

Where's the Government's Authority for Federal Indian Policy?

by Darrel Smith

I recently had the opportunity to ask one of this country's most knowledgeable and successful lawyers in the field of Indian issues what authority the federal government is using as a basis for its federal Indian policies. He immediately listed Article II, Section 2—the government's treaty-making authority, and Article I, Section 8, Clause 3—Congress' authority to “regulate commerce . . . with the Indian tribes.” I then asked how either one of these powers could explain the fact that the federal government permanently owns and holds the title to virtually all “Indian land” in this country, or how these powers explain the ability of the federal government to virtually overrule any decision a tribe makes. He looked at me for a moment, sat back in his chair, raised his arms into the air and said, “They have pulled their authority out of thin air.”

CERA's Lana Marcussen is convinced that federal ownership of land on Indian reservations classifies these areas as territories and the federal government is actually taking their authority from Article IV, Section 3, Clause 2—“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” While this explanation certainly seems to explain why the government has so jealously guarded its ownership of “Indian land” for so many years and offers a tentative explanation for the government's plenary [total] power in “Indian country,” it still fails to explain a simple problem.

It is a basic legal principle that a later law takes precedence over any contradictory provisions of an earlier law, and an amendment to the Constitution amends and takes precedence over the original provisions of the Constitution. Indians and non-Indians are citizens within this country and its states. Why is any provision of the original Constitution allowed to take precedence over the Fourteenth Amendment's guarantee of the “equal protection of the laws” and the protections of the Bill of Rights? These amendments should take precedence over any contradictory provisions of the original Constitution and yet they are not protecting reservation citizens.

This brings me back to my original question. Can anyone simply and specifically explain where Congress, the courts or the executive branch get their authority to violate the most basic human rights of reservation residents? CERA would like an answer. Those of us who actually live on reservations have a right to an answer.