

BOOK REVIEW

Felix S. Cohen's *Handbook of Federal Indian Law*, Second Edition. By Rennard Strickland & Charles F. Wilkinson, Editors. Miche Bobbs-Merrill, Charlottesville, Virginia, 1982.

Federal Indian law originated in Chief Justice Marshall's three landmark opinions in the first half of the nineteenth century which fixed the nature of Indian land ownership as "possessory" and the status of Indian tribes as "dependent sovereigns."¹ From those first few cases to countless subsequent cases and statutes which have explained and balanced the precarious relationship among the federal, state, and tribal governments, federal Indian law has been susceptible to the vagaries of both fashion and semantics. As a result, it is a study which lends itself more appropriately to crystal ball gazing for policy shifts than to "black letter" rules of law. Application of its precepts tends toward fluid results rather than certain, arithmetic answers.

Until recently, only one treatise had attempted the task of synthesis and analysis of federal Indian law. This was Felix Cohen's *Handbook of Federal Indian Law*, published in 1942, reissued in 1971, and generally regarded as the "Bible" of federal Indian law. Although decidedly dated as a working research tool, Cohen's original work remained the undisputed authority in the field for forty years.² As is modestly stated in the introduction to the 1982 revision of Cohen's work: "Cohen was the Blackstone of American Indian Law. He brought organization and conceptual clarity to the field."³

The introduction to this 1982 revision of the *Handbook* provides a brief biography of Cohen, who wrote and published prolifically and spent fourteen years in government service with the Department of the Interior. While at the Interior Department, he headed an "Indian Law Survey" which produced the original *Handbook of Federal Indian Law*.

After Cohen died in 1953 at the age of forty-six, his work was not

1. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

2. A 1981 publication, W. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* (1981), compactly tracks areas of substantive Indian law and serves well as a handbook to the casebook, D. GETCHES, D. ROSENFELT & C. WILKINSON, *FEDERAL INDIAN LAW* (1979). Although both of these books are accessible and well done, they do not approach either the scholarship or the depth of Cohen's work and the subsequent revision.

3. FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* viii (R. Strickland & C. Wilkinson eds. 2d ed. 1982) [hereinafter cited as *HANDBOOK*].

updated although subsequent editions appeared in 1958 and 1971. The bowdlerized 1958 edition was a government revision whose specific purpose was to amend Cohen's original work to present a one-sided narrow thesis supporting limitless federal power over Indian affairs. This bias, as well as inadequate and inaccurate scholarship, subjected this edition to harsh criticism. The 1971 republication was merely a reprint of Cohen's 1942 work necessitated by a shortage of the original. The 1982 revision was initiated by a 1968 congressional mandate to the Department of the Interior directing it to update, revise, and republish the *Handbook*.⁴ As sometimes occurs in the workings of government, little progress was made on this massive project. Seven years passed before the Department of the Interior contracted out revision of Cohen's *Handbook* to a consortium consisting of the University of New Mexico School of Law and a board of almost two dozen editors and contributors who form a "Who's Who" of current scholarship in the area of federal Indian law.

Statutory and case law concerning Indian rights has been revolutionized since Cohen's original work, so the effort undertaken was massive. The end result differs in both format and size from Cohen's original. While a sentence or paragraph from the original may be tracked here and there, the most obvious sign of homage to the original is in repetition of the type face which lists the table of contents at the start of each chapter.

Although my original reaction was to be suspicious of any "committee" attempt by so many chefs to create a consistent work, the end result is, happily, a rich, integrated effort rather than a disjointed series of essays. The style is consistent, and the work as a whole quite readable.

In many respects, the 1982 revision makes Cohen's 1942 work appear quaint. This is perhaps a result of the depth of analysis contained in the revision, or perhaps of the fact that the original had far less case law with which to concern itself. In some respects, the revision is merely a skeleton that has been fleshed out over the last forty years. In others, it is an entirely new creation. Specific examples abound.

For instance, Indian water rights did not warrant a chapter in the original. The economic importance of water rights in the West and subsequent decisions and statutes which set out a complicated scheme for adjudication and quantification of Indian rights have resulted in a thirty page chapter in the revision which admirably describes the issues involved and sets out a bibliography of both scholarly literature in the area as well as case citations.

Another illustration is in the area of taxation. The concept that an Indian tribe had authority to tax both its own members and non-Indians within the confines of the reservation was dealt with briefly and theoretically in Cohen's 1942 work. Growing awareness by tribal governments of an untapped economic base on the reservation which could be mined by a creative tax code have resulted in numerous real-life situations which warranted the discussion in the text anticipating the ruling of the United States

4. 25 U.S.C. 1341(a)(2) (1976).

Supreme Court in *Merrion v. Jicarilla Apache Tribe*.⁵

The focus of the federal government in Indian affairs has also shifted. Because the Department of the Interior had directed that the first edition clearly describe the history and powers of the Bureau of Indian Affairs and Department of the Interior in its pages, an entire chapter was devoted to the Bureau's history, and intrusion of the Bureau's presence was obvious in almost all areas of discussion. This focus is absent in the revision.

Both the economic and social importance of exploitation of mineral rights as well as other industrial development on the reservation has catapulted the issue of tribal rights to lease and develop tribal land into one warranting lengthy discussion in the revision. The status of both Alaskan and Hawaiian natives has also been changed drastically by statute since Cohen's day, and is well treated in the revision. The anomaly of the relationship of those tribes terminated by congressional legislation in the 1950's and early 1960's is another example of an important issue which did not even exist at the time Cohen wrote his original work.

The value of Cohen's original work was that his opinion and synthesis were given equal weight with statements of case or statutory law. The revision continues this tradition of interpreting as well as stating the law. The treatise contains objective statements of what the law in a particular issue of Indian policy actually is, and posits beliefs or philosophical opinions stating what the law should be. In this respect, the revision is a phenomenal effort that goes beyond a mere compilation of law and analysis of trends.

In view of the rate at which the field of Indian law has raised issues motivating the United States Supreme Court to churn out opinions and Congress and the executive branch to legislate and to regulate, it is inevitable that some of the analysis and revision will soon be viewed either as prophetic or outdated. For example, the section in the text discussing the authority of tribal authorities to levy taxes⁶ was published prior to the United States Supreme Court opinion in *Merrion v. Jicarilla Apache Tribe*⁷ which spoke definitively to the issue. In *Merrion*, the Court upheld the tribe's inherent power to impose a severance tax on non-Indian production of oil and gas on land leased from the tribe.⁸ The Court specifically disagreed with the premise that the power to tax derives only from the power to exclude non-Indians from the reservation,⁹ and specifically found that federal legislation in the area of energy did not preempt the right of the tribe to enact its own taxing legislation.¹⁰ The opinion sets aside any of the concerns raised in the text that federal action may have impliedly limited the tribe's right to tax non-Indian leases, and makes an even stronger statement for the tribe's sovereign rights than does the *Handbook's* analysis. Although this section now could be expanded, its analysis is generally con-

5. HANDBOOK, *supra* note 3, at 431-39.

6. *Id.* at 431-35.

7. 455 U.S. 130 (1982).

8. *Id.* at 141, 159.

9. *Id.* at 137.

10. *Id.* at 152.

sistent with *Merrion's* ruling in that it recognizes authority for the tribe's general power to tax, acknowledges the assent of the Department of the Interior to the tribe's taxing schemes, and cites authority upholding various tribal taxes imposed on non-Indian lessees.

One instance in which the editors may not have divined so accurately is in the area of liquor regulation. In its introduction, the editorial board states that, "[T]he importance of Indian liquor laws has waned [thus requiring] considerably less treatment today than in 1942."¹¹ As a result, this topic is given a scant three and one-half page analysis¹² concluding with an interpretation that 18 U.S.C. section 1161 firmly establishes that a state cannot enforce its liquor licensing laws to limit or regulate liquor sales by Indians in Indian country.¹³ The authority cited for this proposition is good—a Tenth Circuit Court of Appeals opinion,¹⁴ a federal district court opinion,¹⁵ and a Department of the Interior ruling.¹⁶ However, the fact that the United States Supreme Court has accepted certiorari in *Rice v. Rehner*,¹⁶ raising the issue of whether state liquor licensing must be complied with before the tribe can sell liquor on its reservation pursuant to its own licensing scheme, casts some doubt both on the editorial board's analysis that liquor laws have assumed less importance, and that the state of the law is fixed. Legal backlash of a ruling reversing *Rehner* could cast doubt on the legal underpinning protecting the tribe from state domination and regulation and evidence a shift in federal policy which would undermine other sections of the text.

Whether the book's discussion of adjudicatory jurisdiction to determine the extent and relative priorities of conflicting water entitlements¹⁸ will be considered as foresight or merely a bad guess will depend on the decision of the United States Supreme Court in *Arizona v. San Carlos Apache Tribe*¹⁹ and *Montana v. Northern Cheyenne Tribe*.²⁰ The *Handbook's* exploration of the scope of the McCarran Amendment (which has been interpreted as a waiver of sovereign immunity over the Indian tribe's rights to avoid state court adjudication of water rights) implies that whether the state court's jurisdiction will stand should be a fact-by-fact consideration relying on issues such as the ability to avoid piecemeal adjudication in water claims; the forum in which the action was originally brought; the forum where all necessary parties may be joined and adequately represented; and whether the water rights are able to be quantified. Next year, this discussion may be either antiquated or accurate, depending on the Court's rulings this term.

11. HANDBOOK, *supra* note 3, at x.

12. *Id.* at 305-08.

13. 18 U.S.C. § 1161 (1976).

14. HANDBOOK, *supra* note 3, at 308 (citing *United States v. New Mexico*, 590 F.2d 323 (10th Cir. 1978), *cert. denied*, 444 U.S. 832 (1979)).

15. *Id.* (citing *Zaste v. North Dakota*, No. A1-75-29 (D.N.D. June 29, 1977)).

16. *Id.* (citing 78 Int. Dec. 39 (1971)).

17. 678 F.2d 1340 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3339 (Nov. 1, 1982).

18. HANDBOOK, *supra* note 3, at 599-603.

19. 668 F.2d 1093 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3253 (Oct. 4, 1982).

20. 668 F.2d 1080 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3253 (Oct. 4, 1982).

Obviously, this is a book that presumes a lot of the reader. In this respect, the work is more scholarly than comparable treatises in, for example, contracts or evidence. In some respects this attribute of scholasticism is a positive one; in at least one other, it results in my major criticism of this work.

In an attempt to be objective and encyclopedic, the authors have taken much of the life and excitement out of a fascinating area of the law that combines history, anthropology, and American political mores. Individual editors have proven themselves able to capture this in their past writings, so obviously there was a conscientious attempt by the editorial board to distill this spirit out of the treatise.

The cases and statutes themselves which are analyzed in the text are rich with human detail. Fairly consistently, the *Handbook* omits both the facts underlying the cases and the social and cultural backdrop that gave rise to the cases and directed their ultimate disposition. As a result, the historical richness is diminished or lost. For a work that stresses that these factors must all be considered for a case to remain valid precedent,²¹ this is a serious omission. To obtain the necessary historical perspective, it is necessary either to know or to read and retain the lengthy chapter of historical background material, and then attempt to take each case citation or area of analysis and plug it into that historic setting after first researching and determining the relevant treaty or other status affecting the tribe under consideration. To expect so much of the reader of a treatise is unrealistic, although flattering. Realistically, to have performed this function for the reader in any depth would have required both a multivolume work and a reader with more patience for footnotes than most.

Cohen's work was obviously colored by the historic times in which he wrote, and the federal mandate which financed his work. The forward to Cohen's work by then-Secretary of the Interior Harold L. Ickes decreed that:

Ignorance of one's legal rights is always the handmaid of despotism. This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberties, and at the same time it should give to those who deal with Indians, whether on behalf of the Federal or State governments or as private individuals, the understanding which may prevent oppression.²²

If, indeed, knowledge provides the weapons necessary to combat despot-

21. HANDBOOK, *supra* note 3, at 48 states:

History is relevant to the field of Indian law on a number of levels. In litigation concerning the interpretation of treaties and agreements, historical support for the circumstances surrounding negotiation and ratification must be admitted into evidence Only with such a backdrop can a modern court place the transaction in a context appropriate for decision.

History aids in understanding the doctrinal development of the field of Indian law

Finally, the history of federal-Indian relations can assist in synthesizing the currents in our national policy

22. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW xix (1971).

ism and assert one's legal rights, the 1982 revision admirably retools the work of its predecessor.

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