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Cases and Materials on Federal Indian Law (6th Edition)

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**Cases and Materials on Federal Indian Law (6th
Edition)**

*David H. Getches, Charles F. Wilkinson,
Robert A. Williams, Jr. and Matthew L.M.
Fletcher*

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Dedicated to

Vine Deloria, Jr. (1933–2005)
Legal scholar, author, mentor, friend

and

Wilma Mankiller (1945–2010)
Courageous and visionary tribal leader

Whose legacies are celebrated
by this book on Federal Indian Law.

PREFACE

It is difficult to imagine another field of law so dynamic as Indian law. In the thirty years since our first edition was published, Indian law has expanded at warp speed (at least relative to the typical pace for change in the law). Thus, updating a casebook is a more challenging and thoroughgoing task than it is in most other fields. More than eighty percent of the cases in this volume did not exist when the first edition came out in 1978. Moreover, the apparent directions of the law have shifted along with theoretical perspectives offered by the growing number of scholars who contribute to Indian law. A brief history of the evolution of this work is illustrative.

During the mid-1970s, David Getches, Charles Wilkinson, and Daniel Rosenfelt prepared the first edition after several years of representing Indian tribes and groups through legal services programs, particularly the Native American Rights Fund (NARF). The content and organization was based on materials prepared at NARF to train Indian legal services attorneys. At that point the field seemed arcane, but the authors believed it had promise as an intellectually exciting subject, charged with potent implications for a largely forgotten minority group and great symbolic force for our system of law. Teachers in a few law schools, including Professors Wilkinson and Rosenfelt who had become full-time law teachers, were offering Indian law courses. Fortunately, Professor Monroe Price had developed his pioneering casebook which appeared in 1973.

West Publishing Company took a considerable risk in accepting the first edition of this book for publication, doubting that there would be a sufficient market. Everyone's expectations were exceeded as courses proliferated in the nation's law schools and in undergraduate programs, and as enrollments in them increased. The organizing themes of the first edition are preserved here. The book proceeds from the foundation cases in Indian law, standing as landmarks in a rich historical landscape. The periods of history are classified in ways that are now standard and the organization was adopted in other works such as the 1982 edition of Felix S. Cohen's *Handbook of Federal Indian Law*, recently updated in 2005. The analysis of certain issues (e.g., preemption in Indian law) has been accepted by scholars and courts and the analytical approach to criminal jurisdiction has been used widely in classes and teaching materials.

By the time of the second edition in 1986, Professors Getches and Wilkinson found it necessary to integrate a remarkable spate of Supreme Court decisions that had applied the foundation cases in modern contexts—taxation, regulation, water rights, and fishing rights conflicts. With considera-

ble fealty, the Court carried forward the fundamental principles of federal preemptive powers, tribal sovereignty, and limited state authority in Indian country. A few decisions suggested curious aberrations. Since the second edition, the case law represented in the book has focused almost entirely on United States Supreme Court decisions, with some tribal court cases added to convey an understanding of how the increasingly sophisticated tribal judicial systems function. Provocative, new Indian law scholarship was added, along with materials on applications of Indian law principles to Alaska Natives, Native Hawaiians, and indigenous peoples in other countries.

The third edition saw several major changes. The addition of Professor Williams as an author gave the book greater historical depth and sharpened the moral questions raised in studying the subject, with the inclusion of his original research revealing precedents for the foundations of Indian law tracing to medieval times. Similarly, the growing body of materials in critical race studies could be well-represented because of Professor Williams' leadership in that field. And he also enriched the book's coverage of international and comparative materials.

Most striking in the third edition was the inclusion of new cases that were apparently out of step with the most venerable and reliable principles in the field and seemed to be built on the "aberrations" included in the second edition. This phenomenon, as the first pages in many Indian law articles of this period illustrate, led newcomers to the field to describe it in terms of its complexity and confusion. Indeed, the Supreme Court had become especially active in protecting non-Indian rights and property and began to write opinions that created exceptions to established, two hundred year-old principles; they could be read as carving out new principles.

The fourth edition confirmed a continuing trend of Supreme Court decisions that departed from the foundation cases that constituted most of the first edition and which still dominate the first part of the book. The effect of these decisions was to erode and fragment the territory where tribal law prevails, and suggested a serious undermining of tribal sovereignty, even as tribes were becoming more competent and determined to govern.

The fourth edition also added new material on reservation economic development, examining the role and importance of tribal sovereignty in this area where tribes continue to gain ground economically. Legalized gambling, which has proven to be lucrative for many tribes, was also covered in more detail than in earlier editions.

The fifth edition demonstrated that in many ways, Indian law has reached a crossroads. New Supreme Court decisions suggested that the Justices are deeply divided over fundamental questions in the field. One of the Justices has gone so far as to say that Indian law is "schizophrenic," and the decisions added to the fifth edition on important issues such as the scope of the federal trust responsibility to tribes, the extent of congressional plenary power over Indian affairs, and limits on tribal sovereignty over non-members revealed that the Rehnquist Court fomented instability and unpredictability in the field. The fifth edition also added new materials on tribal courts and

tribal customary law, protection of Indian sacred sites on public lands, and comparative and international human rights developments.

The sixth edition, with the inclusion of author Matthew L.M. Fletcher, argues for the first time that Native nations have moved into a new era of law and policy—nation-building. Self-determination has helped to propel Native nations into an era of building modern and successful nations, and this edition incorporates materials on the reality of ground-level tribal governance that draw on Professor Fletcher’s expertise and experience concerning tribal law and tribal courts. The Supreme Court’s dissonance on the foundational principles of federal Indian law—this will be the first edition of the casebook unable to report on a significant advance or defense of tribal interests in the federal courts—has motivated Native nations to advance the field in legislative and regulatory arenas. Further, given the approval by the Obama Administration of the United Nations Declaration on the Rights of Indigenous Peoples, Native nations may be looking farther outward to assert their basic human rights as indigenous peoples.

As with prior editions, we are deeply indebted to many colleagues who contributed to the content and direction of the book. Among those whose comments, suggestions, and ideas were influential are: Professor Barbara Cosens of the University of Idaho furnished valuable information on tribal water rights settlements. Professor Kate Fort offered excellent commentary on the Indian Child Welfare Act materials. We also thank Wenona Singel, John Petoskey, and Zeke Fletcher, who commented on and supplied materials for the tribal courts and gaming materials.

We also want to acknowledge the fine research and editorial assistance of University of Colorado Law School student Anne Mariah Tapp, Class of 2012, and University of Arizona Rogers College of Law students Katherine C. Belzowski, LL.M., Grant Christensen, LL.M., Joseph Ezzo, Jr., Class of 2012, Jill Marie Kappus, LL.M., Sherri L. Mitchell, Class of 2011.

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A word on our use of excerpted material is in order. In addition to our edited versions of judicial decisions we include abridgements of the copyrighted articles and other material with permission. Our acknowledgments to the authors and other copyright holders begin on the next page. In reprinting excerpts of cases and other materials we have indicated our omissions of text with “ * * * ” while preserving the author’s indication of omissions from quoted material by use of “ . . . ”. We have, however, omitted citations to cases and other authority without notation. Footnotes in the original work also have been eliminated without notation, although where they are included

in the excerpt, we have used the original numbering. Footnotes signaled with an asterisk and the notation “Ed.” were added by us.

D.H.G.
R.A.W.
C.F.W.
M.L.M.F.

SUMMARY OF CONTENTS

	Page
PREFACE	iii
ACKNOWLEDGMENTS.....	iii
TABLE OF CASES.....	iii
Chapter One. Introduction: Indians and Indian Law	1
A. The Study of Indian Law	1
B. American Indians Today—An Overview	8
C. Perspectives on Indian Law.....	29
PART ONE. THE HISTORY OF FEDERAL INDIAN LAW AND POLICY	
Chapter Two. The European Doctrine of Discovery and American Indian Rights	43
A. Medieval and Renaissance Origins.....	44
B. The English North American Colonial Era Influence on United States Federal Indian Law and Policy	54
C. United States Colonizing Legal Theory	64
Chapter Three. The Federal-Tribal Treaty Relationship: The Formative Years (1789–1871)	74
A. Colonial Era Origins.....	74
B. “The Savage as the Wolf”: The Founders’ First Indian Policy	87
C. Legislative Enforcement of the Treaty Policy: Trade and Intercourse Acts	90
D. Removal	94
E. The Status of Indian Treaties in United States Law.....	128
Chapter Four. Centuries of Shifting Law and Policy	140
A. Allotments and Assimilation (1871–1928).....	141
B. The Period of Indian Reorganization (1928–1945)	187
C. The Termination Period (1945–1961).....	200
D. The Era of Self-Determination (1961–Present)	216
PART TWO. FEDERAL INDIAN LAW AND POLICY IN CONTEMPORARY PERSPECTIVE	
Chapter Five. The Federal-Tribal Relationship	244
A. Tribal Property Interests	244
B. The Federal-Tribal Relationship as a Source of Federal Power.....	305
C. The Federal-Tribal Relationship as a Source of Indian Rights.....	329

	Page
Chapter Six. Tribal Sovereignty and the Challenge of Nation-Building	367
A. Customary and Traditional American Indian Legal Systems	368
B. Tribal Governments as Independent Sovereigns	373
C. The Contemporary Scope of Tribal Sovereignty Under the Indian Civil Rights Act	379
D. Tribal Sovereign Immunity	394
E. Tribal Justice Systems in Historical and Cultural Context	403
Chapter Seven. Tribal Sovereignty and Jurisdiction: Congressional and Judicial Recognition and Limitations	447
A. The Arena of Federal and Tribal Jurisdiction: “Indian Country”	448
B. Federal Criminal Jurisdiction	470
C. “Public Law 280”—A Congressional Transfer of Jurisdiction to Some States	488
D. Judicially-Imposed Limitations on Tribal Jurisdiction in Indian Country	505
Chapter Eight. Tribal and State Conflicts Over Civil Regulatory and Adjudicatory Jurisdiction	532
A. Civil Adjudicatory Jurisdiction in Indian Country	532
B. Taxation and Regulation	588
C. Federal Environmental Regulation in Indian Country: Treating Tribes as States	635
D. Judicial Jurisdiction by Congressional Statute: The Indian Child Welfare Act of 1978	647
Chapter Nine. The Nation-Building Challenge: Federal Indian Law and Reservation Development	665
A. Managing the Resources of the Reservation	677
B. Indian Gaming	708
Chapter Ten. Indian Religion and Culture	727
A. Protection of American Indian Sacred Lands and Sites	728
B. Protection of American Indian Religious Practices and Beliefs	746
C. Protection of American Indian Cultural Resources	758
Chapter Eleven. Water Rights	766
A. Water Law in the West	768
B. Nature and Extent of Indian Reserved Water Rights	771
C. Quantification	793
D. Regulation and Administration of Water in Indian Country	832
Chapter Twelve. Fishing and Hunting Rights	838
A. Regulation of On-Reservation Fishing and Hunting	840
B. Off-Reservation Fishing and Hunting	849
PART THREE. THE FRONTIERS OF INDIGENOUS PEOPLES’ RIGHTS	
Chapter Thirteen. Rights of Alaska Natives and Native Hawaiians	887
A. Alaska Natives: Looking Forward to the Past?	888
B. Hawaii: Islands of Neglect	909

	Page
Chapter Fourteen. Comparative and International Legal Perspectives on Indigenous Peoples' Rights	952
A. Native Law in Other Nations.....	953
B. Emerging Voices: Indigenous Rights and International Law.....	1004
INDEX.....	1033

TABLE OF CONTENTS

	Page
PREFACE	iii
ACKNOWLEDGMENTS.....	iii
TABLE OF CASES.....	iii
Chapter One. Introduction: Indians and Indian Law	1
Sec.	
A. The Study of Indian Law	1
1. What Is Federal Indian Law?	1
2. Why Study Indian Law?	6
B. American Indians Today—An Overview	8
C. Perspectives on Indian Law	29
<i>Robert A. Williams, Jr., Columbus’s Legacy: The Rehnquist Court’s Perpetuation of European Cultural Racism Against American Indian Tribes</i>	29
<i>Charles F. Wilkinson, American Indians, Time and the Law</i>	31
<i>David H. Getches, A Philosophy of Permanence: The Indians’ Legacy for the West</i>	34
<i>Matthew L.M Fletcher, Looking to the East: The Stories of Modern Indian People and the Development of Tribal Law</i>	36
PART ONE. THE HISTORY OF FEDERAL INDIAN LAW AND POLICY	
Chapter Two. The European Doctrine of Discovery and American Indian Rights	43
Sec.	
A. Medieval and Renaissance Origins.....	44
1. The Crusading Legal Tradition	44
2. The Crusading Legal Tradition and Europe’s “Age of Discovery”	46
3. Spanish Colonial Law and the Rights of American Indians	48
4. Spanish Legal Theory and Indian Rights	50
<i>Notes</i>	53
B. The English North American Colonial Era Influence on United States Federal Indian Law and Policy	54
1. Early Precedents	55
2. Early English Colonial Practice Respecting Indian Rights	57
<i>Chester E. Eisinger, The Puritan’s Justification for Taking the Land</i>	57
<i>Note</i>	59
3. British Imperial Policy and Indian Lands.....	59
4. The Founders’ Debates on Indian Lands.....	61
C. United States Colonizing Legal Theory	64
<i>Johnson v. McIntosh</i>	64
<i>Notes</i>	70

	Page
Chapter Three. The Federal–Tribal Treaty Relationship: The Formative Years (1789–1871)	74
Sec.	
A. Colonial Era Origins.....	74
<i>Dorothy V. Jones, British Colonial Indian Treaties</i>	75
<i>Treaty of Peace Between the French, the Iroquois, and Other Nations</i>	77
<i>Robert A. Williams, Jr., Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800</i>	81
<i>Note: The Virginia Colony’s Treaty Relations With Powhatan’s Confederacy</i> ...	85
B. “The Savage as the Wolf”: The Founders’ First Indian Policy	87
<i>George Washington to James Duane</i>	87
<i>Note</i>	88
<i>Treaty of Hopewell With the Cherokees</i>	89
<i>Note</i>	90
C. Legislative Enforcement of the Treaty Policy: Trade and Intercourse Acts	90
<i>Francis Paul Prucha, American Indian Policy in the Formative Years: Indian Trade and Intercourse Acts, 1790–1834</i>	91
<i>Note</i>	93
D. Removal	94
1. The Justifications for Indian Removal	94
2. The Cherokee Cases	96
<i>Francis Paul Prucha, American Indian Policy in the Formative Years: Indian Trade and Intercourse Acts, 1790–1834</i>	99
<i>Notes</i>	102
<i>Cherokee Nation v. Georgia</i>	105
<i>Note</i>	111
<i>Worcester v. Georgia</i>	113
<i>Notes</i>	122
3. The Legacy of the Cherokee Cases	126
<i>D’arcy McNickle, They Came Here First</i>	126
<i>Notes</i>	127
E. The Status of Indian Treaties in United States Law.....	128
1. Canons of Construction	128
<i>Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows or Grass Grows Upon the Earth”— How Long a Time Is That?</i>	128
<i>Notes</i>	131
<i>United States v. Washington</i>	132
<i>Notes</i>	136
2. Treaties and Reserved Rights	136
<i>United States v. Winans</i>	137
<i>Notes</i>	139
Chapter Four. Centuries of Shifting Law and Policy	140
Sec.	
A. Allotments and Assimilation (1871–1928)	141
1. “Civilizing” the Indian: The BIA and the Reservation System	142
<i>S. Lyman Tyler, A History of Indian Policy</i>	142
<i>Note</i>	144
<i>Indian Commissioner Medill on Indian Colonies</i>	144
<i>Indian Commissioner Mix on Reservation Policy</i>	146
<i>Indian Commissioner Taylor on Indian Civilization</i>	147

Sec.	Page
A. Allotments and Assimilation (1871–1928)—Continued	
2. Reforms and the End of Treaty-Making	148
<i>Report of the Board of Indian Commissioners</i>	149
<i>Indian Commissioner Parker on the Treaty System</i>	150
<i>President Grant's Peace Policy</i>	151
Notes	151
3. Expansion of Federal Power Over the Reservation	153
<i>Ex Parte Crow Dog</i>	153
Note	157
<i>United States v. Kagama</i>	158
Notes	160
<i>United States v. Sandoval</i>	160
Notes	162
Note: <i>Indian Citizenship and Tribalism</i>	163
4. The General Allotment Act	165
<i>Delos Sacket Otis, History of the Allotment Policy, Hearings on H.R. 7902</i> <i>Before the House Comm. on Indian Affairs</i>	166
<i>John Collier, Memorandum, The Purposes and Operation of the Wheeler-</i> <i>Howard Indian Rights Bill, Hearings on H.R. 7902 Before the Senate</i> <i>and House Committees on Indian Affairs</i>	171
Notes	173
<i>Ann Laquer Estlin, Lone Wolf v. Hitchcock: The Long Shadow, in the</i> <i>Aggressions of Civilization: Federal Indian Policy Since the 1880's</i> <i>Lone Wolf v. Hitchcock</i>	176
Notes	183
Notes	184
5. Assimilationist Policies	185
B. The Period of Indian Reorganization (1928–1945)	187
1. The Indian Reorganization Act: Design for Modern Tribal Gov- ernments	188
<i>Comment, Tribal Self-Government and the Indian Reorganization Act of</i> <i>1934</i>	189
<i>Edward H. Spicer, Cycles of Conquest</i>	194
Notes	195
2. The Contributions of Felix Cohen	197
<i>Felix S. Cohen, Handbook of Federal Indian Law</i>	198
Note	199
C. The Termination Period (1945–1961)	200
1. Passage of the Termination Program	200
<i>Gary Orfield, A Study of the Termination Policy</i>	201
Note	203
2. The Effects of Termination: Some Rights Lost; Some Retained	204
<i>Charles F. Wilkinson & Eric R. Biggs, The Evolution of the Termination</i> <i>Policy</i>	204
<i>Menominee Tribe of Indians v. United States</i>	207
Notes	211
<i>Repealing the Act Terminating Federal Supervision Over the Property</i> <i>and Members of the Menominee Indian Tribe of Wisconsin</i>	214
Notes	215
D. The Era of Self-Determination (1961–Present)	216
1. A Reaction to Termination	216
2. President Nixon's Message to Congress	217
<i>Message From the President of the United States Transmitting Recom-</i> <i>mendations for Indian Policy</i>	217
Note	219
3. Congressional Response and New Tribal Responsibilities	220

Sec.	Page
D. The Era of Self-Determination (1961–Present)—Continued	
4. The Supreme Court and the Modern Indian Rights Movement.....	224
<i>Morton v. Mancari</i>	225
Notes	230
5. The 21st Century Challenge: Shaping a New Era of Federal Indian Law and Policy Through Native Nation Building	239
Note.....	242
PART TWO. FEDERAL INDIAN LAW AND POLICY IN CON- TEMPORARY PERSPECTIVE	
Chapter Five. The Federal–Tribal Relationship	244
Sec.	
A. Tribal Property Interests	244
<i>United States v. Shoshone Tribe of Indians</i>	245
Notes	248
<i>Sioux Tribe v. United States</i>	249
Notes	252
<i>Montana v. United States</i>	253
Notes	257
<i>Tee–Hit–Ton Indians v. United States</i>	259
Notes	266
Note: <i>Tribal Property Rights, the Indian Claims Commission, and Contempo- rary International Human Rights Law</i>	267
<i>Case of Mary and Carrie Dann v. United States Case No. 11.140 (Judgment on the Merits)</i>	275
Notes	279
<i>County of Oneida v. Oneida Indian Nation</i>	280
Notes	289
<i>City of Sherrill, New York v. Oneida Indian Nation of New York</i>	290
Notes	295
Note: <i>Tribal Recognition</i>	299
Note.....	304
B. The Federal–Tribal Relationship as a Source of Federal Power	305
1. The Marshall Model of Indian Rights and Congressional Plenary Power in Indian Affairs	306
Robert A. Williams, Jr., <i>The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence</i>	307
Robert Laurence, <i>Learning to Live With the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams’ Algebra</i>	308
Robert A. Williams, Jr., <i>Learning Not to Live With Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live With the Plenary Power of Congress Over the Indian Nations</i>	310
Notes	311
2. Treaty Abrogation	313
<i>United States v. Dion</i>	313
Note: <i>Indian Treaty Abrogation and Congressional Intent</i>	319
C. The Federal–Tribal Relationship as a Source of Indian Rights	329
1. Executive Accountability Under the Trust Relationship	329
<i>Seminole Nation v. United States</i>	329
Notes	331
<i>United States v. Navajo Nation</i>	334
Notes	339

Sec.	Page
C. The Federal–Tribal Relationship as a Source of Indian Rights— Continued	
2. Executive Agency Conflicts in the Administration of the Federal Trust Responsibility to Indians	346
<i>Pyramid Lake Paiute Tribe of Indians v. Morton</i>	347
Notes	351
3. Congressional Accountability Under the Trust Relationship	355
<i>United States v. Sioux Nation of Indians</i>	355
Notes	365
Chapter Six. Tribal Sovereignty and the Challenge of Nation- Building	367
Sec.	
A. Customary and Traditional American Indian Legal Systems	368
B. Tribal Governments as Independent Sovereigns	373
<i>Talton v. Mayes</i>	373
Notes	374
<i>United States v. Wheeler</i>	376
C. The Contemporary Scope of Tribal Sovereignty Under the Indian Civil Rights Act	379
<i>Santa Clara Pueblo v. Martinez</i>	381
Notes	387
Note: <i>Santa Clara, Feminist Legal Theory, and the Definition of “Member- ship” in Native Nations</i>	389
D. Tribal Sovereign Immunity	394
<i>Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.</i>	395
Notes	398
E. Tribal Justice Systems in Historical and Cultural Context	403
1. Tribal Courts in the Modern Era: Origins, Growth and Develop- ment	403
<i>Williams v. Lee</i>	405
Notes	407
2. Tribal Courts in the Contemporary United States Legal System ...	408
<i>Native Nation Courts: Key Players in Nation Rebuilding</i>	408
Notes	410
3. Tribal Court Decision Making in Modern Tribal Legal Systems ...	410
a. The Preservation and Restoration of Tribal Customs and Traditions in Tribal Common Law	411
<i>Raymond D. Austin, ADR and the Navajo Peacemaker Court</i>	412
<i>In the Matter of the Appeal of Lee</i>	414
Notes	417
<i>Village of Mishongnovi v. Humeyestewa</i>	421
Notes	425
b. Alternative Tribal Dispute Resolution Mechanisms: Peacemak- er Courts and Sentencing Circles	426
<i>Nancy A. Costello, Walking Together in a Good Way: Indian Peace- maker Courts in Michigan</i>	426
Note	428
c. The Rise of “Intertribal Common Law”, or a Tribal Law for Nonmembers?	429
<i>Matthew L.M. Fletcher, Toward a Theory of Intertribal and Intratri- bal Common Law</i>	429
Notes	431

Sec.	Page
E. Tribal Justice Systems in Historical and Cultural Context—Continued	
d. The Special Challenge of Litigating the Indian Civil Rights Act in Tribal Courts	432
Notes	433
<i>Note: On Sex and Race Based Laws in Indian Country</i>	434
4. Tribal Constitutions	440
5. Tribal Code Development	443
<i>Wenona T. Singel, Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule</i>	443
<i>Note</i>	445
Chapter Seven. Tribal Sovereignty and Jurisdiction: Congressional and Judicial Recognition and Limitations	447
Sec.	
A. The Arena of Federal and Tribal Jurisdiction: “Indian Country”	448
1. Litigating “Indian Country”: Reservation Diminishment and Disestablishment	448
<i>Solem v. Bartlett</i>	451
Notes	456
<i>Note: Demographics and the Disestablishment and Diminishment of Indian Reservations</i>	459
<i>Note: Land in Trust as Ensuring Tribal Jurisdiction</i>	463
<i>Carcieri v. Salazar</i>	465
Notes	470
B. Federal Criminal Jurisdiction	470
1. The Indian Country Crimes Act, 18 U.S.C. § 1152	472
Notes	474
2. The Major Crimes Act, 18 U.S.C. § 1153	474
<i>United States v. Antelope</i>	477
Notes	479
3. The Assimilative Crimes Act, 18 U.S.C. § 13	480
Notes	482
4. An Analytical Approach to Criminal Jurisdiction in Indian Country	483
<i>Note on the Indian Status of Major Crimes Act Defendants</i>	487
C. “Public Law 280”—A Congressional Transfer of Jurisdiction to Some States	488
<i>Carole E. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians</i>	489
Notes	494
<i>Bryan v. Itasca County</i>	496
Notes	501
<i>Carole Goldberg-Ambrose, Public Law 280 and the Problem of Lawlessness in California Indian Country</i>	502
Notes	504
D. Judicially-Imposed Limitations on Tribal Jurisdiction in Indian Country	505
1. Implied Limitations on Tribal Criminal Jurisdiction	506
<i>Oliphant v. Suquamish Indian Tribe</i>	506
Notes	512
<i>United States v. Lara</i>	517
Notes	527
2. Implied Limitations on Tribal Civil Regulatory Jurisdiction	528
<i>Montana v. United States</i>	528
Notes	531

	Page
Chapter Eight. Tribal and State Conflicts Over Civil Regulatory and Adjudicatory Jurisdiction	532
Sec.	
A. Civil Adjudicatory Jurisdiction in Indian Country.....	532
1. Suits Against Tribal Members.....	532
<i>Note: Personal Jurisdiction and State Service of Process in Indian Country</i>	534
2. Suits Against Non-Members of the Tribe.....	537
<i>National Farmers Union Insurance Companies v. Crow Tribe of Indians</i>	538
<i>Notes</i>	542
<i>Note: The Supreme Court's Application of the Montana Rule to Tribal Jurisdiction</i>	546
<i>Strate v. A-1 Contractors</i>	551
<i>Notes</i>	557
<i>Nevada v. Hicks</i>	558
<i>Notes</i>	570
<i>Plains Commerce Bank v. Long Family Land and Cattle Co.</i>	572
<i>Notes</i>	583
<i>Note: Enforcing Tribal Court Judgments in State and Federal Courts</i>	586
B. Taxation and Regulation.....	588
1. Tribal Authority to Tax and Regulate in Indian Country.....	589
<i>Merrion v. Jicarilla Apache Tribe</i>	589
<i>Notes</i>	594
2. State Authority to Tax in Indian Country: The Scope of Federal Preemption Over Reservation Economic Development.....	596
<i>Note: Preemption in Indian Law</i>	601
<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i>	605
<i>Note</i>	612
<i>Note: Tribal Sovereign Immunity and Enforcing the Collection of "Concededly Lawful" State Taxes From Non-Members of the Tribe in Indian Country</i>	613
<i>Wagnon v. Prairie Band Potawatomi Nation</i>	618
<i>Notes</i>	626
3. State Taxation of Land and Natural Resource Development in Indian Country.....	628
<i>Montana v. Blackfeet Tribe of Indians</i>	628
<i>Notes</i>	630
<i>Note: Resolving Jurisdictional Disputes by Cooperative Agreement</i>	634
C. Federal Environmental Regulation in Indian Country: Treating Tribes as States.....	635
1. The Clean Air Act.....	637
2. Clean Water Act.....	639
3. Resources Conservation and Recovery Act.....	641
4. Other Federal Environmental Statutes.....	642
<i>Note: Fulfilling Trust Responsibilities Over Indian Lands</i>	645
D. Judicial Jurisdiction by Congressional Statute: The Indian Child Welfare Act of 1978.....	647
<i>Barbara Ann Atwood, Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance</i>	648

	Page
Sec.	
D. Judicial Jurisdiction by Congressional Statute: The Indian Child Welfare Act of 1978—Continued	
<i>Matthew L.M. Fletcher, The Origins of the Indian Child Welfare Act: A Survey of the Legislative History</i>	650
<i>Mississippi Band of Choctaw Indians v. Holyfield</i>	654
Notes	659
Note: Judicially-Created Common Law “Exceptions” to the Application of ICWA	661
 Chapter Nine. The Nation-Building Challenge: Federal Indian Law and Reservation Development	665
<i>Stephen Cornell, Sovereignty, Prosperity and Policy in Indian Country Today</i>	666
Notes	673
 Sec.	
A. Managing the Resources of the Reservation	677
1. Land Leasing in Indian Country	677
<i>Reid Peyton Chambers & Monroe E. Price, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands</i>	678
Notes	679
2. Mineral Development	683
Notes	685
Note: <i>Problems in Federal Management of Indian Mineral Resources and Revenues</i>	691
3. Timber Management	693
Note: <i>Federal Income Taxation of Reservation Enterprises</i>	696
4. The Role of Tribal Sovereignty in the Management and Control of Reservation Resources: A Case Study on Indian Tribes and the Endangered Species Act	697
<i>Testimony of Ronnie Lupe, Chairman of the White Mountain Apache Tribe Prepared for the U.S. Senate Committee on Environment and Public Works Subcommittee on Drinking Water, Fisheries and Wildlife</i>	699
Note	702
<i>Statement of the Relationship Between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service</i>	702
Note: <i>The Secretarial Order on “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”</i>	704
Note: <i>The Role of Federal Indian Law in Reservation Economic Development</i>	706
B. Indian Gaming	708
1. The Supreme Court’s Application of Public Law 280’s Regulatory-Prohibitory Distinction	709
<i>California v. Cabazon Band of Mission Indians</i>	709
Notes	714
2. The Congressional Response to Cabazon: the Indian Gaming Regulatory Act	715
<i>Matthew L.M. Fletcher, Bringing Balance to Indian Gaming</i>	717
Notes	721
 Chapter Ten. Indian Religion and Culture	727
Sec.	
A. Protection of American Indian Sacred Lands and Sites	728
<i>Lyng v. Northwest Indian Cemetery Protective Association</i>	728
Notes	737
Note: <i>Federal Regulatory Responses to Protection of Indian Sacred Sites on Public Lands: The Move Toward Tribal Consultation</i>	738

Sec.	Page
B. Protection of American Indian Religious Practices and Beliefs.....	746
<i>Employment Division, Department of Human Resources of Oregon v. Smith</i> ...	746
Notes	752
C. Protection of American Indian Cultural Resources.....	758
1. The Native American Grave Protection and Repatriation Act (NAGPRA)	758
2. The National Museum of the American Indian Act.....	760
3. The Archeological Resources Protection Act	760
4. Other Federal, State, and Tribal Laws Protective of Indian Cul- ture.....	761
Note.....	762
5. Intellectual Property Rights.....	763
Note.....	764
Chapter Eleven. Water Rights	766
Sec.	
A. Water Law in the West	768
<i>Harold A. Ranquist, The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water</i>	768
B. Nature and Extent of Indian Reserved Water Rights.....	771
<i>Winters v. United States</i>	771
Notes	773
<i>Arizona v. California</i>	775
Notes	779
<i>United States v. Adair</i>	783
Notes	790
C. Quantification	793
1. Jurisdiction	793
<i>Colorado River Water Conservation District v. United States</i>	793
Notes	798
2. Adjudication	801
<i>In re General Adjudication of All Rights to Use Water in the Big Horn River System</i>	801
Notes	808
Note: <i>Reservation Purposes and the Quantification Process</i>	810
3. Finality of Adjudication.....	814
<i>Nevada v. United States</i>	814
Notes	820
4. Non-Judicial Quantification	822
5. Marketing Tribal Water	830
D. Regulation and Administration of Water in Indian Country	832
<i>United States v. Anderson</i>	832
Notes	835
Chapter Twelve. Fishing and Hunting Rights	838
Sec.	
A. Regulation of On-Reservation Fishing and Hunting	840
<i>New Mexico v. Mescalero Apache Tribe</i>	840
Notes	846
Note: <i>Cooperative Wildlife Management Agreements</i>	847

Sec.	Page
B. Off-Reservation Fishing and Hunting.....	849
1. Pacific Northwest.....	849
<i>United States v. Winans</i>	850
<i>Note</i>	851
<i>Washington v. Washington State Commercial Passenger Fishing Vessel Association</i>	857
<i>Notes</i>	866
2. Great Lakes.....	869
<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i>	874
<i>Note: Interpretation of Indian Treaty Language</i>	883
 PART THREE. THE FRONTIERS OF INDIGENOUS PEOPLES RIGHTS 	
Chapter Thirteen. Rights of Alaska Natives and Native Hawaiians.....	887
Sec.	
A. Alaska Natives: Looking Forward to the Past?.....	888
1. Historical Background.....	888
2. The Alaska Native Claims Settlement Act.....	889
3. Native Lands in Alaska.....	893
<i>Alaska v. Native Village of Venetie</i>	893
<i>Notes</i>	896
4. Alaska Native Self-Governing Rights and Status.....	897
<i>John v. Baker</i>	899
<i>Note</i>	903
5. Native Culture and Subsistence Rights.....	904
<i>Note: Survival of Alaska Native Subsistence Rights Under ANILCA and Alaska State Law</i>	905
B. Hawaii: Islands of Neglect.....	909
1. Historic Claims and Contemporary Wrongs.....	910
2. Native Rights Under Hawaiian Common and Statutory Law.....	917
<i>Public Access Shoreline Hawaii (PASH) v. Hawai'i County Planning Commission</i>	917
<i>Notes</i>	926
3. Enforcing Native Rights Under Federal Legislation.....	928
<i>Day v. Apoliona</i>	928
<i>Notes</i>	933
4. Native Hawaiians as Native Americans.....	936
<i>Rice v. Cayetano</i>	936
<i>Notes</i>	944
<i>Note: Toward Federal Recognition of Native Hawaiians</i>	946
<i>Hawaii v. Office of Hawaiian Affairs</i>	949
<i>Notes</i>	951
 Chapter Fourteen. Comparative and International Legal Perspectives on Indigenous Peoples' Rights.....	 952
Sec.	
A. Native Law in Other Nations.....	953
1. Canada.....	953
<i>Douglas Sanders, Aboriginal Rights in Canada: An Overview</i>	953
<i>Notes</i>	955
<i>Guerin v. The Queen</i>	958
<i>Note</i>	963

Sec.	Page
A. Native Law in Other Nations—Continued	
<i>Delgamuukw v. British Columbia</i>	963
Notes	972
Note: <i>Treaties or International Human Rights Law as More Effective Alternatives to Litigation for First Nations in Canada?</i>	977
2. New Zealand	980
<i>J.G.A. Pocock, Law, Sovereignty, and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi</i>	980
Notes	985
3. Australia	990
<i>Mabo v. Queensland</i>	990
Notes	999
B. Emerging Voices: Indigenous Rights and International Law	1004
1. The United Nations Human Rights System	1004
<i>United Nations Declaration on the Rights of Indigenous Peoples</i>	1004
Notes	1010
Note: <i>Article 27 of the International Covenant on Civil and Political Rights and Indigenous Peoples' Human Rights</i>	1012
2. The Inter-American Human Rights System	1015
<i>The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System</i>	1015
Notes	1021
<i>Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua</i>	1022
Notes	1028
INDEX	1033