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AN ANALYSIS OF THE OPINION OF THE TEXAS ATTORNEY GENERAL BY CHIEF JUDGE NC NAIDU

The Attorney-General of Texas, Greg Abbot, published an Opinion in July 18, 2005, cited as Opinion No. GA-0339, when he wrestled with the issue whether the Live Oak Treaty of 1838 between the Lipan Apache and the Republic of Texas is still a binding agreement.

The Grand Council of the Lipan Apache Band of Texas has requested me to analyze the Opinion to determine if there is merit, pith and substance to the Attorney-General's Opinion.

THE LIPAN APACHE BAND OF TEXAS OPINION

AA. ABROGATION OF TREATIES

The Attorney-General's Opinion on the abrogation of Indian Treaties is reproduced herein. Abrogation is the AG's first line of defense and justification to ignore, avoid and evade the power and authority of a Treaty with its inherent rights, obligations, duties, abilities, disabilities, and liabilities when seen through the constitutional lens, as it should be.

The word “abrogation “ means to “abolish a law or custom by formal or authoritative action; to annul or repeal,” according to Black’s Law Dictionary. These are heady words especially “authoritative” action. I think the word “authoritarian” was trying to gain utterance.

First, the Attorney General (hereinafter “AG”) quotes Sally J. Johnson’s work when he agrees and endorses her findings that these treaties remain in effect unless otherwise modified, to paraphrase the AG.

The AG does not say *all* treaties but that *these* treaties remain in effect.

The “unless modified” part of Sally J. Johnson’s findings is very different from abolish, annul or repeal for the purposes of abrogation. Modified, or amended or altered may mean the same thing where consensus is the key, whereas authoritative action is necessary for wanting to abolish, annul or repeal a law especially when the legislative imperative of consensus meets face to face with U.S. Const. Art.2, sec. 2, cl.2 which gives the President of the United States power (authoritative action) to make treaties with the Senate’s acquiescence.

Next, let’s be sure that we understand the import, impact, scope, scale and effect of U.S. Const. art. VI, cl. 2 of the federal Constitution which the AG asserts makes “Indian treaties the law of the land…..”.

My reading of U.S. Const. art. VI, cl. 2 says that the “Constitution and **all** treaties made shall be the **supreme** law of the land……..”

Therefore, all treaties would include the five Lipan Indian treaties, namely, Live Oak Treaty, 1838; Tehuacana Creek Treaty, 1844; Council Springs Treaty, 1846; Spring Creek Treaty, 1850; and the San Saba Treaty, 1851. All these treaties were made after 1789, the post-Constitutional adoption and ratification period in time.

In other words, **all** treaties made under the authority of the Constitution and the United States are not merely laws but **supreme** laws of our country. Abrogation is not a constitutional right or imperative to be loosely utilized for authoritative action accompanied with arbitrary intent.

We do not know whether this was an oversight on the part of the AG but my point is made.

Before we go further in analyzing the AG's Opinion, it is vital that understand the definition of "**treaty**' as defined in Black's Law Dictionary:

A formally signed and ratified agreement between two nations or ***sovereigns;***

An international agreement concluded between two or more states in written form and governed by international law.

I had a reason to bold the word "sovereign" because we need to define that too. A quick glance at Black's Law Dictionary offered this definition:

A person, body, or state vested with independent and **supreme** *authority*.

The Unabridged Twentieth Century Dictionary in my chambers offered this definition for "sovereign."

Supreme in power; possessing supreme power; independent of and ***unlimited*** *by any other*.

When you juxtapose the words in the context of treaty, supreme, unlimited and power, you will notice that a treaty is the end all and be all of unlimited power. A sovereign rules and reigns because of the inherent unlimited power a sovereign enjoys. As an illustration and an example, Queen Elizabeth II of the United Kingdom reigns although she does not rule.

Next, the AG opines that "Although Congress may not impair rights vested under Indian treaties, it may supersede or abrogate the treaties by legislation or subsequent treaty." This means that Congress has the power to annul, abolish or repeal the supreme law of the land, i.e. a treaty, by legislation or another treaty. What if the Lipan Apache Band of Texas refused to sign such a (subsequent) treaty ? Have they lost their inherent rights encompassed in the previous or earlier Treaty ?

To abolish, repeal or annul a **supreme** law of the land (treaty) takes more than an act of the legislature in passing a law to replace, abolish, repeal or annul a previous one especially if it is a **treaty**. It is tantamount to constitutional amendment which is the province of Article V of the U.S. Constitution which calls for two thirds of both Houses proposing such amendments, or, on the application of the legislatures of two thirds of the several states provided it is ratified by three fourths of the legislatures of the several states……

It makes no constitutional sense at all by merely referring to an act of abrogation outside constitutional moorings. The Constitution is a safe harbor where storms have no effect. When your reasoning is not tethered to the Constitution it automatically becomes adrift in an ocean of uncertainty violently buffeted by the currents of inconsistency, doubt and ambiguity. That is what has happened to ALL treaties concluded between the U.S. government and the Indian tribes, bands, clans and nations.

Next, the AG introduces the issue of intent to abrogate treaties which was declared in a decided case. Now, we have *stare decisis* staring at established principles of supremacy. One decided case, or several do not alter the fabric of the Constitution, One swallow does not a summer make. Congress does have the power and authority to repeal a law, but a supreme law like the Constitution and all treaties must follow the strictures of Article V of the U.S. Constitution.

The most vexatious part of the AG's Opinion is contained in this portion of his analysis when he says:

However, "when a subsequent inconsistent law cannot be reconciled with a prior treaty, the subsequent law is deemed to abrogate the treaty to the extent of the inconsistency, without specific words of abrogation.

In essence, the AG is saying that when the legislature makes a honest blunder as to intent, content, extent, scope, scale, effect, import or impact of a particular law vis-a-vis a previous one fraught with inconsistency, it is quite alright because that inconsistency is sufficient to abrogate (abolish,

repeal, annul) the supreme law (treaty) of the land even if specific and precise words were not employed !! This is an outrage worse than the Yazoo land fraud of the 1800's.

The AG's statement fails constitutional muster, derides true and time tested principles of law, violates equity, denigrates civilized behavior, and advances jurisprudential terrorism.

Indian treaty rights, especially those of the south-west corner of these United States were first held sacred with the arrival of the conquistador Coronado in 1540. As time progressed, in 1680 Indians had bona fide land rights called the *Recopilacion de leyes los Reynos de los Indias.* This was based on the ancient principle of *usucapio*, a Latin word meaning "ownership owing to lengthened possession."

The power, authority and supremacy of *usucapio* became embodied in a principle of law expressed in Latin as *usucapio constituta est ut aliquis litium finis esset* meaning usucapion was instituted that there might be an **end** of lawsuits – or to put it simply and plainly, the right of property conferred by lengthened possession was introduced or made law, in order that after a certain term no question should be possible concerning the ownership of property.

The introduction of land titles in the European tradition makes no sense to the Indian enjoying *usucapio* because English jurisprudence, recognizing primitive law, custom and usage as a principle of applicable law, declared that there ought to be no question of such rights.

Usufructuary rights of gathering, planting, harvesting, hunting and fishing accompany the right of *usucapio*. They can be abrogated ONLY if the usufructuary rights mysteriously assumed the character of a privilege without constitutional fiat in a legislative imperative.

We have found no case from the federal courts that engages in that task. However, utilizing the abrogation principles recited above, we endeavor to answer your question as we think the federal courts would answer it.

With those words the AG relegated and delegated the work of the federal courts to his very own imagination which found expression and utterance as an Opinion.

BB. THE MARSHALL COURT'S CONTRIBUTION TO DISTORTION OF INDIAN RIGHTS AND STANDING

The late "great Chief Justice" John Marshall singlehandedly decided the fate of the Indian nations as "wards and dependent nations" of the guardian U.S. government**.** Marshall began his career in law after studying for *six weeks* under George Wythe at William and Mary College in 1780. When he eventually practiced law he could cite no precedents or other legal authorities (see G. Edward White, *The American Judicial Tradition : Profiles of Leading American Judges*, pp.10, 11, 12).

But Marshall had developed a powerful facility and ability to condense and distill an argument down to its essence.

It is important to understand the man and his jurisprudential proclivities. This is the man who pronounced the new concept of judicial review in the celebrated case of Marbury v. Madison in 1803 by giving a new twist of interpretation to section 13 of the 1789 Judiciary Act. Judicial review is not alluded to or mentioned or mandated nor stipulated in the U.S. Constitution, yet it is an enduring, endearing and everlasting concept that survives till today.

This was the man who announced new interpretations to the Indian nations' standing in America as *coequal* sovereigns. The moment the Cherokee cases were decided in the 1830's, legislatures and courts looked at Indians as a dispensable lot fit only to be relegated to the ghettoes of rural reservations.

This was the man who entrenched and enshrined the contract clause of U.S. Const. Art. 1, cl.10 into the constitutional moorings in Fletcher v. Peck (1810), and Dartmouth College v. Woodward (1819), and yet chose to

ignore the ramifications of the Commerce Clause and the Indians in the U.S. Cons. Art. 1, sec. 6, cl. 3. – *Congress shall have power to regulate commerce with foreign nations, among the several states, and with the Indian Tribes*.

The contract between the U.S. government and the Indian tribes became subject to judicial review although freedom of contract and the mandate that no state shall impair the obligation of a contract became moot when it concerned contracts with Indian Tribes despite judicial review favoring the obligation of contracts in Fletcher and Dartmouth College.

Is this law or justice ?

In United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876), the Supreme Court declared that treaties with Indian Tribes are accorded the same dignity as that given to treaties with foreign nations as if the Commerce Clause in U.S. Const. Art. 1. Sec. 6., cl. 3 was given a new meaning and a new breath of life support as it lay writhing and gasping for air and life after suffering the "wards and dependents" status accorded by Chief Justice John Marshall in the 1830's.

The same dignity accorded to Indian Tribes, as that accorded to foreign nations, were also observed in cases like Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979); Holden v. Joy, 84 U.S. (17 Wall.) 211, 242-43 (1872); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

CC. FELIX COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW*

Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith….

With that bold and true statement of 1953, the author of the Handbook of Federal Indian Law, Felix S. Cohen (1907-1953) explores Indian law in America. The Handbook is the result of a collection of forty-six volumes of federal laws and treaties compiled, structured as published in 1942 under

the auspices of the Department of the Interior.

By the mid-1960's the need for accurate, current and scholarly revision of Cohen's original Handbook had become apparent. Senator Sam Ervin, Chairman of the Senate Subcommittee on Constitutional Rights spearheaded a campaign to get the Handbook updated to be included in the Indian Civil Rights Act of 1968.

Cohen mentions in his handbook (pp.62, 63, 64) that abrogation has to be ***intended***, clearly and specifically, otherwise the courts would invalidate the legislature's subsequent treaties. This presents a difficult constitutional conundrum.

In *Indian Affairs and their Administration 86* (Philadelphia: University of Pennsylvania Press, 1932) A. Hoopes records the fact that some important treaties were negotiated but never ratified by the Senate, or ratified only after a long delay.

Treaties were sometimes consummated by methods amounting to bribery, according to studies conducted by J. Kinney in his *A Continent Lost – A Civilization Won 37-38, 44-45, 52. 71. 93-94,* (Baltimore: The Johns Hopkins Press, 1937).

In accordance with the general rule applicable to foreign treaties under the auspices and in the spirit of U.S. Const. Art. 1, sec. 6, cl. 3, however, the courts **will not inquire** into whether an Indian tribe was properly represented during negotiation of a ratified treaty or whether such a treaty was procured by **fraud or duress.** This was the findings in United States v New York Indians, 173 U.S. 464, 469-70 (1899); Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1857); Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903).

The deck is stacked against the Indian Tribes. What can it do except to vindicate its position in its own tribal courts outside the camel's nose syndrome of Title 25 United States Code.

Congress has made some weak attempts to help Indian Tribes recover

monetary damages for treaty abrogation's made by the United States to the Court of Claims. After 1946, the beginning of the end came in the persona of the Indian Claims Commission.

Until a decade before 1871 when no more treaties were made with Indian Tribes, some treaties with Indian Tribes enjoyed the same standards as those made with foreign nations. See Treaty with the Comanches and Wichetaws, August 24, 1885, art. 9. 7 Stat. 474, 475; Treaty with the Creek, August9, 1814, 7 Stat.120.

DD. CONCLUDING REMARKS AND OBSERVATIONS

Whether any of the treaties between the Lipan Apaches and the United States is binding ought to seen, viewed and contemplated through the imperatives of U.S. Const. Art. 1, sec. 6, cl. 3; Art. 2, sec. 2, cl.2; and Art.6, cl. 2., hereinafter the "**16322262 Imperative."**

The 16322262 Imperative brings federal Indian jurisprudence to the great confluence where the sovereignty of the Indian tribes, the treaty-making power of the U.S President, and the supremacy clause of the Constitution meet each other in uniformity, conformity and certainty. There is order in the chaotic relationship of checks and balances.

The three organs of state – the legislature, the executive and the judiciary – obtain, maintain, sustain and retain their separation of powers from the Constitution, the written law of our land. Each organ of the state has an in-built mechanism serving the functions of checks and balances through the Constitution.

We can only turn to the Constitution for guidance as to whether all the aforementioned treaties between the Lipan Apaches and the United States government are binding to the extent that they are **fair, equitable and just**. That is the yardstick. The Congress and the President are not permitted by the Constitution to create a subsequent treaty to abrogate a previous recognized right bestowed by the treaty. The inalienable right of *usucapio* needs no treaty proviso. The Indians' inalienable right is already

recognized, regarded, revered, reported and recorded in our Preamble to the Declaration of Independence.

The question of abrogation is moot because abrogation is not mentioned in the U.S. Constitution. Intent cannot be mentioned per se. Intent is not enumerated but may have subtle implications in our Constitution. That is the extent of the supposed power of abrogation.

But whither *usuacpio* and its express power ? The binding power of all treaties made with the Lipan Apaches must pass the *usucapio* test.

EE. SUGGESTED CLOSURE METHOD WITH THE PRESIDENT OF THE UNITED STATES

A safe and secure to determine the binding nature of the treaties concluded between the Lipan Apache and the U.S. Government would be to write the President of the United States and have him decide this issue as he is constitutionally mandated under Art.2, sec. 2, cl. 2 and vested with the power and authority to make treaties with the advice and consent of the Senate (not the House of Representatives).

It would augur well for Native American Nations, Tribes, Bands and Clans to demand a Permanent Representative to be attached to the White House to keep the President informed at all times regarding Native American issues. The Senate Indian Affairs Committee cannot perform this function. The treaty-making power of the President and the Commerce Clause of the U.S. Constitution offers the Native Americans the same dignity and respect offered foreign nations, so, why not have the Permanent Representative to the White House be an Ambassador-at-large for all Native American Nations, Tribes, Bands and Clans. Even the Vatican has its own Ambassador – the Apostolic Nuncio – in Washington D.C.

We have to do all things proper and necessary to give this Issue great and deep attention. We have missed many opportunities. We cannot afford to let this matter slip into oblivion because of frustration and righteous indignation.

We have to bring all the Native American Nations, Tribes, Bands and Clans to the table for the Permanent Representative position to gain credibility.

Submitted by Chief Judge NC Naidu for and in behalf of the Lipan Apache Band of Texas, San Antonio.

July 27, 2010

Seattle, Washington

I. Abrogation of Indian Treaties in the Opinion of Attorney General Greg Abbot

"Although all Indian treaties were executed over 100 years ago, unless otherwise modified, these treaties remain in effect." Sally J. Johnson, *Honoring Treaty Rights and Conserving Endangered Species after United States v. Dion* , 13 Pub. Land L.Rev. 179, 179 (1992) (citing *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987)). Pursuant to the Supremacy Clause of the United States Constitution, *see* U.S. Const. art. VI, cl. 2, Indian treaties become the law of the land and supersede conflicting state laws or state constitutional provisions. *See*, *e.g.*, *Antoine v. Washington*, 420 U.S. 194, 204 (1975); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876). Although Congress may not impair rights vested under Indian treaties, it may supersede or abrogate the treaties by legislation or subsequent treaty. *See South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993); *United States v. Sohappy*, 770 F.2d 816, 818 (9th Cir. 1985); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 459-60 (D. N.J. 1999); *United States v. Michigan*, 471 F. Supp. 192, 253 (W. D. Mich. 1979).

An intent to abrogate treaty rights must be expressed clearly and unequivocally, but need not be explicit where it is clear. *See United States v. Dion*, 476 U.S. 734, 739-40 (1986). A later statute or treaty must be harmonized with existing treaties to the extent possible. *See Menominee Tribe v. United States*, 391 U.S. 404, 411 (1968). However, "when a subsequent inconsistent law cannot be reconciled with a prior treaty, the

subsequent law is deemed to abrogate the treaty to the extent of the inconsistency, without specific words of abrogation." *Iwanowa*, 67 F. Supp. 2d at 459 (citing *Breard v. Greene*, 523 U.S. 371, 376 (1998)). Similarly, where there is an irreconcilable conflict between a subsequent treaty and a prior treaty, the new treaty abrogates the prior inconsistent treaty or provision therein. *See id.*; *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the two [treaties] relate to the same subject [and] . . . are inconsistent, the last one in date will control the other."); *Farrell v. United States* , 110 F. 942, 951 (8th Cir. 1901).

It is important to note here that the Live Oak Treaty is essentially a pledge of perpetual friendship between the Republic of Texas and the Lipan Indians. *See* Live Oak Treaty, *supra* note 4, at 30. While it does contain some specific provisions, the Live Oak Treaty and the four subsequent treaties we examine do not relate to or establish rights to any piece or tract of land, uses of land, or particular rights that stem from the land, such as the usufructuary rights of hunting and fishing. In most instances where a court considers a treaty, a particular right guaranteed or bestowed by the treaty is the issue. The question of whether a treaty has been abrogated in such instances, then, is whether a subsequent legislative act or treaty interfered with the right protected or bestowed in the prior treaty as to render the prior right void. If so, the particular right, not the whole treaty, is considered abrogated. You do not inquire about a particular aspect of, or right bestowed in, the Live Oak Treaty. *See generally* Request Letter, *supra* note 3. Instead, you ask us to opine on the wholesale validity of the entire treaty. *See id*. We have found no case from the federal courts that engages in that task. However, utilizing the abrogation principles recited above, we endeavor to answer your question as we think the federal courts would answer it.