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L A W O F F I C E S

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MEMORANDUM

DATE: September 12, 2005
TO: Delaware Nation
FROM: Steven D. Sandven
RE: **Indian Civil Rights Act**

Please find for your review the following overview of the Indian Civil Rights Act of 1968, 25 U.S.C.A. § 1301 et seq. (the Act). The Act was passed by Congress in order to impose most of the provisions of the Bill of Rights upon the tribes. The Act imposes on the tribes most of the Bill of Rights verbatim. However, there are notable exceptions. Clause (1) protects the free exercise of religion, but has no provision prohibiting the establishment of religion by a tribe. This omission was in recognition of the fact that in some of the tribes, especially the Pueblos, government and religion and all the rest of life are inextricably interwoven. Divorcement of religion from government would have altered those tribes beyond recognition; Congress did not wish to go that far as long as the free exercise of religion by individuals was protected.

Another point at which the protection of the Act falls short of that of the U.S. Constitution is Clause (6) which provides the right of an accused to have counsel "at his own expense." The U.S. Constitution requires state and federal government to supply counsel to indigents at government expense when the prosecution may result in imprisonment. Fears of saddling the tribes with an excessive financial burden and the shortage of lawyers in Indian country apparently influenced Congress. *See Tom v. Sutton*, 533 F.2d 1101 (9th Cir.1976).

The principal guarantees of the Act are found in 25 U.S.C.A. § 1302 which provides:

§ 1302 Constitutional rights

No Indian tribe in exercising powers of self-government shall:

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for redress of grievances;

- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to an person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Enforcement of much of the Act is left entirely to the tribal courts. Some tribal court systems are reasonably well equipped for the task; others are not. In either case, the effectuation of the *non-criminal* portion of the Act lies entirely with tribes.

Please contact me if there are any questions.