**Federal Indian Law Outline**

**Introduction**

**Chapter 1: Indians and Indian Law**

1. **Defining Indian Law**

**Federal Common Law:**

* Supreme Court case law
* You can break it down to three core areas: (1) to what extent are Indian tribes still sovereign; (2) Fed gov power over tribes; (3) jurisdiction
* The nature of Fed gov’s obligations: Federal trust responsibility – founded on biased notion that Europeans are Superior

1. **Sovereignty**

* Tribal Sovereignty today: Complicated – because of fed crts. Before if a crime was committed on Indian land feds/state had no jurisdiction. Then non-Indians started trouble. Then they started limiting sovereignty on their own lands.
* **Tribes are domestic dependent nations not foreign nations**
* **While tribes have sovereignty it is only to the extent that Congress allows**

1. **Indians Today**

* 500+ tribes in the US, 200 in Alaska
* Since 1970s Congress has allowed for more recognition of tribes
* **Cherokee** and **Navajo** are the largest but most tribes have about 150 members
* **Tribal members decide who is in the** **tribe** – most of them have done this via blood based criteria. Tribes are trying to move back to the old norm which relies on ties with the communities rather than the blood line. **Supreme Court: rule is that it is up to the tribe.**
* Economic Conditions and Health: grim, impacts of casinos limited in preventing this. Indian tribes do not unite 🡺 they are separate tribes first, Indians second.
* Defining what a tribe is can be difficult – some are not recognized – If they can show enough continuity in their history they might be able to get recognized but it is a difficult task.

**Natural Resources**

* Indians w/ treaties reserved water rights – including fishing and hunting
* In 1970s a bunch of Indians were arrested for fishing without a license but the Supreme Court said the only way you can restrict their use of usual and accustomed places is for environmental conservation – Indians can even use your backyard
* When tribes don’t have this in their treaty the issue is whether they have an aboriginal right?
* Hunting and gathering issues – pesticides in gathering and extent to which areas are traditional hunting grounds

1. **Perspectives of Indian Law P.29**

**Common perspective:**

* Felix Cohen: argued that Native Americans were the canary in the coal mine when you look at American democracy – he compared them to Jews in Nazi Germany. How do you deal with the concept of tribalism in a multi-cultural democracy? Tribes don’t vibe with the melting pot idea.
* Wilkinson: History of racism and cultural bias. Thinks a new base needs to be developed and the old doctrines thrown out.

**Part 1: The History of Federal Indian Law and Policy**

**Chapter 2: The European Doctrine of Discovery and American Indian Rights**

1. **English Framework**

* **Primary goal** = economic – competition w/ Spanish crown. **Secondary Goal:** Legal and Religious enterprise
* **Oxford Treatise**: it was ok to take land from Indians because they were “hideous” and “ate human flesh”
* ***Calvin’s case***: Scotsman who was considered foreign wanted to be heard in English court – in Dicta they say if you are **not Christian your land can be taken by Christians**
* **English outnumbered**: engage in practice of treating Indians as if they owned the land 🡺 they make treaties.
* **Winthrop: 2 Rights: (1) natural and civil. Both are god given.** 2 Justifications: Indians possessed land that was vacuum domicilium and so they possessed it only by natural right which is not valid. Christians (1) occupy the Earth, increase and multiply; (2) God must have meant for us to do this since the Natives are all dying off - Book suggestion: “How the Natives Lost their Land”
* **Who can buy land?** Before the revolution land speculators were told to buy land from Indians – after the Articles of Confederation, only the US can sell to the Indians unless it is within one of the Colonies’ territory – Dec of Independence puts an end to this
* **French-Indian War** – England strikes a deal and says that they won’t settle past Appalachians

1. **US Colonizing Legal Theory**

***Johnson v. McIntosh* - 1823**

* Washington and others were going out and speculating on lands disobeying the Proclamation
* Dude purchases a huge size of land – The US later decides they should own the land and they decide to sell it to someone else
* Facts of the Case: It was a scam. The attorney hired by the plaintiffs went out and handpicked the plaintiffs and defendants and drafted an agreed upon statement of facts – etc.
* **Marshall’s moral justification:** “superior genius of Europeans bestowing on Indians” benefits of Christianity – basically manifest destiny
* **Indians only have the right to occupy** – the US gets this power from (1) the Crown (British and French) and (2) Conquest (keep in mind that a vast majority of native lands were not acquired by conquest – either unoccupied or treaties).
* **Other justifications:** (1) Leaving land to Indians means to leave it to wilderness; (2) for native Americans their occupation was war – they were fierce savages
* **Effects of this decision:** Indians lose their sovereignty: US is a settler state – (1) they create myths about natives; (2) they don’t adapt to homeland – leaves no room for natives The Natives did get rid of competing settlers but were then obliged to deal with US government
* **Key aspect** is the transfer of Indian title and concept of diminished sov. The concept of Indian right of occupancy – you can only sell to discovering sovereigns; unless the sov recognizes your title they can take them –Right to occupy has no legal definition and is super ambiguous. Basically the Indians had no right to sell the lands in the first place

***Mabo v. Queensland -* Australia**

* Issue same as *McIntosh*
* Aus high Court on the nature of native title: They go in a different direction –To conserve title the Natives had to conserve their laws and customs
* Difference w/ aborigines = The crown had taken active steps to extinguish title of aborigines
* 1st: they say that the old cases were racist and that by mere discovery common law title was not obtained – they have to do something affirmative with the land – give it to farmers, build schools, build other public buildings
* They say native title still exists out of their original sov and is not extinguished unless it is clear that the Aus state has done so.

**Chapter 3: The Federal-Tribal Treaty Relationship: the Formative Years**

1. **Colonial Era Origins**

**Broad Principles of the Marshall Trilogy:**

* (1) Congress exercises plenary power over Indian Affairs; (2) Indians tribes retain inherent sovereign powers (though diminished) over their internal affairs and reservation territory; (3) the US possesses a trust responsibility toward Indian Tribes; and (4) Courts should interpret treaties liberally in favor of the tribes

***Dorothy v. Jones* - British Colonial Indian Treatise: p.75**

* Dvlpmt of new body of diplomacy
* In 1822: conversation b/w head chief of Pawnee Tribe w/ President James Monroe saying they had all they needed as long as they keep their people off their land. Then 50 years later they are kicked off their land
* Native Americans did not view these diplomatic treaty relationships the same was USA did – they were a ritual act – It was sacred and was a trust and if you broke it you had the wrath of god falling on you – you became relatives – These kinds of treaties existed b/w tribes and were used as a form of survival. Europeans didn’t view them the same way. When Europeans became to dominate the Europeans began using the treaties to avoid bloodshed
* There are two key symbols that flowed from this – the peace pipe and wampum (bell on the collar?)

1. **The Founders’ First Indian Policy: The Savage as the Wolf**

**Question:** Do they uphold the 1763 proclamation the Brits did?

1. **Establishing Federal Policy: George Washington to James Duane: 1783 - p.87 (on exam)**

* In these early docs you see the beginning of using state power to wage war against native inhabitants – ethnic cleansing driven by the state
* View of colonist: they couldn’t afford war with tribes – far more effective to use peaceful means
* They also knew from the past 100 years’ experience that time was on their side
* Racist metaphor – “Savage as a wolf” – Stereotype that Indians are wild
* Fed Gov gets monopoly on Settlement
* Albert Memmi’s essential elements for racist attitude p.46 apply to Washington: (1) Imaginary Differences: they are viewed as savages – racist myth is built out of the real fact that Indians were hunter gatherers; (2) Assigning Values to the differences; (3) Generalizations; (3) Justifying aggression
* Washington’s recommendations, influenced by the British Proclamation of 1763, were adopted almost immediately and virtually unaltered I a set of reports prepared by the Congress’s Select Committee on Indian Affairs. A formal Proclamation was issued by the Congress prohibiting unauthorized settlement or purchase of Indian Lands.
* **These policies and recommendations established the framework for US Indian treaties and the Trade and Intercourse Act and the underlying principles were embedded in the federal-tribal relationship**

1. **Implementing the Washington Recommendations**

**Treaty of Hopewell – First real treaty**

* Between the US and the Cherokee
* **Crossing boundaries:** Art V & VII: V: Congress agreed that if any white people settled on their land they could deal with it as they saw fit but if a non-Indian (VII) did something they had to bring them to the US courts 🡺 pragmatic solution article V: let them kill settlers so they don’t have to deal with it. 🡺 VII: racist belief that white people don’t get a fair deal in Indian judgments
* **Trade:** Art 9: Congress regulates the trade – next year they passed their first non-intercourse Act 🡺 flows out of the Commerce Clause (Look up it will be on the test – Indian Commerce Clause – it is what gives Congress Power over commerce w/ Indians)
* **Border line:** An underlying promise implicit in the boundary-line policy implemented by congress in the early Indian treaties was that the Indian Reservations created temporary boundaries. Washington suggested in his 1783 recommendations to Congress that the pressures of advancing white settlement on the frontier would drive the Indians westward.

1. **The Trade and Intercourse Act**

**Introduction:**

* Western Boundary was impossible to enforce – whites’ attitude of cultural superiority
* The Trade and Intercourse Act: Short hand for saying Fed Crts decide who gets to engage in trade with Indians

**Trade and Intercourse Act: 6 Key elements of American Indian Policy – p.91**

* (1) **Protection of Indian rights to their land** by setting definite boundaries for the Indian Counry, restricting the whites from entering the area except under certain controls, and removing illegal intruders
* (2**) Control of the disposition of Indian Lands** by denying the right of private individuals or local governments to acquire land from the Indians by purchase or by any other means
* (3) **Regulation of the Indian trade** by determining the conditions under which individuals might engage in the trade, prohibiting certain classes of traders, and actually entering into the trade itself.
* (4) **Control of liquor** **traffic** by regulating the flow ointo the Indian Country and then prohibiting it altogether
* (5) **Provision for the punishment of crimes committed by members of one race against another** and compensation for damages suffered by one group at the hands of the other, in order to remove the occasions for private retaliation which let to frontier battles
* (6) **Promotion of civilization and education among the Indians**, in the hope that they might be absorbed into the general stream of American society
* Some States continued to trade with Indians after the non-intercourse acts (NY, Maine, CN …). In the late 1960s Lawyers realized there was no statute of lim on these acts and challenge that the Ny and Maine and CN lands were illegally taken and there were no legal theories to stop them. There was a lot of opposition. The claims were resolved by a 1980 Congressional settlement negotiated among the tribes, the State of Maine, and the affected private landowners.

1. **Removal**
2. **Justification for Removal**

* Before people would settle against a treaty and then Congress would condemn it and then renegotiate
* Close of 18th Century: removal of eastern tribes beyond the Mississippi was already being proposed as a final solution to the Indian problem (p.94-95: Old farts justifying removal)

1. **The Cherokee Cases**

**Background:**

* White Invasion in Cherokee Lands: Treaty with Cherokee not being respected (G.W. complains – p.96)
* Large tribe – serious military power and treated as such. Original political org was in towns – elect chiefs for different purposes. European impact – East Cherokee began farming (deforestation; depletion of game)
* Instead of applying **the Treaty of Hopewell** the US negotiated the **Treaty of Holston** w/ Cherokees in 1791 where more land was ceded to the US
* **1802 Georgia Compact** (deal to enter country):Georgia wanted the Fed Gov to extinguish all title to Indian land within Georgia – was never enforced but GA began trying to relocate Indians. Some voluntary relocation via treaties. One requirement was extinguishment of all Indian title to land but Cong couldn’t do that b/c of treaty with Cherokee**.** They held on until Andrew Jackson became president:
* By 1820s vast majority of Cherokee were farming, wearing European clothes and inter-marrying; they had a constitution, a legislative body, an executive and a court
* 1829 Georgia Gold Rush – Game changer for Cherokees
* **The Remedy** was to breach the Cherokees’ treaty and forcibly remove them across the Mississippi River. In 1830, Georgia Governor Gilmer rationalized the removal policy – Treaties were just a trick to get the Indians to cede to whites their god given rights to land (quote p.98)
* **The Removal Act:** passed by Congress in 1830: Basically President can designate and subdivide lands west of the Mississippi to remove Indians to. Also promises that those lands will forever remain in Indian hands. Text p.98

***Cherokee Nation v. Georgia*- Important foundational case of Federal-Tribe relationship**

* **Background:** In 1826 GA passed a law closing their state courts to Cherokees a ruling said that if a tribe became small enough state law applied. GA was well aware they did not have jurisdiction – they knew they were gona lose so as soon as the attorney filed an appeal they lynched the lawyer – appeal was granted. Cherokee Chief: John Ross (Guwisguwi – Rare Bird). Fought under Andrew Jackson and in 1812 founded Chattanooga, TN. He took a delegation to Congress and failed
* **Issue:** Georgia’s breach of US-Cherokee Treaty
* **Underlying Issue: Does SCOTUS have Jurisdiction. Are Indians Tribes foreign nations under the Constitution?**– Art III S2: SCOUTS jurisdiction in cases b/w“… between a state, or the citizens thereof, and foreign states, citizens or subjects”
* Cherokee say they are a foreign state, it is their only option at getting Sup Crt Jurisdiction
* Justice Marshall calls them **Domestic Dependent Nations**: (1) they occupy a territory that the US asserts independent title over. (2) They look to the government for protection; (3) state of pupilage; (4) an attempt at taking Indian land would be considered hostile.
* He uses **Indian Commerce Clause** – Indian Tribes are separate from foreign nations – **Contradistinguishing language**
* **Marshall:** “The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of the opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.”
* **Baldwin & Johnson Concurrence:** Indians don’t have sovereignty – Hopewell Treaty 🡺 they were at the mercy of the US – they were just conceding stuff. Reflects prevailing racist view.
* **Dissent**: weak state doesn’t cease being a state – cited Vattel: 3 elements: (1) united for mutual benefit; (2) made decisions as a group; (3) were not dependent on foreign power
* Justices were divided (4) may be a tributary or feudatory state and still sovereign
* Where could Cherokees sue?
* What is sovereignty? It is an ever moving target. Vattel at the time laid it out: (1) territory; (2) authority - Relations with other states doesn’t affect that. Overtime a population idea is inserted (doesn’t come up in these cases)

***Worcester v. Georgia***

* 7 missionaries violate GA state law and refuse to get permits to live on Cherokee land – sentenced to 4 years of hard labor
* GA doesn’t show up to Supreme Court
* **Marshall: expounds upon ideas of what a domestic dependent** **nation** is
* He says they are **distinct political communities**
* **Two Constitutional Ideas**: (1) Indian Commerce Clause and (2) the Power to make Treaties
* Issue of Tribes’ Self Governance
* **Marshall on the Treaty of Hopewell: “It’s essential articles treat the Cherokee as a nation”:** (1) the language of the Treaty of Hopewell is bases on a Congressional attempt to receive from Indians the same respect they gave the king of England; (2) Protection of Cherokee by US (“does not imply the destruction of the protected); (3) Punishment for citizens of one country harming those of the other: means US considered Cherokees as a nation; (4) They did not surrender their self-governance: they did not think they divested themselves of the right to self-governance on subjects not connected with trade
* **Treat of Holston doesn’t undermine this, it is just about protection**
* **3 Concepts laid out by Marshall:** (1) Tribal sovereignty; (2) Federal law can preempt state law; (3) Trust Doctrine. 🡺 Why didn’t he take the rights of tribes? Lay the groundwork for the federal government’s power over the states; Christian philosophy; respect for treaties (supremacy).
* **Sovereignty: Not Sov in Constitution as relates to land conveyance, only in internal governance in relation to the states**
* McLean Concurrence: Crts get to decide when a Tribe doesn’t exist – line of reasoning was rejected, only Congress can make that decision

[**Other Case Brief]**

* **Facts of the Case**. In September 1831, Samuel A. Worcester and others, all non-Native Americans, were indicted in the Supreme Court for the county of Gwinnett in the state of Georgia for "residing within the limits of the Cherokee nation without a license" and "without having taken the oath to support and defend the constitution and laws of the state of Georgia." They were indicted under an 1830 act of the Georgia legislature entitled "an act to prevent the exercise of assumed and arbitrary [power](http://www.oyez.org/cases/1792-1850/1832/1832_2) by all persons, under pretext of authority from the Cherokee Indians." Among other things, Worcester argued that the state could not maintain the prosecution because the statute violated the Constitution, treaties between the United States and the Cherokee nation, and an act of Congress entitled "an act to regulate trade and intercourse with the Indian tribes." Worcester was convicted and sentenced to "hard labour in the penitentiary for four years." The U.S. Supreme Court received the case on a writ of error.
* **Question**Does the state of Georgia have the authority to regulate the intercourse between citizens of its state and members of the Cherokee Nation?
* **Holding:** No. In an opinion delivered by Chief Justice John Marshall, the Court held that the Georgia act, under which Worcester was prosecuted, violated the Constitution, treaties, and laws of the United States. Noting that the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union," Chief Justice Marshall argued, "The Cherokee nation, then, is a distinct community occupying its own territory in which the laws of Georgia can have no force. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." The Georgia act thus interfered with the federal government's authority and was unconstitutional. Justice Henry Baldwin dissented for procedural reasons and on the merits.

**Removal:**

* **Modern Courts rely on *Worcester*:** However the trend has been away from the idea of inherent Indian Sov as a bar to state jurisdiction and toward a reliance on Fed Preemption
* GA had already started removing people when other states began
* 30 tribes relocated to OK
* Last Cherokees to be removed in 1838 – lots would die on the trail of tears

**Legacy:**

* What legal theories could have been better? Treat them as Foreign States – One thing is they could have been incorporated into the Constitution – Fit them in the Federal Puzzle

1. **The Status of Indian Treaties in US Law**
2. **Canons of Construction:**

**Generally:**

* After 1815, US Indian policy became necessarily responsive to the westward expansion – p.128
* The Courts have been liberal in recognizing the existence of Indian Treaty rights in those instances when they are not clearly states in the treaty
* Origins: End of the War of 1812: Indians have less leverage because the English are gone. 2 choices for natives: get overrun or move west
* **Barriers to treaties/dishonest practices**: language barrier, threats, coercion, settlers would appoint representatives who didn’t really represent the tribe (often bribed or coerced). US never honored the treaties. US did receive benefits from treaties: land w/o armed conflict
* These inequalities brought upon the canons of construction in interpreting Indian Treaties
* **Three primary rules have been developed:** (1) ambiguous expressions must be resolved in favor of the Indian parties concerned; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of Indians
* **Example:** the treaty phrase “to be held as Indian lands are held” also reserved hunting and fishing rights to the Indians. Language was interpreted as reserving to the Indians the right to fish at the usual and accustomed places.

***Winters* doctrine:**

* Attempt to interpret what tribes reserved when they reserved their lands
* **Doctrine:** **implicit in the treaties is that they have water rights sufficient to fulfill the purpose of their reservation –purpose is that Indian tribes continue to exist so they have water rights for future uses**
* **2 other important aspects:** (1) their water rights trump everybody else’s; (2) purpose = continued existence

***US v. Washington***

* Involves fishing rights**.** State was trying to regulate when tribal members could fish
* **Key Language of the treaty**: right of taking fish, at all the usual and accustomed grounds and station in common w/ the citizens of the state
* **Washington argues** that “in common” means the exact same rights as Washington citizens – but no dice treaties trump state laws and that interpretation renders the treaties null
* Chinook was used for the treaties, it was a very simple trade jargon
* Historical use of salmon was a major thing – case mentions salmon based ceremonies (first salmon ceremony)
* “in common with the citizens of the territory”: Crt says in common means they get 50% - it raises a question of whether you have a treaty reserved right to have fish in the water
* **Specifically, the court held tha**t, when the tribes conveyed millions of acres of land in Washington State through a series of treaties signed in 1854 and 1855, they reserved the [right](http://en.wikipedia.org/wiki/Treaty_rights) to continue [fishing](http://en.wikipedia.org/wiki/Fishing). For example, the [Treaty of Medicine Creek](http://en.wikipedia.org/wiki/Treaty_of_Medicine_Creek) (1854) mentions that "the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory". Most of the treaties negotiated by [Territorial](http://en.wikipedia.org/wiki/Washington_Territory) Governor [Isaac Stevens](http://en.wikipedia.org/wiki/Isaac_Stevens) included very similar language.
* The court looked at the [minutes](http://en.wikipedia.org/wiki/Minutes) of the treaty negotiations to interpret the meaning of the treaty language "in common with" as the United States described it to the Tribes**, holding that the United States intended for there to be an equal sharing of the fish resource between the Tribes and the settlers.** As the court stated, the phrase means "sharing equally the opportunity to take fish...therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish...and treaty right fishermen shall have the opportunity to take up to the same percentage".

***State v. Tinno***

* Even though tribe only has hunting rights the court concludes that the tribes understood this as fishing rights as well

Congress changes treaties unilaterally after negotiation:

* Plenary power allowed them to do this

***US v. Winans***

* **Issue:** access to usual and accustomed grounds when they are owned privately by the white
* The lower courts say the fishers own the land in fee, so no access
* The higher courts reverse – they say the treaty should be interpreted as the Indians understood them at the time
* **Treaty is a reservation of rights not granted from the Indians to the US** – they gave up the right to go to war, to negotiate w/ foreign nations, to block RR construction
* The use of the power at issue bears heavily on the importance of the right to the tribe and thus to what they understood
* The State attempted to use the equal footing doctrine to challenge the treaty – States got waters – they try and use that
* The Court observed that **the treaty foresaw the contingency of future ownership**, and secured the Indians’ rights and privileges both against the [United States](http://en.wikipedia.org/wiki/United_States) and its grantees and against the state and its grantees. Therefore, the grant of a license to operate a [fish wheel](http://en.wikipedia.org/wiki/Fish_wheel) gave the respondents no power to exclude the Indians from fishing. In other words, the [State of Washington](http://en.wikipedia.org/wiki/Washington_(U.S._state)) could not use [common law](http://en.wikipedia.org/wiki/Common_law) property rights to absolutely exclude the Indians from fishing on the [Columbia River](http://en.wikipedia.org/wiki/Columbia_River).
* Relying on its earlier decision in Shively v. Bowlby, 152 U.S. 1 (1894), the Court also dismissed the argument that the Indians’ treaty rights were subordinate to the powers acquired by the state upon its entry into the Union. The Court upheld the Indians' right of access to respondent's private property, thus protecting their privileges under the treaty.

**Results of *Washington***

* Elements of Indian reserved fishing rights 🡺 creates a perpetual easement over those lands
* Limits state police power over WL

**Chapter 4: Centuries of Shifting Law and Policy**

**Congress and Indians Wars**

* Up until the 1890s there were hundreds of small Indian wars
* 1864: Sand Creek Massacre (160 people murdered) – Peace was forfeited with Cheyenne
* 1878-79: Cheyenne Exodus
* Lost Cattle – you get compensation if Indians not at war
* But Congress didn’t declare war on any Indian tribe –
* Federal Courts are divided on what it means to be at war
* Alternative to the Marshall approach – if it isn’t the doctrine of discovery than t is pure conquest

1. **Allotments and Assimilation**
2. **Introduction**

**Allotments and Assimilation (1871 – 1928)**

* **Late 19th: Congress expanded** its exercise of legislative powers to keep order in Indian Country, to protect Indians from hostile non-Indians, and otherwise to legislate for the “national interest”
* Enactment of the allotment policy and its accompanying assimilationist efforts brought new notions of what was necessary for the “benefit of tribes”
* Federal agencies are forcing the dependence of tribes by making them live on shitty lands
* They are starving, diseased and more and more dependent on the Fed Gov
* **Allotment policy**: convert them from hunters to farmers and eradicate their culture and sell surplus lands to settlers - Based on **plenary power of Congress**
* The Bureau of Indian Affairs took unprecedented control of everyday life, seeking to squeeze out Indian government, religion and culture. Tribal lands were carved up and parceled out to individual Indians who were to be converted from hunter gatherers to farmers.
* Surplus lands were sold for non-Indian settlement – loss of about 2/3 of all Indian lands

1. **“Civilizing” the Indian: the BIA and the Reservation System**

* Reservations created as “best means of civilizing the Indian” **–** Physically forced on Reservations so that “Christian agents and teachers could help them assimilate the white man’s culture” p.143

**Reports from Commissioners of Indian Affairs**

* **Report by Medill** P.144: Concept that Indian men were inherently lazy. That they had to stop the Indian chase. Gender roles: they try and reverse their gender roles to comply with European ones. Nature of reservations: they said they were temporary b/c the native would end up being civilized
* **Other ideas:** decreasing game

1. **Reforms and the end of Treaty Making**

* **1871: end of treaty making –** Power struggle between senate and house – Senate makes treaties and house pays – so they argued and that was it. Also the Indians were no longer viewed as sovereigns b/c their military power was no more
* **Executive Order Reservations –** Sup Crt say they have the same rights as treaty reservations – same thing for statutes relating to the tribes
* **Take away: Canons of Construction are still important but there are some severe limitations – e.g. tax canon of construction v. treaty canon 🡺 tax comes out winner**

1. **Expansion of the Federal Power over the Reservation**

***Ex Parte Crow Dog* 1883**

* represents one of the **SC’s strongest affirmations of the principle of tribal sovereignty** announced in the Marshall trilogy
* Defendant, an Indian, was convicted in a district court for the murder of another Indian from his same band and nation that occurred in Indian country.
* **D claims that** it was not an offense under US laws, and the district court had no jurisdiction to try him.
* **The Court said** that based on previous treaty construction, the laws of the US did not apply. And **absent a clear expression of the intention of Congress** to have them apply, they will not.
* **Court said** (p. 155), “They were nevertheless to be subject to the laws of the US, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the US, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society.”
* There would be a different political response had the Indian killed a non-Indian, b/c at this time it would be a noncitizen killing a citizen.
* **Absent congressional statute, crime of Indian v. Indian is a tribal matter. It is part of the 1828-1870 Dependent Domestic Nation idea**

**Major Crimes Act of 1885 (p.157)**

* Congress enacted this giving the US jurisdiction to try and punish murder and other serious crimes committed by Indians against other Indians on the reservation.
* Extended jurisdiction of Federal Courts to 7 serious crimes at the time….but now it covers much more
* **The passage of the MCA was consistent with the general trend of Indian policy**, the move from a policy based on treaty rights recognizing Indian sovereignty to one of dependency and forced assimilation.

***United States v. Kagama, 1886***

* Two Indians were indicted for murdering another Indian on the Hoopa Valley Reservation. This case comes after the MCA and they are prosecuted in Federal Court
* **Kagama challenged** **the MCA** as being outside of Congress’ law making powers.
* **The Court relies** on the powers granted to Congress in **the Commerce clause** to allow them to create such an act **-** “It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States.”
* “The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers is necessary to their protection, as well as to the safety of those among whom they dwell.”
* **Congressional power to control the Indians doesn’t come from an Enumerated Power in the Constitution; instead it is a combination of the Commerce Clause precedent and the ward guardian status.**

***United States v. Sandoval,1913***

* **This case overruled a district court decision** stating that a law making it a crime to introduce intoxicating liquor into Indian country was inapplicable to the New Mexico Pueblos.
* **The major issue** was whether the Pueblo lands were “Indian country” over which legislative authority of Congress extends. Because the Pueblos’ lands unlike reservations were owned communally in fee simple by the Pueblos.
* **The Court** determined that the US has a duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired and whether within or without the limits of a State.
* Congress is allowed to apply the prohibition to the lands of the Pueblo.

**Citizen Act of 1924:**

* Naturalized all “Indians born within the territorial limits of the United States.”

1. **The General Allotment Act**

* A few treaties had provided for the allotment of lands, meaning the conversion of some tribal land into parcels of land held by individual tribal members.
* **Allotment became a principal device** in the program to assimilate Indians at the same time as tribal lands were made available for non-Indian settlement. (Indian policy merged with Manifest Destiny)
* **General Allotment Act of 1887, or Dawes Act:**
* Vehicle Congress used to allot lands on most Indian reservation. About 41 million acres of former tribal land was allotted. Opened many reservations up to settlement by non-Indians

**Delos Sacket, “History of the Allotment Policy, Hearing On HR 7902, Before the House Commission on Indian Affairs.”**

* Allotment goes back to the basic idea of who owns the land, the US.US gives title to the land, 160 acres to each family head, 80 acres to each single person over 18, and 40 acres to single persons under 18.
* You could apply for the allotment, but less than 5% were applied for. A series of statutes gave the allotment, either through executive order or legislation.Theland was held in trust for 25 years and it prohibited sale, barter, or any levy of the land. No taxes for that 25 year period.

**John Collier, Memorandum, “The Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Hearings on HR 7902 Before the Senate and House Committees on Indian Affairs.”**

* Through sale by the Government of the fictitiously designated ‘surplus’ lands; sales by allottees after the trust period had ended; and through sales by the Government of heirship land: Indian land holdings was cut from 138,000,000 acres in 1887 to 48,000,000 acres in 1934.

**Ann Laquer Estin, “Lone Wolf v. Hitchcock: The Long Shadow, in the Aggressions of Civilization: Federal Indian Policy Since the 1880s**

***Lone Wolf v. Hitchcock***

* Creates idea of **PLENARY AUTHORITY/POWER.** Congress has plenary authority over the Indians. Congress hasabsolute authority within the confines of the granted power. So long as done in good faith
* **The scope or authorit**y with regards to tribes is political
* US was buying use rights of tribal land. Indian Commissioner David Jerome was given the task of getting a treaty formed to allow the US to purchase the land. And the treaty ended up giving the tribes 2 million dollars that was placed into an Indian trust fund for health care and education.
* **The Court determined** that Congress had authority to do this b/c they have full administrative power over Indian tribal property and they have plenary authority, which so long as it is based on good faith and no political bad faith is shown, it is ok. The power has always been with Congress to make treaties and since both parties agree, problems must be taken up with Congress – excludes States, Executive, and Judicial from getting involved

1. **Assimilationist Policies**

* Attempt to do away with Indian culture - Crow Dog, Kagama, and Lone Wolf all tried to resist this!
* The whole theory is that it would benefit the Indians by eliminating the reservations.
* Education became central to assimilationist thinking.

1. **The Period of Indian Reorganization (1928-1945)**

* The decisions in Kagama, Lone Wolf, and Sandoval, all stood for the idea that federal power would be exercised to supplant rather than secure the role of tribes as sovereigns.

1. **The Indian Reorganization Act of 1934: Design for Modern Tribal Governments**

* **Underlying Premise**: the forced assimilation of Indians through the Allotment Act legislation and related policies worked to destroy Indians as individuals and Indian communities.
* A tribe itself organized as a self-governing community was better equipped to deal with the outside influences of the dominant society

**Tribal Self-Government and the Indian Reorganization Act of 1934**

* Every section of the IRA in some way affects tribal self-government - several sections listed p. 190-192.
* **Under final Act**, the Secretary was empowered to review many actions of the tribal governments, and still retains close control over tribal governments.
* 2 year period tribes could accept or reject the IRA **-** 258 elections held, 181 tribes accepted, and 77 tribes rejected.
* IRA also applies to 14 tribes that didn’t hold elections.
* Within 12 years of accepting IRA: 161 constitutions were written, 131 corporate charters were adopted.
* A by-product of the IRA has been better control and management of tribal property.
* **Indian Reorganization Act (IRA) (1928 – 1946)**: Arriving from the New Deal type government that the government exists to help people**.** Eliminated allotments which insured that Indian land stayed with the tribe
* Restates that tribes cannot give land fee simple, but affords them a special status once again
* Land owned by an Indian or the tribe, or held in trust, could not be sold without approval of the Secretary
* Such land is also considered Indian Country

1. **The Contributions of Felix Cohen**

**Felix S. Cohen, “Handbook of Federal Indian Law”**

* **Reservation Idea:** “those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”
* Each tribal relationship with federal government as a sovereign power, recognized in treaties and legislation
* **Treaties and statutes** of Congress are looked to by courts as limitations or evidences of recognition of original tribal powers; **they are not a direct source of the tribal power**.
* It is often forgotten that the tribes were never defeated, they remain sovereign entities and can govern themselves

1. “**Two Edged Sword”**

* IRA starts with the idea that we didn’t directly conquer the Indians, but we are the superior of the two governments.
* sovereignty is a domestic dependent sovereignty **-** you retain sovereignty but there is always balance with Congress plenary authority

1. **The Termination Period (1945-1961)**

* **1949:** Hoover Commission called for complete integration of Indians should be the goal so that Indians would move into the mass of the population as full, taxpaying citizens.
* Now is repudiated, during this time hundreds of tribes were terminated.

1. **Passage of the Termination Program**

**Gary Orfield, “A Study of the Termination Policy**

* **House Concurrent Resolution 108** called for ending Federal supervision of Indian people as rapidly as possible.
* **Three things about Passage of 108**:(1)mixed support, there were some Indians that supported the termination of tribal government; (2) there were no academic experts that testified or wrote about what effects this would have on the socio-economic aspects of the tribes; (3) Arthur Watkins, chairman of Indian Affairs subcommittee in the Senate, was the driving force behind this: progress could come only by total removal of federal supervision.
* **There were many other programs** implementing the push toward rapid assimilation that had dramatic impacts on tribes that were not singled out for termination, like: **(1)** **Public Law 280:** passed in 1953 **-** Congress passed general legislation extending state civil and criminal jurisdiction into Indian country **-** California, Wisconsin, and Florida jumped on this right away; **(2) Sovereignty was effectively ended through different acts.** Ownership and trust relationship ended, state jurisdiction, judicial authority was imposed, exceptions from state taxation were removed, and government programs were discontinued

1. **The Effects of Termination: Some Rights Lost; Some Retained**

**Charles F. Wilkinson and Eric R. Biggs, “The Evolution of the Termination Policy”**

* 109 tribes and bands were terminated**;**  1,362,155 acres and 11,466 individuals were affected
* **Purpose of program** was to “free” Indians from federal supervision and to eliminate “restrictions deemed discriminatory” but it little to promote freedom or root out discrimination
* **Major Effects:** (1) fundamental changes in land ownership patterns; (2) trust relationship was ended**;** (3)state legislative jurisdiction was imposed**;** (4)state judiciary authority was imposed; (5) all exemptions from state taxing authority ended; (6) all special federal programs to tribes were discontinued; (7) all special federal programs to individuals were discontinued; (8) tribal sovereignty was effectively ended; (9) individual tribe members received checks for the value of their land.

***Menominee Tribe of Indians v. United States, 1968***

* Menominees were granted a reservation in Wisconsin by the Treaty of Wolf River in 1854, which said it was “for a home, to be held as Indian lands are held.” The Court interpreted that to include hunting and fishing rights. In 1962, Wisconsin prosecuted 3 Menominees for violating their hunting and fishing regulations stating that b/c of the Indian Termination Act of 1954, the Menominees were subject to Wisconsin law.
* **Court determined** that the tribe possessed hunting and fishing rights under the Wolf River Treaty, and that **those rights were NOT abrogated by the Termination Act of 1954**. Treaties are not considered diminished unless Congress specifically states as such.
* Any interpretation is done favorable to the Indians.

***Kimball v. Callahan*, (9th Circuit 1974)**

* *Kimball I*: 1974—cert. Denied
* Five members of the Klamath Tribe who withdrew under the tribe’s termination plan claimed they retained treaty rights of hunting and fishing free from state regulation on their former reservation land.
* **Court determined** that like Menominee the rights of the treaty were upheld, b/c they were not specifically abrogated in the Termination Act.
* Court refused to distinguish Menominee

1. **The Era of Self-Determination (1961-Present)**
2. **A Reaction to Termination**

* Tribes realized that more often than not, federal policy had been directed toward the destruction of tribalism
* Only tribal control of Indian policy and lasting guarantees of sovereignty could assure tribal survival in the US
* National Congress of American Indians (NCAI), created in the 40s**,** “supratribal” entity

1. **President Nixon’s Message to Congress**

* Message From the President of the US Transmitting Recommendations for Indian Policy
* Indian future is determined by Indian acts and Indian decisions
* **Goal**: “to strengthen the Indian’s sense of autonomy without threatening his sense of community.”
* **His Recommendations**: (1) Reject termination; (2) give Indians the right to control and operate Federal programs - provide monetary support from the federal government, but allow the Indian communities the privilege of self- determination allowing them to run the programs themselves; (3) Indian Education: every Indian community wishing to do so should be able to control its own Indian schools

1. **Congressional Response and New Tribal Responsibilities**

* **Indian Self-Determination and Education Assistance Act of 1975:** gives express authority to Secretaries of Interior and Health and Human Services to contract with, and make grants to Indian tribes and other Indian organizations for the delivery of federal services
* Reflects fundamental philosophical change!! Federal domination should end. Tribal programs are funded by government, but planned and administered by tribes themselves.
* **Indian Child Welfare Act of** 1978. Child custody cases involving Indian children defer heavily to tribal governments
* **American Indian Religious Freedom Act of** 1978. Not very effectivebut symbolically important acknowledgment of Indian religious tenets

1. **The** **Supreme Court as Defender of “Special” Indian Tribal Rights**

* Landmark decisions affirming tribal rights, consistent with Marshall trilogy

***Morton v. Mancari, 1974***

* Section 12 of the IRA provided an Indian preference, Indians shall have preference to appointment of vacancies in any positions in the Indian Office
* The BIA established the qualifications, was told to promote an Indian over a non-Indian
* Non-Indian employees of the BIA filed suit claiming that the ‘Indian Preference Statutes’ were repealed by the 1972 Equal Employment Opportunity Act, and it was a denial of their due process
* Court says it is not a racial preference for Indians; it is a substantive preference of the federal tribal relationship. Employment Criteria that is reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.
* Compared to the constitutional requirement that a US Senator must be an “inhabitant of that State for which he shall be chosen.”

**Part 2: Federal Indian Law and Policy in Contemporary Perspective**

**Chapter 5: the Federal-Tribal Relationship**

1. **Tribal Property Interests**

* Source of Indian Rights in property may be traced to aboriginal possession, treaty, agreement, statute, executive action, purchase, or action of a colony, state, or foreign nation.
* **If land holdings have been recognized or confirmed by Congress (which is different from the right of occupancy) the government must pay compensation if it takes recognized title away, but it doesn’t need to with an aboriginal title.**

***United States v. Shoshone Tribe of Indians*, 1938 - Property interest of Congressional grant**

* Shoshone Tribe brought suit to recover value of part of its reservation taken by the US by putting upon it, without the tribe’s consent, a band of Arapahoe Indians.
* The US appeals claiming that it is error to hold that the right of the tribe included the timber and mineral resources on the reservation.
* **SCOTUS determined** that the right of the Shoshone Tribe included the timber and minerals within the reservation, and they should be compensated for that value lost in the taking.
* **Where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe MUST be compensated if the lands are subsequently taken from them!!!**

***Sioux Tribe v. United States*, 1942 - Property interest of executive grant**

* In 1875 and 76, President issued executive orders setting aside four tracts of land for the use of the Sioux Tribe. He later withdrew the lands for public domain.
* **The issue** is whether the President had the power to bestow upon the Tribe an interest in the lands of such a character as to require compensation when the interest was extinguished by an executive order?
* **With no express constitutional or statutory authorization for President’s conveyance of a compensable interest…no compensable interest exists.**
* Only Congress grants the right to occupancy (which is compensable)
* Executive orders granting land are licenses, and are terminable at will without requiring compensation **-** Executive orders require Congressional approval before right to occupancy is granted
* **Executive Order Reservation provide NO COMPENSATION**

***Montana v. United States*, 1981 - Property interest of a riverbed**

* Crow Tribe of Montana claims the **authority to prohibit all hunting and fishing by non-members of the Tribe on non-Indian property within the reservation boundaries,** b/c of its purported ownership of the bed of the Big Horn River, the treaties which created its reservation, and its inherent power as a sovereign.
* **Issue** is whether the US conveyed ownership of the riverbed to the tribe by treaties and therefore continues to hold the land in trust for the Tribe, or whether the US retained ownership of the riverbed as public land which passed to the State of Montana when it entered the Union.
* **Court determined that the treaties fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty**.
* The treaty did not expressly refer to the riverbed, nor was an intention to convey the riverbed expressed in “clear and especial word” or “definitely declared or otherwise made plain”- Therefore the tribe could not prohibit non-Indians from hunting and fishing on Big Horn River
* **Congress must specifically convey title to the riverbed.**
* **Presumption BS:** There is a **presumption** that Congress did not intend to convey the riverbed, which is unlike any other treaty readings/interpretations b/c Indians are supposed to be favored.

***Tee-Hit-Ton Indians v. United States*, 1955 - Property Interest of land granted by President and Revoked by Congress**

* Alaskan tribe sought compensation for a taking by the US of certain timber from Alaskan lands allegedly belonging to the group.
* **The Issue** in this case centers on the nature of the Tribe’s interest in the land, if any.
* **The Court** determined that there must be a definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. And here there was no Congressional expression declaring the tribes right of occupancy, therefore they were only allowed right of use after Alaska was bought from Russia, thus when Congress sold the timber they had no right to compensation from it.
* Indian occupation of land without government recognition of ownership creates NO rights against taking or extinction by the US protected by the 5th Amendment or any other principle of law, thus no compensation is necessary.
* **Unless Congress has expressed desire that Indian tribe have title, they may have no 5th Amendment separate claim.**

***Case of Mary and Carrie Dann v. United States, 2002* - Inter-American Commission on Human Rights**

* Danns were members of the Western Shoshone, and were cited by the Bureau of Land Management for grazing cattle on the public lands without a federal permit. They claimed they had been in possession of the property since time immemorial. However, the Western Shoshone had obtained a final award from the Indian Claims Commission for the extinguishments of tribal claims to aboriginal title in those same lands. A $26 million interest bearing trust account was established.
* **The lower courts** held that the deposit in the trust account amounted to “payment” and that any tribal claim to aboriginal title had been extinguished.
* **But the question here** is whether the Danns have an individual aboriginal rights claim?
* Danns petitioned the Inter-American Commission on Human Rights
* IACHR: “The State has failed to ensure the Danns’ right to property under conditions of equality contrary to Articles II, XVIII and XXIII of the American Declaration in connection with their claim to property rights in the Western Shoshone ancestral lands.”  **-** “This requires in particular that the Danns be afforded resort to the courts for the protection of their property rights, in conditions of equality and in a manner that considers both the collective and individual nature of the property rights that the Danns may claim in the Western Shoshone ancestral lands.”

***County of Oneida v. Oneida Indian Nation*, 1985**

* After the Trade and Intercourse Act of 1793 (which said no one could purchase land from the Indians without the consent of the Federal Government), New York State entered into an agreement with the Oneida Indian Nation conveying 100,000 acres without governmental approval.
* **The Oneidas claim** that this transaction is void and the state of NY has unlawful possession of their land and sought damages representing the fair rental value of that part of the land presently owned and occupied.
* **County claims** that they have no claim under Federal Common Law, and if they did have a claim it was pre-empted by the Nonintercourse Act of 1973, and if they do have a claim the Statute of Limitations has run, the US ratified the unlawful conveyances by federally approving later treaties, and this claim is non-justiciable.
* **Holding**: affirm the finding of liability of the County**.** Oneidas have a claim based on federal common law for violation of their possessory rights. (they talk about Johnson v. Mc’Intosh, Cherokee Nation, Worcester v. Georgia)
* **Non Intercourse Act does not Pre-Empt.** The NIA did not state any remedial plan for dealing with violations, and never said anything about removing the common law right to sue**.** Congress would have to explicitly state intent to pre-empt. The Court will not recognize cases as preempting.
* **Statute of Limitations**: There is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights.
* **Indian Claims Limitation Act of 1982:** Congress for the first time imposed a SOL on certain tort and contract claims for damages brought by individual Indians and Indian tribes.It established a system for the final resolution of pre 1966 claims.
* **Ratification**: by applying the canons of construction, which are rooted in the unique trust relationship, the treaties are construed liberally in favor of Indians, and absent any explicit statutory language, the ratification of later treaties (where Oneidas granted land to NY) does not qualify as a ratification of the 1795 conveyance (the one in question)
* **Nonjusticiability:** Congress’ plenary power in Indian affairs does not mean that litigation involving such matters necessarily entails nonjusticiable political questions**. Right to occupancy includes federal common-law right to sue for enforcement, thus Congressional revocation required**

***South Carolina v. Catawba Indian Tribe***, **1986** - **Problems with Oneida type litigation**

* Eastern land claims have been blocked on procedural grounds, often b/c the tribe has lost its status.
* During the Termination period when states could intercourse with the tribes, the ex-tribe members became subservient to the state’s system, thus triggering a SOL.
* **SC held that the 1959 act terminating the Catawba Tribe of SC subjected the tribe’s land claim to the state SOL, and denied their claim.**

***State of Vermont v. Elliott*, (Vermont 1992), cert denied 1993**

* A group, claiming to be members of the Western Abenaki Tribe, was charged with fishing without a license at a ‘fish in’ demonstration. They claimed aboriginal rights for fishing.
* **VT SC held they were no longer a tribe and they lost their land b/c of forced movement. The land was taken by force and the tribe wasn’t entitled to compensation.**
* **The Trade and Intercourse Act** prohibits states and others acting under the color of law from removing land from the federal tribal regime, but it didn’t apply to private individuals stealing land. To be compensated for that you should pursue the individuals in state court for adverse possession, trespass, etc.

***United States v. John*, 1978 - Tribal Recognition**

* MS is challenging the exercise of federal jurisdiction over certain crimes committed on land within the area of the state designated as a reservation for the MS Choctaw Indians
* **SC says that it doesn’t matter that they are merely a remnant of a larger group that was long ago removed from MS, nor does it matter that federal supervision over them has not been continuous, federal government still has jurisdiction**

***Montoya v. United States*, 1901 - commonly used definition of “tribe”**

* “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory”
* BIA promulgated rules to determine which groups are entitled to be federally acknowledged as tribes in 1978.

**BIA promulgated rules** to determine which groups are entitled to be federally acknowledged as tribes in 1978. **1**. Section 83.7, pg 313; **2**. most common group of petitions are groups that were terminated, and they are seeking to regain their tribal status. **3**. often either tribe itself or a subgroup of the tribe seeking to regain recognition

**Section 83.7**

* Most common group of petitions are groups that were terminated, and they are seeking to regain their tribal status.
* Often either tribe itself or a subgroup of the tribe seeking to regain recognition

1. **The Federal-Tribal Relationships as a Source of Federal Power**
2. **Treaty Abrogation**

***United States v. Dion*, 1986**

* Dion was convicted of shooting four bald eagles on his Indian Reservation in violation of the Endangered Species Act. He claims that the tribe has a treaty right to hunt bald and golden eagles within the reservation and that the ESA and the Eagle Protection Act did not abrogate that treaty.
* **SC determined** that the ESA and EPA did abrogate the treaty, thus making Dion susceptible to charges.
* **Typical Test for Abrogation**: “it must be clear and explicit” **-** But it doesn’t take express declaration in every situation so long as there is **clear and plain intent** to abrogate the treaty rights. Congress can limit or end treaty rights
* Conduct must be expressly prohibited and whether Congress intended on prohibiting Indians is examined

***FPC v. Tuscarora Indian Nation*, 1960 - Indian Treaty Abrogation and Congressional Intent**

* “clear expression to the contrary” **-** “General Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary”
* ONE OF THE MOST FREQUENTLY QUOTED STATEMENTS IN ALL OF INDIAN LAW:
* Justice Black’s dissent: “Great nations, like great men, should keep their word.”

***Seneca Nation Cases***

* “sufficiently clear and specific” **-** so long as there is a sufficient, clear and specific intent of the rights

1. **The Federal-Tribal Relationships as a Source of Indian Rights**
2. **Executive Accountability Under the Trust Relationship (obligation to take care of Indians)**

***Seminole Nation v. United States*, 1942**

* There was a 1856 treaty where the federal government promised to establish a trust fund with the annual interest to be paid to the members of the Seminole Nation per capita as an annuity.
* **The tribe sued** for alleged violations of the treaty because of how some payments were made. Some payments were made directly to the tribal treasurer and to creditors at the request of the Seminole General Council, and it was a question of whether or not this violated the treaty obligation.
* Any kind of trust or fiduciary status requires complying with own trust documents. The treaty is a trust document, and the Government knowingly did not follow it, therefore it was a violation of their fiduciary duty.
* “The Federal trust duty extends to protection of Indians from their own improvidence.” **Knowledge of misappropriation is a breach of fiduciary responsibility of Congress.**

***Morton v. Ruiz*, 1974 – BIA regulations and APA requirements**

* BIA takes away benefits to a guy who moved off reservation – the BIA Manual included a requirement that limited benefits to Indians living on reservations
* BIA did not undertake formal agency notice and comment proceedings under APA
* That deficiency was fatal to the BIA regulation

***US v. Mitchell I & II***

* Claim for money damages for Federal mismanagement of the timber on Indian allotments
* *Mitchell* I: SCOTUS: the allottees had not established liability under the General Allotment Act, because it contemplated that the allottee and not the US was to manage the land, The Act created only a limited trust relationship between the US and the allottee that does not impose any duty upon the Government to manage timber resources
* *Mitchell II*: Under timber management statutes there is an enforceable duty.
* **Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties even though nothing is said expressly in the authorizing or underlying statute about a trust fund, to a trust or fiduciary connection**
* Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties

***United States v. Navajo Nation*, 2003**

* Involves the **Indian Mineral Leasing Act of 1938**, which assigns the responsibility of approving coal leases between tribes and private individuals to the Secretary of the Interior. The Tribe is seeking to recover money for an alleged breach of trust.
* **Court determined** that the IMLA and its implementing regulations **impose no obligations** resembling the detailed fiduciary responsibilities supporting a claim for money damages. **No trust relationship acknowledged when a statute grants licensing to the Indians with neutral approval from the Secretary**. A managed asset is required for a trust relationship. The federal government needs to hold something for duty to arrive.
* NO trust relationship exists. It is not explicitly stated and doesn’t exist.
* **BARNES THINKS THIS IS WRONG**! b/c he says a trust relationship is implicit in all things dealing with the tribe, and unless explicitly abrogated it exists. Here Ginsberg is saying unless included it doesn’t exist. Opposite of what SCOTUS has been saying!
* **ANALYTICAL STEPS: “The Federal Government’s liability cannot be premised on control alone**. The analysis must begin with (1) specific rights – creating or duty – imposing statutory or regulatory prescriptions, and if that prescription bears the hallmarks of a conventional fiduciary relationship, then (2) Trust principles could play a role in inferring that the trust obligation is enforceable by damages.
* **RULE on “networks of statutes & breach of trust” p.342**

1. **Executive Agency Conflicts in the Administration of the Federal Trust Responsibility to Indians**

***Pyramid Lake Paiute Tribe of Indians v. Morton,* (DC 1972)**

* **Tribe is challenging** a regulation issued by the Secretary of the Interior. The regulation involves a Dam built as part of a federal water development project intended to benefit non-Indian irrigators. Tribe contends that the regulation delivers more water to the District than required by applicable court decrees and statutes, and improperly diverts water that otherwise would flow into nearby Pyramid Lake located on the tribe’s reservation. The Tribe’s principal source of livelihood is the Lake.
* **Secretary has a duty** that all water not obligated by court decree goes to Pyramid Lake. Therefore a fiduciary duty is established. US acting through the Secretary of Interior “has charged itself with moral obligations of the **highest responsibility and trust**…dealings with Indians, should therefore be **judged by the most exacting fiduciary standards.”**
* **Tribal interests are first priority** when fiduciary responsibility has been created (government has possession of something: here they are granting water rights)

***The Orr Ditch Litigation*, pg 361**

* **Trust fiduciary relationship comes out of any federal regulation program, absent congressional act saying otherwise!**
* Take any area of federal regulation and it will apply to Indians, almost any regulation of western land by federal government is going to affect the Indians. It doesn’t have to be about water rights.
* There is a trump duty to protect the Indians, but so long as Congress abrogates that duty, it is okay.

1. **Congressional Accountability Under the Trust Relationship**

***United States v. Sioux Nation of Indians, 1980***

* Sioux Nation claims that the US unlawfully abrogated the Fort Laramie Treaty of 1868, which the US pledged the Great Sioux Reservation, including the Black Hills, would be set apart for the absolute and undisturbed use and occupation of the Indians.
* US was attempting to acquire the Black Hills land for mining of gold and silver. The Sioux refused to sell, and so Congress enacted an appropriations bill in 1876 allowing no appropriation being made for subsistence of the Sioux. As a result the US renegotiated the Sioux treaty giving the US the Black Hills portion of the land, which had to be approved by ¾ of the adult males of the tribe, but wasn’t. This 1876 agreement abrogated the 1868 one.
* Sioux claim the government took the Black Hills without just compensation. It had been acquired through unfair and dishonorable dealings.
* **Court determines that the *Lone Wolf* Congressional presumption of good faith in dealings with Indians is not the appropriate standard -** The question of whether there was good faith is factual in nature, not a presumption!
* By examining the congressional committee reports, statements, and other evidence…it is concluded that **this was not in good faith and the tribe should be compensated for the unjust taking.**
* **Though Congress has plenary power, a complete elimination of rights becomes a taking and must be justly compensated. There is no taking so long as Congress is “transmuting” property (giving property for property)**

**Chapter 6: Tribal Sovereignty and the Administration of Justice in Indian Country**

1. **Tribal Governments as Independent Sovereigns**

***Talton v. Mayes, 1896* (tribes are independent from feds)**

* Appellant, a Cherokee Indian, was charged with murder of another Cherokee Indian, within the Cherokee territory.
* Tribal power exists when Congress has not taken away that power. Tribal power does not come from Congress. 5th Ad is not applicable**.** Other matters that are a sovereign matter are sovereignty reserved**.** Remember Congress can take away that sovereignty
* **Indian tribe’s power to punish tribal offenders is part of its own retained sovereignty. And when they punish a tribe member for violating tribal law, they are acting as an independent sovereign.**

***United States v. Wheeler*, 1978 (Two separate sovereigns)**

* Defendant pled guilty in Tribal Court to disorderly conduct and to contributing to the delinquency of a minor, and then a year later he was indicted in federal court for rape arising out of the same incident.
* **Issue** is whether the Double Jeopardy Clause of the 5th Amendment bars the prosecution of an Indian in federal district court under the Major Crimes Act, when he has previously been convicted in tribal court of lesser included offense?
* **The Double Jeopardy Clause does not apply**. Therefore the Federal Government is not barred from bringing its suit. Double jeopardy not applicable when both the federal government and tribal courts have prosecuted an individual
* **Both the tribe and federal government are two separate sovereigns**

1. **The Contemporary Scope of Tribal Sovereignty Under the Indian Civil Rights Act**

**Santa Clara Pueblo v. Martinez, 1978 (No federal remedy for ICRA)**

* **Issue:** whether a federal court may pass on the validity of an Indian tribe’s ordinance to deny membership to children of female members who marry outside the tribe, but extending membership to children of men that marry outside the tribe. Petitioner is claiming sexual and ancestral discrimination in violation of ICRA of 1968.
* **The act does not expressly authorize bringing a civil suit in federal court.**
* **Court determines that ICRA does not read as such!**
* Efforts by the federal judiciary to apply the statutory prohibitions of ICRA in a civil context may substantially interfere with a tribe’s ability to maintain itself as a culturally and politically distinct entity.
* **The Indian Rights Act** created a list of Constitutional restraints that limit the states and extended the writ of habeas corpus to federal courts on Indian criminal matters
* **The Act did not specifically** create any other remedy in federal court than habeas corpus
* **Waiver of Sovereign immunity must be expressed**, here it is not so there is no cause of action

1. **Tribal Sovereign Immunity**

* **A tribe is subject to suit only as expressly authorized by Congress or where the tribe has effectively waived its immunity.**

***Kiowa Tribe of OK v. Manufacturing Technologies*, Inc, 1998**

* Tribe defaulted on a note and was sued. Nothing in the note subjects or limits the sovereign rights of the Tribe.
* **Court determined that the Tribe has tribal sovereign immunity. Congress has not abrogated the immunity, and the tribe has not waived it, therefore they cannot be sued**.
* Court discusses how it is Congress’ job to alter tribal sovereign immunity through explicit legislation, which they are suggesting should happen b/c of presence now in enterprises that provide services to non-Indians, and persons who are unaware of their immunity.

**Information from Notes p. 410**

* **Tribal sovereign immunity defenses are not a shield against suit by the US against a tribe**
* **TSI doesn’t bar relief where the P requests injunctive or declaratory** relief against individual tribal government officials who allegedly acted outside the scope of their authority. Ex parte Young
* Most court have acted on the assumption that tribes may waive their sovereign immunity to facilitate business dealings without express congressional approval.

1. **Tribal justice Systems in Historical and Cultural Context**
2. **Tribal Courts in the modern Era: Origins, Growth and Development**

***Williams v. Lee*, 1959 (authority over actions on reservation)**

* Respondent is not an Indian and operates a general store in AZ on the Navajo Indian Reservation under a license required by federal statute. He brought this suit in state court to collect for the goods sold to a Indian who lives on the reservation that purchased items on credit.
* **Question is whether the state court or tribal court had jurisdiction**.
* **Tribal Court would have jurisdiction**.
* […] “to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”
* **It is immaterial that respondent is a non-Indian**; transaction took place on the Reservation with an Indian.
* Tribe has authority over activities on their reservations- opinion goes from a historical perspective

1. **Tribal Law Making in Modern Tribal Legal Systems**

**The Courts of the Navajo Nation**

* In re Certified Question II: ***Navajo Nation v. Macdonald*, 1989**
* MacDonald was challenging the authority of the Navajo Tribal Council to relieve him and the Vice-Chairman of their executive and legislative authority by placing them on leave, after they were exposed for soliciting and taking bribes and kickbacks from contractors doing business with the Navajo Nation.
* **The Council can place Chairman and VC on administrative leave if they have reasonable grounds to believe the official “seriously breached his fiduciary trust to the Navajo people” and if the leave will be in the best interests of the Nation.**
* have a duty to exercise powers honestly, faithfully, legally, ethically

**In re: Validation of Marriage of Francisco, SC Navajo 1989**

* Chaca and Francisco cohabitated as man and wife for nine years, but did not obtain a marriage license, marry according to state law, or participate in traditional Navajo wedding ceremony. Chaca died, and Francisco needs to have her common-law marriage validated in order to collect a portion of the life insurance proceeds.
* **The Navajo tradition and custom do not recognize common-law marriage; therefore, this court overrules all prior ruling that Navajo courts can validate unlicensed marriages in which no Navajo traditional ceremony occurred.**
* To enhance Navajo sovereignty, preserve Navajo marriage tradition, and protect those who adhere to it, Navajo courts will validate unlicensed Navajo traditional marriages between Navajos….but they will not validate state common law marriages

**The Development of Tribal Law in Other Tribal Justice Systems**

* “**jurisgenesis”**: process whereby a community engages in the creation of legal meanings.

***Village of Mishongnovi v. Humeyestewa, Hopi AC* 1998**

* **Issue:** Whether federal standing doctrine applies in Hopi Tribal Court in a case involving a dispute over who should rightfully control a bank account held in the name of the Village.
* **Constitutional limits on federal courts are not necessarily placed on tribal courts, it is within Indian reserved power – Indians may deal with their problems in an Indian-common-law system**
* The tribes can have a more relaxed standing than federal courts
* Tribes have more of a mediation role for their courts
* **For standing “threatened or actual injury that is logically related” is required**
* The tribes can have a more relaxed “political question” ban
* There is no checks and balances within the tribe
* No fear of Article III because it does not apply to the tribes

**[Case in outline was not in book – more to ch. 6 than this]**

**Chapter 7: Tribal Sovereignty and Jurisdiction: Congressional and Judicial Recognition and Limitations**

**To Analyze a Jurisdictional Dispute:**

* **5 Step Process:**

1. Is the area in question “Indian Country”?
2. If it is not, special jurisdictional rules of Indian law do not apply
3. If it is Indian Country, and a tribal member engaged in on reservation activities is the object of the assertion of jurisdiction by the state, the tribe presumptively has jurisdiction to the exclusion of the state.
4. However, Look at federal legislation to be sure Congress has not altered rules covering the situation.
5. If it is not an Indian involved in Indian Country, to what extent does the overlapping jurisdiction of the tribe and state play. Look to congressional actions and Supreme Court decisions.
6. **The Arena of Federal and Tribal Jurisdiction: “Indian Country”**
7. **Litigating Indian Country: Reservation Diminishment and Disestablishment**

* **“Indian Country”:** geographic area in which tribal and federal law normally applies and state laws normally do not apply.
* **IC includes:** (1) Reservations designated by congress and executive proclamation; (2) Indian owned land, communal land; (3)Trust lands, anything that may not be part of the reservation but is being held by the US for the Indians; (4) Any Tribal Land that is actually purchased.
* **Two Thoughts:**

1. **Historical:** if you divide it up any further you would begin to diminish the culture and cohesiveness
2. if had to worry about crossing between Indian and Non-Indian land it would be confusing as to which laws apply. If historically Indian land and still in the confines of Indian land, it is designated “Indian Country” but this doesn’t mean the laws/rights apply equally to all in the area

* **Analysis:** (1) always look to jurisdiction. Is it happening in Indian Country?; (2) What is the identity of the party involved? Bureau of Indian Affairs registration? Tribal recognition?Is this a civil or criminal matter?

***Solem v. Bartlett*, 1984**

* **Issue:** Can Bartlett commit rape on the reservation, but be prosecuted for rape by the state court? No.
* Bartlett contended that the crime he was convicted of occurred on the Reservation and the state does not have jurisdiction to prosecute him. The crime occurred on a portion of the reservation which had been **opened by Congress for settlement by non-Indians**, but this was **still in Indian Country**, and therefore the STATE had **no jurisdiction** over him.
* **There was no language stating a clear congressional purpose to diminish the reservation**

***Hagen***

* Sup Crt finds that Cong had intended to diminish res boundaries – language and demographics showed that the res had been diminished
* “shall be restored to the public domain”

***Yankton Sioux***

* Res diminished by 1894 Act – required relinquishment and ceding of land
* Clear language
* How much weight should be given to a policy like allotment that the US has shied away from
* PFC reading of the statute is clear diminishment had taken place but in 1894 we are already in the self-determination era for tribes – so why does the Court rely on this failed policy of allotment?

***Carcieri v. Salazar***

* Involves Trust provisions of IRA
* Case turns on the meaning of the language of Indian Reorg Act: tribe had to under Fed juris to be eligible to have land taken into trust
* Tribe was not recognized when law was passed in 1934 – no Fed juris
* State had juris since they were not recognized?
* Prof says it is a hard one to swallow
* Tribes need to trace their ability to have lands taken into trust back t o1934 when Trust act was enacted and prove they were under fed juris (recognized)

**Other notes:**

**Issue: Does** the federal government have the ability to take land into trust for American Indian tribes recognized after the Indian Reorganization Act of 1934?

**Holding:** No, The Supreme Court reversed the First Circuit holding that the Indian Reorganization Act of 1934 did not [apply](http://www.oyez.org/cases/2000-2009/2008/2008_07_526) to tribes not recognized at the time of the statute's creation. Therefore, the Indian Reorganization Act did not authorize the Secretary of the Interior to act on behalf of the Narrangansett Tribe as trustee. With Justice Clarence Thomas writing for the majority and joined by Chief Justice John G. Roberts, Justice Antonin G. Scalia, Justice Anthony M. Kennedy, Justice Stephen G. Breyer, and Justice Samuel A. Alito, the Court reasoned that the statute unambiguously referred only to those tribes that were under federal jurisdiction in 1934, and therefore did not apply to the Narrangansett Tribe.

Justice Breyer wrote a separate concurring opinion qualifying his assent to the majority opinion. In part, he argued that the statute was not "unambiguous", but through contextual analysis, the statute referred only to those tribes under federal jurisdiction in 1934. Justice David H. Souter, joined by Justice Ruth Bader Ginsburg, also wrote separately, concurring in part and dissenting in part. He departed from the majority opinion by arguing that the case should have been remanded for the Narrangansett Tribe to pursue an alternative legal theory. Justice John Paul Stevens dissented arguing that the Narrangansett Tribe was an Indian Tribe under the meaning of the statute, though not specified by name, and therefore the Secretary of the Interior should be allowed to act on its behalf.

1. **Federal Criminal Jurisdiction**
2. **The Indian Country Crimes Act, 1790**

* Extends federal enclave law to interracial crimes in Indian Country
* Applies to Indian reservations the federal statutes applicable to federal enclaves such as military installations and national parks
* **Covers crimes committed by non-Indians against Indians and crimes by Indians against non-Indians**
* The criminal version Non Intercourse Act
* **Exceptions** to the broad provisions:(1) crimes by an Indian against an Indian are exempted (but look to Major Crimes Act); (2) allows for concurrent jurisdiction by the tribal courts; (3) recognizes provisions in treaties retaining tribal jurisdiction, which will allow tribal court jurisdiction over non-Indians

1. **The Major Crimes Act 1880**

* **Punishing Indian offenders for commission in Indian country of several felonies**
* **Overturned Crow Dog’s rule** of exclusive tribal jurisdiction over crimes among Indians.
* Initially mandated **federal jurisdiction** over 7 crimes, but now covers more than a dozen major crimes: (1) applies ONLY when the perpetrator is an INDIAN; (2) victim can be an Indian or non-Indian; (3) must occur in Indian Country

***United States v. Antelope*, 1977**

* **Two Indians** broke into the home of a **non-Indian** within the boundaries of an **Indian Reservation**, they robbed and killed her. They were prosecuted in Federal Court under the Major Crimes Act. They are claiming that the MCA violates the Due Process Clause of the 5th Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians. If they weren’t Indian they would only be subject to Idaho state law, which has a more lenient sentence.
* **Court says this is not racial** **classification**; they are being prosecuted under Federal law b/c of the **location of the offense**, Indian Country.
* Respondents were subjected to the same body of law as any other individual, Indian or non-Indian charged with first-degree murder committed in a federal enclave.
* Due Process was not violated.

1. **The Assimilative Crimes Act, 1825**

* Allowing **federal prosecutions for state law violations**.
* General law made applicable in Indian Country by the Indian Country Crimes Act
* **Permits federal prosecutions by “assimilating” substantive state law**
* **No state judicial jurisdiction is involved**
* **Allows minor crimes (nonfederal crimes) to be prosecuted by a federal prosecutor in federal court by applying state law**.
* Crimes can be federally investigated
* **CANNOT prosecute under ACA unless ICCA applies!**

1. **An Analytical Approach to Criminal Jurisdiction in Indian Country**

* **Was the Locus of the Crime in Indian Country?**

1. No: state courts have jurisdiction, no federal or tribal juris
2. Yes: analysis continues

* **Does “Public Law 280” or a Specific Jurisdictional statute apply?**

1. Yes: state courts have jurisdiction. If PL280 applies, federal courts have no jurisdiction, but may have it if the particular law that is being enforced so provides.
2. No: analysis continues

* **Was the Crime Committed by or Against an Indian?**

1. Indian status: “whether the person in question has some demonstrable biological identification as an Indian and has been socially or legally recognized as an Indian”
2. Determine the Indian status of both the criminal defendant and the victim

* **Which Defendant-Victim Category Applies?**

1. **Crime by an Indian against an Indian**
2. State courts cannot have jurisdiction
3. If crime under MCA federal court has jurisdiction
4. ICCA is inapplicable
5. ACA is inapplicable b/c ICCA is inapplicable
6. Tribal court has jurisdiction, unless under MCA, and even then may have concurrent jurisdiction.
7. **Crime by an Indian against a Non-Indian**
8. state courts cannot have jurisdiction
9. If crime under MCA, federal court jurisdiction
10. If crime applicable within federal enclaves, federal court jurisdiction under ICCA, unless tribal courts has already rendered punishment!!! Tribes have concurrent jurisdiction
11. If no major crime or federal enclave crime, state law can be applied under ACA.
12. **Crime by a non-Indian against an Indian**
13. state courts cannot have jurisdiction
14. If crime applicable within federal enclaves, FCJ under ICCA
15. If no federal enclave crime, state substantive criminal law is incorporated through ACA, and FCJ
16. MJCA doesn’t apply b/c only covers crimes by Indians
17. Tribal Courts MAY NOT prosecute under *Oliphant*
18. **Crime by a non-Indian against a non-Indian**
19. *McBratney* Rule: Goes directly to state court
20. Federal courts and tribal courts have no jurisdiction
21. “**Victimless” and “consensual” crimes by an Indian**
22. Tribal Courts should have exclusive jurisdiction
23. “**Victimless” and “consensual” crimes by a non-Indian**
24. *McBratney* would apply to allow state jurisdiction where no interest of the tribe, its members or property is involved and if federal policy not impacted: so State court jurisdiction.
25. Federal courts technically have jurisdiction over crimes covered by federal enclave law or state law via ACA under the ICCA.
26. **Public Law 280: A Congressional Transfer of Jurisdiction to Some States**

* **Alters the traditional dominance of federal and tribal law as to those reservations affected by the Act**. There were 6 mandatory states that had to adopt PL 280, and several ‘optional states”, now it requires tribal consent to have the state adopt PL 280.
* **Optional/tribal Consent States**: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, Washington
* **Mandatory States**: Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin
* **Public Law 280:** certain tribes were so unruly that they could not govern themselves. State must provide police and court system. State must take jurisdiction over all matters in Indian Country**.**  State power is preeminent
* **Justification:** Congress’s Plenary Power, they can grant their power to the state.
* **Subjects reservations to state laws both civilly and criminally**.
* **Now must have tribal consent before PL 280 can be applicable**.

***Bryan v. Itasca County*, 1976 - Can States Tax reservation**

* Whether the grant of civil jurisdiction to the States in PL 280 is a congressional grant of power to the States to tax reservation Indians insofar as it is excluded by the terms of the statute.
* Bryan **resides on the reservation** in Minnesota and received a tax notice for his mobile home from the county auditor. Bryan claims they have no authority to tax personal property on a reservation.
* **Court determined PL 280 does not give right to tax.** It grants jurisdiction over private civil litigation involving reservation Indians in state court. It doesn’t grant taxing abilities.

**From WIKI**

**Public Law 280**([Pub.L. 83–280](http://www.law.cornell.edu/jureeka/index.php?doc=USPubLaws&cong=83&no=280), August 15, 1953, codified as [18 U.S.C.](http://en.wikipedia.org/wiki/Title_18_of_the_United_States_Code) [§ 1162](http://www.law.cornell.edu/uscode/18/1162.html), [28 U.S.C.](http://en.wikipedia.org/wiki/Title_28_of_the_United_States_Code) [§ 1360](http://www.law.cornell.edu/uscode/28/1360.html), and [25 U.S.C.](http://en.wikipedia.org/wiki/Title_25_of_the_United_States_Code) [§§ 1321](http://www.law.cornell.edu/uscode/25/1321.html)–[1326](http://www.law.cornell.edu/uscode/25/1326.html), is a [federal law](http://en.wikipedia.org/wiki/Federal_law) of the [United States](http://en.wikipedia.org/wiki/United_States) establishing "a method whereby States may assume jurisdiction over reservation Indians," as stated in [McClanahan v. Arizona State Tax Commission](http://en.wikipedia.org/wiki/McClanahan_v._Arizona_State_Tax_Commission). 411 U.S. 164, 177 (1973).

The Act mandated a transfer of federal law enforcement authority within certain [tribal](http://en.wikipedia.org/wiki/Tribe) nations to state governments in six states: [California](http://en.wikipedia.org/wiki/California), [Minnesota](http://en.wikipedia.org/wiki/Minnesota) (except the [Red Lake Nation](http://en.wikipedia.org/wiki/Ojibwe)), [Nebraska](http://en.wikipedia.org/wiki/Nebraska" \o "Nebraska),[Oregon](http://en.wikipedia.org/wiki/Oregon) (except the [Warm Springs Reservation](http://en.wikipedia.org/wiki/Warm_Springs_Indian_Reservation)), [Wisconsin](http://en.wikipedia.org/wiki/Wisconsin) (except later the [Menominee Indian Reservation](http://en.wikipedia.org/wiki/Menominee_Indian_Reservation)) and, upon its statehood, [Alaska](http://en.wikipedia.org/wiki/Alaska). Other states were allowed to elect similar transfers of power if the Indian tribes affected give their consent. Since then, [Nevada](http://en.wikipedia.org/wiki/Nevada), [South Dakota](http://en.wikipedia.org/wiki/South_Dakota), [Washington](http://en.wikipedia.org/wiki/Washington_(U.S._state)), [Florida](http://en.wikipedia.org/wiki/Florida), [Idaho](http://en.wikipedia.org/wiki/Idaho), [Montana](http://en.wikipedia.org/wiki/Montana), [North Dakota](http://en.wikipedia.org/wiki/North_Dakota), [Arizona](http://en.wikipedia.org/wiki/Arizona), [Iowa](http://en.wikipedia.org/wiki/Iowa), and [Utah](http://en.wikipedia.org/wiki/Utah) have assumed some jurisdiction over crimes committed by tribal members on tribal lands.

The Act added to a complex matrix of jurisdictional conflict that defined [tribal governance](http://en.wikipedia.org/wiki/Tribal_sovereignty_in_the_United_States) at the end of the 20th century. In various states, local police, tribal police, [BIA](http://en.wikipedia.org/wiki/Bureau_of_Indian_Affairs) police, the FBI are the arms of a law enforcement system that enforces laws of tribes, states and the federal government.

Under the Act, states, local [sheriffs](http://en.wikipedia.org/wiki/Sheriff) and state [law enforcement agencies](http://en.wikipedia.org/wiki/Law_enforcement_agency) take tribal members to state courts for prosecution in cases arising from criminal matters within reservation boundaries. But most tribal governments and [pueblos](http://en.wikipedia.org/wiki/Pueblo) have also adopted their own codes, and administer court systems to adjudicate violations of the code.

In states where the Act has not been applied, [Bureau of Indian Affairs](http://en.wikipedia.org/wiki/Bureau_of_Indian_Affairs) (BIA) police respond to major crimes on reservations or pueblos. The [FBI](http://en.wikipedia.org/wiki/FBI) joins in investigations of the most serious criminal matters such as murders or kidnappings. In those states, when allegations against tribal members arise from crimes on a reservation, the [United States Attorney](http://en.wikipedia.org/wiki/United_States_Attorney) cites violations of the [United States Code](http://en.wikipedia.org/wiki/United_States_Code) in a [United States district court](http://en.wikipedia.org/wiki/United_States_district_court). Tribal and pueblo police also enforce local codes in "non-PL 280" states.

1. **Judicially-Imposed Limitations on Tribal Jurisdiction in Indian Country**
2. **Implied Limitations on Tribal Criminal Jurisdiction**

***Oliphant v. Suquamish Indian Tribe*, 1978**

* Petitioners are **non-Indian residents** on the Reservation, and they were charged with assaulting a tribal officer and resisting arrest.
* **Issue** is whether the Indian tribal court has criminal jurisdiction over the non-Indians.
* **Court says NO!!!**
* **Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress**
* “Their rights to complete sovereignty, as independent nations are necessarily diminished” - *Johnson v. McIntosh* – Messed up
* Tribe claims they have jurisdiction that flows from the “Tribe’s retained inherent powers of government over the Port Madison Indian Reservation.”
* **Indians have NO criminal jurisdiction over non-Indians.**

***United States v. Lara*, 2004**

* A congressional statute was passed “recognizing and affirming the inherent authority of a tribe to bring a criminal misdemeanor prosecution against an Indian who is not a member of that tribe, authority that this Court previously held a tribe did not possess.”
* **Does Congress have the constitutional power to relax restrictions that the political branches have over time placed on the exercise of a tribe’ inherent legal authority**? **YES**.
* **Judicial [and executive] branch restrictions can be relaxed by Congress**
* Plenary authority belongs to Congress, nowhere else, and they can make these type of restrictions
* Indians can prosecute non-member Indians for misdemeanor independently of federal prosecution– 25 U.S.C. § 1301(2)

1. **Implied Limitations on Tribal Civil Regulatory Jurisdiction**

***Montana v. United States*, 1981**

* Tribal regulation of duck hunting and trout fishing by non-Indians on their own fee lands within the boundaries of the Crow Reservation.
* **A tribe may prohibit non-members from hunting or fishing on land belonging to the Tribe or held by the US in trust for the Tribe**.
* But the question **is whether the Tribe can regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe?**
* **Courts says: NO**….regulation of hunting and fishing by non-members of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations, and retained inherent sovereignty do not authorize the tribe to do this.
* **A tribe may regulate through taxation, licensing, or other means, activities of nonmembers when: (1) they enter a consensual relationship with the tribe or its members; or (2) when the conduct of the nonmember threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.**

**Chapter 8: Tribal and State Conflicts Over Civil Regulatory and Adjudicatory Jurisdiction**

1. **Civil Adjudicatory Jurisdiction in Indian Country**
2. **Suits Against Tribal Members**

* Preclusion of state courts from assuming jurisdiction over a non- member or a member *against* a member in an action in Indian Country (beware Public Law 280)
* [MAYBE LOOK INTO THIS MORE]

1. **Suits Against Non-Members of the Tribe (tribal assertions of jurisdiction over non-members who are sued in tribal court)**

***National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 1985**

* A minor child was hit by a motorcycle in the parking lot of the elementary school located on the reservation. The school district is a political subdivision of the state. Through his guardian he filed suit in tribal court.
* The existence and extent of a tribal court’s jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
* **This examination should be conducted in the Tribal Court itself!!**  Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief.
* **This is a question of sovereignty which is reserved to the tribes—the tribes will receive the suit first and decide if they have jurisdiction (if no jurisdiction sent to fed. court)**
* **Tribal court will decide if the tribe has jurisdiction based on: (1) Whether there is consent of regulatory power to the tribe; (2) whether the issue effects the health or welfare of the tribe**

***State v. A-1 Contractors*, 1997**

* Authority of **tribal courts** over **personal injury** actions against defendants who are **not tribal members**
* Car accident on a portion of a ND state highway running through an **Indian reservation**. Indian’s vehicle collided with a gravel truck owned by A-1 Contractors, a **non-Indian owned enterprise** with principal place of **business outside the reservation**.
* Based on ***Montana v. US***, the **Tribal Court lacked subject matter jurisdiction over the dispute**
* **Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.**
* **TEST: It must be (1) consented to, or (2) direct effect on political integrity, (3) economic security, or (3) the health or welfare of the tribe.**
* **Reasoning:** Opening the Tribal Court for optional use is not necessary to protect tribal self-government; and requiring A1 to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to “the political integrity, the economic security, or the health or welfare of the Tribe”.
* **Tribal courts have no jurisdiction over non-members for a single tort of a highway automobile accident**
* **Test on Right away (on exam)**: 5 factors for easement across tribal trust land: (1) they look at the specific language; (2) consent of tribe? (3) has tribe reserved right to exercise dominion and control over the right of way – key: when easements expire (like for power lines) this becomes a huge issue; (4) whether the land was open to the public (hwys and roads); (5) whether the right of way was under state control

***Nevada v. Hicks*, 2001 – Jurisdiction over state official**

* **Issue:** Whether a **tribal court** may assert jurisdiction over **civil claims** against **state officials**?
* Sheriff obtained a warrant from the state and from the tribal court to search Hicks’ **home on the reservation** for illegally killing bighorn sheep. Nothing was found during the search, but some of his property was damaged during the process. So he sued the sheriff in individual and official capacity. He is making a claim for abuse of process, violation of civil rights, denial of equal protection, denial of due process, and unreasonable search and seizure.
* **Court concluded that tribal court did not have jurisdiction over the claims against a state official.**
* **Reasoning:** Tribal authority to regulate state officers **in executing process** related to the **off reservation violation of state laws** is not essential to tribal self-government, or internal relations-to “the right to make laws and be ruled by them” - **even if process is on res**
* **Just b/c on reservation doesn’t matter, and just b/c involves Indian doesn’t matter**.
* **The state has a superior interest because**:(1) The defendant is a non-member state official; (2)The official’s purpose is to implement an important state goal (such as prosecute a crime)’ (3) The matter was off-reservation (off reservation crime)
* **The state can enter the reservation to enforce its laws off-reservation**

**Implication of Hicks:**

* State officials probably can’t just arrest people – case in notes: South Dakota Supreme Court – Distinction: in the hicks case the tribal sword of gov is pointed at the states
* Since tribes can’t protect themselves in tribal court can they sue in state court as a person – maybe not – they probably aren’t people under S1983 (The tribal gov)
* Tribal Courts still have some juris over non-indians but the limits are stricter and stricter
* He cites to *Oliphant* 3 times: “implicit divestiture” – Scalia is hanging his hat on this
* There seems to be an underlying fear that tribal courts will not be fair to state officials

***Plains Commerce Bank v. Long Family***

* It gets worse
* Fee land inside reservation boundaries
* Tribal government does not attempt to stop them
* Longs seek injunction in Tribal Court and sue bank under anti-disc laws
* 8 Cir: this meets *Montana* test and Tribal court gets juris
* Supreme Court: unlike previous case they decide that the nature of the land is actually important
* They say it doesn’t meet the *Montana* consensual test or impacts expectations
* **Tribes cannot reg sale of non-Indian fee lands to non-Indians**
* Instead of just saying no tribal court juris over non-Indians they come up with this weird rule that makes no sense

**Other Case brief**

**Facts:** The Long family, members of the Sioux nation, owned a cattle company that had been doing business with the Plains Commerce [Bank](http://www.oyez.org/cases/2000-2009/2007/2007_07_411) for seven years when the family patriarch died. Because Plains Commerce was reluctant to grant operating loans to younger generation family members, it struck a deal with the Longs agreeing to provide the operating loans if the Longs deeded their farmland and house to the bank. According to the Longs the bank never followed through on its promise to provide the operating loans, and after the bank attempted to foreclose on the land the Longs brought suit in a local tribal court seeking a temporary restraining order blocking the land transfer as well as charging the bank with tortuous discrimination. The tribal court returned an award of $700,000 for the Longs, after which Plains Commerce filed suit in federal district court claiming that the tribal court had improperly exercised jurisdiction over the case.

The district court decided that the tribal court had jurisdiction over the claim, and the U.S. Court of Appeals for the Eighth Circuit affirmed. In seeking Supreme Court review, Plains Commerce argued that the tribal court should not have had jurisdiction, and the Eighth Circuit erred in deciding so, because the claim did not fit into one of the exceptions granting such jurisdiction set forth by the Supreme Court in \_Montana v. U.S. \_ On the other hand, the Longs argued that federal courts whose geographic reach encompasses tribal lands have repeatedly allowed tribal courts to adjudicate civil suits against non-members who voluntarily did business with members.

**Question**Under the U.S. Supreme Court's decisions in Montana v. U.S. \_ and \_Nevada v. Hicks, do tribal courts have jurisdiction to hear claims based on civil suits against non-members who voluntarily did business with members?

**Holding**: Generally yes, but not in cases such as this one where the conflict arises over the sale of a piece of land. **On this issue, the Court held unanimously that tribal courts do not have jurisdiction to hear disputes concerning non- Indian banks' sales of their own lands**. Writing for the Court, Chief Justice John G. Roberts stated that **although tribal courts have jurisdiction to regulate conduct occurring on tribal lands, that jurisdiction is lost once title to the land passes into the hands of non-Indians.** Justice Ruth Bader Ginsburg, joined by Justices John Paul Stevens, David Souter, and Stephen Breyer, wrote an opinion **concurring and dissenting** in part, agreeing that the tribal court did not have jurisdiction to disturb the [bank](http://www.oyez.org/cases/2000-2009/2007/2007_07_411)'s [land sale](http://www.oyez.org/cases/2000-2009/2007/2007_07_411) but suggesting that certain damages for discrimination, awarded based on the bank's mistreatment of the Longs due to their Indian heritage, should not have been overturned.

***Full Faith & Credit v. Comity* p.586**

* Will tribal court orders be recognized by state courts? In areas where the two courts are interacting a lot this is never an issue – it is only an issue if they run into judges who have no contact with tribes
* Unclear whether they have to give full faith credit to tribal judgments
* There are fed statutes that do require state courts to give full faith and credit to tribal orders in certain areas of law
* **Elements for foreign court orders: Foreign court must have PSJ, it can’t contravene state policy**
* Lots of judge will look at these and say that tribal juries are not impartial
* **Unclear whether courts must give full faith and credit to tribal court judgments except with ICWA, child support, and DV orders.**
* **Many states and federal courts have given FF&C to tribal judgments**
* **State courts routinely ignore tribal court judgments including those where federal law requires FF&C**

1. **Personal Jurisdiction**

***Joe v. Marcum*, (10th Circuit 1980)**

* **State courts do not have jurisdiction over Indian property or employment within Indian Country -** Even in an ancillary action used to enforce a valid State court judgment
* Joe, a Navajo Indian **living on the reservation**, borrowed money from USLife Credit. This **transaction occurred off of the reservation**. Joe defaulted in the repayment of the loan and USLife brought a breach of contract suit against him and got a declaratory judgment. The validity of this isn’t at issue. Joe is employed by Utah International, which operates a strip mine **on the reservation**. USLife got a writ of garnishment issued on Utah International, and Joe’s pay was garnished. Joe filed suit claiming the District Court had no jurisdiction to garnish wages due to him that were then in the possession of Utah International.
* Navajo Tribal Code does not permit garnishment of wages
* **Court did not have authority to garnish wages of an Indian employed on the reservation -** “to permit a state court of NM to run a garnishment against Utah International on the reservation, and attach wages earned by Joe for on-reservation labor, would thwart the Navajo policy not to allow garnishment. **Such impinges upon tribal sovereignty, and runs counter to the letter and the spirit of the Navajo Treaty.”**

**4**. **Comity and Full Faith and Credit**

* Constitutionally applies only to states
* States and tribes have to make an agreement to give full faith and creditTaxation and Regulations

1. **Taxation and Regulation**
2. **Tribal Authority to Tax and Regulate in Indian Country**

***Merrion v. Jicarilla Apache Tribe*, 1982**

* Tribe is trying to impose a severance tax on oil and gas produced from the reservation.
* **The issue** is whether the tribe has the authority to impose the tax, and if so does it violate the Commerce Clause. Tribe is receiving royalty payments for the oil and gas from the lease it entered into, and Merion is claiming the tribe is getting double revenue.
* **Court determined: Tribe MAY ENFORCE its severance tax** unless and until Congress divests this power. **And the tax cannot be invalidated on the ground that it violates the Commerce Clause.**
* **The power to tax is an essential attribute of Indian sovereignty b/c it is a necessary instrument of self-government and territorial management -** derives from tribe’s general authority as sovereign to control economic activity within its jurisdiction
* **Tribe can tax in Indian Country**.

***Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 1989**

* Tribe’s assertion of civil regulatory jurisdiction over allotted lands held in fee simple by non-members within the reservation’s exterior boundaries
* Tribe lacks inherent jurisdictional authority over parcels, unless one of Montana’s two ‘exceptions’ are met: consensual agreement or a direct effect

***South Dakota v. Bourland*, 1993**

* Tribe had been required by federal law to relinquish lands for the construction of a federal reservoir and later sought to regulate non-Indian fishing on the reservoir.
* **When an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands.**
* The abrogation of this great right, implies the loss of regulatory jurisdiction over the use of the land by others.

1. **State Authority to Tax in Indian Country: The Scope of Federal Preemption Over Reservation Economic Development**

**[More cases p.597]**

***Warren trading Post***: tribal sov not used – they use fed preemption test – tax of non-Indian trader 🡺 fed regs in this area are so comprehensive as to leave no room for state taxation

***McClanahan v. Arizona State Tax Commission*, 1973**

* **Issue:** Can states regulate taxation of tribes on the reservation? NO
* Indian who lived and worked on the Indian Reservation had her wages garnished for a state income tax. She filed sued claiming that state tax was unlawful as applied to reservation Indians.
* **Absent Congress explicit divestiture of sovereignty, taxation by state entity is not permitted on the reservation -** “the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” Williams v. Lee

***Oklahoma***

* The fed gov has recognized a particular community/land as Indian country – that is Indian country as far as preemption analysis goes – look at whole world of fed reg activities related to Indian**s**

**What if it is the tribe off res?**

*Mescalero Apache*

* State may tax
* State juris just like any other business

*Oklahoma*: tribal meber living off res but whose income derives from tribal resources

* State can tax – LOOK UP WHY
* Most tribes have not asserted the power to collect income taxes:

**Only time state can’t tax you is when you work and live on the res**

**Test in Realm of Taxation to determine whether the state can tax within Res boundaries: Preemption Test**

* Applies wherever state reg or taxation conflicts with federal purpose – so comprehensive as to occupy the field
* Indian law preemption sources: Indian Commerce Clause and Marshall Trilogy

***Oklahoma Tax Commission v. Chickasaw Nation***

* Tribes can tax everyone inside the res. Tribe off res is subject to state taxation.
* What happens when a tribal business is making sales to non-Indians
* **Presumption against state taxation – the Court focuses on where the legal incident of the tax fall – prof says illogical**
* The fuel tax rested on the tribes as retailers and not on the wholesaler – Oklahoma seeks to tax the person selling the tax – weird because all taxes get passed down to the ultimate consumer
* Before the notion was that tribal sov barred this unless cong explicitly did something – then w/ preemption it said that cong had to do something to preempt (while maintaining a presumption against state tax) – it is sort of a balancing test 🡺 preempt if interferes or incompatible with Fed purpose *unless* state interest outweighs it 🡺 judicial subjectivism

**Problem with letting state tax on res:**

* States generate enormous amount of revenue on taxes
* Tribes earn very little income from taxes

***Washington v. Confederated Tribes of the Colville Indian Reservation*, 1980**

* WA state cigarette excise tax per carton. Indian tribes are permitted to untaxed cartons for the purpose of resale to members of the tribe, but are required by regulation to collect the tax with respect to sales to nonmembers.
* **3 Issues:** Is it an infringement to a significant tribal interest?Does the tax have an impact on tribal self-government?Has Congress enabled a power that the states are hindering?
* **Non-members on Indian land have to pay state taxes because not being taxed is not a significant state interest**
* Tribal Sovereignty is dependent on and subordinate to only the Federal Government, NOT the State
* Tribal authority to tax on reservation business activity carried on by Indians and non-Indians
* **State can impose tax on non-Indians on reservation, b/c non-Indian is the burdened party**

***White Mountain Apache Tribe v. Bracker*, 1980**

* Tribe organized the Fort Apache Timber Company (FATCO) that manages, harvests, processes, and sells timber. All of the activities are conducted on the reservation, which was created with the aid of federal funds. US entered into contracts with FATCO to harvest timber, and FATCO contracted with six logging companies to perform certain operations that FATCO could not carry out economically on its own. FATCO sought to impose two state taxes on one of the companies, Pinetop: a motor carrier license tax and a fuel use tax.
* Pinetop brought action claiming that federal law prohibited the imposition of the taxes b/c the activities were conducted exclusively within the reservation and on tribal roads.
* The Tribe agreed to reimburse Pinetop for any tax liability incurred, so they are the P in this case.
* **Tax imposed here is not valid. If economic burden is primarily on the tribe, then the state may not reach into the reservation and apply its taxes!!!**
* **Distinction with *Confederated* Tribes -** the cigarette case, the burden was not on the tribe, it was on the non-Indians that were purchasing cigarettes.

***Wagnon v. Prairie Band Potawatomi Nation* – Trickle down tax**

* **Facts:** The Prairie Band Potawatomi Nation, a sovereign Indian tribe, raises revenue with a tax on the gasoline sold at an on-reservation gas station. The Nation purchases the gas from non-Indian, off-reservation distributors. Kansas imposed a tax on distributors of motor fuels, which the distributors pass on to the gas stations they sell to. The Nation sued Wagnon, the Secretary of the Kansas Department of Revenue, seeking to avoid the tax.
* **The Nation argued** that the state's tax interfered with the tribe's sovereignty, and therefore was not allowed by federal law.
* **Wagnon claimed** that since the tax was on off- reservation suppliers, the Nation's sovereignty was unaffected. The District Court accepted that argument and ruled for Wagnon. The Tenth Circuit Court of Appeals reversed, applying the interest-balancing test prescribed by *White Mountain Apache Tribe v. Bracker*. The Circuit Court found that the tribe's interests in economic development, tribal self-sufficiency, and strong tribal government out-weighed Kansas's interest in raising revenue.
* **Issue:** When a State taxes receipt of fuel by non-tribal, off-reservation distributors, manufacturers, and importers, s**hould the *White Mountain Apache v. Bracker*interest-balancing test apply if the fuel is later sold by an Indian tribe?**
* **No. In a 7-2 decision authored by Justice Clarence Thomas, the Court ruled that the White Mountain Apache v. Bracker balancing test applies only where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation."** The Court ruled for Wagnon and upheld the tax, agreeing with the District Court that the balancing **test should not apply to taxes on off-reservation distributors.** Justice Thomas wrote that keeping the scope of the test narrow would maintain the traditional concept of tribal sovereignty, establish a "bright-line standard" in Indian tax-immunity, and still respect tribal authority over on-reservation activities. Justice Ginsburg wrote a dissent, which Justice Kennedy joined.

1. **State Taxation of Land and Natural Resource Development in Indian Country**

***Montana v. Blackfeet Tribe of Indians*, 1985**

* Whether the state may tax the Tribe’s royalty interests received under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act.
* Two such canons are directly applicable in this case - Clear Manifestation Test: (1) First, “the states may tax Indians only when Congress has manifested clearly its consent to such taxation”; (2) second, “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”
* **Tax is not allowed here.**

1. **Federal Environmental Regulation in Indian Country: Treating Tribes as States**

**Introduction 🡺 LOOK UP THE *MONTANA* TEST**

**From Notes:**

* Congress has done something unique: unlike most generally applicable statutes **– with environmental statutes they have delegated regulatory authority to tribes**
* In the context of Indian Country there is a constant tension: their res are small and it is all they have left so if there is enviro deg they have nothing left
* They also have some of the most pristine habitat
* **Another Tension**: tribes are not pro-enviro like enviros are – they want to cut trees and build power plants, mine etc. but at the same time they want to do it in a way that does not destroy the res – one key thing about whether they can be a better steward or not is whether or not they control the process 🡺 before amendments tribes had o control the BIA did and they were controlled by corporations
* E.g. Goshute reservation in Colorado: In Class 1 realm tribes can do anything they want – but Utah allows no gaming period – Goshutes offer a gaming pact with Utah – State of Utah refuses on moral grounds 🡺 Feds were offering to tribes the opportunity to house spent nuclear fuel sites for $ - they had no way of making money and they can’t erect casinos – State of Utah went crazy and so did some of the tribal members went crazy when tribes brought in spent nuclear fuel – ultimately it didn’t happen –
* **Federal Courts decided that enviro laws applied to tribes whether they were discussed or not**
* **Solution for Tribes – they get treated as states 🡺 most fed enviro law requires states to do things ad states get $$$ to do it (Treatment as States = TAS)**
* **To what extent can they reg non-Indian fee lands inside the res or trust lands? EPA has always determined that it directly impacts tribes health and welfare if they can’t regulate**

**Fromm Slides:**

* **Federal laws protecting the environment apply to Indian country. *Federal Power Comm’n v. Tuscarora Indian Nation* (1960)**
* **Most federal environmental laws direct implementing agency to treat tribes as states for purposes of funding and delegating regulatory authority (aka TAS)**
* **Depending on the TAS language in the statute, EPA will either assume the tribe can regulate all lands in a reservation (regardless of ownership) or will use the *Montana* test (direct effect on the political integrity, economic security, or health and welfare) to determine which fee lands over which a tribe may assert environmental regulatory control.**

**Clean Air Act:**

* 1990 Amendments authorized EPA to delegate auth to tribes – broad language: they can reg within the exterior boundaries of the res
* When one states sets AQ standards or particulate matter standards – if the state upwind engages in activities that violate these standards there are mechanisms in the CAA that force state to negotiate there way through it or the feds step in
* **Due to broad language of amendment (“air resources within the exterior boundaries of the reservation”), EPA interprets to mean a tribe can regulate all lands within boundaries regardless of ownership. *Arizona Public Service Co. v. EPA* (D.C. Cir. 2000)**

***Nance v. EPA***

* Big res in terms of land and pop
* Crows have a mine and the Cheyenne do not – Cheyenne say the Crows are violating there standards
* Crow tribe sued the Cheyenne designation as a Class 1 pristine AQ
* The Court upheld Cheyenne’s auth to designate
* **If the state disagrees with the higher standards set by a tribe, it must reach accord with the tribe or be subject to the EPA’s authority to resolve the dispute**

**Clean Water Act**

* A bit more difficult – less broad
* Allows for 8 parts of CWA including setting water quality standards
* 2 issues: Point source discharges (NPDES system) and run-off (non-point source)
* Tribes have to meet the *Montana* test – will it be read narrowly (like SCOTUS is inclined to do) or broadly (like EPA is inclined to do)
* Language in amendments suggest tribal control – EPA relies on this
* 1987 amendments allow TAS for tribes (but less broad that CAA amendment):
* Allows for 8 parts of CWA, incl. WQS
* States cannot set WQS for reservations and EPA doesn’t do it
* EPA’s regulations adopted the *Montana*  test to determine if tribe can set WQS for fee lands within reservation (due to language of amendment that suggest the need for tribal control of water resource first)
* **Montana TEST: A tribe may regulate through taxation, licensing, or other means, activities of nonmembers when: (1) they enter a consensual relationship with the tribe or its members; or (2) when the conduct of the nonmember threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.**

***City of Albuquerque v Browner***

* **Pueblo of Isleta WQS upheld even though it required City to spend millions to improve sewage treatment plant based on combination of Congressional delegation and the Tribe’s inherent authority**
* They set really high WQ standards and city of Alb was faced with having to spend a bunch of money to upgrade storm-water runoff and sewer system
* The city challenges it – they arg that because the tribe set standards so high for religious reasons the EPA approval was a violation of the establishments cl – didn’t get anywhere b/c tribes were setting these standards for many reasons
* The Court’s language: it is clear that it is a delegation of fed auth from cong to tribes and that should be enough but the 10th went out of its way to talk about inherent tribal auth
* When Cong recognizes tribes inherent auth in delegation of power they are not really delegating cong power – recognition leaves more power in the tribes – it revives an old sovereign power

***Montana v. EPA***

* Non-Indians on fee lands w/ feed lots, dairies, auto wrecking yards, dumps etc. – a lot of non-Indian activity with enviro impact
* **Use of *Montana* test upheld to allow EPA to delegate authority to tribe to reg non-Indian activities on non-Indian owned fee land within reservation boundaries**

**Resources Conservation and Recovery Act:**

* **No express delegation to tribes**, but no state jurisdiction either. *Washington DOE v. EPA* (9th 1985).
* RCRA defines Indian tribes as “municipalities”.
* Tribes must enforce minimal federal standards and can independently regulate reservation lands to extent that tribal sovereignty allows

***Backcountry Against Dumps v. EPA* - RCRA**

* NO deference to agency interpretation
* No TAS without express authorization from congress
* Weird decision because they didn’t even touch *Chevron*

**CERCLA (Superfund)**

* 1986 Amendments but: (1) Tribes can’t add site to NPL (states get at least 1) but tribes do’t have to cost share clean-up like states
* 1986 study on slides
* Tribes are natural resource co-trustees under CERCLA so they can sue on their own – like state or fed agencies – very few tribes have the pockets to do that – In most cases they cooperate with state and fed agencies
* Regional Superfund sites: Portland Harbor: 5 tribes with off res treaty rights:
* Hanford Nuclear Reservation: scope of off –res treaty rights: Crts say they can exercise them on all fed public lands that have multiple uses – if set aside for one use (military base – no dice) question is when they make this a multiple use site again to what extent will they have to clean up the site for fishing. Also GW impacts are moving into the Columbia River 🡺 question of if you have a right to fish do you have right to fish in the river (and more precisely healthy fish)
* Under CERCLA 2 passes: (1) clean-up and (2) restoration (often most expensive)

**Feds Trust Responsibilities:**

* **NEPA: doesn’t say a word about tribes – but applies to tribes anyways** – *Davis v. Morton* analogizes public trust with Indian leasing statute
* **Issues with NEPA: (1) burden placed on BIA which has no resources to conduct EIS – anything BIA has to approve is considered a major federal action – usually a developer will pay for this otherwise it is a real barrier; (2) off the reservation NEPA is useless for tribes**
* *Anderson v. Evans*: required for Makah whaling plan approved by fed agency – specific treaty language allows whaling – Court found tribe’s treaty right was limited by the MMPA – enough of an express statement by Cong

**Other Environmental Statutes: ON SLIDES**

* Safe Drinking Water Act – 1986 amendment similar to CWA amendment
* Surface Mining and Control Reclamation Act – federal government retains primacy
* Federal Insecticide, Fungicide and Rodenticide Act – Congress amended to allow tribes to develop own program for applicators
* Hazardous Materials Transportation Uniform Safety Act – applies to tribes and preempts separate tribal regulations

1. **Clean Water Act and the Clean Air Act: the tribes are considered states (CAA specifically says so, the CWA has been read that way)**

* They are delegated authority to control and regulate the federal statutes.

1. **Resources Conservation and Recovery Act (RCRA): tribes are not treated as states and tribes have no delegated power**
2. **Judicial Jurisdiction by Congressional Statute: The Indian Child Welfare Act of 1978**

**Introduction:**

* **One of most sweeping statutes in Indian law and involved in more litigation than any other Indian statute.**
* **Designed to stop racial and cultural biases from being used to separate Indian children from their families and cultures as well as prevent negative impacts to adopted Indian children.**
  + Role of extended family
  + living space conditions
  + Traditional activities and cycles
  + 25 to 35% of Indian children taken this way with 90% placed in non-Indian homes
* **Indian children whose residence or domicile is on a reservation are subject to Indian courts exclusively**
* **Concurrent jurisdiction to Indian children who are not domiciled or resident of the reservation – (1) concurrent but presumptively tribal jurisdiction; (2) on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of “good cause”, objection by either parent, or declination of jurisdiction by tribal court.**
* **State Court must** (1) notify the Tribe and provide parents with counsel; (2) give preference to placing kids with family or tribal community; (3) show active efforts to prevent breakup of the Indian family; (4) must prove TPR; (5) transfer to tribal courts unless good cause shown not to

***Mississippi Band of Choctaw Indians v. Holyfield*, 1989**

* An unmarried Indian couple domiciled on the reservation gave birth to twin babies in Gulfport, and gave the babies up for adoption and signed adoption petition and had adoption decree issued in Harrison County. Tribe moved in Chancery Court to vacate the adoption decree on the ground that under the ICWA exclusive jurisdiction was vested in the tribal court.
* The domicile of the mother was at all relevant time the Choctaw Reservation, and even though the twins themselves had not been there, they adopt the domicile of their mother, which would be the Reservation.
* **Court determines that the Choctaw tribal court should make the custody determination. You must follow the ICWA.**
* If both parents are domiciled on the reservation, then the children are also considered domiciled there even if they are not domiciled there (mother moves off, but has no other domicile, Indian courts have exclusive jurisdiction of children).
* **Dissent: ICWA should be interpreted to be conducive to best interests of child. Allowing parents to defeat tribal court jurisdiction does not endanger Indian tribes**
* **ICWA allows tribes to “reassume” jurisdiction in P.L. 280 states by petition to the BIA**

**From Notes:**

**Critiques of ICWA – LOOK AT SLIDES**

* Child centric people only look at interests of child – so culture not relevant unless it apples to child
* Tribes: more of the same
* State Court Attacks on ICWA: (1) **Existing Indian Family Unit exception** – basically saying kids aren’t Indians because they have no identifiable families
* Randall Kennedy critique: says that the real problem in Indian country is poverty not state officials (prof disagrees); Definition of “Indian Child” that doesn’t take into account complexities of identity; it is a racial matching law (prof also doesn’t buy it)
* ICWA problems: notice problems – state fails to notify the tribe and kid ends up with a non-Indian family for like 5 years; sometimes the tribes will slip through the cracks because the tribe is not on top of their shit and they don’t respond to notice – Prof says it works fairly well cause of the strong language – states have a hard time getting around it
* Does child’s emotional development always fit goal of tribal cultural survival? Randall Kennedy critique:
  + - Real problem poverty, not state officials
    - “Indian child” definition does not take into account complexities of identity
* State court attacks on ICWA:
  + - Existing Indian family unit exception (state court determines how Indian the child is)
    - Futility of “active efforts”

Unreasonable use of “good cause

**Good Cause Exception – LOOK AT SLIDES**

* State courts don’t have to leave juris with tribal courts for good cause
* One excuse: the tribal court doesn’t look enough like a court
* Second excuse: the proceeding was at an advanced stage
* Indian child is over 12 and objects – gets abused because 12 year olds get pressured super easily
* Would cause undue hardship on parties and/or witnesses to travel to tribal court – abused all the time
* Parents of Indian child over the age of 5 are not available and child has had little or no contact with the tribe – **Leads to next case**

***Adoptive Parent v. Baby Girl***

* Look up facts
* Dad gives up rights – but he can’t do that? He changes his mind and he challenges.
* They want issue transferred to tribal court
* Issue: is it an Indian kid
* Alito turns ICWA on its head to a certain extent pretty much guts ICWA – according to prof
* The case breathes life into the idea that state law are relevant in this process – he looked at the three following sections
* **3 provisions at issue S1912(f), (d) and 1915(a)**
* **S192(f)** does not apply when parent in question never had custody of the child, focusing on the phrase ‘continued custody’ in the statute
* **S1912(d**) does not require remedial efforts be made when the parent did not have physical or legal custody
* **1915(a)** On SLIDES
* Concurrence – he attempts to limit the decision to absentee fathers
* Scalia disagrees with statutory interpretation
* Sotomayer: points out problem w/ statutory interpretation and how they turn it on its head and notes that state court not required to return child to non-Indian adopters
* All of this happened because the state didn’t comply with notice requirements
* This decision will force tribes to keep track of what is going on but that is really hard if the state is not providing notice they are screwed
* 2 things not in power point: (1) ICWA applies to all placement of children; (2) the list

**Case Brief:**

**Facts of the Case**

When the biological mother of Baby Girl became pregnant she did not live with the father and the father did not support the mother financially. The mother sent the father a text message asking if he would rather pay child support or relinquish his parental rights. He sent a text back, saying that he would relinquish his rights, though he later testified that he thought he was relinquishing his rights only to the mother. The biological father was a registered member of the Cherokee Nation. The biological mother attempted to verify this status, but spelled the father’s name wrong and misrepresented his birthday in the request, so the Nation could not locate the father’s registration. The mother listed Baby Girl’s ethnicity as “Hispanic” instead of “Native American” on the birth certificate. The mother decided to put Baby Girl up for adoption because she had two other children that she struggled to support.

Adoptive Couple, who resided in South Carolina, began adoption proceedings in that state. The Cherokee Nation finally identified the father as a registered member and filed a notice of intervention, stating that Baby Girl was an “Indian Child” under the Federal Indian Child Welfare Act (ICWA). The father stated that he did not consent to the adoption and would seek custody of Baby Girl. After trial, the family court denied Adoptive Couple’s petition for adoption and granted custody to the biological father. The court held that the biological father was a “parent” under the ICWA because of his paternity and pursuit of custody as soon as he learned that Baby Girl was being put up for adoption. Adoptive Couple did not follow the procedural directives in the ICWA to obtain the father’s consent prior to initiating adoption proceedings. The Supreme Court of South Carolina affirmed.

**Question**

Can a non-custodial parent invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law?

Does ICWA define “parent” to include an unwed biological father who has not complied with state law rules to attain legal status as a parent?

**Holding:** No, **a non-custodial parent cannot invoke the ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent**. The Court did not rule on the definition of “parent,” but, for the sake of argument, assumed that the biological father was a “parent” under the ICWA. Justice Samuel A. Alito, Jr. delivered the opinion of the 5-4 majority. The Court held that the **ICWA was designed to stop the practice of unwarranted removal of Indian children from Indian families “due to the cultural insensitivity and bias of social workers and state courts.” In this case, however, the Court noted that the biological father never had either legal or physical custody of Baby Girl and had previously relinquished his parental rights. Because the biological father gave up custody before birth, and because Baby Girl had never been in his legal or physical custody, the ICWA's goal to prevent the breakup of Indian families did not apply**. Furthermore, the Court held that the ICWA’s preference for placing an Indian child with family, other members of the tribe, or other Indian families did not apply in this case because **no other parties beside the adoptive parents had come forward to adopt Baby Girl.** The Court feared that applying the lower court’s rationale could lead to a scenario where a biological Indian father could play an “ICWA trump card” to override the mother’s decision and the child’s best interests.

**In his concurring opinion**, Justice Clarence Thomas stated that the federal government, in passing the ICWA, may have interfered in the area of family law, a topic constitutionally reserved to the states. However, because the majority opinion avoided constitutional problems, he concurred with the decision. Justice Stephen G. Breyer wrote a separate concurrence in which he stated that the majority’s decision may adversely affect parents without looking at whether the parent would look out for the child’s best interest, and that the ruling still raised the possibility of allowing an absentee father to re-gain custody with the support of his tribe.

**Justice Sonia Sotomayor wrote a dissent** in which she argued that the majority’s opinion distorted the statute and led to a result that was both contrary to Congress’ intent and potentially devastating to Baby Girl. Additionally, she argued that the majority completely ignores Congress’ policy reasons for passing the ICWA and distorts the clear provisions in the act. Finally, Justice Sotomayor stated that the majority’s interpretation of the ICWA applies adversely to all noncustodial Indian parents, regardless of whether those parents actively participated in their child’s upbringing. Justice Ruth Bader Ginsburg and Justice Elena Kagan joined in the dissent, and Justice Antonin Scalia joined in part. In his separate dissent, Justice Antonin Scalia argued that the majority’s definition of the phrase, “continued custody,” should have also included future custody. He also wrote that the majority’s decision “needlessly demeans the right of parenthood” by removing a father’s right to raise his child.

**[JUDICIALLY CREATED EXCEPTIONS TO ICWA p.661]**

**Chapter 9: The Nation Building Challenge: Federal Indian Law and Reservation Development**

**Introduction:**

* **Advantages:** Immunity from state and local regulation**,** No federal income taxes**,** Tax deductions, e.g. Indian Tribal Governmental Tax Status Act (essential governmental functions)
* **Disadvantages:** Remoteness**,** Lack of infrastructure and capital investment**,** Lack of human resources**,** Unique political and legal status, e.g. trust land**,** Risk perceptions

1. **Managing the Resources of the Reservation**
2. **Land Leasing in Indian Country [On sLides]**

* Cong auth leasing of Indian Land by BIA in 1955
* Long term leases allow more development but pose threats of loss of juris and greater assimilation

**What role for the BIA in approving leases?**

* ***Tesuque Pueblo***: BIA rejects lease approved by Tribal Council – it was a big lease and would have brought more people than were in the tribe. Why should the BIA be in this “Great White Father” role?
* ***Yavapai Prescott Indian Tribe***: Tribe has language that allows them or BIA to terminate lease – BIA had not approved it yet. The Court ruled against the tribe finding that the BIA had to be involved – **The BIA cannot give up its “great white father” role by contract**
* ***Rosebud Sioux*** – 2000s Pig Farm: 5 Million spent on the project and the tribe killed it after original tribal council had approved it – The non-Indians were pissed and sued and the Court ruled they couldn’t sue
* **American Indian Agricultural Resources Management Act (1993):** gives full faith and credit for tribal decision in state court – made it easier for tribes to have control over agriculturally related leases

1. **Mineral Development:**

**Indian Mineral Leasing Act 1938 (IMLA)**

* 10 year terms, rolling
* Competitive bidding
* Tribal approval
* Alternatives and the Non-Intercourse Act
* DOI has no fiduciary duty (*Navajo* 2009)

**Indian Mineral Development Act 1982 (IMDA)**

* Non-lease mineral development
* Negotiated by tribe or tribal member but with DOI approval within 180 days
* Few new leases under IMLA, mostly IMDA today

**Communicative leases**

* Company combines several sites to make a “community” such that if one site is productive, company may extend the leases at all of the sites

**Indian Energy Resources Act 1992 (IERA)**

* Grants, tech. assist., and royalty management commission

**Indian Tribal Energy Development and Self-Determination Act 2005 (ITEDSA)**

* Tribal Energy Resource Agreements
* No individual DOI approval needed
* Too complex and, as of 2011, no tribe using due to TR impacts, tribal capacity and statutory issues (e.g. “inherent federal functions”)
* **Issues:** Intervention by allottees , Post-lease tribal taxes and regulations, Scope of fiduciary duty (maximizing profits v. maximizing valuation)**,** Scope of mineral estate (old intent v. new uses)**,** Continuing fraud and mismanagement

**Minerals on Indian Land:**

* 30 % coal west of the Mississippi
* 50% potential uranium reserves
* 20 % known natural gas and oil reserves.
* Over 5 billion barrels of oil, 37 trillion cubic feet of natural gas, and 53 billion tons of coal recoverable with current technologies

1. **Timber Management**

**Introduction:**

* Pretty much carte blanche for BLM until…

**National Indian Forest Resources Management Act of 1990** (NIFRMA)

* Acknowledges trust responsibility
* Integrated Resource Management Plans (IRMPs)
* Improved financial accounting
* Improved trespass enforcement
* **Issues:** (1) Impacts of NIFRMA on “comprehensiveness” of federal regulations to prevent: State taxation of non-Indians andSecurity interests in Indian timber cut by non-Indians;and (2) Scope of federal taxation of timber assets owned by individual Indians:

***Squire v. Capoeman*** (1956):

* income derived directly from trust lands not subject to federal taxes
* Limited to products raised on land, e.g. timber, crops, some livestock

***Squire v. Capoemen***

* **KEY TEST on when Gov can tax Tribal Member for resources they get on tribe land: Any income derived directly from trust lands is not subject to federal taxes**
* Construed very narrowly – Fed crts don’t want Indians to evade taxes so they **apply tax cannons of construction rather than Indian treaty canons of construction** – Timber, crops and livestock but if you raise cattle on someone else’s trust land it is taxable b/c it is not your trust land – same if you do it on land owned by the tribal gov and not you – Very cramped reading
* FED TAX?

***Chickasaw Nation* (2001): tax canons trump Indian canons; no exemption from excise taxes based on IGRA**

1. **Indian Gaming**
2. **The Supreme Court’s Application of Public Law 280’s Regulatory Prohibitory Distinction**

***California v. Cabazon Band of Mission Indians*, 1987**

* **Affirmed tribal sovereignty over gambling activity on the reservation**
* Tribe conducts bingo games on its reservation and has a card club open to non-Indians. CA seeks to apply its state law which doesn’t entirely prohibit playing bingo, but it only permits the games when operated and staffed by members of charitable organizations.
* **CA is a PL 280** **state**, and was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the state. And the granted of civil regulatory authority was more limited.
* **Court determined** that the State’s interest in preventing the infiltration of the tribal bingo enterprises by organized crime does NOT justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them **-** “**State jurisdiction is pre-empted**….if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”
* **Cannot regulate absent expression of Congress** **or some interest of state**
* **Public Law 280** **does not authorize civil regulatory jurisdiction** **over the tribes**
* While Public Law 280 applies criminal jurisdiction there is a dispositive difference between criminal prohibitory and civil regulatory (for instance state taxation)
* California also promotes substantial gaming activity (via state lottery), thus it regulates instead of prohibits gambling in general
* There are **countervailing federal policies:** (1) Indian economic development; and (2) there is an obligation of the federal government to bring the tribes forward

**2**. **The Congressional Response to Cabazon: The Indian Gaming Regulatory Act**

* Somewhat diminishes the scope of the Cabazon ruling, giving states a more significant role to play in the regulation of Indian gaming than the Court said was necessary under established principles of federal Indian law.
* “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”

1. **Indian Gaming Regulatory Act**
2. **Generally:**

* Class I “social games” are allowed—subject solely to jurisdiction of the tribe
* Class II Bingo, lotteries, and poker without bank – can only prohibit in tribes if entire state prohibits
* Class III everything else – must enter into a state/tribal compact to allow Gaining a license from Secretary of Interior
* (1) Get approval; (2) Negotiate in good faith with the state; (3) If the state fails to negotiate tribe then sues the state - Seminole Tribe v. Florida – state sovereign immunity from IGRA. Congress cannot waive state sovereign immunity (11th Ad)
* **Congress revises IGRA and allows the Secretary of Interior to grant Indian gaming without State compact. But new IGRA says Sec of Interior will not approve application for gaming not on traditionally occupied land.**

**Chapter Ten: Indian Religion and Culture**

1. **Protection of American Indian Sacred Lands**

***Lyng v. Northwest Indian Cemetery Protective Association,* 1988**

* **Issue:**  whether the First Amendment’s Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of tribes in NW CA.
* **Court determines it does NOT.**
* **Reasoning:** The individuals would not be coerced by the Government’s action into violating their religious beliefs; nor would the governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.
* **TEST:** cannot prohibit, nor can you be coerced into pursing other beliefs, nor can you be denied equal benefits…however, this doesn’t mean the government cannot intervene.
* **Government actions that are general in intent [neutral towards religion], that burden or even destroy a religious practice, are not an interference with the Free Exercise -** Only neutrality is required
* **Discussion (criticism):** Indian land is to be held in trust of the Indians. The trust relationship requires the government to look after Indian way of life.Thus, something more than neutrality ought to be required from the government
* In the end the court is concerned with not providing any special treatment to the point of acknowledging the possible destruction of their religion
* Positive things from this decision: (1) caused tribes to go back to Cong and lobby for stronger protection in public land use planning laws for their religious rights; (2) Cong designated tribe lands as a wilderness area the same year

[Look for more stuff]

1. **Protection of American Indian Religious Practices and Beliefs**

***Employment Division, Department of Human Resources of Oregon v. Smith*, 1990**

* OR law prohibits the knowing or intentional possession of a “controlled substance” unless prescribed by a medical practitioner. Smith and Black were fired from their jobs b/c they ingested peyote for sacramental purposes at a ceremony of the Native American Church. They were denied unemployment compensation
* Court upheld the OR law stating that it was constitutional and consistent with the Free Exercise Clause. When the government is acting positively towards religion: compelling state interest is required to uphold the act. When government is acting neutrally towards religion than the action is acceptable
* **Congress overturned this decision with the Religious Freedom of Restoration Act**
* **RFRA:** “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless it can be demonstrated that “application of the burden to the person: (1) is in furtherance of a compelling state interest”; (2) is the least restrictive means of furthering that compelling interest

1. **Protection of American Indian Cultural Resources**
2. **The Native American Grave Protection and Repatriation Act (NAGPRA)**

* Prohibits trade, transport, or sale of Native American human remains and directs federal agencies and museums to take inventory of any Native American or Native Hawaiian remains and, if identifiable, the agency or museum is to return them to the tribal descendants.

1. **The National Museum of the American Indian Act**

* Provided for the creation of a new National Museum of the American Indian in the Smithsonian Institution. Provided for repatriation to tribes of some of the Smithsonian’s collection of the remains of an estimated 19,000 Native Americans.

1. **The Archeological Resources Protection Act**

* Prohibits the excavation, removal, alteration, or destruction of archeological resources on federal and tribal lands, and includes protections for graves and human remains

1. **Other Federal, State, and Tribal Laws Protective of Indian Culture p.761**

* Native American Language Act
* Indian Arts and Crafts Act

1. **Intellectual Property Rights**

* The controversy over the use of Native American names and mascots by high schools, colleges, and professional sports teams has received a great deal of publicity and notoriety in recent years.

**Chapter Eleven: Water Rights**

1. **Water Law in the West**

* Doctrine of prior appropriation is the keystone of western water rights - “first in time, first in right”
* State water law = prior appropriation (first in time, first in right): extremely regressive – looks to the past instead of the future 🡺 setting of priority dates. Water rights are pertinent to the land (not to b econfused with riparian doctrine), it is not about bordering a waterway it means the water is attached to the land as a legal matter and the land could be far away.
* Different from the East which is riparian doctrine – if you own land on a stream you have reasonable rights to the water in that stream
* 1952 McCarran Amendment: states may force fed gov to participate in watershed adjudications – includes federally reserved water rights but does it include Indian reserved water rights
* **Key thing to remember for Indian Water Law:** “Practicably irrigable acreage” 🡺 PIA

1. **Nature and Extent of Indian Reserved Water Rights**

***Winters v. United States*, 1908**

* **Assures tribes the right to use sufficient water to fulfill the purposes of their reservations**
* Indians were granted a reservation in Montana, and then the reservation was opened up for settlement by non-Indians, and the Indians on the reservation were having their water use interfered with by the settlers. US brought suit on behalf of the Indians to have the settlers enjoined from interfering with water use on the reservation.
* Reservation of rights for Indians - Water rights that existed with the land stay with the land
* **Federal policies to create an agrarian lifestyle for the Indians requires that water rights be given and kept by the Indians**
* The water rights last as long as the reservation

**Equal Footing Doctrine:**

* Coms up again and again
* Rejected in *Kansa Indians*
* *Minnesota v. Mille Lacs Band:* Equal footing doctrine does not eliminate tribal water rights

***Arizona v. California*, 1963**

* A tribe has reserved water rights, whether or not they are listed in the treaty.
* AZ filed suit against California over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries
* **“The Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.”**
* **US did reserve the water rights for the Indians effective as of the time the Indian Reservations were created.**
* Equal rights to water use no matter if there is an executive, congressional, or treaty recognized reservation
* No benefit of use judgment for Indian water rights **-** The amount of water given is that necessary to make all the land useable
* **Creates PIS standard** – **Practicably Irrigable Acreage: if it can be irrigated, they have a water right – As opposed to reasonable foreseeable need**
* For both present and future needs when it comes down to agriculture
* You see this pattern where tribes get screwed and then a series of SCOTUS cases make it not so bad and then as States become more aware of the sharing of power they lobby and the judges on the bench shift their position

***United States v. Adair*, (9th Circuit 1983)**

* Klamath tribe entered into a treaty with the US in 1864 establishing a reservation in south central Oregon. Then during the Allotment period, much of the land passed from tribal hands to individual ownership. Then in 1954, there was the Klamath Termination Act which members gave up their interest in the tribe for cash. US sought a declaration of the water rights within the Williamson River drainage, which is within the former Klamath Reservation.
* **The Court determined** **that the water rights of the tribe never went away**. They continued with the right to hunt and fish even after the Termination Act.
* **The Tribe can only get rid of these rights by selling them or Congress abrogating them. Termination of Tribe does NOT terminate water rights.**
* **Priority Dates: Time immemorial and 1864**
* **Quantity:** current fish/hunt lifestyle
* **Quantity:** present and future irrigation needs (PIA\_

**Use of PIA for fish and other non-ag uses:** 🡺 see *Finch* and *Bighorn*

**In stream flow rights for the tribe:**

* You have to leave enough for the fish 🡺 even if PIA water is used the tribe can conserve water due to fishing rights

**Slides:**

* ***Adair* cites to *Passenger Fishing Vessel* (moderate living, 50%)**
* **Time immemorial if evidence of pre-contact use, e.g. traditional agriculture**
* **Shared priority date means shared losses. *Walton* (9th 1985)**
* **Agricultural water rights are typically the day of the treaty unless there is proof the tribe farmed before the treaty in which it is time immemorial - 9th:** If the tribal allottees have same priority date as tribe who gets it in a conflict (on slides)

1. **Quantification**

* A tribe’s reserved right with an early priority date leaves all junior rights holders on the same stream uncertain of whether they will have the benefit of their long-established uses if and when the tribe begins using water.
* States and non-Indian water users have pressed for quantification of Indian reserved rights!

1. **Jurisdiction**

* **Reserved Indian water rights are creatures of federal law**
* Their existence and application are independent of state laws, and their effect is to preempt rights determined by state forums.
* **McCarran Amendment, 1952: Congress consented to joinder of the US in state court adjudications of water rights in river systems where the government owns rights. The McCarran Amendment waived federal sovereign immunity for water law**
* **Indian use is federal since the federal government holds their land in trust**
* **Indian sovereign immunity has also been waived by Congress**

***Colorado River Water Conservation District v. United States*, 1976**

* **Allows State Courts to have jurisdiction when determining water rights**
* **Adds Supreme Court laws to McCarran Amendment**
* **Issue:** the effect of the McCarran Amendment upon the jurisdiction of the federal district courts over suits for determination of water rights brought by the US as trustee for certain tribes and as owner of various non-Indian Government claims - **“the provisions of the McCarran Amendment, subject federal reserved rights to general adjudication in state proceedings for the determination of water rights.”**

1. **Adjudication**

***In re General Adjudication of All rights to Use Water in the Big Horn River System*, (Wyoming 1988)**

* State court screws the tribe by reading the treaty in light not favorable towards the tribe (ambiguities are resolved in favor of the farmers)
* Ground water was not specifically granted to Indians so it remains a state right
* The amount of water allowed by Indians is the amount that the treaty stated the purpose was for (agriculture) so the amount to have agriculture and no other water use is allowed.
* **Big questio**n: do tribal Indian reserved water rights include GW – depends on which state you are in

**Arizona: *In re General Adjudication …*** patently unfair to impose PIA in all circumstances

* Does include GW

1. **Finality of Adjudication**

***Nevada v. United States*, 1983**

* US sued to adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation in 1913. In 1944, the District Court of NV entered a decree in the case pursuant to a settlement agreement. In 1973, US filed this action in the same court seeking additional water rights to the Truckee River.
* **Issue** is whether the Government may partially undo the 1944 decree, or whether principles of res judicata prevent it, and the intervenor Pyramid Lake Paiute Tribe, from litigating the claim on the merits.
* **Tribe is not allowed to bring a claim on the merits.**
* *Orr Ditch* and *Nevada* limit *Winter*’s idea of “implied reservation of water”
* **When US brings and fights for Indian water rights, res judicata would be attached to the Indians bringing a suit later.**
* If there is a party who had a sufficiently diverse and conflicted interest that your party’s interest was raised during court, then the new suit will not be allowed

1. **Non-Judicial Quantification**

* Be aware of tribal water settlements p.828
* *Winter* was the big idea: unlimited reserved water rights in Indian Country
* **Then came *Big Horn*, and messed that up, stating that the amount of water allowed is the amount that the treaty stated the purpose of the water was for like agriculture.**
* Finally get ***Orr*,** where tribe must litigate water rights issues on its own, cannot assume US will protect it.

**Water Settlements:**

* Can non-Indians and tribes find willingness to work together?
* Second Key: Congress you need $$$$ - studies, water supply projects (build infrastructure for non-Indians and res), tribal trust funds
* Limited water marketing (if benefits non-Indians): huge debate about interstate water – water transfers from basin to basin between state boundaries – Tribes have more water than they can use from reserved water rights so they can sell some

**Marketing Tribal Water:**

* Issues adjudicated: Nonintercourse act – property right that tribes can’t alienate w/o Cong approval – Under settlement acts cong approved but not with water
* **However, leasing regs would arguably include water rights – irrigation projects leased to non-Indian 🡺 non-Indian has a lease to farming lands in Indian irrigation system**
* Purpose of the Reservation: State courts try and limit the impact – most federal courts recognize the tribal homeland
* Practicalities and benefits as policy matters:

1. **Regulation and Administration of Water in Indian Country**

***United States v. Anderson*, 9th Circuit 1984**

* **Issue:** To what extent do state and tribal governments have jurisdiction to regulate water use by non-Indians within reservation boundaries.
* **The state, not the tribe, has the authority to regulate the use of excess waters by non-Indians on non-tribal, fee, land**.
* ***Montana*: State regs the water use by non-Indians on fee land within allotted reservation – LOOK UP RELATION TO RULE ABOUT CONSENTING TO BE UNDER TRIBAL JURIS**
* **Not like *Walton* b/c res not allotted**

**Competing schemes over unitary source b/w tribe and state:**

* Watersheds, GW, and downstream impact
* If the tribe is clever and makes it look like the state system they probably won’t get challenged

**Chapter Twelve: Fishing and Hunting Rights**

1. **Regulation of On-Reservation Fishing and Hunting**

* **Once a reservation has been set aside by a federal treaty, agreement, statute, or executive order for the use and occupation of a tribe, state jurisdiction over hunting or fishing within the reservation generally is preempted as an incident of the creation of Indian country.**

**Regulation of on-res hunting and fishing**

* Tribes do not need express treaty rights – it is implied

***New Mexico v. Mescalero Apache Tribe*, 1983**

* **Issue:** can a state restrict an Indian Tribe’s regulation of hunting and fishing on its reservation?
* NM concedes that on the reservation the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the tribe and may also regulate the hunting and fishing by nonmembers. But NM contends that it may exercise **concurrent jurisdiction** over nonmembers and that therefore its regulations governing hunting and fishing should also apply to hunting and fishing by nonmembers on the reservation.
* **Court did a balancing test:** “state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority”
* **Elements for Consideration:** (1) traditional notions of Indian sovereignty; (2) promoting self-government; (3) tribal self-sufficiency and economic development, power to manage the use of territory and resources by both members and nonmembers
* State authority must be viewed against any interference with the successful accomplishment of the federal purpose
* Even though NM may be deprived of the sale of state licenses to nonmembers, the financial interest of the state is insufficient to justify the assertion of concurrent jurisdiction.
* **No concurrent jurisdiction.**
* Unlike cig case they talk about the cong goals of economic dvlpmt and self-sufficiency and there wasn’t enough state interest
* Not seen as marketing because the game was in large part produced on the res – In tobacco case, if they produced the tobacco on the res the case would have been different. Also deer hunting is related to their culture

**Notes after:**

* step back to 1973 – what if there are no clear res boundaries?🡺 **Cal seized his gill nets and SCOTUS said the 1892 allotment act and the language involved**

***Bourland* (1993):**

* No tribal regulation where Congress opened up to public (clear intent)
* Did not disturb *Mattz*  rule that must be clear evidence of Congressional intent to disestablish or diminish the rez
* Why didn’t non-Indian fishing directly effect welfare of tribe?

**18USC 1165:**

* Federal crime to hunt or fish on Indian land without permission. Congressional conferral or acknowledgement

***Northern Arapahoe Tribe:***

* The BIA may impose a tribal game code on a rez where inter-tribal politics interfere and risk of extinction or endangerment of big game

**Cooperative WL Management: WA/OR and the BPA**

* CRITFC – 4 treaty tribes
* OR & WA and BPA mitigation funds: (1) Cooperative efforts in tagging and tracking; (2) Large areas of land off-rez placed on under tribal wildlife management with public access allowed; (3) Cooperative efforts in identifying habitat values for mitigation and with mitigation projects; (4) Cooperative efforts in reintroducing, protecting and limiting hunting of big game species

1. **Regulation of Off-Reservation Fishing and Hunting**

* States generally are free to regulate Indians outside of Indian country, except for Indian off-reservation treaty hunting and fishing. In a few instances tribes have reserved off reservation hunting rights.

1. **Pacific Northwest**

***United States v. Winans*, 1905**

* **Rights of tribe to affect off reservation hunting and fishing goes back to original treaty and reservation of rights allowing the Indians to go off reservation and cross others land.**
* Reservation of those not granted, you reserved rights not just land.

***Coffee* (Idaho 1976)**

* Off reservation rights may be protected even if tribe lacks treaty

***Tulee* (1942)**

* No fees, but can state regulate for conservation

***Puyallup I***

* State may regulate manner of fishing for “reasonable and necessary” conservation purposes in a non-discriminatory manner
* No real basis for State authority
* **Problems:**  (1) ignored import of supremacy clause; (2) no real basis for state authority; (3)vague standard; (4) equal protection concept found in treaty language

***Puyallup II*:**

* State discriminated in allowing sport fishing methods over Indian net fishing methods
* “Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets”

***Puyallup III*:**

* Allows state regulation for conservation on the reservation.
* History of prior access cases v. exclusive language of the treaty

***Antoine v. Washington* (1975)**

* Colville hunting rights case - they are not a treaty tribe but an exec order tribe
* Exec orders aren’t tracked as well as congressional statutes
* 12 point agreement here – then Cong allowed for loss of land without talking about the deal between the feds and the tribe
* SCOTUS: we don’ care about the rules of canons of construction, even though it was a contract
* Role of canons of construction and supremacy clause: treaty v. contract

***United States v. Washington***

* Boldt decision
* Right of tribes to take **50% of runs**

***Sohappy v. Smith* (US v. OR) (1969)**

* State may regulate tribal fishing at usual and accustomed sites for conservation purposes only and must apply same restrictions to non-Indians

***Washington v. Washington State Commercial Passenger Fishing Vessel***

* Upheld the Boldt decision allocating a 50% share of runs to tribes (as a maximum) and may be lower depending on changed circumstances so long as provide with “moderate living”
* “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory"

***US v. Washington* (9th 1998)**

* Shellfish catch at 50% absent growers enhancements **-** Conservation regulation allowed

***US v. Washington Phase II* (1980)**

* Hatchery fish included in harvest
* Court found right to protected fish habitat
* En banc 9th circuit removed language re-environmental servitude

***Passenger Vessel***

* Duty to prevent degradation – No – *Oil Port v. Carter*

***United States v. Washington***

* Treaty promise to have abundant fisheries forever
* 1500 plus state road culverts block fish
* WA given 17 years to fix the problem ($700,000 + to fix or replace each culvert)
* WA recently appealed to the 9th

1. **Great Lakes**

**Michigan**

* United States sues Michigan re tribal fishing rights in Great Lakes based on 1836 treaty that reserves a “right of hunting” on ceded lands.
* **US District Court in 1979 finds state has no right to regulate tribal use of gill nets on lakes**
* 1985 special master to allocate catch
* Tribes won later challenges by commercial fisherman in 1980s/90s
* Michigan-Tribal agreement on inland fishing/hunting in 2007

**Wisconsin**

* 6 bands of Chippewa; 3 treaties; “privilege of hunting, fishing . . . in territory ceded”
* **WI Supreme Court rules statehood abrogated treaty rights** (ignoring *Winans*)
* *Lac Courte Oreilles Band v. Voigt* (7th 1983):**Treaty rights not extinguished** (LCO I)
* **Can hunt/fish on all public lands** (LCO II – 1985)
* **All traditionally used resources; can use modern techniques; can sell to non-Indian; no allocation % set; conservation allowed (LCO III – 1987)**
* **State can regulate for health and safety as well and tribes get only “moderate living**” (LCO IV – 1987)
* **Tribes can regulate themselves** (LCO V – 1989)
* **Equal allocation of resources unless tribal moderate standard of living requires less** (LCO VI – 1990)

***Minnesota v. Mille Lacs Band of Chippewa* (1999)**

* Similar tribes, treaties and language as in WI
* **Rejected statehood as abrogation of treaty rights and rejected unauthorized presidential removal actions as abrogating such treaty rights**
* Notes that *Racehorse* later qualified
* Dissent

**Chapter 13: Alaska Natives and Native Hawaiians**

1. **Alaska Natives: Looking Forward to the Past?**
2. **Historical Background**

* Aleut, Inuit (Eskimo), Indians (south coast/inland)
* Treaty of Cession 1867
* Territory Organic Act 1884: “not be disturbed in the possession of any lands actually in their use or occupation”
* ***Tee-Hit-Ton Indians***: no absolute ownership but aboriginal rights exist
* Late entry into United States and little pressure for native lands = no treaties
* Statehood in 1958: Choose 103.5 million acres of 365 million acres. But no rights or jurisdiction in lands “held by any Indians, Eskimos or Aleuts”. 1966 Alaska Federation of Natives. 1968 freeze on land selections v. sales of oil leases
* Oil, the gold rush of the 1960s - Fear of long claims court

1. **Alaska Natives: the Alaska Native Claims Settlement Act**

**USC 1601-1628:**

* 44 million acres $962.5M in exchange for giving up aboriginal land claims (need v. value, e.g. $12B in oil in 1981)
* **(d)(2) provision**: 80M acres for federal “conservation” lands. **ANILCA** 1980 – 110 million acres for federal lands
* **Title taken by native corporations (state), not tribal govts (not extinguished)**
* Only living tribal members became shareholders of native corporations
* **Tribal shares could be sold to non-Indians starting in 1992**

**Lands & Waters**

* 44 million acres. Surface 22M acres to 200 village corporations (25 or more in 1970). Subsurface 22M acres to 12 regional corporations. 16M acres to 6 of regional corporations. 6M acres for allotments, town sites, etc.
* Metlakatla of Annette Island exception - Fee title but protected from state taxation (if undeveloped)

**Money & Shares:**

* $962.5M from $462.5M via Congress over 11 years and $500M via annual revenues over 11 years collected by US and AK from mineral leases
* Money paid to regional corporations and 50% of than redistributed to native villages and shareholders
* Each living native got 100 shares in regional corp. and, if living there, shares in village corp.; later born natives receive through inheritance or purchase

**Fishing & Hunting:**

* Expressly extinguishes aboriginal hunt/fish rights
* Subsistence use protected by MMPA, ANILCA.

**Trust Relationship:**

* Not intended to create “lengthy wardship or trusteeship”
* Does not address existing tribal governments and specifically protected existing federal programs (BIA, IHS, etc.)

1. **Native Lands**

***Alaska v. Native Village of Venetie* – tribe asserts tax**

* 1943 1.8M acre rez. ANCSA creates 2 native corporations and transfers fee title to them. In 1973 Corporations transferred their title to Venetie Tribal Government. In 1986, tribe asserts “Indian country” under 18 USC 1151 and attempts to assess tax against private contractor (and pre-empt state jurisdiction)
* Sec. 1151 includes reservations established by treaty or statute and all “dependent Indian communities”
* Status as “Indian land” important for cultural survival, e.g. *Kagama* (“the people of the States … are often their deadliest enemies”)
* **Congress avoided any discussion of tribal jurisdiction in ANCSA and specifically said it did not address jurisdiction**
* Alaska had historically made no attempt to govern native lands and never provided any services to such lands or the natives residing there
* **Tribes won in 9th Circuit. But State was not happy:**
* e.g., Rep. Al Vezey, R-North Pole, called tribal sovereignty an ''absolute evil'‘ during a state house floor debate
* Now-Chief Justice Roberts argued for Alaska and quoted *Kagama* but recast it as if natives were threat to non-Indians: “[R]eservation Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often “dead[ly] enemies” of the States.”
* **Unanimous (Thomas): Sec. 1151 does not include the Village of Venetie because no federal set aside and no federal superintendence**
* **REASONING:** Not a set aside because of ANCSA: (1) Elimination of reserves “set aside”; (2) Lands held in fee by state chartered corporations; (3) Language about no permanent racially defined; (4) Provisions re free alienation of shares; (5) No federal superintendence because of ANCSA; (6) No “lengthy wardship or trusteeship”; (7) No role of guardianship over lands; (8) BIA and IHS social programs do not indicate Congressional intent to maintain superintendence; (9) Legislative history of ANCSA renouncing paternalism of BIA

**Case brief From notes**

* In 1971, Congress enacted the Alaska Native Claims [Settlement[http://savingsslider-a.akamaihd.net/items/it/img/arrow-10x10.png](http://www.oyez.org/cases/1990-1999/1997/1997_96_1577)](http://www.oyez.org/cases/1990-1999/1997/1997_96_1577) Act (ANCSA), which completely extinguished all aboriginal claims to Alaska land. ANCSA revoked the Neets'aii Gwich'in Indians' reservation surrounding the Village of Venetie. Subsequently, two Native corporations established for the Neets'aii Gwich'in elected to use an ANCSA provision allowing them to take title to former reservation lands in return for forgoing the statute's monetary payments and transfers of nonreservation land. The title to the reservation was ultimately transferred to the Native Village of Venetie Tribal Government (Tribe). In 1986, Alaska entered into a joint venture with a private contractor to construct a public school in Venetie. Afterwards, the Tribe notified the contractor that it owed the Tribe approximately $161,000 in taxes for conducting business activities on its land. The Federal District Court held that, because the Tribe's ANCSA lands were not "Indian country," the Tribe lacked the power to impose a tax upon nonmembers. The Court of Appeals reversed.
* **Issue**: Is the land owned by the Native Village of Venetie Tribal Government "Indian country" pursuant to the Alaska Native Claims [Settlement[http://savingsslider-a.akamaihd.net/items/it/img/arrow-10x10.png](http://www.oyez.org/cases/1990-1999/1997/1997_96_1577)](http://www.oyez.org/cases/1990-1999/1997/1997_96_1577) Act?
* **Holding:** No. In a unanimous opinion delivered by Justice Clarence Thomas, the Court held that the Tribe's land is not "Indian country." "As noted, only one Indian reservation, the Annette Island Reserve, survived ANCSA," explained Justice Thomas in a footnote, [o]ther Indian country exists in Alaska post-ANCSA only if the land in question meets the requirements of a 'dependent Indian community' under our interpretation of [18 USC section 1151 (b)], or if it constitutes 'allotments' under [18 USC section 1151 (c)]." "The Tribe's ANCSA lands do not satisfy either of these requirements," concluded Justice Thomas, "[a]fter the enactment of ANCSA, the Tribe's lands are neither 'validly set apart for [the use of[http://savingsslider-a.akamaihd.net/items/it/img/arrow-10x10.png](http://www.oyez.org/cases/1990-1999/1997/1997_96_1577)](http://www.oyez.org/cases/1990-1999/1997/1997_96_1577) the Indians as such,' nor are they under the superintendence of the Federal Government."

1. **Alaska Native Self-Governance Status**

* Over 225 federally recognized Alaska native tribes; about 150 traditional and 75 IRA style govts

***John v. Baker (AK 1999):***

* Father starts custody fight in native village court and wins only shared custody. He then files similar suit in state court to attempt sole custody. Mother argues state court lacks jurisdiction
* **Supreme Court found inherent sovereignty and remanded for state court to consider whether to honor native court decision under comity.** Tribal status is a political question and DOI in 1993 clarified status of Alaska natives as recognized sovereign tribes; affirmed by Congress in 1994. Congress did not intend for ANCSA to divest power of tribal courts over custody disputes or other internal affairs

**ANALYSIS: State and Native Jurisdiction generally:**

* **4 questions**: (1) Over territory (*Venetie*) - Except trust allotments, reserves, etc. (P.L. 280); (2) Over subject matter (tribal internal affairs; federally delegated criminal juris.) State has criminal juris and tribes have civil; (3) Over people and property (resolved by answering 1st two questions); (4) State juris over Native govts (sovereign immunity) (*Baker)*

1. **Native Culture and Subsistence Rights**

* ANCSA a poor fit with native culture and govt
* Subsistence hunting still essential to survival and completely cultural
* Four federal laws preempt Alaska state law specifically as to subsistence hunting:
  1. Reindeer Industry Act 1937
  2. Marine Mammal Protection Act 1972 (allows Native takes in AK)
  3. ESA 1973 (exempts Natives and subsistence takes in AK)
  4. ANILCA 1980 (subsistence rights for rural Alaskans)

1. **Politics & ANILCA**

* Alaska lost right to regulate on federal lands under ANILCA (*McDowell v. Alaska* (AK 1989))
* State law requires subsistence be for all residents not just rural
* Federal government regulates subsistence hunting on all federal lands (*Bobby v. Alaska*, e.g.)

**Katie John and ANILCA**

* 1990 regs, DOI says no subsistence authority over any navigable waters; challenged by Katie John
* b/c the feds have to reg subsistence hunting they have to pass regs: 1990: DOI says no subsistence authority over any navigable water; challenged by Katie John – this would basically rule out a bunch of regs for natives
* District Court held waters included due to navigational servitude
* 9th held only waters needed for fed lands

**Sum Up:**

* Still have juris over their own affairs – child custody
* Native Corporations control all fee lands which SCOTUS said are not Indian lands
* Hunting and Fishing = gave up all aboriginal claims – only rights they have are subsistence rights reco under fed statute or state law – right now in AK b/c of ANILCA the state of Alaska regs hunting on all fed lands including some of the nav waters – fact specific

1. **Hawaii: Islands of Regret**
2. **Historic Claims and Contemporary Wrongs**

* *Ahupua’a* land system and King Kamehameha III
* Great *Mahele* of 1848: (1) 1.5M acres to 245 chiefs; (2) 2.5M acres to the King; (3) 1.5M for chiefs and people (<1% *kuleana*); (4) 1M acres for the King’s heirs; (5) Over 1M acres sold to non-natives
* 1865 Hawaiian Legislature declares Crown lands inalienable
* 1826, 1849 and 1875 treaties between US and Hawaii
* 1887 bayonet constitution, King Kalakaua
* 1893 overthrow of monarchy, Queen Liliuokalani, with support of U.S. troops - **1.75M acres of native land lost**
* 1910 amendment to organic act to allow native homesteading and 1921 Homes Commission Act (HHCA) (legislative history that natives are wards and Iike Indians); 200,000 acres put aside for native homesteads (allotment act) - 1959 statehood act required holding in public trust
* 1978 state constitutional amendments - OHA
* 1983 Congressional report
* 1993 Congressional apology resolution
* 2004 Office of Native Hawaiian Relations

1. **Hawaii: Common and Statutory Law**

**P.A.S.H. v. Hawai’I County Planning Comm’n (HI 1995):**

* Natives are not same as general public for standing purposes
* Constitutional requirement to protect native gathering rights
* Resort planed on lands that were traditionally used by native Hawaiians. They attempt to intervene in planning commission and they were denied – excuse: you are par tof the general public
* Constitutional req to protect gathering rights (primarily fishing and gathering with some hunting)
* **Hawaiian land patents** = more limited property interest – **when you hold fee title in Hawaii you do not have the same bundle of rights – it is more limited** 🡺 If you were born on these lands you had a right to use them under gathering rights – **and court said you have traditional gathering rights whether or not the non-Indian land owners own the land in fee or not – Limits: gathering is in direct conflict w/ use of the land**
* Hawaiian land patents = more limited property interest (no judicial taking)

**Hawaiian water law**

* similar to western riparian law but at core based on custom and includes strong element of public trust; permitting requires protection of native customary uses

1. **Hawaii: Native Rights and Federal Law**

***Day v. Apoliona* (2007):**

* **Admissions Act Sec. 5(f):** state holds public lands and income as “public trust” for certain uses and any other use “shall constitute a breach of trust”
* Native Hawaiians challenge use of funds by state office of Hawaiian Affairs (OHA)
* **Sec. 1983 challenge for loss of rights: Prior cases found that 5(f) does not create implied private right of action but a breach of the 5(f) trust does create a right enforceable via Sec. 1983**
* **Common law of trusts allows beneficiaries to sue trustee - Congress clearly intended to create right a federal right under Admissions Act**
* OHA’s use of funds must fall outside all 5 areas under Sec. 5(f) before courts will question agency discretion or qualified immunity
* Admissions Act too vague to impose same exacting trust obligations as with Indians
* **HI Supreme Court: State has trust responsibilities under Hawaiian Homes Commission Act 1921**

**Brief from notes:**

* Group of Native Hawaiians challenge the Hawaiian Homes Commission Act under S1983 – breach of the trust duty allows for the COA under S1983
* 9th came up with a way to enforce fiduciary duty under S1983 – there is a common law of trust
* Cong clearly intended to create a federal right under Commissions Act
* There is an enforceable trust
* Problem is enforcing it is difficult b/c the state agencies managing it have QI and a lot of discretion
* Act is too vague to impose the same trust relationship of the Natives in lower 48
* 2 strains of thinking in Hawaii: 9th/SCOTUS saying trust resp is something less than in the lower 48 and the Hawaiian Sup crt and leg say it is the same – when they rest the trust resp on state law they have more success than when they engage in fed actions

1. **Hawaiians as Native Americans**

***Rice v. Cayetano* (2000):**

* Non-Hawaiian challenges ban on voting in OHA board elections
* **District court and 9th Circuit concluded that ban was rationally related to Congress’ use of plenary authority over Indian affairs**
* **SCOTUS**: thinks it is a racial classification – ancestry = proxy for race – 15th amendment does not allow for racial discrimination in elections
* 15th Amendment: no abridgement of right to vote based on race (or ancestry if a proxy)
* State elections v. tribal elections
* **Dissent**: Majority not following precedent in upholding broad sweep of Congress’ plenary power or Congress’ long treatment of Hawaiians as Indians. Congress specifically created trust relationships in Admissions Act and other acts. OHA established by majority of non-native Hawaiians

***Arakaki* and related challenges**

* *Corboy v. Louie* (HI 2011) cert. denied (2012)
* *Kamehameha Schools* (2006)
* Congress and treatment of Hawaiians as Indians = trust relationship? DOI does not allow Hawaiians to seek recognition - *Kahawaiolaa* (9th 2004)
* **P.945 note 4:** talk about *Corboy v. Louie –* Non-natives lost and SCOTUS denied cert
* ***Kamehama Schools:*** dealing with non-natives in schools – LOOK UP
* DOI does not let Hawaiians to seek recognition
* Courts have not made up their mind on the trust relationship
* Response to school case – getting a bill passed to recognize native Hawaiians the same way Indians are recognized
* *Hawaii v OHA*: SCOTUS – you can’t read cong intent into a letter of apology

1. **Hawaii: Federal Recognition**

* Akaka bill: 50% versus the rest
* HI Supreme Court’s injunction of alienation of public lands by OHA based on Apology resolution
* *Hawaii v. OHA* (2009)
* Hawaiian legislature’s response – 2/3 vote

**Chapter 14: Comparative & International Laws on Indigenous Peoples**

1. **Native Law in Other Nations**
   * + 1. **Canada**

* Indian Act & reserves: Non-agri north & British Columbia
* Royal Proclamation of 1763: Recognized tribes and treaty process
* Constitution 1867: National govt power over Indians
* End of treaty making 1920s

**1876 Indian Act:**

* Allowed provinces to abrogate treaties
* Criminalized pursuing Indian claims

***Syliboy* (1929)**

* Tribes are not capable of making enforceable treaties

**1978 Const’l reform**

* Quebec
* Nat’l Indian Brotherhood

**Constitution Act 1982:**

* **Section 35**: **(1) Recognizes existing aboriginal and treaty rights; (2) Indian, Inuit and Metis; (3) Current and future land claims; (4) No gender difference**
* Section 52: part of “supreme law of Canada” - Not subject to Charter of Rights and Freedoms
* ***Syliboy* overruled by *Simon* (1985): Biased language expressly rejected**

***Guerin v. The Queen* (1984)**

* In 1958 City takes 162 acres of 400 acre Musqueam band reserve and offers far worse terms than at earlier ‘surrender’ meeting and hides these terms until 1970
* Surrender requirement of Indian Act creates fiduciary duty
* Aboriginal title of occupancy and the Marshall trilogy - Breach of fiduciary duty = $10 million

**Delgamuukw v. British Columbia (1997)**

* 1984, Gitksan claim 58,000 sq. km. in north B.C.
* B.C. claims extinguished in 1871 when became province
* Oral history plays crucial role and laws of evidence must accommodate
* **Aboriginal title includes right to exclusive use and occupancy and uses must be reconcilable with group’s attachment to land**
* **Protected by Constitution Act**
* **Crown may infringe if justified in keeping with fiduciary duty**

***Sparrow* (1990)**

* **Drift net fishing as aboriginal right**
* **Fisheries Act did not extinguish aboriginal right** - Sovereign’s intention must be clear and plain
* “Justification” test – recognition and affirmation: Prima facie infringement? Valid legislative objective? Conservation v. Native subsistence
* *Gladstone* (1996) – commercial fishing right

***Haida Nation* and *Taku River Tlingit* (2004)**

* duty to consult, accommodate interests

***Marshall II* (1999)**

* Mi’kmaq treaty right to earn a moderate livelihood from fishing limited by conservation or other grounds of public importance

***Sapier* (2006)**

* Mi’kmaq right to take timber not extinguished

**Canada: International Human Rights Law**

* Nunavut territory agreement 1999
* Nisga’a Treaty 1998
* Inter-American Human Rights Comm’n & the BCTC
* 2007 Williams v. HMTQ before Supreme Court in 2013

***William v. HMTQ***

* 2007/2012 decisions:
* Tribe proved aboriginal title
* B.C. Forest Act does not apply on those lands
* B.C. infringed without justification
* Canada failed constitutional duty to protect since 1871
* Title only to lands specifically occupied or intensively used (postage stamp approach v. semi-nomadic tribe)
  + - 1. **New Zealand**

**Prof. Pocock (historian of common law):Doctrine of discovery v. consent of inhabitants**

* **Not “savages living by the chase” (hold land as property)**
* **Possess “sovereignty” (consent required)**
* Crown motives: capacity for transfer of title?
* Cultural differences in defining occupancy of land
* 1840 Treaty of Waitangi – 2 versions (39 v. 512 chiefs)
* Language differences with the treaty (missionary Maori) – sovereignty v. protectorate, Art. I, and preemption v. chieftainship, Art. II
* **Sovereignty** = “**mode by which a human community seeks to command its own history: to take actions which shape its policies in the present, and even . . . To declare the shape of the historic past and process out of which it deems itself to be issuing**” (p.984)

**Notes:**

* “smooth down their dying pillow” v. 15% and growing
* Early case law dismissed treaty, .e.g. *Wi Parata* (1877)
* Maori Land Court 1862 & Native Land Act 1909
* Treaty of Waitangi Act 1975 (Waitangii Tribunal)
* *New Zealand Maori Council* (1987): **fiduciary duty to protect Maori land claims prior to transfer of lands**
* *Huakina* (1987) **water rights must consider spiritual and cultural uses by Maori**
* *Te Weehi* (1986) **fishing rights; settlement (20%)**
  + - 1. **Australia**

***Mabo* (1992):**

* Mer, Dauar & Waier; 8 tribes
* Individual land ownership; 1882 reserve
* **Doctrine of discovery (*terra nullius*)giving absolute title is unjust**
* **Common law must by reflect values of justice and human rights**
* **“Discriminatory denigration of indigenous inhabitants . . . false in fact and unacceptable in our society”**
* **“common law should neither be, nor be seen to be, frozen in an age of racial discrimination” Common law linked to international law**
* Traditional community title still exists in islands (v. tribe becoming disconnected from land and customs with potential fiduciary duty in some cases)
* **Clear and plain intent to extinguish native title required (note which U.S. cases used) e.g. crown grant of land inconsistent with continued native use**
* **Government actions, not common law, extinguishes native title**

**Notes**

* No right of compensation in *Mabo*
* Native Title Act 1993 & the NNT Tribunal
* *Wik Peoples* (1996): statutory leases v. native title
* Native Title Act amendments of 1997
* *Yorta Yorta* (2002) (“tide of history has indeed washed away” )
* no aboriginal sovereignty, e.g. NTER 2007

1. **Emerging Voices: Indigenous Rights and International Law**
2. **United Nations**

**U.N. Declaration on the Rights of Indigenous People 2007**

* **4 opponents’ issues**: who is indigenous, land claims, IP issues, conflicting legal approaches
* Right to self-determination and autonomy
* Right to revitalize cultural traditions and customs
* Right to participate in decision making and land use
* Right to develop own institutions
* Rights to land
* Rights to compensation
* Rights to intellectual property

**Notes**

* 2000 UN Permanent Forum on Indigenous Issues
* 2007 Expert Mechanism on Rights of Indigenous People (studies for HR Council)
* 2008 report by Anaya, UN Special Rapporteur: contextualized elaboration of general human rights principles
* UNICCPR, Art. 27 (Int’l Bill of Rights): Individual complaints (HR C’ee). *Lovelace* (1981) and *Kitok* (1988): compare to *Santa Clara*

1. **OAS – Inter-American**

**Inter-American HR System**

* 1948 American Declaration on the Rights and Duties of Man and the Inter-American Charter of Social Guarantees, Art. 39
* 1978 American Convention on Human Rights (signed but not ratified by U.S.)
* 1979 OAS Inter-American Court of Human Rights (U.S. accepts jurisdiction on a case by case basis); complaints filed by IACHR
* 1997 Proposed American Declaration on the Rights of Indigenous Peoples
* Link between land rights and survival
* Customary international law

***Awas Tingni* (2001):**

* Logging of Mayangna (Sumo) communal lands
* Nicaragua Constitution and laws recognize communal forms of property
* No effective process
* 2008, 73,000+ hectares (183,000+ acres)

**IACHR 2002 Report on the Western Shoshone (Dann sisters)**

* 1863 Treaty of Ruby Valley (no land concessions) Nevada and 4 other states
* Now mostly public lands (over 1000 nuclear bomb tests)
* $26M in compensation refused by tribe (80%) *United States v. Dann* (1985)
* Refused to pay BLM fees or remove cattle