

The political status of Native Americans in the U.S. system

Who Will Govern Indian Country?

by

Rudolph C. Ryser -- Cowlitz

There are 177 independent, self-governing states in the world today. One hundred twenty of these states became independent in the last thirty years. States like Vanuatu and Nauru in the Pacific, Nevis-St. Kitts in the Caribbean and Belize in Central America are among those which became independent in only the last ten years.

From these numbers, we can tell that international agreements promoting decolonization and self-determination of peoples have had a profound affect on the geo-political shape of the world. More peoples live under self-governing State structures now than at any time in human history. As a result of what might be called the enlightened period of Human Rights and Self-Determination of peoples, we might conclude that virtually all people in the world are self-governing and free to choose their own social, economic, political and cultural future. Despite appearances to the contrary, there is an estimated one-half billion people in the world who do not enjoy the full right to govern themselves. These are the peoples of what we now call the Fourth World. They are peoples of the original nations which speckle six continents and hundreds of islands. Peoples of the Fourth World make up nations which are under the control of older and newer states.

While there are scores of states, there are more than three thousand nations in the world which are surrounded by older and newly created states. These nations are in the main under the control of a state against their will -- without their consent. These nations were once separate, independent and fully self-governing. Now they are either non-self-governing or partially self-governing nations dependent on the will and whims of independent states. In many ways we can say these nations have become captives of the state system.

In the Peoples' Republic of China there are fifty separate and distinct nations including the peoples of Tibet, Manchuria, and East Turkistan. The dominant state population is made up of Han people, or people we call Chinese. The Han run and control the Chinese state.

In Guatemala, there are about fifty original nations with a collective population of nearly six million. Together they are known as the Maya. About half of more than eleven million Maya are located in the southern part of the state of Mexico. In both Guatemala and Mexico the state government apparatus is controlled by the descendants of immigrant populations -- mostly from Spain.

In Indonesia, the vast archipelago north of Australia, there are about 300 separate and distinct nations living under the control of a Javanese controlled state apparatus in Jakarta. Some of the nations which have not consented to Indonesian control are the West Papuans, South Moluccans and the East Timorese.

In the vast continent of Africa there are about fifty states, most of which have come into independent existence in only the last thirty years or less. Hundreds of nations continue to exist, surrounded and sometimes bi-sected by the newly created states. Some of these nations are the Alur, Kamba, Maasai, Xhosa, Eritreans, Zulu, and the Lambwa. If an African state government apparatus is not under the control of an immigrant population from Europe, it is under the control of a dominant nation.

In the Union of Soviet Socialist Republics the Russians control the state apparatus, but there are more than 150 non-Russian nations like Latvia, Estonia, Tadsig, Armenia, and Usbek which are either non-self-governing or only partially self-governing. A similar pattern occurs in virtually every European state; and states in South America, South Asia and North America.

The reality of non-self-governing nations is truly a world-wide phenomenon. It is no less a phenomenon inside the boundaries of the United States of America. There are over four hundred Indian and Alaskan Native reservations, rancherios, and village communities surrounded by the United States. Some of these nations are the Hopi, Chippewa, Shoshone, Yakima and Quinault. Like other nations in the world, they are either non-self-governing or partially self-governing. Non is fully self-governing. If all of the reservations, rancherios and village communities were combined, Indian Country would have a land mass of 680,000 square miles -- an area about the size of Alaska. Each part of Indian Country is occupied by a people that makes up a single nation, or a fragment of scores of other nations.

The presence of many nations inside a State's boundaries is clearly not unique.

Who governs these nations? Who will govern these nations in the future? What is the political status of these nations? What is the future political status of these nations. These are the questions which now echo around the world; in the halls of the United Nations, in the capitols of states and increasingly in the councils of Indian Nations in the United States. The United Nations has since 1973 been examining the future status of nations inside existing states. Indeed, the U.N. Working Group on Indigenous Populations is seriously considering language for an International Declaration on the Rights of Indigenous Peoples which would impose international standards on the relations between nations and states.

The States of Sweden, Australia, Canada, Nicaragua, Sri Lanka are

all now considering proposals for the future political status of nations inside their boundaries. In December 1987, the United States government adopted a plan proposed by Indian Nations to determine the extent to which several Indian Nations will assume greater powers of self-governance. The Self-Governance Demonstration Project was authorized by the U.S. Congress in September 1988. This U.S. adopted plan opens the possibility of new self-governance agreements between Indian governments and the U.S. government.

Shouldn't the full meaning of self-determination, of self-government, be extended to nations as freely as it was extended to former colonies which have become independent states?

Of course, we agree that all peoples should freely govern themselves. What is often the bone of contention is *how* nations which were once fully self-governing, and which have sometimes very small populations and land areas can become self-governing again. Inside the United States, the question of how Indian Nations can fully govern themselves is complicated by generations of systematic territorial and population fragmentation. The *how* is further complicated by the existence of fifty states joined in federation, and more than 3000 counties. While many Indian Nations were being fragmented, dismembered and scattered the United States of America was being formed and consolidated. Despite four hundred years of fragmentation and two hundred years of U.S. consolidation, however, there are still sovereign Indian Nations and countless unresolved disputes between these nations and the United States.

Some people ask the question, "How can you have a lot of sovereign nations inside the United States which is itself a sovereign state?" Still others, like Washington State Attorney General Ken Eikenberry in the 1985 report "The State of Washington and Indian Tribes" ask the question, "how to govern a complex, interdependent society with independent sovereignties existing as jurisdictional enclaves within its borders." Indian leaders frequently raise the same questions, only from the point of view of governing an Indian Nation.

In 1980, an Inter-Tribal Study Group on Tribal/State Relation said in its report "Tribes and States in Conflict", "Indian Nations are not now, nor have they ever been, a part of the United States or its system of governments." The Washington Attorney General's 1985 report made the observation "One reason that the State of Washington and its Indian citizens have frequently been in court is because no one truly understands exactly what position an Indian tribe occupies within the federal system." The certainty of Indian leaders and uncertainty among State government officials on the political status of Indian Nations in relation to the U.S. federal system add to the complexity of answering the questions of "Who governs Indian Nations?" and "What is the political status of these nations?"

Questions like these were at the heart of a two year, joint Congressional Study conducted by the American Indian Policy Review

Commission in the middle 1970s. Such questions stirred intense controversy inside the Commission and throughout the country.

In 1977, the American Indian Policy Review Commission published its final report. Strong differences of opinion within the Commission produced a report that included a dissenting statement by former Congressman Lloyd Meeds who sat as the Vice Chairman during the two years of the Commission's life. Congressman Meeds took exception to many parts of the Commission's final report, but he was particularly concerned with the Report's conclusions about tribal governing powers. Congressman Meeds described what he believed to be the Commission's "fundamental error." He wrote that the Commission's report,

perceives the American Indian tribe as a body politic in the nature of a sovereign as that word is used to describe the United States and the States, rather than as a body politic which the United States, through its sovereign power, permits to govern itself and order its internal affairs, but not the affairs of others.

At the heart of Congressman Meeds' dissent was this argument:

In our Federal system, as ordained and established by the United States Constitution, there are but two sovereign entities: the United States and the States. This is obvious not only from an examination of the Constitution, its structure, and its amendments, but also from the express language of the 10th amendment which provides: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the peoples.

(A.I.P.R.C. Final Report 1977:573)

Congressman Meeds goes on to say finally: "The blunt fact of the matter is that American Indian tribes are not a third set of governments in the American federal system. They are not sovereigns." In his statement, Congressman Meeds has done us all a great service. His argument might be outlined in this way:

1. Indian Nations are a body politic which the United States permits to govern itself and order its internal affairs, but not to govern the affairs of others who do not participate in the Indian government.

2. The United States Constitution provides for two sovereigns, the United States and the various States, but it does not provide for a third set of governments which are Indian governments in the American federal system.

3. Indian Nations and their governments are not sovereigns.

I think we might agree that in some respects he helps us to understand why the Washington State Attorney General expresses his

doubts about how a State can "govern a complex, inter-dependent society with independent sovereignties existing as jurisdictional enclaves within its borders." He also helps us to understand why some people have doubts about how there can exist many sovereigns inside a sovereign state. In one respect we find that Congressman Meeds is in complete agreement with some Indian Leaders when he says: "American Indian tribes are not a third set of governments in the American federal system," and he gives the Washington Attorney General a clue about what position Indian tribes have in the federal system. Finally, Congressman Meeds helps us to understand "Who governs these Indian Nations?" and what their political status is. He also gives us some clues about "Who will govern these Indian Nations in the future?" and what their future political status might be.

Let's take the points in Congressman Meeds's argument one by one and see how they can help in our debate on the Political Status of Indian Nations in the United States of America.

First, Congressman Meeds argues that Indian Nations are permitted to exercise a form of self-government by the United States. He suggests that the word self in self-government should be emphasized meaning that Indians should govern Indians only. He furthermore implies, that any resident of an Indian reservation or community who does not have the right to participate in the decisions of an Indian Nation's government must be held exempt from the governing powers of an Indian Nation. Congressman Meeds also suggests that Indian Nations may exercise only those governmental powers that the U.S. government permits.

Though Congressman Meeds seems a victim of gross oversimplification, he is probably correct in saying that the governmental powers of Indian Nations are heavily restricted by the U.S. government. Indeed, I would suggest that because the United States government unilaterally decided to cease making treaties with Indian Nations in 1871, thus effectively bringing to a halt 250 years of treaty relations and setting up the U.S. Congress as the primary arbiter of Indian governmental decision-making; the U.S. government in general and the Congress in particular became a virtual dictator over Indian Nations. Unilateral decision-making by the U.S. government is doubtless responsible for the diminished powers of self-government among Indian Nations.

As for Congressman Meeds' emphasis on the word self in self-government to mean Indians may only govern Indians, he doubtless expresses a somewhat race-conscious view shared by many citizens of the United States. He would surely not intend such a narrow interpretation to apply to the United States or her various States. He surely does not intend that the U.S. government, which is a self-governing state, should have only authority to govern its own citizens and not the non-citizens who visit or live inside U.S. boundaries. He surely would not intend his interpretation of self-government by Indian Nations to also apply to the other 176 states in the world. Were his narrow interpretation to apply to the

States of the world, we would now see a world in jurisdictional chaos.

The plain fact is that the term "self-government" has a well established meaning in literature, history and international relations. It simply means the inherent right of a people to adopt their own form of government, to define citizenship, to regulate domestic relations, prescribe rules of inheritance, levy taxes, regulate property, regulate residents by municipal legislation, conduct trade, and to administer justice, among other things. That the United States has unilaterally restricted Indian self-government does not mean that Indian Nations lack the right and power to exercise full self-government -- the same as any other peoples in the world. Indian Nations reserved their powers of self-governance, and have the right, like any other people to fully resume those powers. To be meaningful, such powers of self-governance must necessarily extend over all civil and criminal activities within an Indian Nation's territory.

In answer to the question "Who governs these Indian Nations?" let us note that since 1871, the United States government, Indian Nations, and more recently some of the various State governments exercise governmental powers inside Indian Nations. Most Indian Nations are only partially self-governing while some exercise no governing powers at all. In the latter case, the United States government and some State governments as well as some counties and even cities exercise governmental powers over some Indian Nations.

Where Indian Nations are partially self-governing in their territories, there exists mixed, overlapping and even competing legal and political systems. For many Tribal, Federal, State, County and municipal legal authorities, Indian Reservations are in political and legal chaos. This is the very condition that Congressman Meeds and all of us expect to avoid in the relations between the states in the world. Because of racial bigotry and historical realities, we find that the chaos we would avoid among States is precisely the disorder created in Indian Country.

Where Congressman Meeds seems certain about the political sovereignty of the United States, the various States and the lack of sovereignty in Indian Nations; others are either totally confused or absolutely certain that all three governments are sovereign. To establish the fact that the U.S. government and the governments of the various States are political sovereigns, Congressman Meeds turns to the U.S. Constitution. He correctly observes that the U.S. Constitution allows for but two sovereign entities. He notes that the U.S. Constitution allows that some powers are delegated and inherent between the two governments. He furthermore observes correctly that the American Indian Policy Review Commission argued in its Final Report that Indian Nations **HAVE THE CHARACTERISTICS OF SOVEREIGNTY** over the lands they occupy analogous to the kind sovereignty possessed by the United States and the States. (A.I.P.R.C. 1977:573) Congressman Meeds suggests, accurately I believe, that "American Indian tribes are not a third

set of governments in the American federal system." Were this so, Indian Nations would be specifically identified in the U.S. Constitution as a third level of government. This is clearly not the case. Finally, the Congressman states bluntly that Indian Nations "are not sovereigns." It is this last statement that gets the Congressman into trouble.

Asserting that Indian Nations are not identified as a third level of government in the U.S. Constitution, Congressman Meeds concludes that Indian Nations are not sovereign entities. I hasten to note that the U.S. Constitution does not list France, China, Canada, or Mexico either. It doesn't even mention the Republic of Vanuatu which became an independent State in 1980. Despite these oversights, I don't believe anyone, including Congressman Meeds would doubt that these are sovereign entities. That the U.S. Constitution fails to mention Indian governments as a third level of government only means that INDIAN NATIONS ARE NOT NOW, NOR HAVE THEY EVER BEEN A PART OF THE UNITED STATES OR ITS FEDERAL SYSTEM.

Indian Nations were not participants in the development and formulation of the Constitution of the United States of America. No Indian Nation ever ratified the U.S. Constitution, but then, neither did France, Canada or China. That Indian Nations were not identified as sovereigns under the U.S. Constitution has nothing to do with their sovereign identity unless you are among those people who believe incorrectly that the United States government created Indian Nations. Of course, to hold this view would require that you ignore archaeological, anthropological, historical, political, and legal evidence to the contrary.

The settled reality is that Indian Nations have original or inherent sovereignty, in many ways more sure and certain than many of the States in the world. The legitimacy of Indian national sovereignty is confirmed by their long presence as peoples on the continent. The fact that Indian Nations established treaty councils between themselves to establish boundaries and resolve disputes confirm that sovereignty. The fact that nations and states in Europe and elsewhere in the world met in treaty councils with Indian Nations before the establishment of the United States of America further confirms that the predecessor states of the U.S. recognized the sovereignty of Indian Nations. That the United States government itself entered into treaties (more than 400) with Indian Nations, confirms that even the U.S. recognizes the original sovereignty of Indian Nations.

From this discussion, we must conclude that the political status of Indian Nations is outside the United States and Indian Nations are sovereigns which have some kind of association with the United States.

While Congressman Meeds' reasoning about Indian Nations and the U.S. federal system is sensible, his conclusion is erroneous. Indian Nations are sovereign entities in a way analogous to the sovereignty of the United States and the various States. Indeed, I would go further to say that the sovereignty of Indian Nations is

fundamentally no different than any other nation or state in the world.

What does this all mean for our second questions: "Who will govern these nations in the future?" -- what is their future political status?

First, I would suggest that we must all agree that the current chaotic "non-governance of Indian Country" is neither good for the United States and its various States, nor each Indian Nation. Neither Indians, nor non-Indians living on Indian Reservations can live a secure, productive and even prosperous life as long as there is uncertainty about who governs in Indian Country. That is my first point.

Secondly, it is essential that we all attempt to understand how the United States was created and that the United States did not create Indian Nations. While it may be a controversial view shared by some Indian Leaders, Congressman Lloyd Meeds and me, I believe we must recognize as a fundamental reality that the political status of Indian Nations has not been formally established. It is certain, however, that Indian Nations are not now, nor have they ever been a part of the United States or the U.S. federal system. Indian Nations are not a **THIRD LEVEL OF GOVERNMENT IN THE AMERICAN FEDERAL SYSTEM**. Indian Nations do not have a defined political status inside the United States. If they do have a political status in relation to the United States, it might be described as "associated nations."

Thirdly, I believe we must understand and agree that Indian Nations have original and inherent sovereignty -- separate and distinct from the sovereignty of the United States, the various States and all other nations and states in the world.

Finally, I suggest that peoples which are distinct from all other must share in the human right to self-determination, the right to freely exercise their own social, economic, political and cultural rights and to choose their political status without external interference; and they must, therefore, have the right to exercise self-government.

The answer to our second questions largely depends on the extent to which Indian people and non-Indians alike agree to these four points. If these points are generally agreed to, then the prospect of determining who will govern Indian Nations and establishing their political status in the future becomes realistic.

To those who ask, "How can you have sovereign nations inside a sovereign state?" I would only ask that they examine the facts. There are sovereign Indian Nations inside the United States boundaries whether they like it or not. How do you have many sovereigns inside of a country? Examine the U.S. Constitution and you will see that there are already many sovereigns inside the United States. That there are still many other sovereigns not

accounted for in the U.S. Constitution means only that either the Constitution should be changed or we create new structures between Indian Nations, the United States and the various States to allow for mutually acceptable ways of dealing with each form of government.

To the Attorney General who asks how do you "govern a complex, interdependent society with independent sovereignties existing as jurisdictional enclaves within its borders?" I suggest that the answer rests with present and future dialogue between officials representing the separate sovereignties. The fact of the matter is that while many States in the United States have sovereign Indian Nations inside their boundaries, Indian Nations also experience the presence of State, County, City and federal jurisdictional enclaves inside their territories. The broad response to State governments is to withdraw their jurisdictional activities inside the boundaries on the basis of mutual agreement with the governments of Indian Nations. Where local state jurisdiction is withdrawn, an Indian government must assume the responsibilities of governance.

Indian governments must be the sole governing authority inside the boundaries of a Reservation in the future. The only alternatives to this arrangement are continued jurisdictional chaos on Indian Reservations or tribal suicide. Neither of these can be acceptable alternatives to the exercise of full self-government by Indian Nations. As the noted Jurist, Felix Cohen observed in the Handbook of Federal Indian Law:

The most basic right of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression, for in a realm where the states are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's land in which government can emanate only from officials of the Interior department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a government department. (Cohen 1942:122)

As for the future political status of Indian Nations, there are but three alternatives which might be considered. Either Indian Nations are fully and recognizably independent, they are associated with a state like the United States or they are absorbed into the United States either as a member of the federal system of governments, or they simply disappear. Clearly Indian Nations in the United States are neither independent nor are they absorbed.

I assert that Indian Nations are now sovereign nations which are associated with the United States. The political status of "associated sovereign nations" is implicit in the relationship between Indian Nations and the United States. The United States is a state associated with Indian Nations.

The United States is associated with many political entities like

Puerto Rico, the Virgin Islands, the Federations of Micronesia, the Marshall Islands, American Samoa, Guam and Belau -- all island nations or states in the Caribbean or the Pacific Ocean. What these nations and states have in common that is not shared with Indian Nations is a mutually defined agreement of association with the United States of relatively modern vintage. Such agreements spell out relationships, methods of dispute resolution and levels of self-government. What Indian Nations have in common that is not shared with sea-ward associated nations and states is a close proximity to the United States itself. Indian Nations are very much like islands in a sea of land where they are in close competition with the United States for natural resources, and governmental jurisdiction.

A defined political status of Indian Nations in relation to the United States is both desirable and necessary. Each Indian Nation and the United States must enter into government to government negotiations to define what their future relationship will be. A political status formally defined would settle in a way not otherwise possible how Indian Nations, the United States and the various States deal with each other. Of greatest importance, Indian Nations would once again become active participants in the political process which determines their political future.

The most desirable future one might project would allow for fully self-governing Indian nations which have formally chosen to associate themselves with the United States. By virtue of free association agreements between Indian Nations and the United States, the U.S. constitution would not have to be amended, the United States would in fact have but two sovereigns and the relationship between the various States and Indian Nations would become that of cooperative neighbors instead of fierce competitors. The political development of the Indian Nations would be advanced, and the certainty and stability of the United States of America would be assured.

The acceptance of an Indian government developed self-governance plan by the United States in 1987 opens the door for determining the level of self-governance and future political status of Indian Nations. Ten Indian governments are now engaged in a self-governance Indian Nation/U.S. agreements. The Indian Nations which have begun to trek on this uncharted path include the Red Lake Chippewa, Mille Lac Chippewa, Rosebud Sioux, Confederated Salish-Kootenai, Tlingit-Haida, Hoopa, Mescalero Apache, Jamestown Band of Klallam, Lummi and the Quinault Indian Nation. The path that these Indian Nations cut through the thicket will largely determine whether Indian Self-Governance can become a full reality or not. It is my hope that they are successful.