

**American Indian Law:
Native Nations and the Federal System**

American Indian Law: Native Nations and the Federal System

Cases and Materials

EIGHTH EDITION

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Preface

Since its inception in 1973, this casebook has surveyed the tribal-federal relationship. It therefore has historically been and remains primarily devoted to the study of federal Indian law, *i.e.*, the federal law developed to regulate the tribal-federal relationship. The separate subject of tribal law, *i.e.* the law by which any particular tribe governs its people and its lands, is equally deserving of scholarly attention. While the authors frequently reference the subject of tribal law in this work, the primary focus of this book has been and continues to be federal Indian law.

This volume represents the eighth Edition of the first casebook developed to teach federal Indian law, initially published by Monroe E. Price in 1973. Over time, significant changes have occurred both in federal Indian law and in the authors and approaches adopted by this casebook. When the First Edition of the casebook was published in 1973, fewer than a dozen instructors focused their scholarly or teaching attention on federal Indian law. At latest count, the number was well over 100. Additionally, the 37-year lifespan of this casebook has witnessed significant changes in federal Indian law, as reflected in the successive editions.

This edition also marks the *first* time a casebook on this subject (or any subject, for that matter) has been authored by a team made up entirely of Indigenous law scholars. We are pleased to welcome a new team of authors who have joined professors Rebecca Tsosie and Angela Riley as primary contributors to this edition, including Dean and Professor Stacy Leeds, Professor Dylan Hedden-Nicely, and Assistant Professor Lauren van Schilfgaarde.

While casebooks obviously tend to focus on reported appellate cases to search for predictably stable decisional patterns, from its inception, this book has pursued a far broader perspective, merging jurisprudence, history, comparative law, ethnology, and sociology to bring meaning to the tribal-federal relationship. We do this to provide the historical, cultural, and jurisprudential tools for a reader to critically analyze the current state of legal doctrine in federal Indian law and also provide some historical perspective on how it emerged and some tools for its improvement going forward. To carry out this broader mission for the casebook, we have incorporated insights from an array of new intellectual developments in law and related fields, including critical race theory, the new legal realism of the law and society movement, empirical

approaches to law, law and economics, indigenous methodology, legal pluralism, and neoinstitutionalism. Federal, tribal, state, and international legal regimes are all implicated in the governance of Native nations, their territories, and their people. These multiple institutional settings create opportunities for different normative visions of tribal-federal relations, as well as alternative legal routes for pursuing Indian and non-Indian objectives.

Chapter 1 of this edition introduces the basic problem of federal Indian law, establishing an appropriate model for the tribal-federal relationship. By examining historical materials, the views of tribal leaders, and early case decisions, including the famous benchmarks of federal Indian law, the Marshall trilogy (*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*), the first chapter seeks to introduce varying conceptions of how Native nations fit with or in the federal union, and how those conceptions have evolved over time. To facilitate a fuller understanding of that dynamic, Chapter 1 also provides a concise history of the evolution of federal Indian policy. Finally, this chapter offers an introduction to international legal protections and comparative models of the treatment of indigenous peoples, designed to encourage those attracted to reformative visions of federal Indian law to challenge their ideas from a global perspective.

Chapter 2 focuses attention on some cross-cutting themes in federal Indian law. It begins by examining federal power in Indian country in the modern era, as well as the government-to-government relationship tribes have with the United States. As part of that analysis, the chapter introduces the idea that special canons of interpretation affect the judicial interpretation of Indian treaties and statutes in important ways, often benefiting Indian tribes. The chapter also examines the legal definitions applied to some basic questions such as who is an Indian or tribal member, what is an Indian tribe, and what land constitutes Indian country. Finally, it examines critical equal protection and due process constitutional questions that surround having a body of law addressing Indians.

Chapters 3 through 5 focus attention on the competition for legal authority and power in Indian country among the three sovereign authorities, each of which asserts claims to political dominion and sovereignty over Indian country and its people—the tribal government, the federal government, and the state government. These chapters examine in that order the history and legal doctrines surrounding each respective government's claim to exercise legitimate political power and authority over the people and resources of Indian country, culminating in a separate chapter (Chapter 5) devoted to jurisdiction under special statutory schemes addressing matters such as child welfare, gaming, and environmental protection. These chapters explore the historical evolution of each sovereign's claim to authority and the prevailing legal doctrines that shape those claims.

Chapters 6 and 7 focus attention on the legal protections afforded to tribal lands and resources, and the manner in which the law facilitates or frustrates the development

of those resources. Chapter 6 focuses primary attention on the legal protection of tribal land and resources appurtenant thereto, such as oil and gas, minerals, and timber. In the natural resource cases, there is a considerable emphasis upon the economic value of the resources. The chapter also explores issues associated with a special kind of tribal property—cultural property—noting that land can also be considered a cultural resource for Native peoples, as illustrated by tribal efforts to protect Native sacred sites on federal public lands.

Chapter 7 focuses on important hunting and fishing, food gathering, and water rights. The protection and enforcement of such Indian rights are critical to Indian survival in the harsh terrains that characterize some reservations. This chapter illustrates the manner in which the political, cultural, and economic facets of Indian autonomy are interwoven into a complex legal fabric governing how Indians and Euro-Americans compete in the legal system for control of the same scarce resources, and how they may also cooperate to achieve their material and cultural needs for those resources. It will illustrate how federal Indian law and its concepts of property and sovereignty have been used to protect or frustrate tribal concerns central to Indian survival.

By choosing to survey some of the broad currents in federal Indian law and provide a rich set of research sources, we have been forced to make certain basic decisions about the organization and structure of this book. First, we have concluded that the richness and diversity of the cases and scholarship relating to Native Americans called for a book that was larger and deeper than would be possible to teach in any single-semester course. Rather, we chose to present an organized body of source material from which any instructor could select the ingredients to craft his or her own course to suit individual objectives. Thus, teachers and students most interested in questions of political authority, sovereignty, legitimacy, and jurisdiction may focus the primary attention of their courses on Chapters 1 through 5. Those primarily interested in the protection of Indian property and natural resources may find their time most profitably spent concentrating mainly on Chapters 1 and 6–7. Some schools, including those of the authors, offer more than one course in federal Indian law. The first course could cover jurisdiction issues, and the second could focus on resource issues, perhaps including some of the special jurisdictional regimes (such as Alaska, Hawaii, and federal environmental laws) covered in Chapter 5. Thus, the authors see the casebook as a flexible tool, readily adaptable to various course configurations.

Finally, a note about the reproduced case opinions: In order to not encumber the page with dots, omissions have not always been indicated with ellipses. In addition, some footnotes have been removed from the cases; those included have the original footnote numbers retained in brackets at the beginning of the footnote text. Occasionally in the text we discuss an important footnote from an excerpted court opinion. We reference it by its original footnote number, which is the number appearing in brackets. In sum, we continue to believe that the casebook represents an instructional

resource that synthesizes the extensive caselaw and statutory body of law that constitutes “Federal Indian law.” Those who are interested in the details of a complete opinion or source should consult the original rather than relying on this abridged version of those materials. We hope the materials are accessible to students and to scholars in a format that is readable and provides additional sources that can be explored by those interested in a more in-depth treatment of the issues.