

TABLE OF CONTENTS



	<u>Page</u>
Table of Cases.....	xxiii
Chapter 1: Introduction: American Indian Law and American Indian Nations and People.....	1
I. What Is American Indian Law?	1
II. A Snapshot of American Indian Nations and People in the 21st Century	2
Chapter 2: Origins of Federal Indian Law	15
I. Colonial Influences on American Indian Policy.....	16
A. First Theories.....	16
Notes and Questions	19
B. The Influence of Franciscus de Victoria.....	19
Notes and Questions	21
C. North American Debates and Practices.....	22
League of Peace Entered Into by Massasoit and the First Settlers of New Plimouth	26
Notes and Questions	26
D. The Impact of Disease	27
II. The Revolutionary Era and Its Aftermath.....	28
A. Conflicts Between Colonists and Crown	28
B. The Articles of Confederation and the Constitution	30
Notes and Questions	31
C. Consolidating Federal Control Over Indian Lands: <i>Johnson v. McIntosh</i>	32
Eric Kades, <i>The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands</i>	33
<i>Johnson v. M'Intosh</i>	35
Notes and Questions	41
III. The Trade and Intercourse Era: 1785-1817	44
A. Treaty Making and Trade and Intercourse Acts	44
Notes and Questions	46
Treaty of Hopewell.....	46
B. Relying on the Disappearing Indian	48
IV. The Removal Era: 1817-1848	49
A. Removal Policy.....	49
B. The Cherokee Cases	52
<i>Cherokee Nation v. Georgia</i>	53
Notes and Questions	60

	<u>Page</u>
<i>Worcester v. Georgia</i>	61
Notes and Questions	70
C. Aftermath of the Cherokee Cases: Many Trails of Tears.....	72
Chapter 3: Experiments in Federal Indian Policy	77
I. Reservation Period: 1848-1886.....	78
A. Reservation Policies.....	78
Annual Report of Commissioner of Indian Affairs	
William Medill (Nov. 30, 1848)	79
Annual Report of the Commissioner of Indian	
Affairs Luke Lea (Nov. 27, 1850)	80
Annual Report of Commissioner of Indian Affairs	
George Manypenny (Nov. 22, 1856).....	81
Annual Report of Commissioner on Indian Affairs	
Nathaniel G. Taylor (Nov. 23, 1868).....	82
Notes and Questions	82
Treaty With the Navajo.....	85
B. The End of Treaty Making?: 1871	87
C. The Emergence of Federal Plenary Power.....	90
<i>Ex Parte Kan-Gi-Shun-Ca (Otherwise Known as</i>	
<i>Crow Dog</i>)	92
Notes and Questions	95
The Major Crimes Act (1885).....	96
<i>United States v. Kagama</i>	96
Notes and Questions	99
Courts of Indian Offenses	101
Rules for Courts of Indian Offenses	101
Notes and Questions	103
II. Allotment and Assimilation: 1887-1928	104
A. The Dawes (Allotment) Act of 1887.....	104
1. Origins and Provisions of the General Allotment	
Act	104
D.S. Otis, the Dawes Act and the Allotment of	
Indian Lands	104
2. Allotment and Tribal Land Loss.....	107
Judith V. Royster, <i>The Legacy of Allotment</i>	107
3. Allotment and Farming.....	108
4. Allotment and the Checkerboarded Reservation.....	109
5. Allotment and Fractionation.....	110
B. Allotment and the Abrogation of Treaty Rights	110
Ann Laquer Estin, <i>Lone Wolf v. Hitchcock: The</i>	
<i>Long Shadow, in The Aggressions of Civilization: Federal Indian Policy Since the 1880's</i>	111
<i>Lone Wolf v. Hitchcock</i>	116
Notes and Questions	117

	<u>Page</u>
C. The Persistence of Treaty Rights	119
<i>United States v. Winans</i>	119
Notes and Questions	122
D. Indian Boarding Schools	123
E. American Indian Citizenship.....	125
III. The Indian New Deal: 1928-1947.....	126
A. Indian New Deal Policies and Legislation.....	128
Notes and Questions	132
B. Tribal Constitutions Adopted Under the IRA	133
Constitution and By-Laws of the Hopi Tribe.....	133
Notes and Questions	136
IV. Termination Era: 1947-1961	138
Stephen Herzberg, <i>The Menominee Indians: Termination to Restoration</i>	142
Notes and Questions	144
V. The Self-Determination Era: 1961 to Present?	147
A. The Path to Self-Determination.....	147
Richard M. Nixon, <i>Special Message on Indian Affairs</i>	148
B. Self-Determination Legislation.....	151
1. Laws Furthering Tribal Control of Governmental Services to Tribal People	151
2. Laws Furthering Tribal Control of Natural Resources and Economic Development	152
3. Laws Protecting Culture and Community.....	153
C. Backlash Against Self-Determination	153
<i>Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin</i>	154
Notes and Questions	161
Chapter 4: Federal Power in Indian Affairs: Scope, Sources and Limitations	163
I. Constitutional Limits on Federal Power	164
A. Surveying Constitutional Limits on Federal Power	164
B. Canonical, Interpretive Limits on Congressional Power.....	168
Philip P. Frickey, <i>Marshallng Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law</i>	169
<i>Menominee Tribe of Indians v. United States</i>	171
<i>United States v. Dion</i>	174
Notes and Questions	179
The Problem of “Generally Applicable” Federal Statutes.....	180
<i>Reich v. Great Lakes Indian Fish and Wildlife Comm'n</i>	181
Notes and Questions	186

	<u>Page</u>
C. Equal Protection as a Restraint on Federal Power	190
<i>Morton v. Mancari</i>	190
Notes and Questions	196
Equal Protection Review	203
II. Federal Power and Indian Property	204
A. Original Indian Title	204
<i>United States v. Santa Fe Pac. R. Co.</i>	205
Notes and Questions	209
B. Federal Taking of Tribal Property.....	210
1. Introductory Note on Sovereign Immunity	210
28 U.S.C. § 1491.....	212
28 U.S.C. § 1505.....	212
<i>Tee-Hit-Ton Indians v. United States</i>	213
Notes and Questions	218
2. Taking of Recognized Title	220
<i>United States v. Sioux Nation</i>	220
Notes and Questions	230
3. The Problem of Executive Order Reservations	231
C. Relief for Breach of Trust Responsibility.....	232
1. <i>Mitchell I and II</i> : Damages for Breach of Fiduciary Duties in Allotment Management	235
<i>United States v. Mitchell</i>	236
Notes and Questions	240
2. Post- <i>Mitchell</i> Trust Cases	240
3. Litigation Regarding Individual Indian Money Accounts.....	243
<i>Cobell v. Norton</i>	244
Notes and Questions	248
Chapter 5: Tribes, Indian Country, and Criminal Jurisdiction	251
I. What Is a Tribe?	251
A. Congressional Power to Define a Tribe.....	252
<i>United States v. Sandoval</i>	252
Notes and Questions	255
B. Modern Debates Over Tribal Status	257
<i>Joint Tribal Council of the Passamaquoddy Tribe v. Morton</i>	258
<i>Mashpee Tribe v. Town of Mashpee</i>	262
Notes and Questions	267
C. Federal Regulations on Tribal Acknowledgement	268
Federal Acknowledgment of American Indian Tribes	269
Mandatory Criteria for Federal Acknowledgment.....	270
Notes and Questions	272

	<u>Page</u>
II. Indian Country: The Basic Jurisdictional Concept	273
A. The Indian Country Statute: 18 U.S.C. § 1151	273
B. Allotment and Reservation Boundaries.....	275
<i>Solem v. Bartlett</i>	276
Notes and Questions	283
<i>Hagen v. Utah</i>	284
<i>South Dakota v. Yankton Sioux Tribe</i>	286
<i>Nebraska v. Parker</i>	288
Notes and Questions	293
C. Dependent Indian Communities.....	294
<i>Alaska v. Native Village of Venetie Tribal Government</i>	295
Notes and Questions	299
D. Federal Expansion of Indian Country: 25 U.S.C. § 465.....	301
III. Attempts to Restore Tribal Territory Through Land Claims	
Litigation.....	304
<i>County of Oneida v. Oneida Indian Nation</i>	305
Notes and Questions	312
<i>City of Sherrill v. Oneida Indian Nation of New York</i>	313
Notes and Questions	314
IV. Federal Allocation of Criminal Jurisdiction in Indian Country.....	316
A. The Indian Country Crimes Act, 18 U.S.C. § 1152	318
B. Major Crimes Act, 18 U.S.C. § 1153	320
C. Basic Chart for Federal Criminal Jurisdiction	321
D. Who Counts As an “Indian”?	322
E. Crisis of Criminal Justice in Indian Country.....	324
F. Fixing the System?	325
Tribal Law and Order Act of 2010.....	326
Notes and Questions	329
Chapter 6: Tribal Sovereignty.....	331
I. The Nature and Source of Tribal Sovereignty.....	331
<i>Talton v. Mayes</i>	331
Notes and Questions	334
<i>United States v. Wheeler</i>	336
Notes and Questions	339
II. Congressional Limitation on Tribal Sovereignty: The Indian Civil Rights Act of 1968	340
Indian Civil Rights Act.....	341
Notes and Questions	344
<i>Santa Clara Pueblo v. Martinez</i>	345
Notes and Questions	353
Tribal Rights, Women’s Rights, and the Debate over <i>Santa Clara Pueblo v. Martinez</i>	354

	<u>Page</u>
ICRA Review After <i>Santa Clara Pueblo v. Martinez</i>	360
<i>Tavares v. Whitehouse</i>	361
Notes and Questions	366
Suits to Challenge Exclusion of “Freedmen” Citizens ..	368
<i>Cherokee Nation v. Nash</i>	370
III. Tribal Sovereign Immunity	371
<i>Michigan v. Bay Mills Indian Community</i>	371
Notes and Questions	378
IV. Tribal Sovereign Institutions.....	382
A. Sovereign Institutions and Economic Development	382
Stephen Cornell, <i>Sovereignty, Policy, and Prosperity in Indian Country Today</i>	383
Notes and Questions	388
B. Tribal Judicial Systems.....	389
Sandra Day O’Connor, <i>Lessons From the Third Sovereign: Indian Tribal Courts</i>	391
Robert B. Porter, <i>Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies</i>	394
The Honorable Robert Yazzie, “ <i>Life Comes From It</i> ”: Navajo Justice Concepts	396
Honorable Robert Yazzie, “ <i>Watch Your Six</i> ”: An Indian Nation Judge’s View of 25 Years of Indian Law, Where We Are and Where We Are Going	397
<i>Halona v. MacDonald</i>	398
<i>Nutongla Sanchez v. Garcia</i>	402
<i>Husband v. Wife</i>	404
Notes and Questions	408
Chapter 7: State–Tribal Struggles Over Jurisdiction	409
I. The Foundational Modern Precedents	410
<i>Williams v. Lee</i>	410
Notes and Questions	412
<i>Warren Trading Post Co. v. Arizona State Tax Commission</i>	414
Notes and Questions	416
<i>McClanahan v. State Tax Commission of Arizona</i>	418
Notes and Questions	422
II. Congressional Authorization of State Jurisdiction in Indian Country	425
Public Law 280.....	427
<i>Bryan v. Itasca County</i>	429
Notes and Questions	435

	<u>Page</u>
<i>California v. Cabazon Band of Mission Indians</i>	439
Notes and Questions	440
III. State Authority in Indian Country Without Congressional Authorization	442
<i>Washington v. Confederated Tribes of the Colville Reservation</i>	442
Notes and Questions	451
<i>White Mountain Apache Tribe v. Bracker</i>	453
Notes and Questions	459
<i>New Mexico v. Mescalero Apache Tribe</i>	461
Notes and Questions	465
<i>California v. Cabazon Band of Mission Indians</i>	466
Notes and Questions	469
<i>Rice v. Rehner</i>	470
<i>Cotton Petroleum Corporation v. New Mexico</i>	471
Notes and Questions	477
IV. Indian Gaming	479
A. Scope of Gaming	481
<i>Rumsey Indian Rancheria of Wintun Indians v. Wilson</i>	482
Notes and Questions	485
B. Negotiation in Good Faith	486
<i>In re Indian Gaming Related Cases</i>	487
Notes and Questions	494
C. The Role of the National Indian Gaming Commission	498
<i>Colorado River Indian Tribes v. National Indian Gaming Commission</i>	498
Notes and Questions	502
D. Land on Which Tribes May Conduct Gaming	503
V. The Indian Child Welfare Act	504
House Report No. 95–1386	504
The Indian Child Welfare Act	506
Notes and Questions	511
<i>Mississippi Band of Choctaw Indians v. Holyfield</i>	514
Notes and Questions	519
<i>Adoptive Couple v. Baby Girl</i>	524
Notes and Questions	536
Chapter 8: Tribal Jurisdiction Over Nonmembers	541
I. Early Law Regarding Tribal Jurisdiction Over Nonmembers	541
II. Modern Judicial Diminishment of Tribal Sovereignty	545
A. Criminal Jurisdiction Over Non-Indians	545
<i>Oliphant v. Suquamish Indian Tribe</i>	545
Notes and Questions	554

	<u>Page</u>
B. Tribal Civil Regulatory Authority Over Nonmembers: 1981–1989	558
<i>Montana v. United States</i>	559
Notes and Questions	564
<i>Merrion v. Jicarilla Apache Tribe</i>	565
Notes and Questions	573
<i>Brendale v. Confederated Tribes and Bands of the Yakima Indian Reservation</i>	575
C. Tribal Adjudicative Authority Over Nonmembers: 1985–1997	577
<i>National Farmers Union Insurance Companies v. Crow Tribe of Indians</i>	577
Notes and Questions	581
<i>Iowa Mutual Insurance Co. v. LaPlante</i>	583
Notes and Questions	585
<i>Strate v. A-1 Contractors</i>	587
Notes and Questions	592
D. Further Limitations on Tribal Civil Authority Over Nonmembers, 1997–Present	594
<i>Atkinson Trading Co. v. Shirley</i>	594
Notes and Questions	599
<i>Nevada v. Hicks</i>	600
Notes and Questions	607
<i>Plains Commerce Bank v. Long Family Land and Cattle Co.</i>	610
Notes and Questions	616
E. Judicial Divestiture Meets Congressional Plenary Power: Criminal Jurisdiction Over Nonmember Indians	618
<i>Duro v. Reina</i>	619
Notes and Questions	622
Separation of Powers, the Constitution and the <i>Duro Fix</i>	624
<i>United States v. Lara</i>	626
Notes and Questions	639
The Violence Against Women Act Reauthorization and a Partial <i>Oliphant Fix</i>	643
Attorney Advocacy and the Federal Judicial Role	644
Philip P. Frickey, (<i>Native</i>) <i>American Exceptionalism in Federal Public Law</i>	644
Bethany Berger, <i>United States v. Lara as a Story of Native Agency</i>	646
Notes and Questions	650

	<u>Page</u>
Chapter 9: Natural Resources, Hunting, Fishing and Gathering Rights	653
I. Land Ownership and Environmental Regulation	653
A. Ownership and Management of Natural Resources on Tribal Lands	654
<i>United States v. Shoshone Tribe</i>	655
Notes and Questions	657
Management of Tribal Timber, Agricultural Lands and Minerals	658
<i>United States v. Navajo Nation</i>	660
The Indian Tribal Energy Development and Self-Determination Act of 2005 (ITESDA)	662
Notes and Questions	663
B. Environmental Regulation	664
<i>City of Albuquerque v. Browner</i>	665
Notes and Questions	669
<i>Arizona Public Service Company v. Environmental Protection Agency</i>	671
Notes and Questions	677
C. Submerged Lands	678
<i>Montana v. United States</i>	679
<i>Idaho v. United States</i>	682
Notes and Questions	690
Shoreline Protection	691
II. Hunting, Fishing and Gathering Rights	692
<i>Washington v. Washington State Commercial Passenger Fishing Vessel Association</i>	693
Notes and Questions	703
State Authority to Regulate for Conservation and Public Safety.....	706
<i>Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. State of Wisconsin</i>	707
Notes and Questions	712
Note on Tribal-State Cooperative Management	713
Treaty-Based Protection of Fish and Wildlife	
Habitat	714
<i>United States v. Washington</i>	715
Notes and Questions	719
<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i>	721
Notes and Questions	731
<i>State v. Buchanan</i>	732
Notes and Questions	738

	<u>Page</u>
Chapter 10: Water Rights	741
I. Foundations of Indian Reserved Rights.....	741
<i>Winters v. United States</i>	741
Notes and Questions	743
II. How Much Water Is Reserved? Practically Irrigable Acreage and Other Standards.....	746
Robert T. Anderson, <i>Indian Water Rights and the Federal Trust Responsibility</i>	746
<i>Arizona v. California</i>	747
Notes and Questions	750
<i>United States v. Adair</i>	752
<i>In re the General Adjudication of All Rights to Use Water in the Big Horn River System</i>	757
<i>In re the General Adjudication of All Rights to Use Water in the Gila River System and Source</i>	764
<i>In re CSRBA (Case No. 49576), United States of America and Coeur d'Alene Tribe</i>	771
Notes and Questions	776
Note on Instream Flows for Fisheries.....	777
III. State Jurisdiction and Modern Adjudications	779
<i>Arizona v. San Carlos Apache Tribe</i>	780
Notes and Questions	785
IV. Conflicts of Interest and the Federal Trust Responsibility.....	788
<i>Nevada v. United States</i>	788
Notes and Questions	794
V. Allotment Water Rights	796
<i>United States v. Powers</i>	796
<i>Colville Confederated Tribes v. Walton</i>	798
Notes and Questions	802
VI. Indian Water Right Settlements.....	803
Robert T. Anderson, <i>Indian Water Rights and the Federal Trust Responsibility</i>	804
Daniel C. McCool, <i>Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era</i>	805
Criteria and Procedures for the Participation of the Federal Government in the Negotiations for the Settlement of Indian Water Rights	806
Notes and Questions	807
Chapter 11: American Indian Religion and Culture.....	811
I. Constitutional and Federal Statutory Framework	813
<i>Lyng v. Northwest Indian Cemetery Protective Association</i>	813
Notes and Questions	822

	<u>Page</u>
<i>Employment Division, Department of Human Resources of Oregon v. Smith</i>	824
Notes and Questions	829
Congressional Response: The Religious Freedom Restoration Act (RFRA)	831
II. Sacred Sites and Lands.....	832
<i>Navajo Nation v. United States Forest Service</i>	833
Notes and Questions	840
Federal Tribal Sacred Sites Agreements,	
Management and Litigation.....	842
Devil's Tower Management Plan and Litigation	842
Rainbow Bridge Management Plan and Litigation	844
Other Federal/Tribal Sacred Sites Management	
Plans and Litigation	845
Notes and Questions	846
III. Cultural and Religious Practices and Beliefs	848
Religious Use of Eagle Feathers and Parts	849
<i>United States v. Hardman</i>	850
Notes and Questions	856
IV. Protection of American Indian Cultural and Intellectual Property	861
A. Protection and Repatriation of Cultural Sites, Objects, Remains and Other Tangible Property.....	861
1. The Native American Grave Protection and Repatriation Act (NAGPRA)	862
2. The Archaeological Resources Protection Act.....	863
3. The National Historic Preservation Act.....	864
4. The Indian Arts and Crafts Act	864
5. Tribal Law	864
B. Protection of Intangible Property	866
1. Preventing Misuse and Appropriation.....	867
2. Promoting the Flourishing of Tribal Culture	870
Chapter 12: Alaska and Hawai'i.....	873
I. Alaska Natives.....	873
A. The Alaska Native Claims Settlement Act	875
Notes and Questions	877
B. Tribal Governments in Alaska	879
<i>John v. Baker</i>	881
Notes and Questions	887
C. Hunting, Fishing and Gathering Rights.....	888
Title VIII of ANILCA.....	889
Notes and Questions	891
<i>Bobby v. Alaska</i>	892
Notes and Questions	896
<i>Alaska v. Babbitt</i>	897

	<u>Page</u>
<i>John v. United States</i>	897
Notes and Questions	903
II. Hawai`i	906
Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Over- throw of the Kingdom of Hawai`i.....	907
A. Claims to Land.....	911
<i>Hawai`i v. Office of Hawaiian Affairs</i>	912
Notes and Questions	916
B. Native Hawaiian Claims to Sovereignty.....	916
Notes and Questions	918
Chapter 13: Indigenous Peoples' Rights in International and Comparative Contexts	923
I. Indigenous Rights in International Law	923
United Nations Declaration on the Rights of Indigenous Peoples	925
Notes and Questions	933
<i>Mayagna (Sumo) Awas Tingni Community v. Nicaragua</i>	939
Notes and Questions	945
II. Rights of Indigenous People in Other Nations	946
A. Australia	946
<i>Mabo v. Queensland</i>	947
Notes and Questions	955
B. New Zealand	957
The Treaty of Waitangi	958
Notes and Questions	959
C. Canada	961
Constitution Act.....	962
<i>Guerin v. The Queen</i>	963
Notes and Questions	967
<i>Delgamuukw v. British Columbia</i>	968
Notes and Questions	972
Epilogue: Perspectives on American Indian Law	977
Foundationalist	977
Critical	978
Pragmatist	979
Tribal Realism	981
Skeptic.....	982
Notes and Questions	982
Appendix: The Constitution of the United States.....	[1]
Index	[17]