

# THE INDIGENOUS WORLD 2008

Copenhagen 2008

## THE INDIGENOUS WORLD 2008

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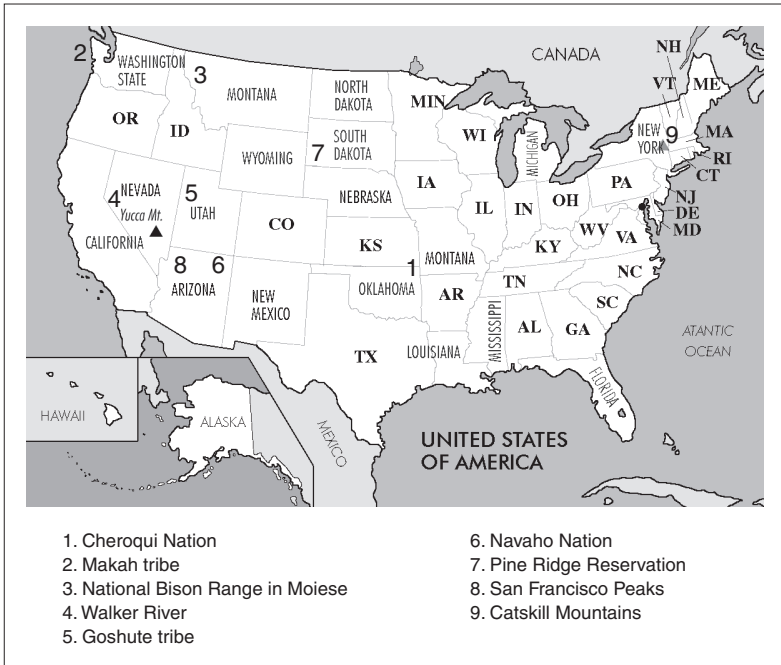
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## THE UNITED STATES

According to the United States Census Bureau 2007<sup>1</sup>, 2,151,322 people in the United States (minus Alaska) identified as Native American only, and 4,006,160 people identified as Native American in combination with another ethnic identity. These numbers add up to 0.75% and 1.4% of the total population respectively. There are currently around 335 federally recognized tribes in the United States (minus Alaska). More than half of American Indians live off-reservation, many in cities.

American Indian law includes individual treaties and federal Indian law, which is in flux and often dependent on individual U.S. Supreme Court decisions. Tribal governments' sovereignty is limited by plenary power of the U.S. Congress, which can unilaterally change historical treaty articles. Separate federal agencies, such as the Bureau of Indian Affairs and the Indian Health Service, are responsible for the federal government's trust responsibilities to Indian tribes. The political status of American Indian nations in relation to the United States has been defined as "that of a ward to his guardian."<sup>2</sup> This is best seen in land ownership. Some of the lands that are the property of American Indians are held in trust by the government; the government holds the title to the land, and is supposed to manage or at least extend oversight over the land's use on behalf of individuals or tribes. In addition to this, the government has treaty obligations, stemming from historical land sales by Indian nations to the federal government.

While there are widespread differences between indigenous nations, as a whole, American Indians have a lower life expectancy and higher poverty rates than the average U.S. citizens. Some of the main challenges they face are related to trust lands and sovereignty, unemployment, housing shortages, health problems and youth suicides.



Developments in United States American Indian policies in 2007 were again influenced by the continued and extremely costly wars in Iraq and Afghanistan. Federal American Indian programs have seen budget cuts for several years, making it even harder to fulfill treaty obligations. The Bureau of Indian Affairs (BIA), for example, has lost \$74 million over the last two years. The start of the presidential election races (elections will be held in November 2008) promised a limited amount of interest for American Indian issues.

With the office having been vacant for two years, Carl Artman was finally sworn in as the new director of the BIA. Artman is a member of the Oneida Nation of Wisconsin. As general counsel for his nation, he pursued a settlement for land claims that involved a possible off-reservation casino in New York (see *Indigenous World 2005*). This action delayed his confirmation to the United States Senate for two years, as the Republican majority had taken a stand against off-reservation gaming, which allows tribes to operate casinos away from their

reservations as long as the land the casino is built on is Indian trust land.

Congress failed to pass a renewed Indian Health Care Improvement Act. It has been eight years since the last adjustment to the bill, and with the Indian Health Service (IHS) facing continuous budget cuts, the state of health care for American Indians, a trust obligation, is dismal. Not only do patients go untreated for lack of funds but the IHS also allocates only 1% of its budget to off-reservation clinics, even though around 60% of American Indians in the United States live off-reservation. There is hope that the bill may be passed in 2008. The federal government's per capita health expenditure on Native Americans came to \$2,130 in 2005. This is about a third of the government's per capita expenditure on its Medicare program, the general social insurance program for older citizens.

## **Cherokee Freedmen**

One of the most controversial American Indian issues in 2007 was the continuing question of whether the Cherokee Freedmen are members of the Cherokee Nation of Oklahoma (see *Indigenous World 2007*). On March 3, the tribe voted in favor of an amendment to its constitution that would restrict membership, excluding those Freedmen who cannot show a direct Cherokee ancestor in their lineage. Freedmen are descendants of slaves held by some Cherokee before the Civil War. When these slaves were freed, they were made members of the Cherokee Nation under a treaty with the United States in 1866. The case has once again brought to light several key issues that define the situation of American Indian nations within the United States, in particular, identity politics and the limitation of indigenous sovereignty.

The 1976 Cherokee constitution requires the approval of amendments, such as a restriction of membership, by the Secretary of the Interior. This necessary approval was withheld by the federal government which, under pressure from African American organizations, took a clear stand against excluding the Cherokee Freedmen. The Cherokee Nation argued that it had passed an amendment to the Constitution in 2003 removing the requirement for Secretarial approval to

amendments. However, the BIA also withheld approval of this amendment, "concerned that approval by the Department of the 2003 amendment at this time would be used by some as a validation or evidence of legitimacy of the Cherokee Nation's removal of its Freedmen members from the tribe in apparent violation of the 1866 treaty."<sup>3</sup> In response, the Cherokee Nation held another referendum on June 23, 2007, again voting in favor of an amendment to their Constitution to remove the need for approval of amendments by the Secretary of the Interior. The BIA then approved that amendment but specifically stated that this could not be construed "as authorizing any action that would be contrary to Federal law."<sup>4</sup>

Since treaties with American Indian nations constitute federal law, and the BIA sees the exclusion of the Freedmen as a violation of a treaty, the approval of the amendment, from that legal perspective, has no impact on the issue of Freedmen membership. The Cherokee Nation, on the other hand, sees the BIA reaction as a violation of its sovereignty. The issue also raises the question of American Indian identity. Principal Chief Smith insists that "The Cherokee Nation simply wants to be an Indian tribe composed of Indians"<sup>5</sup>, which would mean that Indian identity was defined by biological ancestry.

In response to the Cherokee vote, Congresswoman Diane Watson (Democrat, California) introduced a bill to the United States Congress that was aimed at stripping the Cherokee Nation of about \$300 million of annual federal funding. The Congressional Black Caucus and the National Association for the Advancement of Colored People (NAACP) took a stand against the Cherokee Nation, calling the vote to exclude Freedmen racist, which had Principal Chief Smith concerned with the image of his nation. The U.S. House of Representatives voted in September to cut funding for Cherokee Nation housing development programs until the membership of Freedmen was officially restored. In the meantime, litigation on the issue is ongoing in the federal courts.

## **Ecological issues**

Members of the Makah tribe in Washington State killed a whale on September 8, without tribal or federal permits. The Makah have been

interested in reviving whale hunting for twenty years, and previously hunted a whale in 1999 with federal permission attached to certain conditions, such as the use of a traditional canoe. After protests by animal rights groups, the exception to the Marine Mammal Protection Act that had led to that hunt was revoked pending a more in-depth environmental impact statement. The Makah Tribe, who are working with the National Marine Fisheries Service on this process, immediately denounced the illegal hunt, pointing out that the "tribe has demonstrated extraordinary patience in waiting for the legal process to be completed in order to receive our permit to conduct a whale hunt".<sup>6</sup> The whale hunters argued that they were tired of waiting for federal permission. While the Makah have an explicit treaty right to hunt whales, United States courts have argued that they have to abide by federal laws. It is the latter that will be put to the test in the court cases against the whalers. The five crew members will be tried in both tribal and federal courts next year. In the meantime, the environmental impact statement will probably be delayed even longer and the tribe hopes that this illegal hunt will not sway public opinion against it and lead to a negative outcome.

A case that similarly poses questions for tribal sovereignty, federal oversight and the weight of public opinion is the ongoing issue of the National Bison Range in Montana (see *The Indigenous World 2007*). An agreement for shared management of the range between the Confederated Salish and Kootenai Tribes of the Flathead Reservation, upon whose reservation lands the range is located, and the U.S. Fish and Wildlife Service (FWS), was cancelled in 2006 after allegations concerning the tribes' management abilities. Several organizations had publicly doubted the tribes even before an agreement was signed in 2005, and had voiced concerns about the surrender of federal sovereignty to tribal governments as setting a precedent for other cases. Talks between FWS and the tribes continued throughout 2007. In December, the new director of FWS ordered his agency to have a new agreement ready by March 2008. While the tribes have welcomed this development, it will be extremely hard to convince those opposed to an agreement of its advantages and opportunities.

## **Nuclear policies**

In April, the Walker River Paiute Tribe in Nevada blocked attempts to build a rail line across their reservation to the proposed federal nuclear storage facility at Yucca Mountain. The tribal council had been working with the Department of Energy on an environmental impact statement but adopted a resolution to discontinue that cooperation. The mayors of two major cities in the region, Reno and Sparks, expressed relief over the tribe's decision. The planned facility at Yucca Mountain has been causing concern in Nevada and along the proposed transportation routes to the site for years.

In a related case, the Skull Valley Goshute Tribe in Utah filed an appeal against a ruling by the Department of the Interior that blocked the tribe from operating a private storage area for nuclear waste. The tribe had signed an agreement with nuclear power companies to store the waste until a federal solution to the nuclear waste problem was found. The state of Utah and its powerful congressional delegation is at the forefront of opposition to the project which, in the eyes of the tribe, would bring much needed economic development opportunities to the Goshute reservation.

The Navajo Nation, in the meantime, has asked Congress to impose a moratorium on new uranium mining leases on Navajo trust lands until the existing mines have been cleaned up. The reservation has been experiencing a health crisis because of uranium mines; its lands hold a majority of the uranium deposits in the United States. While the Navajo Nation has imposed a ban on uranium mines on reservation land, it cannot stop mining on individually held trust lands that are located off the reservation. The BIA perceives itself as caught between following the wishes of the Navajo council and the desires of individual landowners to make money from mining leases. The BIA's inability to make a clear choice for the health of reservation communities follows a long history of federal agencies siding with economically powerful mining interests against the health interests of Indian communities, which often depend on drinking water that is being polluted by mining operations. In December, the Environmental Protection Agency (EPA) said that, while it planned to resume testing for contamina-

tion on the reservation, it did not have plans to clean-up the contaminated sites. Not only is groundwater being contaminated but erosion is also uncovering waste piles, and uranium ore has been used to construct houses. The Navajo government has asked for an initial \$500 million to get the clean-up process underway.

A proposed expansion of uranium mining near the Pine Ridge reservation in South Dakota also led to protests there. Tribal groups are afraid that the in situ leach method used by Cameco at the Crow Butte mine in Nebraska would deplete the water resources and could contaminate the tribe's drinking water. Rumors about further uranium mining on Pine Ridge also led to an impeachment vote against the tribe's president. Since these rumors could not be confirmed, however, the action - brought by the Black Hills Sioux Nation Treaty Council - was unsuccessful.

While the Navajo Nation is asking for a clean-up of nuclear sites, it is also planning to build a massive new coal-fired power plant. This is opposed by many environmental groups and surrounding states. The proposed Desert Rock plant would sell power to the large cities of the south-west and potentially bring millions of dollars in taxes and profits to the Navajo. Environmental advocates, including Navajo groups, are protesting at the further use of coal to produce power, and are pointing to existing health and ecological problems. The Navajo government sees itself in the role of an underdeveloped nation, in need of jobs and income, pressured to conform to environmental rules made by privileged, developed nations who can afford to value ecology over economics.

## Land issues

The Sherill decision (see *The Indigenous World 2006*), which legalized an historic land theft by the state of New York, is continuing to alter the judicial landscape of the United States. Referring to the decision, a federal judge threw out a land claim by the Shinnecock Nation of New York, citing "highly disruptive consequences" if the tribe were to be allowed to restore sovereignty over the land.<sup>7</sup> The specifics of the case involved a plan for a casino in the wealthy Hamptons area of Long Is-

land, but similar decisions against tribes have become a trend. The courts are arguing that sovereignty over lands cannot be restored to Indian tribes if a restitution of land to tribes would disrupt economies and political systems that have been in place for decades. A loss of sovereignty cannot therefore be reversed, even if the lands in question were illegally taken. As such, the courts are legalizing historical illegal land transactions because upholding the law would create a burden for the majority that has been profiting from these acts. This is an extremely disturbing argument; its broader application means that the United States is not bound to uphold the law if doing so would create a disturbance to a customary, albeit illegal, status quo.

The Saint Regis Mohawk Tribe of New York in the meantime filed a lawsuit against the Bush administration. In February, the Department of the Interior completed an application by the tribe to have some lands turned into trust status, a requirement for building a casino on these lands. However, the Secretary of the Interior, who oversees Indian Affairs, had not granted the application by November. The Saint Regis Mohawk are trying to build a casino in the Catskill Mountains, a popular scenic tourist area within driving distance of New York City. Governor Spitzer of New York has agreed with the tribe's plans and supports the trust application. There are currently around 2,000 land-into-trust applications pending with the BIA. The backlog exists mainly because the Republicans put an unofficial moratorium on trust applications, for fear that tribes would only want to convert lands into trust in order to be able to build off-reservation casinos.

In March, the 9th Circuit Court of Appeals handed several tribes a victory in a lawsuit concerning the San Francisco Peaks, an area sacred to many southwestern tribes, especially the Navajo, Hopi, Hualapai and Havasupai. The tribes had sued the Forest Service in 2005 over the planned expansion of a ski resort in the Coconino National Forest that included a proposal for snowmaking using reclaimed wastewater. This ruling marked a tentative change in course; federal courts had previously shown a tendency to rule in favor of economic development over and above Native religious rights ever since the 1988 Lynn case. While the tribes welcomed the initial ruling by a three-member panel of the court, the full court decided to re-hear the case in December. A decision will be taken in 2008.

## Political developments

In April, Amnesty International published a report highlighting the violence directed against native women.<sup>8</sup> The report documents how the judicial system ignores sexual assaults on Native women because of systemic failures. Tribal courts are limited in their sentencing to a maximum of one year in jail and \$5,000. Under the Major Crimes Act, rape on Indian lands is a crime that falls under federal jurisdiction but federal agencies such as the FBI are chronically understaffed on reservations and often ignore what they consider to be less important crimes and investigations that have little chance of resulting in a conviction. Because investigation of crimes on Indian lands is dependent on whether the perpetrator and/or the victim are Indian, where the crime happened and how severe the crime is, the resulting confusion often leads to law enforcement agencies being incapable of bringing a case. Indian women suffer two and a half times more domestic violence and three and a half times more sexual assaults than average in the United States. According to some estimates, more than one in three Native women will suffer rape during their lifetime; the national average is a little less than one in five.

At the University of Colorado, ethnic studies professor Ward Churchill was fired from his tenured position. The university started an investigation into his research and writing in 2005 after right-wing media and politicians discovered his text on the events of September 11, 2001 in which he attacks the political system of the United States and its treatment of indigenous peoples. While Churchill's has been a very polemic and controversial voice in academia and in indigenous communities, there seems to be little doubt that it was his political opinion that was being punished. □

## Notes and references

- 1 United States Census Bureau, 2007: *The American Community – American Indians and Alaska Natives: 2004*. American Community Survey Reports. Issued May 2007
- 2 *Cherokee Nation v. Georgia*. U.S. Supreme Court, 1831

- 3 Letter from the Assistant Secretary, Indian Affairs, Carl Artman to Principal Chief Chad Smith, May 21, 2007
- 4 Letter from the Assistant Secretary, Indian Affairs, Carl Artman to Principal Chief Chad Smith, August 9, 2007
- 5 "Bill could halt U.S. funds to Cherokees", *Tulsa World*, June 22, 2007
- 6 "Statement by the Makah Tribal Council", *Seattle Times*, September 10, 2007
- 7 *State of New York v. Shinnecock Indian Nation*. U.S. District Court, Eastern District of New York, Oct. 30, 2007
- 8 *Maze of Injustice. The Failure to Protect Indigenous Women from Sexual Violence in the USA*. Amnesty International USA: New York

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