

## BOOK REVIEWS

**Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition.** Charlottesville, Virginia: Michie Bobbs-Merrill, 1982. Pp. xiv, 912. \$80.00.

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American Indian law is complex and difficult. It has its roots in history that dates back to the earliest time of white settlers. American policy toward Indian tribes has swung dramatically between attempts to maintain and strengthen tribal governments and those to terminate tribes and incorporate Indians into general society. Indian tribes today occupy a unique position in our governmental structure; while located within the boundaries of states, they are almost completely isolated from state government controls. In constitutional terms, they are neither states nor subdivisions of the federal government and so are not constrained by constitutional limitations on those governments. Their tribal courts have substantial jurisdiction and their decisions cannot be appealed into either the state or federal court system. Indians are not only members of these unique tribal governments, but also are citizens of the United States and of the state in which they reside and may exercise full rights of citizenship, including voting and access to public services.

The large body of law examining the legal problems of Indians is generally unknown. Indian law is taught in only twenty-five to thirty law schools — and usually to small groups. Only a few lawyers in the country devote most of their time to Indian law issues. Many other attorneys have episodic contact with Indian law when a client runs into a problem that involves Indian law. However, to most lawyers Indian law is something heard of but never used.

In this situation, a good general text is essential — particularly for those whose need for knowledge of Indian law arises in situations that call for a fast route to understanding. The first such text was *Felix S. Cohen, Handbook of Federal Indian Law*, published in 1941. This

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book was written as a publication of the Department of the Interior. But it was much more than that as Felix Cohen took his experience in research and writing in other fields and applied it to the enormous task of organizing Indian law into a coherent status. The scope of the task was so large that although the resulting book presented relevant background, general perspective, and leads to authorities, it was not a complete encyclopedia. It is worth noting also that in the context of the times, the work was seen as most directly serving the needs of Indians and Indian service administrators.<sup>1</sup> During this period, independent lawyers either representing or opposing Indians were very few.

Cohen's work was consistent with the government's approach to Indian problems at that time — seeking to expand the governing and business abilities of tribes and recognizing limits on federal power over Indians. By the 1950s, however, government policy changed almost completely and a major effort was underway to terminate Indian tribes and integrate Indians into the general population. Cohen died in 1953 and his book was of some embarrassment under the new policy. Hence, the Department produced a second version in 1958 entitled *Federal Indian Law*.<sup>2</sup>

In the 1960s, the federal approach to dealing with Indians changed in the direction of stopping termination and supporting independent tribal governments on reservations. Government financing produced a bar of Indian lawyers. Indian law began to emerge as a subject for instruction in law schools. This new dimension to Indian law led, among other things, to a rejection of the 1958 book as not reflecting Felix Cohen's work, as being biased against Indians, and as showing inadequate scholarship.<sup>3</sup>

In 1968 Congress directed that the Handbook be revised and republished. Department of Interior lawyers progressed slowly under this demand. In 1972 the American Indian Law Center, in cooperation with the University of New Mexico, published a facsimile reprint of the 1941 Cohen work. Then, in 1975, the Interior Department decided to seek outside assistance in completing the revision of the work. The University of New Mexico contacted faculty members at a number of law schools who organized a consortium to revise the book. The Department of the Interior contracted with the University of New Mexico and the Board of Authors and Editors to produce the book. Funding

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<sup>1</sup> Ickes, *Foreword* to F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at vi (1941).

<sup>2</sup> UNITED STATES DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW (1958).

<sup>3</sup> See, e.g., *Introduction*, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 1982 EDITION ix (1982).

was provided by the Department and a number of private foundations.

From this effort came the book under review, *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition*, published by Michie Bobbs-Merrill. No author is listed on the outside of the book. Inside is a list of nine members of the Board of Authors and Editors, with Professor Rennard Strickland of the College of Law, University of Tulsa, listed as Editor-in-Chief. Also listed are eleven contributing writers. The Introduction notes that technical editing was done over a period of four years at the University of Oregon by a staff of young lawyers, law students, and paralegals. Also, the production process was similar to that of a law review with initial writers, editors in collective sessions, and examination by outside persons. As a result, we are told: "Every part of the volume, then, is the product of many minds. No chapter or section is the work of any single person."<sup>4</sup>

The authors began the project simply to update Felix Cohen's original work which they regard as "the most enduring contribution of this truly eminent scholar."<sup>5</sup> But, as they note in the Introduction, they soon discovered that the task was much larger. Courts have decided more Indian law issues since 1941 than ever before. Major statutes have been enacted. Government policy has taken major swings. As a result, much more new writing was required than the authors had at first contemplated. Although many sections of Cohen's original text are preserved, this book is substantially a new work.

The result of this collective effort is a first-rate summary of Indian law destined to be very useful. It begins with essential definitions in chapter one and an excellent history of Indian policy in chapter two. Chapters three, four, and five discuss the scope and authority in Indian affairs of the federal government, the tribes, and the states. Chapter six discusses the jurisdiction of courts — federal, tribal, and state — and is particularly well done.

The following chapters address legal issues that are particularly important with respect to Indians. Chapter seven discusses taxation of Indians and persons doing business with Indians by the federal government, the tribes, and the states. Chapter eight deals with hunting, fishing, and gathering rights of Indians and on Indian reservations. Chapter nine addresses the intricacies of tribal property rights. Chapter ten discusses water rights. Chapter eleven deals with individual property rights in tribal property and allotted property. Chapter twelve discusses the civil rights of Indians both with reference to federal and state

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at viii.

governments and with reference to tribal governments. Chapter thirteen is a catalog of government services available to Indians. Chapter fourteen deals with federal law as it applies uniquely to certain special groups: Alaska natives, Indians in Oklahoma, native Hawaiians, and terminated tribes.

The book covers an enormous body of law. Not surprising, then, it does not try to do more than summarize this law and give citations which will lead the reader to more detail. As it is, the book takes 900 pages of the smallest type tolerable — in the case of the footnotes, almost intolerable — and, given its limited market, has to sell for a high price. But within those basic limitations, the authors have done a magnificent job.

The book will be of great help to newcomers to Indian law, particularly to lawyers who have their first Indian cases and need to rapidly absorb enough of this arcane law to represent their clients. For them, a few words of advice are necessary to take advantage of the information the book offers.

First, every newcomer to Indian law should start by carefully reading the initial two chapters. The first chapter discusses the meaning of three terms constantly encountered in Indian law: tribe, Indian, and Indian country. The second chapter presents the history of Indian law. An understanding of that history is a vital preface to any work in current law. In our country, Indians and Indian law are unique in many ways — a consequence of history. One must realize that our country has not been consistent in its dealings with Indians. Rather, as noted earlier, it has swung widely back and forth between seeking to strengthen Indian tribes and maximize their ability to govern their reservations and seeking to dissolve reservation life and integrate Indians into the general society. During a long integration period around the turn of the century and up to the 1920s, the federal government engaged in a scheme to allot Indian lands to individual Indians and take excess land for sale. The allotment period greatly affects modern cases because it resulted in mixtures of non-Indians with Indians and created many reservations containing fewer Indians than non-Indians living on fee-owned land. From the late 1920s until the middle 1940s, another period of Indian reorganization and tribal strengthening occurred. This was followed by about fifteen years of looking in the other direction with a major program of terminating tribes and the enactment of a law<sup>6</sup> giving states the option of taking much jurisdiction away from the

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<sup>6</sup> Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (1953).

tribes. Since the early 1960s, we have been in a period of maximizing the Indians' ability to decide for themselves how they want to live and maximizing tribal governments as the primary governing authority for the tribes. All of this must be generally understood if one is to comprehend current decisions.

Second, some care is necessary to avoid being misled by the book. The individual chapters were the primary responsibility of different people. Clearly, some of them were finished substantially before others. Attempts to bring everything up to one date and to assure that all coverage of a topic is easily accessible were, not surprisingly, less successful than the authors would have liked. One example illustrates the problem. A person reading the second chapter on history finds a subsection on "The Indian Civil Rights Act."<sup>7</sup> The text of that subsection appears to assume that the Civil Rights Act imposed on tribes a set of restraints similar to the constitutional restraints on state governments. The authors conclude that while controversial, the Act recognized the validity of tribal exercise of governmental powers in placing the tribes in a role of responsibility and accountability similar to other governments. The trouble with this is, of course, that in 1978 the Supreme Court decided the case of *Santa Clara Pueblo v. Martinez*.<sup>8</sup> A female member of the tribe sued in a federal court alleging that a tribal ordinance denying membership in the tribe to children of female members who have married outside the tribe while granting this privilege to the children of male members marrying outside the tribe, was a denial of equal protection of the laws guaranteed by the Civil Rights Act. The Supreme Court rejected her claim, holding that the Civil Rights Act could be relied upon only in suits in the tribal courts and that the only cases the federal courts will hear are cases brought on habeas corpus when an individual has been incarcerated for violating tribal criminal laws. This holding dramatically reduced the significance of the Act — particularly since, as the Supreme Court noted in a footnote, the tribal court in the case was the tribal council itself. If one looks at the footnotes in this text, one will find the *Santa Clara Pueblo* case cited and summarized in a sentence. However, a crucial citation appears at the end of the footnote: "See generally, Ch. 12, Sec. E, *infra*."<sup>9</sup> If one sees that and turns to page 666 in the Indian Civil Rights chapter, a much

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<sup>7</sup> FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 1982 EDITION 202 (1982).

<sup>8</sup> 436 U.S. 49 (1978).

<sup>9</sup> FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 1982 EDITION 202, n.247 (1982).

fuller discussion will be found in which the *Santa Clara Pueblo* case and its limitations are discussed in considerable detail. Even there, however, a notation is not made of the wide variety of tribal courts, most, if not all, of which would not be able to interpret and enforce the Civil Rights Act against the tribal government.

Third, one does not find major problems in Indian law isolated and discussed, another limitation resulting from the collective efforts to summarize Indian law. The book does not include a substantive introduction or conclusion that might serve to identify major problems. The individual chapters rarely have introductions and none have conclusions. Major problems are not dealt with in a way that identifies the conflicting points of view and suggests ways Congress and the courts should address their solutions. For example, one of the most complex problems concerns the relationship between tribes and non-Indians. How can a business concern seeking to contract with a tribe to search for oil, to mine coal, to build a power plant, or to cut timber protect its future? Suppose a conflict arises regarding the meaning of the contract with the tribe. Current law suggests that the only way to get it resolved is by a suit in the tribal court and perhaps not even that if the tribe has not waived sovereign immunity. Will that be adequate protection or can alternatives be designed by contract? Must the business worry about future tribal taxes on its activities? Will it also have to pay state taxes on the same activities? Can one provide better arrangements through contract with the tribe? Questions like these are important for the tribe, too, because the more uncertain and difficult the legal position of the outside contractor, the less it will pay the tribe for the contract. Or consider another aspect of the same problem. Many non-Indians often reside on reservations on fee-owned land. For example, the Fort Madison Indian Reservation consists of land sixty-three percent owned by non-Indians with 2929 non-Indians and fifty Indian tribal members living on the reservation.<sup>10</sup> How much governmental authority do the few tribal members have over the many non-Indians? How is this situation dealt with when the individual Indian has full rights of a citizen of the United States and the state, but also purports to govern the reservation and, to some extent, the non-Indians therein through a tribal government which excludes the non-Indians from membership? All of these questions are very difficult and their solution is important to both Indians and non-Indians. Unfortunately, these issues are only discussed in several notations stating that Indians have or should have major con-

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<sup>10</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978).

trol over all persons on reservations.

Fourth, the reader must recognize that the index and the footnotes make it more difficult than necessary to find where topics are discussed. The index apparently was not constructed solely for this book. Instead, the editors adapted an index designed by the National Indian Law Library for the purpose of accessing its files. Consequently, the index is not as useful as if it were designed by going through the book page by page and providing the maximum number of references. Surprisingly, the index omits major topics. For example, the original Cohen book included a chapter on the Pueblo Indians of New Mexico. In this new revision this chapter apparently was considered unnecessary. Incorporated in the book is at least one discussion of the special legal problems relating to Pueblos. But Pueblos are not referred to in the Index. To find the discussion in the book, one would need to know that the leading case is *United States v. Sandoval*,<sup>11</sup> look in the table of cases finding thirty-eight page references, and check them to find the central discussion on pages 92-96 under a heading "Tribes of the Far West" (a heading itself not in the index). In addition, the reader must be careful to watch for cross-references in the footnotes and check them. They are not in the text and generally appear as mere referrals to another section of the book and are tacked on the end of footnotes. Yet, as discussed above in connection with the Indian Civil Rights Act, the reference to a more complete discussion elsewhere may be crucial for a correct understanding.

But even with these problems, and doubtless others which I have not yet discovered, this book is extremely valuable and always to be used. We all owe a debt of gratitude to the authors for accomplishing the major task of producing the book. I only hope that having discharged what they regarded as an obligation to Felix Cohen to produce this book as a revision of the original volume, some of the authors will produce books identifying and analyzing the major problems facing Indian law today.

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<sup>11</sup> 231 U.S. 28 (1913).

