AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM

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CASES AND MATERIALS

Seventh Edition

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Dedications

To my loving parents, Joseph and Ida Goldberg, my partner and husband, Professor Duane Champagne, and my dearest daughter, Andrea.

Carole E. Goldberg

To my beloved children, Daniel and Lisa Tsosie, and to the wonderful students I have had, who continually inspire and motivate me.

Rebecca Tsosie

For my parents, Fred & Phyllis Clinton, whose love and suppport made my contributions to this work possible.
"Honor thy father and thy mother."
Exodus 20:12a

Robert N. Clinton

For Avah and Oona.

Angela R. Riley

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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 Seventh 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. In the Second Edition, published in 1983, Robert N. Clinton joined the book, and the authors reorganized the casebook to recognize the explosive growth in legal attention to federal Indian law during the prior decade, including 32 new decisions of the United States Supreme Court, many, perhaps most, favoring tribal interests. In the Third Edition, published in 1991, Nell Jessup Newton joined as a co-author, and the Preface noted that "the rising expectations created by the previous legislative and judicial successes only represented a prelude to a more bumpy roller coaster ride for the resolution of many Indian issues, particularly in federal and state courts."

Following publication of the Third Edition, that "bumpy roller coaster ride" continued for Indian nations. Indian law cases have occupied a large and disproportionate amount of the Supreme Court's docket. Indians may be around 1.5% of the total United States population, but their cases often consume as much as 5% of the Court's caseload. Between 1994 and 2009, tribal interests have found themselves losing far more cases than they were winning. Of 38 cases involving Native interests over that fifteen-year period (including two that address Native Hawaiians), tribes have prevailed in seven, won partly in one, and had lower court decisions vacated and remanded in three. The other 27 were losses.[1]

Yet, the picture was not as bleak for tribal interests as their win-loss record in the Supreme Court might have suggested. To appropriate Charles Dickens's well-worn phrase from *A Tale of Two Cities*, for Indian tribes, "It was the best of times, it was the worst of times." Tribal governments and their legal systems expanded in size and sophistication, and their business enterprises — particularly in the gaming industry — exploded. Tribes became increasingly self-sufficient and far less reliant on the federal government both for funding and technical assistance. They also became more adept at promoting and defending their positions in federal and state legislative and administrative settings. Furthermore, international attention to the rights of indigenous peoples

[1] *See* Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003, 1013–14 (2009).

worldwide has opened rhetorical space for criticism of Supreme Court decisions as well as new venues for asserting Indian rights.

Such changing times required adaptation from this casebook, and change it did. The Fourth Edition, published in 2003, and the Fifth Edition, published three years later, included a new set of authors, with Carole E. Goldberg and Rebecca Tsosie joining the work. Nevertheless, while no longer named as authors, prior contributors Monroe E. Price and Nell Jessup Newton greatly enhanced the vision still reflected in this casebook, and their significant contributions are gratefully acknowledged. In addition to these changes in personnel, the recent divergence of federal Indian law decisions of the United States Supreme Court from its historic legacy rendered it even more imperative that the authors honor, acknowledge, teach, and publicize the tribal voice and views on the appropriate relationship that should exist between Native nations and the United States. Thus, far greater attention was paid in the Fourth Edition to Indian perspectives and voices on the tribal-federal relationship and to tribal reactions to Supreme Court decisions. The authors' point in undertaking that effort has been to highlight the fact that the tribal-federal relationship has always been and remains a bilateral arrangement in which the federal courts' role in unilaterally finding solutions traditionally has been quite limited. By focusing far greater attention on tribal perspectives in the tribal-federal relationship, the authors also have invited readers to consider precisely how much of the relationship the federal courts and Congress can unilaterally dictate. Ultimately, the authors have asked readers to consider for themselves the appropriate model for tribal-federal relations by focusing on international developments, historic models and understandings, legal treaty and other commitments, and contemporary events, and to further consider how the most appropriate model can be pursued and legally implemented.

The Fifth Edition, coming only three years after its predecessor, maintained considerable continuity with the Fourth Edition, both in the continued collaboration of Professors Clinton, Goldberg, and Tsosie, and in the focus on tribal as well as non-Indian perspectives on Native nations in the federal system. Benefiting from the authors' experience teaching from the Fourth Edition as well as feedback from colleagues in the field, the Fifth edition mainly updated material, reduced the heft of the volume, and reorganized some of the topics to eliminate duplication and enhance "teachability."

The Sixth Edition saw the inclusion of two new co-authors, Kevin K. Washburn and Elizabeth (Libby) Rodke Washburn, who added significant perspectives borne of their deep experience in Indian law scholarship, practice, and advocacy. Their approaches to the material enhanced the casebook by emphasizing political realities in both federal and tribal settings.

This Seventh edition builds on previous work, and is also influenced by the addition of its newest co-author, Angela R. Riley, of the UCLA School of Law. It also marks the departure of now-Secretary for Indian Affairs, Kevin Washburn, and Elizabeth Rodke Washburn, who have rotated off the casebook.

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. The authors of this volume, like the authors of prior editions, have never been interested in merely presenting the "black letter" law as is, without providing the historical, cultural, and jurisprudential tools

for a reader to critically analyze the current state of legal doctrine in federal Indian law and also providing some historical perspective on how it emerged and some tools for its improvement going forward. We seek to provide a wide-ranging inquiry into the role of law and legal processes, both domestic and international, in protecting or frustrating the desires for political and cultural autonomy of various racial, cultural, religious, or national subgroups within a society.

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. As federal Indian law doctrine has become increasingly hostile to tribal claims to sovereignty and property, Indian law scholars and practitioners have turned to these intellectual tools to explain doctrinal developments (*e.g.*, as reflections of institutional racism or the pursuit of economic gains) to refute the empirical premises of adverse decisions (*e.g.*, assertions that tribal courts are unfair to outsiders), and to suggest ways tribes might avoid harmful rulings (*e.g.*, through cooperative agreements or political advocacy). Our own approach, while eclectic, benefits especially from the conceptual apparatus of legal pluralism and institutionalism. Legal pluralism emphasizes the interplay of multiple legal systems that may possess authority over the same territory and people. Institutionalism examines the ways in which the legal entities administering law affect legal actors, including governments as well as individuals. Federal Indian law is especially rich in opportunities for the interaction of legal systems and institutions. 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. We have sought to highlight these opportunities and to suggest how Indian law may enhance or inhibit these pursuits at the federal and tribal levels. Our aim is to inform future practitioners and advocates about pragmatic, political possibilities, and constraints, complementing theoretical and critical perspectives that may challenge the current state of affairs. Thus at several points in the casebook (see especially Chapters 5 and 7), we emphasize intergovernmental relations through cooperative agreements and institutional innovation.

The cross-currents and inconsistencies of such legislative developments, case decisions, and intellectual ferment present formidable challenges to anyone who sets out in a casebook format to capture the depth and richness of the intellectual efforts of tribal people and others, including judges, legislators, lawyers, and academics, to build a coherent body of Indian law. From its inception in Professor Monroe E. Price's hands, this book always sought to present a broad jurisprudential and comparative perspective that transcended mere efforts to accurately portray existing federal Indian law doctrine. The book has not only repeatedly questioned and challenged those doctrines, but also aspired to place federal Indian law in a larger historical and global context and to tie federal legal doctrines affecting indigenous peoples to other similar problems of preserving autonomous cultures and nationalities in South America, Africa, Canada, New Zealand, and Australia, to name but a few. Editors of a book in such a rich field are faced with an exacting task. They can ignore the breadth and richness of the field and devote extended attention to a small part of the panorama of Indian law — such as federal court doctrine — or they can attempt to survey the various cross-currents and expose the reader to a broad, but not necessarily in-depth, treatment of the major issues and perspectives in

the field. We deliberately have chosen the second approach. Since the Fourth Edition, we have added a third and long overdue objective: to accurately portray Indian tribal perspectives and voices on questions of federal Indian law. Thus, we continue to hold to a broad vision for this casebook, although the increasingly diverse directions of the scholarship, decisions, and legislation in Indian law have made it ever more difficult to devote equal attention to all three of our objectives.

In addition, while this casebook was developed primarily as a teaching tool, its authors are deeply committed to providing a sufficiently rich set of legal and other sources, such that the book also serves double-duty as a research sourcebook in the field of federal Indian law. The need for such a sourcebook was greater during the period 1982–2005, when there were no updated editions of the major treatise in the field of Indian law, originally published by Felix Cohen in 1941 and revised by a group of legal scholars, including Professors Clinton and Goldberg, in 1982. With the publication in 2005 of a new edition of this treatise, in which Dean Washburn and Professor Goldberg participated, an invaluable research sourcebook has become available to scholars, students, judges, and practitioners in the field. Furthermore, the authors and editors of the 2005 edition have produced biannual updates to the treatise. Thus, where appropriate, we have referred readers of the casebook to *Cohen's Handbook*, rather than repeat the research it presents. Nevertheless, where illuminating historical analyses and background material are unavailable in other sources, we have included them in the casebook to enrich students' understanding. We have aimed for a casebook that will serve as a resource for students long after graduation.

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 evolution, Chapter 1 also provides a mini-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, including examining 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. It also examines critical equal protection and due process constitutional questions that surround having a body of law addressing Indians. Finally, 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.

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. These materials also question the historical or political legitimacy of some of those claims to political authority. In short, these chapters explore the limits of sovereignty. They provide a test of the extent to which the original self-government and political authority of the aboriginal tribes of the North American continent have been eroded by the dominant colonial power, and they examine how sovereignty and jurisdictional issues have shaped the underlying model applied to the tribal-federal relationship.

Sovereignty and political authority are not ends unto themselves, however. One cannot eat jurisdiction, and sovereignty alone does not support the needs of Indian families. Rather, sovereignty is a tool to be used to support or suppress the destiny and future of Native peoples. Allocating political authority or sovereignty also delegates decision-making responsibilities, and thereby determines whether the political, economic, or cultural destinies of Native American peoples and those who enter onto their reservations will be decided by Native Americans or by non-Indian federal or state governments. To give meaning to such decision-making, however, the very existence of Indian resources, goods, and services must be assured by legal protections.

Chapters 6 and 7 focus attention on the legal protections afforded to Indian property and resource rights, 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 the one resource that simultaneously is often the tribe's most valued cultural resource and sometimes its only major remaining economic resource — tribal land and resources appurtenant thereto, such as oil and gas, minerals, or timber. It also explores issues associated with a special kind of tribal property — cultural property.

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 two- or three-hour Native American law course or seminar. 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. A two-hour course focused

mostly on jurisdiction might consider covering Chapters 1, 2, and portions of 3, 4, and 5. 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.

A further problem for the creation of this volume was imposed by size constraints dictated by both our publisher and the concessions that unfortunately must be made to the length of the academic calendar. As the decisions from the courts grow longer and more ponderous, and the richness, depth, and diversity of the literature increases, casebook editors are forced to make very difficult editing decisions — decisions about issues we did not always agree upon even among ourselves. Significant problems emerge in paring down extensive, sometimes convoluted, often carefully integrated opinions from the Supreme Court into a few pages manageable for a class session. The Fourth and Fifth Editions sometimes paraphrased long significant cases while giving them separate treatment that prevented the lesser attention that students frequently afford to note cases. In the Sixth Edition and in this Seventh Edition, we have maintained some use of this device, but have employed it for fewer cases, to ensure that students read as much of the most important text as possible. Similarly, the historical, political, and legal arguments found in the secondary literature often do not lend themselves to brief encapsulation, either by way of paraphrased description or through inclusion of a carefully pruned snippet or two. Nevertheless, employing these techniques, we have sought to present very complicated material in a more condensed form, while attempting to do justice to the complexity of analysis in the original.

The authors have chosen to leave statutory and regulatory language out of the casebook text, relying on the relatively easy access that today's students have to online sources. That decision was made both to decrease the size of the book and to promote greater readability of the casebook text. Editing of cases and source materials, of course, poses its own technical problems. Specifically, how is a reader to know where editing in a text has occurred? On the other hand, if every editing change is appropriately flagged, the text becomes far less readable. On this question, the authors deliberately opted for visual readability, rather than detailed technical cues. Thus, we have liberally deleted citations and footnotes from both primary cases and secondary works without any indication in text of the omission. Similarly, in new cases, we have used ellipses sparingly, preferring instead when possible to use brackets to indicate where minor editing was necessary to smooth transitions required by omissions. Parallel citations, pinpoint citations, footnotes, and other references have been liberally removed from published cases and other sources, without any flag or indication. Furthermore, in an effort to increase readability, we have chosen not to indicate each deletion of interstitial paragraphs by indented hanging ellipses, relying instead primarily on brackets that begin or end a paragraph to indicate that some editing was done with the intervening material. That editing may represent a short phrase or many paragraphs omitted from the original source. Some deletions are not noted at all. Additionally, in the interest of space, the authors have not consistently noted denials of review by the United States Supreme Court or other non-significant subsequent histories of cases. We believe that this casebook, while intended to have some utility as a research source, should be designed primarily as an instructional volume in which readability represents the most important asset. Those interested in the details of the complete opinion or source should consult the original rather than relying on our

abridged version of those materials, and for case opinions should also employ electronic databases to assure the complete citation to the materials in question.

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Table of Contents

Table of Contents