

tribal sovereignty 101

[Peter] (0:00 - 0:05)

Steve, good morning, good afternoon. I guess either way it is, you know, it's still morning.

[Steve] (0:06 - 0:09)

I'm only at 10.30 here. Yeah, West Coast time.

[Peter] (0:09 - 0:55)

Yeah, good. You know, we haven't talked on the podcast for a while. We've certainly been talking a lot in between, and I think we agreed we were going to do something sort of under the heading of Tribal Sovereignty 101, like, you know, what does this word mean that is bandied about all the time in which you and I know is very deceptive.

Let's just start right there. And then we also, in the meantime, came across a recent flyer from Lakota People's Law Project that we may have time to talk about today, which is actually quite startling and disappointing, but we'll get into what that's all about later. So does that, how's that for like a sound?

[Steve] (0:55 - 0:56)

Yeah, sounds good.

[Peter] (0:57 - 1:43)

Let me just, let me say, you want to show for people who are watching this, just hold up the Cohen book. It's a massive tome. It's often called the Bible.

You can see how big it is. It's the Bible of so-called federal Indian law. And you'll probably want to talk a little bit about how it's organized, because you were pointing out how it's kind of like a catechism, and it has, it's like a legal tome and a catechism all stirred together with little bullet point sections and subsections and all, as if it all really holds together and makes sense just because it's all in an outline.

So it has that appearance, but I want to dive into it a little bit. Do you want to say something?

[Steve] (1:44 - 2:09)

Well, let's give folks a little bit of background, those that may not have any understanding of who Felix Cohen was and how this particular book came together. It was something that he had created. He was the, working for the department of the interior and the solicitor's office, perhaps.

Is that correct? Do you think?

[Peter] (2:09 - 2:11)

Yeah, it was. Yeah. Yep.

[Steve] (2:11 - 3:10)

And so, he had a central role in working to create a compilation of the massive amount of information that makes up what's called federal Indian law. And this massive amount of

statutes and cases and regulations and definitions and so forth, much of which seems very contradictory to folks. And eventually, he was able to compile that together.

And I think it was released around 1941 or 42, right around the time of World War I, excuse me, World War II. And so, that became over the course of time, something that Vine Deloria Jr. referred to as a type of catechism, using an analogy of the Catholic Church and his catechism. And so, what do you want to say beyond that?

[Peter] (3:10 - 3:26)

Well, let me say, move your mic up a little bit, would you? There, yeah. I mean, it sounded a little muffled.

But anyway, yeah. Should we start again, or we're okay? No, I think we're all right.

You ready?

[Steve] (3:26 - 3:27)

Yeah, go on.

[Peter] (3:27 - 4:29)

So yeah, you're right. This was an effort that came out in the so-called Indian New Deal under Franklin Roosevelt with John Collier as the commissioner. And it all was being ballyhooed as this is very progressive.

This is friends of the Indians. We're not going to try to kill them off anymore. It's kind of like the boarding school said, we're not going to kill them off, we're just going to kill the Indian.

And what the handbook does is say, here's a whole lot of cases and decisions. We're going to put them all together so you can see what the courts have said. And this supposedly was an advance over just the chaos and confusion of all the cases standing out there.

And I guess the one thing you could say for Cohen is that he thought he was doing something good here because he kept emphasizing something called tribal sovereignty. And you want to just say something about limited sovereignty, the way I'm used to explaining that on the radio the other day.

[Steve] (4:31 - 9:18)

Well, the way the book is organized is interesting because at least this edition, I have a 2005 edition. I guess I should back up and say that a number of editions have been reissued over the years, over the decades. And I think the reissue, the earliest one was around 1986.

Charles Wilkinson and a number of other people were part of that team putting it together to update it. And prior to that, there was another edition that had been put out by the United States government to more or less undermine what Cohen was attempting to do. And so there's a lot to this.

But when you come to the section on Indian tribal governments, which is 4.01 brackets 1 and B, this is very interesting. It's sort of like Mark 1 verse 8. It's laid out in a similar kind of format.

So you have, for example, the independent origin of tribal sovereignty as a heading. That's the opening 4.01. And you come through here. And eventually, you get to other headings and so forth.

Exclusivity of tribal powers, federal legislation, the executive branch, and tribal government, and so forth. But what you end up seeing if you work through all the information is the way in which something that people think has a lot of strength to it, such as an inherent, quote unquote, inherent tribal sovereignty, it does hint at or allude to the original free and independent existence of native nations and peoples. But it's eventually undermined by other language that contradicts that idea.

So the history of tribal self-government forms the basis for the exercise of modern powers. Indian tribes consistently have been recognized first by the European nations and later by the United States as, quote, distinct independent political communities, unquote, qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty. And then a footnote, which goes to the United States versus Wheeler 1978.

So that kind of gives you a starting point, even though there's other language in here and so forth. But eventually, you come to this other section of the next page, and it has this language. The tribes began their relationship with the federal government with the sovereign powers of independent nations.

There's a reference to the original free existence. They came under the authority of the United States through treaties and agreements between tribes and the federal government and through the assertion of authority by the United States. So unilateral assertion of authority by the United States put them under, very key preposition there, the authority of the United States.

But what is this based on? There's not even a footnote there that tells you what they're basing that on. And I'm sure the other footnote of the prior thing, once again, is the United States versus Wheeler.

So I think it's important to think about who are the people that are compiling all of this information? To what extent is their personal view influencing what ends up in the final edition, this edition right here that I have, and how people are thinking about any of this? And then think about the young law student who enters law school and knowing nothing about any of this.

Or maybe they know a little bit of something if they're from a native nation or community, and they have general notions, but now they're being conditioned to think about these types of issues in this very specific kind of way that's shaped by the mindset, the mentality, the worldview, the mental world of the United States, because that's what this emerges from. It emerges from the mental processes of U.S. government intellectuals that have compiled all this kind of information, and the people that have been thinking about it over the generations.

[Peter] (9:19 - 18:08)

Yeah, I think what you've said shows why people are confused. It's no excuse for lawyers eventually to be confused, because they should if they know what law is all about, which they presumably do, they should be able to read between the lines, understand arguments to be built around all of this. And that doesn't seem to happen very often, because what we see here is a kind of a masquerade going on.

The language you read, the Indians started out as independent nations, but then somehow through a kind of waving of wands and then references to treaties, and a treaty is another whole topic we could get at, somehow became under the United States. So that didn't mean they don't end up that page or those two pages saying, therefore, there's no such thing as tribal sovereignty, because sovereignty can't be under anything else. They just continue to use that phrase tribal sovereignty, having already muddled the concept by saying, oh, it's under something else.

Well, sovereign, the definition of sovereign and sovereignty is something that is unlimited, except by itself. So already right here in the beginning of trying to understand this, we see that there's subterfuge of some kind going on, because whoever is authoring this for whatever purposes wants people to think tribal sovereignty means something significant and enduring. And in fact, they're actually confessing that it doesn't mean anything other than what the US determines it to be, which means that therefore it can't be sovereignty.

So I want to sharpen the references that you started with the 2005, I'm looking at the 2012 edition of the handbook. And by the way, when this was first put out in 1942, the Commissioner of Indian Affairs and Secretary of State were saying, oh, this really helps. All we have is a lot of confusion right now between treaties and statutes and cases and so on and so forth.

And this is really going to clear it up. Well, you've already by your comments shown that there's no clearing up of the confusion, there's still confusion. Well, the 2012 edition tries to boil it all down in an introduction by saying that they asked the question, what is federal Indian law?

And so they say, well, there are three fundamental principles that underlie the entire field. And what I want to do is just quote briefly, these three fundamental principles, so that we can see what kind of nonsense and deception is built into them. So fundamental principle number one is, quote, an Indian nation possesses in the first instance, all the powers of a sovereign state, unquote.

Now that's pretty much what you were just reading from the 2005 edition, kind of a little bit trimmed, but saying possesses in the first instance. Well, what does the first instance mean? The principle that they possessed in the first instance means that, well, something must happen after the first instance.

What happens after the first instance? If you have a principle, it ought to have something definite to it. But this principle just says, well, kind of once upon a time, they had all the powers of a sovereign state.

But if they wrote once upon a time, it certainly wouldn't sound professional. It sounds much more professional to say in the first instance. So now after that principle, they have a paragraph explaining it, okay?

And so they explain it that the inherent powers of an Indian nation are a limited sovereignty that has never been extinguished by the United States. So we say, well, here we are, we're back up to that limited sovereignty. And of course, if sovereignty is something unlimited, then there's, it's an oxymoron, at least.

It's a total contradiction to talk about limited sovereignty. And when you follow it up by saying even that limited sovereignty can be extinguished, then the first principle suddenly is transformed. The first principle starts off with a kind of a historical reference to the time before anti-Indian law in the first instance.

And then it said they were fully sovereign prior to this federal anti-Indian law, but no longer. Because the U.S., the real principle then becomes the U.S. claim of power over native nations. So extreme that it can extinguish them.

So that's the first principle. So let's jump up to the second principle. And the second principle is the federal government has broad powers and responsibilities in Indian affairs.

Well, what does that mean? Federal has broad powers. The first principle said they can extinguish native nations.

So that's pretty darn broad. But what kind of responsibilities does it have? In fact, when you start to think about it, if there's a power that has total power of extinguishment, how can there be any responsibilities?

I mean, when you say responsibility, it means something you're obligated to do. But if there's a total power of domination, what could possibly restrain that power and say, oh, that total dominating power has responsibilities. And so how do they get around this?

This is a kind of a puzzle. So what they say in the explanation is that, oh, well, there's been a tension between doctrines, a tension between doctrines. All right.

That's really interesting. You take a complete contradiction and you call it a tension. What does that actually explain?

It doesn't really explain anything. There's, you have two contradictory, they're not tension between doctrines, you have two contradictory doctrines. One is that there's responsibilities.

One is that there's total power of extinguishment. Who gets to choose which one of those happens? Well, guess what?

The US gets to choose. Well, on what basis does it choose? What principle does the US look at to decide whether it's going to extinguish or behave in a different way?

There isn't any explanation provided. That's, this is just left hanging. So you can see the kind of nonsense, really, that what you end up out of the second principle is exactly the same as the first principle, which is that the whole system is an instrument of US power.

So finally, we get to the third statement. The third statement says, state authority in Indian affairs is limited. Well, first of all, when you say limited, limited is kind of ambiguous.

It's like, what are the limits? Who determines them? What determines them?

If there's actually any third principle, they have to answer those questions. Well, they don't answer those questions. All they say is that federal supremacy doesn't leave any room for state involvement.

It says it leaves little room. So now we have for the third time, we have the principle that the United States has supreme power and sets its own limits and limits on the states. So if you wrap all this up, this effort to dress up the Cohen handbook as if there's something quite coherent about it, and it can be listed here are three fundamental principles.

And the three fundamental principles, when you read them carefully, they all collapse into one rule. If you want to call it a principle, you can call it a principle, but it's a principle of domination because it says US supremacy over native nations and the states guided by what the US wants to do. That's the principle.

And so just to put it in the bluntest way it can be, there's a federal district court judge in 1973, *United States versus Blackfeet tribe*. And he responded to their effort to exert some authority over their own selves. And he said, the blunt fact is that an Indian tribe is sovereign to the extent the United States permits it to be sovereign, neither more nor less.

Well, as we said, that's a very succinct explanation of the so-called three rules. But as you can see, when you have sovereign as permitted by somebody else and it's not really sovereign. All that is in the whole entire, you held it up, it's as bad as a Bible.

That's the core of all those different sections and subsections and sub-subsections. Those are the so-called principles that boil down to a unilateral assertion of domination.

[Steve] (18:09 - 20:30)

Yeah. Well, I have the same, what is federal Indian law question mark in this 2005 edition. And it begins with a reference to sovereign nations under international law.

That's interesting because they're taking a concept of sovereignty that is from the 16th century, Jean Bodin defined it as supremacy over citizens or subjects unrestrained by the laws. So it's restrained by no law. It issues the laws and everyone's one subject to the laws of the sovereign is not subject to any particular law in the way that it is unrestrained.

But also that they're taking this concept of sovereignty, which Sterling Edmonds defined as an authority independent of any other earthly authority. So is that limited? Doesn't sound like But this particular section here in the 2005 edition, they're taking this notion of sovereignty and projecting it back into the past.

And it's this exercise of linguistics, of use of language that is not really tethered to anything that has to make sense. It just, however they pattern the wording together and what have they decided to put together as editors of the overall volume. So then you have this part that these tribes, sovereign nations under international law, which would mean independent of any other earthly authority were brought into the United States.

Now how'd that happen? Through a colonial process, that's a domination process that was partly negotiated and partly imposed. So it's only partly domination, even though it's a colonial process, which is domination.

So the whole, the incoherence, as you'd like to say, the way in which it doesn't hold together in a way that makes sense, that it doesn't contradict itself constantly is not to be found in this particular compilation of information.

[Peter] (20:31 - 21:59)

And, and so I think one of the conclusions you can draw from what we're talking about is that it's understandable that people who are not lawyers are confused about what this phrase tribal sovereignty means. And they think that it means something that it actually doesn't. As you pointed out on the radio, if you just substituted the phrase, which is an accurate translation of what we've just read, instead of saying tribal sovereignty, you said limited sovereignty, then people would say, well, I don't want to use that word.

It doesn't sound very strong at all. What limits it? And if the answer is, well, whatever the US wants to do limits it, you say, well, that sounds horrible.

That doesn't sound like anything. I want to put on my flag and wave and say, yay, rah, rah, tribal sovereignty, because I'm saying, yay, yay, rah, rah, domination. We're dominated.

Then the whole thing collapses. And in some bizarre way, this has fueled so much public discourse talking about tribal sovereignty, tribal sovereignty, sovereign tribes, without any sense that they're speaking nonsense. And that seems to me to be unfortunate, just to put it mildly, because it's not going in the direction they think that it's going.

They think they're saying something positive, forward moving, and they're just embracing a concept of domination, which was created in the last couple of centuries.

[Steve] (22:00 - 22:17)

Well, and imagine somebody with a placard at a rally, and it says, we have limited sovereignty under domination, exclamation mark, and holding it up. Yeah. Now, nobody would hold, you couldn't get anybody to hold a sign like that.

[Peter] (22:17 - 22:17)

Yeah.

[Steve] (22:17 - 22:30)

But you can get them to hold wording up there that actually is equivalent to saying the same thing, but they don't notice it because it's hidden behind other verbiage.

[Peter] (22:30 - 23:01)

Yeah. It might as well be in a foreign language. Sometimes I think what you and I are doing when we talk about these cases and doctrines is we're engaging in a translation process, and we're translating from legalese into plain English.

So, if you held up a sign in whatever, Polish, you know, where nobody speaks Polish, they'd say, oh, yeah, well, that's interesting. What does that say? And so, if they translate it and says, we're dominated people, and we're proud of it, you'd say, well, why are you holding that sign up?

[Steve] (23:02 - 25:03)

Yeah. Yeah. It's kind of extraordinary to think that a compilation of this much information, massive, massive amount of information with such fundamental flaws of contradiction and so forth from the outset, and then which runs all the way through, can be taught in a manner that no one is supposed to notice this.

And none of the uninitiated, the people that are just, as I remember, very specifically, being all excited about sitting down in federal Indian law as an undergraduate student at the University of Oregon, and Professor Charles Wilkinson was my professor, and all excited I'm going to really understand this information now. So, I actually have that as an experience in my life of having been introduced to this type of information, and not really knowing how to interpret what I was looking at, certainly not initially. And gradually, as I was required to read the Johnson versus McIntosh ruling, I could understand English well enough to understand that I wasn't about to accept the nonsense that was in that ruling.

And I remember thinking, why in the through that noose? In other words, because I had the rhetorical background, the rhetoric and communication education that I was getting simultaneously, understanding that if you accept the premise of your opponent in a disputation, in an argument, or what have you, that you're going to end up at the outcome of your opponent, not your own outcome. So, to me, Johnson versus McIntosh, and the whole federal Indian law, by extension, was the premise of the United States.

So, why would I accept that premise, knowing what was in that decision?

[Peter] (25:03 - 25:03)

Yeah.

[Steve] (25:04 - 25:08)

And that was what turned me off to the whole idea of going into that field.

[Peter] (25:08 - 27:47)

Yeah. And so, Steve, take it, when you said the law students studying this, I've wondered that myself, because it seems to me, what are they being taught? Anyway, they're being taught as if this is a law.

But as if they're quick enough, I guess to say, to penetrate through to what we're talking about now and say, wait a minute, there's no real law here. This is just the exercise of unilateral power. Then you say, well, what is that?

That's a system of politics. So, and we can see why that there's so much effort now to dress up so-called Indian issues and things like culture and traditions and so on and so forth and avoid the land issue, because the land issue is like the live wire. You say, well, wait a minute, land is what it's all about, isn't it?

As soon as you touch that, then you're running into Johnson v. McIntosh. He says, no, it's not even your land.

And you touch land back, you say, no, well, that's putting land into trust. That's just saying that's US land. So, the popular discussions stay away from that live wire, but they still like to talk about land.

But now it's land as a site for religious practice, land as a site for ceremonial gathering, land as a site for fill in the blank. It's not the land itself, it's just these activities, these cultural activities. And so those things get all stirred up, stirred together, put in contesting an action by the Forest Service, let's say.

And what is that? That means everybody's writing to their congressperson. Everybody's trying to raise money and have demonstrations and hold up the signs that don't actually say anything.

Well, they actually say something, but they don't say what the people think they say. So, it's all politics. So, are the law students being taught to be political operatives?

Because there's no law here to argue unless you want to challenge it. If you want to say, well, there's a claim of ownership of the land, that's a claim of a right of domination, we're going to challenge that. The Ackermann did it, this Western Shoshone have done it, but not successfully.

Red Lake Band did it, but not successfully. So, you see that it is at least here and there, you find people are challenging that and saying, we're going to actually go to the fundamental question of land, and we're not going to get caught up with all this other stuff that's avoiding the issue of land, and just playing political games of who can score the most points so that some agency feels they have to back down because the public is so outraged.

[Steve] (27:48 - 29:24)

I think some people might get confused to hear you say, well, this isn't law. I mean, for example, I already referenced United States versus Wheeler. And certainly, if you go to this part of what is federal Indian law, and you see Cherokee Nation versus Georgia, so they would say, well, of course, it's law.

And I think what you're alluding to is that aside from the issue of what is law and what is not law in terms of any decision by the Supreme Court, what they're really being introduced to is an explanatory framework. It's a framework of an explanation or set of explanations that they're supposed to use to make sense of all this. And then Cohen has that, I don't have the direct quote in my mind, but he has the massive number of statutes, all the laws, all the treaties, the Code of Federal Regulations, the massive amount of information, and no one can seem to define it.

It defies explanation, defies a definition. But that's not actually correct. It's correct if you approach it in the usual and accustomed manner.

But if you understand that it begins as a claim of a right of domination as a premise, then the through line is right there. That's why they say that there's no way to define it because they don't want to define it honestly, because if they did, the game would be up.

[Peter] (29:25 - 32:18)

Yeah, exactly. That's when I'm saying it's not law. It's a claim of a right of domination dressed up as law in legalese.

And so even if you take Wheeler or any of the cases, how about the Navajo, the San Francisco Peaks case we talked about recently. So you say, well, there they were. They were fighting under environmental protection, historic preservation, et cetera, all these things that are side issues really from who owns the mountain kind of thing, if you want to put it in blunt language.

And so you look at that and you say, well, what did the court decide there, the Ninth Circuit? It looked at all these environmental laws and religious freedom laws and so on. And it says, oh, the question is the test, the legal test, quote unquote, is this going to be an undue burden on the Navajo people?

And so you say, okay, well, I understand that's a law. It says it's an undue burden, but who's going to decide if it's an undue burden? Oh, well, the courts are going to decide that.

The agency, the federal agency is going to decide this. Okay. What is that?

That doesn't demonstrate tribal sovereignty in an actual way. It demonstrates tribal subjection to some other power. So the Navajos or at Standing Rock or in the Black Hills or anywhere else, every time there's an attempt to work within this U.S. environmental law, religious freedom, historic preservation, whatever it is, they're working inside the domination toolkit, which says we have the ultimate right to dominate. That's our fundamental principle. It's not law, it's called assertion of sovereignty, claim of a right of domination. But we wrote up a few rules to guide people of how we are going to exercise that domination.

And so one of the recent things we've done out of the goodness of our hearts is we have a duty of consultation. Okay. So before we go dig this up, whether it's Oak Flat or Thacker Pass or poor sewage on the mountain, before we do that, we're going to consult.

Now, our rule also says you don't get to a consent, but our rule says we have to consult. And then a bunch of lawyers get together. Oh, they didn't have adequate consultation.

They missed rule 432B sub C2 because they didn't get it done in 15 days. You say, well, what's that got to do with religion? It doesn't have any to do with religion.

What's it got to do with the environment? Nothing. It has to do with bureaucratic processes, which have been set in motion by a power that claims the right of making these decisions and ultimately claims, even after all the processes are done, the right to make a decision whether those processes were done properly or not.

Now, that is the confusing mess that people run into when they say, let's protect the sacred mountain or let's protect the sacred, fill in the blank, whatever it may be.

[Steve] (32:19 - 33:26)

Well, that's the consultation process is the rule. We have to hear you out. Yeah.

Yeah. We have to hear you out. You go ahead and express your view to us and we'll listen.

And we'll take that into consideration when we make our decision. But notice that they're the ones making the decision. Notice that they're the ones in the judgment as to the merit or lack of merit or whatever.

In other words, before they ever got over here by ship, their mind and their mental processes, their thoughts and ideas and arguments had no role to play whatsoever because they were not over here in this part of the planet. So as soon as they come ashore, suddenly their mind is in control. And what gave them that permission to go ahead and be in control, the documents that they brought with them that were also bogus, because they just made up a whole bunch of information that made it seem very authentic and authoritative and it comes from God and so forth.

So, of course, it makes sense. Yeah. Because they declare it to make sense, even if it doesn't.

[Peter] (33:26 - 35:14)

Which is what the actual definition of sovereignty is. The declaration is the act, the sovereign act. And so no matter how the sovereign dresses it up, that's the emperor's new clothes.

Whether the sovereign dresses it up with nice sounding words or not, it is the sovereign's act, unconstrained by anything except itself. So that's what they brought over here. That's the mindset.

I've been thinking about that a lot recently, actually, is that these people who came over carried that whole mental world with them. And so everything that they created was created out of that world. And that's still existing.

To the extent that you have Thacker Pass or Oak Flats or San Francisco Peaks or Black Hills or Standing Rock, and you say, well, all of these are being litigated, but what are they being litigated within? What kind of hall of mirrors it turns out to be? It's not actually something that separates itself into the supposed original starting point, which is independent, freely existing peoples negotiating with each other.

I guess there were instances where it existed, but it certainly is not part of the modern understanding of what federal Indian law is all about. Federal Indian law is all about go and beg at the sovereign's feet and try to come up with some things saying, you told us that we had a chance to say something. Now we didn't get a chance to say it.

And the sovereign is going to say, oh, yeah, you're right. Let me hear you out. Or the sovereign's going to say, oh, we gave you plenty of chance.

Look, there was 12 days last December. Or whatever the sovereign wants to say.

[Steve] (35:14 - 35:39)

Yeah, yeah. Well, I think that your use of tribal subjection is very interesting because that's an additional, instead of just saying limited sovereignty, limited subjection. That's interesting.

Wow. Limited subjection, but it really isn't limited because it's subject to a claim of a right of domination. And the sovereign is supreme.

[Peter] (35:42 - 36:01)

Go ahead. Well, I'm just saying exactly what you just said is that it's not even limited subjection because the power that defined limited subjection also defines its power of extinguishment and says, you're limited subjection. We're hereby just going to erase it.

Now you have nothing. Now you have total subjection.

[Steve] (36:02 - 36:36)

I think this is why what we're doing right now, tearing apart all these terms and refashioning them in different ways to look at them in a completely different light is why heretical, the laws of heresy existed. Because if you start down this road, if you start down this path of critiquing all these ideas, so many things cannot hold up. Once you subject them to question and scrutiny, looking through them, tearing them apart and so forth.

Well, if it's divine, you're not allowed to do that.

[Peter] (36:36 - 38:05)

No, not at all. In fact, I was semi serious and semi joking the other day when we were talking and we got on this question of translating the Bible when we were sort of jokingly referring to the way Cohen is regarded as the Bible. And I remembered there was actually quite recently, it was not until the time of Henry VIII and afterwards that the Bible was available in English to the English people.

You could be burned at the stake for having a copy of Tyndale's Bible, and he was eventually burned at the stake for translating it. The people were not supposed to have access to this book in their own language. They were only supposed to depend on the priest to tell them what was in there.

And so what we're doing now, the average person that's living, whether they're native or not, wherever they're living, the person who's thinking about so-called Indian affairs or Indian law or Indian issues, they're not supposed to look at what we're talking about now. They're supposed to hear the phrase tribal sovereignty and go out and go rah, rah, rah, and then feel bad and pissed off when it doesn't work and then blame whoever is the current president or whoever is the current BIA commissioner or whoever is the current secretary. They personalize the whole process.

That's why it fell apart because they don't have an access to a translation in plain English. If they looked at it, they'd say, well, this is a pile of crap. This isn't going to get us anywhere.

Why are we wasting our time with this book?

[Steve] (38:06 - 38:22)

Well, the other the other aspect of this we've talked about before has to do with the use of a religious freedom or freedom of expression argument as against a property domination argument.

[Peter] (38:23 - 38:23)

Yeah.

[Steve] (38:23 - 39:47)

And so the one, as we have read numerous times, the government can do what it wants with its lands, just Sandra Day O'Connor and Ling versus Northwest Cemetery Protection Association or whatever the full title is. And so that notion that it is land that belongs through ownership, through a right of domination to the United States government, puts them in the supreme position as the decision makers with regard to that turf, that area of land. But we have a right to pray.

We have the right to conduct ceremony and so forth. OK, but to the extent that the United States wants to use that land in contradiction to that, even if it means excavating the entire ground literally so that you have a massive hole in the ground. Oh, well, you can still believe what you want to believe.

So we're not interfering with your religion and we're not compelling you in any particular way, according to the rules that they put out there. We're not depriving you of government benefits based upon your religious beliefs and other types of tests such as that, which don't really have anything to do with what the people are seeking as a form of relief to make sure that their area is not disrupted or destroyed. That seems to go nowhere.

[Peter] (39:47 - 41:24)

Yeah, and it can't go anywhere because that's what's tied to the land. And the word reservation, so the image is, oh, the reservation, that's what's left of their original free land. No, that's not technically the definition of the reservation.

The reservation is reserved out of the public lands. And if you look at maps that show where reservations are, you'll find that in the technical sense, it's like land back. This land is, quote, owned by the federal government and held, quote, in trust.

And so people say, wait a minute, you mean even the reservations don't belong to Indians? No, they don't. They can be taken away, they can be extinguished.

And they might get a little bit of money, but they can be extinguished. And so then who owns it? Oh, the US.

Well, I thought we had land back. I thought they were no, no, that's just the US saying, oh, we'll hold this in trust to you, we'll protect it. Well, what are they protecting it from?

Because they have the power to extinguish that. That's part of the trust doctrine we talked about a couple of sessions ago. So that's why it's like a hall of mirrors.

It'll make you go crazy until you finally come put your feet on the ground and say, I see the big picture. I see 2000 years of a system of domination that made its way through Europe, converting, quote, unquote, all the barbarians in Europe, and then somehow stumbling across another whole continent and bringing that system over here and applying it. Once you see that and say, oh, now I see.

Now I got the big picture. Now I can make sense out of the small picture.

[Steve] (41:25 - 41:34)

Well, if you're on a particular Indian reservation, quote, unquote, and you come across the correct sign, you're going to see the words federal reservation.

[Peter] (41:35 - 41:36)

Yeah, that's it.

[Steve] (41:36 - 41:38)

Federal reservation for Indians.

[Peter] (41:38 - 41:41)

Yeah, exactly. Reserved out of federal land.

[Steve] (41:42 - 41:47)

Yeah, there you go. And that's what a lot of people don't know.

[Peter] (41:47 - 41:48)

They don't get it at all.

[Steve] (41:51 - 44:17)

So I wanted to make a little aside here, which is the use of the term civilization, which we've talked about before, and how all of this body of quote, unquote, federal Indian law and policy is part of a process of civilizing the Indians. That's clear that they had this agenda and they're using the terms civilizing and civilization and so forth, the civilized tribes. And so I want to remind people of the Webster's Third New International Dictionary definition of civilization, which goes to a process of civilizing, which then goes to the forcing of a particular cultural pattern on a population to which it is foreign, meaning to which that pattern, that cultural pattern is foreign.

Now, it doesn't identify the nature of that cultural pattern. It just says a cultural pattern that is foreign to that people upon whom the pattern is being imposed, forcibly imposed. So then there's this great quote by regarding the California Spanish Catholic mission system by Lieutenant George Beard, and he's describing what was going on in those missions, and this is describing the process of civilizing the Indians.

Heavy irons, starvation, and other coercive measures with persuasion make the Indian prisoners ready in a fortnight or ten days to receive baptism, unquote. Isn't that something? And here's another one.

If, as it not too infrequently happens, any of the captured Indians show a repugnance to conversion, it is the practice to imprison them for a few days and then allow them to breathe a little fresh air in a walk around the mission to observe the happy life of their

converted countrymen, after which they are again shut up and thus continue to be incarcerated until they declare their readiness to renounce the religion of their forefathers, which is their free and independent way of life.

[Peter] (44:17 - 44:17)

Yeah.

[Steve] (44:18 - 45:09)

Okay. And the reason why I'm emphasizing this is because in the book *The Savages of America*, published in 1959 by Roy Harvey Pierce, he has this very fascinating kind of formula. The practical problem of bringing savages to civilization was to be solved by bringing them to Christianity, which was at its heart.

Success in empire building and trade was to be measured by success in civilizing and Christianizing. Success in civilizing and Christianizing would assure success in empire building and trade. Meantime, the Indian, in his savage nature, stood everywhere as a challenge to order and reason and civilization.

[Peter] (45:10 - 45:10)

Yeah.

[Steve] (45:10 - 45:53)

So, if you were to replace each of those terms of civilization with the word domination, the practical problem of bringing savages to domination was to be solved by bringing them to the Christianity, which was at its heart. And you could go through the whole thing with the domination translator and demonstrate, oh my gosh, they're just using a euphemistic filler or synonym for domination all the way through. And when you start to reveal that, you realize they're just using domination and that type of terminology over and over and over again, but nobody notices it because it's a synonym or a euphemism or both.

[Peter] (45:53 - 47:07)

Yeah. And I think just to wrap that back up into the Cohen handbook and still leave us a few minutes to talk about this other thing we need to look at, is that instead of saying Cohen, or don't leave Cohen's name out, he was the original author, it's just called the Handbook of Federal Indian Law. So, what if we called it the Handbook of Federal Domination of Indians?

Then you'd have a clear picture of it. Okay. What is this?

This is the handbook of federal domination of Indians. Oh, that's great. So, all the laws about domination, yes, they're all in there.

And all the laws that show how the domination should occasionally be gentler are in there. Oh, yes, they're in there too. And the dominator has to consult with the dominated Indians.

Oh, yes, those are in there too. This is a whole nine yards, the Handbook of Federal Domination of Indians. Now, if that could be successfully renamed that way, of course, it would disappear in significance.

It would have no use to any tribal litigant, any lawyer who wanted to say, I'm here to defend Standing Rock, Thacker Pass, you know, the Navajo Mountain, any of that would be useless. You say, why do I want that?

[Steve] (47:07 - 47:53)

Well, I think I would modify that statement, or suggest a modification of that statement. In an effort to defend everyone from domination, it would not be a book of any merit. But to be able to reveal the truth about the overall system, it has tremendous merit.

To finally reveal the true nature of what this is. An obfuscation, it's just the most brilliant obfuscation. In fact, it's so brilliant of an obfuscation, that it's very likely that the practitioners of it, and even the purveyors of it, the creators of it, never understood the underlying domination theme to the extent that we're explaining it at this time.

[Peter] (47:54 - 54:28)

So, yeah, and so it's also what you just said, makes me think about, maybe this is why the whole challenge to the domination within that framework doesn't happen. Why there are so few challenges, is that it's a losing game. Anybody who actually looks at it says, it's a losing game within that framework.

So the only way forward is to challenge the whole framework, which is what the Yakima amicus brief did, etc. You have to challenge the whole framework. You can't get into what, you know, chapter two, section 4.2c1 that you were reading before and say, oh, this is the point we're going to argue. You say the whole framework has to be thrown out. And where do we stand? That's where, okay, we're going to stand on our original free and independent existence.

You can call it sovereignty if you want, but we're standing in our original place, and we're challenging that whole apparatus. That's what we're doing. And unless you have something else.

I'll go for it. I want to just look at this. So a few days ago, March 24th, it was sent out, the Lakota People's Law Project, which is an entity which has been, was involved in Standing Rock and many other situations.

They sent out a flyer analysing US Forest Service approval of some drilling work at Peshaw, which is within the Black Hills. Okay. So there's a lawsuit that's been filed, and this is informing people about it.

And it's extremely problematic. It's really troubling. First of all, it's titled Broken Promises, Buried Rights.

Well, in kind of progressive speak, everybody's supposed to think broken promises, yes, broken treaties, but it doesn't say that. Buried rights, buried rights, what are those rights? Well, that means they would really, anybody to understand that, would have to understand everything we just talked about, because the right of free and independent existence is what's been buried, not some list of rights.

So the heading is a problem. So then you, let's see what this is really all about. Well, they refer to the treaty, all right, they just refer to it as, this is where, you know, we stand from, this is our, our ancestral ground.

Okay. And you say, okay, well, let's see, then what are you going to do about this? You have a, you have a treaty, which says this is your land forever.

And what are you going to do about it? And, well, they're not going to do anything legally about it. They have some people that go out in the land.

And I understand that the drilling companies, small regional drilling company based in South Dakota has decided they don't want to get into this fight. So they backed out, they're not going to take the federal contract after all. But to come back to this, what is the, how are the Lakota framing this?

They say, we have this treaty, this is our land. All right. The soon, it says, we want our, the land back, except it speaks in the third person, what they want, the Sioux Nation, they want their land back.

Okay. And so they say there's an obvious legal problem here. But unfortunately, they don't deal with the legal problem in their complaint.

They say that there's some commenters have mentioned this. They say there've been some public comments on the Forest Service website, but they're not actually going to deal with it in their case. And I can see now just your last comment.

Maybe they're saying this is impossible for us. We can't possibly attack the dominator. Well, that's unfortunate if that's the position that they want to take.

But the thing becomes worse because after all that business about treaty, land, et cetera, obvious legal problem, they're upset because the Forest Service replied to them by saying, this is a land claim issue and only Congress has a power over the land. Well, we know this, you and I, because this goes all the way back to Johnson v. McIntosh that the US owns the black, owns all the land.

And in this case, Congress says the representative of the US is the authority over the land. The Forest Service says that we're not the ones, Congress is the ones. All right.

Now get this. I think really this was written by the environmental lawyers. I don't think this was written by Chase Iron Eyes or anybody directly there because it's so gobbled up here.

The Forest Service, here's what their response is to the Forest Service saying this is a land issue and only Congress can deal with it. They say the Forest Service is correct that it cannot transfer ownership of the Black Hills. That is a matter for Congress.

But the issue is not about land transfer. It's about treaty protected land. Now we're going into completely hall of mirrors.

I thought treaty protected land was a land question. So how can it be a land issue and not a land issue at the same time? And then they conclude this by saying that by framing the

treaty issue as a question of land ownership, or what the heck else is the treaty issue all about if it's not about land?

Anyway, by framing the treaty issue as a question of land ownership, which Congress must address, the Forest Service avoids engaging with the more immediate question, does this honor or dishonor the United States? Now that's really pathetic. I mean, I don't know if you would use the word pathetic or not, but it's sad.

It's at least sad to see such confusion. And what I'm trying to get at here, you don't have to know anything about the framework of federal anti-Indian law to see the confusion in this letter. To start off by saying, this is treaty land.

It's our land forever under the treaty. It's absolute undisturbed use. That's what this is based on.

And then to go down to the next line and say, the Forest Service is trying to get out of this thing by saying it's a land issue. You say, what? All you need to know is basic English and a little bit of being able to read one thing is consistent with another.

You don't have to understand treaty law, domination, any of that. You just say, well, just in terms of ordinary English, they're saying this is a land issue and it's not a land issue. And they're saying both of those at the same time on the same page on the same piece of paper.

[Steve] (54:28 - 58:19)

Well, I did read the document you're referring to, and I see that there are numerous contradictions and problematic ways in which the language is being put together. There's a bottom line here right at the opening, this kind of an aside note. The Forest Service used a procedural loophole to approve drilling at one of the most sacred sites in North America, brushing aside treaty rights, religious freedom protections, and the concerns of thousands of people on the grounds that the project is too small to warrant scrutiny.

That is exactly backwards from how a government that honors its commitments should operate. Well, I just find that to be peculiar to end that by reference. To what extent is the United States a government that honors its commitments, given its history, and particularly with Indian treaties and so forth?

Not at all. And so, I just found that to be rather odd. The other thing too is when you have a treaty, which is, as far as I understand it, the perspective if a treaty is to be interpreted as the native people understood the treaty when it was made, and the people understood themselves to still have their free existence.

As Noble Redman said, we will never forget that we were once free, that original free existence. The idea is that it's still their country, they're the Ocetishokoiné territory, not United States territory. And so, that's where you get into this very weird contradiction, where suddenly a number of native people themselves begin to refer to their own lands as federal lands, and they don't make allowances for the acknowledgement of that land still being their Ocetishokoiné territory.

And you'll even see the term federal land creep into their documents, where they're stating the opponent's position as their own position. And if they're doing that, then in a sense they're just doing the opponent's work for them. And so, why would they do that?

So, that indicates that there's such a deep confusion on the part of many people that are writing these kinds of documents. This is not about hammering on or bashing any particular organization. It's using this as an emblematic example of the kind of confusion that reigns supreme across Indian country in so many ways.

I was at a treaty gathering, an Ogetishokoin treaty gathering a number of years ago, and there was an organization that showed up with a co-management framework for the Black Hills. And all through the document, even though it was an Ogetishokoin treaty gathering, the term federal land was all through the document. Why would they take that position if they have the position that it's their territory and their land, then they're going to go ahead and take that position.

But you couldn't find that position in the document. Because it was all being referred to as federal land.

[Peter] (58:19 - 1:01:16)

Yeah. And so, I'm going to quote a little bit from the complaint that was filed against the Forest Service. And this is why I think the flyer that was put out with all of that confusion saying it's a land issue, it's not a land issue, it is a land issue, it's not a land issue, that nonsense.

I think it was written by environmental lawyers who really can't get their heads anywhere near around what's going on with federal Indian law, anti-Indian law. So, here's the complaint. These are in four paragraphs, I'm just going to read about five words, but it is in four paragraphs in a row, this is where they talk about the treaty.

It says, plaintiffs reserved their original homelands through treaties. All right. And then they name the treaty.

It says, the lands are set apart for the absolute and undisturbed use and occupation. That's a great piece of that treaty as a permanent home. Okay.

That's all in the treaty. Then it says, what are you going to do about this? Are you going to challenge that?

No, because here's the paragraph that follows it. The lands that are affected by this project are valued for traditional, cultural, and religious practices. Those uses will be harmed.

All right. It completely abandons the question of undisturbed ownership of the land and jumps immediately to cultural and religious practices, which of course makes a lot of people's hearts go pitter-pat. Oh, traditional culture.

You referred to the MOU about the Black Hills. That's the next thing they do. They talk about how there's an MOU to recognize traditional, indigenous, cultural, and historical connections to the Black Hills.

All right. Cultural and historical connections. Now, if you go to your house one day and you own your house and somebody else is living there and you say, this is my house.

Oh, you have a cultural and historical connection to this house. I grant you, feel free to come in and use the garden at any time. That's just how ludicrous it is.

They go through it. I'm not going to read it all because it's just bureaucratic gobbledygook, but it includes things about cooperation and collaboration related to cooperative planning. I don't know how you can have cooperative planning without cooperation, but they want increased cooperation apparently.

Then they want habitat improvement and sustainable use and youth programs and workforce development and enhancing visitor relations. All that's part of the MOU. In what way does that say we're here fighting for our treaty right to own this land in our original free existence?

That's what we're here for. We're going to challenge the whole nonsense that says that we don't have that.

[Steve] (1:01:17 - 1:04:02)

Well, and also the Sioux Nation case from 1980, I believe it is, is referenced whereby the judge says that the United States stole the land, which reminds me of S.I. Hayakawa's quip about we stole it fair and square. If you take that position, oh, they stole it, so therefore they have the possession of it, and therefore it's federal land now, then you're really digging the hole even deeper because what you're doing inadvertently or without noticing is reinforcing and reaffirming your opponent's position. Why do that?

That doesn't make any sense at all. Additionally, there's section 106 of the Historic Preservation Act, which if you go into that, you'll find that there's nothing within that framework, which is about historic preservation and places that are designated as a historic landmark. There's nothing in there that differentiates Native nations or peoples from any ethnic group within the United States.

So, if you have Native leadership that participates in a section 106 meeting, they're actually being taken from their position as the officials within a Native government system, and they're reducing their status down to an ethnic group within the society at large. And you can see that very clearly if you pay close attention. In fact, the one time that I went through that, and I don't want to belabor this point because we're running short on time, but they started out with the definition of ethnos, which went to nationhood, and then went to ethnic group, and then that's how I noticed that.

I thought, wow, they're actually explaining that they're going from the nationhood, which the Native government folks would be ostensibly representing, and allowing themselves to be reduced down, reduce the barbarous nations, reduced down to an ethnic group within the society at large, and on that basis. So, there are so many things that escape the attention of people every single day within the field called federal Indian law, that it's kind of tragic, actually.

[Peter] (1:04:02 - 1:05:39)

Yeah. And just maybe one last comment that I'd like to make, which is, so let's imagine that, okay, maybe it is an environmental question, but then the question is, under whose environmental law? Is it the U.S. environmental law that's going to determine what happens on Lakota land? Is it the U.S. environmental law, or is it going to be Lakota environmental law? How about the San Francisco Peaks case in Navajo Mountain? It's like, who's going to determine that it's okay to come and piss on our sacred mountain?

Are we going to determine that, or is the U.S. going to determine that? The U.S. says, oh, we get to determine that, because it's government land, and we say that's not really a bad thing. I mean, maybe it's going to smell a little bit nearby, but you can go to another part of the mountain, and I'm just paraphrasing what's actually in the case.

There's a lot of mountain left. Go somewhere else and pray. Yeah, go ahead.

No, I'm just saying, but instead, here's what you get in the complaint that was filed here. This is mind-numbing, but they talk about there was not an environmental impact statement for the project as required under 42 USC sections 4332C and 4336B2. Instead, they used category 220.6E8, which is limited under 36 CFR section 220.6E8, repromulgated as CFR 7.1.B4D32. Okay, did you get that? That's all very important.

[Steve] (1:05:39 - 1:05:44)

Could you repeat that, please? I missed some of that.

[Peter] (1:05:44 - 1:05:59)

Yeah, I was talking too fast to take notes. So, you say, now, wait a minute. What is the way forward to get our heads around the Black Hills?

What's our way forward to get our heads around what it means to have sacred ground? Is it just to say, oh, well, we'll give you a special permit?