Indians. In this light, we begin to understand why, since the 14<sup>th</sup> Amendment, congressional enactments were drafted in such a fashion as to destroy tribal governance and disband tribal communities (e.g., 1887 Dawes Act, 1953 Termination Act). The destruction of the Indian tribal identity, post-treaty times, has been a common goal in the statutes that sought to regulate “Indian Affairs.” The laws were crafted to destroy the existence of those people referenced as “excluding Indians not taxed”...the tribal people living in their separate communities. In order to tax tribal Indians the U.S. had to “terminate” their tribal status, seeking to undermine their constitutional standing, without amending the constitutional language.

Tomorrow, based on this example constitutional fiction weaving, a DOJ Solicitor could argue that there are no more “*We the People of the United States,*” and that all citizens were absorbed by the individual state politic and therefore state sovereignty must each be given paramount rule (although “state sovereignty” as foundational to the Articles of Confederation, 1777-1787, were defeated in 1787). Before the 14<sup>th</sup> Amendment, people were considered U.S citizens because they were state citizens. There was no clear and separate national citizenship. It was the 14<sup>th</sup> amendment that extended U.S. Citizenship to the Negros, Gypsies, Hindus, Chinese, Irish, and other (then) unwanted aliens that “racism” sought to exclude. Securing citizenship through state powers was a part of the state’s view of their superior status. The resistance to allowing these new citizens the power to vote was defeated by the 15<sup>th</sup> Amendment.

Still, the **People** are foundational, and regardless of state theories of their sovereign superiority, such as “Compact Federalism,” the Court settled this question as early as McCulloch (1819) in favor of the National government. Be warned though, in the 1990’s the Supreme Court has begun to rule in favor of state rights (Gregory v. Ashcroft, 1991) over national governance, in the debates over the application of the tenth amendment.

Most recently, the State of Washington (for example) issued their declaration of state sovereignty. Washington Tribes, then, must be prepared to defend themselves against state expansion of P.L. 280 activities and jurisdictional encroachments, which has been expanded (by legal fiction) to include state taxation of tribal commerce. While Section 2 of the 14<sup>th</sup> amendment made it unconstitutional for states to make tribal Indians state citizens, the individual states have done this in violation of the 14<sup>th</sup> Amendment.

The constitution has been recognized as a popular sovereignty document that limits the power of the United States. Anything not given, as delegated powers, to the President, the Congress, or the Court is reserved. Because of the dispute over the reach of lawful powers delegated to the national government, the states secured the tenth amendment - declaring that any powers not delegated were reserved to the people or the states. However, under the U.S. Constitution, the national and individual state governments cannot simply take over Indian Country by legislative enactment, nor could either simply incorporate tribal Indians as their citizens. This was not an inherent power the "People" could delegate to their government; just as they could not delegate legislative or executive powers to take over a foreign country, outside an act of war and conquest. But, both governments have done to justify taking more from Indian Country.

The treaties and the constitution(s) are the legal fences between national & state relationships with the Indian Nations. If the Indians did not cede the authority to the United States then it was reserved to them, as a consistent part of their inherent tribal sovereignty, and reserved rights (Winans, 1905). The tribes did not authorize jurisdiction over their reservations by state governments (Williams v. Lee, 1959), and did not authorize the United States to declare their tribal Indians citizens, or authorize the US to represent and tax them. These are legal fictions, unless clearly secured and authorized by treaty and with corresponding constitutional amendment. Theoretically, congressional enactments about Indian Affairs are to be tied to implementing treaty articles & obligations...as the Indians would have understood them, not as the way learned lawyers would interpret them.

We might encounter, again, the argument that the Congress has plenary power over the treaty, tribal Indians and could then tax them. It has plenary power over treaty-making, treaties-made, and establishing commerce "*with*" the Indian Tribes. But the Constitution does not delegate plenary power over Indian Nations, Territories, and their natural resources without legally addressing the Indians' rights. Congress has power to abrogate Indian Treaties (Lone Wolf, 1903), and return the benefits gained- which it will not do! Then the question turns upon their "political question powers." The courts ruled that this was not subject to judicial review; but, we find that on ordinary principles of constitutional and administrative law they are subject to judicial review (Delaware Tribal Business Committee v. Weeks, 1977; United States v. Sioux Nation, 1980). The constitutional language that applies to the Indians is exactly that...constitutional law. Administrative laws of the IRS that violate the Constitution are subject to judicial review. But, the problem is judicial activism that continues to create "court-made law" founded upon historical fictions of "Indian Conquest."

Perhaps, if we believed that those individual Indians that lived permanently amongst the citizens of the individual states could be treated the same as any alien, then the U.S. could exercise Article I, Section 8, Clause 4 powers over "**Naturalization**" to make them citizens- which then explains the legal logic of Elk v. Wilkins (1884). But, because of the

conjunction with other provisions of the constitution, it would not be applicable to the “tribal Indians.” Naturalizing tribal Indians is contrary to specific intent of other parts of the constitution. Tribal Indians would remain exempted from this article’s application, as intended by the language of the 14<sup>th</sup> amendment and its manifest purpose to exclude them by the words “*subject to the jurisdiction thereof*” and “*excluding Indians not taxed.*” This exclusion of tribal Indian citizenship was in the 1866 Civil Rights Bill (14 Stat. 27), as well. The statutory law and the constitutional amendment recognized the tribal Indian exclusion was not being removed but rather reinforced.

The Indians Fishing Rights Exemption Campaign resulted in 26 U.S.C., Section 7873 of the Internal Revenue Code (1989). We defended our rights as treaty, tribal Indians represented by our own governments, living on-reservations separated from the People of the United States, and individual states. We argued that treaty (fish) resources were reserved for the treaty-protected tribal Indians and could not be taxed by the United States or individual states, for that would be an additional taking beyond what was ceded by treaty. This was an important argument to the treaty tribes of Washington, Oregon, Idaho, Montana, California, the Great Lakes region, and down to Florida.

All levels (multipliers) of the resulting incomes made from the natural resources dependent tribal economy could only be taxed by the tribal governments, as pertains to the incomes of their tribal (Indians) members or tribal corporations or management entities. The treaty-reserved natural resources were “retained by the tribes” as a matter of treaty right, as an extension of their inherent sovereignty and self-preservation. Taking additional shares by federal taxation is an additional step to permanently impoverishing the Indian nations. For non-Indian governments to tax that right is to destroy that right. Keep in mind that “treaty” fish are no different from “treaty-reserved” coal, oil, uranium, timber, minerals, gold, silver, or other forms of market valued natural resources. All of these natural resources were set-aside by treaty, federal law, or executive order for the tribal Indians’ exclusive use in perpetuity. The tribes did not cede lawful jurisdiction or title over those resources to the United States. The IRS, as a legal entity of the U.S., does not have any more power than the (legal) parent entity.

When the treaty fishing rights campaign began the tribal lawyers sought to get a limited Squire exemption ruling that would only protect the individual treaty fishermen’s incomes. We rejected that as a matter of legal principle. We reserved the whole treaty fishery...not just the first step of the harvest. In our opinion all parts of the tribal fishing industry was exempt from federal and state taxation; i.e, all parts of treaty harvesting, marketing, transporting, protection, management, representation, enforcement, fish court proceedings, habitat protection, aquaculture (hatcheries),...all of it! Our lawyers said we would never win such broad exemptions but we prevailed when Congress considered our logic tied to the treaty-rights. The Chairman of the House Ways and Means Committee tried to kill this language, he failed. He then tried to force us to compromise, so that other treaty tribes could not argue the treaty logic after us, we rejected the offer and prevailed in the long-term.

Today, nearly all Indians are paying income taxes to the United States because the IRS lawyers and DOI Solicitor had help corrupt the constitutional relationship with the Indian Tribes. As noted above, the Solicitor agreed with the IRS in 1940. The Supreme Court agreed with the IRS (1935) lawyers. Thus, to these federal agents, it does not matter what the treaty obligations are, nor what the constitution says, the Supreme Court supports

them. It is all about forcing the tribal Indians, as individual national citizens, into submission. The IRS is the new invading army, systematically entering Indian Country, without limitations. Bureaucratically, it is economically defeating Indian Country by imposing unlawful taxation & collection proceedings- with the blessings of the courts. These cases will not change until we prove what the constitution says and what was the original intent. That is our battle! This is our challenge that we must confront. We still exist as tribal Nations. *Extermination* of tribal Indians by *Starvation* and *Termination & Relocation* failed as federal policies. They could not “Kill the (tribal) Indian” that lives inside us, in Indian Country, as represented by tribal governments, on reservations.

But, be warned. When we battled for Section 7873, the IRS was less organized to address Indian Taxation. Since then, the IRS has developed its own Office of Indian Tribal Governments ([www.irs.gov/tribes](http://www.irs.gov/tribes)). It has been cultivating its own expertise. The IRS has divided up Indian Country and has set targets on auditing and collecting every tax dollar they can estimate is owed by the tribally-created commercial enterprises and tribal people. This division of the IRS has developed its own institutional mindset. It believes the whole IRC applies to everyone and everyone includes all Indians- in complete disregard of treaty commitments and constitutional intent.

In their definitions, the individual Indian is a singular citizen. What taxes a “citizen” may owe is not a legal concern of the tribe, says the tax court. The tribes have no right to step in and try to protect the individual, regardless of treaty rights, says the tax courts. Hundreds of tribes are currently undergoing audits by the IRS and legally challenged to comply with IRS rules, regulations, to make their assessed tax payments or face penalties and fines, per tribal employees or tribal members doing business with the tribal governments, on-reservation (See: Disputes over W2 and 1099 Reporting). The Lummi Nation just went through this process. Most tribal lawyers only know how to comply with the IRS requirements and to negotiate the final sum owed downward. We need political solutions! The tax court, like the Supreme Court, is anti-tribal Indian. Indian Country is confronted with precedence set by the tax court, loaded with legal fictions.

### **BRIEF HISTORY OF THE RELATIONSHIP WITH THE UNITED STATES.**

But, we remind each and everyone of you that before the national “IRS Indian taxation” goals came into existence, we were sovereign nations that entered treaties of peace and friendship with the United States. The United States recognized that these treaties were much more convenient and efficient diplomatic vehicles to develop relationships with the numerous, sovereign Indian Nations. To go to war and attempt “conquest” of the hundreds of Indian Nations located across the continent was not wise, and without guarantee. Peace was cheaper, easier, and safer. The treaties acknowledged the separate status and reserved territories of the tribal Indians. The ceded lands paid to secure and preserve this separate status. However, contrary to the reality of all these Peace Treaties, the Supreme Court, in Tee-Hit-Ton (348 U.S. 272 (1955)), ruled, by legal fiction, that all tribes were “conquered.” This fiction was essential so that the Court could begin to weave justification for applying court-made laws to Indian Country. It was a means for the Courts to rationalize over-reaching by ambiguous national statutes into Indian Country. It was a means for them to apply white laws of general application to all citizens to Indian Country. It side-stepped canons of construction of written constitutions and treaties-made. Fictional conquest has been instituted by legislation and court-made

decisions. By fictional conquest, they took over Indian Country. Our tribal members become their conquered subjects. The problem, in reality, was that there were very few tribes that went to war with the United States and were conquered.

Over 700 Peace & Friendship Treaties were negotiated by commission of the Presidents, with authorization of the Congresses, with about one half of those ratified by the U.S. Senate, and binding upon the whole United States. Those treaties, collectively, secured to the United States nearly four million square miles of land and natural resources, from the Atlantic Ocean to the Pacific, from the Borders of Canada to Mexico. All the treaties were ratified when the US took the benefit of the treaties by its action. The Indian Nations reserved, for their exclusive use and occupation, lands & natural resources that were not ceded to the United States. These lands & natural resources were kept as a matter of their inherent, sovereign right. The tribes occupied the land first and had superior right to its title, although classified as aboriginal title (Johnson v. McIntosh, 1823). The tribal treaty reservation set-asides totaled 138,000,000 acres of treaty-protected lands (1776-1871), decreasing to 48 millions acres by 1934.

The resulting “treaty-obligations” can be summarized as the duties & responsibilities of the “**Sacred Trust of Civilization**.” The United States, as a whole, owes this “Sacred Trust” to all the Treaty Indian Tribes. While protecting the lands from encroachments by white citizens is a treaty (trust) duty, the sacred trust is much more than that. As the US experienced and enjoyed socio-economic enhancement & progress so should have the Indian Nations. All three parts of the national government owed these duties to the Indian Nations- the President, and the Congress, and the Court. And, all federal agencies and departments were bound by the “treaty-commitments” entered into by the United States, after all... “**Great Nations, like great men, keep their word!**” However, as a matter of routine, Indian Affairs has always been sent to the BIA only. It had been permanently relocated from the War Department to the Department of Interior (1848)- which manages federal parks, fish, wildlife (and Indians). The only changes, since then, has been the separation of the Office of Special Trustee (See: Cobell) from the BIA proper.

By 1871, the House of Representatives became jealous of the President’s Treaty-making power and the Senate’s power to ratify the treaties (Art. II, Sec. 2, Cl.2). The House decided that it was an insult to their control over the “Power of the Purse” (Art. 1, Sec. 7) to be forced to appropriate funds to implement treaties they did not help negotiate. Consequently, they placed a “rider” on the appropriations bill that falsely claimed the House could limit the constitutional powers of the President and the Senate (March 3, 1871). This rider, allegedly, stopped the President & Senate from negotiating and ratifying treaties with the Indian Tribes (25 U.S.C., Sec. 71). The House held the “purse” hostage until the President and Senate conceded to the rider. Article 5 of the constitution was not used to amend the constitution to limit the President’s and Senate’s treaty-making powers in relationship to the tribal Indian nations. Acts of congress do not amend the constitution. The rider is only political psychology rather than constitutional law.

After that, the President began to exercise his “Executive” powers and started creating land set-asides for Indian Reservations (e.g., Walker River Reservation, March 19, 1874). These reservations are commonly called “Executive Order Reservations.” As a matter of law, the President can create a reservation or add land to an established treaty reservation but he could not diminish the size of that reservation without an Act of Congress authorizing the diminishment (25 U.S.C., Sec. 398d). Executive orders and statutes

replaced treaty making with the Indians (See generally *Antoine v. Washington*, 420 U.S. 194 (1975). Note that “taxation” is a diminishment of the reservations’ value!

After 1871, Congress took over management of Indian Affairs as a matter of “Statutory Power.” The Indian Commerce Clause gives congress the power *to regulate commerce with foreign Nations, among the several States, and with the Indian Tribes* (Art. I, Sec. 8, Cl. 3). This power is plenary but limited to the subject matter of commerce. The President and Senate create the treaty relationships (Article II, Sec. 2, Cl. 2). The Court can interpret (Art. III, Sec. 2, Cl.1) the legal treaty obligations. The Congress appropriates funds to implement the treaties (Art. I, Sec. 7). But, plenary power over the Indian Nations is not given to the President, the Congress, or the Court by the Constitution. It is a false extension of U.S. Popular Sovereignty that has been created by executive policy and reinforced by national statutes since 1871, supported by the Courts.

In 1887, in another land grab, in violation of the treaties-made, the U.S. Congress enacted the General Allotment Act, commonly known as the *Dawes Act* (24 Stat. 388). This act was structured to dismantle the Indian nations, and make the “tribal Indians” into individuals that would eventually qualify to become U.S. Citizens- to be represented and taxed, and permanently separated from their tribe...so claimed the United States. Allotted Indians would become U.S. Citizens after a period of “civilizing” influence of the Dawes Act (Nice, 1916). After the lands were “allotted out to the Indians” an alleged “surplus” of land & natural resources was declared by the United States and taken away for white homesteaders. Congress would enact a statute specific for each reservation that had a declared surplus available, taking it from the tribes. This was a land grab that totaled an illegal taking of 90,000,000 acres of “treaty-protected” lands. It devastated the ability of most tribal people to survive on the reservations, and destroyed tribal governments.

Taking title to treaty-lands by statute, and then placing the (individual) Indian’s treaty land into trust in the name of the United States, was a fictional exercise of plenary power not founded on the constitution or treaties-made. Nearly 38,000,000 acres were placed into “statutory trust status” by this alleged legal authority. After 25 years the (fee) land would qualify to be taxed by local, white governments, unless the U.S. extended the “trust status” of the tribal Indian. In addition, the act was amended (1910) to give the BIA complete control over the estates of all incompetent and non-competent Indians, and all tribal Indians were so classified. Since all Indians were, allegedly, under this status the BIA completely controlled all of their lands and natural resources, and related contracts.

A lot of tribal lands were taken out of “trust status” and became taxable fee lands. Remember, before Dawes the lands were protected by treaty, and did not have either a fee status or a statutory trust status. The title was treaty-secured to the tribe as a hold, in common for the membership. The US gave itself title to our lands, allegedly to protect our best interests. This protection came in the form of the 25-year trust period. At the end of that period the U.S. was claiming to give jurisdiction over the lands (now transferring into “fee status”) to county/state government. It became taxable and the unemployed tribal Indians could not pay the local taxes. The county/state took the land for back taxes. It was then sold off to the highest “white” bidder. Many times the local whites lodged a “claim” against the land for some alleged unpaid service provided the Indians. Once sold to non-Indians these lands became the foundation to the checker-board jurisdiction problems confronted by Indian Country. In addition, the BIA was usually selling the “prime” estates of the Indians- e.g., mineral rich lands, or timber lands. What was not

sold was leased or rented to non-Indian corporations that sought to economically exploit the natural resources for private gain, the same for agriculture lands.

The alleged benefits to the Indians were the “revenues” derived from the sale, rent, or lease of Indian lands and natural resources. The resulting funds were placed into BIA managed Individual Indian Money Accounts, allegedly to be disbursed to the Indian Owners. But, as Cobell proves, this disbursement did not happen and the funds were taken away as an exercise of governmental corruption and fraud. As pertains to the Squire decision- only the individual owner of the trust land or natural resources had their income exempted from federal taxation...that is if they ever received it. Every level of income derived after the owner was declared taxable- regardless whether or not it was processed or marketed by tribal members or a tribal corporation on-reservation.

There are various enactments dealing with the “commerce” of Indian tribes. But, the process thus far has produced laws that limit that capacity of Indian tribes to participate in commerce that may compete with local white economies. The Indian Commerce Clause has not been used to regulate commerce *with the Indian Tribes*, but to regulate the commerce *of the Indian Tribes*. In all constitutional fairness, the Indian Commerce Clause should be used to regulate the activity and conduct of non-Indian commercial interests and trade activity conducted with the tribal Indians. Any income producing commerce of the tribal Indians should only be subjected to tribal taxation. What is needed is congressional clarification that limits IRS access into Indian Country. The Indian Commerce Clause could be used to accomplish this purpose, constitutionally.

#### **OTHER IMPACTS OF THE RELATIONSHIP:**

Making the socio-economic conditions on the reservations even worse, the BIA failed to probate the estates and divide the lands into lots for the heirs. Thus, most all lands on the Indian Reservations have been subjected to “*fractionated inheritance*.” The lands cannot readily be used by the tribal Indians because there are so many heirs involved. The BIA would never allow use of the land without the heirs agreeing to the use or the subdivision of the land. The continued solution has been on-going BIA estate management that leases/rents/sells the Indian lands. This is unacceptable.

This problem of breaking up the traditional tribal governments and society, and then individualizing the common land ownership, and never allowing the Indians to manage their own estates has resulted in the socio-economic marginalization of the Indian Nations. This is shown statistically by the tribal Indians suffering the highest infant mortalities, highest teenage suicides, shortest life-expectancies, poorest housing, poorest health, highest under-employment & unemployment, lowest educational/vocational attainment rates in the Country. Their lands are rurally isolated, with no infrastructure (i.e., access roads, water, sewer, electricity, gas or other aspects of modernization). Even with modest levels of infrastructure availability, the lands are still fractionated in ownership and completely under BIA “trust” control, with clouded titles that stop economic use. And, because of the clouded titles, tribes are dependent on purchasing “fee lands” from non-Indians in order to have lands for essential government functions and services, and provide housing sites for their membership. But most of the non-Indians living on reservations hate Indians and will not sell their fee lands to tribes.

Most all the tribes recognize the suffering of the people caused by federal laws and policy. Any tribal financial contributions, made by the tribal governments, to help the

people over-come this marginalization (extreme, enduring poverty) is considered taxable by the IRS. The IRS audits, conducted nationwide, have resulted in tribes being forced to file 1099's on all such contributions or assistance made to the tribal Indians (i.e., women, elders, and children). No one is left out of the IRS's estimate of taxable gains.

Consequently, the tribes suffer, as communities, because fluctuating national Indian Affairs policies have devastated tribal people and their land ownership. Their families have become dysfunctional (due to detrimental influences and abuses in Missionary or Boarding Schools and mandatory native attendance). They cannot even build homes on their own inherited property. Over time, the Indians could not even depend upon "Christian Society" for help since they were branded as savage heathens- not unless they converted from traditional spiritual beliefs to Christianity. Those that did not convert were prosecuted under the Religious Crimes Code; which was instituted when President Grant transferred reservation management over to the Churches (1872); since the 1870's BIA was full of fraud and corruption and could not be trusted to manage Indian Affairs (Cong. Hearings, 42nd Congress, Committee on Indian Affairs, March 3, 1873).

The U.S. Congress had already taken control over the treaty-reserved Indian lands, and began to dismantle Indian Criminal Jurisdiction over all of Indian Country by enactment of the Major Crimes Act (Kagama, 1886), and imposition of the General Crimes Act (Chavez, 1933). Before, tribal governments, as independent nations (Worcester, 1832), could prosecute violators of their laws- whether Indian or non-Indian or by treaty-agreement would surrender non-Indian violators up to the federal government. The federal criminal laws were extended into Indian Country to govern prosecution of Indians for major and general crimes; but, it has evolved more into the protection (by non-prosecution) of the "white" criminals' than it was about protecting the tribal Indians, as a people and society. Indian Country has become a haven for white/non-Indian criminal activity (as exemplified by the plague of non-Indian drug dealers, as well as the majority of rapes of Indian women being done by non-Indians coming from off-reservation).

While the Indian Reorganization Act (1934) sought to undo the damages done to Indian Country by the Dawes Act, as recognized by the Merriam Report (1928), this policy was quickly replaced by "**Termination**" (HCR 108, 1953). As a historical note, Post-WWII, the U.N. was implementing world-wide indigenous self-determination and decolonialization. The U.S. decided to terminate tribal consciousness once and for all, rather than allow tribes to become self-determining or demand decolonialization under UN supervision. The US sought to eliminate tribal governments, and relocate the individual Indians and their immediate families into the poorer areas of urban America (**BIA Relocation Program**). Indians remaining on the reservations were to receive no rights and no services- cutting off health and education benefits promised by treaties-made. Plus, they were not entitled to welfare assistance if they owned reservation lands. They were to be starved into submission. The children and elderly left behind had to sell their reservations lands if they wanted federal assistance. The idea was that landless tribal Indians would be absorbed and disappear into the civic culture of the United States. And, the remaining Indians on the reservation would be forced to submit to state jurisdiction (P.L. 280, 1953). There would no longer be any constitutional tribal Indians.

**"Laws are nothing but old politics, if you don't like the laws then change the politics!"** Our campaign is about changing the politics that support the unjust, unconstitutional laws that have been applied to Indian Country. It is about compliance

with the Constitution. Our relationship with the United States is governed by the Constitution. Under both the national and federal system, the individual states are bound to honor this constitutionally established, treaty confirmed, relationship with the Indian Tribes. The Departments of Interior, Treasury, and Justice all have a role in dismantling the legal fictions that have become customarily applied to “Indians” in tax courts or federal district courts....and especially the Supreme Court. Continuing to allow these fictions to exist only damages the long-term constitutional health of the U.S.- as a democratic republic accountable to the People.

As Felix Cohen said, *“Like the miner’s canary the Indian marks the shift from fresh air to poison gas in our political atmosphere, our treatment of the Indian, even more than our treatment of other minorities, marks the rise and fall in our democratic faith.”* We believe, that after years of research, Cohen came to understand that the American Indians are the litmus test to the long-term survival of the U.S. Constitution. The People of the United States did not delegate, could not delegate, plenary power to the national government over the Indians. However, constitutionally, they could delegate powers to regulate their government’s conduct toward and relationships with the Indian Tribes.

When President Clinton and Vice-President Gore were in office, they sent us a message (via Loretta Advent, WHO Intergovernmental Affairs) that our view of the constitutional relationship was a legitimate concern and the laws of the U.S. should be amended to fall in line with our briefing document. President Jackson said, *“The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. ....The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point, the President is independent of both.”* (2 Messages and Papers of the President 576, 581-583). Thus, we must work with the President and the Congress to undo the damages caused by Supreme Court opinions that belittled and denied our standing as a member of the family of sovereign governments existing in the United States, as tribal Indians protected by our own governments, with our own territories (however small) and tax exempt.

Therefore, we ask all tribal leaders, all tribes, and all intertribal organizations to join us in **One Voice that shall advocate Tax Justice for the Indian Tribes!** We want to have the President’s and Congress’ Indian Policies aligned with the U.S. Constitution, and proclaim the commitment to Indian Self-determination and Self-government, and recognize that the application of the Internal Revenue Code to Indian Country must be very limited, very narrowly defined as to the extent of jurisdiction to be exercised by the Internal Revenue Service, Department of Treasury.

We propose, then, that Indian Country seek to request the House and Senate Leadership to commit to holding Oversight Hearings on the Iroquois Resolutions. The oversight is that the resolutions recognized the treaty and commerce clause but other parts of the Constitution are applicable. The Iroquois Resolutions were *Concurrent Resolutions*. The goal of the Oversight Hearings is to produce a Joint Resolution- which would be presented to the President and signed into Law. Both the Congress and President recognize Tribal Self-determination and Self-governance as a matter of law and policy. The next step is constitutional alignment of the two policies. In the end, we could use the hearing records (and Joint Resolution) as tools to educate the Congress on the need for the Tax Preemptions, Exemptions, and Credits proposed for Indian Country. But, we have to organize and strategize for success. That is our job!

## **Example Recommendations for Indian Country:**

**First.** We believe the constitutional language is still valid per “*excluding Indians not taxed.*” We are tribal Indians living on lands reserved exclusively for the tribal Indian people, and we should not have to pay income taxes to the federal or state governments. Providing the power of tribal governments to *preempt the federal income taxes*, for all persons employed in Indian Country, would provide an immediate source of hard dollars to invest into tribal economies and government. This income could be reinvested into tribal essential governmental functions and services, governed by a compact entered into by the tribes with the IRS. However, it should be authorized that the tribes, per this division of employees (outside the group covered by Section 7873), will have the right to allow their employees to continue contributing into Social Security, Unemployment, and Individual Retirement Funds- as authorized/regulated within the said compacts.

**Second.** *Indians that receive per capital distributions* should be allowed to directly make charitable donations to inter-tribally managed education or health funds, and that such charity donations would be completely (100%) covered by *tax credits*...a dollar for dollar reduction in tax liability (like Foreign Tax Credits). This would give them an incentive to donate, and thereby reinvest into charities to help other impoverished Indians and tribal communities. The education funds would be used for the more poverty stricken tribal peoples; making them ready to enter the job markets. The health funds could improve tribal member access to health facilities or help with contract health costs or insurance premiums. Both Indian education and health are underfunded by the United States. And, it would be beneficial to *extend this tax credit to non-Indian corporations* that have located commercial ventures on-reservation. They should be authorized to make donations up to a specified amount per individual and from gross corporate profits, based on reservation created income ...for on-reservation charity purposes, with 100% credit.

**Third.** The United States created the *fractionated heirship problem* and clouded the titles to almost every piece of land in Indian Country. The US set-aside lands for states when they joined the Union; but, when it came to the tribes, all lands were taken from common tribal ownership and distributed to individual Indians by post-treaty federal law. The *Indian Land Consolidation Act* has been a failure and underfunded. And, most non-Indians do not want to sell to “Indians.” To resolve the problem, provide the non-Indians with tax credits or tax exemptions for the sale of fee lands to the tribe(s). If their gained income generated from selling fee lands to the tribe is exempt from federal taxation, or a negotiated reduction of its market value is contracted and written off as a tax credit, then they will sell at a higher rate due to the gains retained. This provides each tribe with the capacity to consolidation land for socio-economic development.

**Fourth.** Amend the Internal Revenue Code, *Section 7873-Indian Fishing Rights Exemption*, so that it applies to all incomes derived from any and *all natural resources set-aside by treaty, executive order, or federal statute* for Indians or Indian Tribes. And, at the same time, authorize the tribes the right to negotiate with the Internal Revenue Service, as a part of their compact, to develop individual retirement accounts that are specially tailored for Indian Country, per this area of tax exempt income.

**Fifth.** The Indian Arts & Crafts Board was created as a national entity to provide federal protection of the Indians’ rights to produce their historic and tradition based arts and crafts for economic gain. The law, and the board, have done little to make this mission economically feasible for Indian Country, after several decades. Any progress that has been made has been stifled by the constant attempts of the Internal Revenue Service to identify Indian artisans, determine if they sold any art, and then apply taxes to the income. Arts and Crafts are directly tied to our native, tribal identity and should never have been subjected to the tax attacks of the IRS. For this reason, we need language that absolutely makes our Arts & Crafts, produced inside of Indian Country by enrolled tribal members (and their dependents) of federally recognized tribes, exempt from federal and state taxes.

**In conclusion**, please notice that all the resulting tribal tax revenues are advocated for reinvestment into Indian Economies and Society, and for performance of essential governmental functions and services. These are revenues that are generated inside of Indian Country. There is no magical formula that has to be developed for distribution amongst the tribes; except that the taxes are retained by the tribal government based on the level of employment or economic activity evolved within the exterior boundaries of each reservation. The funds would go to help stabilize tribal governments, stimulate tribal economies, encourage reinvestment into tribal health and education, arts & crafts, and result in additional development of tribal natural resources and related commerce. For these reasons we seek a united front as One Voice for Indian Country! This is the mission of the ATNI Tax Task Force and the basis of our presentation to secure the support of NCAI (June Conference 09). We have presented this to the White House and will be actively seeking hearings in Congress in the near future. The ideas have been presented to various congressional leadership as well. We must limit the IRS access to Indian Country. We have to draw the boundary line, using the constitution and treaties-made.

In this era, of tribal self-governance, there are no reasons why the IRS could not be required to enter “compacts” with the Indian Tribes. The Compacts would delineate the way the retained taxes (preempted) or their values (exempted, credits) can be reinvested into essential governmental functions and services. The compacts would address tracking and nominal reporting requirements- more so to avoid confusion as to which taxes a citizen or tribal member may owe outstanding and certification of which was preempted, exempted, or covered by credits. The national tax forms need not be amended, it could be “regulated” so that the IRS recognizes that the “foreign tax” sector could be used to assure the otherwise taxable income is eliminated from the computation of taxes owed.

This campaign may take several years to accomplish. We can do it a piece at a time. But, over the long-term, we need an intertribal agreement as to the national goals. For this reason, we sought out the professional legal guidance of Holland and Knight, as well as the political experience and expertise of Ben Nighthorse Campbell. Pacific NW tribes have been asked to start the intertribal fund to help share and cover the costs. Some of the questions may be answered by the IRS administrative procedures, others may surface in different subject-relevant bills; but, in the end, there will be focused long-term goals to make Indian Country exempt from external taxation based on constitutional foundations.

## **CONGRESSIONAL OVERSIGHT HEARINGS TO ALIGN THE INDIAN POLICIES OF THE U.S. CONGRESS AND PRESIDENT**

**CONSTITUTIONAL INTENT**: The U.S. President and Senate share the “Treaty-making Powers” (Article II, Section 2, Clause 2) delegated by the U.S. Constitution. The Senate and House of Representatives share the “Indian Commerce Clause Powers” (Article I, Sec. 2, Clause 3) delegated by the Constitution. The Supreme Court has powers to interpret “treaties-made” (Article III, Sec. 2, Cl. 1). And, all three branches of national government must hold the constitution, acts of legislature, and treaties-made as “Supreme law of the land” (Article VI, Cl. 1 & Cl.2). Tribal Indians, and their inherent forms of government, were kept separate from “We the People of the United States” (Preamble) when the Popular Sovereignty Constitution delegated powers to the national

government, by the words “Excluding Indians not taxed” (Article I, Sec. 2, Cl.3), and the 14<sup>th</sup> Amendment confirmed this separate status (Sec. 1 & Section 2).

**CONGRESSIONAL DECLARATION:** During the Bicentennial Celebrations of the U.S. Constitution (1787-1987), the Senate passed Senate Concurrent Resolution #76 and the House passed House Concurrent Resolution #331. Both resolutions are called the “Iroquois Resolution.” Both pay tribute to the influences the Iroquois and Choctaw Confederacies made to the underlining concepts of the U.S. Constitution. Both resolutions had declared that the relationship with the Indian Tribes is government to government, as founded upon the Constitution. Hearings were held in both the Senate and House. *However*, while it was declared that the relationship was constitutionally founded, it did not define the relationship conclusively as a matter of policy recognition that could contribute to the management of Indian Affairs over time.

**INDIAN AFFAIRS- POLICY MANAGEMENT:** The Constitution divided up the king’s power into the Executive that enforces the law, the Congress that makes the law, and the Court that interprets the law. When it comes to the “Indian Policy” all three branches have their separate position; while the President and Congress declare their policies openly, the Court develops and implements it’s over time by court decisions. What is needed is for the Congress and the President to align their Indian Policies for consistency. This aligned policy statement would be a message to the Supreme Court. Presently, the Supreme Court depends upon the Termination Era version of Felix Cohen’s Handbook on Federal Indian Law as it’s guide. Often, the three branches of government do not have an aligned, consistent national Indian Policy that is constitutionally sound. Over time, this has caused problems for Indian Country and the national government (e.g., 1871 Appropriations Rider, Dawes Act, IRA 1934, Cobell).

**PROPOSED PRESIDENTIAL/CONGRESSIONAL FIX:** Since SCR #76 and HCR #331 did not specify how the Articles of the Constitution specifically guided the development of Presidential and Congressional Indian Affairs Policies, oversight hearings should be held in both houses, with President Obama and his Cabinet being requested to testify, on formation of an aligned Indian Policy declared by a “Joint Resolution” supported by the Presidency. The President can request the Senate Committee on Indian Affairs to hold the hearing based on Article II, Section 2, Clause 2, since that is the committee of jurisdiction over Indians and the Senate can “advise and consent” to treaties. The President can request the House of Representatives to hold hearings, through the Natural Resources Committee, since that is the committee of jurisdiction over Indian Affairs, per Congressional authority delegated by the Commerce Clause. And, there is additional authority to the House Appropriations Committee in regards to its “Power of the Purse” for appropriating funds to implement treaties-made obligations and the Sacred Trust of Civilization. This, then, would require the President exercising his Chief Executive Powers to direct each member of the Cabinet to assure all departments and independent agencies appear as witnesses and submit written testimony. Each Committee would be requested to have an expanded witness list.

**INDIAN COUNTRY MUST BE CONSULTED:** Indian Country has treaty relationships with the United States. Over 700 treaties were negotiated with the Indian Tribes, half the treaties were ratified by the Senate; but the U.S. took the benefit of all the Indian treaties (ratification by action of taking). Indian Country has concerns over Treaties-made, Indian Commerce, derelict Supreme Court decisions that generate legal fictions not in compliance with the canons of construction of written constitutions and treaties-made, and congressional appropriations essential to assure that Indian Country receives benefits from all federal departments and agencies as a part of the “Sacred Trust of Civilization.” Therefore, Indian Tribes and intertribal organizations will want to participate as witnesses and submit written testimony on the need for Presidential and Congressional alignment of their Indian Policies that constitutionally reinforces tribal rights to be Self-determining and Self-governing.

**JUSTIFICATION:** Indian Country has experienced fluctuations in the national Indian policies since 1787; ranging from genocide, to treaty-making, to termination, to self-determination, and now self-government). Indian Affairs is subject matter of the national government, to the exclusion of the individual states- except as lawfully exercised in Congress Assembled. Indian Country must deal with each branch of government- the President, the Congress, and the Supreme Court. Legal fictions about the relationship between the United States and the Indian Nations permeate the relationships Indian Country has with each. All three branches are not unified in their estimate of how to best treat the “Indian Problem” (usual historical term used to describe “Indian Affairs”). For Indian Country, working with the United States is like talking to a legal entity with Dissociative Identify Disorder (multiple personalities). Each branch of government has its own “Indian Affairs” personality (i.e., its own view of what is a perceived valid, justified relationships with the Indian Nations). A healthy national Indian Affairs Policy would be one in which all three branches have a legal identity that collectively deals with Indian Affairs constitutionally, rather than based on legal fictions used to justify additional taking of rights and resources of the Indian tribes. To unite the Indian Policy of the President with the Congressional Policy that provides for Indian Self-determination and Self-governance (P.L. 93-638, as amended) would be a healthy union that could, over time, influence the wayward Supreme Court (See: Milner Ball, Constitution, Court, Indian Tribes, American Bar Foundation Research Journal, Volume 1987, Winter, Number 1).