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The 1982 Felix S. Cohen's Handbook of Federal Indian Law: A Review and Commentary

Margery H. Brown
University of Montana School of Law

BOOK REVIEW

THE 1982 FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW: A REVIEW AND COMMENTARY

Margery H. Brown*

Four decades after its initial publication, *Felix S. Cohen's Handbook of Federal Indian Law* is available in a new edition, substantially reorganized and rewritten, and incorporating developments in Indian law through March 31, 1981.

The new Cohen *Handbook of Federal Indian Law,* published by Michie Bobbs-Merrill, is the work of a nine-member board of authors and editors, and eleven contributing writers. The collective enterprise was guided by Editor-in-Chief Rennard Strickland of the University of Tulsa College of Law and Managing Editor Charles F. Wilkinson of the University of Oregon School of Law.

The 1982 *Handbook* provides a much-needed current treatise, and it adds another chapter in the chronicle of Felix S. Cohen's work. His 1942 *Handbook* synthesized for the first time the developments in American Indian law that had occurred over a century and a half of national experience. Cohen's work first made clear the constitutional underpinnings of the federal-tribal relationship. He then illuminated the ramifications of that relationship in treaties and statutes, in the activities of the Bureau of Indian Affairs, and the consequences for the federal government, Indian tribes and Indian people, and the states and non-Indians.

Cohen brought an unusual breadth of view to his task. After graduating at eighteen from City College of New York, he turned for his graduate work to law, philosophy, anthropology, and political science. He received his doctorate in philosophy from Harvard and his law degree from Columbia. In 1933 he undertook what was to have been a single year's special assignment in the Department of the Interior under Solicitor Nathan R. Margold, and then remained in government service until 1948. Working closely with

* Associate Dean and Associate Professor, University of Montana School of Law. B.A., University of Montana, 1950; M.A., University of Montana, 1953; J.D., University of Montana School of Law, 1975.

Commissioner of Indian Affairs John Collier, Cohen was a principal drafter of the 1934 Wheeler-Howard Indian Reorganization Act. Later, he served as Associate Solicitor and chairman of the Interior Department's Board of Appeals. Throughout the period, and until his death in 1953, he wrote prolifically, primarily of jurisprudence and of law and ethics, in addition to his work in Indian law.[1]

Cohen was named a special assistant to the United States Attorney General in 1939 to head the Indian Law Survey of the Department of Justice. Assisted by Theodore H. Haas, Cohen first compiled a forty-six volume collection of federal laws and treaties. The compilation became the basis for his *Handbook of Federal Indian Law,* published by the Department of the Interior in 1942.

Between 1942 and 1982, two editions of Cohen's *Handbook* were published, and they were markedly dissimilar in impetus and impact. One of the constants of American Indian law and policy has been its propensity for change, and the history of the *Handbook* reflects the pendulum swings in federal policy. The *Handbook*'s first appearance in 1942 came at the end of a decade in which Congress and the executive branch gave approval and support to the reorganization of tribal governments, and to the restoration of the tribes' economic well-being and political independence. In the 1950's, congressional policy shifted toward assimilation and the termination of the special relationship existing between the tribes and the federal government. Cohen's *Handbook* was by then out of print, and in some quarters, out of favor, because of the legal support it provided for both the self-governing powers of Indian tribes and the continuation of the federal government's trustee role in Indian affairs.

The Department of the Interior authorized a revision of Cohen's work, and the *Handbook* became available in a new format in 1958, published first by the Government Printing Office and later reissued by two other publishers. Critics of the 1958 edition have long asserted that it is a distortion of Cohen's work and that it reduces the overriding general rule of law to an unqualified federal plenary power in Indian affairs.

Within a dozen years federal policy again supported tribal self-determination, and in 1971 the American Indian Law Center and the University of New Mexico Press published a facsimile reprint of the 1942 Cohen *Handbook*. Meantime, as part of the In-

1. Biographic information and summaries of Cohen's writing appear in F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW viii-xi (U.N.M. ed. 1971) and F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW vii-ix (1982 ed.).

dian Civil Rights Act of 1968, Congress had directed the Secretary of the Interior to revise and republish the *Handbook*. Producing a contemporary Cohen *Handbook* remained a staff effort within the Interior Department until 1975, when the Solicitor's office turned to the University of New Mexico and contracted with that institution and the consortium of writers who became the board of authors and editors for the 1982 edition.

Inevitably, the distinctions between the 1942 and 1982 *Handbooks* are pronounced—in substance, perspective, emphasis, organization, and style. Editor-in-Chief Strickland has remarked in jest that the 1982 edition utilizes all of Cohen's initial words, albeit that they have been rearranged.

Substantively, the 1982 *Handbook* reflects the sheer growth in Indian law over the past four decades, through acts of Congress and their administrative implementation, through a proliferation of judicial decisions, and through the self-governing activities of the nation's more than one hundred recognized tribal governments. In the years since the *Handbook* was initially published, congressional action has resulted in many significant developments, including: the creation of the Indian Claims Commission in 1946; the codification of the modern definition of "Indian country" in 1948; the termination acts and the transfer of criminal and civil jurisdiction over many tribes to the states in the 1950's; the subsequent repudiation of termination and the inclusion of tribal communities in the economic opportunity legislation of the 1960's; the 1968 Indian Civil Rights Act; and in the 1970's, the Alaska Native Claims Settlement Act, the Indian Self-Determination and Educational Assistance Act, the joint resolution on American Indian Religious Freedom, and the Indian Child Welfare Act. In addition, continuing the pattern begun in the 1960's, the range of federal law affecting the tribes has been broadened by the increased involvement of several federal agencies in a field that was long the province of the Bureau of Indian Affairs. Moreover, when Cohen wrote, the Federal Administrative Procedures Act had not been enacted, and the civil rights legislation of the 1960's lay in the future.

The shifts in federal policy in the years between 1942 and 1982 did not extinguish tribal powers of internal self-government. Most tribes commenced the period armed with abbreviated codes of law closely patterned on a model code proposed by the Bureau of Indian Affairs as a means of implementing the Indian Reorganization Act (IRA). For most tribes the IRA codes were inadequate from the start except in a few civil and criminal areas where only the narrowest range of tribal powers was exercised. As the reorga-

nized tribal governments matured and assumed responsibilities for services and natural resource management that were previously solely federal concerns, tribal councils revised and expanded their ordinances and created departments to administer tribal activities in education, health and welfare, environmental protection, and natural resource development and conservation.

The tribal constitutions adopted under the IRA typically included foreshortened bills of rights, protecting some political, civil, and economic rights of tribal members. Those protections were expanded in 1968 by Congress with the passage of the Indian Civil Rights Act (ICRA).

For a decade, federal district courts adjudicated a variety of ICRA claims brought by both Indians and non-Indians, and federal courts of appeals sustained their jurisdiction. Federal jurisdiction was sharply narrowed, however, by the United States Supreme Court in 1978,[2] and thereafter, the ICRA has been enforceable only in tribal forums, except for access to federal courts of persons in tribal custody who file habeas corpus petitions. The sovereign immunity of tribes from suit was emphasized by the Court. As a consequence of the ruling and earlier jurisdictional decisions, the role of tribal courts has greatly expanded since the Cohen *Handbook* was first published, and litigants in those courts now routinely include both tribal members and non-Indians with claims arising out of reservation transactions.

Even if reservations had remained the exclusive homelands for Indians remaining within their tribal communities, the growth in federal and tribal law would warrant the publication of the successive Cohen *Handbook* editions. Exclusivity, of course, was not maintained. After lands were allotted to individual Indians on many reservations in the late nineteenth and early twentieth centuries, surplus lands were opened to white settlement, town sites were platted, and the pathway was blazed for much of the growth of Indian law. In recent years, courts at every level have addressed issues stemming from the interaction of Indians and non-Indians within reservation boundaries, the jurisdiction of tribal courts, the impact upon non-Indians of tribal regulatory law, the scope of state jurisdiction within reservation boundaries, and the division of responsibility in criminal matters between federal, state, and tribal governments. Many key issues have been settled by decisions of the United States Supreme Court, and there is a new body of law, untouched by the 1942 Cohen *Handbook* but central to each major

2. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 (1978).

division of the 1982 edition.

Both Cohen and the authors of the 1982 *Handbook* have placed particular emphasis upon the importance of an historical perspective to an understanding of Indian law, and the historical development of federal law and policy is carefully summarized in both editions. Readers of the 1942 *Handbook* come quickly to the realization that Cohen was a pioneer in the field. There were few pertinent historical studies available to him, and it is clear that his forty-six volume compilation of statutes and treaties became the principal grist for his *Handbook*. Cohen's historical sections include a chapter-long treatment of federal administration in Indian affairs in which he detailed the development of the Indian Service, drawing heavily on the annual reports written by Commissioners of Indian Affairs between 1832 and 1941. Cohen also employed a chronological scheme to trace the overall course of congressional enactments in Indian affairs and the treaties negotiated by the United States and the tribes. The legislation is summarized decade by decade and treaties are grouped according to definable periods of federal policy. Cohen shared with his readers many of the primary materials with which he worked: lengthy quotations from administrative reports, treaties, statutes, and judicial decisions are incorporated throughout the *Handbook*. For that and other reasons, the 1942 *Handbook* will continue to be an important reference for those who are engaged in Indian law and history.

The 1982 *Handbook* consolidates what were three chapters for Cohen into a single extended chapter on the historical development of federal Indian policy through legislative and executive action. Well-developed sections on the periods of termination and self-determination carry Cohen's treatment forward from 1943 to the present. In addition, the entire historical chapter of the new *Handbook* reflects the important work that has been accomplished in recent years by several scholars in the field of Indian law and history, notably that of Francis Paul Prucha, D'Arcy McNickle, Wilcomb E. Washburn, Angie Debo, William T. Hagan, and S. Lyman Tyler. If there is a fault to be found with the 1982 historical summary, it may rest on the authors' reliance on specialized studies of American Indians and federal Indian policy to the near exclusion of other scholarship. One senses, for example, that segregation of the federal-tribal relationship from other national affairs is carried to an indefensible degree when a footnote documenting Stewart Udall's appointment as Secretary of the Interior in 1961 refers the reader to Debo's *A History of the Indians of the United States*, page 383.

Although Cohen had staff assistance in preparation for writing his *Handbook*, he was the lone author of a very long treatise. By contrast, the strengths derived from the collective authorship of the 1982 *Handbook* are apparent throughout the volume. Its board of authors and editors and contributing writers are all specialists in Indian law, and many have gained national reputations as teachers, authors, and practitioners. Several have played principal roles in making Indian law courses available in the nation's law schools, and the new *Handbook* benefits, too, from their expertise in such related areas as constitutional, administrative and natural resource law. Before collaborating on the *Handbook*, most had written monographs and law review articles in the field of Indian law, and included in the group are authors of the two presently available Indian law casebooks.

In planning the 1982 *Handbook*, the board of authors and editors determined that each part of the volume should be the product of several minds. Chapters were individually assigned and then edited by other members of the group and subjected to the criticism of outside scholars and practicing attorneys before final revision. Efforts were made, obviously successfully, to achieve a consistency and evenness of quality and the result is a very well-written *Handbook*. A group of young lawyers, law students, and paralegals at the University of Oregon School of Law carried out the technical editing of the *Handbook* over a four-year period. The initial Cohen *Handbook* was abundantly documented; the 1982 *Handbook* continues the pattern, and its readers will benefit, not only from extended citations of treaties, statutes, regulations, and cases, but also from being guided to such supplementary materials as congressional committee reports, BIA documents, law review articles, and the wide-ranging reports of the 1977 American Indian Policy Review Commission.

Before turning to other topics in Indian law, both Cohen and the 1982 authors have devoted three chapters to the sources and scope of federal, tribal, and state authority in Indian affairs. In both *Handbook*s, as in most judicial decisions, the starting point remains Chief Justice John Marshall's early nineteenth-century opinions. Because of the course of judicial decisions over the past four decades, the two treatments of federal, tribal, and state powers differ, and the differences bear heavily on the chapters that follow.

Both the 1942 and 1982 *Handbook*s emphasize the express constitutional sources of federal power in Indian affairs, principally the commerce, property, and treaty clauses, and the power of Con-

gress to make war, provide for the general welfare, and admit new states, prescribing the terms of their admission. The 1982 authors note the ascendancy of the Indian commerce clause as a basis for judicial decision, but they prefer the concept expressed in recent opinions recognizing a broad federal power over Indian affairs as an amalgam of several specific constitutional powers.

In describing federal power in Indian affairs, Cohen observed, without extended discussion, that while judicial decisions were explicable on the basis of express constitutional provisions, their language was frequently influenced by the peculiar relationship existing between Indians and the federal government. In illustration, he noted that the United States Supreme Court had upheld the constitutionality of the Indian Major Crimes Act in 1886 on the basis of a federal power to protect the Indians.[3]

By contrast, the authors of the 1982 *Handbook* commence their discussion of federal power in Indian affairs with an explanation of the special relationship between Indians and the United States and the trust responsibility that it has engendered. They do so, not to emphasize the relationship as a source of federal power, but to explain a limitation on how that power can be exercised, legislatively and administratively.

As broad or "plenary" as federal power in Indian affairs might appear to be, Cohen persistently emphasized that in its exercise Congress remained subject to such express constitutional limitations as the federal Bill of Rights. To that limitation, because of judicial decisions in the ensuing years, the 1982 *Handbook* authors now add the power of judicial review to determine whether congressional action is tied rationally to trust obligations, and whether the conduct of executive agencies meets strict fiduciary standards.

The often-cited passage in which Cohen described the source of tribal powers reappears in the 1982 *Handbook*. It explains that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."[4] As it appears in the 1982 *Handbook*, the final phrase is in quotation marks, retrieved from a 1978 ruling by the United States Supreme Court.[5]

The scope of tribal powers, in Cohen's time, was judicially measured by a three-step analysis. Initially, Indian tribes pos-

3. United States v. Kagama, 118 U.S. 375, 384 (1886).

4. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (U.N.M. ed. 1971).

5. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231 (1982 ed.); United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

sessed all of the powers of a sovereign state. Conquest, or discovery that was reasoned to be the equivalent of conquest, subjected the tribes to the legislative power of the United States and terminated such external powers of sovereignty as the power to enter into treaties with foreign nations. Thereafter, unless their powers were expressly qualified by treaties or statutes, Indian tribes retained all of their powers of internal sovereignty.

To that analysis the 1982 *Handbook* authors add two additional principles derived from recent United States Supreme Court decisions. In addition to limitation by treaty or statute, the Court has held that sovereign powers can also be withdrawn by implication, as a necessary result of the dependent status of Indian tribes.[6] As a result, Indian tribes do not retain criminal jurisdiction to try non-Indian defendants, unless specifically permitted to do so by treaty or statute. Although there is no similar bar to the exercise of civil jurisdiction, the Court has held that tribes are without power to regulate the activities of non-Indians on reservation lands when no tribal interest justifies the regulation.[7]

Cohen's chapter on tribal powers is speculative to the extent that while his hope for the renaissance of tribal self-government was strong, he recognized that the legal powers possessed by the tribes were much more extensive than the powers being exercised by most tribes. An overreaching federal bureaucracy was the chief obstacle, in his view, to the assumption by the tribes of responsibilities for their internal affairs.

The treatment of state authority in Indian affairs in the 1942 and 1982 *Handbook*s is very similar when Indian activity is the subject, but differs when situations involve non-Indians. Common to both editions is the proposition that state law generally does not apply to Indian affairs within the territory of an Indian tribe without congressional consent. In summarizing the reasons that had been judicially advanced for the rule, Cohen cited the constitutional delegation of the control of Indian affairs to the federal government, express and implied promises in treaties, and disclaimers of jurisdiction over Indian lands included in enabling acts and state constitutions. Cohen described the result in language which approached a preemption analysis, without employing the term:

> [T]he domain of power of the Federal government over Indian affairs marked out by the federal decisions is so complete, that, as a practical matter, the federal courts and federal administrative

6. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).
7. Montana v. United States, 450 U.S. 544, 565-67 (1981).

officials now generally proceed from the assumption that Indian affairs are matters of federal, rather than state concern, unless the contrary is shown by act of Congress or special circumstance.[8]

After describing the variables of person, place, and transaction which influence decisions in jurisdictional disputes in Indian law, Cohen stated the general rules then prevailing. In matters involving only Indians on an Indian reservation, the states had no jurisdiction in the absence of specific legislation by Congress. In all other cases, the states had jurisdiction unless a matter of special federal concern was involved.

Cohen treated tribal sovereignty and the federal policy of protecting tribal sovereignty from state invasion as a composite barrier to state jurisdiction over Indians on reservations. He did not, however, extend the principle to situations involving non-Indians. Although the power of a tribe to tax non-Indians had been upheld as an inherent attribute of tribal sovereignty, it is apparent that Cohen viewed the alternatives in other situations involving non-Indians within Indian country as including federal and state jurisdiction but not tribal jurisdiction.

The linkage of federal law protecting tribal sovereignty to the exercise of tribal self-government is the bedrock principle stressed by the authors of the 1982 *Handbook* in their discussion of state authority in Indian affairs. They emphasize relatively recent United States Supreme Court decisions which have applied the principles of federal preemption in deciding jurisdictional contests stemming from both Indian and non-Indian activity within reservations. Although federal statutes and administrative regulations and activities have been important in finding preemption of state law in Indian affairs, the authors of the 1982 *Handbook* focus on tribal sovereignty under the protection of federal law as the single most important factor in the exclusion of state law. The theory that emerges, eclipsing infringement and balancing tests, is that state law is excluded by express federal statutes and regulations governing Indian affairs and by implicit federal purposes that are protective of tribal self-government. The rule stated at one point is that non-Indians within Indian country are subject to ordinary state laws except in situations in which Indians, their property, or tribal self-government are affected. Standing alone, the rule is more absolute than case law warrants. As the subsequent chapter on taxation explains, the United States Supreme Court has upheld the levy of state cigarette excise taxes on non-Indian purchases

8. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 117 (U.N.M. ed. 1971).

from Indians within a reservation, and lower federal courts have sustained state property taxes on the leasehold interest of non-Indian lessees of Indian lands.

A long chapter devoted to the actual exercise of jurisdiction follows the treatment of federal, tribal, and state authority in Indian affairs in the 1982 *Handbook*, and both its placement and extent speak for the primacy of the subject in Indian law today. By comparison, Cohen's jurisdictional explanations were brief, and they followed, rather than preceded, chapters treating other major subdivisions of Indian law. In several instances, the contents of Cohen's chapters have been reformulated and rearranged in the 1982 *Handbook,* and the current sequence includes: taxation; hunting, fishing, and gathering rights; tribal property; water rights; individual property; civil rights; government services to Indians, and special groups—Alaska Natives, Oklahoma, Native Hawaiians, and terminated tribes.

The federal-tribal relationship is the most important legal reality in many of these areas, and the 1982 *Handbook* fully details the impact on tribal governments and individual Indians of federal statutes and regulations, and the accompanying administrative oversight of the Bureau of Indian Affairs. The chapters on civil rights and government services underscore the interaction of federal, state, and tribal law, and demonstrate the complexity and quantity of law faced continually by Indian people and tribal governments.

Both the 1942 and 1982 *Handbook*s bear out that judicial decisions have been principal sources of jurisdictional rules in many areas of Indian law, despite congressional power to make clearcut allocations of jurisdiction. When the practical results are considered, it is also clear that the judicial drawing of jurisdictional lines often does not erase the problems and tensions leading to litigation.

A brief section on agreements between Indian tribes and states and local governments in the 1982 *Handbook* may understate the role that mutual endeavors can play in addressing the practical problems left in the wake of jurisdictional decisions. The concept is not new. The Indian Reorganization Act authorized tribes to negotiate with state and local governments, and a similar provision appears in many tribal constitutions. Although a tribal-state compacts bill has been introduced but not enacted by Congress, federal legislation such as the Indian Child Welfare Act provides broad authority for tribal-state agreements. Montana enacted a State-Tribal Cooperative Agreements Act in 1981, and the state is nego-

tiating, as well as litigating, issues concerned with the quantity and adjudication of tribal water rights. A compilation of agreements recently published by the Commission on State-Tribal Relations illustrates that tribes, states, and local governments are cooperating in many areas to discharge responsibilities in such matters of mutual concern as law enforcement, fish and wildlife management, land use planning, and environmental protection.

The dimension that Indian law adds to traditional concepts of federalism has not been widely understood, despite the fact that the activities of tribal governments and the experience of Indian people constitute a significant part of the cultural, political, and economic life of the nation. Those who wish to understand the position of Indian tribes in the American federal system will be well served by consulting the *1982 Felix S. Cohen's Handbook of Federal Indian Law*. Although they may not agree with every premise stated in its encyclopedic coverage, the new Cohen *Handbook* will be indispensable for lawyers and others who work with Indian law within federal, state, local, and tribal governments. It will be equally indispensable for attorneys who represent Indians and non-Indians within and outside of reservation boundaries, who need to know the variations that Indian law produces in such fields of law as taxation, real property, contracts, domestic relations, torts, procedure, and jurisdiction.