

INDIAN LAW RESOURCE CENTER

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Elements of Federal Indian Law in the United States: An Analysis of the Legal Roots of Racism

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In the United States today, indigenous peoples can be deprived of their lands and resources without due process of law and without compensation; indigenous governments can be terminated at will by the federal government; and treaties may be arbitrarily abrogated. This is a result of unjust and discriminatory policies which operate to deny indigenous peoples many of the most basic human rights which other people in the United States take for granted.

The Doctrine of Discovery

Laws in the United States continue to deny basic human rights to Indian peoples that others in the country freely enjoy, especially rights to their lands and rights to be free from discriminatory and arbitrary government action. These ongoing threats to indigenous peoples can be traced directly back to the fundamental principles upon which U.S. Indian law and policy are based, particularly the “doctrine of discovery.” The American formulation of the discovery doctrine is that indigenous peoples were divested of certain natural rights, especially their land and resource rights, by the mere arrival of Europeans because of an assumed European superiority. This doctrine has repeatedly been seized upon to justify discriminatory treatment and erosions of indigenous sovereignty in modern times.

Only a small step is required from the discovery doctrine to the emergence of the doctrines of plenary federal power over indigenous peoples, treaty abrogation, the “trust relationship” between the federal government and indigenous peoples, and the taking of Indian property.

Plenary Power and Treaty Abrogation

The plenary power doctrine holds that the U.S. Congress has plenary or absolute power over the affairs of indigenous peoples in the United States. The law concerning treaty abrogation arises from the doctrine of plenary power. In the 19th Century, indigenous peoples entered into treaties in good faith with the federal government, giving up vast land holdings in exchange for specific territories which would be protected from non-Indian encroachment and within which they would control their own affairs. These

treaties represent legally binding agreements entered into by distinct, sovereign peoples. They are, under the U.S. Constitution, the supreme law of the land. However, the United States Supreme Court has extended the doctrine of federal plenary power over indigenous peoples to include the power to unilaterally abrogate treaties between indigenous nations and the federal government. This practically unlimited power means that indigenous peoples are denied basic rights and legal protections that are afforded to other United States citizens.

Trust Relationship

The United States claims that there exists a trust relationship between indigenous peoples and the federal government. As a result of this claimed relationship, the United States asserts extensive power to manage the lands and affairs of indigenous communities. An underlying assumption of the trust relationship is that indigenous peoples in the United States are incompetent or legally disabled from exercising full control over their own property and affairs.

Currently, the federal government is being sued by indigenous parties for the loss of billions of dollars which were supposedly being managed by the federal Bureau of Indian Affairs, pursuant to the so-called trust relationship, for the benefit of indigenous communities and individual Indians. At one time these monies could have formed stable economies for indigenous communities. Instead, these monies are gone—lost and unaccounted for in an incompetent federal bureaucracy. Ironically, the gross mismanagement of the federal government in managing tribal affairs and resources has resulted in the indigenous peoples of the United States becoming the poorest and most disadvantaged segment of the population.

Taking of Indian Property

In the case of *Tee-Hit-Ton v. United States*, decided in 1955, the Supreme Court announced that the United States government can take indigenous lands and resources held by aboriginal right (that is, by reason of long historical possession and use) without due process of law and without paying any compensation. The *Tee-Hit-Ton* decision continues to be upheld and applied by United States courts. In the case of *Karuk Tribe of California, et al. v. United States*, decided in 2000, the federal circuit court held that the Karuk Tribe of Indians was not entitled to compensation for lands taken from them by an act of Congress, even though those lands had been reserved for the Tribe pursuant to a federal statute and executive orders. The holding in *Karuk* is thus an expansion of the holding in *Tee-Hit-Ton*, applying the principle that Indian land can be taken without compensation even when the land is part of a congressionally established Indian reservation. In a strong dissent, Judge Pauline Newman made the following observations:

It is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the

constitutional protections of the Fifth Amendment. . . .This case is not concerned with Indian title deriving from aboriginal occupancy . . . it is concerned solely with Reservation lands duly established by governmental action The argument, pressed by the panel majority, that reservations established by Act of Congress and implemented by executive order are somehow inferior in their property attributes, is without force or support.

Nonetheless, the current law in the United States is that Congress can take indigenous lands without compensation. This is a brazen denial of basic property rights enjoyed by the rest of the U.S. population.

Conclusion

The indigenous peoples of the United States continue to live under a regime of discriminatory and unjust laws and policies. This unjust framework of law, which so profoundly determines the welfare of indigenous peoples in the United States, must be reformed if indigenous peoples are to rebuild their economies, maintain their cultures, and contribute to the attainment of a pluralistic society.